



EUI Working Papers

LAW 2009/11

DEPARTMENT OF LAW

LAW AND SECURITY - FACING THE DILEMMAS

Martin Scheinin et al.

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
DEPARTMENT OF LAW

Law and Security - Facing the Dilemmas

MARTIN SCHEININ ET AL.

EUI Working Paper **LAW** 2009/11

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year, and the publisher.

The author(s)/editor(s) should inform the Law Department of the EUI if the paper is to be published elsewhere, and should also assume responsibility for any consequent obligation(s).

ISSN 1725-6739

© 2009 Martin Scheinin

Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Abstract

The current volume in the EUI Law Department series of working papers results from the collaboration between the Department and the Finnish national Centre of Excellence *Foundations of European Law and Polity*, led by Professor Kaarlo Tuori of Helsinki University.

Professors and researchers at the EUI Law Department have in a number of ways collaborated in the creation and operation of *Foundations*. Of present and former Professors of the Department, Miguel Poiares Maduro, Hans-W. Micklitz, Wojciech Sadurski and Neil Walker have attended conferences by *Foundations* as speakers. It has been a valuable source of academic inspiration for me personally first to participate in the building-up and launch of *Foundations* while still at Åbo Akademi University in Finland, and then to engage in collaboration with the same Centre of Excellence after moving to the EUI as of September 2008.

Law and Security - Facing the Dilemmas is a collection of papers emanating from so-called working group II within *Foundations*, headed by Professor Kimmo Nuotio of Helsinki University. As much of my own research, writing and teaching at the EUI is related to terrorism and counter-terrorism, it has fallen naturally to me to engage from the EUI side with the work done within *Foundations*.

This collection of papers maps several dimensions of the multifaceted relationship between law and security, looking, *inter alia*, into issues related to the fight against terrorism, criminal law more generally, and the invocation of security among legitimate aims for the limitation of human rights. All authors are either members of *Foundations* or EUI researchers.

I wish to thank Ph.D. candidate Ciarán Burke for his assistance in putting together this collection of papers.

Florence, June 2009,

Martin Scheinin

Keywords

Human rights – security – law - regulations – cross-border crime – Schengen – police cooperation – European Union – terrorism

TABLE OF CONTENTS

Kaarlo Tuori European Security Constitution.....	1
Sakari Hänninen Politics of Security in an Age of Anxiety - The Double-Bind Between Freedom and Control	7
Kimmo Nuotio Security and Criminal Law: The Difficult Relationship	23
Elina Pirjatanniemi Missing Promises – No War Against Intimate Terror.....	39
Martin Scheinin Terrorism and the Pull of 'Balancing' in the Name of Security	55
Federico Fabbrini From Hamdi to Kadi: Comparing the Role of the American and European Judiciaries in Times of Emergencies.....	65
Tuomas Ojanen Human Rights Dilemmas in Terrorist Profiling	81
Lucas Lixinski The Rights/Security Debate in the Inter-American System	97
Patrícia Pinto Soares UN SC Resolution 1593 (2005) and the Fine Art of Twisting ‘International Peace and Security’: The Need for Judicial Balancing	103
Felix Herzog The State as Sniper: Targeted Killings - Corrosion of the Principles of Justice as a Reaction to Terrorism	123

European Security Constitution

Kaarlo Tuori

The Many Constitutions of Europe

Europe is living in an era of a plurality of constitutions. But not only that: there even exists a plurality of pluralities of constitutions. There are many constitutions in Europe in at least three senses. Firstly, constitutional concepts, starting from “constitution” itself, are assigned divergent meanings and read through divergent *conceptions*. This variety can be traced back to differences in cultural backgrounds as well as strategic professional or institutional interests or politico-ideological affiliations of the discussants. Secondly, not only do conceptions of the constitution vary, but we can also point to different *concepts* of constitution, with different connotations and referents. And thirdly, we have the plurality of constitutions in the sense of the co-existence in Europe of trans-national and national constitutions.¹ *Constitutional pluralism*, as the term has been used in recent European constitutional debates, is an interpretation of the plurality of constitutions especially in its last sense, as the co-existence of trans-national and national constitutions. In what follows, I shall ignore the pluralism debate and, instead, focus on the second sense of European constitutional plurality.

The cacophony characteristic of European constitutional debates does not result solely from divergent conceptions of one and the same concept. Constitutional object-language also includes different *concepts* of constitution, with different connotations and referents. Thus, the concept of constitution implicit in the ordo-liberal theory of European economic constitution (*Wirtschaftsverfassung*) is not the same as the concept of constitution implicit in the writings of scholars detecting a process of constitutionalisation running through the landmark decisions of the ECJ in the 1960s. In front of this plurality, the first task for a theorist of European law – located on her slippery meta-level - is to elaborate a taxonomy of the concepts employed at the object level, perhaps complemented by her own conceptual proposals concerning emerging but still un-named European constitutions. Existing discourse, existing linguistic usage, provides the theorist with her starting-point, but merely a starting-point. The theorist may also put forth her own conceptual suggestions, and, if she takes seriously the scholarly obligation to add to the clarity and intelligibility of European law and to give the present polyphony a contra-punctual twist, she even should. But a taxonomy is not all. Obviously, the diverse concepts must have something in common, at least in the sense of family resemblances, which accounts for and warrants the use of the same term, “constitution”. What that something is makes up the general or meta-level concept of (European) constitution. Finding the common denominators of concepts of constitution and (re)constructing a meta-level concept is the second, concomitant task facing a constitutional theorist of European law. These two tasks should not be taken in isolation but, rather, as mutually presupposing and supporting each other. In order to arrive at a taxonomy of putative European constitutions, we have to start from a tentative meta-level notion, which then can be further substantiated after exploring more in depth the individual instances of constitution. The Rawlsian term “reflective equilibrium” might be appropriate for describing interaction between the two levels.

I take my cue for differentiating European constitutions and, simultaneously, (re)constructing a general concept of constitution from Niklas Luhmann. He examines “constitution” as a relational concept. According to him, constitution establishes a *structural coupling* between two differentiated sub-systems of modern society: the legal and political systems. I shall adopt the idea of the relational

¹ A terminological clarification: When I speak of European constitution, the reference is to the transnational level. By contrast, the expression “constitutions in Europe” covers both the transnational and the national level. Correspondingly, “European law”, too, involves the transnational connotation.

character of constitution but detach it from its Luhmannian context and give it a more general turn. “Constitution” is a relational concept: through constitution, the law relates to something else. Let us call this the *constitutional relation*. The relation may be, not only constitutional, but even constitutive. This is the case when constitution constitutes the other pole of the constitutional relation. But constitutional relation is not necessarily constitutive; constitution may also constitutionalise something already existing. Luhmann examines merely a sub-species, albeit a paradigmatic one, of constitution: namely, political constitution. In addition, his systems-theoretical framework allows for only one particular type of constitutional relation: namely, structural coupling.

The constitutive significance of the constitutional relation for constitutional theory implies that the taxonomy of constitutions and corresponding concepts should be based on an analysis of the other pole of the relation, that is, the “something” to which the law relates through the constitution. My proposal for European-level taxonomy is the following:

- economic constitution,
- juridical constitution,
- political constitution,
- social constitution and
- security constitution.

Each of the fields appearing as the other pole of the constitutional relation, with perhaps the exception of security constitution, has been discussed in constitutional terms; constitutional vocabulary, although perhaps not the very concept of constitution, is already part and parcel of the object-language. *Economic constitution* is about the relation of the law to the fundamentals of the economic system; *juridical constitution* concerns the fundamental features of the legal system, it establishes a reflexive relation of the law with itself; through *political constitution*, the law relates to the political system or – to use a different political vocabulary – to the polity and contributes to both its emergence and containment; through its *social constitution*, a polity defines its relationship to the social life-world, the social conditions of life, of its members; and, finally, through *security constitution*, law is related to the security system consisting of security agencies and their inter-relationships.

Relational character is not a privilege of constitutional law: as we have been taught by the institutional theory of law (and Friedrich Carl von Savigny as its predecessor!), all law can be examined from the perspective of its interaction with its object of regulation: the law generates legal-institutional facts, and this, arguably, is the very point of law. So there must be something particular in the way constitution relates to its regulatory object. Connected to the idea of ‘constitutiveness’, “constitution” invokes a sense of “*higher*” law, the observance of which is secured through particular arrangements, say, *constitutional review* by a *constitutional court*. In the context of European constitution(s), “higher law” is law whose primacy, directed both to Member State law and to inferior normative acts by EU institutions, is guarded by the European Court of Justice as the constitutional court of EU law.

As a legal speech act, constitution involves a *claim to autonomy*, comparable to a Declaration of Independence. Drafting a constitution is the first thing a newly-independent nation state engages in, and in adopting the constitution, it reinforces its claim to autonomous existence. Thus, through its landmark decisions, epitomising juridical constitutionalisation, the ECJ raised a claim to independence of the Community legal order with respect to both national legal orders and international law. In the European context, autonomy equals *transnationalisation*: as a trans-national legal order and polity the Community or the Union asserts its distinctiveness from both national and international legal and political models. In addition to autonomy, constitutional vocabulary implies a claim to or promise of *unity, order and coherence*. A constitution is supposed to provide for a structured unity at both ends of the constitutional relation: both in law and in its regulatory object.

As “higher law”, modern constitutions include two main *constitutional elements*: an *institutional-organisational* and a *rights-oriented* one. These are related to two basic functions of constitution

which in different constitutional cultures have received varying emphasis: power generation and power restriction. Through its institutional-organisational element, a constitution establishes power-wielding authorities whose authority is, however, constrained by the rights-element. Such an analytic distinction serves the examination of the diverse European constitutions, too. The rights-dimension of modern constitutions alludes to their *individualist* or *individualising* orientation. Modern constitutions are not only about power, they are also about individuals as subjects of power in the two the meanings of the term “subject”; about the private and public autonomy of individuals. European constitutionalisation has been a process of individualisation as well: a process of establishing direct connections between the Community or the Union and “the peoples of Europe”. The process lends itself to an analysis in the framework of *citizenship*: an analysis of cumulative addition of new layers to European citizenship.

There is one more idea which constitutional object-language evokes and which should be heeded in a meta-level constitutional discussion. At least part of the positive value connotations of constitutional concepts derives from their promise of *legitimacy*. Often enough, the aim of proponents of constitutionalisation is to enhance the legitimacy of the other pole of constitutional relationship, say, European economic order, European legal system or European polity. Accordingly, the claim of constitutionality is often translatable to a claim to legitimacy.

“*Constitutionalisation*”, along with its sub-concepts, such as transnationalisation and individualisation, is a pivotal concept for European constitutional analysis but of lesser use in many nation-state frameworks. “*Constitutionalisation*” is an evolutionary counterpart to the revolutionary-tuned concepts of constituent power, *demos* and constitutional moments, which, in my view, are not transferable to an examination of European constitutions, which have not resulted from the exercise of constituent power by a European *demos* at an identifiable, single constitutional moment. It is no coincidence that European constitutional scholarship focuses so much on the history of the legal aspect of European integration. European constitution is not a stand-still phenomenon but, rather, an ever-uncompleted series of legal speech acts. It is an evolutionary and, contemporaneously, a differentiated process: all the putative European constitutions have not developed simultaneously, or at the same pace but, rather, successively, following a certain order. Especially in countries with a formal, written constitution, the tacit understanding is that, say, juridical and political constitutions emerge and develop parallel to each other. The very talk of different constitutions, distinguished by their specific regulatory objects, may sound strange in nation-state contexts. By contrast, typical of European constitutionalisation is – to borrow Ernst Bloch’s expression – *Gleichzeitigkeit des Ungleichzeitigen*. This entails a new task for European constitutional scholars: to track the diverse temporalities of European constitutionalisation and to detect the internal logic inherent in its course; provided, of course, that there is any such logic!

According to my (hypo)thesis, European constitutionalisation is susceptible to a periodical division where each stage receives its colouring from a particular constitution. Reflecting the temporal and functional primacy of economic integration, the first wave proceeded under the auspices of economic constitution; in the second phase, the emphasis shifted to juridical constitution; during the third wave, the focus was transferred to political constitution. Despite the efforts in the dimension of a social constitution, the main contender for the pacemaker in European constitutionalisation in the post-Constitutional Treaty interregnum – and, arguably, even earlier – has come from another direction: from an emergent security constitution.

Security Constitution as an Anti-Constitution

Security is not merely a policy function among others. At the Treaty level, it was given prominence by the Maastricht’s Treaty’s provisions on the second and third pillars: the second pillar focusing on external and the third pillar on internal security. However, as these pillars were based on intergovernmental premises, the provisions included in the TEU provided but a starting-point for

subsequent constitutionalisation in terms of transnationalisation and detachment from the orbit of both international and national law. Emphasis in constitutionalisation has lain on internal security, which is at least partly explicable by the relative minor significance of legal instruments within the second pillar. Determination of the other pole of the constitutional relation might be seen to raise difficulties. However, a European system of internal security is to be arising, whose institutional core consists of nation-state and transnational police, border-control and immigration agencies, interrelated through various informational and communicative networks.

At the national level, the security system maintains a curiously ambivalent relation to the constitution. On the one hand, according to traditional liberal rule-of-law and *Rechtsstaat* constitutionalism, the agencies of internal security form the main addressee of the constitution's power-constraining function. In continental Europe, this function came to be viewed through the opposition between the *Rechtsstaat* and the police state. A central claim of constitutionalism was to subordinate the latter to the former; the police state was the 'Other' of a *Rechtsstaat* constitution, something pre-existent which was supposed to be negated rather than constituted by the constitution. But security considerations make a (re-)entry into the constitutional sphere as a public interest justifying limitations to constitutionally guaranteed rights: what originally was supposed to be constrained through constitution is turned into a ground for restricting the protective effects of the constitution. The same logic applies to European and international human rights protection, as can be read from the limitation clauses included in the rights provisions of the ECHR. Emergency powers also display a peculiar dialectic between the external and the internal: through national and transnational constitutional provisions, derogations from the constitution, which free the security system from constitutional constraints, are labelled as constitutional.

In the EU, the security system has not preceded constitutionalisation, but has largely been brought into existence through it. At least in the initial stage, the focus has been on the power-constituting and not on the power-constraining functions of constitutionalisation. Especially before September 11, most of the impetus came from internal constitutional logic, from spill-over effects of the economic constitution, in particular the free movement of workers. The removal of internal border controls for the sake of a transnational market economy led to the perception of a need to coordinate external border controls, as well as other action fields of the security authorities. Even in the wording of Art. 2 TEU, the Area of Freedom, Security and Justice is defined through the overreaching aim of assuring free movement of persons.² After the Amsterdam Treaty and the Tampere European Council Resolution in 1999, security has formed one of the most expansive policy and legislative fields of the EU. The post-September 11 fight against terrorism has provided it with additional momentum.

As has been the case with earlier waves of constitutionalisation, constitutionalisation of the security system has proceeded as a gradual transition from intergovernmentalism with its strong international law traits towards transnationalisation. Here the Amsterdam Treaty was the milestone. It transferred visa, asylum, immigration and other policies related to free movement of person from intergovernmental co-operation under the third pillar to the Community pillar. It also subsumed the Schengen rules to work under Community law and thus detached it from its international law moorings. Furthermore, the jurisdiction of the ECJ was extended, not only to the issues transferred to the Community pillar, but also to the legal instruments available under Title VI TEU. However, transnationalisation of political and legislative decision-making was not taken as far as in other policy fields covered by the TEC. Unanimity requirement in the Council is the rule, and the European Parliament has merely a consultative role. Consequently, direct democratic legitimacy is rather weak. The outcome is a peculiar mixture of intergovernmental and transnational features: on the one hand, the third pillar provisions of the TEU have acquired transnational features, especially through the

² According to Art. 2, the objectives of the Union include maintaining and developing "the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime".

jurisdiction of the ECJ, while Title IV TEC retains notable intergovernmental traits. Member States' hesitance in front of transnationalisation does not come as a surprise: after all, we are dealing with a pivotal core area of the traditional understanding of nation-state sovereignty. This also explains the fact that instead of establishing transnational security authorities with competences overlapping the powers of national agencies, institutional-organisational arrangements have focused on facilitating co-operation among the latter. Concerns about national sovereignty are evident in Art. 33 TEU and 64(1) TEC, both stating that the respective titles "shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". Nevertheless, transnational bodies have been instituted as well, such as Europol, Eurojust and External Borders Agency, but the focus in their functions, too, is, on co-ordination and information gathering and transmission.

The particular character of the security constitution is perhaps most salient in the link it establishes with individuals. Earlier waves of constitutionalisation can be examined as a gradual enrichment of European citizenship through the addition of new layers of rights: from economic through judicial and political to social citizenship. By contrast, within the ambit of security constitution the individual is not primarily conceived of as a bearer of rights but as a security risk. Security talk is not rights talk; rights are neither the aim nor the means of constitutionalisation but rather its putative limit. Security constitution hints at the boundaries and the reverse of the citizenship granted under the previous phases of constitutionalisation. From the perspective of the authority, individuals are not only subjects of rights but also potential risks, and, moreover, they may be risks exactly as subjects of rights. In Michel Foucault's account, the edifice of constitutional rights was erected upon a disciplinary infrastructure, which was instrumental to producing the subject which could be endowed with the rights. Security constitution reminds of the limits citizenship in another sense, too. Citizenship both includes and excludes: it defines the membership of the polity through exclusion, by determining and maintaining the boundary towards non-citizens. The security system specifies and supervises this boundary through external border controls as well as the visa, asylum, immigration and other policies falling under Title IV TEC.

It is true, though, that rights talk has been used for a legitimating purpose. In the Tampere conclusions of the European Council, it was stated that "people have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime". But from the perspective of civil and political rights, such talk, hinting at a right to security as a collective good, is very problematic. According to traditional rule-of-law and *Rechtsstaat* constitutionalism, individual rights were supposed to impose constraints on the measures that could be taken in order to promote general security. If security is re-conceptualised as a constitutional right, it is absorbed within the constitution and assigned (at least) equal weight as individual civil and political rights. Constitutionalisation of the security system entails the danger of a reversal of the relationship between security as a collective good or public interest and individual liberty rights: the danger of according default primacy to the former instead of the latter.

When appraised in light of the general constitutional aspirations for unity and coherence, the emerging security constitution does not fare very well. Actually, the inclusion of internal and external security in the objectives of the EU led to increasing fragmentation in the domains of political and juridical constitution, manifest by, e.g., the pillar-structure and the opting-outs allowed to Member States. In the juridical dimension, the TEU also contributed to fragmentation by introducing new second- and third-pillar instruments whose exact legal effects and relationship to Community-law instruments were far from clear. In practice, a new round of juridical constitutionalisation was launched especially within the third pillar. If pre-Maastricht juridical constitutionalisation was limited to Community law, it now covers EU law in its entirety. An important step was taken by the Amsterdam Treaty: the removal of a significant part of former third-pillar issues under the Community pillar signified subsuming them under the constitutional principles developed within Community law. But neither were issues still retained under the third pillar spared amounting juridical transnationalisation and

constitutionalisation. The process ongoing within the third pillar bears striking similarities to what a few decades ago took place within Community law. Again, the key actor is the ECJ, who could initiate a new wave of juridical auto-constitutionalisation relying on the jurisdiction granted by the Amsterdam Treaty. Thus, the ECJ has started extending to third-pillar legal instruments general principles which have defined Community law's relationship to national legal orders; such as direct effect and supremacy, as well as the overarching and legitimating loyalty principle. If the Lisbon Treaty enters into force, it will efface at least some of the remaining uncertainties surrounding the reach of the constitutional principles elaborated by the ECJ for Community law.

The adoption of the principle of supremacy in *Costa v ENEL* was pivotal for constitutionalisation within Community law. The assertion of this principle raised the well-known objections of the German and Italian constitutional courts, related in particular to national basic-rights protection. Similar objections, attesting to the persistence of constitutional pluralism, have been occasioned by developments within the third pillar. National controversies surrounding the implementation of the Framework Decision on European Arrest Warrant provided some constitutional courts with the opportunity to (re)declare their qualifications in respect of the principle of supremacy and to (re)affirm the national *solange* or *controlimiti* doctrine. In the rights-sensitive issues falling under the third pillar, even the European Court of Human Rights may intervene in the pluralist constitutional discourse. In the *Bosphorus* case, the complainant took the matter to the ECtHR after the ECJ had first issued its ruling. If generalisation is warranted, the ECtHR seems not to be as eager to assert its jurisdiction as some national constitutional courts, but is ready to defer quite far to the ECJ. Yet, its decision also involves a hint at a *Solange* approach to the protection of human rights in the EU.

Kadi, one of the most-widely debated recent rulings of the ECJ, does not concern merely the security constitution but has implications for the juridical constitution as well: it can be read as a further step in juridical constitutionalisation, as a reassertion of European law's supremacy in respect of international law. It remains to be seen what will be the reaction to this claim by the actors of international law, international-law scholars included.

The main actors pushing forward the establishment of the Area of Freedom, Justice and Security, as well as enhanced cooperation within the third pillar, have been Member States politicians, backed by the national security apparatuses. Often enough, politicians appear to take recourse to 'Europeanisation' in order to realise policies acceptance for which would cause difficulties at the national plane. The low level of transparency and democratic coverage typical of the security constitution has added to the allure of the European way. Only at the later stage, during the post-Amsterdam era, has the ECJ joined the constitutionalisation process. Scholars, in turn, have in general maintained a rather critical posture towards the emergent security constitution.

Politics of Security in an Age of Anxiety The Double-Bind Between Freedom and Control

Sakari Hänninen

Problem-Setting

During the past two years Finland has experienced two tragic school shootings. The first one of them took place on 7 November 2007 at Jokela High School, a public secondary school. An 18-year student killed 8 persons and then committed suicide. This was a massacre which the gunman had long planned, and even simulated in his home-made video entitled "Jokela High School Massacre", which he uploaded to YouTube only a couple of hours prior to the shooting. This perpetrator described himself in oxymoronic terms, such as "a cynical existentialist, antihuman humanist, antisocial social Darwinist, realistic idealist and godlike atheist". The second school shooting took place on 23 September at Seinäjoki University of Applied Sciences. This time the gunman was a 22-year student who killed 10 people as well as himself. According to a police spokesperson this perpetrator "left notes saying he had a hatred for mankind, for the whole of the human race, and that he had been thinking about what he was going to do for years. The notes show he was very troubled and he hated everything." The detective leading the Kauhajoki investigation pointed out that it was "very likely" that the two gunmen had been in contact, but this conclusion could not be based on conclusive evidence. What is, however, evident is that both of them were motivated by similar "hatred of mankind" and were eager to exercise such "hate-thinking" and "hate-talk" in YouTube where they could exercise verbal violence and simulate measures of cruelty by joining speech communities of their liking.

Even if personally planned, these school shootings represent the most uncertain, the most random, the most aleatory event which challenges the governing of and the politics of security in Finland at present. The crucial security dilemma, in these circumstances, is how to control the random element? Can one control the random element by law? Immediately after the school shootings took place they were thoroughly examined by the police and their findings, besides other first-hand professional information on these events, have already motivated some changes in the strategies of policing and police-work and administrative guidelines. As far as the diagram of security is concerned, these preliminary measures did not introduce any crucial novelties in governing security. In fact, nearly two years have passed since the massacre in Jokela and the situation has not really changed in this respect. It seems evident that the control of the random element, in the light of these events, is a true challenge for the security complex.

The authorities did draw one crucial conclusion about the tragic events at Jokela and Kauhajoki. It was not an accident that they decided that the Jokela and Kauhajoki massacres should be approached as accidents, which naturally identified them with an element of randomness and unpredictability. After each of these events the Cabinet (more particularly the Ministry of Justice) decided to appoint an investigation commission to study the school shootings. In the case of the Jokela shooting, a specific law was enacted in the Parliament (HE 51/2008 vp) in order to make sure that this investigation could be carried out effectively. There is, however, a conspicuous difference in the composition of the two investigation commissions, which indicates a certain change of perspective in the reception of these events, since the Kauhajoki shooting could be understood as a recurrence of what happened at Jokela. The Investigation Commission on the Jokela event is composed of leading civil servants from different ministries. The Investigation Commission on the Kauhajoki case is composed of academics from different fields of study. Both of these boards have a police inspector (from the Ministry of Justice) as a member. Besides, and most importantly, both of these boards are coordinated by the Accident Investigation Board of Finland.

The Report of the Investigation Commission on the Jokela School Shooting on 7 November 2007 was made public on 26 February 2009. The safety and security recommendations laid out by the Commission are forwarded to the competent authorities. The Investigation Commission on the Jokela School Shooting, just like the Accident Investigation Board of Finland, can only make recommendations in order to enhance overall safety and security. The Jokela event, just like the Kauhajoki event, is approached as a most serious accident which belongs to the category of A-investigation. The task of the Investigation Commission has been to focus on the course of events, the measures taken by the authorities, consequences of events, shortcomings of safety rules and regulations, the probability of recurrence, but also factors relevant to these events in the domains of education, social welfare and health especially as far as precautionary and preventive measures are concerned, besides the psychosocial factors. There are two further topics on the agenda of the Commission which are specific for these events as serious accidents: the availability of handguns and the influence of media, internet and video-games.

It is not surprising that the Investigation Commission on the Jokela School Shooting event has followed the standard procedure of the Accident Investigation Board of Finland in investigating serious accidents even if the Jokela (like the Kauhajoki) case is quite exceptional. The standard procedure refers to a security or safety analysis which is exercised roughly in terms of danger, levels of security and accident. What is here characterised as danger can be taken to be the random, uncertain, aleatory element which has destructive consequences, as an accident, if it materialises. It materialises if it (the dangerous random element) penetrates all the levels of security and bypasses or neutralises all the security checks or filters in each level assembled and arranged to prevent serious accidents. It is the intention of this text, in the light of the Jokela and Kauhajoki events, to diagnose in this frame what is the given mode of safeguarding security in Finland at present. It will be specifically examined as to what it means, in the given circumstances, to make an effort to govern security morally, socio-economically, politico-juridically and information-technologically. These four dimensions of securitising measures actually refer to those security checks or filters which can be assembled and arranged in different levels of security. In other words, with these measures it is, in principle, possible to outdo or prevent that a danger (the random element) can materialise as a serious accident. It is, however, quite another matter how well and how effectively such securitising measures can be applied in the present circumstances due to a number of counter-forces - just like the reactions to the Jokela and Kauhajoki events so far have reminded us.

Even if the analysis or diagnosis of the Jokela and Kauhajoki school shootings as an example of how the random element challenges the securitising efforts and practices in our society of control is the principal topic of this article, this analysis will not be carried out by penetrating into the details of these events. It will rather be achieved by, first, outlining the governmental formation of security as a background context to these events so that the official reactions to these events can be, then, analysed in terms of governing security. The outlining of the governmental formation of security will be attempted by taking advantage of the idea of levels of security. In doing so, since security is understood to be constituted by the dialectics between freedom and force, a move from security level to level can be taken to illustrate an increase in the securitisation efforts and challenges. In proceeding from security level to security level I shall also keep in mind that the role of law can be operational at each level, even though, in this diagnostic outline, the significance of legal practices will not be examined. It is only after this overall governmental diagnosis that the specific role of law in securitisation will be addressed in the particular context of the Jokela school shooting event, and its investigation, in which the random element draws the limit of the security diagram. This is also the spectacular boundary where the following four-fold diagnosis ends. It should be also added that, due to these specific events, this diagnosis is especially influenced by the perspective of young people.

Principle of Plenitude

Our age is characterised by an abundance of values, all of which are actualised in one form or another. Hardly no-one is more effectively influenced by the abundance of individual values and fragmentation of ethical regimes than children and youth, who undergo the intense process of value-formation and world-viewing. In the ethically fragmented world of the social, where there are available for each person an endless number of possible combinations of values and choices, the end result can be as well individual indulgence and satisfaction as personal confusion and disorientation. Both of these tendencies can multiply at the collective level, which profoundly challenges - positively and negatively - all efforts in parenting, schooling and education.

On the other hand, we are encouraged to be free to choose among different values and, while doing so, are congratulated for our sovereign decisions. Nobody is more effectively glamourised and bombarded by the marketing agencies than young people whose idealised bodies and virtualised minds are uninhibitedly exploited by all kinds of commercial *pastiches* and practices of the wonderful world of consumption. Hardly any mode of human interaction can escape this kind of commercialisation which is perhaps most convenient to present and realise in terms of competitive games in which there are always winners and losers. The logic of these games is claimed to reside in the freedom to choose rationally between available alternatives. There is no one else than oneself to praise if one wins and no one else but oneself to blame if one loses.

In the all-inclusive market-societies human conduct is conducted by incentives, incitements, seductions and stimuli rather than by prohibitions, commands, interdictions and bans. Where this ethos of freedom is taken literally, there everybody, children and youth included, are seen free to choose nearly any course of action available aiming at the maximum satisfaction of desire and subjective utility since the sum total of such choices is presumed to produce an optimum (equilibrium point). In the ideal case, there are no *a priori* constraints for using our liberties except those that are considered to guarantee the availability of these liberties. Glorification of individual freedom of choice coincides with the demand for individual responsibility.

Even if pluralism of values, ethical fragmentation and fragmentation of collective and even individual identities correctly characterize what is going on in the human life-world, does this mean that the construction of coherent moral principles, which can be used in the securitising of mental infrastructure, becomes insurmountable or even impossible? Cannot we think that, in contrast to ethical fragmentation, moral principles and rules can provide a sound basis for universally binding norms, which are now even and ever more unanimously and universally supported, as can be seen in the adoption of human rights. (Tuori 2007, 130) Isn't it the case that security checks can be organised against dangerous random events on the basis of such universal moral consensus? Even though this question could be answered affirmatively, the counter-question must be immediately posed: to what extent should universal moral norms influence voluntary contracting and autonomous action in the market and communities? This counter-question brings up a counter-answer.

Deregulation, privatisation and devolution characterize at present many European countries too as these societies have applied ordo- or neo-liberal policies in partaking of global capitalism. On the other hand, calls and concerns for social control can strengthen state machinery and work in the opposite direction. As a solution to this dilemma (double-bind), there has taken place a familiar figure: freedom to move globally is connected to tighter control at the local level. When global liberalism joins with local conservatism we have a kind of situation of dual sovereignty characteristic of US-style federalism.

Freedom to choose individually and personal responsibility for consequences characterise the liberal mentality of rule. The privatisation of responsibility is connected with the displacement of public responsibility which cannot actualize without placing obligations and duties on individuals. This is the rationality that is, at present, powerfully propagated and disseminated. Even if this style of reasoning would exemplify an intellectual register in dominance, it does not necessarily mean that it tells the

whole truth about what is going on in the government of conduct in advanced market societies. It is good to look at the US for an example. The distinguished political scientist Theodore J. Lowi (Lowi 1998) points out that "American national government became the home of liberalism; state governments became the home of conservatism...national government policies have been almost entirely instrumental[ly]-devoid of moral imperative...(t)he situation of American states was very different. The coercion inherent in the regulation of any conduct affecting the 'health, safety, and morals of the community' almost always possesses a moral element." This is what he calls "Capitalism's Dirty Little Secret": "they have nothing to say about life after meltdown, or even about what happens when the loosening creates large troubles". (Lowi 1998) In fact, global liberalism and local conservatism can be great allies. This equation "liberalism requires conservatism" does not just mean that global capitalism requires social and moral order and social order will require a relatively strong security apparatus, whether national and centralised or devolved and localised. In fact, it could be written thus: more liberalism requires more conservatism, since global liberalisation of every kind of circulation (global spatial flux), due to its consequences, must be locally checked and balanced (local spatial fix).

Arbitrary Rule

We are playing games whose rules are under permanent negotiation, and sometimes without rules. In these circumstances the naming of the rules of gaming has to take place in the zone between systemic silence and noise and, therefore, this negotiation faces the constant danger of arbitrary rule. The acquisition of language and the use of it in orienting in the surrounding world are naturally of paramount importance in the development of children and youth on all accounts. Making sense of the world, and making (sense of) ourselves, go hand in hand as long as the human being lives his life consciously. This bond between the image of the world and the image of the self is most intense in the life of a young person. It is in this age that the "social imaginary" plays a leading role. By "social imaginary" methods, Charles Taylor (Taylor 2007, 23-30) refers to "the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations." (Taylor 2007, 23)

Even though the natural language is certainly not the only medium of "social imaginary", it is essential in the human effort to gain a sound social existence. Young people in particular, trapped between the narrow span of experience and the wide horizon of expectations, can find it truly difficult to give meaning to a surrounding world in which mute institutional machines or automatic market mechanisms operate in silence, while people in their wheels never stop talking, fussing or caterwauling. Since nobody really knows the user's manual of these machines, one must approach them as if they were constituents of games going on between participants who are constantly negotiating or contracting about the proper rules. In these circumstances, new participants are persuaded or deceived to believe that the arbitrary rules offered by the insiders are, in fact, copied from the missing user's manual. The main characteristic of such arbitrary rules - or games without rules - is that there is no meaningful communication between players but only assumptions about the reactions of others. In the situation of young people, a non-communication between generations might be an example of such ambiguity, and, perhaps, a reminder of a lack of reciprocal recognition. In circumstances of ambiguity and arbitrary rule individuals are easily caught in a double bind of anxiety so that a person can receive two or more conflicting messages so that one message denies the other. Such messages are mediums of control of being, which paralyze action by encouraging choice in a way that contradicts it. Just like William Burroughs says: all modern control systems are riddled with contradiction (Burroughs 1999. 341)

It is characteristic of many games that one can cherish a dream of a grand victory in spite of the credentials, capabilities, or probabilities of attaining it. Where the rules of the game are covered by the veil of ignorance, there this wishful thinking can be easily flourished. There are wonderful novels

which tell stories of such dream-works, like Franz Kafka's "America" (and the Oklahoma theatre) and Nathanael West's "A Cool Million". These novels, just like William Burroughs' writings, unveil human situations in which the individuals involved are bound by contradictory requests or absurd recommendations, which only serve to stalemate one another. Such double-binding practices, and oxymoronic figures of speech, can be characteristic of a self-congratulatory system which promises benefits for those who already have an advantage. Such a deceptive or spurious argumentation is typical of a logic which congratulates a person for achieving a position where she/he was already in the beginning and encourages a person to aspire for a position where she/he should have been already in the beginning. It should be easy to grasp that this kind of discourse is system-affirmative and multiplies those effects which inhibit action by controlling 'being'. This kind of discourse contradicts aspirations of political action which does not just reproduce or repeat the achieved advantages but begins something new. Due to this perplexity the diagram of danger transforms so that following the dissolution of collective formations there are left multitudes which also incorporate insane and violent singularities. Such a danger is especially acute in a country like Finland where violence has deep roots in its history and receives much understanding and credence in its masculine culture. What is really alarming, though, is the fact that childhood is more thoroughly penetrated by violence than adulthood. Even though children and women are often the victims of violent acts, this grievance has not been seriously taken on board in the political agenda.

Many of us live the age of anxiety, which especially burdens persons who are caught in double binds of contradicting messages. Anxiety, restlessness and disorientation have disseminated far and wide especially due to ever-faster circulation of all kinds of material and immaterial mobile elements within reach in no time. All this exchange of commodities, concepts and codes feeds further imitation. Sources of anxiety can be real, but since anxieties are mental constructs, their effects are disseminated and imitated in the global mindscape. Some of these effects are explosive and violent. When justified opposition, resistance or even anger is displaced by obscure resentment, hatred or wrath, the possibility of desperate acts radically increases. The contradictory control of being can only escalate this tendency and other symptoms of alienation. Experiences of anxiety gain rapidly strength when the cherished dreams have bitten the dust in the same markets which circulated them in the first place. These are global markets of mimesis. For this reason, Burroughs speaks about the "the American Non-Dream": "America is not so much a nightmare as a non-dream. The American non-dream is precisely a move to wipe out the dream out of existence. The dream is a spontaneous happening and therefore dangerous to a control system set up by the non-dreamers." (Burroughs 1999, 289) One should specify that the "American dream" and the "American non-dream" are just two sides of the same contradictory speech act, which feeds anxiety, which truly actualises when it turns out that the Dream can never itself become a reality.

The Nordic experience reminds that well-functioning social security and social welfare, health and educational services supported by social rights, are an effective security check also against dangerous random events due to individual disturbances and misfortunes, since they are constructed on the basis of universal, pragmatic and secular principles of justice without having to define the citizen as a specific type of human being in order to operate properly and without laying unrealistic demands for individual merit and success. The real strength of this kind of welfare regime is not only the material basis of security for each person but the fact that this person is not subordinated under any kind of personality, identity or rationality test in order to be recognised as a rights-bearing citizen. This approach is quite contrary to that of "rational economic man", who is ultimately grounded in the fear of being controlled by others, the mortal fear of abject capitulation to others. (Keller 1985, 121-122; Mirowski 2002, 341) The restructuring of the Nordic welfare regime basing on the theory of incentives and activation has, however, since the early 1990s, profoundly challenged the solidarist ethos of welfare. Does this mean that the social security checks have been also displaced? Has this happened in the name of social security of another kind, i.e. in name of social inclusion and social cohesion?

Social inclusion and social cohesion are catchwords which are like black boxes without a bottom: one can place in them whatever one likes and they will be never filled up. In order to balance the system all are invited but some of us only as outsiders. The "social question" has been characterised (Castel 2007) as the group of situations through which a society experiences the risk of its fragmentation and attempts to deny it. All the talk, writing and activities around social inclusion and social cohesion give the impression that the "social question" so defined would be at the core of governmental action of the advanced EU countries. This talk makes sense only in the frame of competition, economic growth and efficiency by emphasising the fundamental role of paid work in the labour markets. In this vision the labour market system is presented as a medium of integration and an answer to the "social question", of the young people too. However, this kind of "market system" is never meant to decisively integrate all the (young) people living in socially vulnerable situations nor can it be presupposed that such a market-mechanism could cooperatively solve all the contradictions stemming from the clashes between different individual values in a socially fragmented society. Rather than in terms of explicitly forward-looking political goals social cohesion and social integration should, here, be understood as a kind of unintentional consequence of a myriad of individual re-entries to the market which is thus claimed to find a new equilibrium point. In this way social cohesion is equated with the idol of stability, an onto-theological description of the market system. Such a description presupposes that the black box has a bottom, so that, as it is filled with new wage-earners, the balance in the scales will be found. However, it is the experience of many young people that they just slip through the open bottom of the black box.

Displacement of Public Responsibility

There is an ongoing competition to transfer one's responsibilities to someone else. In a similar fashion an effort is made to transfer them to the future, which implies the delaying of decisions (undecidability, desistance). Examples of this conduct can be recognised even in the most every-day situations. Wherever children and young people, with their parents, move in the web of private and public institutions, they are often immediately asked to read or even sign a written agreement or listen to oral instruction which seeks to delegate responsibility about the possible damages or misfortunes due to their moves and movements in this web to the individuals themselves. This can happen in the market, on vacation, on the way to school, in government bureaus. The reason for this is that private and public institutions seek to delegate or transfer their potential responsibility to other agencies or individuals as an insurance against risk or an assurance in the face of uncertainty. Such a postponement of responsibility is a mode of governmental escape. The delegation of responsibility characterises a system which cannot be deemed responsible for any damages, because it is seen to function optimally by definition.

In the context of freedom of choice and liberty for all, forward-looking public obligations are displaced by backward-looking private responsibilities which actualize after the (f)act. Glorification of individual freedom of choice coincides with the demand for individual responsibility which displaces forward-looking public responsibility which cannot function without imposing obligations (norms) on individuals. In these circumstances, an obliged act (a duty) is always a kind of corollary of individual responsibility. If a specific situation is characterised by detrimental consequences of past actions, then, and only then, the question of responsibility as accountability arises as a backward-looking decision. If someone is not deemed responsible for anything specific, then he is neither obliged in any specific way. It is easy to see why this kind of "privatisation of responsibility" is a powerful argument in diminishing the forward-looking responsibility of public institutions, which do not, though, have to give up their acquired monopoly of sanctioning behaviour in cases in which individual responsibility is recognised to have been neglected.

Displacement of forward-looking public obligations with backward-looking private responsibilities means that our conduct is conducted or governed in terms of expectations, which is affiliated with what could be called "xenopolitics", which always either comes too early or too late on the scene.

The crucial dilemma facing public authorities seems to be that even with increased power shares at their disposal, there are fewer and fewer domains which can be politically intervened in in a forward-looking manner, only pre-actively or re-actively, but not pro-actively. In other words, public responsibility is more and more "derivative". A "derivative obligation" is an obligation imposed on future action which will be actualised in a situation when the responsibility specified in the present in the face of uncertainty becomes true. Therefore, this is not an obligation which is specified in the present in order to bring about a certain future state of affairs. It is rather an obligation, which actualises only in the future when the responsibility is then and thus recognised and actualised. In this mode politics is exercised counter-factually, as if it could read the present from the point of view of the future. Such a political behaviour is typical of decision-makers who are fond of talking in the name of future generations, as if they gave them their political mandate. Such a talk can be, but surely need not be voiced in the name of children and young people living in the present. The pre-active facet of "xenopolitics" is that it is performative politics, which functions by working on people's expectations and trust.

Activation, freedom of choice and incentives are the say of the day. Technologies of 'responsabilisation' of individuals characterize the government of unemployed, of socially deprived, of single parents, and of youth. The crowning expression of this regime of government is the Personal Responsibility and Work Opportunity Reconciliation Act enacted in the US in 1996, one aim of which has been to cut spending for welfare programs. A similar development has taken place elsewhere, also in Finland, though in a more moderate fashion. As a point of departure for such activation is a presumption, that the individual can be active only in a specific system, which compels the person to take care of oneself, forces her/him to be free. Such a "systems thinking" can focus on the most micro or the most macro setting of human interaction. The crucial point is that this thinking trusts and demands a trust in the system, and in the individual only when she/he adjusts to the system. Those, who do not adjust or challenge the operating principles of the system, can be characterised as "dangerous individuals", some of whom have to be carefully monitored.

The emphasis on individual autonomy, sovereignty and responsibility does not necessarily mean that the individual is trusted, rather the "system" is. But it is trusted on the condition that "dangerous individuals" are domesticated. But who are approached as "dangerous individuals"? The task of controlling dangerous action is complicated since many truly dangerous individuals are overlooked since they are incapable of collective action. Those under surveillance are usually the ones who are estimated to be an ideological security risk to the system or the state. It is symptomatic that, in Finland, squatters, animal rights activists, anti-globalisation activists and environmental activists have been those young people whom the Security Police has classified as proper targets of monitoring and surveillance, but not suspects of school shootings.

Even if publicly organised social security is in the retreat, in circumstances where forward-looking public responsibilities are displaced by private responsibilities operational as back-ward looking accountability, the role of public authorities and institutions need not diminish in making society safe and secure, i.e. in producing governable persons and governable spaces? Can this be accomplished by political and legal means or have we confronted also in the EU and in Finland, the problem of control in the weak state (Hamilton and Sutton 1989, 1-46)? Even if the answer would be in the affirmative and would remind of the force of state and law, one must further ask: safe and secure for whom in what kind of governable spaces with what kind of governable persons? Since it seems to be the case today that the constitutional task of public authorities is above all to make a clearing for market forces and market agents, this priority also sets crucial limits to other potential political and legal interventions which could be used in "securitising infrastructure" but which would narrow the scope of market freedoms. In these circumstances, one may question the extent of the freedom of public authorities to decisively act in facing the random danger.

If individual responsibility is definitely accentuated, the only thing that the state can be expected to do is to help those in need or distress to help themselves as far as social security and social welfare is

concerned. Such is the logic of un-reflexive activation. In this way, the state communicates that it is a passive agent in situations of social vulnerability. These situations cannot, therefore, be approached as political priorities. In this way the decision-makers may define e.g. poverty in an affluent society, or even growing inequalities in health as normal states of affairs, so that it can refrain from any decisive action in these matters. However, there can be abrupt, unpredictable and terrifying events in the circulation of the life-world such as school shootings, which cannot be described, even by the stakeholders of the state, as normal events. These events can be defined as states of exception where the sovereignty is tested.

A Society of Control

We live in a society of control (Deleuze 1990), in which technologies of discipline are increasingly displaced by technologies of security, just like obligation is displaced by responsabilisation. While discipline confines, fixes limits and borders, security safeguards and ensures circulation by modulating conduct in order to foster the bio-political body. In a society of control the obligation to be free finds expression in the privatised responsabilisation-talk. The freedom of individuals is equated with responsibility interpreted as self-control, consumer-sovereignty, human capital, competitiveness. The responsabilisation of individuals, along with the privatisation of responsibility, is a way of redrawing diagrams of control. In a society of control diagrams of security displace or radically supplement diagrams of discipline and juridico-legal mechanisms. The difference between discipline and security is easy to understand, if one thinks why closing a child to his/her room does not work as a punishment, if there is an internet linkage to the whole wide world. Besides, the internet cannot be effectively controlled by disciplinary technologies and it can also turn out to be an insurmountable challenge to techniques of security such as screening, filtering, pooling, tracking. However, discipline and security are not alternatives. What actually changes in the society of control is the system of correlation between them, so that technologies of security become a foremost modality of control directing attention to spaces of security, the aleatory, the form of normalisation and the bio-political relation between security and population. In the diagram of security the question of circulation is crucial, because a certain kind of circulation makes a certain kind of life possible in the form of infrastructure. In this sense, one can talk about "securitising infrastructure" (Lobo-Guerrero 2008), just like Foucault has talked about "capitalising territory" (Foucault 2007, 13-17). At the bottom, this is a problem of the series: an indefinite series of different mobile elements which must be managed by security technologies. The real challenge of this securitising effort is the paradox arising when regimes designed for the protection of critical infrastructure and a liberal mode of life are premised on the identification of identities that match dangerous profiles or just obtrusive or detestable profiles (Lobo-Guerrero 2008). In this dilemma security is interpreted as serenity - and not just as safety, stability or surety - and, therefore, the focus has to be on resilience, and the accompanying governmental technologies have to be flexible and modulating. Such a definition of policy can be found in the Program for internal security (Arjen turvaa 2004).

Security intervenes in possible events, to what is aleatory (Lazzarato 2005): "security mechanisms have to be installed around the random element in a population of living beings so as to optimise a state of life." (Foucault 2003, 246) In diagrams of security a difference between risk and uncertainty becomes pronounced so that calculative risk-management must be supplemented by precautionary action coping with uncertainty. In a society of control monitoring the circulation of series of mobile elements, be they children, adults, teenagers, cars, phone calls, money transfers, robberies, flights, car accidents, in fact, all kinds of acts, events, interactions and transactions, is of outmost importance, but still altogether too rough and approximate to be able to guarantee the smooth running of the circulation necessary for serene life of those who can otherwise afford it. When security is bio-politically perceived, attention will be paid to minor details. In fact, attention will be paid to phenomena at the molecular level and even beyond, so that the life cycle of a virus represents more than metaphorically well the profile of a danger that causes great alarm in a society of control. What is sought after are

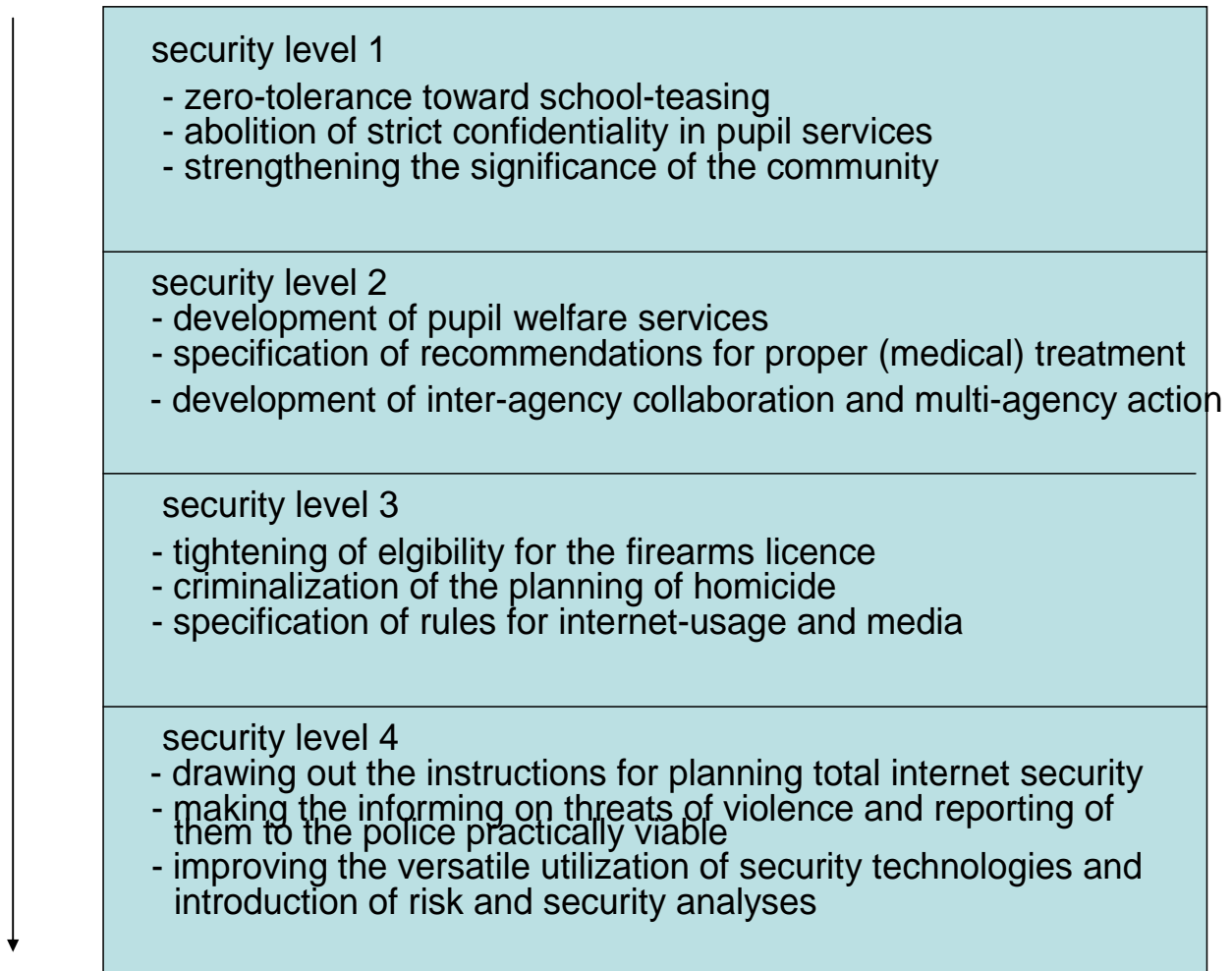
kind of cellular automata which can prevent the penetration of the virus in a cell, activation within the cell, replication within the cell, escape from cell to invade other cells, escape from host to infect a new host (Burroughs 1999, 304). However, even though the infections of disorder of the whole of mankind were pictured by a molecular map, this would not guarantee the security for all and ever or even for once. In the diagram of security one just has to pay attention to phenomena that are random, aleatory, contingent, and unpredictable.

A society of control is a society of spectacle. In a society of control atrocious deeds are both performed and judged for the sake of and in the form of spectacles. Such a theatre of cruelty is part of our everyday in all walks of life. It is in these spectacles that a new sacrificial crisis may emerge. "The essential violence returns to us in a spectacular manner - not only in the form of a violent history but also in the form of subversive knowledge." (Girard 1984, 318) But what is the reason why, in a society of control, the application of security technologies take the form of spectacles too? What explains the paradox that the will to produce security invokes insecurity? The explanation must be sought in the fact that in societies of spectacle the control function of security is exercised by means of word and image. (Burroughs 1999, 199) First of all, in governing the conduct of individuals by the responsabilisation mode, and in controlling the freedom of individuals through the figure of autonomy (control of being), the society of control has become a site of spectacles of self-aggrandizement, self-improvement and self-help. The language of this self-improvement industry asks people to think and make up their minds as to who they want to be or become. (Hänninen 2000, 21) Since the reality of non-dreamers seldom redeems these promises, and since the division between the winners and the losers remains or widens, the reason for this gap must be found and made public. Again this takes place in spectacles in which the personal qualities of the successful (stars) are celebrated and thus they are congratulated for their "understandable" and "justified" success. The tautological message is clear: the less successful must also look at the mirror which tells them who is the responsible individual.

'Governmentalisation' of State

About two weeks before the Investigation Commission of the Jokela School Shooting published its report on 26 February 2009, the ministerial group of internal security convened on 13 February and announced in public that altogether 115 measures had been already launched by the government in different administrative branches to improve the capacity for prevention of, precaution to and the after-treatment of such tragic events as were the Jokela and Kauhajoki school shootings. Since these measures quite single-mindedly correspond to what is now proposed by the Investigation Commission, it is plausible to look at those recommendations first, since they have been formulated in line with the measures started. The Investigation Commission (Jokelan koulusurmat 7.11.2007) makes a number of proposals which serve as the conclusion of the diagnosis of the Jokela school shooting event. As this investigation has proceeded from security level to security level, it is also pertinent to arrange the proposals in this four-fold classification. In this manner the proposed policy pattern can be encapsulated in the following diagram 1.

Diagram 1: Recommendations of the Investigation Commission on the Jokela School Shooting

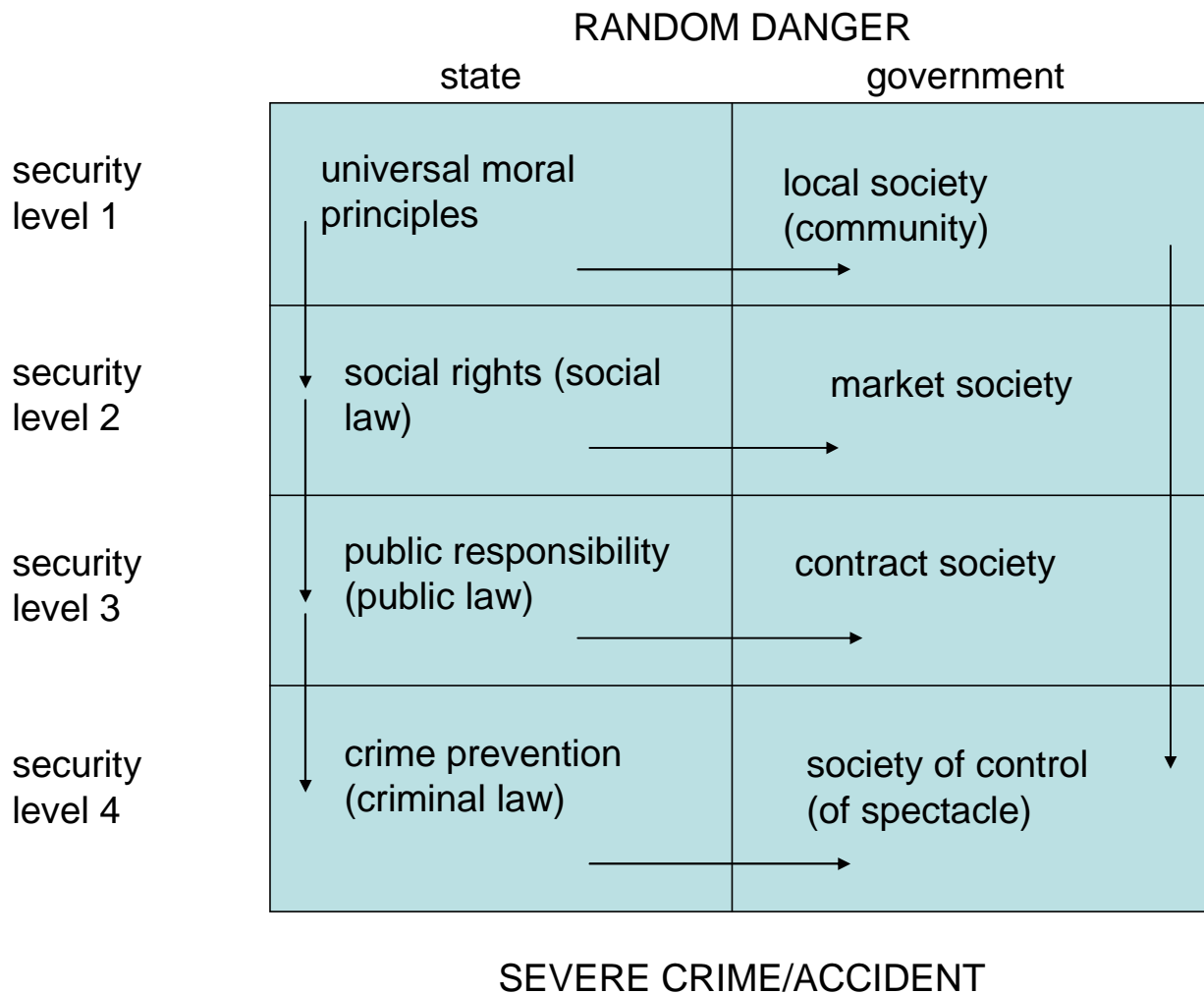


At first glance, the recommendations of the Investigation Commission of the Jokela School shooting appear as well thought-out and focussed proposals for measures to prevent and handle the danger of school shootings and similar violence. There is no doubt about the sincerity and gravity of these efforts of precaution, but the sufficiency and efficiency of which should be critically scrutinised. One must, here, satisfy with some quite general comments each of which referring to a specific security level.

First of all, even though the Commission puts its finger on the morally and practically focal point of the Jokela tragedy: the individual motivation and situation of the perpetrator and the possibility for means to find out about such fatal plans beforehand, the suggested proposals quite totally place their trust on the local community and keep quiet about more universal moral issues such as the rights of the victims. Secondly, even though the Commission emphasises the importance of well-functioning pupil welfare services, including proper medical treatment especially in cases of mental problems, it does not really demand that new resources should be allocated to this task - even if it refers to available resources - not to mention the social rights of pupils. Thirdly, even though the Commission suggests

that the acquisition of firearms (hand guns) should be more strictly licensed and also the planning of homicide - and not just crime involving property - should be criminalised, the Commission is not at all willing to limit the market freedoms and affiliated individual liberties, and, therefore, leaves it to private agents themselves to agree and contract about possible rules for guiding the use of liberties, e.g. in the internet. Fourthly, even though the Commission bases its recommendations on a comprehensive and integral notion of security reinforced by citizens' informing initiatives, the nucleus of the recommendations is definitely articulated around the strong belief in (private) security technologies and analyses, which are widely marketed across borders.

These four comments can be read as referring to lines of escape from the state-based politico-legal complex towards government in the name of "community", "market", "contract" and "security". This illustrates what Michel Foucault has called "governmentalisation" of state (Foucault 1994, 220). This governmental setting can be illustrated in the following diagram 2.



This security diagram is characterised by a double-movement. The school shooting is approached not just as a risk but as random danger or threat whose probability cannot be calculated *a priori* due to the genuine uncertainty of the event. If the danger actualises, none of the security levels have been able to prevent this movement from ending in a catastrophe. Most of the proposals of the Investigation Commission and the precautionary measures already initiated at different security levels aim at governing security without basically expanding state intervention or increasing public responsibility.

The reinforcing of legal regulation can, though, take place at the hard core of security policing. The movement from state to government is illustrated by arrows at each security level of the diagram. When this movement from state to government joins with the movement from security level to security level one ends up in the heart of the society of control. Most of the measures launched by the government are security practices of the society of control, which are resilient and flexible. This setting becomes comprehensible by following the governmental moves from security level to level.

It is significant that in Finland, in the aftermath of the school shootings, the Cabinet seemed to have collectively decided that the best way to react was to talk in the name of the whole community and further proposed that the principal remedy could mainly be provided by the community itself. The same line of reasoning is exercised by the Investigation Commission, whose frame of reference in the diagnosis of the school shooting is definitely that of the community. The moral character and quality of the community is made the chief criterion for judging both the possibility and actuality of such an act of violence. Such a "parochial perspective" urges the Commission to misleadingly call the perpetrator a socially excluded person, even though the perpetrator himself rather despised and hated his fellow human beings and actually belonged to a trans-national community of kindred spirits whom he imitated. Even though the families of the innocent victims and some other pupils have been therapeutically supported and have received modest financial support from the government due to the Act on Compensation for Crime Damage, the rights of the victims has not been articulated as a real issue addressing universal moral and legal principles. It could be claimed that a paradoxical plea for community by the authorities is a xenopolitical reaction, an expression of anxiety, but hardly a sign of a sovereign decision.

The decision to take refuge to communitarian rhetoric could be understood as a sign of weakness due to the fact that the government could not make such political decisions or legal interventions which would guarantee that there were really available sufficient welfare services for pupils. The Investigation Commission emphasises that pupil welfare services, especially mental health services, function as crucial preventive measures against the outbreak of random violent acts, but it does not suggest any definite increase in the financing of public services, which are in need of urgent extra investment in most municipalities. The trust is rather projected into the market to provide such services. It is significant that over a year before the Jokela school shooting the Memorandum of the Working Group preparing a reform of the pupil welfare legislation was published on 19 June 2006 (Oppilashuoltoon liittyvän lainsäädännön uudistamistyöryhmän muistio 19.06.2006). In this Memorandum the condition of the pupil welfare services and legislation was carefully examined and a great number of detailed proposals were made, also in terms of social rights of pupils. Pupil welfare services and legislation were to be developed as a specific entirety. Nothing of the kind really happened before the Jokela and Kauhajoki school shootings, and after these tragic events more plans and work-groups have been again set up. While waiting for public action in this social domain, we can constantly observe how markets are opened up for private services.

The Investigation Commission proposes that the acquisition of handguns should be better controlled by tightening the criteria for the license and that the planning of homicide should be also criminalised. Measures and legislation in line with these proposals have been already started, although no drastic change to the earlier practice is to be expected. It can be rather claimed that the public authorities are doing the minimum that is generally expected of them so that the market interests and individual liberties are not "violated". No doubt the government finds itself in a very paradoxical situation where contradictory demands, even from the same segments of the society, are placed on its conduct. The public authorities should guarantee security; even create stability, while avoiding interfering in the decisions, choices and behaviour of individuals. In this dilemma, the government is seduced to act as if it could trust the "system". Such a system is composed of "rules of conduct" which are also understood as a result of contracting. According to this reasoning public responsibility can be transferred to or displaced by the "contract society" in which choices of individuals according to given rules are decisive. This is the direction where the authorities have been willing to develop the internal

security programming in Finland as can be seen from the draft Internal Security Programme completed on 28 March 2008 (*Turvallinen elämä jokaiselle - Sisäisen turvallisuuden ohjelma 28.03.2008*). It is, though, quite symptomatic that the Internal Security Programme does not specify school shootings and similar crimes as a key area of security action.

Of the 115 measures now taken to prevent and handle crimes like school shootings, most of them seek to improve the efficiency of control of deviant behaviour. Nearly all of them are molecular measures of control such as rescue plans, security training, and guidelines for action, monitoring techniques, net-surveillance and the like. This kind of control applies to those who break the "rules of system" and, therefore, do not actually belong to the "contract society". However, they belong to the core of the "society of control". In this zone the methods and practices of surveillance are important. The time-factor is especially decisive, as is understandable in the context of circulation. If one reads "manuals of security" (*Campus Violence Prevention and Response: Best Practices for Massachusetts Higher Education - June 2008*), the first thing that meets the eye are emergency plans, early detection devices and early warning systems. However, if one compares the exercise of surveillance and control in Finland with the proposed measures of control in the US campuses, the difference is formidable. Finland is certainly not ready to turn its schools and campuses into anything like camps. Finland is still renewing its legislation (on Police Act, Coercive Measures Act, and Criminal Investigation Act) along quite traditional lines. It depends on the moral order of a specific society which segments of the population, which walks of life or which forces of the living are classified, and when and where, in the emergency category. There seems to be at least two logics which conduct this categorisation. Since the moral order of a society is seldom drawn by young people the generational logic is inclined to pre-categorize young people as exposed to risks. The systemic logic, on the other hand, is based on the boundary-work, which quite simply categorises people into insiders and outsiders according to purely ideological criteria of system-affirmative closure. When both of these logics are being applied, e.g. in Finland, it can be understood although not accepted that squatters, anti-globalisation activists, animal rights activists and environmentalists have been selected as risk groups for security.

It is quite evident that security and surveillance devices characteristic of a society of control are often able to recognize and track down real random dangers, and dangerous individuals like planners of school shooting - but not always! In this race, just like in the race between police authorities and criminal minds in general, the confrontation feeds competition in learning the technical tricks of the game. This is a kind of warfare in intelligence, as is conspicuously true about the use of internet. Both parties have to participate in the same game, even though they have totally opposing motives. Since both of them utilize similar techniques of information processing and dissemination, the race easily ends in a vicious circle. The available technologies of communication have made it possible that, today, even singular acts of insane violence - like school shootings - can immediately raise world wide attention. This is naturally a crucial motive of these brutal acts, which not only imitate similar acts in other continents but perversely seek to take advantage of the performative logic which is so familiar from the global youth culture of celebrities. It is most unfortunate, that, in a society of control, the public trial of such shocking assaults can only continue the spectacle, which served as the motive for the brutal act.

References

- Arjen turvaa (2004) Arjen turvaa - Sisäisen turvallisuuden ohjelma (Security in every-day - the Programme of Internal Security). Valtioneuvoston yleisistunto 23.9.2004. Sisäasiainministeriön julkaisuja 44/2004
- Burroughs, William (1999) Word Virus. The William Burroughs Reader (ed. by James Grauerholz and Ira Silverberg). London: Flamingo.
- Campus violence Campus Violence Prevention and Response: Best Practices for Massachusetts Department of Higher Education. June 2008. ARM Applied Risk Management. There is a link to this report at: <http://www.kka.fi/>
- Castel, Rober (2007) Sosiaalinen turvattomuus - mitä on olla suojattu? (Social insecurity - what does it mean to be secured?). Helsinki: Kela 2007.
- Deleuze, Gilles (1990) 'Postscript on the Societies of Control', L'autre journal 1, mai 1990; at: www.nadir.org/nadir/archiv/netzkritik/societyofcontrol.html
- Foucault, Michel (1994) Governmentality, in Michel Foucault - power - essential works of Foucault 1954-1984 (ed. by James D. Faubion). London: Penguin books.
- Foucault, Michel (2003) Society must be defended. London: Penguin books 2003.
- Foucault, Michel (2007) Security, territory, population. London: Palgrave 2007.
- Girard, René (1984) Violence and the Sacred (translated by Patrick Gregory). Baltimore and London: The Johns Hopkins University Press.
- Hamilton, Gary C. and Sutton, John R. (1989) 'The Problem of Control in the Weak State'. Theory and Society Vol 18/1, January 1989, 1-46.
- Hänninen, Sakari (2000) Il fantasma della politica nella "macchina morbida". aut 298, luglio-agosto 2000, 13-33.
- Jokelan koulusurmat Jokelan koulusurmat 7.1.2007. Tutkintalautakunnan raportti (Jokela School Shooting on 7 November 2007 - Report of the Investigation Commission). Oikeusministeriön julkaisu 2009:2.
- Keller, Evelyn Fox (1985) Reflections on Gender and Science. New Haven: Yale University Press.
- Lazzarato, Maurizio (2005) Biopolitics/Bioeconomics: a politics of multiplicity. Multitudes 22, autumn 2005.

- Lobo-Guerrero, Luis (2008) 'Securitising infrastructure, strategising space. Conference 'Economics in Infrasstructure', Delft 22-23 May 2008.
- Lowi, Theodor J. (1998) 'Think Globally, Lose Locally', Boston Review, April/May 1998.
- Mirowski, Philip (2002) *Machine Dreams. Economics becomes a cyborg science.* Cambridge: Cambridge Univerersity Press.
- Oppilashuoltoon Oppilashuoltoon liittyvän lainsäädännön uudistamistyöryhmän muistio 19.06.2006 (Memorandum of the Working Group preparing a reform of the pupil welfare legislation 19 June 2006). Sosiaali- ja terveystieteiden ministeriön selvityksiä 2006:33.
- Taylor, Charles (2007) *Modern Social Imaginaries.* Durham and London: Duke University Press 2007.
- Tuori, Kaarlo (2007) *Oikeuden ratio ja voluntas.* Helsinki: WSOY.
- Turvallinen elämä Turvallinen elämä jokaiselle - Sisäisen turvallisuuden ohjelma .Valtioneuvoston istunto 8. toukokuuta 2008 (Safety First - Internal Security Program. Government plenary session 8 May 2008)

Security and Criminal Law: The Difficult Relationship

Kimmo Nuotio³

Introduction

When discussing the relationship between security and criminal law we need to begin with an analysis of the concept of security, as it is a rather complex one and as these complexities need to be accounted for before we can present any theses on the mutual relationship between security and (criminal) law. This is not to say that the concept of criminal law is much simpler.

The main point I wish to make is that although criminal law can, broadly speaking, be regarded as one of the mechanisms societies may use for security governance, criminal law cannot be normatively approached (solely) from this point of view. Criminal law will lose its legal characteristics if it is regarded instrumentally as a means of promoting security. There is nothing wrong with security as such as a social goal. But if criminal law seeks to promote security directly, this will require and produce deep changes for criminal law at many levels. The formalist structures of criminal law contribute to a culture which produces a certain distance between criminal law and society. This distance is necessary for the legitimacy of criminal law. Security interests are fundamental and have the feature of impacting on the relationship between criminal law and society.

I will not organise this paper following the structural analysis of law according to which law can be understood as a multi-layered structure, including the surface level, the cultural level, and the level of a deep structure. Such a model has been presented by Kaarlo Tuori in his critical legal positivism.⁴ A security orientation could have an impact on criminal law at all those levels. Even the issues of legal subjectivity which are part of the law's deep structures and relevant for the reconstruction of the legal system as a legitimate normative order are relevant. Criminal law is organised according to normative principles and by using concepts that do not easily adapt to a security orientation. The notion of criminal law and the identity of criminal law as a system with all its elements are built on premises that resist a direct security orientation. From the point of view of law and legality, the law's perspective is prioritised. But at the same time, when analysing modern and late modern criminal law, we meet a strongly policy oriented, preventionist criminal justice ideology, which does not feel too bothered about governance. In the following we will see examples of these tensions, which partly are internal to the criminal law theory and practice, and study this difficult relationship more closely.

'Security' has become one of the key notions of our time. There is an enormous demand for security which can be seen in very different contexts. We can speak about security concerns in international relations, relating to issues of warfare, international terrorism, unstable regions, armed conflicts of various kinds, etc. Security is also crucial in the context of a state, as promoting and preserving security is one of the core functions of every state. Yet security is something which needs 'taming'. The crucial issue is how security can be civilised.⁵ Criminal law could indeed be one of the ways in which security gets civilised. The term security ties neatly with the historical concept of governance.⁶ In a sense security is a social concept even more than law is, because security is a product of law. Promoting security is one of the main functions of the law, part of the legal systems' performance. The society has security expectations regarding successful crime prevention and the prevention of other threats. In a sense a crime threat is a security threat *par excellence*. Prevention looks towards the

³ Professor of Law, Centre of Excellence in Foundations of Law and Polity Research, University of Helsinki

⁴ Tuori, K., *Critical Legal Positivism*. Aldershot, Ashgate 2002.

⁵ Loader, I. & Walker, N., *Civilising Security*. Cambridge, CUP 2007.

⁶ See the many-sided presentation in O'Malley, P., *Risk, Uncertainty and Government*. London, Glasshouse 2004.

future, whereas criminal law deals with past actions and only indirectly addresses prevention issues. Still, even today, already at the level of punishment theories, different prevention theories play a significant role.

This point renders visible the idea that security demands could challenge the legal system and call for a reorganisation of the legal system in order to better protect the society and the individuals living in it. In terms of security and prevention, criminal law is perhaps not so different from other regulatory law, such as administrative law, and regulatory and controlling practices, such as policing, unless the specificities of criminal law are accounted for and respected. We should also ask whether security is a legitimate aim and in the interest of the society, and how security actually connects with rights. Could a security interest be used legitimately for reducing rights? Is there a tension between ?, and what are the particular forms of appearance of this tension, and do these have a bearing on criminal law as well? We are already beginning to be faced with enormous questions.

Security is obviously a term full of power and meaning in a political context. Security threats are being identified and recognised, and more often than not they require some form of reaction from some actor seeing himself as being threatened or in a position to take action. Many serious security threats are a concern for the international community. Clearly security is not a brute fact as it is not an object that can be directly observed. Security talk rather refers to a state of affairs, to a status, which is marked by the control or even absence of certain disturbing threats. These threats are also not natural in themselves, as they are not identifiable without schemes of approach. Determining whether there is a risk for a terrorist attack is not just a matter of direct observations, but requires the bringing together of various analyses and making conclusions on the basis of these.

Discussing crime, control and security is naturally nothing new. These issues have been often discussed over the years in several of the branches of criminal sciences, including criminal law scholarship proper, criminology, and penal policy. I will point out a few issues that can shed light to some aspects of these relationships. Quite generally we could say that during the past years a certain shift towards a control paradigm in criminal justice tied with penal populism and punitive policies has led to rising levels of penal repression in many parts of the world. This development has been further underlined by sudden emergence of high security issues especially as regards international terrorism. Criminal law has been affected by the international political agenda addressing security issues. Criminal law quite generally represents a liberal model of individual responsibility, and in today's world a discourse of various security issues in terms of criminal law and individual penal liability seems tempting. Traces of these temptations can be seen in the criminal politics of today. Not only security, but also criminal policy needs taming and civilising.⁷ The culture of instrumentalism is the culture of governance and of finding what works, whereas a culture of formalism refuses to adopt a governance perspective.⁸

The more usual axis chosen has been security and its impact on human rights.⁹ The relationship between security and criminal law shows some differences compared to this, as we will see.

⁷ Lacey, N., *The Prisoners' Dilemma. Political Economy and Punishment in Contemporary Democracies*. CUP, Cambridge 2008. On the qualities of various approaches to democracy in this respect, see also Lijphart, A., *Patterns of democracy: Government Forms and Performance in Thirty-Six Countries* Yale University Press, New Haven, 1999

⁸ See the discussion as regards international law, in Koskeniemi, M., *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. Cambridge University Press, Cambridge 2002, pp. 480-509. A story not that different could be told about the development of criminal law.

⁹ See, for example, Hol, A. M. & Vervaele, J. A.E., *Security and Civil Liberties: The Case of Terrorism*. Intersentia, Antwerpen 2005.

Security and Safety

The concept of security comes close to the concept of risk, as security threats can be analysed in terms of risks. Already this suggests that the relationship between security and criminal law is rather complex, as also the law deals with dangerous actions and dangerous individuals, and as also the law seeks to maintain order and integrity in a society. In a sense, the law is one of the classical means for producing security in a society.

Security as a concept is rich in meanings. It may mean different things in various contexts. It may receive a narrow or a broader, a harder or a softer definition. In context of war, we probably intuitively understand security in its narrowest sense, whereas issues of policing, for instance, may include a much broader and much softer perspective on security.

In the English language security can be, at least to a degree, etymologically distinguished from safety. There is a personal touch in the latter, which the former is lacking. Safety has to do with protection. Safety measures are often paternalistic in a sense. Each and everyone are expected to protect oneself for the case of trouble and accident. Life vests are under your seat. Safety belt should be used, etc. We use the concept of security mainly when referring to something broader, something going beyond the personal. The non-use of safety measures might be more harmful for others than for the non-user, but we do not usually stress this aspect because we regard the matter as belonging to the personal domain. Still, as part of larger safety systems, such routines can be very important. The flight will presumably not depart at all, if you are on an aircraft and refuse to fasten your safety belt.

Safety refers to internal risks whereas security risks are coming from outside. Traffic safety is a good example of this. When we are addressing traffic as a safety issue, we adopt the perspective of a participant. Drivers and pedestrians are part of the traffic system as a personal system, and the level of traffic safety is dependant on the skills, the training, the sense of responsibility, etc., of the participants. Traffic is a social enterprise par excellence, because traffic safety is a product of human performance in a traffic context. The traffic law is important because it regulates the legal frame of traffic as a social practice. Traffic law is not only a matter of introducing sanctions for the breaching of social duties, but it is very much a reflection and re-definition of these duties and mutual normative expectations. Naturally also criminal law has a role to play on this field, but it is not that of a key player.

We could also speak about traffic security, but then we would catch quite another type of phenomena. We would then emphasise the vulnerability of traffic, which is an important social system, as regards various kinds of disasters and large scale accidents stemming from external causes and sometimes also from wilful external action. Wilful acts would include warfare and acts of sabotage aiming at destroying or disturbing a functioning social system of traffic.

The difference between safety and security perspectives is far from straightforward and clear. In a sense the difference between the external-internal perspectives seems the most important one, as both perspectives allow for considerable shifting and flexibility. We could speak about car safety and technological safety issues from an internal perspective, and we could speak about human factors from a security perspective.

External security talk tends to conceptualise the issue at hands differently. It tends to adopt a harder security view, and it tends to restrict itself more to issues threatening the society and its core functions as a whole, instead of more limited risks and harms threatening only individual interests and individuals. The tougher and harder approach becomes visible especially in the way the external threats that originate from human action are treated. The risk of terrorism, especially international terrorism, seems to fall currently in the category of external security risks, which indicates a demand for the state to seek to exclude such risks. Such action is also in fact being combated by much tougher means than ordinary crimes, for instance.

Speaking from a policy perspective, the safety perspective quite naturally leads to the adoption of a fully another type of approach. The safety risks of road traffic, for instance, will be approached quite differently from the security risks of sabotage. Both require a careful analysis and an understanding of the root causes of the risks and harms, but it seems that the typical knowledge basis and the typical context are very different. As regards external threats, we speak about profiling and pro-active isolation and elimination. We always speak about purposeful, intentional action, or a conspiracy to commit such action. As regards internal threats, we speak about training, rehabilitation. And most of these harms are being caused by negligence.

The concept of internal security is used as the counterpart of external security. Internal security means, broadly speaking, policing the order. "Justice and home affairs" catches internal security issues in this core meaning. The EU term area of freedom, security and justice covers the traditional justice and home affairs, but adds immigration.

We should say that security characterises a certain hard core area of security threats mainly corresponding to the spheres of action of the authorities responsible for internal security in a society. It is a state function, perhaps the most central of state functions, to guarantee a certain level of security by reacting to perceived security threats. Usually the police organisation of a country contains a special unit focussed on security issues. The work of such a unit is mainly intelligence work, screening and analysis of information revealing potential security threats. Besides threats towards the state and its political system, security threats can threaten the society in general. In the concept of terrorism, both of these aspects are often present simultaneously.

The concept of internal security refers rather broadly to a state of affairs in a society, where the individuals may fully enjoy their legal rights and freedoms and a safe society without criminality, disturbance, accidents and fear and anxiety stemming from phenomena of the society or from the outside world. A high level of internal security is the product of a good environment at home, at the working place, of functioning services, a well-planned traffic system, help and assistance when needed and a knowledge that wrongdoers will be brought to justice. Getting prepared for large scale accidents and disturbances is also part of the concept.

In a modern welfare state the production of security is deeply linked with structures of knowledge. Knowledge of the society is crucial for maintaining a high level of security. Security risks should be identified and eliminated before they manifest themselves in full. Risks should be prevented by the use of various techniques and technologies. Intelligence work builds on this gathering of information and the analysis of it.

Security is a policy type of concept, describing a preferred state of affairs. In this sense, it is normatively laden. Upholding security is one of the core functions of a state, which means that security is a policy goal that a state typically seeks to guarantee. The authority and monopoly of force belonging to the state is in a sense based on the ability of the state to maintain peace and order on its territory. The rationalistic natural law theories with their discussions concerning the state of nature and the social contracts recognised this. In some sense, at the deepest level, the possibility of a legitimate legal order is based on the ability of the state to secure fundamentals of human life. The traditional, state-oriented concept of security has recently been challenged by a view called *human security*, which stresses the social roots and social needs of security, instead of a state-centred policy approach.

A similar idea is visible in crime prevention thinking. It is clear that the state cannot do everything in effective crime prevention, but the crucial activities need to be performed and placed within the civil society. The police are not unimportant, but the communities of people should also themselves develop their practices accordingly. Restorative justice, victim-offender mediation, planning of the cities, all these may have an impact on the actual level of security. Community approaches are labelled by inclusionary strategies and moral education, whereas commercial private security and policing may involve more external type of controls (closed-circuit television cameras etc.). In a sense the

communities' own efforts to prepare for disorder and offences by adopting measures and policies is a sign of not plainly trusting the law's authority to do the job.

Airport security is one good example of an engineering type of production of security. As guns and knives and explosives can be used for terrorist purposes, they are banned. Every person will be checked at the airport in a thorough manner. Certain specific risks can in fact be heavily reduced by such checks, which are, however, expensive and time consuming. The theoretical point in airport security is that as a form of control it effectively excludes certain options of behaviour by introducing routine checks. It renders other options practically impossible. In order to enter carrying a weapon into aircraft pass the controls you would have to bribe a whole team of security officers, or just be extremely lucky. In most cases, you would be caught, and also prosecuted for a terrorist offence.

A certain specified opportunity of your behaviour will be excluded. The technology of security as applied routinely produces such a result. In crime prevention theories one strand emphasises situational crime prevention. One option for situational crime prevention is that the means of crime are removed. Airport security does this. It does not actually have to turn itself to the passengers and request a certain motivation. The motivation becomes irrelevant, as a passenger simply cannot commit the terrorist offence.

Airport security is in this respect different from ordinary legislation concerning firearms, hand guns and explosives. The administrative law provides a certain legal frame for selling and handling of guns and explosives, and breaches of these rules are in most jurisdictions regarded as criminal. The logic is different however. You may want to buy an illegal gun, and you may even succeed in this. The permit system controls the getting hold of legal guns. It is very much a matter of general trust, how you choose to behave. Law-obedient persons are expected not to engage in illegal handling of guns, as this is forbidden in the legal system. The legal solution leaves room for freedom of action, and seeks to administer the security problem by introducing ideas of moral and legal responsibility. For airport security this is not enough. Airport security treats customers as objects, in this specific sense. Airport security is a parallel to a high security prison. Certain options of behaviour have simply been made virtually impossible. There is no specific morality involved: this is a simple fact.

One important development is the privatisation of security activities. There are more and more guards working for private companies doing jobs that used to belong to the domain of police. There are private prisons in the U.S., as prison services are being produced for the market. Even private armies are involved in conflicts worldwide.

The privatisation is connected with the fact that security has become an industry. A huge technology industry is serving the security industry and developing technological solutions for mastering security threats.

Risk/Danger

The concept of security is closely linked with the concepts of risk and danger. These concepts conceptualise differently the phenomena to which they are being applied.¹⁰ Identifying something as a danger means regarding it as external, as an external threat or possible negative development, with the potential of leading to harm or loss, whereas identifying it as a risk connects it with decision-making. We could say that the concept of danger adopts a victim perspective which is basically applicable to dangers arising both from human action and non-human, that is, natural causes. From the point of view of the potential victim of certain developments, a danger may require precautionary measures to be taken, or equivalent action. But the point is that if the danger arises out of human action, the potential victim often cannot directly influence the development. For him, the danger has its roots in

¹⁰ Introducing this conceptual difference is the starting point in Niklas Luhmann's sociology of the risk. Luhmann, N., *Soziologie des Risikos*. De Gruyter, Berlin 1991, p. 30-31.

the environment. In case of natural catastrophes this is most obviously the case. In case of road traffic, if someone else is driving grossly negligently and causing a danger to us, we may have a chance of communicating with the person and seek to influence the person's driving. But this may be difficult.

Conceptualising something as a danger means identifying the source of trouble as an external one. Dangerous acts are acts that people undertake disregarding the interests of others, when perceived from the potential victim's perspective. The potential victim may have difficulties in understanding the reasons behind the dangerous actions, because these reasons are not always that obvious to an outsider. We need communication between the parties in order to learn more about this.

The concept of risk is, in turn, one that applies to your own actions. The concept has the capacity to rationalise actions from an actor's perspective. Speeding in road traffic may sometimes be even a preferred option, if the reasons are weighty enough. You may need to drive a person to hospital, for instance. Regardless, speeding is dangerous.

The risk perspective is the perspective of the actor, of the decision-maker. In terms of rational action, it internalises the externalities to the action. The potential harm to an outsider caused by the actions of a person should of course be part of the reasons to refrain from that action in the first place, but in real life this is not always so. This is one of the reasons why the society needs law. Legal rules set beforehand give guidance to people when they are in the actor position, that is, when they have to make decisions concerning more or less risky actions. In road traffic, traffic rules are significant as they mostly set the standards for good and reasonable conduct in road traffic environment. The law often even provides for sanctions in case of breaches.

Legal rules are important also from the point of view of the victim. Without legal rules, the individuals would have no other horizon for their expectations than the expected actual conduct of others. The law has the capacity to impose a normative perspective on the issue. Rules of behaviour that are legal in nature are in that context primarily assessed regarding their normative validity. This is extremely important from the point of view of the victim, as the victim may require from the others the observance of obligations that are legal in nature. Also moral and ethical obligations could of course have the same function, but the law is superior to them in the sense that it is more detailed and it also includes procedures for enforcing them.

We could say that security is a complex product of regulating risky behaviour. In social interaction it also entails a subjective component, the feeling of security/insecurity. If a society does not manage to maintain a high level of safety/security, this may have far-reaching consequences in various directions, including respect for law. The legal system and the practices that have been set out for ensuring respect for law are an important part of the governance of the society, but at the same time we can note that security is in the last instance a very social concept. It cannot be produced directly by the state and its bodies and institutions, but needs to be mediated to the level of various social practices.

We noted that risk analysis internalises whereas danger analysis externalises. For risk-taking it is elementary that risk factors are noticed and taken into account properly in the decision-making procedure. As regards non-identified and non-identifiable risks, the actor is very much in the same position as the victims. Due to lack of knowledge, the ability to control possible consequences of the action may appear to be reduced in such cases, as such control only can be exercised after the worrisome facts already have arisen. Risk calculus is cold and analytical. This is of course not to say that decision-making itself needs to be that. The actions of an individual may be motivated by various kinds of reasons, more or less rational.

So far we have spoken of 'dangerousness' only as manifested in dangerous conduct which disregards the interests of others. We need to say some words also about the time dimension. The law namely deals mainly with actions already taken. This is especially true as far as criminal law is concerned. Only for crimes committed will investigation, prosecution and conviction follow. Past crimes are the material for the justice authorities. Social action takes place in the present, the moment after the past

and before the future. At that point we do not know exactly how the law sees this action, whether it is being regarded lawful or unlawful. Future actions are those actions which have not yet manifested themselves.

There is nothing which generally prevents the law from attaching legal consequences to actions that have not yet been committed. In ordinary criminal law there is, however, not much room for such cases, as long as the criminal law mainly deals with fair imputation of penal liabilities for offences committed. The dealing with past actions in terms of criminal law in a sense already requires a transcending of the difference of the perspectives of the actor and the victim, as the court needs to reconstruct the case from the actor's perspective, but at the same time take into account the external manifestations of the risks included in the action itself and manifesting themselves as external dangers. In the application of law the courts perform this by applying also legal doctrines and legal concepts in addition to individual legal norms. The actor perspective is dominant in criminal law, and these practices of applying criminal law elaborate in a sense the project of normatively transferring events and phenomena from danger zone to risk zone. The criminal law understands responsibilities in terms of wrongfulness and blameworthiness of the actions, and establishes the legal consequences of such actions. Criminal proceedings also contribute to the respect of law by the general public, as it reminds them of the validity of legal rules, and thus have an impact on the social practices more generally. How all this takes place must be left aside here.

What interests us more is that somehow more profound phenomena of dangerousness than the ones stemming from negligence and the like are present in the society and in the criminal law as well. So, besides the "general paradigm" there exists a shadow area, which follows another type of rules. We could say that this area is the hard security zone.

The hard security zone is the area in which the criminal law with its application practices tends to focus on persons behind actions, dangerousness instead of capability of rational action, risks of future conduct instead of legal assessment of past actions. We would place here various sorts of security measures ("*Sicherheitsmassnahmen, Massregeln*"), which the legislature provides for treatment of non-responsible, mentally ill offenders. Such persons are not being regarded to respond to official blame in an ordinary manner as they are not capable of controlling their reasons for action. The normal presuppositions concerning human behaviour simply do not hold. The criminal law and the accompanying laws need to provide for some mechanisms, a second "track", to be followed in such cases. As for child offenders, the child welfare may also be seen as a similar second track.

Another example of hard security demands would be special isolation measures that are sometimes applied to dangerous recidivists ("*Sicherungsverwahrung*"). Typical is that such systems are based at least to some extent on the assessment of the risk of future offending, instead of solely the past offences.

Such security orientation finds many expressions in current criminal justice systems. Prison laws contain more of such elements than actually do the core criminal law rules themselves. The rules on early release may contain elements concerning the behaviour during the serving of the sentence. "Backdoor legislation" is richer in this regard than is "indoor legislation". Release from life sentence quite typically involves a scrutiny as regards the risks of re-offending after the release.

If we open up the perspective towards the whole functioning of a criminal justice system, we could summarize the role of "hard" security in the following way. During pre-investigation phase the police work focuses, besides general crime prevention work, on intelligence. The crime scenes are being observed by using the measures that the police laws make available. This surveillance is still rather impersonalised. From the point of view of the criminal justice, this kind of activity is rather independent, as it does not directly serve any purposes similar or same than the criminal proceedings themselves. But still, also this kind of intelligence work is a corollary of criminal law, because by defining certain conducts to be punishable the state is activating the police on this area. In the fields which are closest to the hard security interests of the society, such as treason, arson, terrorism, drugs

criminality, the intelligence work is a very important part of the routines of the police. The intelligence work uses a lot of technologies and processing of information. This work enables at least some production of knowledge as concerns the crime situation and the development of it.

Investigation of crime is the phase in which the procedural rights of the accused form the process and in which there is least room for security orientation. Only barbaric states would allow for torturing criminal suspects or other inhuman treatment. The investigation practices for most serious crimes will certainly differ, and in case of serious and violent crime, the pre-trial investigation may be rather tough for the suspects. Investigative powers of the police are clearly coercive in nature. This coercion is a necessary part of modern judicial procedure.

During trial the procedural guarantees may restrict a security orientation. The human rights and procedural law principles ensure that the accused person be taken as the true subject of the process, instead of merely being an object. Basically the same routines are being gone through in every case, be they of what nature ever. During the trial, significant coercive state authority may be exercised on the prosecuted person. Such coercion is promoting a very specific security interest, namely the interest to secure the completing of the judicial process.

The substantial norms of penal law may also reflect the particular security interests of the society. Whether or not one should accept preparation of a crime as a separate offence, is not only a matter of justice and fairness. One should ask, in what sense does the criminal legislature wish to address offences which have not yet progressed to the stage of an unlawful attempt. The reasons behind this choice have to do with prevention, preservation of law and order, protecting the society. The preparation offence namely manifests openly the will to breach the law, and this manifestation will perhaps motivate the treating of this fact as an offence.

More generally, the offence descriptions of various kinds of regulatory offences no longer contain the element of a harm caused, but suffice to cover the unlawful conduct only, usually complemented with some sort of requisite concerning abstract or concrete endangerment. The point is to broaden the scope of criminal law to cover risky activities generally, thus addressing the root cause of the harms. This orientation leads to a transformation of the liability structures in criminal law. We note the tendency that especially in the high security areas, such as terrorism and organised crime, the forms of the penal liability have been complemented to the largest extent with such annexes. As a result, the actual offence may require rather little and be determined heavily on the basis of the context and the subjective elements of the offence. In some countries, such as USA and UK, the anti-terrorism laws exhibit features tantamount to a national state of emergency.

As already mentioned, the enforcement of the sentence may contain security elements. High risk prisoners will serve their sentences under circumstances different from those of ordinary prisoners. Even after the sentence has been served, that fact of offending may come to play a role. A person convicted for the sexual abuse of a child may be effectively banned from working with children, for instance.

Especially in the German academic context, the phenomenon of a "*Feindstrafrecht*", an "enemy penal law", has been discussed over last years. The point in this discussion is actually exactly the question, how much criminal law should take into account the fact that some individuals might really be dangerous and present a serious risk to society. Criminal law is about protecting the society, but it protects the society by applying a very specific set of rules. The rule of law and democracy establish normative commitments implying that every person needs to be respected as the subject of law, not as an object. Criminal law builds on the concepts of individual guilt and blame, thus seeming not to leave much room for plain security concerns.

This discussion has been started by Günther Jakobs, who recognises that we already are having a sort of enemy penal law which goes beyond the ordinary presuppositions of law-abidingness, rational action and rehabilitation. For him the point is that despite the Kantian origins of criminal law thought

which stresses importance of the concept of the person as the cornerstone of criminal law, that concept is not rigid. In his reading, the modern and late modern criminal law are much more security oriented than we are willing to confess. The Kantian tradition has not prevented this from happening. In his reading, the flexibility of *Rechtsstaat* ideas in criminal law context are merely a sign that criminal law is a societal phenomenon which needs to be adapted to the risks and dangers the society is facing.¹¹ The proposal to capture the phenomenon in the terminology has raised voices to defend the constitutional right oriented normative views seeking to refuse this concept.¹²

The concept of a person is very fundamental indeed for a discussion of the security and criminal law. Criminal law is in the need of legitimacy, and the legitimacy of it does not stem from its output. The normative legitimacy of criminal law requires a rather comprehensive argument. I will not go into detail here. Suffice it to say that the specificity of criminal law needs to be accounted for. The principles of criminal law are important in limiting penal liability to specific circumstances. Criminal law only addresses specific wrongs which have been defined at the legislative level. As criminal law is, in terms of political thinking, a way to define certain wrongs, the contents of the criminal law need to be politically reflected and processed in the society. For that reason, the normative reconstruction of the legitimacy of the legal system and the criminal law as part of it, need to begin with mutual recognition of rights of the individuals. The people, the citizens that form the society are the origin of legitimate penal authority in the society.

From the point of view of security certain people could be regarded as risks to the others. But the normative reconstruction of the legitimate legal system, and especially the criminal law, do not allow for introducing a full enemy perspective, as this would be against the normative premises of law. In a democratic *Rechtsstaat* the legal reaction of the state is always limited, and the committing of a crime does not negate this starting point. Even the convicted person continues to be a legal subject and a holder of rights. A punishment may surely, both in legal and in factual terms, restrict some of that person's rights, but I regard it especially as the product of the significance of the concept of the person which prevents the turn to instrumental and objectifying ideological practices. Only when such premises can be negated is the way open towards more straight forward schemes of protection of the society. The legitimacy perspective so to speak builds a link between the political person, the citizen, and the person in law.¹³ The political rights continue to be relevant when the rights of the suspected, accused and convicted person are being defined. This is visible for instance in the various ideas of rehabilitation and the prospects of return to normal life after the sentence has been served. Criminal law cannot basically adopt another perspective if it wishes to continue to be committed to the normative legitimacy of its practices which is being mediated through its legal forms.

Criminal law's formalism is part of the inheritance from the formalism of earlier models of rule of law and *Rechtsstaat*. The process of transformation of liberalist, rights-oriented criminal law towards policy-informed "social law" requires changes to be made, but most crucial aspects of the form need to be preserved. Criminal law cannot directly start reflecting security needs of the society, but it can do so only in an intermediate way. I will not discuss in this paper the various dynamics that the transformations of criminal law might take. Certainly, such theorising is very crucial as regards the analysis of the legitimacy conditions of the criminal laws of today. Most obviously, one prospect is that criminal law may fragment into sub-systems that follow a different internal logic and are being organised according to partly differing principles. The regulation of economic crime could follow different background thought than criminal legislation on terrorism, for instance. Such a fragmentation could, however, raise further issues, and in fact it could be detrimental to the identity of criminal law. This is an obvious result also of the discussion on *Feindstrafrecht*.

¹¹ Jakobs, G., *An den Grenzen rechtlicher Orientierung: Feindstrafrecht*. In *Nullum Crimen Sine Scientia*. FS Jaan Sootak. Juura, Tallinn 2008, p. 131-153.

¹² See, e.g., Roxin, C., *Strafrecht. Allgemeiner Teil*. Band 1. Beck, München 2006, p. 55-57 with further references.

¹³ See Günther, K., *Schuld und kommunikative Freiheit*. Vittorio Klostermann, Frankfurt a.M. 2005.

The History of Thought: Ewald and Foucault

The conceptual frame of security involves the concept of a risk. A state of security means the absence of risks. Hard security in the society means absence of serious risks to life and health and the infrastructure of the society. Since the General Prussian Land Law of 1794 such topics have been covered under the title “crimes involving general endangerment”.

Security is a product of use of knowledge and technologies in order to reduce the level of risk. State security is a product of intelligence work aiming at recognising potential risk factors at an early stage. Security has close links to policing.

François Ewald has in his study on ‘*l’État providence*’ pointed out that liberalism (of the 1700s) is connected with a special understanding of the evil, as it regarded many of the human miseries as being caused by accidents. Evil took the form of an accident. In order to master the question of the evil, the liberalist sociology had to develop new types of calculation models for calculating the probabilities for accidents. The idea in Ewald is that the notion of accident in a sense transcends the liberal scheme, because it remains as the problem to be solved, being at the same type a product of the liberalism itself. Ewald describes the developments towards a welfare state as shift from the paradigm of liberal law to social law. Social law went beyond the liberal scheme, developing new techniques to master accidents, and acknowledging the root causes of miseries in a more profound way than liberalism ever could. The sociological turn meant that also problems of criminality were regarded as issues of regulation, of striking balances for the protection of society.¹⁴

Michel Foucault has also analysed the history of western legal and political thought in a sense which is important to our topic. He elaborated on the issues of security as part of his studies on governmentality in *Securité, territoire, population*.¹⁵ According to him law is basically a rather simple and archaic matter, a manifestation of power. The law as a form has survived a very long history. The law in its “original” sense means just this legal code. Also the simple model of penal law is a modality of security.

According to Foucault the modernisation of a society has meant a transformation of many social processes, including political processes. The politics has grown to reach much deeper into the body of the society than used to be the case during earlier periods in history. Besides a legal power, a disciplinary power has emerged or gained in importance and sophistication. The law gets intertwined with various kinds of practices that go much beyond just the legal code, and these practises in turn seek to influence the individuals which belong to the society and which basically form the polity. The second modality of security is penal law which is now connected to various processes of control, surveillance, seeking to influence the committing of the offence in the first place. The third modality adds the layer of reflection on the rules themselves, a policy level, on top of the earlier ones. What difference would these and those changes make? How could one keep the level of specific form of criminality within acceptable limits as regards the functioning of the society.¹⁶

A thorough history does not interest us here. The important thing is that the modern law seeks to maintain the society by requiring the individuals not only to fear a punishment but also requiring them to learn and to change their attitudes. The birth of prison as a technology of disciplinary power seeking to rehabilitate criminals to ordinary citizens is a paradigmatic example of this. The prison laws are the legal code element, whereas the disciplinary power operates at the level of bureaucratic social

¹⁴ Ewald, F., *L’État providence*. Grasset, Paris 1986.

¹⁵ *Securité, territoire, population*. Cours au Collège de France, 1977-1978. Gallimard, Seuil 2004. [The course given at the Collège de France 1977-1978.] ; Security, Territory, Population. Lectures at the Collège de France, 1977-78, Ed. By M. Senellart. Palgrave, Hampshire 2007.

¹⁶ Foucault, *Sécurité*, p. 6-7./Security, p. 4-6.

practices. For Foucault, individuals do not really exist before the social practises, but are rather a product of them.

According to Foucault's analysis, in today's society, a further, third, dimension can be observed. Besides the disciplinary power, security becomes relevant. The point is that security operates at a level different from the disciplinary power and can be distinguished from it. Security is an apparatus (*dispositif de sécurité*) of the population, whereas the disciplinary power focuses on the individuals. The disciplinary power addresses the body of the individual, aiming also at influencing the mind. Security is an order, a technology.¹⁷ It is clear that this first characterisation is only rough and schematic, as disciplinary mechanisms share a lot with security mechanism. They both seem to operate in multiplicities.¹⁸

Foucault stresses the point that the development of a society throughout history should not be regarded as a march from one model to the next, but that these three dimensions are somehow present in all historical époques. The way the legal code gets arranged with disciplinary practices and security practices varies from time to time. Also security technologies have been present already at earlier times. It is also clear, says Foucault, that the legal code has not disappeared or lost in significance since the rise of the disciplinary power and security apparatuses. The practices applied to criminality show this mix as well. Rehabilitation has not been the only social concern, but a risk of re-offending has always been also involved. This risk of recidivism falls into the domain of security. It has to be mastered with quite another kind of technologies than those of disciplinary power: security risks need to be analysed in terms of probabilities.

We could say that Foucault's analysis roughly corresponds with what has been said earlier concerning law, safety and security. Criminal law, which is the example of also Foucault, has the ability to adapt to all these technologies of power and thus get involved in these technologies and forms of government.

'Polizei' as a Governance of Security

During the course of the history, criminal law used to be regarded as one of means for government, for the good of the society. Development of criminal law is closely linked with the emergence of a state. Together with the authority to administer criminal justice, also other powers grew in the hands of the authority.

Especially the German history is important here. In Germany the doctrines of a good governance of the society were developed from the 15th to 16th onwards. A great amount of police orders (ordinances) were promulgated, as the crown had gained the authority to introduce orders for the sake of protection of the society and promoting various kinds of interests. Typically the police ordinances contained detailed prohibitions of dangerous activities or activities that otherwise required publicly given rules. Also commerce fell under this. The amount of such regulations grew rapidly. The term "*Polizei*" grew to mean a much broader sphere than what today counts as the police. *Polizei* contained both "hard security" and "social development". It concerned the art of maintaining society, of governance. A good police would also strengthen the public authority. During the early days the police orders were not taught in the law faculties of the universities.¹⁹ The science of *Polizei* (*Polizeiwissenschaft*) was, however, developed in the 18th century. Those days the rights of the individual were not really the focal point. The order was that of the virtuous prince.

¹⁷ Ibid., p. 7-8./11

¹⁸ Ibid., p. 11/11-12.

¹⁹ Stolleis, M., *Geschichte des öffentlichen Rechts. Erster Band. Reichspublizistik und Polizeiwissenschaft 1600-1800*. Beck, München 1988, p. 131.

The comprehensive notion of a police was split during the course of these developments. The good governance required that the also freedoms of the individual were protected as part of the order. Freedom had to be integrated within the field of governmental practice. The notion of police was reduced only to cover the negative functions in relation to the maintenance of order, and separated from the positive functions. The notion of police was thus also marginalised.²⁰

Looking back in history reveals an interesting development: in the continental law, especially in German criminal law thinking and constitutional development, the late 18th century and the early 19th century saw a critique of a too broad conception of criminal law. Criminal law had begun to slide into the general *Polizei* approach. The Prussian General Law of the Land from 1794 was a good example of this. The emphasis of the law was to create in its penal law part a comprehensive regulatory order addressing a great variety of security risks. That code is modern resembling the later sociologically oriented approaches and even welfare state legal models.

The history of police law is significant for the development of a modern state and also as regards the notion of a criminal law. The development towards a regulatory police criminal law blurred the boundaries between ordinary criminal law and regulatory law. Criminal law was sort of complemented by a system which was not limited by similar principles, and which was serving diffuse interest.

The Prussian Code and some other codes of that time were heavily criticised by the scholars of that time. Paul Johann Anselm Feuerbach was one of the most critically minded. He was a fierce opponent of the idea that endangerment instead of actual harm could be enough for the establishment of criminal liability. In response to this he formulated his idea that an offence always needs to contain a violation of rights (*Rechtsverletzung*).

We see the tendency that during the 19th century, the proponents of the classical school sought to limit criminal law in relation to the merely regulatory law, thus defending the idea of a restricted criminal law. Interestingly, the regulatory law was important for the development of such forms of liability that later became important also in the field of criminal law. Particularly the issues of negligence, omission and crimes of endangerment were important. The classical school prepared the way for the later ideas of rule of law and democracy, because the idealistic philosophy emphasised the legitimacy requirement. The conviction and the punishment had to be justified in relation to the person in question.

By mid-nineteenth century, the academic branch of *Polizeiwissenschaft* was about to loose its position, and the field was reorganised. Its place was taken by doctrine of administration and administrative law.²¹

The first half of the 19th century was the time when modern criminal law thought was rapidly developed. Idealist philosophy was very important in here in the German context. The idealist philosophy stressed very clearly the point that punishment had to be justified from the point of view of moral principles, and that a consequentialist moral argument did not suffice. The birth of the modern criminal law thus connects with these ideas of a specific criminal law identity, ideology, and culture. It also connected with a more general philosophy of law and state. The critical philosophy had also an impact on legislation those days, but due to practical interests, the theoretical ideas were never fully realised at the level of positive law.

Already the second half of the 19th century saw a turn, not only in theorising, but also in legislative practice. A policy emphasis grew stronger, and the criminal law was being regarded also to serve the interests of protecting the society. The sociological school of Franz von Liszt was inspired by rising positivist criminology and sociology. The sociological school was also influenced by other strands of thought of that time, such as the jurisprudence of interest. The sociological emphasis came to mean

²⁰ Foucault, *Security*, p. 353-4.

²¹ Stolleis, M., *Geschichte des öffentlichen Rechts in Deutschland*. Zweiter Band. Beck, München 1992, p. 419-420.

that the interests of the society were stressed more than the vertical relationship between the offender and the state and its legal order. The related movement of *défense social* marched forward also in the francophone world.²²

The sociological school was not ready to abolish all the legal safeguards of the individual, but it proclaimed a rational reorganising of the criminal law from the point of view of the protection of the society, which was regarded the aim of criminal law. A criminal policy perspective was introduced. It is worth noting here that the sociological school paid a lot of attention to the fact that we should know the criminal in order to decide how to treat him. A special “track” was regarded necessary for the dangerous habitual offenders.

On the conceptual level, the development of the object of protection of the penal provisions is very interesting. Soon after Feuerbach had come with his idea of a “*Rechtsverletzung*”, the idea of a legal “good” began to develop. Various crime definitions were regarded to protect various types of good. Von Liszt himself defined the object of protection to be a “legally protected interest” or “protected legal interest” (*Rechtsgut*). The legal science of 19th century Germany was a lot influenced by studies on Roman law, and also the Roman law viewed rather practically the various interests which the legal system, in this case criminal law, sought to promote. The legally protected interests are interests of an everyday life, and these interests cover not only the interests of an individual (life, health etc), but also the interests of the society (trust in currency, trust in documents, trust in civil servants) and the interests of the state (fair elections, interests of defence, protection of state secrets etc).

Since then German legal science has been rather committed to the idea that a crime always has to include a harmful effect on a *Rechtsgut*. The idea has been that this requirement excludes some diffuse or suspicious interests from being protected through the use of criminal law. In this sense, the *Rechtsgut* requirement resembles the Anglo-American harm principle. They both are thought to denote the limits of criminal law. Moral criminalisations are excluded from the domain of criminal law.

From the point of view of the *Rechtsgut* idea, security is a problematic concept. Security is a very diffuse concept and its relation to the system of rights is unclear. It is a systemic concept, which makes these worries even stronger. On the other hand, we know from the history that we protect also rather diffuse interests. Think about the various interests that entail peace, for instance. We used to protect king’s peace, for instance, and domestic peace. The term security clearly is something different from peace. It also differs from order. The conceptual history of notions of protected legal goods reveals interesting continuities, and a sense of nuances.

The risk is that by accepting security interests to be protected through criminal law too diffuse interests enter the field, and that we face a similar dilemma than that there was between the *Polizei* law and criminal law. The other troublesome feature is that the criminalisations seem to authorize other coercive practices and that these practices then, in turn, restrict the rights of the people. The important thing is that introducing security as a legally protected interest could mean a severe conceptual blurring of the limits of criminal law. This consequence concerns the criminal law’s internal legal structures and especially the principles accounting for its principles and, following, the legitimacy of it. Regarding also the historical backgrounds, these worries need to be taken seriously. Having said that, we must admit that in many cases the security threats can be formulated well enough to satisfy reasonable criteria.

A Foucaultian background will enable us to see some crucial tensions within late modern criminal law. The security orientation reinforces further certain tendencies which are already manifest in modern criminal law of 19th century. Modern criminal law was the product of the enlightenment critique towards former abuse of power. Criminal law had to be restricted to its core area, thus requiring the recognition of a particular legal form. The *Rechtsstaatlichkeit* was important, as was also the

²² See, e.g., Ewald 1986, p. 409-416.

rationalistic adaptation of criminal law to become an instrument of the society to protect itself against various kinds of threats posed by the criminality. In such tensions, modern criminal law was born in late 19th century and early 20th century.

Modern criminal law was already a mix between legal formalism, disciplining and rehabilitating of the individual as well as the security device approach. Dangerous offenders should be isolated and rendered non-harmful, which motivated the establishment of closed institutions for dangerous recidivists. The juridico-legal form of criminal law by mid 1950s was rather flexible, as it bent both towards disciplining individuals (the young offenders, the prisoners) and rendering some individuals non-harmful (the mentally ill, the dangerous recidivists). Foucault calls this development a true inflation of law, an inflation of the juridico-legal code, as the code needs to implant all the various mechanisms of security.²³

Since the 1970's, the juridico-legal form has again been strengthened, as it was perceived that the interventions done in the name of rehabilitation or protection of the society were not fully defensible. A return to neo-classical values took place. This meant a strengthening of the juridico-legal principles governing the practices of criminal law, and a certain censure of these practices. Also the practices concerning dangerousness which represent the core of security device in modern criminal law were normatively censured and to some extent abolished, as punishment was regarded justified solely on the basis of desert. The liberalist principles never, however, entirely played out the security device contents of modern or late modern criminal law.

What we see today is again a mix of various developments, not all pointing to the same direction. In police law, the security paradigm has marched also because the technological means for gathering and processing of information have progressed rapidly. Intelligence work becomes more and more important part of policing. It aims at combating especially severe organised criminality.

The juridico-legal form of criminal law has come to be under pressure as also the neo-classical formalism has lost some of its credibility. This critique of legal formalism coincides with perceived heightened security demands and also some reborn belief in rehabilitation and treatment. The security threats have gained the upper hand as qualitatively new forms of criminality, such as organised crime and terrorism, have emerged and also received a lot of attention on various criminal policy fora. This latest wave was of course, for obvious reasons, not discussed by Foucault himself, which means that we need to give our own judgment on it.

During the modern era, criminal law was regarded as a field of its own, and the juridico-legal form of criminal law was very much a product of legal science. Doctrines of penal liability were formulated, and the system of criminal law was regarded to require academic knowledge. The legal controls of the juridico-legal form of criminal law were rather underdeveloped and less discussed. This is something that has profoundly changed after the World War II. The international human rights law together with national constitutional laws with more detailed provisions concerning the rights and freedoms of the individual forms a new basis for legal formalism, setting limits to the flexible use of criminal law as a tool to reform individuals and protect the society against dangerous individuals.

The late modern condition is thus again a new mix. The legal formalism and the pragmatism rooted either in rehabilitation or security thinking are in a sense competing with each others. New type of criminal law has emerged out of the legal fight of organised crime and terrorism. Not only is there less stress on rehabilitation and disciplinary normalisation, but also a loosening of the offence paradigm itself. The legislatures have decided to introduce new kinds of criminal law provisions as regards organised crime and terrorism. The criminalisations build a much larger distance between what is punishable and what is the completed offence. Various sorts of conspiracy rules and preparation offences have been put into place in order to enable the police to investigate as offences such cases

²³ Foucault, *Sécurité*, p. 9.

that do not yet involve the typical harm. This is especially clear as regards terrorist offences. The idea is that terrorist offences should be prevented by a strict control and supervision of the society in general so that the potential risk factors can be identified and recognised before the actual facts arise.

Throughout the history, security thinking, as well as rehabilitative thinking, has in the context of criminal law been challenging a narrow act-based responsibility model. The liberal thinking has emphasised a strict act-orientation, whereas the rehabilitative and disciplinary practices of modern criminal law go much beyond the mere act: it is the criminal mind and the root causes of criminality which should be addressed. Also the dangerousness of the perpetrator is by necessity a future oriented parameter, a disposition that should be scientifically assessed. It is the person himself which allows for predictions as concerns future actions. Thus, even though the goal would only be to assess the risk of a future commission of an offence, the individual behind the acts is the central focus of interest.

The modern and late modern paradigms of criminal law share the same comprehensive policy approach. All the rules and practices are basically under constant review and assessment, and they can be replaced by others, should this be required. The various sciences from psychology and criminology to criminalistics and social and criminal policy seek to inform the policy makers of the optimal rules and practices.

The security orientation has led partly even to an abandoning of the juridico-legal sphere, as the maintenance of the order through practices no longer mainly takes place by criminal prosecutions and convictions, but instead the proactive surveillance mechanisms are thought to contribute to the maintenance of the order. This is not news, as this is what policing used to be: maintenance of the society, the art of governing the life and well-being of a population.²⁴

The European Union as an Area of Freedom, Security and Justice

The European Union wishes now to establish itself as an Area of Freedom, Security and Justice. In one sense should one understand such an effort? It is rather clear that the European Union is, by developing a capacity in the area, reacting to perceived security threats. The threat presented by criminality was defined as a common problem to be combated together. The term Area of Freedom, Security and Justice was adopted formally in 1999, when the Amsterdam Treaty entered into force. The first ever Justice and Home affairs European council met in Tampere in 1999, agreeing on how to proceed.

The presidency conclusions included a long list of so-called “Tampere milestones”. It consisted of five parts: general observations, the part on common asylum and migration policy, the part on a genuine European area of justice, one of a union wide fight against crime, and a part on stronger external action. The approach towards criminality was a bit different from what we usually find in a domestic setting. There was a strong link between the asylum and migration policy and the need for criminal policy actions. Criminality was in some sense regarded as an external threat. It was namely “people” who had “the right to expect that the Union” addresses the threat to their freedom and legal rights that severe criminality posed. Common effort was needed. “Criminals must find no ways of exploiting differences in the judicial systems of member states.”

Perhaps the most important aspect of addressing certain problems of criminality as common European problems deals with the issue of space. Europe is regarded as a polity with a territory, and problems of criminality are a matter of internal affairs when falling under the Union competence. But why this title Freedom, Security and Justice?

We should perhaps say that the concept of in this freedom refers to the basic freedoms, that is, economic freedoms, such as free movement of persons. Since the adoption of the Charter of

²⁴ Foucault, *Sécurité*, p. 319 pp.

Fundamental Freedoms and Rights these may have been added as well. Security and justice shows a certain being tied together of these two fields. Police cooperation has been the origin of the third pillar, and it dates in informal forms back much before that. Justice also refers to cooperation directly between the legal bodies, the judiciary, thus symbolising an intense mutual trust. Criminal law has not made its way into the title, even though minimum harmonisation of criminal laws has been an important way of legislative cooperation.

Security, then? Perhaps the best way to characterise the concept of security in this name is that it formulates a certain aim for the Union's activities. Security is the name for police cooperation serving the combating of severe forms of cross-border criminality. The ASFJ also covers besides justice and home affairs some parts of the EC law as well, namely borders, visas, immigration, asylum, and some other things. Steve Peers says that the term ASFJ gives an indication that despite this being scattered the measures to be adopted on those provisions still aim towards a common goal.²⁵ These areas form indeed a unity which is marked by the emphasis on responding to perceived security demands. The profile of the EU policy differs from the profiles of the member states themselves. This regional mid-level regime has a rather strong security profile, also due its limited mandate. The EU policy is also part of the larger international system, in which the EU drives the policies and enforces them regionally.

The fragmented nature of the whole of the EC/EU law means also that the third pillar legislation, which is formally still intergovernmental in nature, gets to some extent detached from both democratic and constitutional controls at the EU level. The specific features of third pillar framework enhance its role as part of the international security regime. Criminal law is part of the production of public security which again is one of the main responsibilities of the public authorities and the state. The Third Pillar regime is a good example of what David Garland has called the rise of the culture of control.²⁶ The huge political interest in crime and security at the EU level has probably roots at three levels. There is the growing international concern for certain severe forms of criminality, which call for action and which fall rather naturally under regional cooperation. The second level is the progressing legal and economic integration, which calls for new types of measures in this field. And the third level could be the changing national policy views which tend more than before to punitive solutions. Garland writes in the last context.

The development towards a more control and security oriented penal policy has also been described by Klaus Günther. He actually refers to both the international developments and the domestic experiences of insecurity partly resulting from processing of globalisation, and resulting more punitive penal policies. Even the sensibilities towards human rights violations tend to stress these developments. "As a consequence", says Günther, "public security is widely considered as prior to the right to individual liberty."²⁷ In the context of the European Union, the legislative and institutional developments have been rapid. The real test case is what happens on a policy level and what happens on the level of various practices.

²⁵ Peers, S., *EU Justice and Home Affairs Law*. Second Edition. Oxford UP, Oxford 2006, p. 8.

²⁶ Garland, D., *The Culture of Control. Crime and Social Order in Contemporary Society*. Oxford, Oxford University Press 2001.

²⁷ Günther, K., *Legal pluralism or uniform concept of law? Globalisation as a problem of legal theory*. No Foundations. Journal of Extreme Legal Positivism, Number 5, 2008. 5-21 (12). <http://www.helsinki.fi/nof/>

Missing Promises – No War Against Intimate Terror

Elina Pirjatanniemi

Introduction

The purpose of this paper is to provide some insight into the inefficiency of criminal law in addressing domestic violence against women. The reason for the shortcomings of criminal law has often been explained by virtue of the hidden masculinity of the criminal justice system. This is, however, not something for which I am providing evidence for in this paper. My assumption is rather that reactions against violent acts are mainly dependent on their prospects of shattering the security structure of the state.

A state's willingness to defend its security interests is obviously not the only reason for why domestic violence constitutes a dilemma for the criminal justice system. Another obstacle is created by the fact that the modern state is reluctant to intrude into the private spheres of our lives. This is something many of us have applauded for, but the development has its logical consequences. Acts in private, no matter how violent they are, easily remain private when the privacy of the home is respected and cherished.

The problems of criminal law in the context of domestic violence do not end here. It is not a secret that criminal law is better equipped to meet single dramatic events than to take care of eroding problems. The process of domestic violence explicitly starts from small incidents: one punch here and another there. As the going gets tough, nothing really works. We may punish the offender and we may impose on him a restraining order, but the effectiveness of these measures is contested. Firstly, it seems to be very difficult to guarantee the security of the victim and secondly, it seems to be hard to change the behaviour of the offender and to provide him with adequate support. So the debate on domestic violence goes on, as it has been going on for years, in an atmosphere of hopelessness:

'Overwhelmingly, States are failing in their international obligations to prevent, investigate and prosecute violence against women in the family. While there are encouraging moves to create and implement new policies, procedures and laws with respect to violence against women generally, and domestic violence specifically, such violence does not appear to command Governments' attention. National policies continuously fail to give priority and force to women's human rights. Women continue to be viewed and treated as second-class citizens with a secondary rights status. Violence against women is overwhelmingly viewed as a "woman's" issue rather than a serious human rights issue which affects a large percentage of any country's population. With few exceptions, domestic violence continues, to varying degrees, to be treated by Governments as a private family matter.'²⁸

All things considered, it is tempting to think that the women of the world would benefit from quick and aggressive responses similar to those that characterised the reactions against terrorism. After '9/11', resolutions were passed, conventions were signed and national legislators worked hard in order to pass the laws that would make it possible to detect, prevent and punish those responsible for terrorist acts. Reactions have not been flawless and many of the responses have been disproportionate, but the commitment to address this 'apocalyptic'²⁹ problem has been substantive.³⁰

²⁸ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, Violence against women in the family, E/CN.4/1999/68, 10 March 1999, para. 242.

²⁹ I am quoting Felix Herzog, who characterises the attacks of 9th September as 'das apokalyptische Verbrechen des 11. September 2001', see Herzog, F., ' "Terroristische Netzwerke" und Para-Totalitäres Strafrechtsdenken', in Nuotio, K. (ed.): *Festschrift in honour of Raimo Lahti*, Publications of the Faculty of Law, University of Helsinki (2007), 111.

Our sense of security has been seriously shattered by terrorism. There is no point denying that. But in the shadows of the constant fear of ultimate violence lurks a more everyday terror, it is intimate and pathetic even, it is the fear of being humiliated, battered and killed at home. It is thus useful to remind ourselves of the fact that more people are killed in domestic violence than in terrorist attacks, no matter how we read the statistics. Globally, the most common form of violence experienced by women is domestic violence.³¹

Paradoxically, reactions against terrorism reveal important facts about women, security and criminal law. Firstly, they show how quickly the security landscape can change and how important it is to focus on rights when we talk about security. The next section of this paper provides a perspective on these changes and on their impact on the efforts in combating violence against women. Secondly, reactions against terrorism expose the inherent limits of criminal law in addressing domestic violence. The comparison between the ‘intimate’ and ‘ultimate’ violence, how illogical it may sound to begin with, helps us to understand why it is so difficult to use criminal law in the context of domestic violence. These questions will be elaborated in the final section.

Admittedly, violence occurs in all kinds of intimate relationships. Nevertheless, my paper focuses on women’s safety. I am by no means implying that women are not capable of violent behaviour, we most definitively are. As there has been very little in-depth research about women’s violence to male partners – or about other types of intimate violence – I found it difficult to address this topic from a more general perspective.³² The most important justification for the focus in this paper is, however, the prevalence of violence against women.

Perspectives on Security

From state security to human security

There are several ways of classifying the concept of security. Generally, the term refers to freedom from danger or from fear. The concept involves the protection of some object by reducing its vulnerability. Furthermore, it is possible to make a distinction between a) the referent object (who or what is being secured), b) the nature of the threat from which the object is being secured and finally, c) the means of seeking security.³³

The traditional concept of security was closely related to national security. The referent object was primarily a state. Emphasis was on military threats, and accordingly, military power was also the means of achieving security.³⁴ This framework was nevertheless challenged in the 1980s and 1990s. It had difficulties to cope with all those multi-causal, multi-dimensional, multi-level and multi-actor security threats, all of which obviously could not be remedied by customary military actions or by

(Contd.) _____

³⁰ On the legal developments, see Nuotio, K., ‘*Terrorism as a Catalyst for the Emergence, Harmonisation and Reform of Criminal Law*’, *Journal of International Criminal Justice* 4 (2006), 998–1016 and Jung, H., ‘*Uses and Abuses of Criminal Law Responses to Terrorism*’, in Nuotio, K. (ed.): *Festschrift in honour of Raimo Lahti*, Publications of the Faculty of Law, University of Helsinki (2007), 97–109.

³¹ See In-depth study on all forms of violence against women, Report of the Secretary General, A/61/122/Add.1, 6 July 2006, paras 112–117.

³² For a detailed treatment on women’s violence to men, see Dobash, R.P., & Dobash, R.E. ‘*Women’s Violence to Men in Intimate Relationships*’, *British Journal of Criminology* (2004), 324–349. On same-sex partner violence, see Brown, C., ‘*Gender-Role Implications on Same-Sex Intimate Partner Abuse*’, *Journal of Family Violence* (2008), 457–462.

³³ See von Tigerstrom, B., *Human Security and International Law. Prospects and Problems*. Studies in International Law: Volume 14. Hart Publishing: Oxford and Portland, Oregon (2007), 8.

³⁴ Tigerstrom 2007, 9.

other state-centred methods. New approaches to conflict-resolution laid emphasis on a broader notion of ‘human security’, which puts the individual at the centre of security concerns.³⁵

The use of the concept of human security is usually traced back to the UNDP Human Development Report from 1994. The notion was explicitly pushed into the political agenda:

‘The concept of security has for too long been interpreted narrowly: as security of territory from external aggression, or as protection of national interest in foreign policy or as global security from the threat of a nuclear holocaust. It has related more to nation-states than to people [...] Forgotten were the legitimate concerns of ordinary people who sought security in their daily lives. For many of them security symbolised protection from the threat of disease, hunger, unemployment, crime, social conflict, political repression and environmental hazards [...] Human security is not a concern with weapons — it is a concern with human life and dignity.’³⁶

In the 1990s, this approach was adopted as an important element in the foreign policy of a number of countries and it was also used by several international organisations and by some non-governmental organisations. In 2001, the Commission on Human Security, an independent commission of experts, was established to promote public understanding of the concept, to develop it as an operational tool for policy formation and implementation and to propose a programme of action to address the most pressing threats to human security.³⁷

The final report of the Commission, *Human Security Now*, was published in 2003.³⁸ The starting point of the report is that the international community urgently needs a new paradigm of security. It is noteworthy that the report does not make any attempts to replace the traditional concept of state security. According to *Human Security Now*, it is crucial to shift the attention from the security of the state to the security of the people, but human security is still seen only as a complement to state security.³⁹

The basic idea of human security is that it focuses on the individual and the community rather than on the state. The concept includes threats that have not always been classified as threats to state security. Human security approach also expands the range of actors beyond the state. Lastly, human security is not only about protecting people, but empowering people to fend for themselves.⁴⁰

The report gives close attention to a selection of topics that are relevant to human security. To begin with, it explores conflict-related aspects of human security such as violent conflicts, people on the move and post-conflict situations. In addition, it concentrates on poverty-related aspects of human security, that is, economic insecurity, ill health and lack of knowledge.⁴¹

³⁵ On the origin of the concept, see Frerks, G., ‘*Human security as a discourse and counter-discourse*’, 19 *Security and Human Rights*, (2008), 8.

³⁶ See United Nations Development Programme (UNDP), *Human Development Report 1994*. New York/Oxford: Oxford University Press, 22.

³⁷ See further Tigerstrom 2007, 21–26.

³⁸ *Human Security Now: Commission for Human Security* (2003) New York. Available at <http://www.humansecurity-chs.org/finalreport/index.html> (accessed 27 May 2009). The importance of the concept is witnessed by the fact that human security has a unit of its own within the UN system. The Human Security Unit (HSU) was established at the United Nations Secretariat in the Office for the Coordination of Humanitarian Affairs (OCHA) in May 2004. Its overall objective is to place human security in the mainstream of UN activities. The question of human security has thus matured into a policy that is entitled to permanent institutions.

³⁹ *Human Security Now* 2003, 2.

⁴⁰ *Human Security Now* 2003, 4.

⁴¹ *Human Security Now* 2003, 12.

The topic at hand, domestic violence, is mentioned in the context of health problems. The report states that health emergencies arising from epidemics demanding urgent action are only the tip of an iceberg. It continues:

‘More significant and longer in term are the silent crises of poverty-linked illnesses and violence, especially gender-based domestic violence. Too often neglected, these silent crises of human insecurity deserve similar priority. A human security approach would recognize these people-centred priorities.’⁴²

This acknowledgment is a step forward, but the relevance of it should not be exaggerated. The report has been described as ‘a gender-, race- and religion-free’ document and its comments on security challenges are not particularly gender-based.⁴³ The basic ideas and principles included in the report can nevertheless be useful even in a more gender-aware context. Some interesting efforts have already been made in this direction. Marie Vlachová and Léa Biason have suggested that security studies should be ‘engendered’. These engendered security studies should then analyse, *inter alia*, how to use security institutions’ potentials and powers in an innovative manner, how to divide responsibilities for dealing with violence and how the security sector could address issues of poverty constituting the basis for trafficking in women.⁴⁴

One step forward, some steps back

The attacks of 9th September 2001 profoundly changed the security architecture in the world. The new security landscape was built in the ruins of the Twin Towers and it was built quickly. In the aftermath of the attacks terrorism was placed as the number one security threat in most countries. After the landmark Security Council Resolution 1373 of 28 September 2001, adopted under Chapter VII of the United Nations Charter, the fight against terrorism ultimately moved to the very centre of the international security agenda.

Many commentators have pointed out that the human security approach has been marginalised by the hard security concerns of the war against terrorism.⁴⁵ In the newly militarised discourse on terrorism it is difficult to demand other security issues to be put on the agenda. This shift has had important consequences as regards domestic violence. First, increased trends towards militarisation, armed conflicts and global terrorism have focused attention on violence in emergency situations. Second, the closeness of people of different cultures has drawn attention to the violence of the ‘other’. All this has resulted in a de-politicisation of the public discourse on violence against women in certain areas. This is evidenced in a number ways, including the use of neutral terms to describe some forms of violence; the cutting of funds for women’s programmes in the name of gender mainstreaming and the adoption of conciliatory procedures in dealing with violence against women.⁴⁶ Furthermore, the war against terrorism itself has had a negative impact on women’s lives in various ways.

The human security debate has often been characterised as an alternative security discourse, as compared to earlier views that were state-centred and military-strategic in nature.⁴⁷ The notion itself has, however, been heavily criticised. It tends to escape definitions and boundaries, which is obviously

⁴² *Human Security Now* 2003, 107.

⁴³ See Vlachová, M., & Biason, L., ‘Violence against Women as a Challenge for Security Sector Governance’, in Häggi, H., and Winkler, T.H., (eds.): *Challenges of Security Sector Governance* (2003), DCAF & LIT Verlag, 7.

⁴⁴ See further Vlachová & Biason 2003, 24–27.

⁴⁵ See, e.g. Frerks 2008, 13 and Tigerstrom 2007, 20.

⁴⁶ Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Towards an effective implementation of international norms to end violence against women, E/CN.4/2004/66, 26 December 2003, para. 71.

⁴⁷ Frerks 2008, 10.

a problem.⁴⁸ The confusion around the concept is especially dangerous as regards human rights. There is an overwhelming risk that human security policies are accepted as some kind of a ‘light’ version of the human rights regime, rather than a complementary policy that strengthens the protection of human rights. These risks are tangible even if we take into consideration that the fundamental idea of human security clearly focuses on human perspectives and human dignity.

The tension between the claims of security and those of rights is by no means a novelty. What is remarkable though is the tendency for security to trump the demands for the protection of rights. Ian Loader tries to make sense of this controversy by speaking about ‘seductions of security’. The term refers to the underlying ideas of security that may be difficult to articulate but are nevertheless compelling. According to Loader, security appeals because it connects with people’s anxieties about the condition of the world and, at the same time, with their fantasies about what the world should become. The strength of the concept comes from its ability to combine fear and comfort. In addition, security demands possess an affective connection to collective belonging and cultural and political subjectivity. Security demands are thus entangled in the production and reproduction of a ‘we’ whose values and territory are threatened. Security is also often identified with a strong, sovereign authority and with the desire to eliminate all thinkable risks.⁴⁹ All security talk, traditional or human oriented, bears inherent risks of over-securitisation.⁵⁰

These features are difficult to combine with a rights-based approach. As Loaden puts it, to insist upon rights in the face of security dangers is to urge delay when speed is needed and to tie the hands of the police when they need all the powers put at their disposal. In times of insecurity rights become obstacles, they lead to a gamble with our safety.⁵¹ All in all, demands on security change our perspectives and make it harder to argue for the protection of human rights.

The dangers of security talk are more significant in the context of state security, but the human security approach does not avoid them either. However, if security discourse is something we have to take part in, it is better to adhere to human security than to the traditional notion of state security. It is nevertheless useful to remember the words of Barbara von Tigerstrom as she concludes her study on the concept: ‘human security seems to offer a better way of asking questions, but does not provide us with many answers.’⁵² The human security approach does not tell us, von Tigerstrom exemplifies, whether a right to humanitarian intervention exists or should exist. Instead, the approach helps us to focus on different questions: what could or should have been done to avoid having to ask this question at all?⁵³ These types of questions are important and they provide valuable insight as regards policy-making, but at the same time it is important to realise that people need answers. Battered women, rape victims or girls living in fear of honour killings want to know if they have the right to live without violence. In order to answer their questions the human security approach is simply not enough. Instead, we need to rely on rights discourse.

⁴⁸ The following citation illustrates the nature of the concept: ‘Several analysts have attempted rigorous definitions of human security. But like other fundamental concepts, such as human freedom, human security is more easily identified through its absence than its presence.’ UNDP *Human Development Report 1994*, 23.

⁴⁹ Loader, I., ‘*The Cultural Lives of Security and Rights*’, in Goold, B.J., & Lazarus, L. (eds.): *Security and Human Rights* (2007), Oxford and Portland, Oregon: Hart Publishing, 37–38.

⁵⁰ See Frerks 2008, 13–14.

⁵¹ Loaden 2007, 39.

⁵² Tigerstrom 2007, 212.

⁵³ Tigerstrom 2007, 212.

Women's rights are human rights

Efforts to identify domestic violence as a violation of international human rights have defined international activism on domestic violence for some time. Domestic violence is not directly addressed in the International Bill of Rights, that is, in the Universal Declaration of Human Rights⁵⁴, the International Covenant on Civil and Political Rights⁵⁵ or the International Covenant on Economic, Social and Cultural Rights⁵⁶. They do, however, articulate fundamental human rights that are commonly violated in domestic violence cases, such as, for instance, the right to life.

Quite interestingly, the Convention on the Elimination of All Forms of Discrimination against Woman (CEDAW)⁵⁷ does not include any specific provisions on domestic violence. However, in 1992 the Committee on the Elimination of Discrimination against Women (the Committee), which supervises the implementation of the Convention, adopted General Recommendation No. 19, which clearly stated that the prohibition of discrimination against women defined in Article 1 of the Convention also includes gender-based violence. According to the Recommendation, gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.⁵⁸

In this Recommendation, the Committee made two important specifications as regards domestic violence. Firstly, it emphasised that discrimination under the Convention is not restricted to action by or on behalf of governments but it also includes discrimination against women by any person, organisation or enterprise.⁵⁹ Secondly, the Committee specifically noticed the dilemma with intimate violence:

'Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.'⁶⁰

The next important step was taken in December 1993 when the United Nations General Assembly adopted the Declaration on the Elimination of Violence Against Women.⁶¹ It was the first international instrument to deal exclusively with violence against women and it affirms that violence against women violates women's human rights and fundamental freedoms. It also included a clear and comprehensive definition of violence against women: 'the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological

⁵⁴ Universal Declaration of Human Rights, G.A. Res. 217 A(III) Dec. 10, 1948, U.N. Doc A/810 (1948).

⁵⁵ International Covenant on Civil and Political Rights, G.A. Res. 2200 A(XXI), December 16, 1966, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

⁵⁶ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A(XXI), December 16, 1966, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966).

⁵⁷ The Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR Supp. (No. 46), U.N. Doc. A/Res/34/180.

⁵⁸ General Recommendation No. 19, Committee on the Elimination of Discrimination against Women, U.N. Doc. A/47/38 (1992).

⁵⁹ General Recommendation No. 19, *supra* note 31, para. 9.

⁶⁰ General Recommendation No. 19, *supra* note 31, para. 23.

⁶¹ Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, December 20, 1993.

harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.’⁶²

The Declaration breaks down the public/private dichotomy, which has been a significant cause of women’s exclusion.⁶³ In addition, the Declaration sets forth specific steps member states should take in combating domestic violence. States should, *inter alia*, exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons. Furthermore, states should develop sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence. These women should also be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm they have suffered.⁶⁴

Violence against women has been monitored by a thematic reporter since 1994. Special Rapporteurs on violence against women⁶⁵ have had a significant role in investigating the causes and consequences of gender-based violence; their analyses and recommendations have also had an impact on the way states deal with these issues.

Adoption of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP)⁶⁶ in 1999 is another important milestone in the efforts to address violence against women. The Optional Protocol contains both an individual complaints procedure and an inquiry procedure.⁶⁷ As of May 2009, the Committee has made public decisions in 10 individual communications under the CEDAW-OP and it has completed one inquiry.⁶⁸ Of the 10 individual communications five have been rejected on admissibility grounds. Five cases have been considered on the merits and violations have been found in four. Three of these have involved a failure by the State Party to provide effective legal and/or practical protection against serious domestic violence.

Moreover, there have been many important regional efforts concerning violence against women. In this regard, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women⁶⁹ is worth a special mentioning. The convention provides a model for an institutional mechanism dedicated to investigating and ruling on violence against women, including domestic violence. It applies to violence in public and private life and includes an individual complaint procedure, which allows individual petitioners and NGOs to file complaints against states with the

⁶² Declaration on the Elimination of Violence Against Women, *supra* note 34, art. 1.

⁶³ On the private/public dichotomy in this context, see Hernández-Truyol, B.E, ‘*Human Rights through Gendered Lens: Emergence, Evolution, Revolution*’, in Askin, K.D., & Koenig, D.M, (eds.): *Women and International Human Rights Law, Volume 1* (1999), Ardsley, New York: Transnational Publishers, 31–35.

⁶⁴ See further Declaration on the Elimination of Violence Against Women, *supra* note 34, art. 4.

⁶⁵ The first rapporteur, Radhika Coomaraswamy, was appointed by the United Nations Commission on Human Rights in 1994. She was succeeded by the current rapporteur, Yakin Ertürk, in 2003. All their reports are available at <http://www.unhcr.ch/html/menu2/7/b/women/documents.htm> (accessed 27 May 2009).

⁶⁶ The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 2131 UNTS 83.

⁶⁷ The individual complaints procedure allows individual women, or groups of women, to submit claims of violations of rights protected under the Convention to the Committee. The inquiry procedure enables the Committee to initiate inquiries into situations of grave or systematic violations of women’s rights.

⁶⁸ See <http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm> (accessed 29 May 2009).

⁶⁹ The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), adopted by acclamation, twenty-fourth session of the General Assembly of the OAS, 9 June 1994.

Inter-American Commission on Human Rights⁷⁰ and with the Inter-American Court of Human Rights.⁷¹

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa⁷² addresses this issue, domestic violence included, explicitly. Domestic violence has also received increasing attention in the Council of Europe and both the Council and its Council of Ministers have issued a number of recommendations on domestic violence.⁷³ The same remark can be made about the European Union.⁷⁴ Domestic violence is one of the focus areas within the Daphne programme⁷⁵, which is a comprehensive agenda on preventive measures to fight violence against children, young people and women.

Criminal Law and Domestic Violence

Introduction

Criminal law is often described as the most violent of all the legal disciplines. This characterisation is an oversimplification – criminal law is not the sole source of sorrow within a legal system – but it is nevertheless obvious that the presence of power is central in criminal justice systems. A State's right to punish overrides the hopes and wishes of individuals; it coerces them to obey the rules and orders of the sovereign. In exchange the criminal justice system pledges to safeguard the community against criminality. Apparently, the state cannot keep its promises up to one hundred per cent, but as long as the crime rate is at a tolerable level, the legitimacy of the arrangement remains unchallenged.

Every society has its own level of tolerance as regards the prevalence of different types of criminality. In a sense criminal law is always a cultural product. If we leave the details, we can nonetheless see remarkable similarities in states' reactions against crimes. For the purposes of this study it is sufficient to notice that all peacetime societies punish those guilty of violent crimes. In other words, to guarantee the physical safety and security of the individuals belongs to the core of duties of every state. This obligation covers both ultimate violence, such as terrorism, and intimate violence.

There are, however, remarkable divergences in the ways states address different types of violence. If the security of the state is threatened, the reaction is tough. In the contemporary world there are few, if any, actions that are equivalent to those against terrorism. Terrorism is a crime against the state in its purest form. It threatens – at least symbolically – the existence of a whole nation, which leads to quick and massive counterattacks. The security of an individual is naturally also in the state's interest, but the picture is more blurred. Domestic violence is especially problematic, because it includes elements that are unfamiliar to the typical criminal justice scenario: intimacy and interdependency. It is also

⁷⁰ The Commission has also dealt with the issue of domestic violence; see *Maria da Penha Maia Fernandes vs Brazil*, Report N° 54/01, Case 12.051 April 16, 2001.

⁷¹ See *Miguel Castro-Castro Prison v. Peru*, 25 November 2006, Ser. C no. 63, paras. 376–379.

⁷² Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003.

⁷³ See, e.g., Recommendation No R (85) 4, adopted by the Committee of Ministers in 1985 and Recommendation No R (2002) 5, adopted by the Committee of Ministers on 30 April 2002.

⁷⁴ See, e.g., Resolution on the report from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the state of women's health in the European Community (COM(97)0224 C4-0333/97), Official Journal C175, 21 June 1999. See also Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM/2001/0257), Official Journal C 270 E, 25 September 2001.

⁷⁵ Information about the Daphne programme is available at http://ec.europa.eu/justice_home (accessed 27 May 2009).

typical that this type of violence develops gradually, which makes it difficult to handle within the criminal justice system.

In discussions about the role of criminal law, the relevance of media coverage cannot be neglected. With the exception of criminal policy experts, the media largely draws the society's picture of criminality. It is not a secret that the current media atmosphere nurtures big stories of good and bad. Terrorists use these trends; publicity and a considerable amount of dramatics are prerequisites for a successful terrorist attack. These public elements also explain why terrorist acts catch our attention. In comparison, domestic quarrels sound more or less pathetic. No one wants to hear about them.

The criminal justice system meets many challenges as it tries to protect women from domestic violence. Some of these challenges are treated in the following subsections. The aim of my analysis is to provide understanding for the limits of criminal law in the context of domestic violence. As I mentioned earlier, I am using terrorism as a method of comparison in my analysis. By doing this I am not arguing that these two forms of violence should be treated in the same manner. Rather, the comparison is used because I believe that differences in reactions against ultimate and intimate violence may provide revealing insights in our way to understand the function of criminal law.

On the duty to protect

Domestic violence brings into focus an issue that has troubled the international community for some time, namely, the question of state responsibility for the actions of private individuals. Without going into any details, it can be concluded that it is now a recognised part of general international human rights law that states are responsible for 1) the protection of the rights of individuals to exercise their human rights, 2) the investigation of alleged violations of human rights, 3) the punishment of the violators of human rights and 4) for the provision of effective remedies for the victims of human rights violations.⁷⁶

Article 3 in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women concludes this development: 'Every woman has the right to be free from violence in both the public and private spheres.' States have the corresponding duty to prevent violence against women. For obvious reasons, the role of criminal law has been emphasised in this context. Criminal punishment carries the clear condemnation of society for the conduct of the abuser and acknowledges his personal responsibility for the crime.

The proper role of criminal law is always a difficult task to agree upon. In the light of the legal instruments presented earlier in this paper, it nevertheless seems clear that states have a duty to develop necessary criminal penalties in order to prevent domestic violence and to punish those responsible.⁷⁷ The existence of this duty in the context of domestic violence has been tested, *inter alia*, in the European Court on Human Rights (ECtHR). The Court has held that a state has a positive obligation to put in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.⁷⁸

⁷⁶ On state responsibility in domestic violence context, see generally Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, Violence in the family, E/CN.4/1996/53, 6 February 1996, paras 30–35.

⁷⁷ See General Recommendation No. 19, *supra* note 31, para. 24(r), Declaration on the Elimination of Violence Against Women, *supra* note 34, art. 4(d), Convention of Belém do Pará, *supra* note 42, art. 7, and Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, *supra* note 45, art 2(a–b). See also Recommendation No R (2002) 5, *supra* note 46, paras 34–35 and COM(97)0224 C4-0333/97, *supra* note 47, para. 23.

⁷⁸ See Case of *Kontrová v. Slovakia*, judgment of 31 May 2007, and Case of *Branko Tomasic v. Croatia*, judgment 15 January 2009.

The criminal justice system is also included among the alternatives that the UN Special Rapporteurs have been recommending. Special Rapporteur Coomaraswamy in fact argues that domestic violence should be dealt with special criminal laws. According to her, these 'are most effective with regard to crime between "intimates". Though contained within the framework of criminal laws, these procedures would try to meet the special needs posed by domestic violence.'⁷⁹

As far as the duty to protect is concerned, the most crucial point is the effectiveness of the criminal justice system. Criminalisation is one thing, effective implementation another. This has also been stressed in the work of the Committee on the Elimination of Discrimination against Women.⁸⁰ It is noteworthy that in cases where there has been preventable violence that has occurred because of the state's failure to fulfil its duty of due diligence, prosecution of the offender will not in itself be enough to redress the violation.⁸¹

The issue of effective protection has recently been examined in the case law of the ECtHR. When examining the state's duty to protect women from domestic violence, the Court has concluded that the scope of the obligation must be interpreted in such a way that it does not impose an impossible or disproportionate burden on the authorities. Furthermore, the obligation does not apply to every claimed risk to life. According to the Court: 'For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.'⁸²

The context of domestic violence

Terrorist attacks are intrinsically public acts. In general, they also attain wide media coverage.

Domestic violence often occurs out of sight, without witnesses or public statements of responsibility. Obviously, this does not turn domestic violence into a private matter. A woman has the right to be protected against her violent partner as well as she is entitled to protection against violence in other forms. The problem is, however, that in order to prevent domestic violence, the state should intrude into the intimate sphere of home and family.

The relationship between the victim and the offender is probably the most difficult aspect in intimate violence.⁸³ A typical violent crime scene consists of two strangers, whose destinies are united for a moment, but there are no assumptions or expectations of future co-operation. After the case is closed these two strangers may live their lives separately from each other. Parties in the domestic violence scene do not automatically have this privilege. A relationship, however impossible it is, is still a relationship with several interdependencies.⁸⁴

⁷⁹ See Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45, E/CN.4/1995/42, 22 November 1994, para. 132.

⁸⁰ See *A. T. v. Hungary* (2/2003), 26 January 2005, A/60/38 (Part I) (2005) Annex III at 80; 12 IHRR 998 (2005) para. 9.3.

⁸¹ See *Goekce (deceased) v Austria* (5/2005), 6 August 2007, CEDAW/C/39/D/5/2005 paras 12.1.4–12.1.6 and *Yildirim (deceased) v Austria* (6/2005), 6 August 2007, CEDAW/C/39/D/6/2005 paras 12.1.2–12.1.6.

⁸² See Case of *Kontrová v. Slovakia*, judgment of 31 May 2007, paras 46–55 and Case of *Branko Tomasic v. Croatia*, judgment 15 January 2009, paras 51–62. The judgment in the case *Opuz v. Turkey* (Appl. No. 33401/02) is currently awaited. It involves a number of issues of domestic violence.

⁸³ See also Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45, E/CN.4/1995/42, 22 November 1994, para. 125.

⁸⁴ See also Douglas, H., 'The Criminal Law's Response to Domestic Violence: What's Going On?', 30 Sydney Law Review (2008), 442.

It is evident that criminal law has problems with intimacy and relatedness. ‘Sins’ of aliens are easier to handle than those of the beloved. Many women have in fact realised that they cannot count on the criminal justice system to protect them. Police response may be indifferent or at least uninformed. Prosecutors may trivialise their cases and the sentences passed may be too lenient.⁸⁵ On the other hand, it is fair to admit that these cases can be very complex for the criminal justice authorities. Many victims are ambivalent about the benefits of pursuing criminal prosecution. In many intimate violence cases women seek to prevent prosecutions or refuse to assist as prosecution witnesses. Reasons for this are manifold. Women may fear increased violence or they may be reluctant to break up the family unit. They may feel that they are, in one way or another, responsible for the violence. They may assume that the court process will be traumatic and that the sentencing regime is, in any case, ineffective and/or overly lenient.⁸⁶

Despite the critique directed against criminal law, domestic violence activists have since the 1970s stressed that domestic violence should be understood as criminal assault.⁸⁷ The most serious cases most definitively belong to the sphere of the criminal justice system, but the problem is that women would need help long before they are battered black and blue. In the eyes of the victim every punch is a problem, whereas many of them are only minor offences within the criminal justice system. In this respect it is very difficult to declare a war against intimate terror.

Spectacular events and eroding problems

Terrorist attacks and domestic violence have some similarities. In both types of terror, the goal is to force the other/others to live in fear. Interestingly, it is also typical for both these offences that the offender feels no remorse.⁸⁸ Nevertheless, from the perspective of the criminal justice system the dissimilarities between these two are more important than their similarities. One of these differences is an aspect already touched upon in the previous subsection, that is, the intensity of the offence.

It is an unfortunate fact that dramatic events get our attention more easily than eroding problems. Oil spills or nuclear power plant accidents do not pass unnoticed, whereas loss of biodiversity in nature may very well do so. Criminal justice system does not constitute any exception in this regard. Dramatic events are more easily construed as problems that the system can deal with, while eroding problems are more likely characterised as societal problems that the regime should keep at distance. This attitude has obviously consequences as regards our opinions of the role of criminal law in the sphere of domestic violence. This type of violence often develops gradually, which means that it is fairly difficult to say when the state should intervene. In addition, criminal justice system is not, and it cannot be, the primary method of solving problems. Zero-tolerance may thus be impossible; at least as far as the criminal justice system is concerned.

Principles of criminalisation offer only partial guidance in this context. The interest at hand – or *Rechtsgut* – is clearly legitimate, but to evaluate the social costs and benefits of criminalisation is much more complicated. The *ultima ratio* principle is not that easy to implement either. It seems clear that states have a duty to criminalize serious cases of domestic violence, that is, violent assaults with dramatic outcome, but all these small steps, minor punches here and there, are not enough to activate the criminal justice system.

⁸⁵ See further, e.g., Thomas, C., ‘Domestic Violence’ in Kelly D. Askin & Dorean M. Koenig (eds.): *Women and International Human Rights Law, Volume 1* (1999), Ardsley, New York: Transnational Publishers, 221–240.

⁸⁶ See further Douglas 2008, 447–457.

⁸⁷ Douglas 2008, 443.

⁸⁸ As regards domestic violence, see Douglas 2008, 457, 45. On remorse and terrorism, see Schicor, D., ‘Thinking about Terrorism and Its Victims’, *2 Victims and Offenders* (2007), 278–280.

If a terrorist group launches a bomb in an aeroplane, few of us ponder upon whether criminal justice system should be utilised or not. Furthermore, it is easier to defend the expansion of criminal law in these circumstances than in the sphere of domestic violence. It can even be argued, as Shlomit Wallerstein has done, that states have a duty to defend themselves in cases of ultimate violence. According to Wallerstein, the individual's right to self-defence is then transferred to the state. It is noteworthy that every threat that activates the individual's right to self-defence does not entail this type of transference. Threats that do trigger the state's duty of self-defence are distinct in that they pose a danger to all, or at least to a large majority of citizens. It is also characteristic to these situations that the number of aggressors is unknown and the threat is a real and imminent one. If these requirements are fulfilled, the state has a duty to expand its criminal law in order to protect its citizens. Wallerstein argues that it is apparent that there are only a very limited number of threats than can comply with the threshold conditions necessary to trigger the state's duty of self-defence. A typical example could be, according to Wallerstein, the threat posed by anti-democratic groups aiming to overthrow democratic regimes.⁸⁹

The fact that criminal law is more apt to handle single dramatic events than gradually eroding problems can have serious consequences for those victimised by domestic violence. In these cases it would be crucial to intervene immediately after the first punch, but the threshold is, for obvious reasons, rather high. If we really want to help these women, it is important to admit that the criminal justice system has only a limited role in preventing domestic violence. It would appear that an integrated approach is necessary in dealing with these situations. Many commentators have preferred multidisciplinary strategies, with lawyers, psychologists, social workers and others working together to gain a holistic understanding of each particular case and the needs of the individual victim.⁹⁰

The most innocent of them all

The concept of terrorism has proven very difficult to define. Reasons for this are well-known. Despite the divergences, there are some elements that most scholars agree to link to the concept.⁹¹ There is no need to analyze all these elements in detail herein, but the relationship between the direct victim and the proper target is nevertheless interesting. Namely, victims of terrorism differ from many other crime victims because of their interchangeability.⁹² Direct victims of a terrorist attack – those who are killed or mutilated – are typically victimised because they happen to be at a certain location at a certain time. The personalities or attributes of victims are not important as such, as their fate only serves as an instrument of terror. The proper target of the attack is thus the state or other authority.

The fact that victims are both interchangeable and instrumental has several consequences as regards our reaction to the crime. To begin with, terrorist crimes lead to a general feeling of insecurity in a society. People identify themselves with the victims as they feel that they themselves could be

⁸⁹ See Wallerstein, S., *'The State's Duty of Self-defence: Justifying the Expansion of Criminal Law'*, in Goold, B.J., & Lazarus, L., (eds.): *Security and Human Rights* (2007), Oxford and Portland, Oregon: Hart Publishing, 295–302.

⁹⁰ See also Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45, E/CN.4/1995/42, 22 November 1994, para. 141.

⁹¹ As an example we can take the definition included in Security Council Resolution 1566 (2004), according to which terrorist acts are: 'criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature,'.

⁹² See also Schicor 2007, 271, 273.

victimised by similar acts of violence.⁹³ All this increases fear of crime, and that again mobilises decision-makers, even if there are no subsequent attacks.⁹⁴

The inability to avoid victimisation additionally accentuates the loss of security. Normally, potential crime victims can minimize their risks by their behaviour. Consequently, it is nearly always possible to attribute some degree of responsibility to victims for the crimes committed against them. In regard to terrorist attacks there is no shared responsibility between the offender and their victims, which means that there is nearly nothing the victims could have done in order to minimize their risks. Because of their limited blameworthiness, the victims of terrorist attacks tend to receive public sympathy more than most other victims do.⁹⁵

As stated earlier, a typical act of domestic violence represents a very different type of crime scene. The target of the battering is clearly identifiable. She is assaulted because of her identity. In fact there are few other crimes where the element of victim blaming is so manifest than in domestic violence. Persons living in violent relationships are surrounded by all these why-questions: Why did you not leave him when he hit you for the first time? Why did you not contact the police? Why did you not leave him when he hit you again? All these painful questions are in a way relevant. We assume that every adult woman is responsible for her safety and capable of making moves that can save her life. Her possibility – however theoretical – to choose her fate makes us insecure in our reactions.

Victims of terrorist attacks and victims of domestic violence differ also at a more abstract level. Terrorist attacks tend to shatter the relationship between the individual and the state. The individual is sacrificed because of the politics driven by the state. Firstly, the real target of the attack is the state; individuals are used as instruments. Secondly, by killing innocent individuals, those very persons the state has a special duty to protect, terrorists ridicule the state. Single cases of domestic violence seldom put the authority of the state into question.

Final Remarks

The Government of Finland adopted its first Internal Security Programme in 2004. The programme was an effort to analyse the security landscape in Finland and it also suggested measures that should be taken in the near future. The analysis of the current situation started with a rather peculiar observation: 'Finland is one of the safest countries in Europe. The most significant exception is the amount of violent crime. In fact, the number of violent offences, homicides in particular, in Finland is the largest in Western Europe in relation to the population.'⁹⁶

As the absence of violent criminality is normally linked to safety, the statement above entails clarification. Violence in Finland has a certain pattern. The likelihood of being assaulted or even killed is clearly highest among socially marginalised men. In fact, the majority of Finnish homicides occur in the context of drinking quarrels between unemployed, middle-aged male alcoholics. As far as women are concerned the most likely offender is the sexual partner. A spouse, boyfriend or ex-partner kills approximately 70 per cent of all the female victims.⁹⁷ The high incidence of violence against women, including the high number of women killed in domestic violence, has also been brought up by the

⁹³ See Schicor 2007, 273.

⁹⁴ On the effects of fear of crime, see, e.g., Garland, D., *The Culture of Control. Crime and Social Order in Contemporary Society* (2001), Oxford: University Press, 152-154.

⁹⁵ Schicor 2007, 274–276.

⁹⁶ A safer community, Internal Security Programme, 6. Violence is one of the key challenges also according to the latest programme, see further Safety First – Internal Security Programme, 11. Both programmes are available at <http://www.intermin.fi> (accessed 27 May 2009).

⁹⁷ See Kivivuori, J., & Lehti, M., & Aaltonen, M., *Homicide in Finland, 2002-2006*, Research Brief 3/2007, National Research Institute of Legal Policy, Finland. Available at <http://www.optula.om.fi> (accessed 27 May 2009).

Committee on the Elimination of Discrimination against Women as the Committee has considered the periodic reports of Finland.⁹⁸

Domestic violence is obviously not a particularly Finnish problem. On the contrary, it is something that truly unites the women of the world. Many studies have illustrated that women in non-conflict settings are at greatest risk of violence from their husbands or intimate partners than from strangers.⁹⁹

It is thus not surprising that domestic violence has gained attention as a serious security issue both nationally and internationally. The emergence of the concept of human security has been crucial in this context. It laid emphasis on a broader notion of security and laid the individual at the centre of security concerns. The dramatic events of 9th September 2001 put an end to that. Terrorism became the number one security threat and the human security approach was quickly marginalised by the hard security concerns of the war against terrorism. It is too early to say whether the new administration in Washington is able to achieve real changes in this militarised security landscape, but they do sound different from their predecessors. One thing is certain, though; security approaches are sensitive to politics.

The human security approach has been described as a new way of asking questions and as such it is certainly a useful tool in policymaking. The approach does not, however, provide those answers that are needed when basic human rights of women are repeatedly violated. Violence against women, domestic or other, is primarily a human rights issue. The international community has made significant efforts in order to address this dilemma within the human rights regime and the development certainly gives reason for cautious optimism.

The aim of this paper has been to analyse one of the instruments to address domestic violence, namely criminal law. Although the limitations of the criminal law approach are widely known, many commentators still believe in the possibilities of the criminal justice system. It obviously has a role to play in addressing domestic violence, but our expectations should be very realistic. There are several reasons for this. Firstly, it seems clear that the criminal justice system is better equipped to address ultimate violence than intimate terror. Secondly, within the criminal justice system the threshold for intervening is – for obvious reasons – rather high. Domestic violence again develops gradually towards more and more serious forms of violence and terror. When the system is finally ready to act, it might be too late to protect the woman.

If we really want to help these women, it is important to admit that the criminal justice system has only a limited role in preventing domestic violence. Many commentators have preferred multidisciplinary strategies, with lawyers, psychologists, social workers and others working together to gain a holistic understanding of each particular case and the needs of the individual victim. All this requires an integrated approach and sufficient financial resources. To conclude; we need no war against domestic violence, but we need to keep our promises to all those women living in constant fear and danger. The weight of these promises will be tested during the next few years as the economic crisis once again forces us to prioritize.

Violence against women is a continuum of acts that violate women's basic human rights, resulting in devastating consequences for women who experience it, traumatic impact on those who witness it, de-

⁹⁸ Concluding observations of the Committee on the Elimination of Discrimination against Women: Finland, CEDAW/C/FIN/CO/6, 18 July 2008, para. 173. See also Universal Periodic Review of the Human Rights Council, A/HRC/WG.6/1/FIN/4, para. 50.

⁹⁹ See, e.g., WHO Multi-country Study on Women's Health and Domestic Violence against Women, Initial results on prevalence, health outcome and women's responses, Geneva, World Health Organisation, 2005. Available at http://www.who.int/gender/violence/who_multicountry_study/en/ (accessed 27 May 2009).

legitimation of States that fail to prevent it and the impoverishment of entire societies that tolerate it.¹⁰⁰

¹⁰⁰ Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Towards an effective implementation of international norms to end violence against women, E/CN.4/2004/66, 26 December 2003, para. 69.

Terrorism and the Pull of 'Balancing' in the Name of Security

Martin Scheinin

Robert Alexy's Model of Rules and Principles

Building upon Ronald Dworkin's earlier work, Robert Alexy presented in the mid-1980s an elaborated and analytically sophisticated version of the distinction between rules and principles.¹⁰¹ For the purposes of the discussion below, Alexy's theory can be crystallised into a set of ten rather simple points. Their formulation is my own and cannot be attributed to Alexy who might disagree on some of the inferences drawn.

- i. Rules and principles are sub-categories of legal norms.
- ii. These two sub-categories are exhaustive and mutually exclusive: Every legal norm is either a norm or a principle.
- iii. Rules are applied in an all-or-nothing fashion, so that within its scope of application, a rule determines the outcome of the case, irrespective of any other legal arguments made.
- iv. Seeming conflicts between rules are resolved through defining the scope of application of each rule, so that only one of them applies in the case at hand. (E.g., the scope of application of a general norm may be affected by the existence of another rule that operates as an exception to the general rule.)
- v. A rule has no validity outside its defined scope of application.
- vi. Principles are characterised by a dimension of weight, and they are applied in a more-or-less fashion. Principles are optimisation requirements.
- vii. Collisions between principles are resolved by favouring the principle that weighs more in the case at hand, while optimising also the application of the competing principle to the greatest extent legally and factually possible.
- viii. Principles retain their validity even when outweighed by a competing principle, as the validity of principles pertains to them as belonging to the legal order taken as a whole.
- ix. There cannot be conflicts or collisions between a rule and a principle. Any suggestion to the contrary results from confusion and must be resolved through looking more carefully into the content and nature of the seemingly conflicting norms.
- x. A rule and a principle representing the same value/goal can coexist within a legal order, so that a rule (with a specific scope of application) is 'surrounded' by a principle that is valid within the legal order as a whole.

There are important corollaries that can be inferred from these ten points. Point No. 10 can be illustrated by a reference to the rule as the inviolable core of a right, whereas the other dimensions of the same right would fall outside the core and be, for instance, subject to permissible limitations through a process of weighing and balancing. This illustration, of course, does not exclude the possibility that one and the same right can carry more than one core, i.e. more specific norm to be categorised as a rule. As to point No. 4, the underlying assumption is that there are no genuine conflicts between rules but any appearance of such a conflict can be explained away through a more careful definition of the respective scopes of application of the two rules. In legal practice, this denial of conflicts between rules may be a weak point of Alexy's model but nevertheless flows from the distinction between rules and principles.

¹⁰¹ Robert Alexy, *Theorie der Grundrechte*, 1985.

Another weak point in Alexy's model is of epistemological nature: how do we know or 'see' that a legal norm is a rule or a principle? The answer requires a clear distinction between the actual norm and its expression as legal text, e.g. in the form of a statute. A norm that 'really' is a principle may be linguistically expressed through a formulation that for its syntax looks like a rule, and vice versa. With the separation between a norm and a norm formulation, the distinction between rules and principles appears to lose some of its analytical rigor. However, this is not due to the distinction itself but only to the imprecise nature of natural language. Ultimately, it is for the judge or the legal scholar to 'find' the rule or the principle behind the veil of the norm formulation.

There are good reasons for categorising many legal norms on human rights (or constitutional rights, or fundamental rights) as principles. Human rights norms often have a direct link to morality, they are of a high level of abstraction and they make a claim for a sphere of validity that permeates the legal order as a whole. It is also tempting to accept the idea that human rights norms do not lose their validity even in situations where they are outplayed or outweighed. Hence, they must be complied with to the maximum of what is legally and factually possible even in the worst situation. And clearly, there are many situations where human rights allow for weighing and balancing, such as the application of a permissible limitations clause where the role of proportionality may be crucial.

However, it seems equally important to emphasize that many - or at least some, and perhaps all of them fairly narrow in scope - constitutional or international norms about fundamental rights must be characterised as rules. When a case falls within their properly defined scope of application, then the rule applies in an all-or-nothing fashion and determines the outcome of the case. No balancing is needed or allowed, the 'categorical approach'¹⁰² governs, and rightly so. If specific conduct is properly categorised as torture, then its prohibition cannot be outweighed by any competing factors, irrespective of their weight.

On the basis of point 10 in the previously presented Alexy's combined model of rules and principles, one could say that most, if not all, human rights include an inviolable core with the character of a rule, surrounded by a much broader principle that is valid at the level of the legal order as a whole. All detainees must be treated humanely,¹⁰³ to the extent factually and normatively possible. This leaves a lot for balancing as to the treatment afforded to detainees, depending on the general security situation (war/peace), the prison facilities, the budget available for the prison, the assessed dangerousness of the detainee, and perhaps also his crime. But no detainee may be subjected to torture or other inhuman treatment,¹⁰⁴ whatever are the circumstances. This applies also to the treatment of real and presumed terrorists.

A Paradox: Alexy's Defence of Fundamental Rights as Principles

Although having demonstrated that a combined model of rules and principles is the proper one in explaining the functioning of norms on fundamental rights, Alexy has in practice engaged in fine-tuning the role of fundamental rights as principles into perfection, and in a powerful defence of such a position. Seemingly, he is reducing the operation of fundamental rights into principles only. Above all in respect of the German Constitutional Court he has demonstrated how a rational practice of fundamental rights adjudication can operate through weighing and balancing, and avoid 'categorical

¹⁰² Rosenfeld, M., 'Judicial Balancing in Times of Stress: Comparing the American, British and Israeli Approaches to the War on Terror', 27 *Cardozo Law Review* 2079-2150 (2006).

¹⁰³ Article 10, paragraph 1, of the International Covenant on Civil and Political Rights (ICCPR).

¹⁰⁴ *Idem*, article 7. The example chosen suggests that the right to humane treatment is a principle, whereas the prohibition against inhuman treatment is a rule. This demonstrates the earlier point about the weakness of natural language (inhumane vs. inhuman).

approaches' (to again use Michel Rosenfeld's term). As a guide for constitutional rights adjudication, Alexy's theory boils down to an optimisation thesis or a 'law of balancing'.¹⁰⁵

The critique by Jürgen Habermas (based on his collaboration with Ingeborg Maus and Klaus Günther) is well known and has in part served as inspiration for Alexy in his fine-tuning and defence of the law of balancing. In short, this critique warns that applying constitutional rights as principles that will be weighed against each other and also against other competing principles will lead to goal-oriented weighing, accept the outweighing of constitutional rights by other collective goods than other rights proper (including 'security'), enable the sacrificing of individual rights at times for collective goods, and destroy the 'firewall' between rules and principles. There is no guarantee that 'balancing' will be governed by rational standards, and therefore treating constitutional rights as principles carries the risk of resulting in irrational rulings, arbitrariness and 'irrational balancing'.¹⁰⁶ In short, for Habermas there are 'too little constitutional rights'¹⁰⁷ in Alexy's own version of putting his theory into practice.

Alexy has responded to the critique on several occasions and, instead of developing his original combined model of rules and principles, concentrated on bringing to perfection the part that relates to principles. In short, Alexy has - convincingly - demonstrated that a rational model of adjudicating individual rights through weighing and balancing is *possible*. One of the answers he provides is that the 'weight formula' can be expressed with mathematical precision¹⁰⁸ and that situations of stalemate where the weighing of two competing principles gives exactly the same result, if they arise, could be resolved by fine-tuning the scale.¹⁰⁹ For instance, if confronted with a situation where the torture of one individual could help in saving a thousand lives, Alexy might say that the case can be resolved without declaring that the prohibition against torture is absolute and should therefore be applied as a rule. Instead, one could fine-tune the scale by saying that although the prohibition against torture and the saving of one thousand lives both are 'very weighty' principles, the former one can be redefined as 'very very weighty' and the latter one as 'moderately very weighty'.¹¹⁰

Although Alexy's defence of the approach of weighing and balancing is impressive in proving the *possibility* of a rational model of balancing, he, in my view, misses the real point in Habermas's critique, namely that accepting a model based (only) on weighing and balancing does not *exclude* its erosion to irrationality, arbitrariness and insufficient protection of the rights of the individual. Jurisprudence even in the finest democracies of the world, by highly respected judicial organs, runs the risk, in particular in the post 9/11 era of global terrorism, to accept too many compromises in the name of balancing. If such a court in normal times lets itself be strongly 'pulled' into the approach of balancing, it may be unable to break loose of that frame when the day comes when it should.

The risks in less developed legal systems are of course even greater. And the same can be said of international judicial or quasi-judicial human rights procedures that are institutionally much weaker

¹⁰⁵ The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other." Alexy, R., *Constitutional Rights, Balancing and Rationality*, Ratio Juris, Vol 16 (2003) 2:131-140. See, also Postscript in Alexy, R., *A Theory of Fundamental Rights*, 2002 (English edition of *Theorie der Grundrechte*) and Alexy, R., *Constitutional Rights and Legal Systems*, in Nergelius, J., (ed.), *Constitutionalism - New Challenges: European Law from a Nordic Perspective*, 2008.

¹⁰⁶ Habermas, J., *Between Facts and Norms*, 1996, 254-259 and summarised by Alexy in his Postscript to the English edition of *Theorie der Grundrechte*; Alexy R., *A Theory of Fundamental Rights*, 2002, 388. See, in particular the section of the Postscript carrying the heading "*Too Little and Too Much*", pp. 388-390.

¹⁰⁷ Alexy 2002, 389.

¹⁰⁸ See, Alexy 2002 p. 409 footnote 97.

¹⁰⁹ A careful reader will note that, somewhat paradoxically, this solution is analogous to the method for solving seeming conflicts between rules under point No. 4 of the original model of rules and principles. Instead of fine-tuning the respective scopes of application of the two rules, no the weighing scale is fine-tuned.

¹¹⁰ Reference is made to Alexy 2008 p. 14-15 and to a discussion that followed his presentation of the paper in Berlin in December 2002.

than Constitutional Courts or Supreme Courts that legitimately can perceive of themselves as being in the driver's seat. A further risk lies in the message that highly developed legal systems pass to less developed ones when resorting to 'balancing' when deciding cases related to the fundamental rights of the individual.

Why is the 'pull of balancing' so attractive to many prestigious national courts? In many Western democracies constitutional adjudication has been confronted with constant criticism about the increasing and overly large role of courts, endangering the proper role of democratically elected bodies. The 'pull of balancing', i.e. avoiding a categorical approach and deciding cases through weighing and balancing has been a part of the response. By articulating a position, even a 'theory', that it will not make categorical decisions but will always resort to contextual assessment and balancing, a Supreme Court or Constitutional Court passes a message of a judicial policy, about respecting the proper role of the democratic legislature and about staying within the realm of judicial decision-making, i.e. deciding one case at a time. In a highly developed constitutional democracy, these courts can afford to do so, knowing that they will remain in the driver's seat and will have a chance to decide any new case in favour of individual rights by expanding the line of 'very very very ... weighty' to infinity if needed.

Robert Alexy has proven that a model based on the fine-tuning to perfection of the operation of constitutional rights as principles may be rational and may result in principled and coherent jurisprudence that never fails to give adequate protection to the rights of the individual. This he has done convincingly, and I don't doubt that in a perfect world a perfect court - Dworkin's Judge Herkules - will do a good job through an approach of balancing.

The problem, however, is that the world is not perfect, and that even most courts of the world are not perfect.

The 'pull of balancing' is typical for highly developed constitutional democracies. Hence, the best courts in the world are likely to feel that pull, and to adjust their line of construction to it. They will demonstrate to themselves and to the political branches of government that the judiciary will avoid categorical approaches, will respect the powers of the political branches of government and will develop an institutionalised practice of jurisprudence that is both rational and manages to afford adequate protection to individual rights whenever needed. Reducing the operation of fundamental rights into principles does not seem to be too high a price for obtaining all these benefits.

This paper, however, takes a different view and defends the lasting value of treating fundamental *rights* also as rules.

The Evidence: Some Illustrative Cases¹¹¹

In the international discourse on countering terrorism, there is a strong undercurrent of governments wishing to take back some of their earlier and presumably permanent and unconditioned commitments in the field of human rights. While human rights are still recognised as fundamental values upon which democratic and liberal societies are built, we now hear calls for 'striking a new balance', for instance between security and rights. New rules are said to apply in the unprecedented era of post-9/11 international terrorism. Have politicians, legislatures, courts and academics been naïve when they have over the previous decades based many of their most important decisions or positions on the presumed primacy and even absolute nature of human rights?

¹¹¹ This section is familiar to the Finnish readers of Scheinin, M., '*Punninnasta ja ehdottomista ihmisoikeuksista terrorismia torjuttaessa*', in Hurri (ed), *Demokraattisen oikeuden ehdot: Kritiikki, politiikka, kulttuuri - Kaarlo Tuorin 60-vuotisjuhlakirja*, Helsinki 2008. Italian readers may have seen the English version, Scheinin, M., '*"Balancing" and "Absolute" Human Rights in the Fight against Terrorism*', *Percorsi costituzionali I* (2008) 1: 191-198. The case *Saadi v. Italy* is not presented in the earlier versions.

This brief paper now turns to address the above question in the light of recent judicial or quasi-judicial decisions by national courts and international bodies concerning the role of individual rights when dealing with suspected terrorists. It needs to be pointed out that 'balancing' is not the only challenge to the full application of fundamental human rights norms in that context, including the prohibition against torture and other inhuman treatment. Another post-9/11 trend is *exclusion* from the scope of application of human rights norms, for instance by reference to their essentially territorial nature and many other constructions that have the common effect of excluding certain categories of persons from the scope of application of human rights law or international humanitarian law, or even both.

The case of *Suresh*

Only some months after the atrocious terrorist attacks of 11 September 2001 the Supreme Court of Canada handed over its ruling in the case of *Manickavasagam Suresh v. Canada (Minister of Citizenship and Immigration)*.¹¹² According to the ruling Mr. Suresh, a suspected fundraiser of the LTTE (Tamil Tigers) of Sri Lanka could not be deported to his home country due to his fear and allegation of a risk of torture. Somewhat paradoxically, the *Suresh* ruling, despite of its outcome of affording protection to an individual, opened the door for the application of a 'balancing' approach in respect of the prohibition against torture. This is due to the reasoning of the Court which explicitly spoke of a 'contextual approach', an approach that 'is essentially one of balancing'. According to the Court, deportation to torture abroad would depend on a variety of factors, including the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or to the country's security, and the threat of terrorism to Canada. While pronouncing that it was 'likely' that the balance will be struck the same way in most cases, the Court declared that it would be impossible to say in advance that the balance will necessarily be struck the same way in every case.¹¹³

The *Suresh* ruling should be understood against the setting of a Supreme Court guarding a constitutional system where fundamental rights of the individual have strong substantive and procedural protection and where any later decision by the executive to deport a person can be challenged before the courts and ultimately brought again to the Supreme Court. In these circumstances it may appear as wise judicial policy not to decide all future cases in advance but to emphasize the role of the judiciary as a neutral arbiter that restricts itself to case-by-case decisions without prejudging legal issues by way of absolute postulates declared beforehand.

The backside of the *Suresh* ruling, however, is that it gives to the rest of the world the message that the prohibition against torture is not absolute but subject to 'balancing' against security interests. The Supreme Court of Canada will not be able to control what happens to persons subject to removal from other countries in which the judiciary may be less immune to political pressure, not to speak of countries where the final 'balancing' may in practice be done by the executive as the invocation of national security grounds for deportation may block a person's access to judicial remedies.

The case of *Ahani*

Any reader of *Suresh* should be aware of the fact that on the very same day the Supreme Court of Canada decided the companion case of *Mansour Ahani v. Minister of Citizenship and Immigration and Attorney General of Canada*.¹¹⁴ While Mr Suresh was allowed to stay, Mr Ahani, an alleged assassin working for the Iranian government, was sent back to Iran despite his claim that he would face persecution and torture. What is remarkable in the ruling by the Supreme Court of Canada is that its decision was *not* based on the 'balancing' caveat carved out in *Suresh* but a much more traditional and

¹¹² *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; 2002 SCC 1 (January 11, 2002)

¹¹³ *Suresh v. Canada (Minister of Citizenship and Immigration)*, paragraph 45.

¹¹⁴ *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 72; 2002 SCC 2 (January 11, 2002)

safer assessment that the risk of torture had not been made out for purposes of the standard of review to be applied by the court. By declaring that the Minister's assessment of the risk was 'unassailable' by the court,¹¹⁵ the Supreme Court avoided stepping on the dangerous path it opened on the same day in *Suresh* in alluding to the possibility of sending someone to face torture on the basis of 'balancing'. But deciding to allow sending Ahani to Iran on the day when the same court in *Suresh* said that the issue of sending someone to face torture ultimately is a matter of balancing delivers a strong message. Namely, that the Canadian Supreme Court had already been pulled too deep into the approach of balancing, so that it was unable to adopt a 'categorical' position in a matter where it would have been needed.

For Mr Ahani the ruling of the Supreme Court of Canada was final in the sense that he was deported to Iran. For purposes of assessment under (international) human rights law, however, the proceedings continued before the United Nations Human Rights Committee, the treaty body acting under the International Covenant on Civil and Political Rights. In March 2004 the Committee came to the conclusion that Canada had violated the prohibition against torture and other inhuman treatment enshrined in article 7 of the ICCPR by deporting Mr Ahani to Iran. This conclusion was largely based on procedural grounds and in particular the Supreme Court's deference in respect of the executive's assessment of the risk of torture. Conscious of the Supreme Court's reasoning in the companion case of *Suresh*,¹¹⁶ however, the Committee in passing expressed its disapproval of any 'balancing' approach in respect of the risk of torture: 'the prohibition on torture, including as expressed in article 7 of the Covenant, is an absolute one that is not subject to countervailing considerations'.¹¹⁷

The cases of *Chahal* and *Saadi*

The Human Rights Committee's position, reflected in *Ahani*, that the prohibition against torture or other inhuman treatment, including its dimension of *non-refoulement* is not subject to 'balancing', is well known in international human rights law. Much earlier, in the case of *Chahal v. the United Kingdom*, decided by the European Court of Human Rights in 1996, it was expressed in clear and uncompromised terms that the European Convention on Human Rights absolutely prohibits *refoulement* when there is a 'real risk' of a person being subjected to treatment contrary to Article 3 of the Convention if he is returned to his own country.¹¹⁸ The case related to the envisaged deportation of Mr Karamjit Singh Chahal, a militant Sikh of Indian nationality, back to India for reasons related to terrorism.

¹¹⁵ *Ahani v. Canada (Minister of Citizenship and Immigration)*, paragraph 19. See also paragraph 17: "Likewise, on the second question, we conclude that the Court may intervene only if the Minister's decision is not supported on the evidence, or fails to consider the appropriate factors. The reviewing court should also recognize that the nature of the inquiry may limit the evidence required. While the issue of deportation to risk of torture engages s. 7 of the Charter and hence possesses a constitutional dimension, the Minister's decision is largely fact-based. The inquiry into whether Ahani faces a substantial risk of torture involves consideration of the human rights record of the home state, the personal risk faced by the claimant, any assurances that the claimant will not be tortured and their worth and, in that respect, the ability of the home state to control its own security forces, and more. Such issues are largely outside the realm of expertise of reviewing courts and possess a negligible legal dimension. Considerable deference is therefore required."

¹¹⁶ *Mansour Ahani v. Canada* (Communication No. 1051/2002), Views of the Human Rights Committee 29 March 2004, paragraph 2.9. The present author was a member of the Human Rights Committee at the time of the decision.

¹¹⁷ *Ahani* (Human Rights Committee), paragraph 10.10.

¹¹⁸ *Chahal v. the United Kingdom*, European Court of Human Rights, Judgment of 25 October 1996, paragraph 107. See, also, paragraph 79: "...The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."; and paragraph 80: "The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion".

After September 2001 some governments have requested the European Court of Human Rights to reconsider its position on the absolute nature of the *non-refoulement* obligation, inter alia, by proposing a 'balancing' approach to replace it. In a Working Document the Commission of the European Union suggested that the Court might need to review its position:

"Following the 11th September events, the European Court of Human Rights may in the future again have to rule on questions relating to the interpretation of Article 3, in particular on the question in how far there can be a 'balancing act' between the protection needs of the individual, set off against the security interests of a state."¹¹⁹

In some more recent cases the governments of Italy, Lithuania, Portugal, Slovakia and the United Kingdom were granted the right to intervene as third parties, some of them suggesting the introduction of a 'balancing' test to the application of Article 3.¹²⁰

The European Court of Human Rights confronted the challenge in the case of *Saadi v. Italy*, decided in February 2008. In a Grand Chamber ruling the Court maintained its position on the absolute nature of ECHR article 3 and went to some length, even technicalities, in dismissing the offered alternative approach of balancing.¹²¹

137. The Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence (see *Chahal*, cited above, § 79, and *Shamayev and Others*, cited above, § 335). It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.
138. Accordingly, the Court cannot accept the argument of the United Kingdom Government, supported by the respondent Government, that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole (see paragraphs 120 and 122 above). Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule (see the case-law cited in paragraph 127 above). It must therefore reaffirm the principle stated in the *Chahal* judgment (cited above, § 81) that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account...
139. The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener,

¹¹⁹ Commission of the European Union, Commission Working Document, The relationship between safeguarding internal security and complying with international protection obligations and instruments, 5 December 2001. COM(2001) 743 final, p. 14. Available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0743en01.pdf

¹²⁰ European Court of Human Rights, Press release issued by the Registrar, Application lodged with the Court, *Ramzy v. the Netherlands*, 20 October 2005.

¹²¹ *Saadi v. Italy*, Application no. 37201/06, Grand Chamber Judgment of 28 February 2008.

where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.

The cases of *Mohamed* and *Tantoush*

Interestingly, while some governments in Europe may feel that the European Court of Human Rights has gone too far in maintaining the absolute nature of the prohibition against torture and other inhuman treatment even in respect of compelling national security interests, the position of the Court has been widely accepted in human rights law and is even in post-9/11 times obtaining recognition by judicial bodies in other parts of the world.

In *Khalfan Khamis Mohamed v. President of South Africa and Six Others*, involving deportation to the United States under the risk of capital punishment, the Constitutional Court of South Africa explicitly took distance from the Canadian ‘balancing’ approach:

“But whatever the position may be under Canadian law where deprivation of the right to life, liberty and human dignity is dependent upon the fundamental principles of justice, our Constitution sets different standards for protecting the right to life, to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. Under our Constitution these rights are not qualified by other principles of justice. There are no such exceptions to the protection of these rights. Where the removal of a person to another country is effected by the state in circumstances that threaten the life or human dignity of such person, sections 10 and 11 of the Bill of Rights are implicated.”¹²²

While the *Mohamed* case was decided briefly before September 2001, the same position was nevertheless maintained in the more recently decided case of *Ibrahim Ali Abubaker Tantoush v. the Refugee Appeals Board and Others*¹²³, involving the possible return to Libya of a person who was listed as a terrorist by the so-called 1267 Committee of the United Nations Security Council.¹²⁴ Despite his listing as a terrorist by the United Nations, Mr Tantoush was declared to be a refugee and his deportation to Libya was blocked.

Summary and Conclusion

As elaborated by Robert Alexy, every legal norm is either a rule or a principle. Rules are applied in an all-or-nothing fashion so that if a case falls within the scope of application of a rule, the rule determines the outcome of the case without a need to address other considerations. Principles, in turn, are characterised by a dimension of weight and are applied through a process of weighing and balancing that takes into account also competing principles and optimises the realisation of all of them. This model of rules and principles applies also to fundamental rights of the individual, be they formulated as constitutional rights,¹²⁵ or international human rights, or otherwise. Many human rights may be subject to a process of balancing which properly applied takes place within the framework of human rights law itself, by way of applying the test of permissible limitations and the requirement of proportionality as one stage in that process. However, some human rights, such as the prohibition against torture or other inhuman treatment, have been formulated as prohibitions and do not include a

¹²² *Khalfan Khamis Mohamed v. President of South Africa and Six Others*, Constitutional Court of South Africa, Judgment of 28 May 2001, CCT 17/01, paragraph 14.

¹²³ See, Security Council resolution S/RES/1267 (1999) and Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama Bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them, available at <http://www.un.org/sc/committees/1267/consolist.shtml>. Mr. Tantoush still appears on the list on 27 May 2009.

¹²⁴ *Ibrahim Ali Abubaker Tantoush v. the Refugee Appeals Board and Others*, High Court of South Africa (Transvaal Provincial Division), Case No. 13182/06, heard on 14 August 2007.

¹²⁵ See, Alexy, R., *A Theory of Constitutional Rights*, Oxford University Press, 2002.

limitation clause. Furthermore, even human rights that are subject to permissible limitations, should be understood to include one or more 'core' elements within which a broader principle is crystallised as a rule that allows no limitations or 'balancing'.

One of the paradoxical outcomes of jurisprudence emanating in stable and highly developed constitutional jurisdictions such as the Canadian and German ones, is that because of wishing to avoid prejudging future cases the Supreme or Constitutional Court may wish to operate on the basis of principles only, as if rules that are not subject to balancing did not exist. A hidden assumption behind such an approach is that any future case may be brought before the same court which will then be able to prevent any abuse of 'balancing' to the detriment of the fundamental rights of the individual. The theory has been articulated by Robert Alexy himself, to the effect that any individual case can be decided without resorting to the categorical sword of a rule, as the fine-tuning of the scheme for applying corresponding principles always is capable of producing the same result.¹²⁶

In international human rights law the situation still is very different from a stable constitutional court guarding the outcome of every single case. Human rights courts and quasi-judicial bodies may be difficult to access, their procedure may be lengthy, and governments may fail to comply with requests for interim measures or even with the final decision. For these reasons international human rights law still needs to emphasize the existence of absolute rules that are not subject to 'balancing' against competing interests.

The situation is largely the same in less perfect national constitutional systems where the role of the judiciary may be confronted with a number of challenges and where the executive may have effective means to prevent a future case ever getting before the highest judicial organ. In those situations, a Supreme Court or Constitutional Court may best perform its task if it adopts a 'categorical' approach in respect of the most fundamental rights of the individual, on the first occasion that arises - as it may also be the last one.

In the era of global terrorism and counter-terrorism the highest judicial organs of well-developed constitutional democracies should think of what kind of message they wish to pass to the judges in other parts of the world.

¹²⁶ See, Alexy, R., *A Theory of Constitutional Rights*, Oxford University Press, 2002, in particular the Postscript, at p. 388 et seq.

From Hamdi to Kadi: Comparing the Role of the American and European Judiciaries in Times of Emergencies

Federico Fabbrini*

Introduction

This paper analyzes three decisions of the United States Supreme Court (USSCt) and three decisions of the European Court of Justice (ECJ) reviewing the constitutionality of executive and legislative measures adopted by the United States (US) and the European Union (EU) in the fight against terrorism¹²⁷. The purpose of the essay is to design an analytical framework to explain the role of the American and European judiciaries in times of emergency¹²⁸. The role of the judiciary is a consequence of the institutional position of the judicial power *vis-à-vis* the other branches of government; directly linked to this, then, is the kind of judicial review that courts exercise¹²⁹. Since the main function of courts is to enforce constitutional rights, however, understanding the role of the judiciary in times of emergency has broader implication also from the substantive point of view of the protection of fundamental liberties¹³⁰.

My argument will be that the role of the judicial power is dynamical, varying from an early self-restraint, in the aftermath of an emergency, to a later constitutional self-confidence, as the fear of a new terrorist attacks shades over time. More specifically, I will attempt to identify in the jurisprudence of the USSCt and the ECJ a three-step evolution. In an initial phase, both courts exercise a deferential approach, with a minimal review of the acts of the political branches of government. In a second, intermediate phase, then, the two courts start limiting the effects of their precedents, and acknowledge for themselves a power to scrutinize more extensively the policies of the other branches. Eventually, in

* PhD student, Law Dept., EUI. E-mail: federico.fabbrini@eui.eu

¹²⁷ The USSCt cases are: *Yaser E. Hamdi et al. v. Donald H. Rumsfeld et al.* 542 US 507 (2004); *Salim A. Hamdan v. Donald H. Rumsfeld et al.* 548 US 557 (2006); *Lakhdar Boumediene et al. v. George W. Bush et al.* 553 US _ (2008). The ECJ cases are: Case T-351/01 *Yassin A. Kadi v. Council of the EU and Commission of the EC* [2005] ECR II-3649; Case T-228/02 *Organisation des Modjahedines du peuple d'Iran (OMPI) v. Council of the EU*, [2006] ECR II-4665; Joined Cases C-402/05 P & C-415/05 P *Yassin A. Kadi & Al Barakaat International Foundation v. EU Council and Commission* judgment of 3 September 2008, nyr

¹²⁸ For the purpose of this paper 'emergency' will be considered, following Ackerman, B., *Before the next attack: Preserving Civil Liberties in an age of terrorism* 171 (2006), as the condition that exist when a democracy momentary affronts a threat to effective sovereignty without, however, facing an existential danger. For a functional equivalent see the definition of 'stress' given by Michel Rosenfeld, *Judicial Balancing in Times of Stress: Comparing the American, British and Israeli Approaches to the War on Terror*, in 27 *Cardozo Law Review* (2006) 2079, 2081 which is regarded as the condition falling "somewhere between ordinary conditions and conditions of crisis".

¹²⁹ On the institutional role of the US and EU high courts and judicial review, see, among many: Shapiro, M., *Law and Politics in the Supreme Court* (1964); Shapiro, M., *The European Court of Justice: of Institutions and Democracy*, in 32 *Israel Law Review* 1 (1998), 3, 5; Maduro, M., *We the Court : The European Court of Justice and the European Economic Constitution* (1998); *The European Court of justice* (Grainne de Burca & Joseph Weiler eds., 2001); Fried, C., *Saying What the Law Is: The Constitution in the Supreme Court* (2004); Sadurski, W., 'Reasonableness' and Value Pluralism in Law and Politics, in 13 *EUI WP* (2008), 3; Jacobs, F., *The Sovereignty of Law: The European Way* (2007)

¹³⁰ On constitutional review and fundamental rights, see, among many: Cappelletti, M., *La giurisdizione costituzionale delle libertà* (1955); *Learned Hand, The Bill of Rights* (1958); Troper, M., *Justice Constitutionnelle et démocratie*, in 1 *Revue Française de droit constitutionnel* (1990), 31; Barbera, A., *Le basi filosofiche del Costituzionalismo* (1996); Morrone, A., *Il custode della ragionevolezza* (2000); Antonio D'Atena, *Costituzionalismo moderno e tutela dei diritti fondamentali*, in *Tutela dei diritti fondamentali e costituzionalismo multilivello* (Antonio D'Atena et al. eds., 2004); Peter Haberle, *Role and Impact of Constitutional Courts in a Comparative Perspective*, in *The Future of the European Judicial System in a Comparative Perspective* (Ingolf Pernice et al. eds., 2006) 65, 71

the last phase, the judiciaries reaffirm their institutional position in the US and EU balances of governance and strictly review the counter-terrorism measures adopted by the executive and legislative power, restoring to its full extent the rule of law.

The structure of the paper, therefore, is as follows. Section 2 will assess several methodological issues arising from a comparative analysis of constitutional review of counter-terrorism measures by the USSCt and the ECJ, including the *caveats* that shall be taken into account in performing this task. Sections 3, 4, 5 will deal separately with each of the three judicial phases I have delineated, providing an emblematic example drawn from the case law of both the USSCt and the ECJ. In the last section, finally, I will employ the empirical evidences gathered and endeavour to design, inductively, a dynamic model of the role of the judiciary in times of emergency, that address the institutional position of the courts, the type of review that they employ and the degree of fundamental rights protection that they ensure.

Preliminary Methodological Remarks: Comparing Constitutional Review of Counter-Terrorism Measures by the European Court of Justice and the US Supreme Court

It has already been highlighted that the USSCt and the ECJ (that includes the Court of First Instance, CFI)¹³¹ “may be regarded as comparable from the standpoint of constitutional review”¹³². A comparative analysis¹³³ of their response to the US and EU joint efforts in the fight against terrorism seems meaningful for several reasons. At the substantive level, both courts operate simultaneously as ordinary court as well as constitutional tribunals charged of the primary duty to guard the supremacy of the Constitution and to ensure the protection of a common core of fundamental rights. Contrary to the US, the EU (so far) lacks a binding Bill of Rights: nonetheless, the ECJ has developed (drawing on the common constitutional traditions of the Member States and on the European Human Rights Convention)¹³⁴ a catalogue of fundamental rights that allows it to “function in the realm of constitutional adjudication much like the USSCt does”¹³⁵.

From an institutional point of view, then, many similarities exist between the two courts, since they both operate within systems of separation and balance of powers. In the US constitutional structure, the judiciary (and above all the USSCt) is regarded as the third department of the federal government, *à coté* of the executive and the legislature¹³⁶. But, in fact, also the EU framework of government departs from the pluri-secular, centralised European model of governance, characterised by a fusion of

¹³¹ It shall indeed be remembered that the CFI is part of the ECJ and that according to Art. 220 TEC, they both “shall ensure that in the interpretation and application of this Treaty the law is observed”. See Cartabia, M., & Weiler, J., *L'Italia in Europa. Profili istituzionali e costituzionali* 55 (2000)

¹³² Rosenfeld, M., *Comparing Constitutional Review by the European Court of Justice and the US Supreme Court*, in *The Future of the European Judicial System in a Comparative Perspective* (Ingolf Pernice et al. eds., 2006) 33, 34

¹³³ On the comparative method and its advantages more generally, see: Davide, R., & Jauffret Spinosi, C., *I grandi sistemi giuridici contemporanei* (1994); *The Jurisprudence of Human Rights Law: a Comparative Interpretive Approach* (Martin Scheinin et al. eds., 2000); Sacco, R., *Introduzione al diritto comparato* (2001); de Vergottini, G., *Diritto Costituzionale Comparato* (2004)

¹³⁴ On the rise of fundamental rights in the jurisprudence of the ECJ see among many, Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in *The EU and Human rights* (Philip Alston ed., 1999), 859; Von Bogdandy, A., *The European Union as a Human Rights Organisation? Human Rights at the Core of the European Union*, in *37 Common Market Law Review* (2000), 1307; De Búrca, G., *Human Rights, the Charter and Beyond*, in 10 Jean Monnet WP (2001); *The European Charter of Fundamental Rights: Politics, Law and Policy* (Steve Peers & Angela Wards eds., 2004)

¹³⁵ Rosenfeld (supra note 6), 40

¹³⁶ For a canonical definition of the US system of governance as “separated institutions sharing power” see Neustadt, R., *Presidential Power and the Modern President* 33 (1960)

powers between parliaments and executives and a subservient role for the judiciary¹³⁷. Thus, even though the EU system of governance is still embryonic¹³⁸ (i.e. being the boundaries between the executive and the legislative authorities blurred, and the balance between the latter and the judiciary less evident), “the ECJ performs much the same function as the USSCt with respect to vertical and horizontal division of powers issues”¹³⁹.

On the other hand, one needs to be aware of several *caveats* while comparing the case law of the USSCt and of the ECJ. General differences in structure, composition, reasoning, style and rhetoric (i.e. such as the existence of dissenting opinions) influence how each of these courts confronts and manages constitutional review¹⁴⁰. Furthermore, from the specific point of view of the theme addressed in this paper, it has to be remembered that a disparity exists between the counter-terrorism measures adopted in the US and reviewed by the USSCt and those enacted in the EU and scrutinised by the ECJ: the first concerned the legality of the detention of individuals suspected of being involved in terrorist activities; the latter dealt with the legality of the blacklisting of suspected-terrorist, with resulting freezing of their assets. In both case, anyway, a violation of the principle of due process was alleged by the petitioners and dismissed by the political branches.

Keeping this in mind, it is worth stressing that a comparative analysis of the role of the US and EU judiciary in the review of counter-terrorism measures “might be quite fruitful”¹⁴¹. To begin with, the comparative method will shade light over “the ‘common cores’ at the international and universal levels, the confluences and divergences, the consonances and disagreements among the various legal systems and the different ‘legal families’, and their ideal and practical reasons”¹⁴². The identification of certain commonalities in the case law on counter-terrorism measures of the USSCt and the ECJ, then, will make it possible to inductively elaborate an analytical model that describes what the role of the judiciary is during the times of emergencies and therefore the degree to which fundamental rights are safeguarded.

The Initial Phase: Constitutional Self-Restraint

In the first cases dealing with the legality of counter-terrorism measures, both the USSCt and the ECJ adopted a deferential approach toward the determination of the political branches of government, limiting at a minimum or excluding *tout court* judicial review over the instruments adopted to fight terrorism and, thus, frustrating the protection of fundamental rights enshrined in the US Constitution and recognised in the general principles of EU Law.

¹³⁷ Interesting analysis of the EU system of governance include, *The Institutionalisation of Europe* (Alec Stone Sweet et al. eds., 2001); Pernice, I., *Multilevel Constitutionalism in the European Union*, in 27 *European Law Review* (2002), 511; Brunkhorst, H., *A polity without a State? European constitutionalism between evolution and revolution*, in *Developing a Constitution for Europe* (Augustin Menéndez et al. eds., 2004); *Sovereignty in Transition* (Neil Walker ed., 2003); Franz Mayer, *The European Constitution and the Courts: Adjudicating Constitutional Law in a Multilevel system*, in Jean Monnet WP (2003); Stone Sweet, A., *The Judicial Construction of Europe* (2004); Neil Walker, *EU Constitutionalism in the State Constitutional Tradition*, in 21 *EUI WP* (2006)

¹³⁸ Della Cananea, G., *L’Unione Europea: Un ordinamento composito* (2003), Snyder, F., *The Unfinished Constitution of the European Union: Principles, Process and Culture*, in *European Constitutionalism beyond the State* (Joseph Weiler & Marlene Wind eds., 2003)

¹³⁹ Rosenfeld (supra note 6), 37

¹⁴⁰ Id., 41

¹⁴¹ Id., 40

¹⁴² Cappelletti, M., *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato* xii (1972)

*Hamdi v. Rumsfeld*¹⁴³

In *Hamdi*, for the first time, the USSCt was called to decide, through an action for *habeas corpus*, about the lawfulness of the indefinite detention without trial of a US citizen captured in Afghanistan and deemed to be an ‘enemy combatant’ by the executive power¹⁴⁴. In its first serious confrontation with a question raising severe constitutional concerns (especially with regard to the principle of due process), the USSCt “responded with a cacophony of opinions”¹⁴⁵ leaving to J. O’Connor task of writing the controlling one. Speaking for a plurality of four judges, she affirmed that “the detention of individuals [...] for the duration of the particular conflict in which they were captured, is so fundamental and accepted and incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorised the President to use”¹⁴⁶.

Subsequently, the plurality of the USSCt moved to the issue of the process due to a citizen who disputes his enemy combatant status emphasising “the tension that exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizens contends he is due before he is deprived of a constitutional right”¹⁴⁷. *Prima facie* the USSCt decided to balance “the most elemental of liberty interests – the interest in being free from physical detention by one’s own government”¹⁴⁸, with the “sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the US”¹⁴⁹, thus rejecting both the “unilateralism”¹⁵⁰ of the Administration as well as the “civil libertarian maximalism”¹⁵¹ of the petitioner.

In the practical weighing of competing interests, however, the USSCt adopted a “minimalist approach”¹⁵², recurring to a test usually reserved for of public administration’s questions¹⁵³. Therefore, even if the majority quite emphatically affirmed that “it is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad”¹⁵⁴, the result of the “calculus”¹⁵⁵ was, in the end, an indulgent concession to the Executive¹⁵⁶. The majority simply concluded that a citizen “seeking to challenge his classification as an enemy

¹⁴³ *Yaser E. Hamdi et al. v. Donald H. Rumsfeld et al.* 542 US 507 (2004)

¹⁴⁴ The petitioner was challenging his detention on the basis of the *habeas corpus* statute, 28 US §2241(c)(3), according to which the Supreme Court or any other justice may grant *certiorari* to a prisoner held “*in custody in violation of the Constitution or laws or treaties of the US*”.

¹⁴⁵ Ackerman (supra note 2), 27

¹⁴⁶ *Hamdi* (Opinion of O’Connor J.) at 10 [of the slip opinion]. According to Ackerman (supra note 2), 30 this reasoning suggests “disturbing judicial uncertainty”. In their joint dissent J. Scalia and J. Stevens decisively insisted that according to the US constitutional tradition, in the absence of a formal suspension of the writ of *habeas corpus*, “the Executive assertion of military exigency has not been thought sufficient to permit detention without trial” (Scalia J. dissenting, 1). For a defence of the plurality opinion see, however: Richard Fallon & Daniel Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights and the War on Terror*, in 120 HARVARD LAW REVIEW 8 (2007) 2032, 2071

¹⁴⁷ *Hamdi* (Opinion of O’Connor J.) at 21

¹⁴⁸ *Id.* at 22

¹⁴⁹ *Id.* at 24

¹⁵⁰ Rosenfeld (supra note 2), 2082

¹⁵¹ *Id.*

¹⁵² Sunstein, C., *Radicals in Robes: Why Extreme Right-Wing Courts are Wrong for America* 175 (2005)

¹⁵³ The seminal case is *Mathews v. Eldridge*, 542 US 319 (1976). See Ackerman (supra note 2), 30-31

¹⁵⁴ *Hamdi* (Opinion of O’Connor J.) at 25

¹⁵⁵ *Id.* at 22

¹⁵⁶ Dworkin, R., *Corte Suprema e garanzie nel trattamento dei detenuti*, in 4 Quaderni Costituzionali (2005) 905, 909

combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker"¹⁵⁷.

In addition, the USSCt acknowledged that "enemy combatants proceedings may be tailored to alleviate their uncommon potential to burden the Executive"¹⁵⁸ in times of emergency, and even acknowledged that "the standards [...] articulated could be met by an appropriately authorised and properly constituted military tribunal"¹⁵⁹. Hence, "although the popular press has hailed *Hamdi* for reining in presidential power, [...] a much dimmer view"¹⁶⁰ seems necessary.

"When one considers where the balance was struck, the departure from [executive] unilateralism was limited. From the standpoint of judicial balancing itself, the plurality accorded too little weight to the serious deprivation of liberty associated with the designation as an enemy combatant and too much weight on security concerns relating to the war on terrorism"¹⁶¹.

Kadi v. EU Council and Commission ¹⁶²

The decision by the CFI¹⁶³ in *Kadi* was originated by an action for annulment of an EC regulation¹⁶⁴ listing individuals suspected of financing terrorist organisations and freezing their assets¹⁶⁵. Whereas the EC regulation limited significantly several of the constitutional principles protected in the EU legal order (among which, in particular, the right of due process), the CFI pointed out that the regulation simply implemented (a common position adopted under the second pillar of the EU¹⁶⁶, which, in its turn, gave effect to) a resolution of the United Nations (UN) Security Council (SC)¹⁶⁷. According to the CFI, however, the Charter of the UN and, consequently, the resolution of the UNSC, enjoyed supremacy over any other domestic or international obligation, and the EU itself had to "be considered to be bound"¹⁶⁸ by them¹⁶⁹.

Therefore, the CFI took the view that "a limitation of [its] jurisdiction [wa]s necessary"¹⁷⁰, since "any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of EC law relating to the protection of fundamental rights, would therefore imply that the court is to consider, indirectly, the lawfulness of"¹⁷¹ a (superior) UNSC resolution. The CFI

¹⁵⁷ *Hamdi* (Opinion of O'Connor J.) at 26

¹⁵⁸ *Id.* at 27

¹⁵⁹ *Id.* at 31. This statement interestingly follows immediately the passage where the USSCt formally asserts the role of the judiciary "in maintaining th[e] delicate balance of governance" (*Id.* at 29)

¹⁶⁰ Ackerman (*supra* note 2), 29

¹⁶¹ Rosenfeld (*supra* note 2), 2114-2115

¹⁶² Case T-351/01 *Yassin A. Kadi v. Council of the EU and Commission of the EC* [2005] ECR II-3649

¹⁶³ See *supra* note 5

¹⁶⁴ Council Regulation (EC) No. 881/2002 of 27 May 2002, OJ 2002, L 139/9

¹⁶⁵ The applicant was bringing legal action under art. 230(4) TCE according to which "any natural or legal person may, [...] institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former".

¹⁶⁶ Common Position 2002/402/CFSP, OJ 2002, L 139/4

¹⁶⁷ Security Council Resolution 1390 (2002) of 28 January 2002

¹⁶⁸ *Kadi* at § 193

¹⁶⁹ According to Martin Nettesheim, *UN Sanctions Against Individuals: a Challenge to the Architecture of the EU Governance*, in 44 *Common Market Law Review* (2007), 567, 574, this *point de depart* is "somewhat surprising".

¹⁷⁰ *Kadi* at § 218

¹⁷¹ *Id.* at § 215

though, to avoid “deficiencies in the protection of fundamental rights”¹⁷² (which would amount here to a substantial *deni de justice*), found itself

“empowered to check, indirectly, the lawfulness of the resolution of the SC in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the UN, and from which no derogation is possible”¹⁷³.

Nonetheless, the review on the basis of *jus cogens* of the alleged violations of fundamental rights of the petitioner, turned out to be extremely limited¹⁷⁴. The CFI excluded, in fact, that it had the power to “verify that there has been no error of assessment of the facts and evidence relied on by the SC in support of the measure it had taken”¹⁷⁵; and affirmed, leaving wide margin of appreciation to the UNSC, that

“the question whether an individual or organisation poses a threat to international peace and security, like the question of what measures must be adopted vis à vis the person concerned in order to frustrate the threats, entails a political assessment and value judgment which in principle falls within the exclusive competence of the authority to which the international community has entrusted primary responsibility for the maintenance of peace and security”¹⁷⁶.

In conclusion, therefore, the CFI decided that none of the applicant’s arguments alleging breach of fundamental due process right was well founded and upheld the EC regulation, an instrument necessary, “as the world now stands”¹⁷⁷, for struggling with international terrorism. By limiting the scope of its judicial review¹⁷⁸, the first decision of the CFI dealing with the legality of EU counter-terrorism measures, however, “raised several perplexities, since it ended sacrificing entirely the needs of the protection of fundamental rights”¹⁷⁹ giving “a *carte blanche* to the member states”¹⁸⁰ to disregard the rule of law in implementing resolutions of the UNSC. The EU constitutional principles were in fact “outweigh[ed by] the essential public interest in the maintenance of international peace and security”¹⁸¹ pursued by the political branches of the EU.

The intermediate phase

In the second set of cases dealing with the legality of US and EU counter-terrorism measures, both the USSCt and the ECJ began limiting the effects of their previous rulings, either through a strict interpretation of the relevant legislative provisions or through a careful distinguishing with their precedents. Thus, by abandoning the previous self-restraint in favour of a middle review scrutiny, the judiciary progressively made the first step in the direction of restoring the rule of law and granting adequate protection of fundamental rights.

¹⁷² Nettesheim (supra note 43) 574

¹⁷³ *Kadi* at § 227

¹⁷⁴ Lavranos, N., *Judicial Review of UN Sanctions by the CFI*, in 11 *European Foreign Affairs Review* (2006), 471-475. According to Tomuschat, C., *Case Note: Kadi v. EU Council and Commission*, in 43 *Common Market Law Review* (2006), 537, 551, however, “the judgment show that the CFI did not confine its assessment to *jus cogens* proper, but resorted to applying to their full extent the standards evolved in the practice of the EC judicial bodies”.

¹⁷⁵ *Kadi* at § 284

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at § 133

¹⁷⁸ Eckes, C., *Judicial Review of European Anti-Terrorism Measures – The Yusuf and Kadi Judgments of the CFI*, in 14 *European Law Journal* 1 (2008), 74, 82

¹⁷⁹ Cartabia, M., *L’ora dei diritti fondamentali nell’Unione Europea*, in *I Diritti in Azione* (Marta Cartabia ed., 2007), 13, 49

¹⁸⁰ Takis Tridimas & Jose Gutierrez-Fons, *EU Law, International Law and Economic Sanctions against Terrorism: the Judiciary in Distress?*, in 32 *Fordham International Law Journal* (2008), 660, 682

¹⁸¹ *Kadi* at §289

*Hamdan v. Rumsfeld*¹⁸²

In *Hamdan*, a Yemeni national held as enemy combatant in the US prison of Guantánamo was challenging the legality of his detention and his eligibility for trial by military commission established through presidential order. While the case was pending before the USSCt a legislative provision was enacted depriving US courts of jurisdiction to hear application for *habeas corpus* filed by aliens detained by the US in Guantánamo¹⁸³. The administration, therefore, urged the USSCt to decide the case on procedural ground, dismissing the suit for lack of jurisdictional competence. A five justices majority (lead by J. Stevens), however, construed the statute narrowly, and stated that “ordinary principles of statutory construction suffice to rebut the Government’s theory”¹⁸⁴ since both the language and the history of the statute excluded its retroactive application to pending cases.

The USSCt, moreover, rejecting its previous deferential approach toward the arguments of the executive power¹⁸⁵, underlined that “the Government has identified no other ‘important countervailing interest’ that would permit federal courts to depart from their general ‘duty to exercise the jurisdiction that is conferred on them by Congress’”¹⁸⁶ and, consequently, addressed the claims of the petitioners on the merit. With regard to the first claim, concerning the authority of the President to try enemy combatants for crimes against the law of war by military tribunals instituted with executive order, the USSCt ruled that no act of Congress “expand[ed] the President’s authority to convene military commissions”¹⁸⁷ and that, therefore, the statutory requirement of an express congressional authorisation for the establishment of *ad hoc* tribunals had been violated¹⁸⁸.

With regard to the second claim, concerning the legality of the procedures governing the trial by military commission, then, the USSCt highlighted that, according to the rules set forth by the executive, the accused was “precluded from ever learning what evidence was presented”¹⁸⁹ against him and that “striking[ly] *any* evidence [...including] testimonial hearsay and evidence obtained through coercion”¹⁹⁰ was admitted in front of the decision-makers. The majority thus decided that these procedures violated the standard of US military justice as well as the provision of the Geneva Convention granting minimal due process rights¹⁹¹ to the aliens detained in the course of a “conflict not of an international character”¹⁹²: indeed, “those requirements are general ones, crafted to accommodate a wide variety of [situations]. But requirements they are nonetheless”¹⁹³.

¹⁸² *Salim A. Hamdan v. Donald H. Rumsfeld et al.* 548 US 557 (2006)

¹⁸³ Indeed, §1005(e)(1) of the Detainee Treatment Act, Pub. L. 109-148 (2005), amended the *habeas corpus* statute (see, supra note 17) providing that “no court, justice, or judge shall have jurisdiction to hear or consider – an application for writ of *habeas corpus* filed by or on behalf of an alien detained by the Department of Defense at Guantanamo”.

¹⁸⁴ *Hamdan* (Opinion of the Court) at 11 [of the slip opinion]

¹⁸⁵ Bologna, C., *Hamdan v. Rumsfeld: Quando la tutela dei diritti è effetto della separazione dei poteri*, in 4 QUADERNI COSTITUZIONALI (2006), 813, 817. For a critical appraisal of “*Hamdan*’s refusal to give deference to the executive branch” see, however Julian Ku & John Yoo, *Hamdan v. Rumsfeld: the Functional Case for Foreign Affairs Deference to the Executive Branch*, in 23 CONSTITUTIONAL COMMENTARY (2006), 179, 180

¹⁸⁶ *Hamdan* (Opinion of the Court) at 25

¹⁸⁷ *Id.* at 29

¹⁸⁸ According to 10 USC §821, indeed, military tribunals for the trial of offences against the law of war may be established only “by statute or by the law of war”. A plurality of four judges also affirmed that in the absence of a specific congressional authorisation “none of the acts that *Hamdan* is alleged to have committed violates the law of war” (Opinion of Stevens J. at 36)

¹⁸⁹ *Hamdan* (Opinion of the Court) at 50

¹⁹⁰ *Id.* at 51 (italics in the original text)

¹⁹¹ de Londras, F., *The Right to Challenge the Lawfulness of Detention: an International Perspective on US Detention of Suspected Terrorists*, 12 Journal of Conflict and Security Law (2007), 223, 234

¹⁹² *Hamdan* (Opinion of the Court) at 66. Common Art. 3(1)(d) of the Four Geneva Convention of 1949 affirms that “In the case of armed conflict not of an international character [...] the following acts are and shall remain prohibited: [...] the

In conclusion, the USSCt in *Hamdan* took the first steps for assuring adequate protection of fundamental right in the fight against terrorism by making clear that “the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction”¹⁹⁴. The USSCt, in particular, departed from its previous minimalist position¹⁹⁵ favouring an intermediate, “process-based institutional approach”¹⁹⁶ that relies on a form of checks and balances between the legislative and executive branches. At the same time, however, the USSCt did not engaged directly with the relevant constitutional arguments at stake, and “the true novelty of the USSCt decision, in fact, is not a new interference in the activities of the war-making branches of government, but rather the acknowledgment of a relevant role for the Congress in times of emergency”¹⁹⁷.

*OMPI v. EU Council*¹⁹⁸

The issue in front of the CFI in *OMPI* was the same one already at stake in *Kadi*, i.e. the legality of an EC regulation¹⁹⁹ listing individuals suspected of being terrorist (with the freezing of their assets) without due process of law. Whereas the defendant urged the CFI to comply with its precedents denying the power of the EU judiciary to review the contested measure in the light of the fundamental principles of EU law, the CFI found it appropriate to “distinguish the present case”²⁰⁰. Contrary to *Kadi*, in fact, the challenged EC regulation this time implemented a UNSC resolution²⁰¹ that did “not specify individually the persons, groups and entities who are to be the subjects of”²⁰² the financial freezing measures, and therefore “the adoption of those acts [by the EU Council] f[ell] instead within the ambit of the exercise of [a] broad discretion”²⁰³.

As a consequence, the CFI recognised that “the EC institutions concerned, in this case the Council, are in principle bound to observe [the fundamental rights protected by the EU legal order] when they act to giving effect to [a UNSC] resolution”²⁰⁴. The CFI, thus, reviewed the measure adopted by the EU political institutions with regard to the right of due process of the petitioners²⁰⁵, taking thus care to ensure “that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights”²⁰⁶. In the end, the CFI ruled that

(Contd.) _____

passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples”.

¹⁹³ *Hamdan* (Opinion of the Court) at 72

¹⁹⁴ *Id.*

¹⁹⁵ Sunstein, C., *Clear Statement Principles and National Security: Hamdan and Beyond*, in 1 *Supreme Court Review* (2006), 1, 29

¹⁹⁶ Rosenfeld (supra note 2), 2082

¹⁹⁷ Bologna, C., *Tutela dei diritti ed emergenza nell'esperienza statunitense: una political question?*, in *Forum Costituzionale WP* (2007), 13-14

¹⁹⁸ Case T-228/02 *Organisation des Modjahedines du peuple d'Iran (OMPI) v. Council of the EU*, [2006] ECR II-4665

¹⁹⁹ Council Regulation (EC) No. 2580/2001 of 27 December 2001, OJ 2001 L 344/70

²⁰⁰ *Modjahedines* at §99

²⁰¹ Security Council Resolution 1373 (2001) of 28 September 2001

²⁰² *Modjahedines* at §101

²⁰³ *Id.* at §103 According to Elspeth Guild, *The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the 'Terrorist Lists'*, in 46 *Journal of Common Market Studies* 1 (2008), 173, 185 however, defining this argumentation “opaque, is, perhaps, an understatement”.

²⁰⁴ *Modjahedines* at §107

²⁰⁵ Cappuccio, L., *E' illegittima la decisione delle istituzioni comunitarie che non rispetta il diritto di difesa?*, in 2 *Quaderni Costituzionali* (2007), 416, 417

²⁰⁶ *Modjahedines* at §155

“the contested decision d[id] not contain a sufficient statement of reasons and that it was adopted in the course of a procedure during which the applicants right to a fair hearing was not observed [and that] furthermore the CFI was not [itself...] in a position to review the lawfulness of the decision”²⁰⁷.

The CFI therefore annulled the EC regulation in so far as it concerned the plaintiff, reaching the result that was, on the contrary, refused in *Kadi*²⁰⁸. Nonetheless, the CFI made clear that the review it was exercising was a form of manifest error scrutiny²⁰⁹, a review “restricted to checking that the rules governing procedure and the statements of reasons have been complied with, that the facts are materially accurate and that there has been no manifest error of assessment of the facts or misuse of powers”²¹⁰. Therefore, while reaffirming the “imperative”²¹¹ nature of its review, the EU judiciary carved for itself a “limited”²¹², intermediate space acknowledging that “that the Council enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions”²¹³.

The *OMPI* case, in conclusion, represented a step ahead from the first decisions on the legality of the EU counter-terrorism policies since it “br[ought] a measure of rule of law into a field which seems to have been tarnished by the arbitrary”²¹⁴.

“The EU judiciary experimented here its capacity of being rigorous in the protection of rights in one of the most thorny fields, given the fact that the seriousness of the international situation tends to attenuate the sensitiveness toward the rights of the suspected terrorist and produces a stronger propensity toward the demand of security rather than towards the demand of liberty and justice”²¹⁵.

At the same time, however, the CFI took the explicit position of adopting a middle review scrutiny²¹⁶, falling short of affirming an extended constitutional power to ensure the primacy of EU fundamental principles.

The Final Phase: Constitutional Self-Confidence

In some very recent terrorism-related decisions both the USSCt and the ECJ have eventually adopted a bold stand *vis à vis* the political branches of government showing a greater confidence about their indispensable constitutional role in contemporary liberal democracies. By submitting to a full and strict review the US and EU counter-terrorism measures, the two judiciaries have assured a more effective and consistent protection of the fundamental rights enshrined in the two constitutional orders and clearly reasserted that the rule of law shall survive, and remain in force, even in times of emergencies.

²⁰⁷ Id. at §173

²⁰⁸ Eeckhout, P., *Community Terrorism Listing, Fundamental Rights and UN Security Council Resolution: In Search of the Right Fit*, in 3 *European Constitutional Law Review* 2 (2007), 183, 190

²⁰⁹ Sadurski (supra note 3), 3-4

²¹⁰ *Modjahedines* at §159

²¹¹ Id. at §155

²¹² Id. at §159

²¹³ Id.

²¹⁴ Guild (supra note 77), 181

²¹⁵ Cartabia (supra note 53), 51

²¹⁶ Tridimas, T., *Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order*, in 34 *European Law Review* 1 (2009), 103, 122

*Boumediene v. Bush*²¹⁷

In *Boumediene* the USSCt was eventually presented with “a question not resolved by [its] earlier cases relating to the detention of aliens at Guantánamo: whether they have the constitutional privilege of *habeas corpus*”²¹⁸. After the USSCt ruling in *Hamdan*, in fact, Congress had enacted a new provision stripping US federal courts of the jurisdiction to hear claims by enemy combatants held in US custody in Guantánamo and explicitly extended its application to the pending cases²¹⁹. Since the USSCt could not ignore that this was a direct response to his holding and had to conclude that Congress had “deprive[d] the federal courts of jurisdiction to entertain the *habeas corpus* action”²²⁰, the question arose whether also the prisoners in Guantánamo enjoyed the constitutional privilege of the writ of *habeas corpus* and thus whether the contested statute was constitutional.

Writing for a majority of five judges, Kennedy J rejected the formalistic arguments of the Government and adopted a “functional approach to questions of extraterritoriality”²²¹, deciding about the application of the Constitution in Guantánamo on the basis of “objective factors and practical concern”²²². Since, indeed, “the US have maintained complete and uninterrupted control over Guantánamo for over 100 years”²²³, excluding the application of the privilege of *habeas corpus* there would mean to hold that “the political branches have the power to switch the Constitution on or off at will”²²⁴, thus “permit[ting] a striking anomaly in [the US] tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is’”²²⁵. Hence, the USSCt ruled “that Art. I, §9, sec. 2 of the Constitution has full effect at Guantánamo”²²⁶.

“In the light of this holding, the question bec[ame] whether the statute stripping jurisdiction to issue the writ [was constitutional] because Congress ha[d] provided for adequate substitute procedure for *habeas corpus*”²²⁷. According to the USSCt the “easily identified attributes of any constitutionally adequate”²²⁸ substitute for *habeas corpus* proceedings included entailing the prisoner a meaningful opportunity to rebut the reasons that legitimize his detention and the power of the court to order the release of an individual unlawfully detained. Since, however, these minimal requisites were lacking in the alternative procedure set up by the legislature (granting the power to try the enemy aliens held in

²¹⁷ *Lakhdar Boumediene et al. v. George W. Bush et al.* 553 US _ (2008)

²¹⁸ *Boumediene* (Opinion of the Court) at 1 [of the slip opinion]. The US Constitution, Art. I, §9, cl.2 (Suspension Clause) states that “the privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it”.

²¹⁹ Indeed §7(a) of the Military Commission Act, Pub. L. 109-366 (2006), stated that “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the United States” and §7(b) made clear that “The amendment made by §7(a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act”.

²²⁰ *Boumediene* (Opinion of the Court) at 8

²²¹ Id. at 34. Neuman, G., *The extraterritorial Constitution after Boumediene v. Bush*, in 39 Harvard Public Law WP (2008), 4

²²² *Boumediene* (Opinion of the Court) at 34

²²³ Id.

²²⁴ Id. at 35

²²⁵ Id. at 36 quoting the seminal decision of *Marbury v. Madison* 5 US 137 (1803) where judicial review was established.

²²⁶ *Boumediene* (Opinion of the Court) at 41 (see supra note 92) For a critique of the judgment, suggesting “a sneaking cosmopolitanism in the Supreme Court jurisprudence”, see, however Eric Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 228 University of Chicago Public Law and Legal Theory WP (2008), 16

²²⁷ *Boumediene* (Opinion of the Court) at 42

²²⁸ Id. at 50

Guantánamo to *ad hoc* combatant status review tribunals), the USSCt concluded that the contested statute “effect[ed] an unconstitutional suspension of the writ”²²⁹.

In the end, *Boumediene* reasserted the prominent constitutional role of the US judiciary in the balance of governance and in the protection of fundamental rights, also in times of emergency²³⁰. Contrary to the minimalist or moderate stand adopted in its previous rulings concerning the legality of US counter-terrorism measures, the USSCt showed here greater confidence²³¹, exercised a full review and “for the first time in history found it necessary to strike down a statute as violating the Suspension Clause, rather than construe it to avoid invalidity”²³². Striking a more appropriate balance between competing interests, the USSCt clearly stated that “security subsists, too, in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary detention and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers”²³³.

Kadi v. EU Council and Commission ²³⁴

The *Kadi* decision of the CFI was later appealed and the ECJ was hence called to decide in final instance about the legality of an EC regulation implementing a UNSC resolution listing individuals suspected of being terrorist and freezing their assets without due process of law²³⁵. In contrast to the CFI, the Grand Chamber of the ECJ began its reasoning by emphasising that “the EC is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid conformity of their acts with the basic constitutional charter, the EC Treaty”²³⁶. According to the ECJ, it followed from “those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all EC acts must respect fundamental rights”²³⁷.

Overruling the decision of the CFI declaring the immunity from judicial review of the UNSC resolutions implemented in the EU legal, the ECJ reaffirmed the prevalence of primary EU constitutional law, “in particular the general principles of which fundamental rights form part”²³⁸ over the UN Charter and the resolutions of the UNSC²³⁹. Therefore, the ECJ found that

²²⁹ Id. at 64

²³⁰ Martin Katz, *Guantanamo, Boumediene and the Jurisdiction-Stripping: The Imperial President Meets the Imperial Courts*, 25 University of Denver Legal RP (2008), 38

²³¹ Matheson, S., *Presidential Constitutionalism in Perilous Times* 144 (2009)

²³² Neuman (supra note 95), 2-3

²³³ *Boumediene* (Opinion of the Court) at 68-69

²³⁴ Joined Cases C-402/05 P & C-415/05 P *Yassin A. Kadi & Al Barakaat International Foundation v. EU Council and Commission* judgment of 3 September 2008, nyr

²³⁵ See supra note 38, 40, 41

²³⁶ *Kadi* at §281 quoting Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339 affirming for the first time that the EC Treaty is the Constitutional Charter of the EC.

²³⁷ *Kadi* at §285

²³⁸ Id. at §308

²³⁹ Lavranos, N., *Case Note Kadi v. EU Council*, in *Legal Issues of Economic Integration* (2009), 157. For a critique, however, see De Burca, G., *The European Court of Justice and the International Legal Order after Kadi*, Jean Monnet WP (2008), 1 according to which “the judgment is a significant departure from the conventional presentation and widespread understanding of the EU as an actor which maintains a distinctive commitments to international law and institutions”. According to Andrea Gattini, *Case Note Kadi v. Council*, in 46 *Common Market Law Review* (2009), 213, 224 from this point of view the judgment of the ECJ “gives rise to mixed feelings. On the one hand one can not but welcome the unbending commitment of the ECJ to the respect of human rights, but on the other hand the relatively high price, in terms of coherence and unity of the international legal system [...] is worrying”.

“the EC judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all EC acts in the light of the fundamental rights forming an integral part of the general principles of EC law, including review of EC measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the SC”²⁴⁰

and directly engaged in a strict and attentive scrutiny of the contested regulation.

On the merit of the claims raised by the appellant, concerning violation of their fundamental rights, the ECJ held, specifically, that “in the light of the actual circumstances surrounding the inclusion of the appellants’ names in the list of persons and entities covered by the restrictive measures [...] the right of defence, in particular the right to be heard, and the right to effective judicial review were patently not respected”²⁴¹. In addition, according to the ECJ, also the freezing of assets deriving from inclusion on the list “constituted an unjustified restriction of [the] right to propriety”²⁴². As a result, confirming that “in the EU’s flawed system of governance, democracy finds solace in judicial review”²⁴³, the ECJ declared the appeal well founded and annulled the contested EC regulation so far as it concerned the applicants.

In *Kadi*, the ECJ rejected the deferential stand of the CFI and followed the suggestions of AG Maduro of taking seriously, as “constitutional court of the municipal order that is the EC”²⁴⁴, the duty to preserve the rule of law²⁴⁵. Furthermore, the ECJ reasserted the role of the judiciary in times of emergencies by simply excluding that a “regulation [could] escape all review by the EC judicature once it ha[d] been claimed that the act [...] concern[ed] national security and terrorism”²⁴⁶. As indeed the AG again correctly pointed out, “especially in matters of public security, the political process is liable to become overly responsive to immediate popular concern, leading the authorities to allay the anxiety of the many at the expenses of the rights of the few. This is precisely when courts ought to get involved”²⁴⁷, with “constitutional confidence”²⁴⁸.

The Role of the Judiciary in Times of Emergencies

The purpose of this paper was to analyse the role of the judiciary in times of emergencies. The role of the judiciary springs from the institutional position that courts have *vis à vis* the other branches of government. Directly linked with this institutional position, then, is the type of judicial review that courts exercise. Therefore, if one wants to derive inductively the role of the US and EU judiciaries in times of emergency from the assessment of their case law, the task may be achieved either looking at the function that courts carve-out for themselves and for the other institutional actors, or at the degree of intensity according to which they scrutinize the counter-terrorism measures of the other bodies. Whereas, indeed, the USSCt often reasons in institutional terms, specifying what the extent of its power is with regard to the executive and the legislature, the ECJ prefers to adopt the second approach, spelling out what kind of review it will adopt.

²⁴⁰ *Kadi* at §326

²⁴¹ *Id.* at §334

²⁴² *Id.* at §370

²⁴³ Tridimas (supra note 90), 103

²⁴⁴ *Kadi* (Opinion of Maduro AG) at §37

²⁴⁵ Curtin, D., & Eckes, C., *The Kadi Case: Mapping the Boundaries between the Executive and the Judiciary in Europe*, in 5 *International Organisations Law Review* (2008), 365, 366

²⁴⁶ *Kadi* at §343

²⁴⁷ *Kadi* (Opinion of Maduro AG) at §45

²⁴⁸ Tridimas (supra note 90), 114

The role of the judiciary in times of emergencies directly effects the protection of fundamental rights, that are proclaimed and enshrined in the constitutional norms of both the US and EU legal systems. The safeguard of fundamental liberties, indeed, follows from the allocation of powers among the different institutions, and from the kind of judicial review that courts undertake to evaluate the constitutionality of acts adopted by the executive and legislative powers. When the judiciary proclaims self-restraint and adopts a very limited public security scrutiny, the protection of fundamental rights is minimal. When, then, courts craft for themselves a partial role and engage in a middle review scrutiny tackling the manifest error of appreciations of the political branches of government, the protection is intermediate. When, on the contrary, courts claim a confident role and exercise a strict, high level scrutiny, rights are fully protected.

The case law of the USSCt and the ECJ highlights that the role of the judiciary in times of emergencies evolves dynamically over time. In a first, initial phase, both courts owed much deference to the political branches of government and employed a form of emergency constitutional scrutiny that shielded fundamental rights only at a minimum. In *Hamdi* the USSCt acknowledged that the executive power held wide discretion in fighting the war against terror and that the judicial warrantees deriving from the constitutional principle of due process could be tailored to alleviate the undue burden over the war making branches of government. Similarly, in *Kadi*, the CFI found that the link between the EU and the international legal order exempted a domestic measure implementing a UNSC resolution, infringing due process rights, from judicial review (with the exception of the compatibility with the minimal and vague requirements of *jus cogens*).

In a second, intermediate phase, both courts gradually modified their stand and begun restoring the principle of the rule of law. By reducing the discretion of the political powers and employing a more sharp form of review, i.e. the manifest error of appreciation scrutiny, the USSCt and the ECJ enhanced the protection of fundamental rights. The former, in *Hamdan*, interpreted narrowly the congressional statute limiting its jurisdiction and firmly sanctioned the broad counter-terrorism policies of the executive, favouring a more comprehensive involvement of both the judiciary and the legislature in the war on terror. In *OMPI*, in its turn, the CFI operated a careful distinguishing from its precedent in *Kadi*, found that it could review whether instruments adopted by the EU did manifestly erroneously violate core due process rights and quashed the contested EC regulation in so far as it applied to the plaintiff.

In the third, final phase the USSCt and the ECJ reasserted to its full extent the principle of the rule of law and the primary value of protecting fundamental constitutional rights. Both courts showed greater confidence about their institutional role *vis à vis* the other branches of government and exercised a strict, high level scrutiny assessing whether the counter-terrorism measures complied with the human rights standard enshrined in the US and EU constitutional order. In *Boumediene* the USSCt recognised that the Constitution, and more specifically the privilege of *habeas corpus*, applied extra-territorially in Guantánamo and declared unconstitutional a statutory provision stripping federal courts of *habeas corpus* jurisdiction without providing an adequate substitute. The ECJ, then, in *Kadi*, overruled the decision of the CFI and clarified that all EU measures, no matter their origin, must comply with the fundamental rights of the EU legal order.

Various reasons may explain this evolution in the jurisprudence of the USSCt and of the ECJ, with regard to US and EU counter-terrorism measures. The time factor certainly bears a primary relevance: in the aftermath of a terrorist attack (like, i.e., 9/11), when the emergency is at its pick, the judiciary is much more prone to adopt a hands off approach and leave room for manoeuvre to the political branches of government²⁴⁹. Under the environmental pressure and the functional constraint of the time,

²⁴⁹ Cole, D., *Enemy Aliens*, in 54 *Stanford Law Review* (2002), 953, 955; Barak, A., *Democrazia, terrorismo e corti di giustizia*, in *Giurisprudenza Costituzionale* (2002), 3385, 3393; Bin, R., *Democrazia e terrorismo*, in *Forum Costituzionale WP* (2007), 4; Ciampi, A., *Sanzioni del Consiglio di Sicurezza e diritti umani* 330 (2007). For a

court will favour the demand for security at the expense of liberty and justice. As time goes by and the “reassurance” function²⁵⁰ performed by the political powers becomes less pressing, however, courts shift back and make up for the lost time reasserting the principle of the rule of law and requiring that the pursuit of the exigencies of security respects fundamental rights²⁵¹.

Furthermore, for the individuals affected by restrictive counter-terrorism measures, addressing courts may be far easier than attempting to influence and modify the political process. Even if judicial decision-making is more constrained than political decision-making²⁵², courts learn from direct experience and may progressively calibrate the scope of their response by taking into account the effects of their previous decisions²⁵³. In addition, thanks to their independent institutional position, which is not conditional on the direct democratic process, courts may more easily turn to civil-libertarian positions without facing the electoral risk of being considered weak on terrorism. Several authors have departed from these elements to elaborate, *de lege ferenda*, a more adequate institutional framework to respond to the situations of emergency²⁵⁴.

This paper does not dare so much: it has a more modest purpose. It analyzes what is the role of the judiciary in times of emergencies with the purpose of shading light over a fragmented case law and rationalising it in a coherent comparative framework. In my view it is possible to design a dynamic model, that, *de jure condito*, explains (as in the structured table below) the evolving role of both the American and European courts during the terrorist emergency and, consequently, the effectiveness in the protection of fundamental rights, by taking into account the institutional position of the judiciary *vis à vis* the other branches of government and the kind of review that it exercises.

(Contd.) _____

quantitative analysis see then, Lee Epstein, Daniel Ho, Gary King & Jeffrey Segal, *The Supreme Court during Crisis: How War Affects only Non War Cases*, in 80 *New York University Law Review* 1 (2005), 1, 9

²⁵⁰ Ackerman (supra note 2), 44


²⁵¹ Tushnet, M., *Defending Korematsu? Reflection on Civil Liberties in Wartime*, in *Wisconsin Law Review* 2 (2003), 273, 274; Stone, G., *Civil Liberties in Wartime: The American Perspective*, in *Associazione Italiana dei Costituzionalisti WP* (2003); Frosoni, T.E., & Bassu, C., *La libertà personale nell'emergenza costituzionale*, in *Democrazie protette e protezione della democrazia* (Alfonso Di Giovine ed., 2004), 75, 86; Paolo Bonetti, *Terrorismo, emergenza e costituzioni democratiche* 37 (2006)

²⁵² For a theory of constraint see: *Théorie des Contraintes Juridiques* (Michel Troper et al. eds., 2005)

²⁵³ Rosenfeld, M., *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, in 2 *International Journal of Constitutional Law* (2004), 633, 635 On the discursive nature of the judicial function see Maduro, M.P., *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, in 1 *European Journal of Legal Studies* 2 (2007), 1, 15 Academia also may influence the evolution of the jurisprudence during times of emergencies, as highlighted by Neal Katyal, *Hamdan v. Rumsfeld: the Legal Academy Goes to Practice*, 120 *Harvard Law Review* (2006), 65, 67

²⁵⁴ Ackerman (supra note 2), 3

<i>Role of the judiciary</i>	Minimal	Intermediate	Strong
<i>a) Institutional position</i>	Self-restraint / No role for the judiciary	Partial role for the judiciary	Self-confidence / Full role for the judiciary
<i>b) Type of Review</i>	Emergency constitutional scrutiny / Public security scrutiny	Manifest error scrutiny / Middle review scrutiny	Human rights scrutiny / High level scrutiny
<i>Protection of fundamental rights</i>	Limited	Intermediate	Full

Time: t0 = beginning of the emergency 

Conclusion

As the paper demonstrates, from *Hamdi* to *Kadi*, the role of both the US and the EU judiciary in times of emergency evolves in the same dynamic manner. The comparison between the case law of the USSCt and of the ECJ on counter-terrorism measures has highlighted that courts move from an initial phase of judicial self-restraint and limited review, via an intermediate phase of judicial pragmatism and manifest error review, to a conclusive phase of judicial self-confidence and full fundamental rights review. This evolution necessarily effects the protection of fundamental constitutional rights in the US and EU legal orders, which is at the beginning reduced at a minimum but later reasserted and finally effectively ensured.

The comparative perspective, with its *caveats*, helps therefore understanding the judicial developments on both side of the Atlantic and to rationalize them within a single framework of analysis. Whereas the reaction to the tragic events of 9/11 jeopardised the respect of fundamental constitutional rights, the US and EU judiciaries engaged step by step in the effort to restore the rule of law, and to strike a more appropriate balance between liberty and security, in order to avoid that the security of the many be taken at the expense of the liberty of the few; or, to quote Montesquieu, that “in countries where liberty is most esteemed, there [be] laws by which a single person is deprived of it, in order to preserve it for the whole community”²⁵⁵.

²⁵⁵ Montesquieu, *The Spirit of the Laws*, Book 12, Chapter 19

Human Rights Dilemmas in Terrorist Profiling

Tuomas Ojanen²⁵⁶

Post 9/11, terrorist-profiling practices have increased on an unprecedented scale. Law enforcement agencies are increasingly “processing” personal data for terrorist profiles; this is actually among the very reasons why personal data is processed in the first place. De facto terrorist-profiles are also predominantly based on the use of such criteria as “race”, colour, religion, ethnic and national origin to single out persons for enhanced scrutiny.

Terrorist-profiling practices therefore raise the question as to their conformity with a number of human rights guarantees under the principle of non-discrimination, the protection of personal data and other human rights norms. The purpose of the paper is to examine to what extent, if any, terrorist profiling practices are compatible with the principle of non-discrimination and the fundamental rules pertaining to the protection of personal data. To do this, the paper also looks at various approaches to defining profiling in the context of countering terrorism, as well as describes various de facto manifestations of terrorist-profiling practices.

Introduction: The Scope and Purpose of the Paper

The purpose of this paper is to discuss “profiling” in the context of countering terrorism (hereinafter also “terrorist-profiling”). The discussion is through the prism of fundamental and human rights, with emphasis on the right to respect for private life and the protection of personal data, on the one hand, and the principle of non-discrimination, on the other hand. Since the focus is on the European Union (EU) situation, existing European human rights treaties and other instruments for the protection of fundamental and human rights, such as the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, the European Convention on Human Rights (the ECHR), and the Charter of Fundamental Rights of the European Union will provide the general legal framework for discussion. As the discussion pertains to terrorist-profiling practices, other forms of profiling in the fields of law enforcement and administrative control will fall outside the scope of this paper.

The following provides an overview of various approaches to defining profiling in the context of countering terrorism. It also briefly describes some *de facto* manifestations of terrorist-profiling practices. Section 3 discusses terrorist-profiling practices in light of the right to respect for private life and, particularly, the fundamental rules pertaining to the protection of personal data, as stipulated under Article 8 of the European Convention on Human Rights and the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, and as reaffirmed by Articles 7 and 8 of the EU Charter of Fundamental Rights. Section 4 examines the compliance of terrorist-profiling with the principle of non-discrimination, as guaranteed under various international and regional human rights treaties, and as reaffirmed by Article 21 of the EU Charter of Fundamental Rights. Section 5 condenses the essential message of the paper into a few words.

“Profiling” in the Context of Countering Terrorism: Manifestations and Definitions

Terrorist-profiling practices have become a widespread and significant component of counter-terrorism activities in recent years. The EU has encouraged the Member States to co-operate with

²⁵⁶ Professor of Constitutional Law, University of Helsinki. *Member* of the research project team “Europe as a polity”, which is part of Centre of Excellence (CoE) in Research in the Foundations of European Law and Polity, financed by the Academy of Finland, and directed by professor Kaarlo Tuori.

another and with the European Police Office (Europol) for the purpose of developing terrorist profiles, particularly computer-assisted profiling, “to facilitate targeted searches for would-be terrorists”.²⁵⁷ For this purpose, a group of experts from several EU Member States and from Europol has also been established.

According to Draft Council Recommendation on the development of terrorist profiles, “[d]eveloping terrorist profiles means putting together a set of physical, psychological or behavioural variables, which have been identified, as typical of persons involved in terrorist activities and which may have some predictive value in that respect.”²⁵⁸ On the basis of these profiles

“each Member State searches the relevant national data bases (e.g. registers of residents, registers of foreigners, universities etc.) subject to the provisions of national law, for persons who need to be vetted more closely by the security authorities. The more detailed the offender profile, the smaller the group of persons covered by the search.”²⁵⁹

Terrorist-profiling practices may manifest themselves in a variety of ways. Terrorist-profiling practices have occurred in the context of stop and search and identity checks by police, during security checks at various gates of entry, and in the selection of persons for closer scrutiny in counter-terrorism activities.²⁶⁰

An illustrative case of the use of stop and search powers by police can be found from the United Kingdom. Under the 2000 Terrorism Act, which authorises the police to stop and search persons and vehicles without having to show any reasonable suspicion, stops and searches increased significantly post “9/11”. A critical analysis of the Home Office’s stop and search statistics revealed that the use of stop and search powers by police affected most often ethnic minorities, i.e. persons of Asian ethnicity and black people. For example, while stops and searches increased since 9/11 by 150 percent in total in 2002/2003, they affected Asian people up 285 percent and black people up 229 percent. By 2003-2004, Asian people were about 3.6 times more likely, and black people about 4.3 times more likely, to be stopped and searched under counter-terrorism legislation than white people.²⁶¹

One distinct “sub-category” of terrorist-profiling is so-called “data mining” which refers to the use of computer-aided searches of data bases on the basis of certain pre-selected criteria. In recent years the “processing of personal data”²⁶² from different sources for law enforcement purposes has increased on

²⁵⁷ Council of the European Union, Memo from German Delegation to the Article 36 Committee, Subject: Note on computer-aided preventive searches carried out by individual Member States on the basis of coordinated offender profiles (Europe-wide electronic profile searches), Brussels, October 31, 2002, 13626/02, LIMITE ENFOPOL 130.

²⁵⁸ Council of the European Union, Draft Council Recommendation on the development of terrorist profiles, Brussels, 14 October 2002 11858/1/02, REV 1 LIMITE ENFOPOL 117.

²⁵⁹ Council of the European Union, Memo from German Delegation to the Article 36 Committee, Subject: Note on computer-aided preventive searches carried out by individual Member States on the basis of coordinated offender profiles (Europe-wide electronic profile searches), Brussels, October 31, 2002, 13626/02, LIMITE ENFOPOL 130.

²⁶⁰ For an overview of *de facto* profiling practices, see the EU Network of Independent Experts in Fundamental Rights Opinion 4. Ethnic profiling. December 2006. Reference: CFR-CDF.Opinion4-2006, pp. 26-39. Available at: http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2006_4_en.pdf (9.1.2009).

²⁶¹ See Martin Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251 OF 15 MARCH 2006 ENTITLED “HUMAN RIGHTS COUNCIL”, A/HRC/4/26, 29 January 2007, at paragraphs 37 and 53. Available at: <http://daccessdds.un.org/doc/UNDOC/GEN/G07/105/07/PDF/G0710507.pdf?OpenElement> (9.1.2009).

²⁶² According to Article 2 a of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23.11.1995, p. 31 (the so-called Data Protection Directive), “personal data” denotes “any information relating to an identified or identifiable natural person (‘data subject’); “an identifiable person” is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity”.

an unprecedented scale, terrorist-profiling purposes having actually been among the very reasons why personal data have been processed in the first place.²⁶³

A neat illustration is the massive profiling operation - *Rasterfahndung* - carried out in Germany from the end of 2001 until early 2003. This search method was developed by the German authorities in order to detect potential 'dormant' terrorists (such as the 'Hamburg cell' which prepared the 9/11 attacks).

Within *Rasterfahndung*, German police reportedly collected sensitive personal data from public and private databases pertaining to approximately 8.3 million persons.¹² The terrorist profile used within *Rasterfahndung* was largely developed by putting together a set of characteristics of the members of the so-called "Hamburg cell" around Mohammed Atta, one of the 9/11 hijackers. Accordingly, these criteria included:

- 18 - 40 years old
- Male
- Current or former student
- Resident in the regional state (Land) where the data is collected
- Muslim
- Legal residency in Germany
- Nationality or country of birth from a list of 26 countries with predominantly Muslim population / or stateless person / or nationality "undefined" or "unknown".

Approximately 32,000 persons were identified as potential terrorist sleepers and more closely examined. In *none* of these cases did *Rasterfahndung* lead to the bringing of criminal charges for terrorism-related offences.²⁶⁴ As a consequence, the Berlin Data Protection Commissioner issued the following statement:

Rasterfahndung was without result. No arrests or conviction resulted from this.... Two people were arrested in Hamburg soon after 9/11, but they were not caught by Rasterfahndung. They were caught using conventional methods, such as telephone tapping ... Rasterfahndung took up an enormous amount of manpower and time within the police force."²⁶⁵

In 2006, the German Constitutional Court (*Bundesverfassungsgericht*) ruled that *Rasterfahndung* was in breach of the individual's fundamental right of self-determination over personal information under Article 2(1) and 1 of the German Constitution (*Grundgesetz*). According to the Court, the preventive use of this profiling method would only be compatible with the proportionality requirement if it were shown that the public authorities are acting in response to a 'specific endangerment' to national security or human life, rather than a general threat situation as it existed since 11 September 2001.²⁶⁶

The aforementioned descriptions do not exhaust the spectrum of *de facto* terrorist-profiling practices. Besides, there is a lack of complete and detailed knowledge as to the range of terrorist-profiling practices by the police and other authorities. This is a consequence of three distinct, yet inter-related reasons. The first reason simply is that information on these practices is hard to get. While terrorist-

²⁶³ See Opinion of the European Agency for Fundamental Rights on the Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes, paragraph 34. Available at: http://fra.europa.eu/fra/material/pub/discussion/FRA_opinion_PNR_en.pdf (9.1.2009).

²⁶⁴ See in more detail the EU Network of Independent Experts in Fundamental Rights Opinion 4. Ethnic profiling, p. 47.

²⁶⁵ Justice Initiative Interview, Berlin, March 2006. Quoted in the EU Network of Independent Experts in Fundamental Rights Opinion 4. Ethnic profiling, p. 47, footnote 149. For *Rasterfahndung*, see also D. Moeckli, "Discriminatory Profiles: Law Enforcement after 9/11 and 7/7." 2005 *European Human Rights Law Review* 517 (2005).

²⁶⁶ BVerfG, 1 BvR 518/02, 4 April 2006, available at http://www.bverfg.de/entscheidungen/rs20060404_1bvr051802.html, (9.1.2009).

profiling appears to be a significant and widespread component of counter-terrorism measures in Europe and elsewhere, it still remains relatively little documented – or unexplored in academic literature, for that matter.²⁶⁷ There exists little domestic, European and international case-law on profiling in the context of countering terrorism.²⁶⁸ The second reason, partially explaining problems in obtaining information, is that terrorist-profiling practices are not necessarily explicit; they may also be *implicit*, in the sense that they may be based on stereotypical (and often unconscious) assumptions about the propensity of a certain group for terrorism. A third reason to mention is that terrorist-profiling often takes the form of *practices* by police and other authorities which remain *unregulated* or may even be prohibited by law. As shall be seen in due course, a failure to regulate terrorist-profiling practices is a cause for concern from the perspective of fundamental and human rights, not least because the lack of regulation inhibits the monitoring of these practices, as well as ensuring their compatibility with fundamental and human rights in the first place.

Against this background, it should not come as a surprise that reaching a precise and unequivocal definition of terrorist-profiling has also proved to be impossible. There exists no “official” EU or international definition of terrorist profiling – or terrorism in general, for that matter.²⁶⁹ Instead, there are several ways to define profiling in the context of countering terrorism, depending on the perspective of consideration.

Among various concepts, “profiling” can be regarded as a kind of “umbrella” term. It is used to describe “the systematic association of sets of physical, behavioural or psychological characteristics with particular offences and their use as a basis for making law-enforcement decisions.” Profiles can be either *descriptive* or *predictive*. Descriptive profiles are “designed to identify those likely to have committed a particular criminal act and thus reflecting the evidence the investigators have gathered concerning this act.” Predictive profiles, in turn, are “designed to identify those who may be involved in some future, or as-yet-undiscovered, crime.”²⁷⁰

From the perspective of fundamental and human rights, profiling is, in principle and at least in its descriptive form, a lawful means of law-enforcement activity. Detailed profiles based on “factors that are statistically proven to correlate with certain criminal conduct may be effective tools in order to better target limited law-enforcement resources”.²⁷¹ However, the development of these profiles for operational purposes “can only be accepted in the presence of a fair, statistically significant demonstration of the relations between these characteristics and the risk of terrorism”.²⁷² Thus, profiling practices based on unexamined generalisations and stereotyping constitute arbitrary and disproportionate interferences with human rights.

Typically, terrorist profiles are *proactive* as they aim at identifying individuals or groups of people who merit further screening or are considered having a propensity for terrorism. Such profiles usually

²⁶⁷ See, however, De Schutter, Olivier ja Ringelheim, Julie: *Ethnic Profiling: A Rising Challenge for European Human Rights Law*. *Modern Law Review*, 71(3), 358-385. Moeckli, Daniel: “*Discriminatory profiles: law enforcement after 9/11 and 7/7*” (2005) (5) *European Human Rights Law Review*, s. 517-532. See also Goldston, J.: *Ethnic Profiling and Counter-Terrorism : Trends, Dangers and Alternatives*. June 2006. Available at: http://www.soros.org/initiatives/osji/articles_publications/articles/counterterrorism_20060606/goldston_20060606.pdf (9.1.2009)

²⁶⁸ The EU Network of Independent Experts in Fundamental Rights Opinion 4. Ethnic profiling, pp. 40-48.

²⁶⁹ It is a different thing that Council Framework Decision of 13 June 2002 on combating terrorism, 2002/475/JHA, Official Journal of the European Communities, L164/3 includes a definition of terrorist offences, terrorist groups, offences relating to terrorist activities, and penalties.

²⁷⁰ See Scheinin’s report, paragraph 33. See also E.U. Network of Independent Experts on Fundamental Rights, Ethnic profiling, CFR-CDF.Opinion4-2006, pp. 9-13.

²⁷¹ Scheinin’s report, paragraph 33.

²⁷² The EU Network of Independent Experts in Fundamental Rights, Opinion 4. Ethnic profiling, pp.13-14. See also Scheinin’s report, paragraph 33-34.

start from an analysis of past terrorist attacks and the composition of known terrorists and terrorist organisations. The idea is then to identify characteristics and patterns among the individuals that have been involved in terrorism and, accordingly, develop terrorist profiles on the basis of these characteristics and patterns.

Draft Council Recommendation of 2002 on the development of terrorist profiles identified a variety of 'elements' for terrorist profiles. These elements included nationality, travel document, method and means of travel, age, sex, physical distinguishing features (e.g. battle scars), education, choice of cover identity, use of techniques to prevent discovery or counter questioning, places of stay, methods of communication, place of birth psycho-sociological features, family situation, expertise in advanced technologies, skills at using non-conventional weapons, attendance at training courses in paramilitary, flying and other specialist techniques.²⁷³

As is neatly illustrated by the use of stop and search powers in the UK and the German *Rasterfahndung* program, *de facto* terrorist-profiles are predominantly relying on grounds such as "race", colour, religion, ethnic and national origin. At background, there is the tendency towards (stereotyped) thinking that persons of a certain "race", national or ethnic origin or religion are particularly likely to become involved in terrorist activities.

Accordingly, the concept of *ethnic profiling* frequently appears in European discourse on profiling within the context of countering terrorism. "Ethnic profiling" not only catches ethnic, religious and national traits in terrorist profiling practices, but it also lifts into attention the implications of these practices on the *principle of non-discrimination*.

However, it deserves to be emphasised that ethnic profiling does not necessarily violate the principle of non-discrimination. For example, ethnic profiling aiming at monitoring the practices of law enforcement authorities or ensuring a diverse composition of the workforce may be permissible.²⁷⁴ It thus always requires a case-by-case analysis of the objectives pursued and the means used to discover whether ethnic profiling is really in breach of the principle of non-discrimination.

Against this background, the *EU Network of Independent Experts on Fundamental Rights* proposed in its thematic Opinion on Ethnic Profiling in 2006 that ethnic profiling is "the practice of classifying individuals according to their race or ethnic origin, their religion or their national origin, on a systematic basis, whether by automatic means or not, and of treating these individuals on the basis of such a classification."²⁷⁵ Therefore, this definition presents ethnic profiling as a *neutral process* which does not *a priori* constitute a violation of the prohibition against discrimination on grounds of ethnic or national origin, "race" and religion.

However, profiling practices in the context of countering terrorism all too often do raise serious questions as to their compatibility with the principle of non-discrimination. As a consequence, ethnic profiling has often been defined in ways which explicitly emphasises the link between ethnic profiling and discrimination. *European Commission against Racism and Intolerance* (ECRI), for instance, has defined ethnic profiling as "the use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin, in control, surveillance or investigation activities".²⁷⁶ Similarly, *James Goldston*, the Executive Director of the

²⁷³ Council of the European Union, Draft Council Recommendation on the development of terrorist profiles, Brussels, 14 October 2002 11858/1/02, REV 1 LIMITE ENFOPOL 117.

²⁷⁴ The EU Network of Independent Experts in Fundamental Rights, Opinion 4. Ethnic profiling, pp 9-10.

²⁷⁵ The EU Network of Independent Experts in Fundamental Rights, Opinion 4. Ethnic profiling, at p. 9. See also de Schutter and Ringelheim, where ethnic profiling is defined as "the practice of using 'race' or ethnic origin, religion, or national origin, as either the sole factor, or one of several factors in law enforcement decisions, on a systematic basic, whether or not concerned individuals are identified by automatic means."

²⁷⁶ European Commission against Racism and Intolerance (ECRI) General policy recommendation No 11 on combating racism and racial discrimination in policing, adopted on 29 June 2007, CRI/Council of Europe (2007)39, paragraph 1.

Open Society Justice Initiative, has defined ethnic profiling as “the use of racial, ethnic or religious stereotypes in making law enforcement decisions to arrest, stop and search, check identification documents, mine databases, gather intelligence and other techniques.” Thus, this definition is also capable of bringing out the important link between ethnic profiling, on the one hand, and ethnic, religious or national *stereotyping* in profiling practices by various law enforcement authorities, on the other hand.²⁷⁷

Terrorist-Profiling Practices in Light of the Right to Respect for Private Life and the Protection of Personal Data

General remarks

Personal data can and would also be used for profiling purposes, including terrorist profiles. To be sure, this is actually among the very reasons why personal data are processed in the first place. No wonder, then, that counter-terrorism efforts since 9/11 have resulted in “the processing of personal data from different sources on an unprecedented scale”.²⁷⁸

The processing of personal data and, *a fortiori*, profiling constitutes an interference with the right to respect for private life and the protection of personal data, as protected under Article 8 of the ECHR and Articles 7 and 8²⁷⁹ of the Charter of Fundamental Rights of the European Union; Article 7 of that Charter substantially reproduces Article 8 of the ECHR guaranteeing the right to respect for private life, whereas Article 8 of the Charter expressly proclaims the right to protection of personal data.

Under Article 8.2 of the ECHR, an interference with the right to respect for private life is only permitted under the following three *cumulative* conditions, each of which has an autonomous function to fulfil.

- i. The objective must be legitimate and correspond to a pressing social need listed in Article 8(2) of the European Convention on Human Rights ;
- ii. The conditions under which the restriction is imposed must be defined clearly by law, in legislation or regulations which must be accessible to the individual concerned and protect that individual from arbitrariness through, *inter alia*, precision and foreseeability; and
- iii. The means chosen must be proportionate to the end pursued so that they can be considered necessary in “a democratic society”.

Similarly, the fundamental rules pertaining to the protection of personal data must be observed in terrorist-profiling practices based on data-mining. These rules are recognised by a number of instruments adopted within the Council of Europe, notably by the Convention for the Protection of

(Contd.) _____

See also the definition of ethnic profiling by the European Commission in its letter of 7 July 2006 where the Commission defines ethnic profiling as “encompassing any behaviour or discriminatory practices by law enforcement officials and other relevant public actors, against individuals on the basis of their race, ethnicity, religion or national origin, as opposed to their individual behaviour or whether they match a particular ‘suspect’ definition.”

²⁷⁷ Goldston, J.: *Ethnic Profiling and Counter-Terrorism : Trends, Dangers and Alternatives*. June 2006, available at: http://www.soros.org/initiatives/osji/articles_publications/articles/counterterrorism_20060606/goldston_20060606.pdf (9.1.2009)

²⁷⁸ Citation is from Ben Hayes, *A Failure to Regulate: Data Protection and Ethnic Profiling in the Police Sector in Europe*. In *Justice Initiative, Ethnic Profiling by Police in Europe*, 32-43, at p. 37. Available at: <http://www.statewatch.org/news/2005/jun/ben-hayes-A-Fai.pdf> (9.1.2009).

²⁷⁹ For a commentary of Article 8 of the EU Charter of Fundamental Rights on the protection of personal data, see *Tuomas Ojanen: Article 8: Protection of Personal Data*. In *European Network of Experts on Fundamental Rights and the European Commission, Commentary on the Charter of Fundamental Rights of the European Union*, June 2006, 90-97. Available at: http://ec.europa.eu/justice_home/doc_centre/rights/charter/doc_rights_charter_en.htm#network_commentary (9.1.2009)

Individuals with regard to Automatic Processing of Personal Data (1981). Article 8 (2) of the EU Charter of Fundamental Rights also reaffirms these fundamental rules by providing that personal data “must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.” It is also to be emphasised that Article 8 of the EU Charter of Fundamental Rights displays that, in the current state of evolution of European law, the protection of personal data should be increasingly conceived of as featuring as an *autonomous fundamental right*, distinct from the right to respect of private and family life under Article 8 of the ECHR and Article 7 of the EU Charter of Fundamental Rights. Although the Charter is not yet legally binding, prior to the entry into force of the Lisbon Treaty, the Court of Justice has already made a number of references to the Charter, including Article 8 on the protection of personal data.²⁸⁰

The fundamental rules pertaining to the protection of personal data are enshrined in more detail in Directive 95/46/EC (the so-called ‘Data Protection Directive’) which is the first – and still major – legislative measure adopted at the EU level concerning the protection of individuals with regard to the processing of personal data.²⁸¹ In light of that directive, read in conjunction with the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and other instruments within the Council of Europe framework²⁸², these fundamental rules pertaining to the protection of personal data can be formulated as follows:²⁸³

- i. Processing of personal data must be lawful and fair to the individuals concerned.
- ii. The purposes of the processing should be explicit and legitimate and must be determined at the time of the collection of the data.
- iii. Data must be relevant and not excessive in relation to the purpose for which they are processed. Data must also be accurate and where necessary, kept up to date.
- iv. Personal data can only be processed if the data subject has unambiguously given his or her consent. If the rights of data subjects fail to be respected, the individuals enjoy a judicial remedy that allows them to access and rectify personal data relating to them.
- v. Transfers of personal data to third countries are to be allowed only if those countries ensure an adequate level of protection.
- vi. The EU and its Member States must provide one or more independent authorities entrusted with the task of ensuring the correct application of the personal data rules.

Compliance of terrorist-profiling practices with requirements under Article 8 of the ECHR and the fundamental rules pertaining to the processing of personal data

Test of legitimate aim

The aim of (predictive) terrorist-profiling practices is the prevention of terrorist attacks. At a general level, this can be regarded as constituting a legitimate aim and, accordingly, corresponding to “a pressing social need” listed in Article 8(2) of the European Convention on Human Rights. Similarly, it can be regarded as satisfying “the legitimate purpose requirement” under the fundamental rules

²⁸⁰ See e.g. Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU*, judgment of 29 January 2008. In its judgment, the ECJ, inter alia, notes at paragraph 64 that “Article 8 of the Charter expressly proclaims the right to protection of personal data”.

²⁸¹ Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. OJ L 281 of 23.11.1995, p. 31.

²⁸² See also COE Recommendation R (87) 15 of the Committee of Ministers to Member States, regulating the Use of Personal Data in the Police Sector (1987).

²⁸³ See Ojanen 2006, p. 92-93.

pertaining to the protection of personal data. However, since there is no internationally agreed definition of terrorism, one difficulty encountered within the context of this condition may arise out from controversies over the definition of terrorism. If a controversy arises as regards the test of legitimate aim, the state will have to show the presence of “a pressing social need”.

“*In accordance with the law*”

The requirement that the grounds on which the processing of personal data is allowed shall be clearly and precisely laid down by the law is one of the fundamental principles pertaining to the protection of personal data. This is, *inter alia*, indicated by Article 8 of the EU Charter of Fundamental Rights which requires that personal data must “be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law”. Similarly, Article 8 of the European Convention on Human Rights, which has been interpreted broadly by the European Court of Human Rights so as to encompass the protection of personal data,²⁸⁴ requires that any restriction to the right to respect for private life be “in accordance with the law”.

It deserves emphasis that the protection of personal data under Article 8 of the ECHR also entails *the positive obligation* to provide the necessary legislative framework affording practical and effective protection against a violation of Article 8 of the ECHR.²⁸⁵ Moreover, this positive obligation “not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects”.²⁸⁶ To be “foreseeable”, the law should be “formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct”. Therefore, all measures entailing an interference with the right to respect for private life and the protection of personal data should contain *explicit* and sufficiently *detailed* and *precise* provisions concerning the processing of personal data.²⁸⁷

In practice, the profiling of personal data for counter-terrorism purposes within the EU context raises serious concerns as to their conformity with the “in accordance with the law” condition. To begin with, terrorist-profiling practices often remain unregulated by law in the first place. However, it is a cardinal principle of data protection that the individual – “the data subject” – enjoys the right to information about the identity of the controller and about the purposes of the processing for which the data are intended. Similarly, individuals enjoy the right of access to data, and the right to rectification. The absence of a sufficiently precise legal framework forbids the effective observance of these individual rights. In addition, the absence of regulation of terrorist-profiling practices impedes their monitoring. Finally, the situation can be regarded as being in breach of the *positive obligation* to provide the necessary legal framework regulating the use of personal data for profiling purposes.

Furthermore, European law includes significant gaps and ambiguities insofar as the processing of personal data for law enforcement purposes, including terrorist-profiling practices, is concerned. At the current state of evolution of EU law, the EU data protection regime is profoundly determined by

²⁸⁴ For case law of the ECtHR, according to which “the storing of information relating to an individual's private life in a secret register and the release of such information come within the scope of Article 8 § 1”, see *Leander v. Sweden*, judgment of 26 March 1987, Series A no. 116, § 48; *Kopp v. Switzerland*, 25 March 1998, Reports of Judgments and Decisions 1998-II, § 53; *Amann v. Switzerland* [GC], judgment 16 December 2000, § 65; *Rotaru v. Romania*, judgment of 4 May 2000, § 43; *Segerstedt-Wiberg and Others v. Sweden* judgment of 6 June 2006, § 73).

²⁸⁵ Eur. Ct. HR (2nd sect.), *Sari and Colak v. Turkey* (Appl. N° 42596/98 and 42603/98) judgment of 4 April 2006, § 37 where the Court *inter alia* notes the absence of “legislative framework affording practical and effective protection against a violation of Article 8 of the Convention”.

²⁸⁶ *Rotaru v. Romania* judgment of 4 May 2000 (Application no. 28341/95), § 52.

²⁸⁷ *Rotaru v. Romania* judgment of 4 May 2000 (Application no. 28341/95), § 57.

the *pillar division structure* of the EU.²⁸⁸ Data protection within each pillar is structured around separate sets of instruments. The protection of personal data is also one of the fields in which the current pillar structure of the EU continuously gives rise to divergent views of which processing falls under which pillar.²⁸⁹

Data protection is highly developed in the framework of the EC – the so-called Community pillar – due to the existence of specific Community legislation and independent monitoring bodies with the Article 29 Working Party and the European Data Protection Supervisor at their apex. However, the EC data protection regime does not apply to the processing of personal data in the course of activities falling outside the scope of Community law. Accordingly, the scope of application of the EC data protection regime does not include the fields of the Common Foreign and Security Policy (the so-called ‘second pillar’), on the one hand, and of the Police and Judicial Cooperation in criminal matters (the so-called ‘third pillar’), on the other hand. Lest there be any doubt, it is usually explicitly provided for in the relevant EC directives that they do not apply to activities “which fall outside the scope of Community law”.²⁹⁰

The processing of personal data for law enforcement purposes, including terrorist-profiling practices, falls at least largely, if not exclusively, within the ambit of the third pillar of the EU, i.e. the Police and Judicial Cooperation in criminal matters. Although the fundamental rules pertaining to the protection of personal data must also be observed in the processing of personal data within the second and third pillar, there is a lack of a *general legal framework* on the protection of personal data in the second and the third pillar of the EU. At best, data protection is scattered in a series of *ad hoc* sets of rules on data protection in various instruments on the processing of personal data in the framework of police and judicial cooperation in criminal matters.²⁹¹

These problems are increased because the exchange of personal data between the law enforcement authorities in the different Member States has in recent years become a common scenario in the framework of Police and Judicial Cooperation. In this respect, the ‘Hague Programme’, adopted on 5 November 2004 in response to “terrorism”, has included the ‘principle of availability’. In essence, this principle entails that information that is available to certain authorities in a Member State must also be

²⁸⁸ See e.g. Gonzáles Fuster, Gloria ja Paepe, Pieter: *Reflexive Governance and the EU Third Pillar: Analysis of Data Protection and Criminal Law Aspects*. In Guild, Elspeth & Geyer, Florian (eds.), *Security versus Justice*. Ashgate 2008, 129-150, pp. 131-135.

²⁸⁹ For legal disputes arising from the pillar division structure of the EU, see Joined Cases C-317/04 and C-318/04, *European Parliament v. Council and Commission*, Judgment of the Grand Chamber of 30 May 2006, [2006] ECR I-4721. In these so-called PNR cases, the Court of Justice ruled that the arrangements on the transfer of “passenger name records” of air passengers from the EC to the US Bureau of Customs and Border Protection were illegal and should be annulled. See also Case C-301/06, *Ireland v. Council and Parliament*, judgment of 12 February 2009. In this case, Ireland has challenged Directive 2006/24/EC on the retention of telecommunications data on the ground that Article 95 EC does not constitute the appropriate legal basis for this legislative measure, because the main objective of this directive is to facilitate the investigation, detection and prosecution of serious crime, including terrorism. Thus, it should have been adopted under the relevant EU treaty articles concerning the so-called third pillar of the EU, according to the Ireland government. In its judgment of 10 February 2009, the Court of Justice eventually upheld the validity of the Data Retention Directive.

²⁹⁰ See e.g. Article 3(2) of the Data Protection Directive.

²⁹¹ For the protection of personal data in the context of the so-called III pillar, see e.g. the following instruments: Convention implementing the Schengen Agreement of 1990 including specific data protection provisions applicable to the Schengen Information System, OJ L 239, 22.9.2000, p. 19; the Europol Convention of 1995 and, inter alia, the Rules governing the transmission of personal data by Europol to third States and third bodies, OJ C 316, 27.11.1995, p. 2; the Decision setting up Eurojust of 2002, OJ L 63, 6.3.2002, p. 1 and the Rules of procedure on the processing and protection of personal data at Eurojust, OJ C 68, 19.3.2005, p. 1.; the Convention on the use of information technology for customs purposes of 1995, including personal data protection provisions applicable to the Customs Information System, OJ C 316, 27.11.1995, p. 34; and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 2000, in particular Article 23, OJ C 197, 12.7.2000, p. 1, 15.

provided to equivalent authorities in other Member States. Thus, the ‘principle of availability’ has serious implications on the protection of personal data within the EU. In particular, the adoption of this principle accentuates the necessity of the appropriate *legal framework* for the protection of personal data within the third pillar of the EU.

Against this setting, Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters²⁹² is welcome. The decision is the first horizontal data protection instrument in the field of personal data used by police and judicial authorities. The Framework Decision is applicable to cross-border exchanges of personal data within the framework of police and judicial cooperation. The instrument contains rules applicable to onward transfers of personal data to third countries and to the transmission to private parties in Member States. The decision also allows the EU states to have higher-level safeguards for protecting personal data than those established in this instrument.

However, the Framework Decision cannot ensure, by itself that the guarantees of the right to respect for private life and of personal data protection are fully complied with in the processing of personal data in the framework of II and III pillars. As its scope of application only covers *trans-border flows of data between law enforcement authorities of the Member States*, it does not apply to the processing of data by law enforcement agencies within each Member State.

The purpose of the Framework Decision is to ensure a high level of protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data in the framework of police and judicial cooperation in criminal matters, provided for by Title VI of the Treaty on European Union, while guaranteeing a high level of public safety (Article 1(1)). As mentioned above, its scope is limited to the processing of personal data transmitted or made available between Member States²⁹³ and does not cover the collection and processing of personal data at national level²⁹⁴. Article 3 of the framework decision establishes the principles of lawfulness, proportionality and purpose for the collection and the processing of personal data by the competent authorities. Processing of personal data received from or made available by another Member State is possible according to the conditions laid down in Article 11. Member States may transfer personal data transmitted or made available by the competent authority of another Member State to third States or international bodies only under the conditions provided for in Article 13²⁹⁵. One of the conditions is that the Member State from which the data were obtained has given its

²⁹² Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters OJ L 350, 30.12.2008 , p. 60.

²⁹³ Article 1 (2) of Council Framework decision 2008/977/JHA provides: ‘In accordance with this Framework Decision, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy when, for the purpose of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, personal data:(a) are or have been transmitted or made available between Member States; (b) are or have been transmitted or made available by Member States to authorities or to information systems established on the basis of Title VI of the Treaty on European Union; or (c) are or have been transmitted or made available to the competent authorities of the Member States by authorities or information systems established on the basis of the Treaty on European Union or the Treaty establishing the European Community.’

²⁹⁴ According to Article 1 (5) of Council Framework decision 2008/977/JHA: ‘This Framework Decision shall not preclude Member States from providing, for the protection of personal data collected or processed at national level, higher safeguards than those established in this Framework Decision.’

²⁹⁵ Article 13 (1) of Council Framework decision 2008/977/JHA reads as follows: ‘Member States shall provide that personal data transmitted or made available by the competent authority of another Member State may be transferred to third States or international bodies, only if:

- (a) it is necessary for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties;(b) the receiving authority in the third State or receiving international body is responsible for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties; (c) the Member State from which the data were obtained has given its consent to transfer in compliance with its national

consent to transfer in compliance with its national law. However, transfer without prior consent is permitted by the framework decision only if the transfer of data is essential for the prevention of an immediate and serious threat to public security of a Member State or a third State or to essential interests of a Member State and the prior consent cannot be obtained in good time. In this case, the authority responsible for giving consent shall be informed without delay (Article 13 (2)). According to Article 14 of the framework decision, Member States shall provide that personal data received from or made available by the competent authority of another Member State may be transmitted to private parties under certain conditions. Finally, the framework decision envisages that each Member State shall provide that one or more public authorities are responsible for advising and monitoring the application of the framework decision within its territory (Article 25).

The Framework Decision needs to be implemented by the EU member states by 27 November 2010, by taking the necessary measures, including designating one or more public authorities that should be responsible for advising and monitoring the application within its territory.

The entry into force of the Lisbon Treaty would further improve the protection of personal data within the EU legal order. Here, the following improvements are worthy of mention. First, the Lisbon Treaty would confer legally binding status to the EU Charter of Fundamental Rights, including Article 8 on the right to the protection of personal data. Second, the Lisbon Treaty would abolish the three-pillar structure; particularly, the third pillar would be integrated into Title V, Part Three of the TFEU on the Area of Freedom, Security and Justice.

Finally, ambiguous and open-ended formulations tend to be common in various EU instruments regulating the processing of personal data for law enforcement purposes.²⁹⁶

Paradoxically, the concept of “processing of personal data” itself is susceptible to criticism in the first place. In the context of the Data Protection Directive, for example, “the processing of personal data” (“processing”) denotes

“any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction”.²⁹⁷

Hence, the “processing of personal data” is so broadly defined that the definition raises concerns with regard to the requirement that the grounds on which the processing of personal data is allowed shall be *clearly* and *precisely* laid down by the law.²⁹⁸ In addition, open-ended formulations of this kind are problematic in light of the fundamental rule pertaining to the protection of personal data that the data can only be collected for *specified* and *explicit* purposes. Finally, these kinds of formulations beg the

(Contd.) _____

law; and (d) the third State or international body concerned ensures an adequate level of protection for the intended data processing.’

²⁹⁶ For concrete illustrations of open-ended formulations in the EU instruments regulating the processing of personal data, see e.g. the Opinion of the European Agency for Fundamental Rights on the Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes, paragraphs 8-11. Available at: http://fra.europa.eu/fra/material/pub/discussion/FRA_opinion_PNR_en.pdf (9.1.2009). FRA’s opinion on the Commission’s proposal for a Council framework decision on the use of Passenger Name Record (PNR) data for law enforcement purposes has been reflected in the resolution adopted by the European Parliament on 20th November. The resolution “concurrs with FRA’s opinion that profiling based on PNR data should only be intelligence-led, based on individual cases and factual parameters” and stresses the need for future involvement of the FRA in a periodic review and evaluation of any future legislation establishing an EU PNR scheme. Resolution is available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0561+0+DOC+XML+V0//EN&language=EN> (9.1.2009).

²⁹⁷ Article 2 (b) of Directive 95/46/EC.

²⁹⁸ In Finland, the *Constitutional Law Committee of Parliament* has called attention to the vagueness of the concept of processing. See e.g. Opinion 11 of 2008 by the Constitutional Law Committee the Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes.

question of their compatibility with the requirement that the processing of personal data for law enforcement purposes, including countering terrorism, should be *necessary and proportionate* in a democratic society – a theme which is the topic of the next section.

Test of proportionality

Under Article 8.2 of the ECHR, any measure restricting the right to respect for private life should be proportionate. Similarly, the proportionality principle is one of the fundamental principles pertaining to the protection of personal data. In essence, the proportionality test requires in the current context that terrorist-profiling practices are necessary and proportionate means of achieving its legitimate aim (which is the prevention of terrorist attacks).

However, one of the main difficulties in assessing the necessity and proportionality of terrorist-profiling practices is, again, constituted by the lack of information about the concrete terrorist-profiling practices. It is actually only known for a fact that the processing of personal data from various data bases for law enforcement purposes has expanded on an unprecedented scale. In addition, it is known that personal data can and would be used for profiling purposes – this is probably the most important single reason why personal data are processed for law enforcement purposes in the first place.

Moreover, there is very little information on the usefulness and effectiveness of profiling in the context of countering terrorism. In fact, available information suggests that terrorist-profiling practices have been ineffective. A reference can here be made to the German *Rasterfahndung* programme as it did not result in a single criminal charge for terrorism-related offences. Similarly, the use of stop and search method only resulted in arrests of five (white!) persons in connection with terrorism in 2003-04 in the UK, although 8.120 individuals were stopped.²⁹⁹

These negative effects of terrorism profiling practices should also be slotted into the proportionality assessment. A number of studies carried out since 11/9 suggests that terrorist profiling practices, especially those assuming the form of ethnic profiling, have resulted in feelings of alienation and humiliation among members of targeted ethnic and religious groups.³⁰⁰

Finally, there is the *problem of over- and under-inclusion which should also be taken into account when assessing proportionality*. To serve as an effective and useful method for countering terrorism, terrorist profiles must be broad enough to include those persons who present a terrorist threat and, simultaneously, narrow enough to exclude those who do not.³⁰¹ However, available information suggests that *de facto* terrorist profiles all too often fail to accomplish appropriately neither function.³⁰²

Other human rights concerns

The foregoing overview does not exhaust the spectrum of all human rights problems in the context of terrorist-profiling practices from the point of view of requirements under Article 8 of the ECHR and the fundamental principles pertaining to the protection of personal data. In addition, the use of terrorist-profiles – and the processing of personal data for law enforcement purposes in general – *tends* to raise the following concerns with regard to guarantees imposed by these rights:

- i. The absence of appropriate and comprehensive procedural guarantees in the instruments prescribing the processing of personal data for law enforcement purposes and, a fortiori, terrorist-profiling practices. Procedural safeguards are important in order to minimize the risks

²⁹⁹ See Scheinin's report, paragraph 53.

³⁰⁰ See in more detail Goldston, p. 11-12 and Scheinin's report, paragraphs 56-58.

³⁰¹ See Scheinin's report, paragraph 48. See also Goldston, p. 11.

³⁰² See in more detail Scheinin's report, paragraphs 49-52 and Goldston, pp. 11-12.

of a disproportionate interference with the right to respect for private life, and as a safeguard against arbitrariness. This applies even to a greater extent as regards secret surveillance measures, since secrecy

“carries with it a danger of abuse of a kind that is potentially easy in individual cases and could have harmful consequences for democratic society as a whole (...). This being so, the resultant interference can only be regarded as "necessary in a democratic society" if the particular system of secret surveillance adopted contains adequate guarantees against abuse.”³⁰³

- ii. Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data spells out the requirements which follow from the right to respect for private life and the protection of personal data.
- iii. The lack of appropriate supervision of the processing of personal data for law enforcement purposes. The lack of control on secret services often constitutes a special problem in the context of law enforcement, especially considering the fundamental requirement of data protection that compliance with the principles of data protection, including fundamental rights standards, shall be subject to control by an independent authority.
- iv. The transfer of personal data to third countries which fail to ensure an “adequate level of protection”. The cardinal principle pertaining to the transfer of personal data to third countries is the principle that an adequate level of protection of fundamental rights must be ensured and monitored. This principle is absolute in the sense that not even an explicit consent by a Member State can prevail over it. For instance, there are doubts at this time about whether the protection offered by the United States is adequate when personal data is transferred from the EU to the US for processing.³⁰⁴

Ethnic Profiling in Light of the Principle of Non-Discrimination and Fundamental Rules Pertaining to the Processing of So-Called Sensitive Data

As already noted, terrorist profiling practices often assume the form of “ethnic profiling” which is closely linked with the principle of non-discrimination, in particular the prohibition of discrimination on grounds such as race, national origin and religion, as stipulated under Articles 2 and 26 of the International Covenant on Civil and Political Rights, for instance, and as reaffirmed in Article 21 of the EU Charter of Fundamental Rights. What should also be emphasised is that the prohibition of discrimination on the grounds of race and religion features as a *non-derogable right* under international human rights law. Thus, it cannot be derogated from even in the situation of public emergency.

In addition, ethnic profiling is related to such fundamental rules pertaining to the protection of personal data that offer a high level of protection to the processing of personal data relating to “race” or ethnic or national origin or religion. For instance, Article 6 of the Convention for the Protection of

³⁰³ *Malone and Others v. the United Kingdom*, judgment of 2 August 1984, § 81. See also the *Rotaru v. Romania*, judgment of 4 May 2000, § 59: “In order for systems of secret surveillance to be compatible with Article 8 of the Convention, they must contain safeguards established by law which apply to the supervision of the relevant services' activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, inter alia, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure.”

³⁰⁴ E.U. NETWORK OF INDEPENDENT EXPERTS IN FUNDAMENTAL RIGHTS: THE BALANCE BETWEEN FREEDOM AND SECURITY IN THE RESPONSE BY THE EUROPEAN UNION AND ITS MEMBER STATES TO THE TERRORIST THREATS, Thematic Comment, 2002. Available at: http://ec.europa.eu/justice_home/cfr_cdf/doc/obs_thematique_en.pdf (10.1.2009).

Individuals with regard to Automatic Processing of Personal Data, which also applies to the police sector, explicitly prescribes that personal data “revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards.”

A difference in treatment on the basis of criteria such as race, ethnicity, national origin or religion may only be considered compatible with the principle of non-discrimination *if* the difference in treatment pursues a legitimate aim *and if* there exists a reasonable proportionality between the difference in treatment and the legitimate aim sought to be realised.

Although some forms of ethnic profiling are permissible, *de facto* ethnic profiling practices in the context of countering terrorism fail to fulfil these criteria.

First of all, the concept of “race” is unscientific as there are no races. Thus, a difference in treatment on the basis of “race” cannot be regarded as constituting an objective and reasonable ground in the first place.³⁰⁵

Furthermore, the principle of non-discrimination requires that ethnicity may only exceptionally constitute a permissible basis for a difference in treatment. In addition, the case law of the European Court of Human Rights appears to exclude the possibility of considering lawful any difference in treatment based on ethnicity where this would entail a *disadvantageous* treatment on the basis of this criterion either exclusively or predominantly.

The current position of the European Court of Human Rights is perhaps best shown in *Timishev*. In that case, a Chechen lawyer was refused registration in another part of Russia on account of his ethnic background. The Court’s conclusion is plain and unequivocal: “no difference in treatment which is based exclusively or to a decisive extent to a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built in the principles of pluralism and respect for different cultures”.³⁰⁶

Difficult issues of proof often arise where applicants claim that their differential treatment has been motivated by racist considerations by authorities. This is especially so to the extent that profiling practices assume forms of unintentional and unconscious practices by police or other authorities. The case law of the European Court of Human Rights itself illustrates how difficult it may be to prove discrimination in such circumstances.³⁰⁷

Accordingly, even if certain traits relating to ethnicity (e.g. religion or national origin) correlated with terrorist activities, this would not render lawful terrorist-profiling practices involving a differential treatment according to ethnicity. Besides, and as already noted, it is highly doubtful whether terrorist-profiling practices based on ethnic or national origin or religion are *de facto* based on nothing more than unfounded stereotypical generalisations that certain ethnic or religious groups pose a greater terrorist risk than others.³⁰⁸ The development of terrorist profiles on the basis of such characteristics would only be permissible in the presence of a fair, statistically significant demonstration of the correlation between these characteristics and the risk of terrorism. However, such a demonstration has not been made at this time.

As in the context of the right to respect for private life and the protection of personal data, “the proportionality test” also constitutes a central question in the legal assessment of terrorist-profiling

³⁰⁵ See E.U. Network of Independent Experts on Fundamental Rights, Ethnic profiling, CFR-CDF.Opinion4-2006, p.12.

³⁰⁶ *Timishev v. Russia*, 13 December 2005, at § 58.

³⁰⁷ For questions regarding the burden of proof and evidence, see E.U. Network of Independent Experts on Fundamental Rights, Ethnic profiling, CFR-CDF.Opinion4-2006, pp.23-26.

³⁰⁸ As an example of an instrument based on stereotypes for the purpose of terrorist profiling, reference can be made to Council recommendation of 28 November 2002 on the development of terrorist profiles, see doc. 11/11858/02.

practices in light of the principle of non-discrimination. As already noted, the effectiveness of terrorist-profiling practices is more than questionable in light of the available information. Moreover, adverse effects entailed by terrorist-profiling practices must also be slotted into the proportionality assessment. As noted, the most significant adverse effect of profiling based on ethnicity, national origin and religion appears to be that it alienates and victimises certain ethnic and religious groups. This, in turn, may also have significant negative implications for law-enforcement efforts.

In conclusion, given that no information clearly confirms at this stage the efficiency and usefulness of ethnic profiling in the context of countering terrorism and given their adverse effects, such profiling should be regarded as constituting unlawful discrimination. Similarly, such profiling should be considered a disproportionate and thus arbitrary interference with the right to privacy and the fundamental rules pertaining to the protection of so-called “sensitive data”.

It is, however, important to emphasise that these concerns apply in the context of *predictive terrorist profiles*. Instead, the use of (descriptive) terrorist profiles that include criteria associated with ethnicity, national origin and religion is lawful, provided that there are reasonable grounds to assume that the suspect fits into a certain descriptive profile based on such characteristics. In addition, these factors can even be used to target search efforts in *proactive* counter-terrorism measures, provided that there is specific intelligence suggesting that a certain individual fulfilling these characteristics is preparing a terrorist act.³⁰⁹

Conclusion

Terrorist-profiling practices currently constitute a significant component of counter-terrorism activities but their lawfulness is highly doubtful. This is especially so insofar as the so-called *predictive* terrorist-profiles aiming at identifying “would-be” terrorists in some future are concerned.

Predictive terrorist profiles raise serious concern with regard to a number of human rights guarantees under the right to respect for private life, the protection of personal data and the principle of discrimination. While the objective of predictive terrorist profiles – the prevention of terrorist offences – is both legitimate and highly important, these profiles are often inadequately regulated by law. Moreover, predictive profiles commonly fall short of requirements under the test of proportionality.

A special problem is constituted by the forms of profiling practices based on grounds such as ethnic or national origin or religion (so-called ethnic profiling). The use of such criteria in terrorist profiling practices is clearly discriminatory, not only because of the absence of any proven correlation between such criteria and propensity to commit terrorist attacks, but also because “no difference in treatment which is based exclusively or to a decisive extent to a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built in the principles of pluralism and respect for different cultures” (ECtHR, *Timishev*, 13 December 2005, § 58). In addition, the effectiveness of ethnic profiling is highly doubtful, and it also entails a number of adverse effects.

Obviously, all this is begging the question about the meaningfulness of (predictive) terrorist profiles. – Is it at all possible to predict what sorts of people are most likely to become terrorists and develop terrorist profiles accordingly?

Little by little, the tendency seems to be towards recognising that (potential) terrorists are very difficult to profile and that terrorist profiles based on ethnic or religious characteristics are particularly useless because terrorists can easily evade such profiles.³¹⁰ As a consequence, there piecemeal seems to be a transition towards profiling based on *individual conduct* rather than on ethnic or religious

³⁰⁹ See Scheinin’s report, para.59.

³¹⁰ Goldston, p. 12.

characteristics.³¹¹ This trend should be welcomed, not only because profiling based on behavioural patterns appears to be more effective, but also because such profiling is much better in compliance with the fundamental principle that law enforcement activities should, at least largely, if not exclusively, be based on an individual's personal conduct.

³¹¹ See e.g. Washington Post, Terrorists Proving Harder to Profile. March 12, 2007, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/11/AR2007031101618.html> (11.1.2009). See also Scheinin's report, at para. 85, where this is recommended.

The Rights/Security Debate in the Inter-American System

Lucas Lixinski*

Introduction

The relationship between human rights and security concern is one of the oldest yardsticks of human rights law. While the state is bound to protect human rights, at the same time providing security for its citizens is one of its core functions, and, according to contractualist theories such as Locke's, the very reason why the state is created in the first place.

The aim of this contribution is by no means to offer a general theory on this issue. The focus instead is on a very specific instance of this debate, looking at the interplay between human rights and security in international human rights adjudication. Even more specifically, I will look at this issue within the Inter-American System for the protection of human rights, hoping that this case study will help shed some light on broader attempts towards a general framework for this relationship.

The Inter-American System, or, better said, the American continent, offers an interesting scenario for discussing this relationship. For one, most countries in the continent have experience some sort of dictatorial government, in which the defence of "national security" was an extensively used tool to limit the exercise of human rights, often abusively. It was not uncommon that oppositionists in these countries were labelled "terrorists". Terrorism did take place in the continent, though, even prior to the 2001 attacks: in Peru, the activities of the "*Sendero Luminoso*" ("Shiny Path"), an insurgent guerrilla movement, were officially characterised as terrorism, and several cases were brought before the Inter-American system concerning human rights violations perpetrated by the Peruvian state in the name of its fight against these terrorists. And then, of course, there are the 2001 attacks in the United States, which triggered the ongoing "War on Terror", as it is called.

In order to analyze this scenario in more detail, this paper is divided in two parts. The first part will look at the general framing of the relationship between rights and security as a limitation to human rights from the perspective of the practice of the Inter-American Court. The second part will analyze the interplay between rights and security in the specific context of terrorism, looking more specifically at the Report on Human Rights and Terrorism presented by the Inter-American Commission in the wake of the September 11, 2001 attacks in the United States. I will argue that even though terrorism requires a careful consideration of human rights issues, it does not significantly change the human rights obligations imposed upon states even in "normal" times.

Security as a General Limitation to the Exercise of Rights

The American Convention on Human Rights is the key instrument interpreted by the Inter-American Court. There are several mentions to security throughout its text, which offer the basic elements for understanding the relationship between these two concerns in the system.

The interest of security is mentioned as a possible justification for limiting the exercise of the rights to freedom of conscience and religion,³¹² freedom of expression,³¹³ freedom of assembly³¹⁴ and

* Ph.D. Researcher, European University Institute (Italy); LL.M. in Human Rights with Specialisation in European and Global Legal Practice, Central European University (Hungary); LL.B., Federal University of Rio Grande do Sul (Brazil). MAE-AECI Fellow (Spain).

³¹² "Article 12. Freedom of Conscience and Religion 1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private. [...] 3. Freedom to manifest one's

association,³¹⁵ and freedom of movement.³¹⁶ It is interesting to notice the presence of two different expressions referring to security: “public safety” and “national security”. While these two expressions are simultaneously present in almost all the rights above, it is important to notice that “national security” is not mentioned in the article on freedom of conscience and religion, and “public safety” is not a legitimate ground for restricting freedom of expression.

What is, then, the difference between these two expressions, a difference also marked in the (original) Spanish text of the Convention?³¹⁷ Article 27 of the American Convention, dealing with the suspension of rights in times of emergency, helps shed light on the issue.³¹⁸ This article deals with the suspension of guarantees that can happen when the *security* of a state party is at stake. And it goes on to enunciate the rights which cannot be derogated from even in times of emergency, which includes the right to freedom of religion, which, as pointed out above, does not include “national security” as a legitimate ground for limitation. Therefore, one can say that “national security” refers to actual states of emergency, whereas “public safety” is a more loosely defined interest, with a lower threshold.

That might also help explain why “public safety” cannot be invoked to restrict freedom of expression, which is considered by the Inter-American Court as one of the fundamental pillars of the system of

(Contd.) _____

religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect *public safety*, order, health, or morals, or the rights or freedoms of others. [...]” (emphasis added)

³¹³ “Article 13. Freedom of Thought and Expression 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. [...] 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: [...] b. the protection of *national security*, public order, or public health or morals. [...]” (emphasis added)

³¹⁴ “Article 15. Right of Assembly The right of peaceful assembly, without arms, is recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of *national security*, *public safety* or public order, or to protect public health or morals or the rights or freedom of others.” (emphasis added)

³¹⁵ “Article 16. Freedom of Association 1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes. 2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of *national security*, *public safety* or public order, or to protect public health or morals or the rights and freedoms of others. [...]” (emphasis added)

³¹⁶ “Article 22. Freedom of Movement and Residence 1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law. 2. Every person has the right to leave any country freely, including his own. 3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect *national security*, *public safety*, public order, public morals, public health, or the rights or freedoms of others. [...]” (emphasis added)

³¹⁷ The Spanish text uses the terms “*seguridad nacional*” and “*seguridad pública*”, which have been respectively translated as “national security” and “public safety”, even though the word used in the Spanish version for the English translation of “security” and “safety” is the same.

³¹⁸ “Article 27. Suspension of Guarantees 1. In time of war, public danger, or other emergency that threatens the independence or *security* of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin. 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights. 3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organisation of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.” (emphasis added)

human rights protection established by the Convention.³¹⁹ Therefore, “national security” is a much more important interest, and a higher threshold to be met, while “public safety” is a more trivial interest to be protected. For the purposes of this paper, I will then understand “security” to mean “national security” in the language of the American Convention.

The provision on suspension of rights in time of emergency mentioned above must also be highlighted for the fact that it offers the gateway through which overarching, particularly serious national security issues clash with the rights protected by the Convention.³²⁰ About the suspension of rights, the Inter-American Court has said that whenever the suspension of guarantees has been duly decreed Article 27 must be taken into account. In these circumstances, all action of public powers that goes beyond the limits of the dispositions stating the state of emergency is illegal. These limitations are necessary to ensure that there are appropriate means to control the measures taken in the name of security, to guarantee their proportionality to the needs of the situation and that they do not exceed the limits imposed by the Convention.³²¹

But the most authoritative interpretation of this provision has been done in the advisory competence of the Court. In its Advisory Opinion on Habeas Corpus under the Suspension of Guarantees, the Court stated that under some circumstances the suspension of guarantees may be deemed as the only way to address emergencies and to preserve the core values of democracy. However, this must not imply overlooking the fact that abuses can still occur as a result of emergency measures that are not justified according to the requirements of Article 27. As a matter of fact, the Court stated, abusing states of emergency has been the experience of the American continent. Considering the foundational principles of the Inter-American system, however, the suspension of guarantees cannot under any circumstances overthrow the “effective exercise of representative democracy” enshrined in the OAS Charter (Article 3).

This is true especially considering the values of the American Convention, the Preamble of which reaffirms the intention (of the American States) “to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.” Suspending guarantees, according to the Court, is illegitimate when it is used as a means to undermine the democratic system, which establishes limits that cannot be crossed, thereby guaranteeing the permanent protection of core human rights.

Furthermore, Article 27(1) provides for different situations and determines that the measures that may be taken in emergencies must be tailored to the specific demands of the situation, making it thus clear that what is permissible in one type of emergency can be unthinkable in another. The lawfulness of measures adopted in emergencies will depend upon the character, intensity, pervasiveness and particular context of the emergency, as well as upon the proportionality and reasonability of the measures.

Finally, the suspension of guarantees allows governments to impose restrictions on rights and freedoms that would otherwise be impermissible or heavily scrutinised. But that does not mean that

³¹⁹ See for instance the landmark cases I/A Court H.R., Case of *Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment February 6, 2001. Series C No. 74; and I/A Court H.R., Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73.

³²⁰ For a general commentary on this provision and its reach, see Medina Quiroga, C., *Las Obligaciones de los Estados bajo la Convención Americana sobre Derechos Humanos* [“The Obligations of States under the American Convention on Human Rights”], in *La Corte Interamericana de Derechos Humanos: Un Cuarto de Siglo: 1979-2004* [“The Inter-American Court of Human Rights: A Quarter of Century: 1979-2004”] 207 (San José, C. R., Corte Interamericana de Derechos Humanos 2005).

³²¹ I/A Court H.R., Case of *Durand and Ugarte v. Peru. Merits*. Judgment of August 16, 2000. Series C No. 68, para. 99 (citing I/A Court H.R., *Habeas Corpus under Guarantees Suspension, Advisory Opinion* OC-8/87 January 30, 1987. Series A No. 8, para. 38; and I/A Court H.R., *Judicial Guarantees in states of emergency. Advisory Opinion* OC-9/87 on October 6, 1987. Series A No. 9, para. 21.) (footnotes omitted).

the suspension of guarantees is a suspension of the rule of law, nor does it authorize a disregard for the principle of legality. When guarantees are suspended, said the Court, legal restraints upon the actions of public authorities are considered differently, but they still exist, and the government cannot be deemed to have absolute powers in the name of protecting security. There is an unbreakable bond, according to the Court, involving the principle of legality, democracy and the rule of law.³²² The same ideas have been repeated in the subsequent Advisory Opinion of the Court, dealing with judicial guarantees in states of emergency.³²³

All in all, the Court states that, even though there are security concerns which must be taken into account in favour of the State, these cannot be dissociated with the ultimate goal of preserving the rule of law and the democratic system, the preservation of which is what justified the state of emergency in the first place.

Further, as to security generally, the Court has stated in several contentious cases that the state has the right and the duty to guarantee security. However, no matter how serious are the actions jeopardising such security, it is inadmissible that the state utilises any means to reach the goals of security. No activity of the state, according to the Court, can be founded upon despising human dignity.³²⁴

This is the general spirit within the Inter-American System regarding the “rights v. security” debate. The same spirit applies in the context of terrorism, as I will try to show in the next section.

Rights v. Security in the Context of Terrorism

Before turning to the report by the Inter-American Commission on Human Rights and Terrorism, it is important to look at some of its sources of inspiration in the judicial practice of the Inter-American Court. There have been several instances of terrorism in the American continent prior to the 2001 attacks in the United States, and the Inter-American Court had the chance to analyze the relationship between rights and security in the context of counter-terrorism efforts in the specific case of Peru, which fought against the insurgent movement “*Sendero Luminoso*” (“Shiny Path”) for many years.

In most of these cases, the Court was faced with the issue of the rights of individuals suspected of being terrorists. Against the allegations by the state that persons accused of terrorist were somehow “less entitled” to rights, particularly fair trial rights and right to humane conditions of imprisonment, the Court has said that it was not in the position to determine the nature or gravity of the crimes attributed to the accused of terrorism. The state has the right and obligation to safeguard its own security, which must be exercised within certain limits and according to procedures that strike the balance between collective security and individual human rights. However, certain human rights take precedence in these situations. While “terrorist violence” is not justified, those accused of it are still persons under state custody and accused of crimes, and must therefore have their human rights protected equally and in all circumstances.³²⁵ Therefore, even though some discretion is left to states in

³²² I/A Court H.R., *Habeas Corpus under Guarantees Suspension*, Advisory Opinion OC-8/87 January 30, 1987. Series A No. 8, paras. 20-24.

³²³ I/A Court H.R., *Judicial Guarantees in states of emergency*. Advisory Opinion OC-9/87 on October 6, 1987. Series A No. 9.

³²⁴ I/A Court H.R., Case of *Durand and Ugarte v. Peru. Merits*. Judgment of August 16, 2000. Series C No. 68, para. 69; I/A Court H.R., Case of *Neira-Alegría et al. v. Peru. Merits*. Judgment of January 19, 1995. Series C No. 20, para. 75; I/A Court H.R., Case of *Godínez-Cruz v. Honduras. Merits*. Judgment of January 20, 1989. Series C No. 5, para. 162; and I/A Court H.R., Case of *Velásquez-Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 154.

³²⁵ I/A Court H.R., Case of *Lori Berenson-Mejía v. Peru. Merits, Reparations and Costs*. Judgment of November 25, 2004. Series C No. 119, para. 91 (citing I/A Court H.R., Case of *Juan Humberto Sánchez v. Honduras. Preliminary Objection, Merits, Reparations and Costs*. Judgment of June 7, 2003. Series C No. 99, para. 111; I/A Court H.R., Case of *Bámaca-Velásquez v. Guatemala. Merits*. Judgment of November 25, 2000. Series C No. 70, paras. 143 and 174; I/A Court H.R., Case of *Durand and Ugarte v. Peru. Merits*. Judgment of August 16, 2000. Series C No. 68, para. 69; I/A Court H.R.,

dealing with terrorist measures, the Court firmly holds to the idea that human rights is its ultimate mandate, and that these should be observed, even in the most extreme circumstances.

This idea was borne in mind by the Inter-American Commission when it prepared, by its own initiative³²⁶ and with the support of the OAS General Assembly,³²⁷ its Report on Human Rights and Terrorism.³²⁸ The report highlights that the September 11, 2001 attacks in the United States are evidence of an increase of the “terrorist threat” both qualitatively and quantitatively, thus making for the need to assess how state measures aimed at countering this threat must respect human rights standards.³²⁹

The report makes use of two core legal frameworks, international human rights law and international humanitarian law. Leaving aside the complicated interplay between these two areas,³³⁰ it is noteworthy that international humanitarian law becomes part of the Commission’s analysis, especially when one takes into account that the adjudicatory practice of the Commission and Court dealing with terrorism had not invoked international humanitarian law, despite the ease with which this area of law is inserted in other cases of the Inter-American System.³³¹ But, as the political rhetoric of counter-terrorism announced at the time the beginning of a “war on terror”, it is understandable that international humanitarian law became a relevant frame of analysis for the Commission.

The report analyses several rights in the context of terrorism, looking at each right from the perspectives of human rights law, humanitarian law, and the specific context of terrorism, which apparently, in the view of the Commission, represents a space in between. The rights analyzed are the right to life,³³² the right to personal freedom and security,³³³ the right to humane treatment,³³⁴ the right to fair trial,³³⁵ freedom of expression,³³⁶ non-discrimination and judicial protection,³³⁷ as well as the specific situation of foreigners with regard to counter-terrorism efforts.³³⁸

(Contd.) _____

Case of *Castillo-Petruzzi et al. v. Peru. Merits, Reparations and Costs*. Judgment of May 30, 1999. Series C No. 52, paras. 204 and 89.) (footnotes omitted).

³²⁶ Inter-American Commission on Human Rights Resolution “*Terrorism and Human Rights*”, of December 12, 2001.

³²⁷ OAS General Assembly Resolution AG/RES. 1906 (XXXII-O/02), “*Human Rights and Terrorism*”, of June 4, 2002.

³²⁸ Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., of October 22, 2002 [hereinafter “Report on Terrorism and Human Rights”].

³²⁹ Report on Terrorism and Human Rights, para. 3.

³³⁰ For details on this relationship, see Hans-Joachim Heintze, *On the Relationship between Human Rights Law and International Humanitarian Law*, 86 *International Review of the Red Cross* 789 (2004); William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 *European Journal of International Law* 741 (2005); Amna Guellali, *Lex Specialis, Droit International Humanitaire et Droits de l’Homme: Leur Interaction dans les Nouveaux Conflits Armés*, 2007 *Revue Générale de Droit International Public* 539; Noam Lubell, *Challenges in applying human rights law to armed conflict*, 87 *International Review of the Red Cross* 737 (2005); Louise Doswald-Beck and Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 293 *International Review of the Red Cross* 94 (1993).

³³¹ See Fanny Martin, *Application du Droit International Humanitaire par la Cour Interaméricaine des Droits de l’Homme*, 83 *International Review of the Red Cross* 1037 (2001); David S. Weissbrodt and Beth Andrus, *The Right to Life During Armed Conflict: Disabled Peoples’ International v. United States*, 29 *Harvard International Law Journal* 59 (1988); Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 324 *International Review of the Red Cross* 505 (1998). The most relevant decisions of the Inter-American Court are I/A Court H.R., Case of *Las Palmeras v. Colombia. Preliminary Objections*. Judgment of February 4, 2000. Series C No. 67; I/A Court H.R., Case of *Bámaca-Velásquez v. Guatemala. Merits*. Judgment of November 25, 2000. Series C No. 70; and, more recently, I/A Court H.R., Case of *the Ituango Massacres v. Colombia. Preliminary Objection, Merits, Reparations and Costs*. Judgment of July 1, 2006 Series C No. 148.

³³² Report on Terrorism and Human Rights, paras. 81-117.

³³³ Report on Terrorism and Human Rights, paras. 118-146.

³³⁴ Report on Terrorism and Human Rights, paras. 147-216.

³³⁵ Report on Terrorism and Human Rights, paras. 217-263.

Of these, the section on human treatment is the most interesting, as it highlights the use of torture as an interrogation technique, detailing extensively interrogation techniques that amount to torture, or, at least, a violation of humane treatment standards. Drawing on standards of the European Court of Human Rights adopted by the Inter-American Court,³³⁹ the Commission concludes that standards of humane treatment applicable in “normal” times are equally applicable to situations of fight against terrorism.

As a matter of fact, the conclusion to which the Commission arrives at the end of the report is that human rights standards are fully applicable to counter-terrorism efforts, and must be coupled with the application of humanitarian law whenever a situation of emergency has been declared and derogations from rights determined.³⁴⁰ Therefore, even though security concerns do play a role in the implementation of human rights, not even the most serious of them can justify disregarding core human rights standards.

Concluding Remarks

Security plays an important role in limiting the exercise of human rights. However, in the practice of the Inter-American System, “security” can never be invoked as a blanket license to restrict the exercise of rights. Even though it is an important consideration, and it is open to a certain degree of national discretion, the organs of the Inter-American System will always be ready to step in and ensure that human rights are not excessively limited by security concerns.

The American Convention speaks of two different concerns related to security: “national security” and “public safety”. While the latter is a weaker form of limitation, and is to be heavily scrutinised whenever invoked, the former imposes a higher threshold for being invoked by a State Party, and implies the suspension of guarantees under the procedure determined by Article 27 of the American Convention. But it should also offer, supposedly, a wider margin of discretion to the invoking state, even though at all times subject to the control of the Inter-American Commission and Court. The Court has even come to the point of determining a violation of Article 27 in conjunction with other provisions of the Convention in a case where there was an abuse by the state of its faculty to declare a security emergency.³⁴¹

And when it comes to terrorism, the ultimate threat to the balance between rights and security, the Inter-American System has firmly held its general position, and affirmed that, even though the fight against terrorism is important, so is the maintenance of the democratic rule of law. If the fight against terrorism has the ultimate goal of preserving the democratic rule of law, it is unthinkable that human rights, which are the cornerstone of democracy and the rule of law, are sidestepped in the name of this fight. The ends do not justify the means, and this maxim is all the more applicable when the means chosen imply violating human dignity, which must be at the very core of any end of human activity.

(Contd.) _____

³³⁶ Report on Terrorism and Human Rights, paras. 264-333.

³³⁷ Report on Terrorism and Human Rights, paras. 334-356.

³³⁸ Report on Terrorism and Human Rights, paras. 375-413.

³³⁹ Report on Terrorism and Human Rights, para. 159.

³⁴⁰ Report on Terrorism and Human Rights, Recommendations.

³⁴¹ I/A Court H.R., *Case of Neira-Alegría et al. v. Peru. Merits*. Judgment of January 19, 1995. Series C No. 20, para. 75.

CORRIGENDUM

EUI Working Papers
LAW 2009/11
LAW AND SECURITY - FACING THE DILEMMAS
Martin Scheinin et al.

Article by Patricia PINTO SOARES
UN SC Resolution 1593 (2005) and the Fine Art of Twisting 'International Peace and Security': The Need for Judicial Balancing

Footnote 391 on pages 117-118 should read as follows:

The jurisdiction of a court consists of both the power and the duty that oblige a determined organ with judicial functions to assert the law for the case under trial. It is not correct to infer that a court only has jurisdiction if it can decide on the merits of the case. The 'case' as a judicial reality is an entity phenomenologically different from the actual facts that constitute and conform it. Accordingly, a court's decision that recognises its lack of jurisdiction is likewise a judicial decision as well as a statement regarding the applicable law to the case in question; *in* Caeiro, P., 'Claros e escuros de um auto-retrato: breve anotação à jurisprudência dos Tribunais Penais Internacionais para a antiga Jugoslávia e para o Ruanda sobre a própria legitimação', *Direito Penal Internacional para a Protecção dos Direitos Humanos. Simpósio da Faculdade de Direito da Universidade de Coimbra e Goethe-Institut de Lisboa*, 2003, p. 215-216.

UN SC Resolution 1593 (2005) and the Fine Art of Twisting 'International Peace and Security': The Need for Judicial Balancing

Patrícia Pinto Soares*

The paper addresses some of the most striking perplexities arising out of the latest practice of the UN SC under Chapter VII *vis-à-vis* the first permanent international criminal court, and the need for the ICC to review SC decisions which hamper the latter's mandate. It is submitted that such review corresponds to a beneficial judicial balancing of international peace and security, on the one hand, and international criminal justice, on the other, which furthers the development of a democratic international legal order. The article departs from the analysis of Resolution 1593 (2005). I will examine the nature and legal source of the Resolution, dedicating particular regard to its legality in light of both the UN Charter and the Rome Statute. In this endeavour, it will be highlighted the (non-) accordance of Resolution 1593 (2005) with essential principles of international criminal law. This analysis will be based upon practical problems faced by the ICC Prosecutor during the investigations in Darfur. Particularly, it will draw attention to the way in which 'international peace and security' tend to be politically manipulated as to pursue private interests in such a manner that criminal justice is nearly or totally barred. Against this background, I will explain how the balancing of peace and security *vis-à-vis* international criminal justice has been left at the discretion of the SC and how the latter is entirely unfit to undertake this role. The paper concludes with my personal view regarding the effect of the Resolution in appraisal on the mandate of the ICC and the difficult relationship between the UN political organ and the Court motivated by the permanent antagonism intermeshing law and *Realpolitik*.

The Impact of Security Council Resolution 1593 (2005) on the ICC system

Resolution 1593 (2005)

Through Resolution 1593³⁴², the SC, using for the first time the power bestowed upon it by Article 13 of the Rome Statute, referred the situation in Darfur to the ICC. As had already occurred³⁴³, the SC exempted from the Court's jurisdiction all peacekeepers nationals of non-States Parties to the Statute. It went, however, further on its ruling as to ensure exclusive jurisdiction to the State of nationality.³⁴⁴ Again as in the past, these determinations were the price to pay in order to prevent the veto of the USA, in this case to the referral of the situation in Darfur to the ICC as recommended by the UN Commission of Inquiry.³⁴⁵

* PhD Candidate, European University Institute, Florence.

³⁴² Resolution 1593 (2005), 31 March.

³⁴³ See Resolution 1422 (2002), 12 July, by which the SC requested the ICC not to initiate any investigations or prosecutions over peacekeepers of non-States Parties to the Rome Statute as well as manifested its intention to renew the request for successive periods of 12 months for as long as deemed necessary. This settlement was the cost to pay as to ensure the non opposition of the USA to the renewal of UN peacekeeping missions in Bosnia Herzegovina.

³⁴⁴ See also SC Resolution 1497 (2003). As to ensure the UN operations in Liberia, which is a State Party to the Statute of Rome, the SC gave in once more before the demands of the USA. Accordingly, it passed Resolution 1497 (2003), which contents are basically the same as the ones of Resolution 1593 (2005).

³⁴⁵ See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General. UN doc. s/2005/60, 25th January 2005

The ICC's legal personality

Before examining the legality of the Resolution, a preliminary issue begs for scrutiny due to its consequences on the subject in appraisal.

The ICC was granted distinct legal personality³⁴⁶. Accordingly, it is independent of States, the UN and in particular the SC.³⁴⁷ It is thus fair to conclude that it is not automatically bound by SC decisions even if States may be so. One can raise the question of whether international organisations may be endowed with more extensive powers than those that States which have created them are entitled to. In other words, can the ICC, as a creation of States, be considered not bound by SC resolutions when States are, in principle, obliged to carry them out. The answer is affirmative. States, by investing the Court with a detached legal personality, have expressed their sovereign will to edify an institution different from States themselves, probably aware of the controversies that the establishment of the first permanent international criminal court would raise. One may, in addition, counter-argue that States are obliged to ensure the obedience of SC decisions in and by the agencies they are party to. However, this argument cannot prevail with regard to the ICC which is a court and therefore bound to carry out its judicial mandate with absolute independence.

If the ICC is not automatically bound by SC resolutions, the eventual obligation of the Court to follow those decisions is drawn from the Statute itself.

The Statute of Rome

The first provision to be taken into account is Article 16 of the Statute which bars the commencement or continuance of investigations and prosecutions after a request to that effect presented through a resolution adopted under Chapter VII of the UN Charter. The SC is bound to respect two conditions in order to defer proceedings: on the one hand, there has to be an actual threat to, or breach of, international peace and security; on the other, the SC is not entitled to permanently bar proceedings but merely to suspend them when it is feared that they might seriously jeopardize peace and security. Resolution 1593 (2005) does not respect any of the above-mentioned conditions.

The negotiation of Article 16 shows that it was intended to work on a case-by-case basis, grounded on concrete circumstances that, for the maintenance of international peace and security, could justify the postponement of criminal proceedings.³⁴⁸ If another had been the will of the fathers of the Statute, they would have accepted some of the American proposals, namely the one advocating that the request referred to in Article 16 should be automatically renewed each 12 months if the SC did not decide on the contrary. These proposals were, nonetheless, rejected. Resolution 1593 permanently blocks the jurisdiction of the Court. This striking interference with the ICC mandate amounts to an amendment of the Statute which is not in accordance with the will of States Parties and Article 39 VCLT³⁴⁹. As better explained *infra*, the SC is not empowered to amend or derogate treaty-law.

The intent of Article 16 is to permit the SC to suspend Court's proceedings when otherwise interests of international peace and security could be at risk. However, threats to international peace and security cannot be evaluated in hypothetical terms or considered to exist just as derivation of a SC's statement, most of all due to the effects of a Resolution adopted under Chapter VII. That is clearly the case if one takes into consideration that Article 16 functions as guardian of the corner-principles of the Statute. The Resolution directly jeopardises the principle of complementarity since it entails, though

³⁴⁶ See Article 4 and the Preamble of the Statute of Rome.

³⁴⁷ Contrarily to the *ad hoc* Tribunals, the ICC is not a subsidiary organ of the SC.

³⁴⁸ See, namely, the proposals of Costa Rica, Singapore and United Kingdom, Bergasmo and Pejic, "On Article 16", in Triffterer and Rosbaud (ed.), *The Rome Statute of the International Criminal Court*, 2000, p. 375 *et seq.*

³⁴⁹ "A treaty may be amended by agreement between the parties...".

not expressly stated, a direct prohibition on States to cooperate with the ICC. It diminishes Article 27 which recognises no immunities. In addition, the parameters of equality seem to rest at the SC disposal. Being this a strictly political organ, delicate problems of legality and legitimacy arise. Lastly, it is important to note that the Resolution entails a general narrowing of ICC's jurisdiction *ratione personae*, which is open to large criticism. The SC is empowered to do so neither by the Statute nor any other instrument. It is entirely in accordance with Article 16 to request suspension of investigations in respect of an actual case or investigation, and thus determinate individuals; it is very different to bar any proceedings *ab initio* in respect of a group of people independently of the precise framework of the crime eventually committed. This is most the case if one bears in mind that the Resolution was not ground on considerations related to the situation in Darfur but on the permanent pressing of the USA to ensure overall immunity of its nationals before the ICC. Conversely, it shall be noted that the SC can discretionally decide to refer a situation to the ICC or not. From the moment it decides to do so, it has to follow and respect the rules of procedure and the independence of the Court as enshrined in the Statute of Rome.

The Charter

After concluding that Resolution 1593 is not in accordance with the Statute of Rome, the question arising is whether the UN Charter supplies any ground imposing the prevalence of the Resolution over the discipline established by the Statute of Rome. This matter begs the consideration of the powers recognised to the SC, especially when acting under Chapter VII.

The purposes and principles of the Charter

The purposes of the Organisation are enshrined in Article 1. For their systematic placement and considering that they are not only established in the Preamble of the Charter but reinstated in an autonomous provision, they give rise to legal obligations rather than merely programmatic indications. This means that each decision taken by the organs of the UN needs to reflect the Purposes and, in case of doubt, the interpretation of such decisions shall be made in light of Article 1. Paragraph 1, Article 1 is divided in two parts: the first posits the prime purpose of the Organisation whereas the second sets out the means to achieve the purpose. Nonetheless, *peaceful means, justice and international law* are to be considered as a purpose in themselves and not only as a means. The Organisation cannot pursue international peace and security through abusive acts.³⁵⁰

Article 2 of the Charter determines that the *Organisation is based on the principle of sovereign equality of all its Members*. States enjoy the same general rights and obligations independently of their economic, military and political power, size or population. It intends to exclude the superiority of one State before another at the same time establishing States' status to be respected by the Organisation.

Kelsen sustained that "the State is then sovereign when it is subject only to international law, not to the national law of any other State. Consequently, the State's sovereignty under international law is its legal independence from other States".³⁵¹ Through the mentioned Resolution, and others of similar content, the SC permitted the perversion of Article 2/1. The USA could not impose their laws and

³⁵⁰ See in particular Article 1/1 according to which the Organisation aims "*To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace*". See also Article 1/3: "*To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...*".

³⁵¹ Kelsen H., '*The Principle of Sovereign Equality of States as a Basis for International Organisation*', YLJ, 53, 1944, p. 208.

political views on other sovereign States. Consequently, it used its influence within the SC and managed the approval of decisions contrary to the intent of States and international law. The SC supplied the United States with a mechanism to override sovereign rights and derogate international obligations. It consisted on a fraud to the law, namely that of the UN Charter.

According to Tomuschat sovereignty is in a process of progressive erosion, where “the international community places ever more constraints on the freedom of action of States ... driven by a global change in the perception of how the right balance between individual State interests and interests of mankind as a whole should be established”.³⁵² This process limits abuses and ensures the protection of human rights. Sovereignty is narrowed, or reshaped, in its core. In turn States are somehow compensated as they are main actors in the process of disclosing the interests of mankind as a whole, namely through the conclusion of international treaties.³⁵³ The SC neglected the dynamics of international relations and contemporary law, which is most disturbing if one takes into account that the Statute of Rome has already been ratified by more than half of UN members.

The principle of good faith

The principle of good faith is enshrined in Article 2/2 of the UN Charter³⁵⁴. An important feature of the duty to act in good faith is that it addresses both States and the organs of the UN.³⁵⁵

In the San Francisco Conference it was stated that

“the expression ‘sovereign equality of all Members’ in Art 2(1) was chosen on the understanding and condition that while each State enjoyed the rights inherent in full sovereignty, each member was still required to comply faithfully with international duties and obligations. The good faith clause was therefore intended to blunt the principle of sovereignty...In legal terms, therefore, no State can invoke its sovereignty in order to evade its international obligations as determined by the duty of good faith and in accordance with the Charter”.³⁵⁶

It is fair to conclude, *a contrario sensu*, that the powers given to the SC by means of Chapter VII are only duly exercised if in accordance with the Purposes that were at the basis of the creation of the UN and the fundamental principles of the Charter. When the SC disregards this obligation, States are legitimised in invoking their sovereignty in order not to follow the former decisions. In line with this view, the ICC, due to its independent legal personality and for the delegation of sovereignty States have bestowed upon it, can react in the very same way to abusive enactments. They would behave in this way not to violate the Charter, the duty to act in good faith or international obligations but precisely to act in accordance with them all.

The binding nature of the principle of good faith on the Organisation reminds it of its own reality and limits: mostly due to its highly comprehensive aims and for the contemporary structure of the international order, it can only survive through the renewal of States consent and their joint will to further support the UN.

³⁵² Tomuschat, ‘Obligations Arising for States Without or Against their Will’, Rec. de Cours 241, 1993, p. 195-375, at 292.

³⁵³ In this sense, see Fassebender/Bleckmann, ‘Article 2’, in Simma (ed.), *Charter of the United Nations, A Commentary*, 2002, p. 86.

³⁵⁴ *All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.*

³⁵⁵ See Schwarzenberger, G., *International Law: As Applied by International Courts and Tribunals*, vol. III, 1976, p. 215; Spiropoulos, ICJ, *Effects of Awards of Compensation Made by the UNAT*, Pleadings Series, 1954, p. 351.

³⁵⁶ Müller/Kolb, ‘Article 2’, in Simma (ed.) *The Charter of the United Nations, A Commentary*, 2002, p.95.

Articles 24 and 25 of the UN Charter

It is a mistake to interpret Article 24 as bestowing upon the SC unlimited powers. Paragraph 1 attributes to the SC the main responsibility concerning international peace and security. States endowed it with such power presupposing that it would act on the behalf of the community of States. Furthermore, paragraph 2 establishes that *in discharging these duties the SC shall act in accordance with the Purposes and the Principles of the United Nations*. The SC only exercises its powers on behalf of States if it respects the principles and purposes of the Charter. Conversely, Article 25 establishes that States are only obliged to *accept and carry out ... decisions of the Security Council in accordance with the... Charter*. Some Authors argue that the wording "*in accordance with the present Charter*" refers to the Charter imposition on Member States to accept and carry out the decisions of the SC. To others, instead, Article 25 is to be read as granting binding effects only to those decisions which were taken in accordance with the provisions of the Charter. The latter is the proper interpretation. The former is immediately contrary to the letter of the provision. However, if Article 25 is considered unclear, one should then recall the Preamble of the Charter as to proceed to the interpretation of the norm. A teleological interpretation - always acknowledged as a valid and highly relevant means³⁵⁷ - of Article 25 supports the view endorsed in this paper. Its *effect-utile* consists of the fact that between two possible interpretations, the one better serving the purposes of the treaty and the remaining provisions considered in overall terms must be chosen.

The protection of human rights, the principles of humanitarian law and respect for justice, referred to in the purposes and principles, play an essential role within the interpretative task. It is not forgotten that the action of the SC under Chapter VII is not primordially motivated by justice or the protection of human rights but by interests of international peace and security. Nonetheless, it must act based upon proportionality and good faith. This means that peace cannot be achieved through the sacrifice of those purposes that justified the creation of the UNO and the respective delegation of sovereignty made by Member States. The arm cannot absorb the brain of the overall entity becoming itself *the* entity. It has no legitimacy to this effect and it is not prepared for the role.

A threat to, or breach of, international peace and security

It was previously explained the importance of Article 16 in order to assess the Resolution in light of the ICC Statute. However, there is also the possibility that the SC has determined the bar of proceedings directly on the basis of the Charter, precisely Article 41, Chapter VII. Essential condition for the exercise of the binding powers established therein is, in accordance with Article 39, the determination of a *threat to peace, breach of the peace, or act of aggression*.

The *travaux préparatoires* of Article 39 reveal the clear intent of States not to submit the SC to a large range of limitations when acting under Chapter VII.

The SC indeed enjoys a broad level of discretion concerning the determination of a threat to, or breach of, international peace and security: Article 39, 40 and 42 are quite elucidative in this respect. Nonetheless, the SC is not completely free when determining if the conditions to act under Chapter VII have been met.

The concept of 'peace' can be understood in broad or narrow terms. Bearing in mind the far-reaching and highly discretionary powers of the SC as well as the purpose of Chapter VII; the necessity and exceptional character of the measures adopted; and the will of States when negotiating the UN Charter, it is my view that a narrow conception of peace is the most adequate. In this sense, it means the inexistence of use of force engaged by a State against another. The notion shall be adapted as to be applied to internal conflicts where violations of human rights achieve the threshold of gravity that

³⁵⁷ See Article 36/5 of the ICJ Statute. See also *Aerial Incident*, ICJ Reports, 1959, p. 127 *et seq.*; and *Certain Expenses*, ICJ Reports, 1992, p. 162 *et seq.*

claims for their classification as a threat to, or breach of, international peace and security. Furthermore, a threat to peace can be identified in situations not characterised as armed conflicts but where the disrespect for human rights and human dignity is outrageous. The point is that in such cases the population is kept under control by physical or psychological coercion. Therefore, the requirement on the 'use of force' shall be retained fulfilled, especially considering the weak position of the people *vis-à-vis* the State or the dominating group.

The notion of 'threat to international peace and security' inherently implies a high threshold of gravity which should be evaluated in light of concepts as 'widespread' and 'systematic'. If a 'threat to peace' is conducive to either the probable outbreak of armed conflicts or the imminent risk of gross violations of human rights, a 'breach of peace' is the consummation of the threat; that is, the actual outburst of the conflict or the feared derogation of fundamental rights.

In accordance with the view exposed, Chapter VII powers can never be deployed with regard to a 'threat' determined in abstract; that is, in respect of the paper-subject, without the existence of at least some tension which, in presence of actual or envisaged proceedings, achieves the threshold of gravity that permits and advises its qualification in accordance with Article 39 of the Charter. This methodology was not adopted when passing Resolution 1593.

'International security' corresponds to the existence of objective conditions without which peace cannot subsist. International security assures every State that peace will not be breached or at least the impact of the breach will be limited.³⁵⁸ Likewise, it implies the right of every State to benefit from any legitimate and efficient system of security, at the same time establishing the duty of States to support those available systems.³⁵⁹ When States ratified the Statute of Rome they were contributing to a comprehensive system of international security and consequently accomplishing an obligation imposed by the Charter. No one can seriously argue that a community where core crimes are committed on a large scale without a proportional and prompt criminal reaction has achieved the satisfactory standards of security. Therefore, States' efforts to ensure prosecution and punishment of perpetrators is not only in accordance with the principles of justice and international law referred to in Article 1/1³⁶⁰ but represents likewise a means to bring efficiency to the system of international security. This view is reinforced by the numerous statements of UN organs, including the SC itself, and State representatives underlining that justice and international peace and security go hand in hand and are not mutually exclusive.³⁶¹ It was exactly on the basis of such a premise that the SC created both *ad hoc* tribunals.

³⁵⁸ The concept of 'international security' was dealt with by a group of governmental experts following the GA Resolution 37/99, 13th December, 1983, which sustained a "*comprehensive study of concepts of security, in particular security policies which emphasise co-operative efforts and mutual understanding between States, with a view to developing proposals for policies aimed at preventing the arms race, building confidence in relations between States, enhancing the possibility of reaching agreements on arms limitation and disarmament and promoting political and economic society*" (UN Doc. A/40/533).

³⁵⁹ Through Resolution 41/90, Dec. 4, 1986, the General Assembly affirmed that national and international security have been intermeshing increasingly, which underscores the need for States to approach international security in a comprehensive and co-operative manner.

³⁶⁰ With the Declaration on the Strengthening of International Security, the General Assembly reaffirmed the "*universal and unconditional validity of the Purposes and Principles of the Charter of the United Nations as the basis of relations among States irrespectively of their size, geographical location, level of development or political, economic and social system*". Res.2734 (XXV), 16th December, 1970.

³⁶¹ See, for example, the Preamble of the *Special Relationship Agreement between the International Criminal Court and the United Nations*, which came into force on the 4th October 2004.

The powers of the SC under Chapter VII

It is submitted that the SC, under Chapter VII, only enjoys police powers. Inasmuch as it is not a judge it cannot recall Chapter VII in order to decide disputes with binding and definitive effects which was precisely what it did through Resolution 1593 (2005). It settled a controversy existing between the USA, on the one hand, and States Parties to the Statute and the ICC, on the other. No provision of the Charter empowers the SC to decide *ex novo* and by itself which party in conflict is right in its claims.³⁶² Worse still is the fact that such a decision was only supported as a response to a State's self-interested and subjectively motivated claim. During the S. Francisco Conference, it was stressed by a Declaration of the USA and the United Kingdom that the SC could only recommend the terms for disputes' settlement under Article 37 of the Charter, but could not evoke Chapter VII to decide compulsory on the matter.³⁶³ Partly as a result, States decided not to adopt the provision of Chapter VII, section B, n° 1, which referred to the possibility of a threat to peace arising from the failure of a pacific settlement of disputes in accordance with Chapter VI. The UN Charter limits the intervention of the SC under Chapter VII to preliminary and short-term measures. To assert States and individuals' rights and obligations with binding effects raises a species of compulsory jurisdiction while the Charter has opted for a system of voluntary submission of States to third-party settlement.

Nor is the SC a legislator. It is not entitled to law-making powers even after the determination of a threat to peace made in regular terms. Precisely, it cannot modify the interpretation, the content and the effects of a treaty, such as the ICC Statute, in a sense contrary to the one meant by the signatory States. The amendment system enshrined in the Statute is complex, demanding and completely independent from the UN or the SC.³⁶⁴ According to Article 103, a resolution of the SC may prevail over an international agreement. Attending, however, to the 'police' function of the SC activity under Chapter VII the prevalence of the resolution over the treaty has to be understood as temporary. Thus, the agreement will recover its initial efficacy once international peace and security are reinstated. SC resolutions do not derogate treaty-law; they may only provisionally 'freeze' treaties' effects and their normal place within the international law system.³⁶⁵

The distressing effect of Resolution 1593 goes much further. On the one hand, it establishes exclusive jurisdiction to the national State, which means to ignore the rule of territorial jurisdiction so well established in international law and repeatedly asserted by national and international judicial and non-judicial bodies as a compulsory duty in respect of gross violations of human rights. Besides, it disregards those trends sustaining the existence of a rule of customary law permitting (and, in some cases, obliging) States to exercise universal jurisdiction as far as core crimes are concerned. Conversely, it is defensible the existence of a preemptory duty to prosecute whereas extradition to a forum capable of ensuring genuine proceedings is not feasible.

It is often argued that the competences of the SC under Chapter VII comprise such general political discretion that no legal evaluation can be made concerning its action. This view is not endorsed herein. Also in respect of the UN governs the Rule of Law. Some scholars sustain that through its decisions

³⁶² The SC acknowledged those limitations when stating, with respect to the creation of the *ad hoc* tribunals, that existing law would be applied but no new law created. See SC Resolution 827 (1993).

³⁶³ See UNCIO XII, p. 162, Doc. 1027 III/2/31 (1).

³⁶⁴ Amendments shall be proposed by States Parties to the Statute and approved by the Assembly of States Parties or a Revision Conference (See Article 121 and 5/2 of the ICC Statute). Unilateral amendments are excluded.

³⁶⁵ In accordance with Article 103 of the Charter "*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail*". It is important to bear in mind that in the terms of this provision only obligations under the Charter – that is, established by it or by the organs of the UN in accordance with the Charter – enjoy primacy vis-à-vis other international agreements. Therefore, the SC can only resort to Article 103 in order to enforce its decisions if the latter are fully in accordance with the Charter, which in the case of Resolution 1593 is highly questionable.

the SC creates obligations on States thus generating law. Again, I disagree. Law is general and abstract, enacted to rule on the behaviour of subjects of law and emerges out of a democratically legitimised process. The resolutions of the SC cannot, obviously, aspire to such democratic legitimacy. Furthermore, its enactments shall be temporary and concrete.

To this point, it is appropriate to quote Bernhardt, according to whom

‘Even if the SC has wide discretionary powers under this Chapter, these powers are not unlimited. The Charter is a legally binding instrument and no organ is endowed with complete freedom to act or not to act. The present author holds the opinion that in case of manifest ultra vires decisions of any organ, such decisions are not binding and cannot prevail in case of conflict with obligations under other agreements’.³⁶⁶

A practical insight

It is highly improbable that peacekeepers’ actions may ever constitute one of the crimes over which the ICC is to exercise jurisdiction. Nonetheless, as a question of principle, the blanket immunity passed by the SC and corresponding implications remain an extremely important political and legal challenge in light of the mandate of the Court and its promise, with the full support of the UN, to stringently fight impunity of the most heinous perpetrators.

The SC has been modifying treaties and customary rules as consequence of strictly political conveniences pledged by the most influential of its members. The root of the problem lies on the very structural organisation of the Council, most of all in respect of its voting and vetoing system, which is rather complex and highly improbable to suffer any modification in the near future. The SC has been resorting to ‘international peace and security’ as a magic formula enabling it to act with unlimited powers, namely to behave like the worldwide legislator, judge and police. It has been crossing the most basic borders between politics and law with the inevitable consequence of discrediting international criminal justice and jeopardising the work of those actors that in such a complex area try, within tight limits, to ensure that perpetrators will be brought to justice.

The difficult and frequent clash between law and *Realpolitik* is evident in every act and statement of agents of both areas as well as the need for their mutual reliance. In all its reports to the SC, the ICC Prosecutor never complained about the problematic contents of Resolution 1593, from the limitation *ratione personae* of the Court’s jurisdiction to the fact that, contrarily to the Relationship Agreement between the ICC and the UN, it excluded non-States Parties to the Statute from any financial contribution to the expenses related with the situation in Darfur. The Prosecutor was probably trying to avoid any direct conflict with the SC aware of the need for its support in order to ensure the enforcement of measures issued by the Court. However, the Prosecutor stressed many times the non-cooperation of Sudan with the Court namely in respect of the arrest warrants against Harun and Kushayb, the targeting of potential witnesses which undermines the development of investigations and the non disclosure of information asked for. The Prosecutor expressly requested the SC to act in order to ensure the cooperation with the Court through “*No political support, no financial aid... to those individuals subject of an arrest warrant or those protecting them... individual travel bans*”³⁶⁷, recalling that Sudan was disrespecting a decision enacted under Chapter VII. The SC did no more than remind Sudan of its obligation under Resolution 1593 when it could use Article 41 of UN Charter to ensure compliance.³⁶⁸ More than three years have passed since the Resolution approval. President Al-Bashir continues to defy the international community, crimes continue to be committed on a large scale in Darfur. When the ICC Prosecutor requested the Chambers to issue an arrest warrant against

³⁶⁶ See Bernhardt, “On Article 103”, in Simma (ed.), *The Charter of the United Nations, A Commentary*, 2002, p. 1299.

³⁶⁷ Eighth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), para. 101,

³⁶⁸ UNSC Presidential Statement 21, 16 June 2008

President Al-Bashir - charged with genocide, crimes against humanity and war crimes - some States started advising and urging the SC to 'freeze' the warrant as it would allegedly imperil security and peace negotiations in Darfur.³⁶⁹ President Bashir himself asked for the protection of the African Union, the SC and the international community in general as a warrant against him would only further reduce security and undermine the peace process in the territory despite the fact that

"At least 35.000 persons have been killed, around 300.000 suffered a "slow death", thousands of women and girls are victims of rape. 2.5 million people in the camps, today, are subjected to conditions of life calculated to bring about their physical destruction. (...) Genocide continues. Rape in and around the camps continue. More than 5,000 displaced persons die each month".³⁷⁰

Despite being already named in an arrest warrant issued by the ICC³⁷¹, Al-Bashir has been visiting neighbouring countries without the latter enforcing the judicial order.³⁷² The SC could compel States to respect the Court's ruling but did not yet do anything to the effect. One can only hope that the SC will be able to stop the permanent twisting of 'international peace and security', always resorted to in order to safeguard political claims which run against the dicta of law and justice. The SC is to keep in mind that it itself, in Resolution 1593, has qualified the outrageous crimes committed in Darfur as a threat to, or breach of, international peace and security; that Bashir repeatedly promised cease-fires and criminal accountability without ever honouring his promises; that in his own words "*we are not looking for problems, but if they come to us then we will teach them a lesson they won't forget*"³⁷³; that Hamid Musa, Governor of South Darfur, in the eventuality of a warrant against Bashir, threatened the international community with "*more genocide like it has been not seen before by anyone*"³⁷⁴. It appears the image is trying to be given that justice, on the one hand, and peace and security, on the other, are ever and ever more incompatible when the framework is exactly developing in the opposite sense. Never as now has the international community been so committed to recognising that accountability for the most serious international crimes is a fundamental condition for national reconciliation, peace and stability. UN organs have followed this path several times, States have increasingly been adhering to this view as reported in UN General-Assembly meetings. The UN Secretary-General has been sharp and steady on his position. The SC has delineated a comprehensive solution to Darfur comprising four main guidelines: peace, security, justice and humanitarian aid. All of them are compromised by the ongoing criminal practice in the territory. Even peacekeepers and humanitarian workers have been subject of numerous attacks resulting in several dead and thousands of wounded.³⁷⁵ Furthermore, the SC need to carefully consider the message it sends with its decisions. In respect of the Al Bashir case, the SC could eventually block the arrest warrant on the basis of Article 16 Rome Statute by requesting the suspension of investigations. Were this particular case to have more than one suspect and it would be highly challengeable that the SC could prevent proceedings in respect of only one of the alleged perpetrators on grounds of exclusive political pressing. The principle of prosecutorial opportunity, common to several legal systems, cannot be

³⁶⁹ For an overview on the positions adopted on the matter, see Security Council, 6028th Meeting, Doc. SC/9516, available online at <http://www.un.org/News/Press/docs/2008/sc9516.doc.htm>

³⁷⁰ Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005), New York, 3 December 2008, p. 2-3, available online at http://www.icc-cpi.int/otp/otp_events.html

³⁷¹ Issued on 4th March 2009.

³⁷² See for example *Embattled al-Bashir visits Ethiopia*, in http://www.upi.com/Top_News/2009/04/21/Embattled-al-Bashir-visits-Ethiopia/UPI-63141240326542/.

³⁷³ See *Darfur: ICC Prosecutor Eighth Address to the Security Council*, available online at <http://www.iccnw.org/?mod=newsdetail&news=3190>.

³⁷⁴ See Statement to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005), 3 December 2008, New York, available online at http://www.amicc.org/docs/2008-12-03_unsc_statement-FINAL.pdf.

³⁷⁵ In this respect, *The Prosecutor v. Bahr Idriss Abu Garda* is presently being heard before the Pre-Trial Chamber I of the ICC.

resorted to in order to justify inequality furthered by the SC. At the domestic level the principle of opportunity is submitted to the scrutiny of an independent judicial entity, and often to the agreement of private parties directly involved in the quarrel, and it is generally accepted because it does not imperil the administration of justice.

Balancing of International Peace and Security vis-à-vis Criminal Justice

Part I aimed at evidencing how the SC has become a resourceful forum for powerful States to enforce their political claims against the general consensus of the international community in respect of international criminal justice.³⁷⁶ With the following analysis I intend to highlight the need for a reviewing procedure over potentially abusive decisions of the UN political organ which are capable of seriously hampering the fight against impunity of perpetrators of the most serious crimes of concern to the international community as a whole. I will start by analysing the clash between political claims and law, observed in the context of the ‘war against terror’, as to demonstrate that an important parallelism links the ‘war against terror’ with the interplay, in the terms above explained, between the SC and the ICC. Subsequently, I will focus exclusively on the terms of the relationship between the SC and the ICC and therein advocate the necessity of judicial balancing to be pursued by the permanent court as the most suitable solution to ensure a proportional safeguarding of international peace and security, on the one hand, and international criminal justice in regard to core crimes, on the other.

Balancing within the ‘War On Terror’

Balancing of security and human rights became the matter of the day in the aftermath of September 11. The policies adopted initially by the USA and afterwards followed by other countries within the ‘war on terror’ were characterised by being stringently restrictive of human rights.³⁷⁷ It was against this background that many voices have been raised against an utterly overstated security in jeopardy of fundamental individual rights. When one faces a conflict between two prominent goals it is through

³⁷⁶ In fact, one of the main arguments for the American claims was that trials of individuals without the consent of the national State would run counter international law. But then why to exempt peacekeepers and not all nationals? The US also argued that as the ICC was established through a treaty it could not have jurisdiction over non States-Parties to the Statute. However, the USA did not veto the passing of Resolution 1593 (2005) which submitted nationals of non-Parties to the jurisdiction of the Court.may arise.

³⁷⁷ The examples illustrative of strong limitations of human rights are several and surpass the scope of this paper. However, follows a brief reference of striking events in order to better contextualize the issue of balancing. Upon the premise that national security needed to be protected against terrorism, the United States detained hundreds of individuals. On 13 November, President Bush issued the ‘Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror’ Military Order by which he claimed its capacity of Commander in Chief to detain non-citizens for an indeterminate period and have them tried by military commissions which are not subject to the same due process requirements as national courts. In 2002 began the transfer of citizens from more than 40 countries to the US Naval Base in Guantanamo Bay where hundreds of alleged suspects have been held incommunicado for more than two years without access to lawyers or courts. There was no right of appeal to any civilian court. The limitations imposed on the right to choose counselling as well as the monitoring of lawyer-client meetings led the National Association of Criminal Defense Lawyers affirmed it would be unethical for a criminal lawyer to undertake any case under this conditions as suspects would not be ensured adequate and ethical representation (National Association of Criminal Defense Lawyers, Ethics Advisory Committee, Opinion 03-04, approved by the NACDL Board of Directors, 2 August 2003; see also ‘Rules for Terror Tribunals May Deter Lawyers’, *New York Times*, 13 July 2003). The Pentagon confirmed that detainees could still be kept under arrest even if they had been considered not guilty or had already served their sentence, whenever the USA were to consider them a risk to national security. It is important to note that there have never been given any criteria to proceed to this evaluation. It seems the targeted individuals have been so on basis of their nationality, religion or race, contrarily to several human treaties expressly prohibiting discrimination based upon such grounds (For example, the USA accepted not to seek death penalty or monitor lawyer-client meetings for UK and Australian nationals held in Guantanamo. See US Department of Defense, ‘DOD Statement on British Detainee Meetings’ and ‘DOD Statement on Australian Detainee Meetings, *New Releases*, 23 July 2003; ‘Bowling to Ally, Bush to Rethink Tribunals for British Subjects’, *New York Times*, 19 July 2003).

their mutual balancing that an equitable solution may be achieved. The question arising regards the most apt authority to pursue such balancing. Former American President Bush has called upon himself the capacity to assess and decide which goal – security or human rights – should prevail, and conversely which should be sacrificed and to what extent. However, those individuals most hardly affected in their freedom have resorted to courts in order to vindicate their rights. Balancing is in truth a constant of the judicial mandate. When different rights or interests worthy of legal protection enter into conflict, courts are called upon to proceed to their cross-evaluation as to surmount the impasse and reach an equitable solution for the case in question. Judicial balancing becomes rather complex however when one has crossed the border of ordinary conditions, as within the framework of the 'war against terror'. For example, in many democratic countries, the declaration of a state of emergency or distress results on a constraint or suspension of fundamental rights. Some constitutions expressly provide for it.³⁷⁸ Some countries, as the USA, do not enjoy of a corresponding constitutional provision. However, e.g., the habeas corpus can be suspended³⁷⁹ in a crisis and Presidents have de facto enlarged their powers as to respond to emergencies³⁸⁰.

Michel Rosenfeld, referring to the 'war on terror' distinguishes between *ordinary times*, *times of stress* and *times of crisis* arguing that within each of these contexts judicial balancing is submitted to different frameworks. In the words of Rosenfeld:

"Times of stress are neither ordinary times nor times of crisis. In the context of a crisis, be it military, economic, social or natural, the head of government may be entitled to proclaim exceptional powers and to suspend constitutional rights(...). In an acute crisis, the polity is singularly focused on survival and all other political concerns and objectives recede into the background. In contrast, in ordinary times, the polity can readily absorb the full impact of the give and take of everyday politics, and constitutional rights ought to be protected to their fullest possible extent".³⁸¹

Ordinary times do not coincide with the lack of conflict; rather, conflict and tension are normal and indispensable components of progressive societies. In an ordinary framework, though, the customary social tension does imperil neither the polity and its structures of governance nor the security of peoples. According to the Author, times of stress are a middle term between crisis and ordinary moments. The criteria of differentiation of stress *vis-à-vis* crisis can be distinguished in the *severity, intensity and duration* of the threat.³⁸²

It is important to underline that even in times of crisis fundamental rights do not simply disappear. Rather, it is as if another sector of law had joined criminal law and constitutional law as to ensure a proportional reconciliation between the urgent necessity of safeguarding the community and the respect for individual rights. For this reason, a government is fully entitled to pass a regulation determining an obligatory curfew while a national insurrection is taking place. On the opposite it is not entitled to arrest, torture and expel from the country all members of rebels' family merely on the basis of their bonds with suspects. Rosenfeld refers to the set of norms trying to harmonize security and

³⁷⁸ See e.g. Article 16 of the 1953 French Constitution.

³⁷⁹ Article 1, §9, cl. 2. US Constitution.

³⁸⁰ See Rosenfeld, M., 'Judicial Treatment of 'War on Terror' Cases in a Comparative Perspective', presented at the workshop on *Security and Law: Facing the Dilemmas*, held at the European University Institute, Florence, 22-23 January 2009.

³⁸¹ *Ibidem*.

³⁸² Rosenfeld explains that the line between crisis and times of stress can be a tiny one, however "a less severe, less intense and more durable threat is likely to give rise to times of stress whereas a severe, intense, concentrated threat, of relatively short duration, is likely to provoke a crisis. For example, a foreign military invasion or a widespread military insurrection is likely to provoke a crisis. On the other hand, the aftermath of the terrorist attacks against New York City on 11 September 2001 – which involved threats, perceived threats, launching a 'war on terror' fought mainly in faraway countries, arrest and detention of potential terrorists, but no further terrorist attacks on the United States as at the time of writing – has produced times of stress rather than times of crisis". *Ibidem*.

liberty as ‘police power law paradigm’. This harmonisation endeavour is necessarily to be made on the basis of accurate rationales of proportionality. Proportionality requires balancing and the latter, intended at being legitimised as it shall, can only be achieved through the former.

The previous brief contextualisation of balancing within the ‘war against terror’ aimed at providing the framework that permits to comprehend that, as herein submitted, the question of balancing is raised in very similar terms with respect to the UN Security Council performance within the realm of international criminal law and therein very particularly in respect of the ICC system. It is sustained that before issuing Resolution 1593 (2005) the SC should have evaluated the circumstances in order to assess whether it was dealing with ordinary, stress or crisis conditions. It is my view that the American threat of veto could not be seen as a crisis. Eventually, it could be framed as a situation of stress and the SC could have then called upon itself the entitlements provided by the police power law paradigm. However, the scrutiny of proportionality could not have led to such restrictive measures as the ones enshrined in Resolution 1593.

The need for balancing in the interplay between the SC and the ICC

SC Resolution 1593 (2005) was passed under Chapter VII of the Charter and thus allegedly as response to a threat to, or breach of, international peace and security. Notwithstanding the SC did not explicitly state it, the conclusion to be withdrawn from the Resolution is that the functioning of the ICC normal mandate raised a threat to international peace and security. Being that the case, one would be facing a conflict between two major goals: the peace and security of the international community, and international criminal justice. It cannot be seriously argued that international peace and security is not a higher objective to be pursued. Conversely, individual criminal liability for those responsible for the most serious attacks against humanity has progressively become a goal of prime importance.³⁸³ Criminal law is a legal branch which intends to ensure and enforce – as *ultima ratio* that it is – the most essential core of fundamental individual rights. International criminal law, and most particular core crimes law, aims at vindicating human rights and thus protecting individuals from severe attacks which by their gravity strike and threaten not only the direct victim but the entire human community. Prosecution and punishment of core human rights violations are indispensable tools in the protection of those rights which criminal rules aim at safeguarding.

What one has been observing is the SC taking on the role of a judicial body and thus proceeding to the balancing of crucial interests to the international community: peace and security *vis-à-vis* criminal justice. The first important note to stress, as better explained at a later moment, is that the SC is not the most adequate organ to undertake such an evaluation as it is a strictly political organ subject to stern political manipulation. The second note concerns the fact that peace and security, on the one hand, and international criminal justice, on the other, are not antagonist. Nor do they relate to each other on the basis of a strict inversely proportional rationale. There cannot be international peace and security without an efficient system of international criminal justice able to ensure prosecution and punishment for wrongdoers responsible for the most heinous attacks to humanity.

The nub of core crimes law is with no major disagreement considered of a constitutional nature, be it under the title of customary law, *jus cogens* or natural law. Attention is to be drawn to the fact that the present considerations do not confuse primary and secondary obligations. The prohibition to commit torture is broadly recognised as a peremptory one. It is quite different to aver the peremptory nature of

³⁸³ Paragraph 2, 3, 4 and 5 of the Preamble of the Rome Statute state as follows: “Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, (...)Recognising that such grave crimes threaten the peace, security and well being of the world, (...) Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, (...)Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes (...)”

the obligation to ensure individual criminal responsibility. However, it is submitted that the logical conclusion when core crimes are at stake is that prosecution and punishment become themselves peremptory duties. Two philosophical mainstreams can be recalled to size up the duty to ensure criminal accountability in such cases. On the one hand, naturalists conceive international law as aimed to drive the whole community to peace and just livelihood. Accordingly, what is contrary to essential notions of justice and prevents peaceful co-existence shall be universally prohibited. The logical consequence is that enforcement mechanisms necessary to ensure accomplishment with those norms must likewise be universally binding. On the other, positivists sustain that systems lacking mechanisms to sanction potential offenders of substantive legal prohibitions present an insurmountable lacuna. The obligation to take action is a primary requisite of any valid legal system. If the criminalisation of core crimes is not seriously challenged by any country nowadays, enforcement mechanisms are necessarily required. In this sense, criminal accountability becomes the compulsory outcome of the core crimes law system even without the need of engaging on the assessment of treaty and customary law in order to evaluate the contemporary status and contents of the *aut dedere aut judicare* principle.³⁸⁴ Against this backdrop, the ICC becomes, in the end, the enforcer of that core of human rights which is an inherent component of human dignity whenever States, primarily responsible for the task, are unable or unwilling to take action.

Constitutional values can only be restricted for the benefit of other constitutional values, thus international criminal justice cannot be weighed against national security interests. Both international criminal justice and international peace and security enjoy of higher status within the international order. The latter is a societal goal as well as the former. However, international criminal justice in respect of core crimes realm presents very particular features. It shares traits of fundamental human rights. As previously explained, criminal accountability is a crucial tool in the enforcement of the most essential human rights. At the same time, it benefits and safeguards the international community³⁸⁵ as a whole. Accordingly, both the single individual and the international community are entitled to demand the world for criminal justice. In this sense, the parallel between security *versus* human rights, on the one hand, and international security *versus* international criminal justice, on the other, becomes more evident. The former takes place in the context of a State-individual relation; the latter is referred to a broader framework: the binomial is composed by worldwide *Realpolitik* (often referred to under the edge of 'international peace and security') summarising polity demands, and international criminal justice as the safety net that promotes the survival of humankind. Hence, international criminal justice can only be balanced *vis-à-vis* peace and security of the international community considered in overall terms. If it is true that the security of each State is a necessary component of international security the latter however is not and cannot be confused with private and self-interested claims conditioned to the subjective evaluation of governments.

When States are unwilling or unable to deal with issues of peace and security arising under their jurisdiction, the SC is entitled to step in. It is a strictly emergency entitlement submitted to the scrutiny

³⁸⁴ For a question of length I will not scrutinize this matter. However, it is sustained that the duty to extradite or prosecute has acquired customary and peremptory nature in respect of core crimes. See, e.g., Enache and Fried, 'Universal Crime, Jurisdiction and the Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law', 43 *McGill Law Journal* 613, 1998; Bassiouni and Wise., *Aut Dedere Aut Judicare, The Duty to Extradite or Prosecute in International Law*, 1995; Bassiouni, 'Universal Jurisdiction for Core Crimes: Historical Perspectives and Contemporary Practice', 42 *Va. J. Int'l L.* 81, 2002.

³⁸⁵ The international community is taken herein as an abstract construction – *rectior*, a legal fiction, thus not requiring precise conceptual definition - which represents the right of each and every person not to be struck in his/her essential dignity. States are certainly relevant at an intermediate level. On the one hand, they shall exercise sovereign powers in accordance with the will, and on the interest, of the people, on the basis of the 'social contract' On the other, they are required to enforce the will of the international community on the basis of the Roman *actio popularis*. International criminal law lies on the indirect enforcement system; that is to say that it depends on the action of States to put into effect its dicta. Because core crimes threaten the very survival of mankind, their enforcement does not depend on States' will as in this regard States are a means to optimize the system and reduce, as far as possible, its legal gaps.

of the principle of proportionality as the latter will be the legitimising agent of any restriction of a certain right or goal in favour of another.

For the far-reaching powers of the SC when acting under Chapter VII and for it is invoking a threat of, or breach to, international peace and security, it is the UN political organ that incurs the onus of proving that (i) the non-suspension of the normal jurisdiction of the ICC would amount to a strike at common peace and security, and (ii) the measures it adopted accomplish with the Charter requirements and with the principle of proportionality. Part I already analysed Resolution 1593 (2005) *vis-à-vis* the UN Charter concluding it has not been issued in accordance with the rules of the Charter. As far as proportionality is concerned, some considerations need to be drawn. The SC is obliged to respect the principle of proportionality even when acting under Chapter VII. It may only approve measures that affect States' rights or obligations if inevitably necessary and instrumental to enforce genuine peace purposes. Article 40 and 42 refer to *necessary* measures. Conversely, Article 42 determines that military action shall be undertaken only if the resources enshrined in Article 41 prove to be inadequate. From the mentioned provision emerges the Charter longing to reduce binding actions from the SC to a minimum. One may argue that the claimed unbinding nature of SC's activity remains untouched even when submitted to the scrutiny of proportionality since it is up to the SC to value if the measure is necessary or not. Indeed, Article 40 refers to measures the SC 'deems necessary or desirable'; Article 42 permits military action if the SC 'considers' that the measures established in Article 41 are inadequate. In my view the power of the SC is significantly limited by the scrutiny of proportionality.

The principle of proportionality can be divided into three sub-conditions: i) the means chosen shall be rationally directed and probably leading to the aim desired; ii) the means selected shall be the less damaging among the possibilities available to other conflicting interests; iii) the damage provoked on one goal shall be proportional to the benefit produced on the other. This last test can be assessed in two ways: i) by directly weighing the benefits against the harms caused by the means elected; ii) by comparing different alternative means in order to determine whether an apparently less efficient means is accompanied by drastic damage on the result pursued as well as the proportional relation between that alternative means and the harm caused.

The SC neither explained its choice nor tried to evaluate the impact of its resolutions.

As easily withdrawn from the analysis provided for in Part I, the Resolution in question seriously undermines the fight against impunity to which the international community, including the UN, is increasingly committing to, and the credibility of the ICC. From a legal viewpoint, both Resolutions run against some of the most well established principles of international law and disregard customary law. Furthermore, it is not possible to proceed to any evaluation of means and results because the SC did not identify any goal intended to be achieved by means of the Resolution. Resolution 1593 (2005) does identify the situation in Darfur as a threat to peace and security but such determination lacks any logical connection to the blanket immunities awarded by the SC. The SC passed it in order to prevent the announced American veto to the referral of the situation in Darfur to the ICC. If any threat existed to international peace and security it was created by the USA and its menace of veto. As a matter of fact, the General Assembly declared that a means to ensure international peace and security consists of the achievement of a balance of power. Consequently, hegemonic behaviours represent a serious threat.³⁸⁶ The SC should have then provided adequate responses against the abusive exercise of the privilege of vetoing instead of rewarding it as it seems to have done.³⁸⁷

³⁸⁶ GA Resolution 34/103, 14th December, 1979.

³⁸⁷ Article 48 of the UN Charter determines that the "... *action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Council may determine*". Article 49 conversely establishes that the Organisation (thus, comprising the SC), "... *shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its*

In spite of the previous considerations, were one to conclude that the Resolution in question was somewhat appropriate to restrain a threat to international peace and security and even then it would be hardly feasible to sustain it on grounds of proportionality or necessity. For instance, the SC could have had exempted peacekeepers from the ICC jurisdiction – and eventually even award the national State with exclusive jurisdiction – under the strict condition that the latter was to ensure genuine proceedings. In the absence of such a guaranty or corresponding lawsuits other competent States and, complementarily, the ICC would regain jurisdiction. In reality, there is no need for this kind of condition if the intent is to avoid nationals of non-States parties being submitted to the ICC as the principle of complementarity already assures it. Were the SC trying to reinforce what is already clear-cut and, again, the solution was by no means justifiable in light of either the UN Charter, the ICC Statute or international law in general.

Judicial balancing of SC decisions

Referring to a domestic system, Rosenfeld writes that:

“Proportionality analysis comprises measuring, fitting, comparing and balancing in relation to normative standards or values that transcend proportionality itself. Responsibility for proportionality can be entrusted to legislators, members of the executive branch or to judges, or it can be apportioned among all of them. How much of proportionality analysis and balancing is left to judges depends on many factors, including the particular constitutional order involved and the particular nature of the legislation and or executive decrees at stake. Furthermore, how much of, and what kind of, proportionality analysis and balancing should be optimally left to judges is also context-dependent (...). Finally, when proportionality standards have been set by the legislature and when balancing is embodied in legislation, whether ordinary or constitutional, a judge applying such legislation or evaluating it in connection with a constitutional challenge may be pretty much limited to performing a categorical determination”.³⁸⁸

The SC, for context and structural reasons, is not in a position to ensure a legitimised balancing. It is herein submitted that the ICC shall if necessary review SC decisions which appear abusive, running counter to the Rome Statute and the UN Charter. On the one hand, Article 4 of the Statute determines that the ICC has all the powers and the needed legal capacity to properly fulfil its functions and display its mandate. Thus, the Court is bound to assess all positive and negative conditions for the exercise of its jurisdiction. The power of the ICC to judicially review resolutions enacted by the SC derives from its legal status as an independent international permanent Court within the limits established in the Statute.³⁸⁹ On the other, the compromise undertaken *vis-à-vis* the international community with respect to the prosecution of perpetrators imposes on the Court, in the name of its credibility and future effectiveness, a behaviour in line with the commitment undertaken and stated in the Preamble of, as well as through out, the Statute of Rome. In the end, ‘*criminal law is only efficacious if the body that determines criminality is viewed as legitimate*’.³⁹⁰

The existence of a threat to, or breach of, international peace and security determined in accordance with Chapter VII of the UN Charter is a negative condition of ICC’ jurisdiction.³⁹¹ In line with Article

(Contd.) _____

functions and the fulfilment of its purposes”. The SC has thus the power to determine sanctions in case of members’ non compliance with the UN Charter and the Organisation lawful binding decisions.

³⁸⁸ Rosenfeld, M., ‘*Judicial Treatment of ‘War on Terror’ Cases in a Comparative Perspective*’, presented on the workshop on *Security and Law: Facing the Dilemmas*, held at the European University Institute, Florence, 22-23 January 2009.

³⁸⁹ In accordance with Article 19 of the Statute of Rome, the Court shall examine its own jurisdiction as well as the admissibility of the case brought before it.

³⁹⁰ Alvarez, J.E., ‘*Nuremberg revisited: The Tadic case*’, *EJIL*, 7, (1996), p.250 *et seq.*

³⁹¹ The jurisdiction of a court consists on both the power and the duty that oblige a determined organ with judicial functions to assert the law for the case under trial. It is not correct to infer that a court only has jurisdiction if it can decide on the merits of the case. The ‘case’ as a judicial reality is an entity phenomenologically different from the actual facts that constitute and conform it. Accordingly, a court’s decision that recognises its lack of jurisdiction is likewise a judicial

16 of the Statute, only a request to that effect presented by the SC through a Resolution adopted under Chapter VII prevents the commencement, or determines the suspension, of proceedings. Consequently, the ICC is not only entitled but is actually obliged to review the consistency of SC's resolutions with the Charter. Article 16 directly remits to Chapter VII, necessarily acknowledging the capacity of the Court to control the accordance of such request with the Charter. It is senseless to determine the submission of the Court to a specific rule with material insights without accepting that it shall have the competence to ensure the respect for that norm. Other interpretation appears incompatible with the nature of the judicial function. As a court that it is, the ICC has the duty to analyse *ex officio* all facts that may affect, positive or negatively, its jurisdiction and, consequently, the lawfulness of any bar to its jurisdiction. This thesis is supported by the well-known theory of 'inherent powers'. The judicial activity is to fulfil special functions, from which are derived the needed residual powers – even if not directly enshrined in the respective constituent document³⁹² – that permit it to engage in, and accomplish with, its mission. In addition, the '*compétence de la compétence*' theory underpins the conclusions just withdrawn.³⁹³ This argument was used by the Appellate Chamber of the ICTY to refuse the claims of Tadic.³⁹⁴ On its grounds, the Tribunal ruled that it itself was the major judge concerning the determination of its competence. In keeping with this view, the Court shall not attain its judgement only to the formal adequacy of resolutions, which would be superficial and useless *vis-à-vis* the most problematic substantive issues as explained in Part I. From the moment the SC, allegedly in order to ensure or restore peace, intrudes in the criminal competences of the Court, the latter is fully entitled to ascertain the lawfulness of such interference.

Against this background, it is not a convincing argument that the broad interpretation of threat to, or breach of, international peace and security adopted by the SC unties it from all legal bindings. As explained by Castanheira Neves, the committed political nature of the legislative power finds its diametric opposite balance in the autonomously juridical nature of the judicial power.³⁹⁵ It does not mean to substitute the discretionary decision of the SC by the ruling of the Court. The Court would not directly review decisions of the SC, but it can and shall do it incidentally or indirectly with the single objective of establishing its jurisdiction concerning an actual dispute. In other words, the Court must pronounce itself only as far as the legality of the resolution (in light of the Statute and the UN Charter) is concerned but cannot go into the merits of the political choice of the SC. Furthermore, the review cannot be pursued direct and autonomously; that is, the Court can only proceed to such evaluation when decisions of the SC threaten the fulfilment of the Court mandate in accordance with the Rome Statute.

Under this perspective the ICC becomes a counter-power to the SC. It will not be a power that competes within the common political market of powers but a power through which *the* power suffers

(Contd.) _____

decision as well as a statement regarding the applicable law to the case in question; in Caeiro, P., 'Claros e escuros de um auto-retrato: breve anotação à jurisprudência dos Tribunais Penais Internacionais para a antiga Jugoslávia e para o Ruanda sobre a própria legitimação', *Direito Penal Internacional para a Protecção dos Direitos Humanos. Simpósio da Faculdade de Direito da Universidade de Coimbra e Goethe-Institut de Lisboa, 2003*, p. 215-216.

³⁹² "... an international court has the power to determine whether it has jurisdiction in a particular case, even if there is no express provision giving it the power to do so" ... "indeed, a court has a duty to determine its own competence". Hall, 'Article 19', Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, p. 407.

³⁹³ Sarooshi, 'The Powers of the United Nations International Criminal Tribunals' Max Planck UNYB 2 (1998), p. 145 *et seq.*, for whom the determination of the inherent powers of the Tribunals is to be dealt with exclusively by the organ itself in the name of the '*compétence de la compétence*'.

³⁹⁴ ICTY, Prosecutor v. Dusko Tadic, 2 October 1995. Available online at www.un.org/icty.

³⁹⁵ Castanheira Neves, "Entre o 'Legislador', a 'Sociedade' e o 'Juiz', ou entre 'Sistema', 'Função' e 'Problema' – os modelos actualmente alternativos de realização jurisdicional do direito", *Boletim da Faculdade de Direito de Coimbra*, 74, 1988, p. 1: "...a índole política (comprometidamente política) da função legislativa [tenha] o seu contrapólo na índole jurídica (autonomamente jurídica) da função jurisdicional".

the competition (the limit and the critique of validity and legitimacy) of Law.³⁹⁶ The argument used by the Trial Chamber of the ICTY in the Tadic case³⁹⁷, according to which a pronouncement of the SC is a political question and consequently non-justiciable by the Tribunal finds no support. The understanding of the Trial Chamber is incompatible with the social legitimacy that brands, and is inherent to, justice. The Court of the United Nations itself recognised that the SC is not completely free from limits and bindings.³⁹⁸ *A fortiori*, the review of SC's decisions has to be considered not only possible but due, in particular when they permeate the international criminal law realm and affect fundamental rights of victims, the accused, due process and critical legal principles. By reviewing the lawfulness of SC decisions in the terms explained, the ICC provides individuals and the international community with the guaranty that *Realpolitik* will be, within the limits of the UN Charter and the Rome Statute, submitted to the scrutiny of Law.

From the viewpoint of criminal policy and democratic rationales it seems clearly preferable to endorse judicial balancing as opposed to the political balancing the SC can and has been furthering. It would much benefit the principle of equality in international law and safeguard sovereign equality of States, especially as the ICJ has always shown reluctance to pronounce itself on the action and powers of the SC. The ICC is in position to be a counter-weight to the SC. UN members do not enjoy veto rights in the General Assembly and thus it is impossible to prevent any abusive behaviours from the permanent members of the SC. Attending to the fact that the number of States negotiating the ratification of the Statute of Rome is always increasing, the Court may somehow equilibrate the abuses verified within the SC.

The categorical approach

In Rosenfeld's previous quotation, he somewhat shows reluctance towards the so-called categorical approach, that is criteria or rules previously posited by law or government's regulations conditioning judicial balancing. It is not difficult to understand the Author's reasons. The executive does not appear better suited for determining the terms of balancing for it looks for efficiency which in the present times of globalisation and consumption is much attached to the logic of liberal markets and its final goal of growing wealth. Executives follow rationales of self-interested claims whereas universal human rights are awarded low importance, if any at all. Legislatures can also be made actors of balancing. However the previous critiques are as much valid also in regard of Parliaments. The

³⁹⁶ Castanheira Neves, *O Instituto dos Assentos*, 1983, p. 64 et seq.: "... nao é o seu um poder que concorra no comum mercado político dos poderes, mas um poder através do qual o poder sofre a concorrência (o limite e a crítica de validade e de legitimação) do direito".

³⁹⁷ ICTY, *Prosecutor v. Tadic*, Trial Chamber, 1997.

³⁹⁸ See ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Accident at Lockerbie* (Libya v. USA), 1989. The Court recognises that the SC is not free from legal bindings, in particular with regard to the accomplishment of obligations arising out of the UN Charter. The Court considered that no sufficient evidence of *mala fide* or *ultra vires* behaviour was presented by Libya at the preliminary stage; therefore, the Court could not order interim measures nor the suspension of SC Resolution 748. The Court considered that Article 103 trumped any rights Libya might have under the Montreal Convention. Notwithstanding, had Libya invoked a different ground of *ultra vires* – that a coercive demand of extraction for a State's own national *could be deemed contrary to sovereign rights under general international law* – then, in the words of Acting President Oda, it *would have instituted a totally different litigation, and whether or not the Court has jurisdiction to deal with that issue is a completely different issue*. Judge Lach, in its separate opinion, stressed that the decision of the Court should not... *be seen as abdication of the Court powers*. The ICJ did neither assume that SC's decisions are unjusticiable nor withdrew its competence to review the organ determinations in case of violation of the UN Charter. See Franck, "The 'Powers of Appreciation': Who is the ultimate guardian of UN Legality?", *AJIL*, 86, 1992, p. 522-523, positing with respect to the Lockerbie case that ... *there are such limits and they cannot be left exclusively to the Security Council to interpret. The legality of actions by any UN organ must be judged by reference to the Charter as a 'constitution' of delegated powers. In extreme cases, the Court may have to be the last-resort defender of the system legitimacy if the UN is to continue to enjoy the adherence of its members. This seems to be tacitly acknowledged judicial common ground*.

interplay of political powers and parties' private lobbies continue to be felt in this realm as well. Thus, it is highly improbable that a political organ could ever transparently display or guide balancing. Courts shall be recognised to a certain degree of judicial discretion in order to be able to pondering conflicting, though prominent, goals. One could argue that judicial balancing furthers courts to make policy. Instead, it is considered that in such cases courts will not be making policy but rather interpreting the law and filling in legal lacunae. All laws imply policy, grounded on morals and values. If this is the kind of policy one is fearing courts may make, there is nothing to be alarmed about as it corresponds to nothing more and nothing less than the exercise of proper judicial functions.

Martin Scheinin supports a proficient combination of judicial balancing with the categorical approach.³⁹⁹ The Author argues that balancing should somehow and to a certain extent be defined instead of awarding the judicial power with such a level of discretion that would permit it to decide on a case by case basis, which is probable to lead to inequitable decisions in respect of similar cases. The risk becomes bigger when one is facing

“less perfect constitutional systems where the role of the judiciary may be confronted with a number of challenges and where the executive may have effective means to prevent a future case ever getting before the highest judicial organ. In those situations, a Supreme or Constitutional Court may best perform its task if it adopts a ‘categorical’ approach in respect of the most fundamental rights of the individual, on the first occasion that arises – as it may also be the last one”.⁴⁰⁰

Another flaw pointed out to pure judicial balancing is that it may lead to results opposed to the ones initially intended. Precisely, there is a general belief that courts will enforce law. However, it may happen that trying not to condition future cases, courts will not be sufficiently assertive concerning non-disposable rights or preemptory norms, thus creating legal-holes which could be wickedly manipulated.

In my view, it is advisable and safer to acknowledge some non-disposable norms which are not open to discretion, be it political or judicial. When displaying judicial balancing, the ICC would already be submitted to a certain extent to the categorical approach. The interplay of Article 13 and 16 of the Rome Statute and the principle of complementarity ensures that the Court will show reverence towards the needs of international peace and security, which is different from giving in before strictly political decisions which reflect purely individualistic self-interested claims of politically powerful States. Furthermore, the Court is bound by general principles of law, in particular the principle of proportionality.

Conclusion

Political manipulation of law within the SC based on the openness of ‘international peace and security’ will certainly keep on occurring. Nonetheless, one can argue that a new, though very distant, light can be seen at the end of the tunnel.

The ICC is a permanent court. Its legal capacity includes, in accordance with the doctrine of inherent powers, all necessary prerogatives to ensure the exercise of its judicial functions in independent terms. That is to say that the ICC can and shall analyse all SC resolutions able to interfere with its activity, blur its independence and violate the Statute of Rome. Inasmuch as the Court is the last interpreter of the Statute and independent from the SC it can conclude for the abusive nature of particular decisions and not follow them. The review powers of the ICC are most important if one takes into account the reluctance of the ICJ to directly or indirectly pronounce itself on the exercise of SC powers, though it

³⁹⁹ Scheinin, M., ‘*Terrorism and the Pull of ‘Balancing’ in the Name of Security*’, presented on the workshop on *Security and Law: Facing the Dilemmas*, held at the European University Institute, Florence, 22-23 January 2009.

⁴⁰⁰ *Ibidem*.

should not be excluded *ab initio* to resort the UN Court on the matter in the framework of an Advisory Opinion. By indirectly reviewing SC decisions, the ICC will ensure that international criminal justice in respect of the most heinous attacks to humanity is not inevitably at the disposal of *Realpolitik*. The Court would ensure a legitimised forum of balancing of international peace and security *vis-à-vis* international criminal justice. In doing so the ICC becomes a counter-power to the SC which will hopefully reduce abuses of power.

Were the ICC to conclude for the illegality of the general immunity established in Resolution 1593 it would still be entitled to keep on with the investigations in Darfur as, in accordance with Article 44 VCLT functioning as a guideline, the nullity of a part does not extend to the full body of the legal instrument.

The walk down this path is indeed difficult and challenging, requiring the SC members, which are also Parties to the Rome Statute, to honour the compromise they have freely engaged in. Otherwise, it seems international criminal justice will be doomed to back away instead of continuing its walk from the successful attainment that the establishment of the ICC represented.

The State as Sniper: Targeted Killings - Corrosion of the Principles of Justice as a Reaction to Terrorism

Felix Herzog

The liberal tradition of criminal law based on the rule of law and on respect for the constitutional rights of the offender is fragile. Since its birth during the great revolutions of the 19th century it has faced opposition from the restorative forces which have tried to make use of situations of fading awareness to substitute it with the pure logic of the power and to use it as a brute instrumental force.⁴⁰¹ Anyhow, the liberal tradition of criminal law with its principles and guarantees has achieved deep roots in the collective consciousness of the people: thus, the citizens have developed a keen sense of awareness and an ability to distinguish situations which are not governed by law and justice but by arbitrariness.

As a result, there are plenty of examples in the history of mankind, where political power's legal servants tried to provide a dubious legal legitimation to acts of arbitrariness and injustice. But those efforts are often so diaphanous that people are not convinced of such legitimacy and are confirmed in their initial impression – according to the proverb “Whoever has the power, determines what is just” - that such legitimations do not bear on principles of law but only are a form of law-nihilism.

In the age of relativism in jurisprudence it is certainly complicated to say what is lawful. On the other hand it should be possible to say what is considered as flagrant breach of law, injustice that cries out to heaven. In this way, philosophy of law should be conceived as a “*philosophia negativa*”, which delineates the frontiers of law from legal wrong.⁴⁰² In such a philosophy a crucial point would be to deliver a justification for the prohibition of state-enemies liquidation on the basis of the category of the intangibility of human dignity (Art. 1, Par. 1 German Constitution).⁴⁰³

But, as we all have to register in the discourse of politics and law, nowadays the term of human dignity tends to be watered down and put into question in the fields of constitutional and criminal law by theorists and the practitioners of the state of emergency. A prominent German professor of Constitutional Law, Otto Depenheuer, appeals in his book (published August 2007) “The self-assertion of the rule of law state”⁴⁰⁴ for “thinking the unthinkable” and concludes, that the “state of human dignity” is doomed to failure in its fight against terrorism, if it acknowledges its enemies as subjects of human rights. According to him, the enemy does not merit treatment and judgement according to the legal order rules. As Depenheuer states, the enemy is not entitled to this right, because he fundamentally opposes this legal order.⁴⁰⁵ Therefore he does not even have the right to be prosecuted and punished according to criminal law rules, because “enemies are not to be punished; they are to be annihilated”.⁴⁰⁶

Given this way of speaking and in the face of such an apodictic train of thought, it is admittedly difficult to stay serene. First of all I would like to make some remarks to the origin of such a body of thoughts taking as an example the positions of the German professor of Criminal Law Michael Pawlik.

⁴⁰¹ Basically on this issue Naucke, *Über die Zerbrechlichkeit des rechtsstaatlichen Strafrechts*, KritV 1990, p. 244

⁴⁰² About that Hassemer, W., *Unverfügbares im Strafprozeß*, in: *ders., Strafen im Rechtsstaat*, 2000, p. 97 referring to Arthur Kaufmann, Gustav Radbruch, 1987, p. 154.

⁴⁰³ See also Kaufmann, A., *Vorüberlegungen zu einer juristischen Logik und Ontologie der Relationen*, in: *Rechtstheorie* 17 (1986), p. 257 (275).

⁴⁰⁴ *Otto Depenheuer, Selbstbehauptung des Rechtsstaates*, Paderborn 2007.

⁴⁰⁵ Op. cit. p. 62.

⁴⁰⁶ Op. cit. P. 64.

But before that I would like to draw your attention to the following:

According to the prominent position of human dignity in the German constitutional legal order and under the terms of the recently once again confirmed jurisdiction of the German Federal Constitutional Court⁴⁰⁷ it cannot be doubted that the respect for human dignity as the basic legal norm before every other legal norm prescribes the material validity of each law in such a rule of law organised state. That is true also in its fight against terrorism. The respect for human dignity is to be conceived as an imperative canon before any process of law making and execution of law. The point here is not an escape to an idealistic view on law based on metaphysical categories or a naïve view of the reality in the aftermath of the disillusion following the 9/11 attacks.

Appealing for the assertion of the human dignity means recognising the human being as a person in an existential sense. The person and its inviolability is according to the classical philosophical tradition the object of legal protection *par excellence*. This idea is expressed in a memorable way in Hegel's Philosophy of Law through its basic legal rule "Be a person and respect the others as persons".⁴⁰⁸ The core of this legal rule is in modern terms the normative principle of reciprocal recognition between individuals as well as the epistemological principle of the compatibility of perspectives (as a requirement for the existence of a shared world).⁴⁰⁹

We suspend the recognition towards persons if, after having considered them as enemies, we argue for the legality of the pre-emptive and clandestine abduction of these persons, their secret detention under miserable conditions or their killing in an ambush. If this is accepted as legal action, we leave every sense of lawfulness behind us and accept a sheer instrumental-functional execution of power.

In light of the international ostracism towards comparable activities authorised by the Argentine military dictators or by Serbian paramilitary commandos during the battles around Sarajevo, such an assessment could only have happened because the compatibility of perspectives and the respect for human dignity towards presumable terrorist enemies had been given up. In this way those persons are equated to dangerous beasts and distanced from a legal (human rights-based) level. The fundamentals of a law culture which focuses on human dignity are in this way put into question, especially when it is assumed that something like this can be conceptualised via legal categorisation.

Nevertheless - and that shows, what jurists are capable of, when they get corrupted by power⁴¹⁰ - there are many historical examples of lawyers, who employed their intellectual abilities "to think the unthinkable", to knit a coat of legal legitimation for power abuses and contempt of human dignity. In the history of the German jurisprudence, Carl Schmitt stands to the forefront⁴¹¹; a thinker, still considered a fascinating intellectual, brilliant stylist and radical political philosopher. He is declared in the above mentioned book of Otto Depenheuer⁴¹² as well as in the world of ideas of Michael Pawlik, which is to be outlined below, as a beacon of wisdom in the field of the theory of emergency state. That same Carl Schmitt, who is often admired as an inspiring intellectual as far as the handling of the threat produced by terrorism is concerned, proclaimed the brutal assassination of Hitler's opponents inside the *Nationalsozialistische Deutsche Arbeiterpartei* (NSDAP) as an act of legitimate law-making. Writing 1934 about Adolf Hitler's killing command, he proclaimed that "The *Führer's* deed

⁴⁰⁷ The First Senate of the German Federal Constitutional Court admitted with his judgement of 15 February 2006 – 1 BvR 557/05 – (= NJW 2006, p. 751) that an authorisation to shoot an airplane, hijacked by terrorists would consist a violation of constitutional principles and clearly recognised the human dignity as an ultimate value of the constitutional order.

⁴⁰⁸ Hegel, G.W.F., *Grundlinien der Philosophie des Rechts*, § 36.

⁴⁰⁹ See about this Herzog, F., *Prävention des Unrechts oder Manifestation des Rechts*, Frankfurt a.M. 1987, p. 104.

⁴¹⁰ Cp. Rütters, B., *Entartetes Recht*, München 1989.

⁴¹¹ Cp. Rütters, B., *Wer war Carl Schmitt?*, NJW 1994, p. 1681; from the same author: *Altes und Neues von und über Carl Schmitt*, NJW 1996, p. 896.

⁴¹² Op. cit. p. 39.

is an act of genuine jurisdiction”.⁴¹³ So much about Carl Schmitt... Well, the quotation of such a thinker doesn't mean that those who do it, sympathize with fascist ideology; however, if the incentives of such a quotation relate to a desire for provocation, that would be a clear indicator for the affinity for a totalitarian way of reacting against terrorism.⁴¹⁴

Michael Pawlik – a Günter Jakobs disciple, somehow overwhelmed by the desire to outbid his masters controversial theory about “criminal law of the enemy”⁴¹⁵ – seized the opportunity to illustrate his provoking thesis inspired by Carl Schmitt in an article in the *Frankfurter Allgemeine Zeitung* (FAZ), entitled “The terrorist doesn't want to get rehabilitated”.⁴¹⁶ In a train of thought, already known by Jakobs, wavering between analysis and normativity he writes: “The fact that modern terrorism constitutes a functional equivalent to the war waged by states, cannot be ignored by the law”. So, he implies that an orientation towards categories of the law of war should basically not be denied to a state attacked by terrorism. Furthermore he states, that: a strict distinction between a rule-based framework of defence in the shape of police and criminal law and a much more “robust” law of war has been overtaken by the reality. And then Pawlik adds: “Do we sacrifice in this way the human rights status of terrorism instigators in favour of pure efficiency aims? Not at all”. After having demonstrated that this would not be legally possible in Germany *de lege lata*, Pawlik descends to his programmatic essence *de lege ferenda*: “within the scope of a new prevention law with some elements of the law of war, the point is the elimination of the opponent and that by means of detention or killing, also beyond and outside of particular combat operations”. At the end of this treatise Pawlik praises Carl Schmitt, who diagnosed early that a scholar's task is “to call a spade a spade”.

Due to the fact that positions like this are getting more and more popular amongst politicians and lawyers in Europe I would like to discuss, if this claimed right to kill, also outside of particular combat war operations – for this phenomenon the term of targeted killing has been established – accords with the criminal, international and human rights law requirements for state actions, or furthermore, if the state puts itself through such actions on a level with a outlaw sniper.

It would be beyond the scope of this chapter to address the issue of the law situation in the United States of America, following the declaration on the war on terrorism through President Bush.⁴¹⁷ Beyond any political argumentation it can be asserted that neither in Germany nor in the European Union's area of freedom, justice and security can a declaration of war as well as a state of defence/emergency be said to exist regarding the ‘conflict’ with terrorism. That can be seen by the framework decision of 13. June 2002 on counterterrorism⁴¹⁸ stipulating in Art. 1 that the member states shall take

“the necessary measures to ensure that particular intentional acts defined as offences under national law shall be deemed to be terrorist offences, when they are committed with the aim of seriously intimidating a population or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation by means of attacks upon a person's life, kidnapping or hostage taking, seizure of means of public transport etc.”.⁴¹⁹

⁴¹³ Schmitt, C., *Der Führer schützt das Recht*, Deutsche Juristen-Zeitung 1934, p. 943.

⁴¹⁴ See on this issue my article, *Terroristische Netzwerke und para-totalitäres Strafrechtsdenken*, KritV 2006, p. 343.

⁴¹⁵ An outline and a critical review of this theory, *ibid* p. 343; in original in Günter Jakobs, *Terroristen als Personen im Recht?*, ZStW 117 (2005), p. 839.

⁴¹⁶ FAZ Nr. 47 of 25 February 2008, p. 40.

⁴¹⁷ See about this my article *Terroristische Netzwerke*, *op. cit.* p. 343.

⁴¹⁸ AbIEG Nr. L 164/3 of 22 June 2002

⁴¹⁹ On the definition of terrorism see also the Common Position of the Council of the European Union of 27 December 2001, AbIEG L 344/93 of 28 December 2001.

Thus, terrorism is described as an especially serious crime, whose investigation, prosecution and conviction is subject to the authority of national law enforcement agencies and criminal justice – and not to the authority of the armed forces and by means of military action.

II

For this reason we should take a close look at possible legal legitimations of employing deadly action against terrorists.

It is regarded as a central principle of the law of self-defence that the law should not yield against unlawful acts – but this gives no right to eliminate “the enemy”. Under the aspect of the abuse of law, the idea that exercising the right of self-defence is not allowed to mutate into an unlawful act, constitutes an inherent part of the self-defence dogmatic. Although recently there is a lot of confusion in the German criminal law literature about this basic assumption, particularly in the field of the justifying cases of so-called rescue torture⁴²⁰, nobody has challenged the dogma that acting in self-defence presupposes a self-defence situation or in other words an immediate unlawful attack.⁴²¹ A preventive self-defence is not legitimate, so it would be unlawful.⁴²² Although “thinking the unthinkable” is propagated, it is however not conceivable that the targeted killing of a sleeper, of an Islamist terrorist not caught in action could be comprehended as such a defence of a current unlawful attack.

However, a broader criminal law perspective at the level of justification also generates nothing that could be useful as a justification. Of course we could think about the possibility to consider a “sleeper” terrorist as a danger in terms of a justificatory emergency (§ 34 German Criminal Code). Within the scope of the necessary weighing of interests between the threatening danger and the threatening infringement of rights of the person concerned by the emergency act, somebody could try to sketch comparable scenarios (always bearing in mind the possibility of attacks, such as in New York, Madrid or London). However, because of the impossibility to balance between the protected interests, the conflicting interests are in this constellation of the same value: in both cases lives of individuals are concerned. Since in the same time life is considered as the utmost protected value in our law culture, which cannot be outweighed by another protectable interest, one can read in the two most renowned commentaries of the German Penal Code: “acts of killing in state of emergency cannot be considered in any case as justified”⁴²³ and another statement: “the prohibition of killing innocent persons, who did not commit an attack is a fundamental legal principle anterior to the state”.⁴²⁴

Thus, since such a sleeper is in the terms of the counter-terrorism discourse a dangerous individual, but in the terms of Criminal Law a non-attacking innocent person, his pre-emptive liquidation doesn’t come into consideration.

As a next step is to be demonstrated through a presentation of the international law of war positions about targeted killing that even if we were at war against terrorism, such targeted killings outside of particular combat actions could be justified only by means of an utter deflection of law.⁴²⁵

Targeted killings as state practice are common. As a prominent example and a matter of judicial dispute is the practice of targeted killings against Hamas members.⁴²⁶ The most important question in

⁴²⁰ About the present status of discussion cp. NK-StGB (Herzog), 2nd. Ed., Baden-Baden 2006, § 32 Rn. 59, 67.

⁴²¹ Ibid, § 32 Rn. 26 et. seq.

⁴²² Ibid, § 32, Rn. 31.

⁴²³ Schönke/Schröder-Lenckner/Perron, StGB, 27th. Ed., München 2006, § 34 Rn. 23.

⁴²⁴ Fischer, StGB, 53rd. Ed., München 2006, Introduction to § 32 Rn. 2.

⁴²⁵ A brilliant outline of this discussion in Schmitz-Elvenich, H.F., *Targeted Killing*, Frankfurt a.M. 2008.

this context is whether those targeted killings on a foreign territory can be considered as a case of self-defence.

Both Art. 51 of the UN-Charter and the international customary law recognise a natural right to defend oneself against aggression.⁴²⁷ So we have to clarify if terrorist attacks are to be considered as acts of aggression in this sense.

The fact that terrorists are not considered to be state aggressors does not constitute an obstacle for the application of the state emergency rules – this would seem to be the latest development in the field of international law after the 9/11 attacks.⁴²⁸ That however does not suspend the broader prerequisite of the self-defence right, analogous to the self-defence situation, which is necessary for the application of the criminal law self-defence right, namely the existence of an armed attack. Such an attack is assumed, when through a terrorist attack a great number of persons is endangered, or when people die or when institutions of great value are destroyed.⁴²⁹ However self-defence state acts are first of all liable to a time limitation, a fact that seemingly has been ignored by the US National Security Strategy (NSS) doctrine of the “pre-emptive self-defence”.⁴³⁰ In this way a classical international law debate is taking place close to the dogmatics of the criminal law self-defence construction. In the range of this debate it is demanded that the attack should always be current and the period of time between the attack and the act of self-defence as short as possible.⁴³¹

The proximity to the criminal law self defence rules is also effective for another classical international law formula (the so-called Webster doctrine), which integrates an imminent attack into the notion of a current attack.⁴³² Thus, it is accepted in the international law discourse that the USA could already start their self-defence act against the Japanese attack in Pearl Harbour at the moment of the aircraft’s approach.⁴³³ In contrast, the Israeli attacks of 1981 against Iraqi nuclear reactors were condemned by the UN Security Council as a clear violation of international law⁴³⁴, because there is a rule – exactly as in criminal law – that self-defence is only legitimate under the circumstances that inactivity would lead to an immediate occurrence of the armed attack.⁴³⁵ In this respect the theoretic construction that the bare existence of a terrorist organisation is equivalent to a continuous attack as a legitimization for self-defence acts can not be accepted. Furthermore, repeated attacks by particular terrorist organisations do not justify a consideration of these attacks as a permanent attack, against which it would be admissible to take the appropriate measures at any place and at any time.⁴³⁶

The opposed view, held by the Bush Administration, known also as the Bush doctrine⁴³⁷, and typified in the National Security Strategy (NSS) does not merit (also according to a prevailing view in the international law literature) our approval. According to this view, the NSS is considered as incompatible with the internationally accepted prohibition of violence and alludes to the enormous risk

(Contd.) _____

⁴²⁶ Ibid, p. 12 et. seq. That was also the subject-matter of a judgement of the Israeli Supreme Court in 2006 as some Israeli human rights organisations considered these targeted killings as state assassinations and instituted legal proceedings against this practice: this judgement available in: http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690a34.pdf.

⁴²⁷ Op. cit. P. 50 et. seq.

⁴²⁸ Ibid, p. 57, 68.

⁴²⁹ Ibid, p. 72, 81.

⁴³⁰ Ibid, p. 131 et. seq.

⁴³¹ Ibid, p. 128 et. seq.

⁴³² Ibid, p. 136 et. seq.

⁴³³ Ibid, p. 139.

⁴³⁴ SC Res. 487 (1981) of 19 June 1981.

⁴³⁵ Schmitz/Elvenich, op.cit., p. 141.

⁴³⁶ Ibid, p. 143.

⁴³⁷ The text of this doctrine available in: www.whitehouse.gov/nss/nss.pdf.

of abuse, when states consider that they are authorised to act in self-defence in spite of the lack of objective criteria. Those actions can also not be legitimate taking into consideration the proportionality of a justified defence. Thus, at such a moment of pre-emptive self-defence the quality and intensity of the presumptive threatening attack cannot be foreseen.⁴³⁸

This aspect refers back to the necessity and proportionality as central criteria for the justification of self-defence actions. The International Court of Justice in its *Nicaragua* ruling in 1986 pointed out that “self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it”.⁴³⁹ Where such particular measures go beyond these boundaries, this act is to be considered as a breach of the prohibition upon the use of violence. In this way, the measure of targeted killing is only then legitimate when it constitutes the last possibility of self-defence against a present attack.⁴⁴⁰

Even if it were barely imaginable that the community of states within the framework of the United Nations would create a right to war with preventive elements, which would legitimate pre-emptive targeted killings, some comments in respect of International Humanitarian Law are necessary, in order to clarify to what degree of destruction of our legal culture this would lead.

We could agree with those who advert to the special quality of the armed conflicts between states and international terrorist organisations (Keyword: asymmetric armed conflicts) and point out that terrorists cannot invoke the combatant status.⁴⁴¹ But we have to point out that the US Supreme Court ascertained in its ruling *Hamdan vs. Rumsfeld* that this cannot lead to a full break-up of the legal framework from the International Humanitarian Law.⁴⁴² The humanitarian minimum guarantees (Art. 3 of the Geneva Convention) are nowadays considered to be binding for the “war against terrorism”⁴⁴³, so that the ruling of the US Supreme Court draws the consequence and declares the illegality of the military commissions, which have been established by the Bush Administration.⁴⁴⁴ That means, furthermore, that illegal combatants may not be killed at any time and outside of particular combat operations. Terrorists as legitimate target subjects in terms of Humanitarian Law, as soon and as long as they directly participate as illegal combatants in the armed conflict. When illegal combatants back out of these conflicts, in other words in their private sphere, their civilian status is revived, so that they should also enjoy the protection of the civilian population.⁴⁴⁵

At least some remarks are due as to the human rights dimension: from Art. 15 Para. 2 ECHR draws a linkage between international Humanitarian Law and human rights: this article stipulates that a derogation to Art. 2 ECHR (the right to life) is permissible only in lawful acts conducted in the course of an armed conflict. So, targeted killings can be permissible only within acts of war and not as sniper-attacks outside an armed conflict. This principle corresponds in this way to the basic core of human rights, which is people’s protection from arbitrariness, abuses or violence of states.⁴⁴⁶ Furthermore Art. 15 Para. 2 ECHR prescribes that the right to life cannot be suspended under reference to a national state of emergency. As a matter of fact Art. 2 Para. 2 ECHR contains exceptions from the right to life by using force which is no more than “absolutely necessary”, a) in defence of any person

⁴³⁸ Schmitz/Elvenich, op.cit. p. 148 et. seq.

⁴³⁹ IGH, *Nicaragua vs. USA*, 1986 ICJ Reports, p. 14 et. seq. (p. 194, para. 176).

⁴⁴⁰ Schmitz/Elvenich, op. cit., p. 158, 161.

⁴⁴¹ Ibid, p. 168 et. seq.

⁴⁴² US Supreme Court *Hamdan vs. Rumsfeld*, Judgment of 29 June 2006, available in www.supremecourtus.gov/opinions/05pdf/05-184.pdf.

⁴⁴³ Schmitz/Elvenich, op.cit., p. 180, 187, 196.

⁴⁴⁴ US Supreme Court, op. cit., p. 53 et. seq.

⁴⁴⁵ Schmitz/Elvenich, op.cit., p. 205, 232.

⁴⁴⁶ Ibid, p. 236, 238, 245.

from unlawful violence, b) in order to effect a lawful arrest (...); c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

The criterion of the absolute necessity is interpreted narrowly by the European Court of Human Rights, which demands a strict control of proportionality. – Concerning the course of action of the British army towards Provisional Irish Republican Army (PIRA) terrorists, the Court argued that the fight against terrorism should be organised in a way which could avoid deadly escalation.⁴⁴⁷ But also in the wake of this confrontation the state has always to consider the possibility of using other available milder measures, which could eliminate the threat emanating from the terrorist persons. Consequently the targeted killing of a terrorist will be absolutely necessary in the terms of Art. 2 Par. 2 ECHR only in a case of a serious, imminent threat of life and after having exhausted all other available means.⁴⁴⁸

Thus, we don't need to argue any further that targeted killings are always unlawful, both when they have a preventive character and when they are regarded as bare punishment actions; then in both cases they run contrary to the rule of law and the fair trial guarantees.⁴⁴⁹

III

Human rights must not be sacrificed to counter terrorism, as per the statement of Kofi Annan before the Commission on Human Rights on April 12, 2002.⁴⁵⁰ A state which provides for the respect of human dignity and the guardians of human rights should not be denounced as weak, politically open to blackmail or irresponsible towards the potential terrorism victims.⁴⁵¹ The 'liquidation' of enemies cannot be considered as an option under the rule of law.⁴⁵² The state that within the framework of a so-called "innovative" law of prevention commands, carries out or authorises killings through state or paramilitary units outside of armed conflicts, is using a means, which negates the respect of human dignity as a basic principle of the Constitution as well as the international humanitarian law and the human rights, even if the protection and the safety of predominant community interests are supposed to legitimate these acts. Thus, the targeted and killed human is not anymore perceived and treated as a human being with rights (or as a legal person) but rather as an enemy, as a dangerous beast, which should be eliminated.

The state acts through targeted killings as a sniper, whose activities do not anymore refer to law and justice but only to an ethos which serves to disseminate an atmosphere of intimidating control through the arbitrary use of force.

The state as sniper infringes the human dignity of the affected persons as well as the accomplished standards of International Humanitarian Law to such an extent that itself loses its dignity and its (moral) legitimacy. Thus, we should regard as one of terrorism's gravest consequences the fact that we can find more and more politicians and even legal scholars who are advocates of such a terrorist state.

⁴⁴⁷ ECHR, *McCann and Others vs. UK*, Judgement of 4 May 2001, Reports of Judgements and Decisions, 2001-XII, p. 333 et. seq. (paras 202 et. seq.)

⁴⁴⁸ Schmitz/Elvenich, op.cit. p. 254.

⁴⁴⁹ Ibid, p. 254.

⁴⁵⁰ Press Release SG/SM/8196, available in: www.un.org/News/Press/docs/2002/sgsm8196.doc.htm.

⁴⁵¹ As Depeneheuer suggested, op. cit. p. 26.

⁴⁵² So Pawlik, op. cit. (Fn. 16).