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EU Counter-terrorism Law: What Kind of Exemplar of Transnational Law?

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Abstract: This article examines counter-terrorism efforts in the EU as it matures as a field of law. It sets out three critiques of EU counter-terrorism law: that of ineffectiveness, of anti-constitutionalism, and of contrariness to human rights and the rule of law. It considers these critiques in light of the development of policies and legal initiatives – against foreign terrorist fighters and against radicalisation. It concludes that there are both persistent problems, and some improvements, in the law. The EU's capacity to meet the challenges posed by terrorism and the counter-terrorism imperative, and how it does so, has global impact. The article concludes with an argument for better law-making in the EU to ensure it serves as a better exemplar of transnational law.

Keywords: counter-terrorism; counter-radicalisation; foreign fighters; rule of law; transnational law

I. INTRODUCTION

Since 2013 there have been twenty terrorist attacks with fatalities in Belgium, Denmark, Finland, France, Germany, Sweden, and the UK. These attacks have involved cars, vans and hand-held weapons and, in rarer cases, explosives. Europol reports that the principal targets of the attacks have been 'symbols of Western lifestyle' and 'symbols of authority', or else 'indiscriminate' targets.¹ They have included a nightclub in Paris, a pop concert in Manchester, and transport hubs, amongst others.

The resurgence of terrorist activity, as with previous attacks, has led to fresh EU law-making. The new centrepiece of the EU legislative response is the Directive on Combating Terrorism (DCT).² The Directive recasts the provisions of the Framework Decision on Combating Terrorism (FDCT) and adds new measures in light of developments in international counter-terrorism co-operation.³ The new measures broaden the scope of counter-terrorism law to include the 'foreign terrorist fighter' as a subject of regulation. The new law also aims to combat 'radicalisation' to terrorism. Despite the challenges which these new measures raise, the European Commission has proposed a Terrorism Regulation to add yet more powers, even before it has conducted an assessment of the impact of the Directive.⁴ The different measures entail different degrees of legal integration. The Framework Decision was the least integrated of the three types of measure. Directives (for example the Data Retention Directive), and regulations (for example those that ground

¹ Some earlier versions of this work were presented in Leiden, The Hague and Santiago de Compostela. I am grateful to participants there and to the reviewers and editors for their comments. Errors and eccentricities are my own.

² Europol, European Union Terrorism Situation and Trend Report 2018 (Europol, 2018), p. 5.

³ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6.

⁴ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [2002] OJ L164/3, amended by Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism [2008] OJ L330/21.

⁵ European Commission, Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online COM(2018) 640 final, Brussels, 12.9.2018 ('TOCR Proposal').

sanctions/restrictive measures), have been used before. However, the shift to now use a Terrorism Regulation for the next batch of powers is, at least symbolically, something of a centralising move.

The recent additions to EU law and policy is an opportunity to re-evaluate the EU's role in counter-terrorism law. The case studies in this article are laws and policies against 'foreign terrorist fighters' and 'radicalisation'. These are related subjects both in international law and in EU law and policy. The foreign terrorist fighter is a contemporary twist on an older phenomenon: the foreign fighter – an individual who travels from their state of nationality or residence to take part in a conflict elsewhere.⁵ Because the new term includes the concept of terrorism it is, of course, contestable. The concepts of 'radicalisation' and 'counter-radicalisation' predate the rise in interest in foreign terrorist fighters.⁶ However, even more so than laws on foreign terrorist fighters, a legal response to radicalisation is beset with problems of scope and definition and remains deeply controversial. The challenges are evident in one Member State – the United Kingdom – where the Government has abandoned a previous strong commitment to legislate for the related, perhaps co-extensive, field of 'counter extremism' because of the seeming impossibility of a legally robust definition of the phenomenon of extremism.⁷

Before the FDCT was adopted in the aftermath of the New York and Washington DC attacks in 2001, there was no EU counter-terrorism law as such, and no literature on the subject.⁸ A doctrinal and critical literature had begun to emerge by the time of the amendments to the Framework Decision in 2008. Now, after almost two decades of EU legislation in response to terrorism, there is a rich and growing body of research on it and on related fields.⁹ One consideration for an analysis such as this is that it risks the reification of these problematic concepts.¹⁰ However, whatever is thought of the idea of a 'foreign terrorist fighter' or 'radicalisation' as legal subjects, the response to the phenomena demand examination. Part of that analysis, of necessity, is whether it is possible to undertake effective legal action, within the constraints of constitutionalism, and with respect for human rights and the rule of law.

This article continues in four parts. Part II provides an overview of EU counter-terrorism law as it stands today, sets out three critiques of that law, and assesses the expansion of legal subjects by the DCT and the Terrorism Regulation proposal. Part III considers EU action against foreign terrorist fighters in the context of international efforts. Part IV addresses action taken by the EU against radicalisation to terrorism. The final part, Part V, re-evaluates the state of play in EU counter-terrorism law. It concludes that there are both persistent problems, and some improvements, in the law. The EU is the leading exemplar of a transnational legal order. Its capacity to meet the challenges posed by terrorism and the counter-terrorism imperative, and how it does so, has global impact.

⁵ See, for earlier examples, D Malet, *Foreign Fighters: Transnational Identity in Civic Conflicts* (OUP, 2013), Chapter 2; M Donnelly, T M Sanderson and Z Fellman, *Foreign Fighters in History* (CSIS, 2017).

⁶ E Bakker, 'EU Counter-Radicalisation Policies: A Comprehensive and Consistent Approach?' (2015) 30(2-3) *Intelligence and National Security* 281, p 288.

⁷ 'Paralysis at the heart of UK counter-extremism policy' *The Guardian* 17 September 2017. The UK has, however, pursued a new Counter-terrorism and Border Security Act 2019 which addresses, in part, radicalisation.

⁸ The principal literature of relevance at that time was in the field of police co-operation and Justice and Home Affairs. See M Anderson, M den Boer, P Cullen, W Gilmore, C Raab, and N Walker, *Policing the European Union* (OUP, 1996), and S Peers, *EU Justice and Home Affairs Law* (OUP, first edition 2000, now in its fourth edition, 2016).

⁹ M O'Neill, *The Evolving EU Counter-terrorism Legal Framework* (Routledge, 2011), as well as several more policy-specific monographs and articles, referenced *infra*.

¹⁰ On the challenge of reification of 'terrorism' see C Tilly, 'Terror, Terrorism, Terrorists', (2004) 22(1) *Sociological Theory* 5.

II. EU COUNTER-TERRORISM LAW

Terrorism is the pre-eminent example in EU law of a criminal act that is a ‘supranational public wrong’.¹¹ In doctrinal terms this is because it is the first of ten ‘Euro-crimes’ for which the EU has an explicit authority to legislate.¹² Even before the introduction of that explicit legal authority by the Lisbon Treaty, terrorism was the subject of a range of laws, institutions, policies and practices at Union level. This law transcends several fields of doctrine, including constitutional and administrative law, criminal law, procedural co-operation, immigration and asylum law, and external relations law. As a response to the 11 September 2001 attacks, it is a creation of the current century and so too is its developing literature. This part of the article sets out the law, outlines three critiques of EU law in the field, and describes the new wave of EU counter-terrorism law in recent years.

A. The Response to 11 September 2001

The EU response to the 11 September 2001 attacks by Al-Qaeda in New York and Washington DC was swift. The attacks had as their target the symbols of US economic and political powers – but there were also many European victims – and the attacks and their aftermath was seen on live television across Europe. The need to respond was a significant catalyst for co-operation in then-moribund EU criminal law and criminal justice.¹³ This is the ‘counter-terrorism imperative’: the political need to be seen to take action in response to terrorist attacks or the threat thereof.

The initial legislative measures to be agreed at EU level were the FDCT and the Framework Decision on the European Arrest Warrant (FDEAW).¹⁴ The former was later amended, while the latter was joined by a successor measure, the Framework Decision on the European Evidence Warrant (FDEEW).¹⁵ The FDCT, like all framework decisions, is intergovernmental in form. However, with its aim of approximation of counter-terrorism offences across Member States, it is somewhat supranational in function. It sets out a common definition of terrorism and requires all EU Member States to render criminal any behaviour that matches that definition. The FDEAW and FDEEW, in contrast, co-ordinate co-operation between national criminal justice authorities – they are intergovernmental in both form and function.¹⁶ This distinction between intergovernmentalism and supranationalism and the shift from the former to the latter since the Lisbon Treaty is evidence of an integrative dynamic in this field where concerns as to sovereign carry great weight.

In institutional terms, EU counter-terrorism includes the legislative and executive roles of the Parliament, Council, and Commission. The Commission’s role has been most significant in some areas, for example in relation to implementation of restrictive measures, where it operates lists of individuals subject to asset-freezes and travel bans. In the aftermath of the Madrid train bombings in 2004, the office of the

¹¹ S Couvts, ‘Supranational Public Wrongs: The Limitations and Possibilities of European Criminal Law and a European Community’ (2017) 54 *Common Market Law Review* 771.

¹² Article 83(1) TFEU.

¹³ For a useful map of the field of EU criminal law (and criminal justice) see A Weyembergh and C Brière, ‘EU Criminal Law: An expanding field for research, with some uncharted territories’ in A Ripoll Servent and F Trauner (eds), *The Routledge Handbook of Justice and Home Affairs Research* (Routledge, 2017).

¹⁴ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

¹⁵ Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters [2008] OJ L350/72. The European Evidence Warrant was later complemented by the European Investigation Order. See Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L130/1.

¹⁶ See M J Borgers, ‘Implementing Framework Decisions’ (2007) 44 *Common Market Law Review* 1361.

EU Counter-terrorism Co-ordinator was established, and agencies and offices such as Eurojust, Europol (home to the European Counter Terrorism Centre), INTCEN and others have also come to greater prominence.

In legislative terms, the EU had already adopted supranational counter-terrorism measures before the new competences provided to it by the Lisbon Treaty. These include, in particular, directives to require telecommunications data surveillance,¹⁷ to further develop financial surveillance,¹⁸ and to provide for travel surveillance.¹⁹ These initial EU efforts used powers to surveil both those under suspicion and also the general population of users of financial, telecommunications, and travel services. Surveillance measures are a technocratic assemblage whereby personal data can be used, either in advance of an attack, or in the aftermath of one, to identify individuals against whom to target more intrusive measures.

If surveillance is the broad net of counter-terrorism policy, the sharp end aims to incapacitate those who are held to present a particular threat, such as suspected financiers of terrorism. The EU does not have an army or police force. Yet, even with its limited role in operational matters, the EU does have enforcement powers, such as to ensure financial incapacitation through ‘sanctions’ now known as ‘restrictive measures’.²⁰ These laws led to the *Kadi* litigation saga, which has set down some general pronouncements on the EU response to terrorism, and is a foundational case in EU Court of Justice (CJEU) case-law.²¹ Chief amongst these pronouncements is the affirmation of the rule of law – both that there must be a legal basis for action against terrorism and that any such action is susceptible to robust judicial review. The litigation is also a key early contribution of the EU to transnational counter-terrorism law – it prompted a change in UN procedures for the listing and delisting individuals on global counter-terrorism sanctions lists.²² The *Kadi* case is the earliest, and still the most significant contribution of the EU to the development of transnational counter-terrorism law.

Because, however, of the multi-level nature of EU law and governance, within Europe EU counter-terrorism law relies on national legislatures for its faithful transposition into national law and on national executives and agencies for its effective implementation. This has not always led to consistent implementation or coherent action. National legislatures have sometimes been either unable or unwilling to accurately transpose EU measures into national law. National executives and, in particular, agencies, have proven sceptical of the value added by EU co-operation.²³ This reluctance of national authorities is, in part, because counter-terrorism is a ‘high

¹⁷ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54.

¹⁸ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L141/73.

¹⁹ Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime [2016] OJ L119/132.

²⁰ Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan [2002] OJ L39/9.

²¹ See C Eckes, ‘EU restrictive measures against natural and legal persons: from counter-terrorist to third country sanctions’ (2014) 51 *Common Market Law Review* 869 and C Eckes, ‘The Law and Practice of EU Sanctions’ Amsterdam Centre for European Law and Governance Research Paper No. 2018-01.

²² L Ginsborg and M Scheinin, ‘You Can’t Always Get What You Want: The Kadi II Conundrum and the Security Council 1267 Terrorist Sanctions Regime’ (2011) 8(1) *Essex Human Rights Review* 7.

²³ On the agencies see M Den Boer, C Hillebrand and A Nölke, ‘Legitimacy Under Pressure: The European Web of Counter-terrorism Networks’ (2008) 46(1) *Journal of Common Market Studies* 101.

politics domain' in which concerns over sovereignty limit co-operation.²⁴ There is therefore ongoing tension between the integrative dynamic and the jealous protection of sovereign power.

B. Critiques of EU Counter-terrorism Law

Three broad critiques of EU counter-terrorism law and policy can be identified: (i) of ineffectiveness; (ii) of anti-constitutionalism; (iii) of contrariness to human rights and the rule of law. These critiques are not unrelated. If the law is ineffective, interferences with human rights are more difficult to justify and therefore more likely to be violations of those rights. Furthermore, compliance with human rights and the rule of law is part of constitutionalism. The separate categorisation of human rights and the rule of law here is because of the extent of the critiques rather than their analytical distinctiveness.

The question of effectiveness of counter-terrorism is beset with challenges. It is difficult to assess the effectiveness of counter-terrorism law because of the secrecy of the field.²⁵ Indeed secrecy may even be used as a substitute for proof of efficacy.²⁶ Counter-terrorism measures, the argument goes, cannot be subject to ordinary tests of effectiveness because the evidence of their effectiveness cannot be shared on grounds of national security. It must therefore be presumed – a problematic proposition when the necessity and proportionality of such measures must be weighed against their interference with human rights.

Insofar as the effectiveness of counter-terrorism can be assessed, legal scholarship is in part dependent on other disciplines in the conduct of such assessments.²⁷ This is certainly the case in relation to the satisfactory social function of legal actors, norms, and processes (analysis of external effectiveness). Such analysis relies on disciplines including international relations, security and strategic studies, and geography.²⁸ Early assessments of the EU's contribution by scholars in those fields were not positive. EU counter-terrorism efforts were, one analysis claimed, evidence that the Union is a 'paper tiger' with a 'prevailing lack of genuine pro-integration thinking' in the field.²⁹

It is easier for lawyers to contribute to examinations of the impact of legal initiatives on the operation of the legal system and its principles (analysis of internal effectiveness).³⁰ In doing so the critique of ineffectiveness overlaps with that of anti-constitutionalism. This is because principles which ensure internal effectiveness (for example that the law is clear, and is given effect to by the executive) also form part of the constitutional order. In its analysis of effectiveness, then, this article follows a line of 'law in context' work which combines insights from other disciplines on external effectiveness with legal analysis of internal effectiveness.³¹

²⁴ J Argomaniz, *The EU and Counter-terrorism: Politics, polity, and policies after 9/11* (Routledge, 2011), p 8.

²⁵ K Roach, *Comparative Counter-terrorism Law* (Cambridge University Press, 2015), p 684.

²⁶ See M deGoede and M Wesseling, 'Secrecy and security in transatlantic terrorism finance tracking' (2017) 39(3) *Journal of European Integration* 253.

²⁷ For an examination of the question of 'effectiveness' of counter-terrorism in legal and other contexts, see M Vermeulen, D Deering and S McCarthy, *Report on Legal Understandings of Impact, Legitimacy & Effectiveness of EU Counter-terrorism* (SECILE, 2013), and F de Londras, J Doody, J Supe and S Zalkalne *Cross-Disciplinary Perspectives, on Impact, Legitimacy & Effectiveness in the Context of EU Counter-terrorism* (SECILE, 2013).

²⁸ J Argomaniz, *The EU and Counter-terrorism: Politics, polity, and policies after 9/11* (Routledge, 2011); R Bossong, *The Evolution of EU Counter-terrorism: European Security Policy after 9/11* (Routledge, 2012); O Bures, *EU Counter-terrorism Policy: A Paper Tiger?* (Routledge, 2011).

²⁹ O Bures, 'EU Counterterrorism Policy: A Paper Tiger?' (2007) 18(1) *Terrorism and Political Violence* 57 and O Bures, 'EU Counterterrorism Policy: A Paper Tiger?' (Routledge, 2011).

³⁰ The distinction is drawn from C McCrudden, 'Legal Research and the Social Sciences' (2006) *Law Quarterly Review* 632.

³¹ See C C Murphy, *EU Counter-terrorism Law: Pre-emption and the Rule of Law* (Hart Publishing, expanded paperback edition, 2015).

The critique of anti-constitutionalism holds that, through the adoption of EU counter-terrorism measures, the Union acts contrary to its constitutional principles.³² These principles relate, in particular, to the requirement of a legal basis for legislative measures and the division of competence between the EU and its Member States, as well as others.

Two examples illustrate the legal basis point. First, it is arguable that, prior to the Lisbon Treaty, the EU did not have the competence to adopt restrictive measures against individuals. This argument was raised, unsuccessfully, in the *Kadi* litigation. The CJEU held that a combination of Articles 60, 301, and 308 EC were sufficient legal basis.³³ The argument of a lack of legal basis before the Lisbon Treaty remains persuasive, if now mainly of historical interest.³⁴

Second, two Member States sought to challenge the Data Retention Directive on the ground that it ought to have been adopted as a third pillar measure (such as a framework decision) rather than as a Directive under the first pillar.³⁵ The CJEU again rejected this argument because, it held, the measure had as its purpose the harmonisation of the internal market.

In both these cases the CJEU used dubious legal basis analysis to facilitate counter-terrorism efforts by the EU. Extraordinarily legal measures which test the limits of the law don't only arise in counter-terrorism efforts. EU action in the height of the global financial crisis also ran up against the limits of EU treaty competences.³⁶ States tend to enjoy "extensive responsibility within [their] domain".³⁷ Where there is an emergency, then subject to the requirements of national constitutional law, states may arrogate to themselves the necessary powers to act. In contrast, EU competences are strictly set out in the EU treaties. Their limits are liable to be tested and transgressed in crises – such as in response to terrorism.

A further line of analysis relates to the division of competence between the EU and its Member States. The distinction between the European level of governance, and that of the Member States, came to the fore in *Advocaten vor de Wereld*.³⁸ The CJEU rejected a challenge to the lawfulness of FDEAW brought on the basis of the principle of legality. In particular, the challenge was that the 32 offences listed in the FDEAW for which the dual criminality requirement was to be abolished were insufficiently precise. The Court held that the definition of activity as criminal, under the EAW, was for national law and therefore the lack of precision in the EU law was not fatal to its legality.³⁹

In contrast, the UK argued without success in *Watson* that even if retention of telecommunications data by service providers falls within the scope of EU law, the terms under which law enforcement officials access that data fall outside EU law's

³² By 'constitutionalism' is meant that power is exercised in accordance with 'a set of norms (rules, principles or values) creating, structuring, and possibly defining the limits of, government power or authority'. See W Waluchow, 'Constitutionalism', *Stanford Encyclopedia of Philosophy*, 20 December 2017, available: < <https://plato.stanford.edu/entries/constitutionalism/>>. On the general principles of EU law see T Tridimas, *The General Principles of EU Law*, Second Edition (OUP, 2007).

³³ *Yassin Abdullah Kadi and Al Barakat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P, EU:C:2008:461, para 236.

³⁴ By their provision of an explicit legal basis in the Lisbon Treaty, the Member States may give greater credence to the claim that prior to the Treaty, such a basis did not exist. The explicit legal basis for restrictive measures is found in Article 75 TFEU. However, the EU continues to rely on Article 215 TFEU, despite the former article being preferable on both *lex specialis* and democratic grounds. A contrarian view would be that the clarification of a legal basis post-Lisbon does not mean there was not already a legal basis before that Treaty.

³⁵ *Ireland v European Parliament and European Council*, C-301/06, EU:C:2009:68.

³⁶ I am grateful to the editor, Professor Kenneth Armstrong, for bringing this point to my attention. See A Hinarejos, 'The Euro Area Crisis and Constitutional Limits to Fiscal Integration' (2012) 14 *Cambridge Yearbook of European Legal Studies* 243.

³⁷ J Raz, "Why the State" in N Roughan and A Halpin (eds), *In Pursuit of Pluralism Jurisprudence* (CUP, 2017).

³⁸ *Advocaten voor de Wereld*, C-303/05, EU:C:2007:261.

³⁹ *Ibid*, paras 48-54.

scope.⁴⁰ The Court held that the fact that the manner in which national authorities could access the data was set out in national law did not mean that that law could escape the requirement to be compliant with EU law.⁴¹

These cases, like the litigation on legal basis, bolster EU competences in counter-terrorism law. We can but speculate as to whether the Court seeks to ensure that the Union can be an effective actor against terrorism, or to extend its own role in the field (if the EU is competent to act then the Court's supervisory role also applies), or both, or neither. However, regardless of any institutional goal the Court may have, the effect of its judgments is to promote the Union's role, and its own role, in this field.

Additional challenges to constitutionalism have arisen in relation to agreements between the EU and external partners to enable lawful transatlantic data flows. Thus, EU-US PNR Agreements (air travel data), and the EU-US SWIFT Agreement (financial transactions data) have been challenged in the EU Court of Justice.⁴² In its most recent judgment on the matter, the CJEU for the first time applied the EU Charter to a draft international agreement, and found the draft EU-Canada Passenger Name Record Agreement violates the Charter.⁴³ The grounds for the judgment were the draft Agreement's lack of clarity and precision, failures of specificity as to data transfer and processing, and the inadequacy of oversight and redress mechanisms. The Agreement is now subject to renegotiation. Judgments on external relations, by definition, have an impact beyond the EU as they may build the EU's capacity to shape transnational counter-terrorism law.

The judgments on these external relations matters lie between the critique of anti-constitutionalism and the more specific critique of contrariness to human rights and the rule of law. It is in this third area that arguments as to EU counter-terrorism law have been most robust.⁴⁴ In terms of human rights, the right to freedom of expression, due process rights, right to privacy (including data protection rights), and others, have all been the subject of interference. In some cases those rights have been found to be violated by the CJEU. For example, in relation to due process and privacy, the Court has held EU action to be unlawful in cases such as *Kadi* and *Digital Rights Ireland*, with consequence for counter-terrorism law in Europe and beyond. The alteration of processes in the UN Security Council Al-Qaeda (now Al-Qaeda and Islamic State) sanctions regime is one such consequence. The *Digital Rights Ireland* judgment (and its successors) has put the EU at the forefront of developing data retention and surveillance standards.

As for the rule of law, EU counter-terrorism law is vague in its terms, and has been impugned as an infringement of the principles of legality (in criminal law) and the requirements of accessibility and foreseeability (in law in general).⁴⁵ A counter-claim here is that it is not EU law which renders the conduct criminal but national law.⁴⁶ EU law, the counterargument goes, cannot by itself impose criminal law obligations upon individuals and relies on transposition to do so. On this view, the principle of legality in criminal law applies not at EU level, but at national level.

The premise is correct, but the argument does not convince. First, the principle of legality in criminal law (which can be found in both the ECHR and EU Charter), is

⁴⁰ See *Digital Rights Ireland*, C-293/12, EU:C:2014:238; *Tele2 Sverige and Watson v. GCHQ*, Joined Cases C-203/15 and C-685/15, EU:C:2016:970.

⁴¹ *Ibid*, paras 62-81.

⁴² *European Parliament v. Council and European Parliament v. Commission*, Joined Cases C-317/04 and C-318/04, ECLI:EU:C:2006:346 on the EU-US PNR Agreement; and *Council v. in 't Veld*, C-350/12 P, ECLI:EU:C:2014:2039 on access to documents in relation to the EU-US Swift Agreements.

⁴³ *Draft agreement between Canada and the European Union on Transfer of Passenger Name Record data*, Opinion 1/15, EU:C:2017:592.

⁴⁴ See in general the work of Statewatch, available at <<http://www.statewatch.org>>.

⁴⁵ See Murphy, n 31 above, pp 227-228.

⁴⁶ Coutts, n 11 above.

an expression of a broader principle of legal certainty. Even if one accepts the relevance of a distinction between EU law which requires criminal liability to be imposed and national law which actually imposes criminal liability, that distinction cannot allow EU law escape the requirements of legal certainty. It may soften the critique but it does not answer it.

Second, *Advocaten voor der Wereld* does not call this into question. In that judgment, the CJEU rejected a challenge to the FDEAW. The rejected argument was that the list of offences exempted from the dual criminality require is too vague. The CJEU held that the definition of offences was for national law.⁴⁷ In the Court's words, the FDEAW 'does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract...'.⁴⁸ However, this contrasts with the Data Retention Directive – for which the whole basis of EU competence is that EU action is preferable to likely divergence in national law if the EU did not act.⁴⁹ Thus, the exercise of competence requires convergent rather than divergent law. Vagueness in EU law increases the scope for divergence across Member States.

Third, as a matter of doctrine, the analysis of the CJEU in *Digital Rights Ireland* and in *Watson* rejects the contention that Union law may mandate coercive action be taken and leave the provision of safeguards to national legislatures. The UK has argued, without success, that national criminal procedures pursuant to powers given by EU law can fall outside the scope of EU law. It is therefore necessary for rule of law principles to be upheld at all levels of governance. The importance of this point is further emphasised by ongoing developments in EU and UN law on foreign terrorist fighters – as we will soon see.

C. The New Wave of EU Counter-terrorism Laws

The EU adopted the DCT on 15 March 2017. It shares certain characteristics with early EU counter-terrorism law. First, the proposal for the Directive was introduced without any prior impact assessment. Second, the proposal was a response to an act of violence – the murders in the Bataclan theatre in Paris.⁵⁰ Third, the proposal is in part a legislative response to action by the UN Security Council and by the Council of Europe.⁵¹ The shift towards supranational legislative forms has implications for the effectiveness of the law and its compliance with constitutional principles. These points will be returned to in Part V of this article.

A new legislative process is underway even before completion of the Commission's review of implementation of the DCT. On 12 September 2018, the Commission published its proposal for a Terrorism Regulation.⁵² The proposal relates to online terrorist content. The non-governmental organisation, European Digital Rights, described it as a 'tactic' brought forward under pressure from France and

⁴⁷ *Advocaten voor de Wereld* ECLI:EU:C:2007:261, C-303/05, paras 48-54.

⁴⁸ *Ibid*, para 52.

⁴⁹ See DCT, Preamble, recital 34, amongst other recitals.

⁵⁰ Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism COM(2015)/0625 final.

⁵¹ One additional novel aspect is found in Article 24, which provides for the protection of, and provision of assistance to, victims of terrorism. Of particular note is the requirement to provide 'emotional and psychological support, such as trauma support and counselling'. It is unclear how Member States are to ensure that the services are 'confidential, free of charge, and easily accessible to all victims of terrorism'. This provision includes what could be quite a significant commitment of resources for Member States' mental health services. Insofar as there is new content in the Directive it largely derives from UN Security Council resolution 2178 (SCR 2178), UN Doc S/Res/2178 (2014). The Directive sits alongside an Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism agreed on 22 October 2015.

⁵² European Commission, Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online COM(2018) 640 final.

Germany ahead of the 2019 European Parliament elections.³³ The use of Union measures for political purposes – rather than to add anything of substance to EU counter-terrorism efforts – is itself not new. French President Hollande, in the aftermath of the attacks in Paris in 2015, invoked Article 42(7) EU. The High Representative of the European Union for Foreign Affairs and Security Policy, Federica Mogherini, described the invocation as “a political act, a political message”.³⁴ It is noteworthy that France did not invoke the solidarity clause in Article 222 TFEU – which would have given the European Commission a greater role in the response.

This critical overview of EU counter-terrorism law, and of critiques of that law, demonstrates that the EU undergoes many of the same pressures as states do, in particular the ‘counter-terrorism imperative’. The particular constitutional structure of the EU makes fulfilment of that imperative difficult, both in terms of political agreement on what ought to be done, and how, and in giving legal effect to any such agreement. However, insofar as the EU does act, that action may be of greater consequence than action taken by any of its Member States.

A challenge for all critiques of EU law is the claim that they rest upon fallacious analogies with either an idealised past or with national law and policy. This challenge holds that as the transnationalisation of law progresses, arguments about the character of the law ought not assume that absent transnationalisation, the law would be more effective, less anti-constitutional, or more respectful of human rights and the rule of law. It is not unreasonable to ask whether we expect more from EU counter-terrorism law than we would from national law – either today or in the past. There are at least three answers. First, EU law has impact across all Member States. Its greater geographic scope increases the number of individuals subject to it and increases the significance of the law. Second, multi-level law and legal procedure presents particular difficulties for individuals subject to the law and procedure. There is therefore a need for greater efforts to preserve the rule of law and vindicate human rights. Third, the EU is the pre-eminent example of a transnational legal order. There is an onus on the EU to exhibit the values it claims to uphold, not least given rising authoritarianism in world politics.

These points are explored once more below but first it is necessary to consider two contemporary policy fields which, once again, broaden the scope of EU counter-terrorism law: foreign terrorist fighters and radicalisation.

III. FOREIGN TERRORIST FIGHTERS AND EU LAW

The contribution of ‘foreign fighters’ to conflicts outside of their own states is not a new phenomenon.³⁵ For example, the most well-known foreign fighters in Europe since the Second World War were the International Brigades that fought against General Francisco Franco during the Spanish Civil War.³⁶ Furthermore, between 1980 and 2010, even before the international community began to focus on ‘foreign terrorist fighters’, up to 30,000 individuals travelled to conflicts in the Middle East.³⁷

Contemporary concern about ‘foreign fighters’, or more commonly ‘foreign terrorist fighters’, stems from the increase in travel of fighters to the conflicts in Syria and Iraq since 2010. This increase coincided with the seizure of territory across the two

³³ ‘EU Terrorism Regulation – an EU election tactic’, 12 September 2018, available: <https://edri.org/press-release-eu-terrorism-regulation-an-eu-election-tactic/>

³⁴ “France invokes EU’s article 42.7, but what does it mean?” *The Guardian* 17 November 2015.

³⁵ S Farer, ‘Spain’s Foreign Fighters: The Lincoln Brigade and the Legacy of the Spanish Civil War’ *Foreign Affairs*, September/October 2016.

³⁶ *Ibid.*

³⁷ T Hegghammer, ‘The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad’ (2010/2011) 35(3) *International Security* 53.

countries by the organisation known as Islamic State. Islamic State’s claim to establish a caliphate drew individuals from across Africa, Europe, and farther afield to join its proto-state.³⁸ Motivations for foreign terrorist fighters differ, but include a combination of ‘outrage at what is taking place in the country they wish to travel to, adherence to the ideology of the group they wish to join, and a search for identity and meaning in their personal lives’.³⁹

The travel of individuals to the conflicts across Iraq and Syria is of concern for two reasons. First, such individuals contribute to hostilities in those states and may make the conflicts more difficult to resolve. Second, those who have fought on behalf of ‘Islamic State’ may return to take action against the states from which they have travelled. Europol estimates that approximately 5,000 persons from the EU have travelled to Iraq and Syria as foreign terrorist fighters, with 1,500 of those thought to have returned to the EU.⁴⁰ It is concern about the activities of these individuals that has triggered related law-making at both UN and EU levels.

A. United Nations Action against Foreign Terrorist Fighters

The UN Security Council adopted a definition of ‘foreign terrorist fighter’ in SCR 2178, agreed at a meeting under US President Barack Obama’s chairmanship on 24 September 2014.⁴¹ The presence of the US President is a marker of the meeting’s significance in world politics, which was only the sixth in the Security Council’s history to take place at the level of Heads of State and Government. The resolution’s definition of foreign terrorist fighter is:

individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.⁴²

This definition is broad and is made broader still because of the expanded terminology about terrorism that the UN now uses. In 2001, SCR 1373 referred to ‘any act of international terrorism’. In 2004, SCR 1566 went further to condemn ‘all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed’.⁴³ SCR 2178 (2015), and later SCR 2396 (2017), refer to ‘terrorism in all its forms and manifestations’.⁴⁴ These later resolutions broaden the scope of UN law. In particular, they do not limit their impact to matters of international concern, but also include those of national concern, and afford states greater latitude to determine what constitutes terrorist behaviour.⁴⁵

³⁸ UN Security Council Counter-terrorism Committee Executive Directorate, *The Challenge of Returning and Relocating Foreign Terrorist Fighters: Research Perspectives* (UN, 2018), p 4.

³⁹ R Frenett and T Silverman, ‘Foreign Fighters: Motivations for Travel to Foreign Conflicts’, in A de Guttery, F Capone, and C Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer, 2016), p 63.

⁴⁰ Europol, *TESAT 2018*, p 26.

⁴¹ U.N. Doc. S/Res/2178 (2014).

⁴² *Ibid.*, Preamble Recital 9.

⁴³ U.N. Doc. S/Res/1566 (2004), para 1. Paragraph 3 does include a definition of terrorism offences: ‘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 organization 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.’

⁴⁴ SCR 2178 does explicitly state that participation in ‘armed conflict’ falls within its scope – something which expands rather than limits the definition.

⁴⁵ K Ambos, ‘Our terrorists, your terrorists? The UN Security Council urges states to combat ‘foreign terrorist fighters’, but does not define ‘terrorism’ (EJIL: Talk!, 2 October 2014).

This tendency to broaden the scope of action is worrisome because the resolutions are examples of ‘hegemonic international law’.⁶⁶ They are ‘hegemonic’ because the use of authority under Chapter VII of the UN Charter requires states to act, and to legislate for counter-terrorism, in ways they might not otherwise do. The subject matter of the resolutions varies. In 2001, SCR 1373 focussed on the financing of terrorism.⁶⁷ In 2005, SCR 1624 addressed incitement to terrorism and border controls.⁶⁸ SCR 2178 continues this trend of mobility restriction. On one view, the effect of SCR 2178 is even more dramatic, as ‘foreign terrorist fighters’ themselves might be addressees of the resolution. Peters claims that paragraph 1 of the resolution is ‘is the legal basis for everyone’s obligation not to commit terrorist acts or participate in the armed conflict surrounding [Islamic State]’.⁶⁹ However, she notes that such an interpretation of the resolution, which would directly impose criminal sanctions on individuals, would be contrary to the principle of legality. That the imposition of obligations on individuals is even arguable is further evidence that the Security Council’s action is hegemonic in nature. It suggests the capacity not only to agenda-set for national legislatures – but to bypass them entirely. Were this to transpire it would lend further weight to the argument that constitutional principles must be upheld at all levels of governance and not just the national level.

The transnationalisation of the law is not yet at that point. However, the Security Council has assumed an agenda-setting role, and now requires all states to adopt a pre-emptive approach to counter-terrorism.⁷⁰ Foreign terrorist fighters also feature in SCR 2253 (2015), which extends the mandate of the Al-Qaeda Sanctions Committee to cover Islamic State,⁷¹ and in SCR 2395 (2017), on the role of the Counter-Terrorism Committee Executive Directorate (CTED) in oversight of implementation of UN resolutions and in the promotion of capacity-building for counter-terrorism.⁷² The principal successor to SCR 2178 was SCR 2396, adopted on 21 December 2017. The resolution reconsiders the threat of foreign terrorist fighters as Islamic State loses ground in the conflicts in Iraq and Syria. It identifies the increase in likelihood that foreign terrorist fighters may become ‘returnees’ – i.e. that they may return to their states of origin and pose a security risk.⁷³ Resolution 2396 ‘urges’ states ‘to develop and implement appropriate investigative and prosecutorial strategies’ to target foreign terrorist fighters.⁷⁴ These resolutions have been subject to criticism by successive UN Special Rapporteurs on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism.⁷⁵ Nevertheless, the EU law largely follows the terms of the UN resolution.

The EU, of course, is not a member of the UN Security Council, or an addressee of its resolutions. Two EU Member States – France and the UK – are not only members of the Security Council but are permanent members.⁷⁶ Article 34 EU requires those Member States ‘in the execution of their functions, [to] defend the positions and the interests of the Union, without prejudice to their responsibilities under the provisions

⁶⁶ J Alvarez, ‘Hegemonic International Law Revisited’ (2003) 97(4) *American Journal of International Law* 873.

⁶⁷ U.N. Doc. S/Res/1373 (2001). For a critique see Alvarez n 62 above, pp 874-878.

⁶⁸ U.N. Doc. S/Res/1624 (2005).

⁶⁹ A Peters, Security Council Resolution 2178 (2014): The ‘Foreign Terrorist Fighter’ as an International Legal Person, Part I (*EJIL: Talk!*, 20 November 2014).

⁷⁰ See C C Murphy, ‘Transnational Counter-terrorism Law: Law, Power and Legitimacy in the “Wars on Terror”’ (2015) 6(1) *Transnational Legal Theory* 31.

⁷¹ U.N. Doc. S/Res/2253 (2015).

⁷² U.N. Doc. S/Res/2395 (2017).

⁷³ U.N. Doc. S/Res/2396 (2017).

⁷⁴ U.N. Doc. S/Res/2396 (2017), paragraph 18.

⁷⁵ F Ní Aoláin, ‘The UN Security Council, Global Watch Lists, Biometrics, and the Threat to the Rule of Law’ (*Just Security*, 17 January 2018).

⁷⁶ Until the purported departure of the UK from the EU on 31 October 2019 after which France will become the only such member.

of the United Nations Charter’. This puts France and the UK, as well as the Netherlands, Poland and Sweden, who currently hold non-permanent seats, under an obligation to play an ambassadorial role for EU values in the UN.

It is difficult to make claims about the extent to which this is being done. It is notable that some of the most recent provisions, for example to ‘develop the capacity to collect, process and analyse’ Passenger Name Record (PNR) data for counter-terrorism purposes, are existent EU policies.⁷⁷ UN counter-terrorism action fits well with EU counter-terrorism law and policy – as the analysis of DCT measures on foreign terrorist fighters will show. But whether that is a result of advocacy by Member States for EU policies, or is merely a consequence of less co-ordinated policy-laundering, is not clear.

B. EU Implementation of UN Law on Foreign Terrorist Fighters

Part of the effect of the DCT is to recast the provisions of the FDCT in a supranational measure. The new measures in the law relate in large part to foreign terrorist fighters. Recital 5 of the Preamble to the DCT cites EU Member States’ responsibilities to implement SCR 2178 as well as the Council of Europe Additional Protocol on foreign terrorist fighters.⁷⁸ The Directive implements several of those obligations. It echoes the resolution in its Preamble:

Individuals referred to as ‘foreign terrorist fighters’ travel abroad for the purpose of terrorism. Returning foreign terrorist fighters pose a heightened security threat to all Member States. Foreign terrorist fighters have been linked to recent attacks and plots in several Member States. In addition, the Union and its Member States face increased threats from individuals who are inspired or instructed by terrorist groups abroad but who remain within Europe.⁷⁹

The provisions of the Directive which most directly address foreign terrorist fighters are Articles 9 and 10. Article 9(1) states:

Each Member State shall take the necessary measures to ensure that travelling to a country other than that Member State for the purpose of committing, or contributing to the commission of, a terrorist offence as referred to in Article 3, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group as referred to in Article 4, or for the purpose of the providing or receiving of training for terrorism as referred to in Articles 7 and 8 is punishable as a criminal offence when committed intentionally.

This clause implicates travel when that travel is for any one of three purposes: first, to commit or contribute to a terrorist offence; second, to participate in a terrorist group with knowledge that this will further the group’s criminal activity; and third, to provide or receive training for terrorism. Article 9(2) builds on the former clause to require criminalisation either of travel into the Member State for one of the above three purposes, or of preparatory acts by a person entering the Member State in relation to terrorist offences. Article 10 further widens the net. It requires Member States to ensure that ‘any act of organisation or facilitation’ which assists a person in travelling for the

⁷⁷ U.N. Doc. S/Res/2396 (2017), Article 12.

⁷⁸ DCT, Preamble, recital 5.

⁷⁹ DCT, Preamble, recital 4.

purposes of terrorism is a criminal offence. As with the Article 9 offences, the Article 10 offences require that the behaviour be done ‘intentionally’ to be caught by the provision.⁵⁰

These articles are problematic. The offences they set out require an act (travel, or travel-related behaviour) and a mental state (intention in relation to terrorism or a terrorist group). But the act itself does not constitute ‘harm’. Travel by individuals, of itself, is not criminal activity. Indeed, the right to leave any country, and to return to one’s own country, is set out in Article 13(2) of the Universal Declaration of Human Rights. Further elaboration of the right is found in Article 12(2) of the International Covenant on Civil and Political Rights and, in Europe, in Article 2(2) of Protocol No. 4 to the European Convention on Human Rights. Of course, states may exercise powers over their border. However, the existence of a right to travel demonstrates that the behavioural element is, without the existence of the mental element, merely the exercise of a human right.

The mental element is, therefore, key to the travel offences. The bar is a low one. Intention to commit or to contribute to the commission of a terrorist offence is sufficient, but is not necessary, to make out the travel offences. It is also unnecessary for any act of terrorism to be carried out. Rather, the full list of intentions, any one of which is sufficient, is broad. It includes an intention to commit a range of inchoate acts – including intention to further a group’s criminal but not necessarily terrorist activities.⁵¹ However, while the bar is low, much depends on there being sufficient evidence to prove intention to a criminal law standard. Given that the activities in question may take place outside the EU or any of its Member States it is not surprising that prosecutions have proven difficult.⁵²

Of course, the existence of offences can be useful, even without prosecutions, as they may provide a basis for the use of extraordinary powers by law enforcement officials. Thus, where terrorism is suspected, the law may permit greater surveillance, or longer pre-trial detention, than where other crimes are suspected. From a rule of law point of view, if those powers are dependent on there being a suspicion of terrorism, then the use of powers can be limited. However, at EU level, the provision of new powers is not necessarily linked to terrorism, at least not as defined in EU law. Two examples illustrate the point. First, it is those who commit crimes as defined in national law, not EU law, who can be subject to an EAW request.⁵³ Second, individuals subject to EU restrictive measures do not have to be under suspicion of a particular – or any – terrorist offence. Rather, they must be associated with Al-Qaida, Islamic State, or another listed entities.⁵⁴ In a similar vein, the DCT calls for new offences, and new powers, against foreign terrorist fighters, without limiting those powers by reference to the definition of terrorism. As such, it is facilitative of executive action, without being restrictive of that action, and empowers law enforcement authorities in the EU to restrict the mobility of those under suspicion.

⁵⁰ DCT, Article 10.

⁵¹ DCT, Article 9(1).

⁵² This has been acknowledged in a summary of research by the UN Counter-terrorism Committee Executive Directorate: CTED, *The Challenge of Returning and Relocating Foreign Terrorist Fighters: Research Perspectives*, CTED Trends Report, March 2018, p 13: ‘It takes time to develop a brief of evidence; some returnees will not meet the required evidentiary threshold, while those that do may only be prosecuted for relatively minor offences, meaning that prison sentences imposed on FTFs can be relatively short.’

⁵³ Article 2(2) FDEAW provides for surrender for the list of 32 offences ‘as they are defined by the law of the issuing Member State’.

⁵⁴ Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da’esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP [2016] OJ L255/25; Council Regulation (EU) 2016/1686 of 20 September 2016 imposing additional restrictive measures directed against ISIL (Da’esh) and Al-Qaeda and natural and legal persons, entities or bodies associated with them [2016] OJ L255/1.

The focus on mobility of potential terrorists fits with longer-term EU policies. Critics have described this approach as on ‘Fortress Europe’.⁵⁵ These policies are based on the idea that, if Europe eliminates internal borders, it must strengthen external borders. The Schengen system of border controls has come under new stresses in recent years. These stresses have, in part, been brought about as a result of the mass displacement of people caused by the conflict in Syria, in particular, as well as insecurity across North Africa and the Middle East.⁵⁶ Concerns that asylum seekers from Syria might unwittingly provide cover for foreign terrorist fighters, or other combatants, seeking to enter Europe to carry out attacks has led to a new commitment to control Europe’s external borders, and even calls for the closing of internal borders.⁵⁷ In December 2018, new rules on the Schengen Information System came into force, which include obligations to better monitor terrorist activity.⁵⁸

The phenomenon of ‘foreign terrorist fighters’ and the threat they pose to security in the Europe and elsewhere may be of more limited concern in the future.⁵⁹ Some of the offences in the DCT may therefore be redundant, and even if they are not, there remains the challenge of successive prosecution. Ultimately, if the focus of measures against foreign terrorist fighters is on their exclusion, this only incapacitates the individual in relation to one territory and does not prevent them being a threat elsewhere. Furthermore, the approach is liable to operational failures, as with the return from Libya to the UK of Salman Abedi, responsible for the 2017 Manchester bombing.⁶⁰ Even if the individual is excluded from a territory, they may still pose a threat, such as through the radicalisation of others in the territory. It is to this question that the analysis next turns.

IV. COUNTER-RADICALISATION AND EU LAW

The term ‘radicalisation’ entered the vernacular in the aftermath of 11 September 2001, as policy-makers, academics, and others, sought to understand how individuals are drawn into terrorism.⁶¹ It has been controversial from the outset – perhaps even more so than the term ‘terrorism’. The International Centre for the Study of Radicalisation and Political Violence (ICSR) reports that most ‘definitions currently in circulation describe radicalisation as the process (or processes) whereby individuals or groups come to approve of and (ultimately) participate in the use of violence for political aims’.⁶² All conceptions of radicalisation consider it to relate to a progression in beliefs, but different conceptions have different end-points to that progression.⁶³

Efforts to combat radicalisation can be understood by reference to two ideal type models: ‘Anglo-Saxon’ and ‘European’.⁶⁴ Under the Anglo-Saxon model, counter-radicalisation focuses on behavioural radicalisation (that which is likely to result in

⁵⁵ See N Coleman, ‘From Gulf War to Gulf War - Years of Security Concern in Immigration and Asylum Policies at European Level’ in A Baldacchini and E Guild (eds), *Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe* (Brill Publishing, 2006).

⁵⁶ See M Ceccorulli, ‘Back to Schengen: the collective securitisation of the EU free-border area’ (2019) 42(2) *West European Politics* 302.

⁵⁷ ‘Extend border controls to counter terror threat, say France and Germany’ *The Guardian* 15 September 2017.

⁵⁸ See European Commission, ‘Security Union: new rules on reinforced Schengen Information System enter into force’ *Brussels* 28 December 2018.

⁵⁹ See in general UNCTED, *The Challenge of Returning and Relocating Foreign Terrorist Fighters: Research Perspectives*, March 2018.

⁶⁰ Intelligence and Security Committee of Parliament, *The 2017 Attacks: What Needs to Change?* HCL1694, 22 November 2018.

⁶¹ M Sedgwick, ‘The Concept of Radicalisation as a Source of Confusion’ (2010) 22 *Terrorism and Political Violence* 479, p. 480. For a review of the term’s use, see P Neumann, ‘Introduction’, in P Neumann and J Stoil (eds), *Perspectives on Radicalisation and Political Violence* (ICSR, 2008), p 3.

⁶² ICSR, *Prisons and Terrorism: Radicalisation and De-radicalisation in 15 Countries* (ICSR, 2010), p 12.

⁶³ P Neumann, ‘The Trouble with Radicalisation’ (2013) 89(4) *International Affairs* 873, pp 874-875.

⁶⁴ *Ibid.*, p. 885.

violence) and uses criminal law and criminal justice as its tools. Under the European model, counter-radicalisation's focus is cognitive radicalisation (counter-constitutionalist thought) and uses a wider range of tools. The conception of radicalisation, and the proposition that action should be taken to prevent radicalisation, gives rise to tensions with human rights and civil liberties. These are the freedom of thought and conscience, freedom of (political) speech, and perhaps freedom of association. Thus, even more so than in relation to foreign terrorist fighters, counter-radicalisation is a field of action wherein the utility of legal measures is open to question. This question has not prevented the EU from adopting such measures.

The impact of UN law on EU counter-radicalisation is less pronounced than in the field of foreign terrorist fighters. Concern about 'acts of terrorism motivated by intolerance or extremism' has been a feature of UN Security Council resolutions since SCR 1373 (2001).¹⁰² SCR 1624, adopted in 2005, refers to 'incitement of terrorist acts motivated by extremism and intolerance'.¹⁰³ Its operative text, Article 1, calls upon states to prohibit incitement, to prevent it, and to 'deny safe haven' to persons if there is 'credible and relevant information giving serious reasons' to consider they are guilty of it. In 2014, by SCR 2178, the UN took note of the relationship between radicalisation and recruitment, and the rise in foreign terrorist fighters. Article 15 of SCR 2178 'underscores' the importance of 'countering violent extremism, ... including preventing radicalization...'. The clause acknowledges the distinction between radicalisation and recruitment, and indeed also between those two activities, and mobilization. It does not, however, define any of the terms. Nevertheless, the provision does not carry the same requirement of mandatory action as articles 5, 6, and 8, which address foreign terrorist fighters, and the financing of terrorism. Rather, article 15 and the other articles which explicitly address radicalisation, are recommendatory in nature.

A. Counter-Radicalisation and the EU

EU policies on radicalisation date to the aftermath of the attacks in Madrid and London.¹⁰⁴ The EU is a useful context in which to study counter-radicalisation because different Member States take different approaches and so the EU is under the influence of both 'Anglo-Saxon' and 'European' models. EU policies entail consists of successive, overlapping, documents from both the Council (in particular under Dutch and British Presidencies) and the Commission.¹⁰⁵ In 2004, the Commission published a Communication which included the term 'violent radicalisation',¹⁰⁶ even as it sought to stress the distinction between radical thought and terrorism. It published a further Communication a year later, after the London attacks. These Commission communications relied upon the EU's capacity to facilitate the exchange of expertise as a principal contribution to the field. The 2005 EU Counter-terrorism Strategy and EU Strategy for Combating Radicalisation both address the subject.¹⁰⁷ These strategies have been updated several times sit alongside broader EU security and external relations policies.¹⁰⁸ Thus, radicalisation features in the Hague Programme (2004) and

¹⁰² U.N. Doc. S/Res/1373 (2001), Preamble, recital 6.

¹⁰³ U.N. Doc. S/Res/1624 (2005), Preamble, recital 5.

¹⁰⁴ Bakker, n 6 above, p 283; R Bossong, 'EU cooperation on terrorism prevention and violent radicalization: frustrated ambitions or new forms of EU security governance?' (2014) 27(1) *Cambridge Review of International Affairs* 66.

¹⁰⁵ Bossong, n 97 above, pp 67-70.

¹⁰⁶ European Commission, 'Communication from the Commission to the Council and the European Parliament Prevention, preparedness and response to terrorist attack', COM(2004) 698 final.

¹⁰⁷ European Commission, 'Communication from the Commission to the Council and the European Parliament concerning terrorist recruitment, addressing the factors contributing to violent radicalisation', COM(2005) 313 final.

¹⁰⁸ See Bossong, n 97 above.

in the Stockholm Programme (2009) with objectives and policies for the 'area of freedom, security, and justice'.¹⁰⁹

In 2013, Council conclusions called upon the Commission to develop a new communication on counter-radicalisation. The Commission's reply came in 2014.¹¹⁰ The Communication emphasises, even in its title, a link between radicalisation and violence: 'Preventing Radicalisation to Terrorism and Violent Extremism'. It refers to 'a larger variety of ideologies' which inspire terrorism in Europe, including 'nationalist and separatist ideologies, those inspired by Al-Qaida, violent left-wing, anarchist, and right-wing ideologies'.¹¹¹ The Communication notes that 'comprehensive approaches' under the EU Counter-Terrorism Strategy' are 'not widely used'.¹¹² It also claims that 'effective prevention means involving non-governmental organisations, front line workers, security services, and experts in the field'.¹¹³ Front line workers are said to include 'social workers, educators, healthcare workers, police, prison staff, and probation staff'.¹¹⁴ The Communication distinguishes between disengagement, in which the individual renounces violence but not 'the ideology underpinning it', and de-radicalisation, in which the individual renounces both.¹¹⁵

The Communication reads more like an *à la carte* menu from which Member States are encouraged to choose different policy elements rather than a coherent strategy. It relies upon different conceptions of radicalisation: 'increasingly reactionary and extremist views in other parts of society',¹¹⁶ and 'radicalisation leading to extremist violence'.¹¹⁷ It is not surprising, therefore, that from the outset it was criticised because of 'an absence of priorities and realistic objectives'.¹¹⁸ The EU policy documents demonstrate that the Union mixes both the 'Anglo-Saxon' and the 'European' models.¹¹⁹ However, these policy compromises becomes problematic when one considers the prospect of 'trade-offs' between the models such that combination of both approaches by the EU may be counter-productive.¹²⁰

In institutional terms, the Council and Commission have been in the lead in the development of EU policy. In 2013 the Commission established the Radicalisation Awareness Network Centre of Excellence (RAN), which describes itself as 'a network of frontline or grassroots practitioners from around Europe who work daily with people who have already been radicalised, or who are vulnerable to radicalisation'.¹²¹ In 2017 it further established a High-Level Expert Group on Radicalisation, with a mandate to give advice on stakeholder co-operation and collaboration, policy development, and 'more structured co-operation mechanisms'. The group's work concluded in 2018 with the presentation of its final report. The limitations of the Commission's approach have been laid bare by the EU Court of Auditors.¹²² The report, in plain but damning language, observes: 'the achievements of specific actions are

¹⁰⁹ See C C Murphy and D Acosta Arcarazo, 'Rethinking Europe's Freedom, Security and Justice' in D Acosta Arcarazo and C C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing, 2014).

¹¹⁰ European Commission, 'Preventing Radicalisation to Terrorism and Violent Extremism: Strengthening the EU's Response COM(2013) 941 final, Brussels, 15.1.2014 ('2014 Communication').

¹¹¹ European Commission, 2014 Communication, p 2.

¹¹² *Ibid*, p 4.

¹¹³ *Ibid*.

¹¹⁴ *Ibid*, p 6.

¹¹⁵ *Ibid*, p 6.

¹¹⁶ *Ibid*, p 2.

¹¹⁷ *Ibid*, p. 3.

¹¹⁸ Bossong, n 96 above, p 69.

¹¹⁹ *Ibid*.

¹²⁰ On the trade-offs see Neumann, n 93 above, p 888.

¹²¹ See 'Radicalisation Awareness Network (RAN)', available at: http://ec.europa.eu/home-affairs/what-we-do/networks/radicalisation_awareness_network_en.

¹²² European Court of Auditors, *Tackling radicalisation that leads to terrorism: the Commission addressed the needs of Member States, but with some shortfalls in coordination and evaluation* (2018).

often measured in terms of amount of activity rather than effectiveness'.¹¹⁶ This is suggestive of a hamster in a wheel: no matter how much effort is spent it remains in the same place. The Commission is recommended to 'improve the framework for overall coordination of actions addressing radicalisation; increase practical support to practitioners and policymakers in Member States; and improve the framework for assessing results.'

B. EU Legislation to Combat Radicalisation

The contribution of EU law to EU counter-radicalisation, prior to the DCT and Terrorism Regulation Proposal, can be said to encompass speech offences, other inchoate offences, and surveillance provisions. As the analysis moves from specific offences to broader provisions, for example on surveillance, we move further from counter-radicalisation into general counter-terrorism policy.

An early legal element to the EU's efforts to combat radicalisation is found in the 2008 amendment to the FDCT. The FDCT already had an offence of incitement of terrorism, in its Article 4(1).¹¹⁷ However, prior to the adoption of the amending legislation, the European Commission had raised concerns about the absence of a definition of 'incitement' in the FDCT, as well as the absence of any common concept of incitement in Member State laws.¹¹⁸ In addition, after the adoption of the FDCT, requirements to criminalise incitement of terrorism were included in SCR 1624 (2005) and the Council of Europe Convention on the Prevention of Terrorism.¹¹⁹ The amendments to the FDCT included the introduction of a new offence, 'provocation of terrorism', to address the perceived gap in the law. The definition of the offence in the FDCT, as amended, did not include any explicit reference to the internet, even though it was of concern.

The FDCT also provides for a range of broader inchoate offences. These are the giving and the receipt of training for terrorism,¹²⁰ aiding or abetting terrorism,¹²¹ the attempt of (most) terrorist offences.¹²² The offences are all measures which could be deployed to prevent activity that might otherwise radicalise individuals. Their particular focus is not radicalisation *per se* but the broader prevention of terrorism.

Surveillance of the general population – in their travel, financial transactions, and telecommunications – may also contribute to counter-radicalisation operations. Although all of these aspects of counter-terrorism law may have relevance, telecommunications surveillance is most relevant, as it provides a means to surveil communications between individuals. The Data Retention Directive required Member States to have telecommunications service providers retain information on telephone calls made and web services accessed.¹²³ The CJEU has held the Directive unlawful but several Member States continue to pursue legislation for this purpose.¹²⁴

Furthermore, the UK has proposed domestic policies that would go further. In the aftermath of revelations from Edward Snowden and others about general

¹¹⁶ Ibid.

¹¹⁷ 'Each Member State shall take the necessary measures to ensure that inciting or aiding or abetting an offence referred to in Article 1(1), Articles 2 or 3 is made punishable.'

¹¹⁸ Commission (EC), Commission Staff Working Paper, Annex to the Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism SEC(2004) 688 8 June 2004 ('First Evaluation Report Annex'), p. 19.

¹¹⁹ UN Security Council resolution 1624 (2005), Council of Europe Convention on the Prevention of Terrorism, CETS No.196, Warsaw, 16/05/2005.

¹²⁰ FDCT, as amended, Article 3(2)(c).

¹²¹ FDCT, as amended, Article 4(1).

¹²² FDCT, as amended, Article 4(3)-(4).

¹²³ Data Retention Directive, n 17 above.

¹²⁴ See N Vainio and S Miettinen, 'Telecommunications data retention after Digital Rights Ireland: legislative and judicial reactions in the Member States' (2015) 23(3) *International Journal of Law and Information Technology* 290. See further <http://www.statewatch.org/news/2019/may/eu-council-data-retention.htm>.

surveillance of communications, service providers have sought to assure their users as to privacy, in particular through encryption of communications. This has led to calls for the forcible decryption of communications at the request of law enforcement agencies.¹²⁵ A legal basis for forcible decryption may already exist in UK law, in the guise of 'technical capabilities notices'.¹²⁶ However, no such power has, as of yet, found its way into EU legislation.

It is now is public speech rather than private communication that EU counter-radicalisation law targets. The principal parts of the DCT that address radicalisation (albeit not always in explicit terms) are found in Article 5 (provocation of terrorism), Article 14 (incitement and other inchoate offences), and Article 21 (online content). Article 21(1) sets out that:

Member States shall take the necessary measures to ensure the prompt removal of online content constituting a public provocation to commit a terrorist offence, as referred to in Article 5, that is hosted in their territory. They shall also endeavour to obtain the removal of such content hosted outside their territory.

Member States may also take measures to block access to such content, subject to safeguards.¹²⁷ The Terrorism Regulation Proposal would entail additional obligations on online content. It proposes to 'to prevent the misuse of hosting services for the dissemination of terrorist content online'.¹²⁸ It would provide law enforcement officials across the EU with several powers in relation to online content. First, they would be able to issue a 'removal order', to require an internet hosting service provider to remove content within one hour. Second, they would be able to refer hosted material to hosting service providers for review under the provider's own terms and conditions. And, in addition, hosting service providers would be required to take 'proactive measures' to remove terrorist material, including with the use of 'automated detection tools'.¹²⁹

EU legal measures – both existent and proposed – to combat radicalisation continues to expand the regulatory scope of counter-terrorism law. Just as the focus on foreign terrorist fighters proposes to further control the mobility of persons, a focus on radicalisation purports to control to availability of information in public and private spheres. In doing so it grants authorities greater capabilities to surveil the population and incapacitate certain targets.

V. EU COUNTER-TERRORISM LAW: EUROPE & BEYOND

The expansion of EU counter-terrorism law is in part reflective of similar expansions in UN law. Where it is, for example on foreign terrorist fighters, it shares some of the flaws of the global measures. In other areas, for example radicalisation, intra-EU policy dynamics may be more influential, and there is incoherence in EU policies. This section concludes the analysis in two parts. First, it re-examines the three critiques of EU counter-terrorism law, in light of the adoption of new laws and policies against foreign terrorist fighters and radicalisation. The conclusion here is that, for all of the new initiatives, much stays the same. Second, it considers the future of the EU in transnational counter-terrorism efforts. Here, the analysis draws together the threads

¹²⁵ See, for example, BBC News, 'WhatsApp must not be 'place for terrorists to hide'', 26 March 2017, available: <https://www.bbc.com/news/uk-39396578>.

¹²⁶ Investigatory Powers Act 2016, s 253.

¹²⁷ DCT, Article 21(2)-(3).

¹²⁸ Terrorism Regulation Proposal, Article 1(1).

¹²⁹ Terrorism Regulation Proposal, p 4.

from the previous parts of this article, to suggest that there remains potential for the EU to better use its position to advocate for better law.

The shift towards the use of a Directive (and in the future a Regulation) has some impact, albeit not a dramatic one, on the ongoing salience of the three critiques of EU counter-terrorism law. The internal effectiveness of EU counter-terrorism law is likely to be stronger than it was when the principal measure was the FDCT. The DCT, as a measure adopted upon the legal bases of Article 83(1) and Article 82(2) TFEU, benefits from the full enforcement mechanisms and procedures that the European Commission and the CJEU can bring to bear. For those Member States to whom the adopted Directive applies, there will be the prospect of enforcement proceedings in the case of tardy or inaccurate transposition. The first step in relation to the DCT will be a review by the Commission, which is due to report to the Council and the Parliament by 8 March 2020 on implementation of the Directive, and then again by 8 September 2021 on the Directive's 'added value'.¹³⁰ It remains to be seen whether this review is done, and done well, as several previous measures have included review clauses which have gone without implementation.¹³¹ Nevertheless, the content of the Directive is rather broad so it is not clear what satisfactory transposition of some measures would entail. The Commission and CJEU, in their enforcement efforts, will have much discretion to decide whether or not it considers a particular state's transposition to be appropriate. The same is true of the Terrorism Regulation which, if promulgated, will not only be a supranational measure but will enjoy direct applicability in all EU Member States – there will not necessarily be any need for national measures for it to take effect.

The internal and external effectiveness of the DCT is limited by the opt-outs by three Member States: Denmark,¹³² Ireland, and the UK.¹³³ Denmark and Ireland remain bound by the Framework Decision but do not participate in the DCT. The Directive and the Framework Decision are not, by and large, very different. As such, the application of the former by Denmark and Ireland is not likely to result in significant divergence in the law across the Member States. The UK's 2014 opt-out from criminal justice co-operation included an opt-out from the FDCT and so the UK is not bound by the FDCT or the DCT.¹³⁴ Furthermore, the departure of the UK from the EU leaves its participation in EU counter-terrorism law, policy, and operations, subject to renegotiation.¹³⁵ The UK and Ireland's refusal to opt-in, despite their adoption of measures to implement the underlying SCR 2178, and Denmark's general opt-out in this field, indicates a degree of scepticism about – or outright opposition to – EU law against terrorism. The UK government, in justifying its decision not to opt-in to a Council Decision on EU participation in the Council of Europe Convention and Additional Protocol on the Prevention of Terrorism, states:

The long-standing approach of the UK Government is that it would not be in the national interest to do anything which could bind us to an exercise of EU competence in relation to counter-terrorism which could limit our future ability to act independently

¹³⁰ DCT, Article 29(1) and (2). The latter clause sets out the terms of the 'added value' review: 'assessing the added value of this Directive with regard to combating terrorism. The report shall also cover the impact of this Directive on fundamental rights and freedoms, including on non-discrimination, on the rule of law, and on the level of protection and assistance provided to victims of terrorism.'

¹³¹ See B Hayes and C Jones (Stewatch), *Report on How the EU Assesses the Impact, Legitimacy and Effectiveness of Its Counter-Terrorism Laws* (SECILE Consortium, 2014).

¹³² DCT, Preamble, recital 41; with reference to Protocol No 21 of the Lisbon Treaty.

¹³³ DCT, Preamble, recital 42; with reference to Protocol No 22 of the Lisbon Treaty.

¹³⁴ See: Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014.

¹³⁵ D Anderson, 'Terrorism: The EU Picture', *Counsel*, available at: <https://www.counselmagazine.co.uk/articles/terrorism-the-eu-picture> and D Anderson, 'Terrorism and the Law', Graham Turnbull Lecture, The Law Society, 21 April 2016.

on terrorism legislation; or which could grant the Court of Justice of the European Union jurisdiction over national security matters in relation to the UK.¹³⁶

This statement makes clear that the impact of EU laws and policies is not only to provide 'added value' but also to empower EU institutions as an actor in this field.

There has been less change in relation to the critiques of anti-constitutionalism and of contrariness to human rights and the rule of law. In terms of constitutionalism, EU legal authority in this field is on a more sound footing after the agreement and coming into force of the Lisbon Treaty. There are now more explicit legal bases to legislate for counter-terrorism than in the past. Thus, whereas before it was possible to criticise EU counter-terrorism law for being contrary to the principle of legality insofar as there was not a legal basis for its acts, that criticism is much less severe today. Furthermore, the Commission and CJEU enforcement powers raise the prospect of more rule of law compliance in EU counter-terrorism law as the DCT is transposed across the EU. The same will be the case of the Terrorism Regulation (if adopted). The division of competences remains a point of tension between the EU and its Member States. Arguments about opt-outs in counter-terrorism law are proxies for wider arguments over the appropriate scope of EU authority. This is evident in the UK consideration of whether or not to join the EU's participation in the Council of Europe Additional Protocol.

Despite progress in terms of legal authority, rule of law concerns and human rights protection issues persist. Central to these problems is the lack of clarity and precision in the law. The DCT relies on a broad definition of 'terrorism'. Beyond the question of certainty – the broader critique of contrariness to human rights remain. The safeguards in the DCT, as with the FDCT, are largely in the (non-binding) Preamble rather than the (binding) substantive text. For example, recital 10 to the Preamble proposes the following limitations on the offence of provocation of terrorism. First, the conduct should be punishable 'when it causes a danger that terrorist acts may be committed'. In a determination as to whether that is the case, the 'specific circumstances' of a case should be taken into account. These circumstances include 'the author and the addressee of the message, as well as the context in which the act is committed'. Consideration is also to be given to 'the significance and the credible nature of the danger'.¹³⁷ These provisions, if given effect, would narrow the gap between an act of provocation and potential harm. The Commission's responsibility to consider the Directive's impact on human rights is therefore a significant one.¹³⁸

The exercise of EU competence has political and legal ramifications. In political terms, it marks out the EU as an actor in counter-terrorism at regional and global level. In legal terms, Member States are 'within the scope of EU law'¹³⁹ when they act in relation to (at least some) counter-terrorism law, the CJEU has jurisdiction over the interpretation of the law, and the Charter of Fundamental Rights is applicable. EU counter-terrorism law therefore establishes and perpetuates soft power for the Union in counter-terrorism policy. The critiques of EU counter-terrorism law draw attention to ways in which that power can be better used.

¹³⁶ See House of Commons European Scrutiny Select Committee, 'EU participation in Council of Europe Convention and Additional Protocol on the Prevention of Terrorism: Summary and Committee's Conclusions', [13.2], 24 January 2018, citing an Explanatory Memorandum of 27 November 2017 by the Minister for Security.

¹³⁷ DCT, Preamble, recital 10.

¹³⁸ DCT, Article 29(2).

¹³⁹ D Anderson and C C Murphy, 'The Charter of Fundamental Rights' in A Biondi, P Eeckhout and S Ripley (eds), *EU Law after Lisbon* (OUP, 2012), pp 164-165.

The adoption of the DCT in response to an attack suggests that EU law-making remains crisis driven. If the Commission dispenses with impact assessments when it brings forward legislative proposals then it brings into question not only the rule of law as a legal principle but also the rule of law as a political value. In a similar vein are criticisms of the Terrorism Regulation Proposal as political opportunism ahead of European elections. The need for prior assessment of counter-terrorism proposals and review after implementation is acknowledged as a key part of a robust policy process in counter-terrorism.¹⁴⁰ EU institutions cannot overlook the ways in which measures which rely heavily on discretion could be used to suppress political dissent in states with weak rule of law safeguards. As EU Commissioner for Trade, Celia Malmstrom, argued in another context: 'We want to shape globalisation, not to be shaped by it. It's not only goods and services that we export through open global trade. It is our values and standards – sharing and enforcing them is a critical part of our response to globalisation.'¹⁴¹

If the EU is growing as a developer of counter-terrorism policies then it must uphold its values. Several steps could be taken to do so. First, the EU could devise policies and adopt laws in accordance with processes which contain adequate mechanisms for *ex ante* and *ex post* scrutiny. This requires both prior impact assessments and implementation reviews. Second, the Union could ensure that, where policies require legislation, principles of constitutionalism, human rights protection, and the rule of law, are concerns at all levels of governance. This would entail not only robust judicial review by the CJEU but also the careful drafting of legislation in the first place so that EU rules model good practice from the outset of the rule-making and rule-enforcement process. Third, EU Member States could use their influence in other organisations, such as the UN, to promote these good practices across the globe. In doing so the EU would better live up to its potential as an exemplar of transnational law.

¹⁴⁰ See the reports of the SECILE Consortium, summary available at: https://cordis.europa.eu/result/rcn/164039_en.html, last accessed 1 December 2018.
¹⁴¹ EU Commissioner for Trade, Celia Malmstrom, 'Changes in Trade', Brussels 28 May 2018.