

*Sieber/Mitsilegas/Mylonopoulos/Billis/Knust (eds.)*

Alternative Systems of Crime Control

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und internationales Strafrecht

# Alternative Systems of Crime Control

National, Transnational, and International  
Dimensions

Edited by

Ulrich Sieber • Valsamis Mitsilegas • Christos Mylonopoulos  
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## Foreword

The typical trial-oriented systems of criminal justice that are primarily based on the strict application of substantive criminal law have reached their functional and logistical limits in most parts of the modern legal world. As a result, new sanction models, less formal, administrative, and discretionary case disposals, plea bargaining arrangements, and other alternative procedural and transitional justice mechanisms have emerged at unprecedented levels in national and international legal orders affiliated both with the civil law and the common law tradition. These normative constructs and practices aim at abbreviating, simplifying, or circumventing the criminal investigation and prosecution. They seek to enhance the effectiveness of conflict resolution proceedings and to shift the focus of crime control from repression to prevention.

The analysis of these topics, which illustrate the general paradigm shift currently taking place in criminal law, exceeds the scope of a single research study. For this reason, the Max Planck Institute for Foreign and International Criminal Law (Freiburg, Germany), the School of Law of the Queen Mary University London (UK), and the European & International Criminal Law Institute (Athens, Greece) are collaborating on a more in-depth exploration of these issues. As the first publication of this joint research agenda, the present thematically edited volume adopts a general approach on alternative, informal, preventive, and transitional types of criminal justice and the legitimacy of new sanction models in the global risk society. It does so mainly by focusing on distinctive aspects of national, transnational, and international crime control systems as well as on the special regimes of counter-terrorism measures and security law. The common purpose of the studies gathered in this book is the comparative, model-based, and evaluative (legitimacy-oriented) examination and analysis of the topics at issue.

The authors are experts and internationally acclaimed scholars in this field. Their research results were first presented and discussed at an international conference held on 26–27 January 2018 at Middle Temple in London, UK. With all three institutions deeply engaged in the exploration of the formal limits of criminal justice and punishment, this research collaboration is expected to continue with new studies and co-organized international conferences in Freiburg (June 2018), with focus on the prevention, investigation, and sanctioning of economic crime, and in Athens (2019), with focus on similar topics on cybercrime.

The editors of this volume would like to thank the authors for their very topical, critical, and up-to-date contributions as well as for their presentations at the London conference. We are also very grateful to all our collaborators from the School of Law at Queen Mary University of London, the Max Planck Institute for Foreign and International Criminal Law, and the European & International Criminal Law Institute for superbly organizing the conference. Finally, our sincere thanks are due to the Max Planck Institute collaborators Ms. *Yvonne Shah-Schlageter* for the linguistic revisions of the papers, Ms. *Ines Hofmann* for the layout of the text and for preparing it for publication, and to Mr. *Daniel Burke*, Mr. *Samuel Hahn*, Mr. *Felix Schwind*, and Ms. *Sophia Stelzhammer*, who offered their invaluable assistance to the editing team in this process.

Athens, Freiburg i.Br., London, May 2018

The editors

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# **Part 1**

## **Paradigm Shift**



# **The New Architecture of Security Law – Crime Control in the Global Risk Society –**

*Ulrich Sieber*

## **I. Security dogma of the risk society**

International terrorism, organized crime, economic crime and cybercrime, as well as the prevalence of political corruption and the actions of rogue state governments – all currently combine to impress upon the general public the significance of crime, crime control, and security. These phenomena of complex crime not only dominate present-day public discussion, the media, and political debate; largely unnoticed by the eyes of both the public and politicians, they have also led to a fundamental paradigm shift in the field of crime control: the traditionally *punitive* (or *repressive*) criminal law is being entrusted with progressively more *preventive* tasks, and it is increasingly being supplemented or partially replaced with ‘more effective’ legal regimes. These processes of change in the risk society are amplified by globalization and the new technologies of the information society.

Driving this present-day transformation of crime control are a number of underlying factors. For one, the transformation we witness is engendered by *objective* changes, such as new threats and new forms of crime, for example in the fields of terrorism, organized crime, or cybercrime.<sup>1</sup> Just as crucial, however, is the general public’s increasing fear of crime on a *subjective* level. Although the public’s feelings of insecurity are often not borne out by objective changes in fact, they frequently end up having greater influence on criminal policy than the actually existing risks.<sup>2</sup> In many countries, the emerging sense of insecurity and the associated calls for ‘tougher’ laws are taken up by populist politicians who seek to get (re)elected by focusing on *political* concepts of ‘law and order’. The resulting practice of ‘governing through fear of crime’<sup>3</sup> can be seen, for example, in extremist parties’ demands for protection against migrants as well as in appeals for an intensified ‘fight’ against crime.

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<sup>1</sup> See in greater detail *Sieber, U.*, Grenzen des Strafrechts, ZStW, vol. 119, 2007, 1–68 (3–7, 16–26).

<sup>2</sup> See *Gusy, C.*, Sicherheitskultur – Sicherheitspolitik – Sicherheitsrecht, der kriminalist, issue 5, 2011, 16–21.

<sup>3</sup> In reference to *Simon, J.*, Governing through Crime, Oxford University Press, Oxford et al. 2007.

The combination of these objective, subjective, and political factors has greatly influenced legal policy in recent years: in many areas, public criminal policy is today no longer dominated by traditional questions of culpability and punishment. They have instead given way to notions of *risk* and *danger*, and to the concepts of *prevention* and *security*. This ‘security dogma’ has fundamentally altered the existing approaches of social control by means of (criminal) law and has led to a new objective of legal policy: the guarantee of security through early intervention, prevention, and pre-emption. Since risks are ubiquitous in modern society, absolute security is unattainable, and the prediction of future dangers is highly vulnerable to error, this ‘security dogma’ threatens to lead to ever broader, ultimately limitless prevention and intervention. Traditional criminal law, as limited by the requirement of specificity grounded in the *nullum crimen* principle and by the principle of *ultima ratio*, is thus replaced by a concept of prevention. This concept’s malleability renders it very easily and greatly expandable – both by the legislature and in its application through government bodies and the judiciary.<sup>4</sup>

In important areas of complex crime, traditionally punitive criminal law thereby not only turns into a tool with strongly preventive orientation. It also becomes part of a general security law, in which preventive criminal law, police law, intelligence law, the laws of war, as well as administrative criminal law, civil law, and private legal regimes combine to form a new security architecture. Criminal law is thus supplemented or supplanted by legal regimes which pursue different aims and provide for more attenuated guarantees than criminal law does.

A comprehensive analysis of this fundamental movement of crime control in the global risk society is missing in academic literature. German criminal law science has discussed aspects of the current development under the catchphrase ‘*Enemy Criminal Law*’ (*Feindstrafrecht*). As a descriptive term, however, this phrase is much too general. And as a concept of legal policy it is unsuitable due to the complete indeterminacy of what it means by ‘enemy’ and because of the connected erosion of the principle of legality.<sup>5</sup>

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<sup>4</sup> See, regarding this development *Albrecht, H.-J.*, Wandel der Sicherheit – Von präventiver zu präemptiver Sicherheit? Entwicklungen der Sicherheitspolitik in Systemen des öffentlichen Personentransports, in: S. Fischer/C. Masala (eds.), *Innere Sicherheit nach 9/11*, Springer VS, Wiesbaden 2016, pp. 209–229; *Donini, M.*, Sicherheit und Strafrecht, in: Institut für Juristische Zeitgeschichte (ed.), *Jahrbuch der Juristischen Zeitgeschichte*, vol. 10, Berlin 2008/2009, pp. 298–316; *Hassemer, W.*, Sicherheit durch Strafrecht, StV 2006, 321–332; *Koops*, Law Innovation & Technology 1 (1) 2009, pp. 93–124; *Schöch, H.*, Kriminalpolitik in Zeiten komplexer Bedrohungsformen, in: F. Lösel et al. (eds.), *Kriminologie und wissenschaftsbasierte Kriminalpolitik*, Forum Verlag Godesberg, Mönchengladbach 2007, pp. 45–64; *Sieber, U.*, Legitimation und Grenzen von Gefährdungsdelikten im Vorfeld terroristischer Gewalt, NStZ 2009, 353–364; *Sieber, U./Vogel, B.*, Terrorismusfinanzierung – Prävention im Spannungsfeld von internationalen Vorgaben und nationalem Tatstrafrecht, Duncker & Humblot, Berlin 2015.

<sup>5</sup> See also *infra* IV at the end.

This article therefore aims to provide a differentiated analysis of this development as well as an assessment better suited for guiding legal policy. It begins by providing a descriptive overview of the evolution of new legal regimes for crime control in the global information and risk society, both within and beyond criminal law. The subsequent section then analyses and assesses the associated fundamental changes. The final part serves to summarize the findings. In addition, it highlights legal science's resulting legal policy tasks of developing a security law rooted in principles of constitutional law and human rights – one which better allows for achieving both of the conflicting aims: guaranteeing effectivity *and* liberty.

## II. Contours of the new security architecture

The evolution of the new security law with its enhanced preventive aim can be observed both within and beyond criminal law:

- Driven by the delineated forces, traditional criminal law is transforming in important areas from a punitive instrument for punishment *ex-post* to a preventive instrument of danger prevention *ex ante* (below A).
- It simultaneously blends together with other legal regimes to form a new general 'security law' in a new security architecture that is no longer dominated, as was the case in the past, by a monopoly of criminal law and its safeguards (below B).

### A. Enhancement of preventive criminal law

#### 1. Substantive law

In substantive criminal law, the development into a preventive law manifests itself especially in the increasing protection of common goods and institutions (such as the financial markets), as well as in the criminalization of various types of hazardous activity. The latter may include, for example, endangerment by creating uncontrolled, objectively dangerous situations, endangerment by subjectively planning to commit an offence (in particular concerning inchoate and preparatory offences), as well as endangerment by criminal cooperation (in particular concerning the conspiracy offences, which are dominated by subjective elements and typical for common law legal systems, and which have a more pronounced objective character and are prevalent in continental Europe).<sup>6</sup>

Through various techniques, offences of endangerment shift the criminally reproachable wrong from the unlawfulness of the outcome (so-called *Erfolgsunrecht*) to the unlawfulness of the act itself (so-called *Handlungsunrecht*). The category of

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<sup>6</sup> Regarding the systematization and legitimation of these categories of offences, especially concerning aspects of legal policy, see *Sieber, U.*, Legitimation und Grenzen von Gefährdungsdelikten im Vorfeld terroristischer Gewalt, NSTz 2009, 353–364 (357–361).

‘preparatory offences’, which is presently expanding at a particularly fast pace, shifts criminal liability into the preparatory stage of planning an offence. Here, objective elements of the offence are replaced with subjective elements. Unlike other offences of endangerment, they base criminal liability not on the risk inherent in performing a certain action. Instead, criminal liability is justified primarily by the criminal intentions of the (potential) perpetrator. Thus, these offences are based on the same concepts as those that underlie criminal liability for attempt, but they stretch this approach even further to include mere preparatory activities which occur in time before the stage of ‘attempt’ even begins.<sup>7</sup>

In current terrorism criminal law, this development is particularly apparent when looking at the criminalization of temporally early (often everyday) preparatory activities that are performed with ultimately criminal intentions. Illustrative examples of this tendency include the criminalizations of attempted ‘departure from the country’ for the purpose of training for terrorism as well as of ‘gathering’ assets in order to support the commission of terrorist offences.<sup>8</sup> These activities were criminalized in Germany in 2015 due to international requirements stipulated by the United Nations (UN) and the Financial Action Task Force (FATF). The objective elements of these offences often consist only of a socially acceptable behaviour.<sup>9</sup> Due to the high maximum sentences in these provisions, preventive criminal law is developing functions similar to those of preventive detention (so-called *Sicherungsverwahrung*) (which is used in Germany and some other countries particularly in cases of sexual or violent crimes). However, contrary to preventive detention, these new instances of preliminary stage criminalizations do not require previous convictions.<sup>10</sup>

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<sup>7</sup> For a summary, see the reference *supra* in fn. 6; for the fundamentals, see also *Jakobs, G.*, *Kriminalisierung im Vorfeld einer Rechtsgutsverletzung*, ZStW, vol. 97, 1985, 751–785; *Kaspar, J.*, *Verhältnismäßigkeit und Grundrechtsschutz im Präventionsstrafrecht*, Nomos, Baden-Baden 2014. Regarding American criminal law, see *Hügel, L.*, *Strafbarkeit der Anschlagsfinanzierung durch terroristische Einzeltäter und deren Unterstützer*, Duncker & Humblot, Berlin 2014; regarding English criminal law, see *Herbert, S.*, *Grenzen des Strafrechts bei der Terrorismusgesetzgebung*, Duncker & Humblot, Berlin 2014.

<sup>8</sup> *Sieber, U./Vogel, B.*, op. cit. (n. 4), pp. 68–192.

<sup>9</sup> Regarding the ensuing doctrinal demand for an objective manifestation of the criminal planning, as well as regarding the implications for the threatened punishment for these offences of endangerment, see *Sieber, U.*, op. cit. (n. 6), pp. 353–364 (375–361) and *Sieber, U./Vogel, B.*, op. cit. (n. 4), pp. 137–152.

<sup>10</sup> For a summary and legal comparison, see the articles on preventive detention in *Koch, H.-G.* (ed.), *Wegsperrten? Freiheitsentziehende Maßnahmen gegen gefährliche, strafrechtlich verantwortliche (Rückfall-)Täter im internationalen Vergleich*, Duncker & Humblot, Berlin 2011.

## 2. *Procedural law*

This preventive concept also has serious consequences in the *law of criminal procedure*, which – as a result of the expanded scope of substantive law – is now also applicable in the preliminary stages, and thus allows for the investigation of the newly created preliminary stage offences. The undercover investigation methods originating in the field of intelligence law, which are used for early stage investigation and to establish the subjective criminal offence elements that dominate substantive criminal law, have for quite some time enjoyed widespread use in criminal proceedings as well as in law enforcement and are being expanded further. The most recent examples: alongside telecommunication surveillance, as well as visual monitoring and eavesdropping measures for residential surveillance, Germany has now incorporated the investigative tools of ‘online search’ and ‘source data interception’ (*Quelldatenüberwachung*) into the Code of Criminal Procedure. These measures allow investigative authorities to covertly infiltrate and search computer systems in criminal proceedings based on the suspicion that one of various offences has been committed.<sup>11</sup> In a great number of legal orders, these new investigative measures have shifted the balance between security and freedom – which is of crucial importance for a democratic order – considerably in favour of security interests.

In some nations, such as the US, the powers to dispense with prosecution and to plea bargain have also made criminal law more flexible. In consequence, the aims of uncovering the truth and (punitive) retribution are losing their importance, while purpose-driven strategies for closing cases (for example imposing an obligation to establish a compliance programme) may gain in prominence.<sup>12</sup>

### **B. Expansion of security regimes outside criminal law**

Simultaneously with the above-described development in criminal law, the expansion of preventive crime control and a shift from criminal law to other measures of security law appear in a multitude of forms outside of criminal law: administrative criminal law with ‘mega-fines’, police law and other rules of administrative law, targeted sanctions, intelligence law, the law of armed conflict, civil law, and private norm systems (such as compliance rules) are becoming ever more important as compared to criminal law. The non-criminal law legal regimes that are – now globally – being used to control crime in many cases allow for much more far-

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<sup>11</sup> See sections 100a and b StPO.

<sup>12</sup> See the contribution by *Emmanouil Billis* and *Nandor Knust* in this volume. See also *Billis, E.*, *Die Rolle des Richters in adversatorischen und im inquisitorischen Beweisverfahren*, Duncker & Humblot, Berlin 2015, pp. 106–110, 134–137.

reaching and more flexible encroachments on rights than traditional criminal law and the law of criminal procedure.<sup>13</sup>

These measures will subsequently be analysed jointly – a first in the scientific literature, as far as can be ascertained.<sup>14</sup> To this end, they are grouped into six categories: (1) traditional measures of rehabilitation and incapacitation in the Criminal Code, (2) administrative sanctions on the borderline between repression and prevention, (3) measures for averting danger, (4) special regimes for the secret procurement and utilization of information, (5) special regimes for exceptional situations, as well as (6) private norm systems and other public-private partnerships. In addition, there are (7) combinations of these main categories.

### *1. Traditional preventive measures of incapacitation in criminal law: focus on preventive detention*

In Germany, as in many other legal orders, preventive detention is formally part of the Criminal Code and has long been recognized as a *measure of rehabilitation and incapacitation*. Its application requires the commission of one or more serious criminal offences. In substance, however, preventive detention belongs to preventive law (for averting danger).<sup>15</sup> The decision on whether or not to impose preventive detention hinges on whether the person in question presents a danger to public safety due to their inclination towards committing serious criminal offences. The finding of this danger, however, must also be based on the prior commission of a criminal offence.

Although the instrument of preventive detention has been modified in Germany in recent years, it has so far hardly been extended for use in preventing terrorism, organized crime, or economic crime. The reasons for this are, on the one hand, the uncertainties and imponderabilities inherent in predictive decisions concerning persons – especially persons who have not yet committed any kind of criminal offence. On the other hand, imposing preventive detention requires an unlawful predicate offence, whose commission must have been determined in a criminal

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<sup>13</sup> See Sieber, U., Blurring the Categories of Criminal Law and the Law of War – Efforts and Effects in the Pursuit of Internal and External Security, in: S. Manacorda/A. Nieto (eds.), *Criminal Law Between War and Peace*, Universidad de Castilla-La Mancha, Cuenca 2009, pp. 35–69 (63–69).

<sup>14</sup> See, however, a first outline of the considerations in question by Sieber, U., *Der Paradigmenwechsel vom Strafrecht zum Sicherheitsrecht: Zur neuen Sicherheitsarchitektur der globalen Risikogesellschaft*, in: K. Tiedemann/U. Sieber/H. Satzger et al. (eds.), *Die Verfassung moderner Strafrechtspflege*, Nomos, Baden-Baden 2016, pp. 351 ff.

<sup>15</sup> See, for example, Peglau, J., *Sicherungsverwahrung im Umbruch*, in: T. Fischer/K. Bernsmann (eds.), *Festschrift für Ruth Rissing-van Saan*, De Gruyter, Berlin 2011, pp. 437–451 (443); for a legal comparison, see Koch, H.-G., *Gesamtschau*, in: H.-G. Koch (ed.), *op. cit.* (n. 10), pp. 494–543.



proceeding. Thus, the process not only provides for fundamental criminal law safeguards but also has only a ‘delayed’ effect as a preventive instrument. This renders it unsuitable, say, for use against terrorist first offenders (especially suicide attackers). As a result, preventive detention has so far not been employed to fight terrorism and other forms of modern complex crime. Instead, it has been replaced by the above-mentioned preventive preliminary-stage offences which allow for immediate pretrial detention and long-term prison sentences (which raises questions about a potential circumvention of the requirements for preventive detention).

Many other legal orders lack such corresponding measures and in doing so they basically take the continuing danger posed by violent criminal offenders into account by incorporating this consideration into the sentencing decision in traditional criminal law in the form of lengthy prison sentences. However, the imposition of a lengthy prison sentence usually also requires the prior commission of a serious criminal offence.<sup>16</sup>

*2. Administrative sanctions on the borderline between repression  
and prevention: administrative offences, administrative sanctions,  
and confiscation proceedings*

Like preventive detention, administrative sanctions and confiscation proceedings have a long tradition. They are of considerable importance in legal practice.

a) The ‘*administrative criminal law*’ in its contemporary form of ‘administrative offence law’ (*Ordnungswidrigkeitenrecht*) was developed in Germany back in the 19th century. According to prevailing opinion, it principally differs from core criminal law in that it does not actually constitute criminal law and is no longer connected with an ‘ethical reproach’.<sup>17</sup> It also does not provide for prison sentences; instead, most sanctions consist only of administrative fines, which are not entered in the central criminal register (*Bundeszentralregister*).

In procedural law, the main difference to criminal law is that the first-instance decision is made by an (usually closer and more specialized) administrative body which is also responsible for the investigation and prosecution. Court proceedings, governed to a large extent by the rules applicable to regular criminal trials, ensue if

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<sup>16</sup> Regarding the non-application of preventive detention in the context at hand, see already *Sieber, U.*, op. cit. (n. 6), pp. 353–364 (356). Regarding questions of preventive custody, see *Freund, G.*, Gefahren und Gefährlichkeiten im Straf- und Maßregelrecht, GA, vol. 157, 2010, 193–210; *Koch, H.-G.*, op. cit. (n. 15), pp. 498–512; *Satzger, H.*, Sicherungsverwahrung – Europarechtliche Vorgaben und Grundgesetz, StV 2013, 243–249; *Schöch, H.*, Sicherungsverwahrung im Übergang, Neue Kriminalpolitik, 2012, 47–54.

<sup>17</sup> Cp. BVerfGE 22, 49 ff.; *Sieber, U.*, Administrative Sanction Law in Germany, in: M. Dyson/B. Vogel (eds.), Limits of Criminal Law, Intersentia, Cambridge 2018, p. 301 (311 ff.).

the affected person files an objection. Some procedural rights (particularly rights to request the taking of evidence) and principles of criminal procedure (in particular the principles of immediacy and orality) are limited in their applicability.<sup>18</sup>

However, similarly to the expanding ‘administrative sanction law’ of the European Union (EU), it is no longer used only as an effective tool against petty crime. Today, it is also used for law enforcement purposes by specialized authorities responsible for regulatory economic governance. In some cases, these authorities may impose extremely high administrative fines, as provided for in administrative competition offence law. Due to the severity of these sanctions one must ask whether the attenuation of constitutional guarantees that exist in the area of petty crime can still be considered legitimate with regard to these new ‘mega-administrative offences’.<sup>19</sup>

b) The EU’s *sanction law* is in many ways similar to this body of law. Especially in competition law, the law of banking supervision, and in the new data protection law, one can witness a trend towards ever-increasing administrative fines based on the model of sanctions imposed by the US Securities and Exchange Commission (SEC) and the US Department of Justice (DOJ), which can amount to billions of US dollars. The size of these financial sanctions in EU sanction law, the resulting power potential and broad scope of discretion granted to the executive, the integration of the investigative authorities into the administrative system, and particularly the reduced availability of judicial review and the diminution of other criminal law safeguards may frequently render the enforcement of these administrative proceedings ‘effective’. However, these procedures generally also have a lower level of constitutional or human rights-based safeguards than criminal law does.<sup>20</sup>

c) In many states, the proceeds of crimes or – even more extensive – any ‘inex-plicable wealth’ are confiscated with the help of *new confiscation systems*. These are designed and labelled as preventive measures (such as in Italy) or as instruments of civil procedure (such as in the US). Due to their classification in law as non-criminal, the evidentiary standards that apply for establishing the criminal origin of assets are less stringent than the high standards of criminal law (for example, in the US only a ‘preponderance of evidence’ is required). Additionally (and in contradiction to the criminal law principle of *nemo tenetur*), duties to cooperate with regard to determining the origin of suspicious assets apply. These procedural

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<sup>18</sup> For example, the court has more extensive powers with regard to rejecting motions for taking evidence and the corresponding reasons such a rejection may be based on (section 77 (2) and (3) OWiG). The taking of evidence in the administrative offence procedure also does not follow the strict precepts of section 244 StPO. Furthermore, there exist, for example, facilitations regarding the scope and manner of the taking of evidence pursuant to sections 77, 77a OWiG.

<sup>19</sup> See Sieber, U., op. cit. (n. 17), p. 301 (326 ff.).

<sup>20</sup> See Dannecker, G., Der Grundrechtsschutz im Kartellordnungswidrigkeitenrecht im Lichte der neueren Rechtsprechung des EuGH, NZKart 2015, 25–30.

rules make civil asset forfeiture and similar instruments used against ‘inexplicable wealth’ much easier to enforce than in corresponding criminal proceedings. However, they weaken the procedural rights of those affected, sometimes to a great extent.<sup>21</sup>

### 3. Law on the averting of danger: *focus on general police law and law on foreigners*

Numerous states have developed measures for crime control in the form of the so-called *law on the averting of danger* (*Gefahrenabwehrrecht*), especially ‘police law’ (*Polizeirecht*). In recent years, these regimes have been extended considerably.

a) The respective legal orders with ‘*police law*’ very basically differentiate between (repressive or punitive) criminal law – which ties to *past* criminal offences – and (preventive) police law – which aims to prevent *future* harm. When members of the police act pursuant to police law, they are no longer subordinates to the public prosecutors’ office and no longer bound by the respective codes of criminal procedure. Other legal orders are not familiar with this kind of autonomous police law and seek to avert impending crimes through criminal law by prosecuting preparatory actions (this is the case, for example, in many Latin-American countries). Some legal orders develop independent regimes, such as the ‘control orders’ in England, which partially function as substantial equivalents to continental European police law.

In recent years, preventive interventions for purposes of state security have expanded into even earlier stages in Germany’s police-law based ‘law on the averting of danger’. For a long time, German police law permitted only less intrusive measures, especially measures with an information-gathering objective, in cases of merely an abstract danger. For more intrusive encroachments (especially on the freedom of persons), police law required a concrete danger. Today, following the legislative reforms of the German Federal Criminal Police Office Act (*Bundeskriminalamtgesetz*) and the Bavarian State Police Law in 2018, an ‘impending’ danger

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<sup>21</sup> See Rui, J.P./Sieber, U. (eds.), *Non-Conviction-Based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction*, Duncker & Humblot, Berlin 2015, esp. pp. 245–304 (265–275). The federal government’s ‘law for the reform of criminal law asset recovery’ of 13 April 2017 (Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung) now provides for a kind of non-conviction-based confiscation in sections 76a (IV) StGB, 437 StPO. Pursuant to these provisions, assets that stem from certain serious, unlawful offences can be confiscated. The court can base its corresponding ‘conviction’, *inter alia*, on ‘a gross disparity between the value of the asset and the lawful income of the affected person’, as well as the ‘personal and economic situation of the affected person’. According to the – on this issue not very enlightening – explanatory memorandum (BT-Drs. 18/9525 p. 73), ‘no excessive requirements concerning the forming of a conviction may be imposed’.

suffices already to justify significant encroachments on the rights of freedom of citizens.<sup>22</sup> The new Federal Criminal Police Office Act, with its covert intrusion into IT-systems and electronic location monitoring, contains a similar expansion into early stages for defence against terrorist attacks.<sup>23</sup> The German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) moved in the same direction when it expanded the standards for determining the existence of a concrete danger with regard to secret surveillance measures by focusing less on a concrete dangerous occurrence and more on the dangerousness of a person.<sup>24</sup>

Simultaneously, the police law measures pursuing preventive aims were augmented with *sanction-like legal consequences*. In Germany these include measures such as new ‘control sanctions’, especially restraining orders, orders not to go to or to leave a certain location, obligations to personally and regularly present themselves at a police station, the warning of potential endangerers by police (*Gefährderansprachen*), as well as ‘control networks’ for repeat offenders.<sup>25</sup> Up until 2018, German police law provided for preventive custody only for brief periods of time and after a comprehensive disclosure of the decision-making rationale.<sup>26</sup> The aforementioned Bavarian State Law on the Responsibilities and Powers of the Police (*Landespolizeiaufgabengesetz*) of 2018 has crossed this line as well and permits detention for up to three months based on a judicial decision if a certain level of danger has been reached.<sup>27</sup> Detention may be extended for up to three months at a time.<sup>28</sup> Thus, under the dogma of prevention, the preventive police law is increasingly equipped with the legal consequences of traditional criminal law. Thus, preventive custody becomes possible not only in form of criminal sentences or preventive detention pursuant to the German Criminal Code but also in form of purely preventive police custody. The scope of application of this type of – also

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<sup>22</sup> See art. 11 (3) *Bayerisches Polizeiaufgabengesetz* in the version dated 18 May 2018: ‘when, in the specific case, 1. The individual behaviour of a person gives rise to the concrete probability or 2. Preparatory actions on their own or together with further facts permit a conclusion about concrete circumstances pursuant to which attacks of considerable intensity or effect can be expected in the foreseeable future (impending danger)’.

<sup>23</sup> See, since 25 May 2018, art. 49 (1) Sentence 2 No. 2 and art. 56 (1) of the Federal Criminal Police Office Act of 1 June 2017.

<sup>24</sup> BVerfG, Judgment of 20 April 2016 – 1 BvR 966/09 (BKA-Gesetz), para. 112.

<sup>25</sup> See *Jasch, M.*, Neue Sanktionspraktiken im präventiven Sicherheitsrecht, *Kritische Justiz*, issue 3, 2014, 237–248.

<sup>26</sup> See for Germany, e.g., sections 39, 42 BPolG (max. 4 days), section 20p BKAG in connection with section 42 BPolG (max. 4 days); section 28 PolG Baden-Württemberg (max. 2 weeks); section 17 PAG Bavaria (max. 2 weeks); sections 30, 33 ASOG Berlin (4 days).

<sup>27</sup> Meaning when it is ‘indispensable in order to prevent the immediately impending commission or continuation of an administrative offence of considerable significance for the general public or to prevent a criminal offence’, see art. 17 (2) No. 2 BayPAG.

<sup>28</sup> See arts. 16–20 BayPAG.

long-term – police custody goes well beyond that of traditional criminal law-based preventive detention, especially because it does not require the commission of a prior criminal offence. This would have been unthinkable in the past.

England also has severe criminal law-like ‘terrorism prevention measures’.<sup>29</sup> They allow not only for exclusion orders but also, among others, for the imposition of house arrest. A typical feature of these ‘control orders’ is that they merely require the suspicion of an activity motivated by terrorism and grant the executive broad latitude for making a prognosis. The extent to which procedural guarantees are applicable to such measures is very limited. In particular, they allow for the liberal use of undisclosed intelligence information. One particularly far-reaching measure was the lengthy administrative detention of foreign nationals provided for in section 23 of the English Anti-terrorism, Crime and Security Act 2001. The law was declared to be contrary to the European Convention on Human Rights (ECHR) by the European Court of Human Rights (ECtHR).<sup>30</sup> Long preventive detention on the basis of drastically diminished procedural rights and inaccessible intelligence information is also provided for in the Israel Emergency Powers (Detention) Law.<sup>31</sup>

b) Alongside police law as the basic law on the averting of dangers, there are also special laws on the averting of danger for specific areas, such as food law or nuclear law. In the context at hand, *the law on foreigners and the immigration law* are of particular interest. In these areas, the expulsion of foreign nationals occurs not only in consequence of a criminal conviction (with corresponding safeguards) but also without a conviction, based on special administrative law – rather than criminal law – provisions relating to situations of risk.<sup>32</sup> For example, under the German Residence Act, there is already an interest in expulsion when ‘facts give reason to believe’ that a foreigner has supported a terrorist organization.<sup>33</sup> As in general police law, we are witnessing a forward shift of intervention powers into the preliminary stage. The standards of evidence and for making a prognosis are reduced compared to other legal regimes.

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<sup>29</sup> See Terrorism Prevention and Investigation Measures Act 2011; regarding the prior rules (so-called ‘control orders’), see *Forster, S.*, *Freiheitsbeschränkungen für mutmaßliche Terroristen*, Duncker & Humblot, Berlin 2010.

<sup>30</sup> See House of Lords, *A and others v Secretary of State for the Home Department* [2004] UKHL 56 and ECtHR, *A and others v UK* Application, Judgment of 19 February 2009, No. 3455/05.

<sup>31</sup> On Israel, see *Gil, E./Kremnitzer, M.*, *A Reexamination of Administrative Detention in a Jewish and Democratic State*, The Israel Democracy Institute (pub.) 2011.

<sup>32</sup> Regarding the powers of expulsion in the German Residence Act, see the overview by *Brühl, R.*, *Das Ausweisungsrecht in Studium und Praxis*, JuS 2016, 23–29.

<sup>33</sup> Section 54 (1) no. 2 German Residence Act.

4. *Special regimes for the covert procurement of information: intelligence law, investigation of money laundering, and special data collections*

The ‘executive’ systems of crime control with their criminal sanctions, coercive powers, measures of protection, administrative sanctions, and measures for averting danger are increasingly being supplemented with *systems of information procurement*, which pursue their own aims, yet at the same time they (at least also) support the aforementioned systems by providing information for crime control.

a) In Germany, as in most other states, *intelligence law* allows for surveillance and investigation measures without requiring suspicion of having committed an offence (as required for criminal law measures), without requiring impending danger (as is characteristic of police law), and without requiring a prior judicial decision. These surveillance measures serve special purposes (especially state security), but – to some extent – are also used for crime control. In Germany, the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*) can take action for the purposes of crime control especially in situations with relevance for national security. The Federal Intelligence Service (*Bundesnachrichtendienst*) is additionally authorized to act, inter alia, to obtain information on specific forms of organized crime with a connection to foreign countries, in particular concerning the drug trade, counterfeiting, money laundering, or the smuggling of foreign persons into the country.<sup>34</sup> Furthermore, the Offices for the Protection of the Constitution (*Landesämter für Verfassungsschutz*) of some German *Bundesländer* (the *Bundesländer* being the 16 states of the Federal Republic of Germany) have the additional task of monitoring efforts and activities of general organized crime.<sup>35</sup> Subsequently, the gathered information is partially forwarded to and used in the justice system, or is analysed in joint centralized entities (such as the Counter-Terrorism Center). In individual legal orders, one and the same authority (such as the American FBI) has the powers both for prosecuting crime and for performing intelligence-related work.<sup>36</sup> The disclosure of information to criminal justice and other ‘executive’ systems here occurs not only in specific cases between individual government bodies but also in joint data centers, such as the Terrorism Center, where data from a multitude of control systems are brought together and used jointly.

<sup>34</sup> See section 3 (1) BVerfSchG; section 5 (1) GlO.

<sup>35</sup> See, e.g., art. 1 (1) sentence 2 (3), and art. 3 (1) no. 5 BayVSG. For Saxony, see Constitutional Court of the Free State of Saxony, Judgment Vf. 67-II-04 of 21 July 2005. Foundational already *Werthebach, E./Droste-Lehnen, B.*, *Der Verfassungsschutz*, DÖV 1992, 514–522.

<sup>36</sup> For a legal comparison, see *Lang, X.*, *Geheimdienstinformationen im deutschen und amerikanischen Strafprozess*, Duncker & Humblot, Berlin 2013. Elaborately discussing the US Foreign Intelligence Surveillance Act, see the contribution by *Stephen Thaman* in this volume.

b) An institutionally independent regime for the procurement of information similar to that of intelligence law are the globally connected *anti-money laundering* systems. These systems provide for the analysis of financial data through specialized Financial Investigation Units (FIUs), which are part of a tightly meshed international network. The procurement of information ensues – just as with the analysis of telecommunication data – through private parties obligated to cooperate. In future, this process promises to become even more effective with the expansion of public-private partnerships. In this case, judicial decision is not necessary, either. Like the intelligence services, the FIUs primarily have the power to gather information. And apart from the power to prohibit certain financial transactions, they generally have no executive functions, either. Instead, executive measures ensue when the edited findings of the analysing authority are shared with the institutions of other control systems (such as prosecution and police authorities), which then make use of the information when taking action based on their respective powers of intervention. In terms of effectiveness, this specialization and outsourcing of financial data analysis not only brings with it the benefit of being able to involve highly specialized authorities. Above all – and similarly to intelligence law – it allows for an analysis absent any suspicion, which would not have been permissible under the law of criminal procedure, yet the results of which end up being shared with the criminal justice system anyway. In this way, FIUs act as data gatherers, both preventively as well as repressively (punitively).

c) In the field of *telecommunication data*, the gathering of mass data is largely performed – just as with the prevention of money laundering – by private entities. While this allows government entities to access the data in question, analysing and screening the data becomes more difficult for the state when the telecommunications data are stored in a decentralized fashion by a multitude of different telecommunications providers. For this reason, intelligence services themselves also store the telecommunications data on a massive scale, as was particularly demonstrated by the data collections and analysis programmes of the American NSA revealed by Edward Snowden.

d) The gathering of information by means of personal mass data is not only of interest with respect to financial data (by the FIUs) and telecommunication data (by intelligence services and police) but also with respect to the *location and travel data of persons*. Pertinent analysis systems are being expanded in this area as well. A first approach to this is the storage of (flight) passenger data (Passenger Name Records – PNRs) by the Passenger Information Units (PIUs). Additionally, in particular in the area of counter-terrorism, there is the possibility for corresponding alerts during border controls pursuant to art. 36 (2) and (3), as well as art. 37 of the Schengen Information System II.<sup>37</sup> As a consequence of such an alert, the affected persons are then registered during all border controls or other ID inspections, and

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<sup>37</sup> See the contribution by Niovi Vavoula in this volume.



are reported in a European network. Self-driving cars, the Internet of Things, artificial neural networks, and artificial intelligence have the potential of raising the utilization of location and travel data to a whole new level in the future.

e) There are also loose networks that bring together special information from different institutions in joint data sets. One such example is Germany's *anti-terror database*, which, inter alia, stores information on potentially dangerous terrorist offenders and their contact persons. A number of authorities participate in this database; they include, inter alia, the Federal Criminal Police Office (*Bundeskriminalamt*), the Federal Police (*Bundespolizei*), the Criminal Police Offices of the *Länder* (*Landeskriminalämter*), the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*), the Military Counterintelligence Service (*Militärischer Abschirmdienst*), the Offices for the Protection of the Constitution of the *Länder* (*Landesämter für Verfassungsschutz*), as well as the Federal Intelligence Service (*Bundesnachrichtendienst*). However, due to statutory requirements and the Federal Constitutional Court's ruling, both the groups of people whose data may be stored as well as the scope of the stored data are strictly limited.<sup>38</sup>

f) In summary, the following can be stated regarding these *information procurement systems*: Compared to the purely criminal law-based gathering of information, this approach – as well as the gathering of telecommunication data through intelligence services, police, and private entities, and of financial data through FIUs – offers a number of advantages to the security agencies: it allows for the screening of persons absent any suspicion, for risk analysis, and avoids having to meet the suspicion level requirement of criminal law; plus, it permits informal international collaboration. However, it also means that many citizens are treated as 'pre-suspects', 'suspects', 'potential risks', or potential 'endangerers'. The possibility of pooling the data from these different systems and their use by preventively and punitively acting authorities involve a special and very considerable potential for surveillance and analysis – especially with regard to the use of neural networks and artificial intelligence. This shall be discussed in more detail below.

### 5. *Special regimes for exceptional situations:*

*emergency laws, targeted sanctions, law of armed conflict, and transitional justice*

There are further special legal crime control regimes for *particular situations*. These regimes permit significant deviations from the 'norm' of the aforementioned systems.

a) Some individual states go far beyond the normal restrictions on constitutional standards by developing *exception and emergency laws* for the areas of terrorism and organized crime. These laws especially suspend certain safeguards and create

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<sup>38</sup> BVerfG, NJW 2013, 1499 ff.



additional powers for the executive. But they can also create new, broadly formulated criminal offence provisions, expand the scope of existing powers of intervention that are contingent on the existence of danger, or reduce the level of suspicion necessary for measures pursuant to the law of criminal procedure.<sup>39</sup> The various national emergency powers differ greatly from country to country. In Germany, for example, emergency lawmaking power is limited to securing the state's capacity to act. In other nations, however, derogations from the protection of certain human rights in times of a public emergency within the limited scope of art. 15 ECHR are at issue. Partially, this leads to the development of far-reaching powers of intervention for the purposes of crime control. For instance, during the war on drugs, Colombia created an exceptional law which provided even for military action such as aerial bombardments of drug plantations and processing plants. Though this rule is no longer valid law, it is still applied in practice.

Such regimes – often consciously – stray far from the existing legal framework. In some cases, this may be motivated by a desire to expand executive powers; but it may also be motivated by the desire not to ‘contaminate’ instruments of general law through the extreme extension of powers. Exceptional law thus need not necessarily be viewed as a removal of constitutional standards but could also be seen as an attempt to avoid a permanent dilution of general law principles.

The French example provides a particularly interesting instance of repression and prevention shifting. From 2015 to 2017 France responded to its terrorist threats by creating emergency lawmaking power (which was extended six times). This allowed authorities, for example, to conduct searches and impose house arrest without judicial approval.<sup>40</sup> Based on the state of emergency, measures of the ‘police judiciaire’ were assigned to the ‘police administrative’. The consequence of this was not only that protective provisions of criminal law were inapplicable but also that the Prefect and the Minister of the Interior gained significantly in power; also, the administrative courts were in charge of ex-post review of actions taken by the ‘police administrative’ rather than the ordinary courts. The exceptional lawmaking power has meanwhile been replaced by the ‘loi renforçant la sécurité intérieure et la lutte contre le terrorisme’, pursuant to which there are multiple of these extraordinary measures in normal criminal law and police law. This example is of particular interest because the distinction between the ‘police administrative’ and the

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<sup>39</sup> To be distinguished from this is the so-called ‘necessity’ (*kleiner Notstand*, in Germany section 34 StGB), which is meant to allow for the courts to create procedural powers of intervention in concrete cases, such as the so-called ‘rescue torture’ (*Rettungsfolter*), an approach broadly rejected in German criminal law. See Wang, G., *Die strafrechtliche Rechtfertigung der Rettungsfolter*, Duncker & Humblot, Berlin 2014.

<sup>40</sup> Loi n° 2015-1501 du 20 novembre 2015 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence et renforçant l'efficacité de ses dispositions. The validity of the law has meanwhile been extended.

‘police judiciaire’ – which goes back to the French revolution and serves the separation of powers – is blurred.

The recent Turkish emergency decrees issued between 2016 and 2018 and containing preventive and punitive regulations, also evinced an extreme encroachment on liberty through emergency legislation. In criminal law, these decrees created criminal offences against the state covering basically all forms of association with the Gülen movement and other groups ‘threatening national security’.<sup>41</sup> Legal consequences for violating these provisions included dismissal from one’s employment as well as the dissolution and nationalization of companies, universities, trusts, etc.<sup>42</sup> These emergency decrees were enacted by the Council of Ministers, which is chaired by the president.<sup>43</sup> The constitutional court was not authorized to review them, and hardly any other kind of legal recourse existed.<sup>44</sup> In addition, the relevant procedural safeguards were attenuated.<sup>45</sup>

b) The transfer of power from the judiciary to the executive, which ensues in emergency law, can also be observed in the so-called ‘*listing procedures*’ of the *United Nations and the EU*, for example when the terrorist nature of a suspicious organization or person is no longer determined pursuant to statutory provisions by a court but in constitutionally problematic procedures of international committees pursuant to their self-imposed vague standards. As in emergency law, the applicable protective rights of individuals often deviate significantly from the constitutional standards of national procedures.<sup>46</sup> The measures are classified as foreign and security policy rather than as matters of internal security. With regard to the United Nations, for instance, they are justified on the basis of ‘threats to international peace’ pursuant to chapter VII of the Charter of the UN, i.e. as a category of international law.

The increased power of executive and international organizations is mirrored especially in the UN Security Council’s anti-terrorism sanctions. For example, according to Security Council resolutions 1267, 1989, and 2253 against ISL and

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<sup>41</sup> Pursuant to sections 2 (1), 4 (1) of the ordinance with power of law No. 667 (R.G. of 23 July 2016 – 29779), the measures affect those natural persons and entities which ‘belong to, are connected to, or in contact with the fetullahist terror organization (FETÖ/PDY) which has been determined to be a threat to national security’.

<sup>42</sup> See the ordinance with power of law No. 667 (R.G. of 23 July 2016 – 29779), No. 668 (R.G. of 27 July 2016 – 29783), No. 670 (R.G. of 17 August 2016), No. 676 (R.G. of 29 October 2016 – 29872), as well as the parliamentary laws No. 6749 (R.G. of 29 October 2016 – 29872), No. 6755 (R.G. of 24 November 2016 – 29898), and No. 6758 (R.G. of 24 November 2016 – 29898).

<sup>43</sup> Art. 121 (3) of the Turkish constitution.

<sup>44</sup> See *Günday, M.*, OHAL, İhraç KHK’leri ve Hukuki Durum, Ankara Barosu Dergisi 2017/1, pp. 29–38.

<sup>45</sup> See *Arslan, M.*, Die türkische Strafprozessordnung, Duncker & Humblot, Berlin 2017, pp. 9 ff.

<sup>46</sup> See ECJ (GC), Judgment of 18 July 2013 (Kadi II) – C-584/10 –, paras. 136 ff.

Al-Qaida, the legislative, the executive (in form of a Sanctions Committee comprised of members of the Security Council), and the ‘judiciary’ (in form of an ombudsperson) are all provided by the UN Security Council itself. Thus, there exists no separation of powers. With the preventive ‘freezing’ of all assets, travel restrictions, and ‘prohibitions of provision’ (so-called *Bereitstellungsverbote*) the ensuing ‘listings’ entail serious legal consequences: the prohibitions of provision prohibit providing practically any kind of support to the listed person or the listed undertaking. Violations of these prohibitions of provision are additionally punishable pursuant to national criminal statutes, which refer to these listings, and thus go beyond traditional administrative sanctions with regard to the nature of their legal consequences. They are called ‘smart sanctions’ or ‘targeted sanctions’, since – in contrast to the traditional sanctions – they do not impact an entire country but only certain persons or organizations.

The listing decisions are frequently made on the basis of intelligence service information and without the affected person being accorded substantive participation rights. The affected person can only take action after a listing and try to effect a de-listing or a non-implementation of sanctions – for UN sanctions through the ombudsperson (whose recommendation for a de-listing can, however, be rejected by an unanimous decision of the Security Council members) and for EU sanctions through the European Court of Justice (ECJ) – without, however, being permitted to fully examine the evidence produced against him or her.<sup>47</sup>

c) The use of the *laws of armed conflict* to ‘fight’ against crime, especially in the ‘war on drugs’, the ‘war on organized crime’, ‘cybercrime’, and the ‘war on terrorism’, goes another significant step further with regard to its (legal) consequences: the national interpretation of the law of armed conflict in the US and Israel sometimes allows for the targeted killing of terrorists. With most states having abolished the death penalty, this option, through individual nation-specific interpretations of international humanitarian law, enables state killings for the purpose of fighting crime – and, unlike the death penalty, does not require criminal law-standard evidence or a prior case-specific judicial decision. This concept is expanded even further when the national interpretation of the law of armed conflict is not limited to fighters and combatants but is rather extended to the newly created category of ‘illegal combatants’, who are thereby denied practically all legal protection. With this dubious interpretation of international humanitarian law, the traditional categories and distinctions between ‘war’ and ‘peace’ as well as between ‘inner’ and

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<sup>47</sup> See Macke, J., UN-Sicherheitsrat und Strafrecht, Duncker & Humblot, Berlin 2010; Cameron, I., EU Sanctions: Law and Policy Issues Concerning Restrictive Measures, Intersentia, Cambridge et al. 2013; Avbelj, M./Fontanelli, F./Martinico, G. (eds.), Kadi on Trial, Routledge, London/New York 2014; see also the contribution by Florian Jeßberger and Nils Andrzejewski as well as the contribution by Nikolaos Theodorakis in this volume.

‘outer security’ become blurred.<sup>48</sup> This form of crime control through the law of armed conflict serves only purposes of prevention.

d) In situations of *transitional justice* or *post-conflict justice*, we can also observe a flexibilization and preventive orientation of procedural law: the peculiarities of criminal law found in transitional societies following a system change from regimes of injustice to democratic states governed by the rule of law may in most cases pursue the repressive punishment of perpetrators of serious crimes. However, they usually also pursue the further preventive aims of reconciliation and peace-keeping, as well as victim compensation. To achieve reconciliation and peace, criminal prosecution may be dispensed with to a certain degree – within the limits of the culpability principle and the international principle of complementarity in art. 17 of the Rome Statute of the International Criminal Court (ICC). This is particularly the case when a government is unable to pacify an (for example rural) area or is unable to enforce its authority vis-à-vis individual groups (for example former military personnel or organized groups of criminals).<sup>49</sup> This conditional waiver of criminal prosecution is often due to the fact that prosecuting each and every crime would completely overwhelm the capacities of the international and national criminal justice systems owing to the high number of perpetrators.

In these special situations, different (criminal law) legal and quasi-legal mechanisms often mesh together.<sup>50</sup> This does not concern shifts from repression to prevention. However, transitional justice illustrates that the criminal law system – with its focus on establishing individual criminal liability – is just part of a holistic model of transitional justice and its goals. The frequently encountered conditional waiver of criminal prosecution, sentence reductions, amnesties, granting of parole, conflict resolution through truth commissions, and other approaches, however, also illustrate the different competing objectives in the area of crime control, among

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<sup>48</sup> See for the relevant questions regarding the law of armed conflict and targeted killing (also outside of armed conflicts) *Ben-Naftali, O./Michaeli, K.*, ‘We Must Not Make a Scarecrow of the Law’: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 *Cornell International Law Journal* (2003–2004) 233–292 (290); *Kretzmer, D.*, Targeted Killing of Suspected Terrorists: ExtraJudicial Executions or Legitimate Means of Defence?, *European Journal of International Law*, vol. 16, 2005, 171, 201–212; *Melzer, N.*, Targeted Killing in International Law, Oxford University Press, Oxford et al. 2008; *Neubert, C.-W.*, Der Einsatz tödlicher Waffengewalt durch die deutsche auswärtige Gewalt, Duncker & Humblot, Berlin 2016; *Sassòli, M.*, The Status of Persons Held in Guantánamo under International Humanitarian Law, *Journal of International Criminal Justice*, vol. 2, 2004, 96–106 (100 ff.); *Sieber, U.*, op. cit. (n. 13), pp. 35–89 (36–37, 55–69); *Cassese, A.*, *International Law*, 2d ed., Oxford University Press, Oxford et al. 2005, pp. 408 ff.

<sup>49</sup> As happened in the case of Colombia: see the contribution by *John Vervaele* in this volume. In the case of Rwanda, a model of sentence reduction was used in dealing with the genocide as well, see *Knust, N.*, *Strafrecht und Gacaca*, Duncker & Humblot, Berlin 2013, pp. 262, 254–257, 284–289.

<sup>50</sup> *Knust, N.*, op. cit. (n. 49).

them the finding of truth or the compensation of individual victims – aims that lie beyond traditional criminal law repression.<sup>51</sup>

#### 6. *Private norm systems: compliance regimes and public-private partnerships*

It is not only state regulation that serves to promote crime control. Particularly with regard to the containment of economic crime, new *private norm systems and private institutions* also play an important role.

a) Private *compliance programmes* employ not only preventive measures for the prevention of crime, but in many western states they also lead to private investigations. These investigations are not limited by precisely defined statutory safeguards and, in practice, are acquiesced to by the employees and, as the case may be, by the companies themselves due to fear of otherwise incurring even greater sanctions. Such private investigations are carried out ‘transnationally’ without mutual legal assistance procedures, for example by American consulting and law firms even in Germany (such as in the Siemens case for American authorities), and their findings are provided to the judiciary.<sup>52</sup> Some of these systems are not imposed in the form of legal obligations but more indirectly, through a reward system granting immunity or leniency to companies that committed economic crimes if the company had corresponding compliance programmes in place and fully cooperates with authorities during the investigation – even if this is to the detriment of its employees.

b) The private sector is increasingly also being combined with other state control systems in the form of *public-private partnerships*. This holds true especially with regard to the abovementioned regimes for information procurement, such as intelligence law, money laundering investigations, and systems for determining people’s whereabouts. Today, telecommunications companies, banks, other financial and non-financial institutions (like attorneys, notaries public, jewellers), airlines, and certain producers of hazardous materials are under obligation to collect, gather, and transmit a whole variety of data to the state. Relevant due diligence duties with regard to criminal activities are now also being extended to the examination of suppliers and supply chains.<sup>53</sup> This ‘privatization of preventive crime control’ leads, inter alia, to problems concerning the applicability of constitutional rights, which were originally developed as rights against intrusion by the state but are now supposed to provide protection against private entities.

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<sup>51</sup> See the contributions by *Philipp Ambach*, *James Stewart*, and *John Vervaele* in this volume.

<sup>52</sup> See *Engelhart, M.*, Sanktionierung von Unternehmen und Compliance, 2d ed., Duncker & Humblot, Berlin 2012; *Sieber, U./Engelhart, M.*, Compliance Programs for the Prevention of Economic Crimes, Duncker & Humblot, Berlin 2014; *Sieber, U.* (ed.), Strafrecht und Wirtschaftsstrafrecht: Dogmatik, Rechtsvergleich, Rechtstatsachen. Festschrift für Klaus Tiedemann zum 70. Geburtstag, Cologne 2008, pp. 449–484.

<sup>53</sup> See *Sieber, U./Vogel, B.*, op. cit. (n. 4), pp. 49–67, 123–131.

### *7. Combinations of and tensions between the legal regimes*

Additional synergies also result from combinations of the aforementioned legal regimes. This is the case especially when the data collected in one legal regime are exchanged with institutions responsible for another legal regime, or when different participating institutions carry out joint activities.<sup>54</sup> In special cases, the combination of different legal systems can also lead to further cumulation effects with a greater degree of intrusiveness and tensions between the different basic principles of different legal regimes (for example when a risk-based power of intervention of police law is combined with a criminalized preliminary-stage preparatory activity).<sup>55</sup> This combination of different legal regimes can also lead to considerable tensions, e.g. when classified information gathered by way of data mining in an intelligence agency is transferred to the criminal justice system (where data mining may not be used as a tool to establish suspicion) and is to be introduced into a criminal trial (in which the available evidence generally must be shared with the accused). Both an individualized as well as an overall view of the different legal regimes clearly illustrate that the shift from traditional punitive criminal law to new preventive control strategies is compromising key civil liberties.

## **III. Overall analysis and assessment**

### **A. Multitude and variety of control systems**

Overall, the discussed regulations show that a surprising number of different legal regimes are being used for crime control. From the perspective of criminal law, at least quantitatively speaking and in the area of complex crime, it has gotten considerable company far beyond traditional police law. From the overall perspective of the emerging security law discussed at the beginning of this article one can observe that criminal law, despite all its unique characteristics and specificities, has become a part of this comprehensive body of security law.

Impressive is not only the number but also the variety of the discovered alternative systems. They differ with respect to their aims, their legal consequences, their applicability during ‘normal situations’ and special situations, their national and international effectiveness, their legal principles, and much more. Much like different figures in a game of chess, these systems have very different capabilities, and their own unique strengths and weaknesses.

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<sup>54</sup> See BVerfGE 133, 277, Judgment of 24 April 2013 – 1 BvR 1215/07 (Antiterror-datei), recitals 106–137; BVerfG, Judgment of 20 April 2016 – 1 BvR 966/09 (BKA-Gesetz), recitals 305–321.

<sup>55</sup> See *Bäcker, M.*, *Kriminalpräventionsrecht*, Mohr Siebeck, Tübingen 2015, pp. 349–361; *Brodowski, D.*, *Verdeckte technische Überwachungsmaßnahmen im Polizei- und Strafverfahrensrecht*, Mohr Siebeck, Tübingen 2016.

Considering the number and variety of the systems, it is furthermore remarkable that up until now neither a synopsis, nor a comparison, nor a systematization of these different legal regimes has been undertaken by scholars or practitioners. Granted: in some legal orders, special aspects have been examined, such as the relationship between prevention and repression (in particular between police law and criminal law), between core criminal law, administrative sanction law, and administrative law, as well as between civil law, criminal law, and other public law regulation. But what is missing is a comprehensive analysis of which specific regimes have evolved for crime control in practice, which combinations, inconsistencies, information flows, reciprocal blocking functions, differing safeguards, or other connections or tensions exist between these subsystems, and of how effectively these different systems really are in practice. So far, there exists no general or ‘comprehensive’ security policy to speak of.

## B. Triumph of the prevention dogma

This first joint scientific analysis of the various regimes of the new security law impressively confirms the aforementioned paradigm shift from punishment to prevention. This change is evident both in the new preventive criminal law as well as in the alternatively applied new regimes of security law.

Due to the new preparatory and risk-based offences, traditional culpability-based criminal law is – in individual areas of substantive law – turning from a punitive instrument of punishment ex-post also into a *preventive criminal law* instrument for averting danger ex-ante. Especially the expanded ‘preparatory offences’ shift criminal law liability far forward into the planning stages of an offence. This has distinct advantages in terms of prevention: for one, (especially secret) investigation and surveillance measures of criminal procedure can be employed at an early stage. Of particular relevance in the area of terrorism prevention is the ability to impose pre-trial detention and long-term prison sentences against persons deemed dangerous based on their intentions, even though they were not known ever to have run afoul of the criminal justice system before – as would be necessary for imposing preventive detention (*Sicherungsverwahrung*) pursuant to the Criminal Code. As such, specific deterrence not only exerts psychological influence on the perpetrator but through the deprivation of liberty it also has an immediate physically coercive effect.

For the legal regimes outside of culpability-based criminal law, the dominance of preventions is even more obvious – especially for complex crime.<sup>56</sup> Of particular

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<sup>56</sup> Regarding this, see also Gusy, C., Prävention und Repression – Vom Nachtwächterstaat zum Präventionsstaat?, in: D. Kugelmann (ed.), *Polizei unter dem Grundgesetz*, Nomos, Baden-Baden 2010, pp. 11–26; Würtenberger, T., *Sicherheitsarchitektur im Wandel*, in: D. Kugelmann (ed.), *Polizei unter dem Grundgesetz*, Nomos, Baden-Baden 2010, pp. 73–90.



significance here in the area of crime control is the (non-criminal law) *public law in form of law on averting danger* (especially police law), which from its basic conception is exclusively designed to accomplish preventive objectives. Its preventive function is especially reinforced by three developments. First, in preventively oriented police law and in the other fields of public law, legal consequences with an immediately preventive effect are being expanded; take, for instance, control orders, administrative custody, lists of potential endangerers, and provisions on expulsion in the law on foreigners. Second, just as in criminal law, there are clear tendencies in direction of a temporal expansion into earlier stages. This can be observed, for example, in the lawmaker's decision – as discussed – to no longer require a concrete danger as prerequisite for a variety of coercive measures but instead to allow an abstract 'impending danger' (i.e. the mere possibility that a concrete danger in fact exists) to suffice. Third, the public law regulations support crime control through an even earlier stage of 'precautionary averting of danger' with covert information procurement; the justice system also benefits from this by receiving the resulting information, at least in important cases. This information procurement is effectuated through an expansion of preventive police law's powers of information procurement (such as online searches and optical residential surveillance in Germany), through the extension of a concept of danger prevention (especially through data retention and through further private duties of cooperation, for example in connection with the monitoring of base materials that could be used for criminal purposes such as producing drugs or bombs), through intelligence law (with the investigation of crimes against the state, the proliferation of weapons and other dangerous goods, terrorism and, to some extent, also organized crime), as well as through special regimes for the analysis of telecommunications, finance, and movement data.<sup>57</sup>

The increasingly used *administrative sanction law* formally remains a punitive disciplinary instrument. Factually, however, it is being employed for purposes beyond its traditional function of punishing petty crime: in economic sanction law – especially in EU law – it is also being used by specialized authorities as a governmental steering and power instrument. When a governmental authority makes its individual-case decision on the imposition of a sanction conditional upon a specific behavioural change, this actually also serves preventive purposes. This development is promoted by the informalization that may be observed in this area of the law and is especially facilitated by the fact that administrative sanction law can be applied by the executive with broad discretion. The levels of administrative fines have been increased or 'upgraded' in a way similar to criminal law sanctions and thus can be used by the administrative authorities as a threat in order to compel certain behavioural changes. Similar steering effects can also be achieved by means

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<sup>57</sup> On the admissibility of evidence collected in other legal regimes, see most recently in brief BVerfG, Judgment of 20 April 2016 (fn. 23), recitals 276–292.



of regular administrative law without sanctions when supervisory authorities have the ability to order costly special audits, which have to be paid for, e.g. by the financial institution being audited.

Regarding the provisions of *non-criminal law confiscation of proceeds of crime* (in particular non-conviction-based confiscation), one must – in addition to measures with criminal law sanctions – differentiate between two models with different aims. First, there is the clearly preventive confiscation of dangerous goods and – especially under Italian law – of money serving criminal purposes, i.e. traditional measures of police law. Second, a so-called ‘civil law’ recovery of the proceeds of crime is being developed. It is based on principles of civil procedure but should rather be classified as belonging to public law due to its sovereign execution for the benefit of the state. In addition to its preventive and investigative functions, public law thereby takes on the additional task of confiscating illicit gains. Regarding the *laws of armed conflict*, the *EU’s* and the *UN’s* ‘*smart sanctions*’, also with respect to other systems discussed above, there is also a marked focus on prevention.

Finally, the creation of private *compliance systems* in practice involves the transfer of two different functions to private business: compliance programmes exhibit both preventive elements, which are meant to prevent the commission of criminal offences, as well as punitive elements, which help investigating and prosecuting committed criminal offences. This fully confirms the hypothesis about the shift of security law towards prevention mentioned at the beginning of this article.

### C. Increase in security and efficiency

The shift towards prevention and the evolution of new control regimes beg the central question: do these developments actually lead to more security and prevention? Without empirical-criminological studies, however, there cannot be a sound scientific answer to this. What can be said, however, is that the new developments considerably expand the competent authorities’ possible courses of action and thus at least *may* lead to more security:

- *Preventive criminal law* with its preliminary stage offences provides a legally certain basis for early investigation measures and especially a deprivation of liberty in the stages before harm has occurred.
- *Police law* extends the criminal law powers of intervention with purely preventive powers of intervention which do not require prior offence commission but instead let purely future-oriented predictive decisions suffice. In police law and the law on foreigners, these powers of intervention are temporally shifted even further forward into the preliminary stages as compared to criminal procedural law, especially when the legislature lets a merely ‘impending danger’ suffice for various coercive measures. Thus, police law-based investigation does not require the existence of the initial suspicion of a criminal offence having been committed, unlike the law of criminal procedure.

- *Intelligence law, anti-money laundering regimes, and the collection of telecommunication and location data* provide even greater capabilities for data mining for the purpose of screening a large number of unsuspected citizens with the help of telecommunication and financial transaction data.
- *Compliance measures* outsource a significant part of state preventive activities to private companies and utilize these companies' huge amounts of data without having to comply with all of the procedural rights and safeguards that apply vis-à-vis state actors.
- The *listing procedures* allow for transnationally effective measures by using barely verifiable intelligence information in procedures that lack a multitude of traditional limitations.
- The *laws of armed conflict* also serve to justify transnationally enforceable measures which take place without any prior individual legal procedures and lead to lethal consequences that were renounced in criminal law long ago with the abolishment of the death penalty.

On the whole, one is confronted with an *impressive arsenal of measures* outside of criminal law which – in comparison to traditional criminal law – significantly expands the state's abilities to control and keep crime at bay.

When evaluating the effectivity of these options, though, one has to take into account that the aforementioned alternative legal measures can also have a *negative impact on security* in particular cases. This is the case, for example, when societal groups are stigmatized (for example through police warnings), when people are moved to hatred against the government and society (for example because of civilian casualties of an immoderate martial law or because of incomprehensible prevention measures), or when certain prevention measures (such as long preventive custody) clash with basic societal notions of justice and thus undermine the basic maxims of a community based on constitutional values deemed necessary for peaceful coexistence. One must also take into account, however, that when the state does not appropriately respond to new security challenges, then public confidence in its ability to act may suffer. This may encourage populism, and may thus ultimately lead to a further reduction of constitutional standards through politics.

In the end, there should therefore be no doubt that the development and diversification of different security regimes brings with it great potential to improve security. But the extent to which this potential is actually tapped depends on the concrete design of these procedures. And yet, the problem of the new legal regimes lies not just in the manner and scope of their effective future development. Rather, the main problem primarily lies in the related loss of liberty, privacy, and rule of law safeguards, which is why they require a separate and more detailed analysis.

## D. Loss of civil liberties

### 1. Consequences of the new security laws of the risk society

The preceding analysis has shown that the new security architecture of the risk society can not only lead to an increase in security, but that it in many cases also comes with a drastic reduction of safeguards protecting civil liberties. Most of the aforementioned changes can be viewed not only as beneficial to security but also – conversely – as detrimental to the civil liberties of citizens:

- *Preventive criminal law* shifts criminal law liability into a very early stage and thereby affects the principle of culpability and individual self-determination.
- The expansion of *police law*-based powers of intervention into earlier stages with regard to abstract dangers leads to an increasing administrative power and a high level of vagueness, which, in turn, can lead to illegitimate restrictions on liberty and to arbitrariness.
- Individual national interpretations of the *laws of war* create a kind of ‘death penalty’ issued by the administration and barely subject to procedural control.
- *Intelligence law* sidesteps the requirements of suspicion of offence commission and the existence of an impending danger for investigative measures.
- *Non-conviction-based confiscation* undermines criminal law’s high evidentiary standard and the right against self-incrimination.
- *Administrative sanctions law* leads to a shift of power from the judiciary to the administration and reduces rights of defence and judicial controls.
- *Compliance rules* partially dispense with essential procedural guarantees (such as the *nemo tenetur* principle), which are axiomatic parts of traditional punitive criminal law.

To some extent, these losses of liberty are *inherent* in the objectives and nature of the alternative legal regimes. This is true especially for the preventive approach to control, since the prediction of a future danger (in police law) lacks certainty and is much more difficult to make than determining the commission of a past offence or of a corresponding suspicion. For this reason, preventive detention under criminal law (discussed above) must be based not just on a predictive decision but also on the finding of past criminal offences. The discussion about allowing so-called ‘rescue torture’ ‘only’ for preventive purposes demonstrates that – at least in some individual areas – preventive infringements can be justified more easily than corresponding punitive infringements.<sup>58</sup> The lower level of protection for individuals in intelligence-based (especially strategic) telecommunication surveillance is justified with the specific danger that intelligence law seeks to counter. When a listing system is to be used against mass murderers and despots, then the injustices identified

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<sup>58</sup> Cp. for Germany, especially the discussion concerning the case ‘Daschner’; in that regard, see Wang, G., op. cit. (n. 39).

obviously cannot be established and investigated in a foreign country with the means and safeguards accorded by national criminal law. Legal regimes that were created purely for particular special situations such as armed conflicts are also particularly susceptible to the degradation of civil liberties and misuse. An extensive interpretation of these special situations or a misuse of these special rights is capable of creating a completely different legal system without need for elaborate justification. For example: through the construction of a ‘war on drugs’ or a ‘war on terrorism’ these regimes can provide the state with a completely different arsenal for ‘fighting’ against foreigners or its own citizens, making them prisoners of a never-ending war, stranded on an island lacking all human rights protections, or – even worse – to ‘illegal combatants’ substantially without rights.<sup>59</sup> A part of the restrictions of freedom described here are thus founded in the aims, special situations, and other specificities of the respective legal regimes.

However, the dangers connected with and the particular aims pursued by the different legal regimes by no means justify or constitute the basis for all of the abovementioned restrictions on civil liberties. In many cases, the lack of constitutional guarantees stems from the fact that the new systems are categorized without conceptional reasoning as non-criminal law regulations intended to maintain security, and to which criminal law or other safeguards were not applied. Due to the blurring of internal and external security and of war and peace, these rules are not only developed by representatives of criminal law academia and the judiciary, but are also applied in some areas of practice that have less of a ‘penchant for liberty’, especially in the intelligence service, the military, and foreign policy. In consequence, an analysis of whether criminal law safeguards apply is frequently not undertaken. Nor is time taken to consider whether functional equivalents to these traditional criminal law safeguards need to be construed from other constitutional or human rights guarantees. The demand for security in the modern risk society described at the beginning further facilitates this neglect of civil liberties.

## 2. *Additional amplifying effects of the information society*

The clash of security and liberty, which is particularly severe in preventive crime control, is amplified by another fundamental change that is characteristic for 21<sup>st</sup> century society: the transformation into an information society. As discussed, in almost all regimes of security law, the technological changes of information society allow for effective IT-based surveillance measures in form of the gathering, retention, storage, linking, and analysis of massively produced personal data. The data currently used come mainly from telecommunication networks (esp. the internet) and from the analysis of financial data. But data also originate from increasingly employed video cameras in connection with biometric identification systems, elec-

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<sup>59</sup> See Sieber, *U.*, op. cit. (n. 13), pp. 35–89 (55–63).

tronically readable identity documents and cards, and many other sources. The data used are not only those gathered and stored by the investigative authorities specifically in the interest of crime control but also huge amounts of data that incidentally accrue with service providers in the course of their business activities or that need to be collected due to cooperation duties from or by private persons and entities specifically for the purposes of danger prevention.

This development of a ‘surveillance paradigm’<sup>60</sup> facilitates comprehensive concepts of precaution and new forms of profiling which already today surpass Orwellian visions. With the mass generation of personal data on the ‘internet of things’, these possibilities for surveillance will only considerably increase in the future. We are no longer faced with the problem of finding the proverbial needle in the haystack. As the former head of the American NSA put it – ultimately accurately – with regard to the concept of analysing massive amounts of data: ‘You need the haystack to find the needle.’

In addition, on the basis of big data, new concepts of predictive policing are meant to prevent future crimes before they are even planned. The developers of new computer-based analysis programmes for the police are already promising that, in future, investigating officers may arrive at the predicted crime scene before the perpetrator does. This form of prevention may seem exaggerated. Yet, nevertheless, the combination of big data, the future capabilities of artificial intelligence, and the already commencing cooperation of security authorities with the big internet companies (esp. their financial resources, their large data collections, and their know-how from the advertising industry) will enable data screening and precautionary concepts to an unprecedented extent. Criminal procedure’s traditional ‘suspicion of offence commission’ as the standard for initiating an investigation will, in many cases, be replaced or circumvented by the screening and risk analysis of ‘persons of interest’. Thus, the development of IT can lead to new investigation structures and new legal concepts of ‘suspects’, ‘pre-suspects’, ‘endangerers’, or ‘persons of interest’, which can no longer procedurally be checked based on clear algorithms and rules – as the computer-based target selection of combat drones with the help of artificial intelligence already demonstrates. The traditional general conflict between security and liberty thus can take on a totally new dimension.<sup>61</sup>

### *3. Additional elimination of constitutional guarantees due to globalization*

The loss of national (domestic) territorial control connected with globalization further accelerates the loss of civil liberty guarantees. Globalization requires all criminal law and non-criminal law control strategies to develop new models of transnational law enforcement. Their efficiency often comes at a cost to the protec-

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<sup>60</sup> See the contribution by *Thierry Delpuech* and *Jacqueline Ross* in this volume.

<sup>61</sup> See the contribution by *Lorena Bachmaier* in this volume.

tions which the person concerned is afforded pursuant to their national law when provisions of foreign legal systems with attenuated standards of protection are applied in other legal orders. This becomes easily apparent regarding the extension of the traditional rules on legal assistance when the principle of direct mutual recognition of foreign judgments is applied, which, based on the invocation of ‘mutual trust’, leads to the loss of legal rules protecting the rights of individuals.

The same holds true with regard to many international and also extraterritorially effective national sanction regimes which are developed by the executive or international organizations, often without corresponding democratic legitimization, or which are issued by the national executive and encroach upon the national legal orders of other states without their consent. The circumvention of citizens’ national protections becomes obvious, for example, in the case of online investigative measures performed by intelligence services, where foreign servers are accessed directly, without involvement of the locally responsible justice systems and under violation of state sovereignty. The same phenomenon exists when criminal law investigative authorities perform such measures.<sup>62</sup>

These examples show that the sovereignty rights of nations can have an important protective function for citizens since they help assert local legal guarantees that are not recognized in other countries. The transnationally effective cooperation mechanisms therefore often have significant negative consequences for national protective guarantees in transnational procedures. The changes of information society and globalization thus further intensify the loss of civil liberties in modern risk society with its new preventive security architecture.

### **E. Overall evaluation**

The evaluation of the new security architecture is ambivalent and requires a distinction. On the one hand, the new interdisciplinary security law has new tools for crime control that criminal law alone lacks, and which principally should be used to effectively deal with the new objective challenges in global risk society; to some extent, they are even indispensable. Moreover, the preventive approach, in very general terms, has advantages compared to criminal law punishment – especially from the perspective of (potential) victims. This is true particularly in areas in which criminal law is largely ineffective – such as in cases of terrorist suicide attackers.

Yet, on the other hand, some of the new legal prevention regimes are highly problematic with regard to their specific design. It is true that most of the discussed regimes are principally based on sound premises: criminal law can also have the immediate aim of prevention, public law should serve the (also proactive) preven-

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<sup>62</sup> See *Sieber, U./Neubert, C.-W.*, Transnational Criminal Investigations in Cyberspace: Challenges to National Sovereignty, *Max Planck Yearbook of United Nations Law*, vol. 20, 2016, 241–321.

tion of crime and dangers, the law of armed conflict must, in certain cases, permit defending oneself also against large-scale attacks by terrorist groups, and the confiscation of (net) profits from criminal offences can legally be legitimized as the correction of an unjust enrichment – even if it ensues in the area of public law. However, the corresponding new powers of intervention and legal consequences for crime control must be fitted compatibly into the respective legal regimes. In addition, the application of the human rights-based protective guarantees of these areas of law and – in the case of criminal punishment-like sanctions – those of criminal law must be ensured. At present, these rule-of-law requirements are not met in many areas of crime control. Thus, the evaluation of the concrete design of the new security law requires a much more differentiated examination of its individual components and new research efforts.

## IV. The future tasks of legal science and criminology

### A. The need for interdisciplinary integrated research

At present, research into the new architecture of security law is insufficient. This is especially evident with respect to its construction, which so far only consists of a summation of some security regimes and as yet has little in common with a systematic collection of the respective legal regimes or a coherent ‘architecture’. Indeed, there is individual research on specific areas, such as on preventive criminal law (which sometimes is summarily rejected as being ‘attitude-based criminal law’ or a criminal law purely punishing thoughts), on the difference between criminal law and administrative sanction law, on certain measures of police law and intelligence law, on the use of the laws of armed conflict against terrorism, on constitutional and human rights-related limits, as well as studies concerning the relationship between police law, intelligence law, and criminal (procedural) law.<sup>63</sup> But there is no overall concept concerning the elements and the system of the various legal regimes, their interaction, or regarding the limits and guarantees of the new security law. The main cause of this limited perspective in criminal law science lies in its self-elected restriction to traditional criminal law; in other areas of law, one may often observe a similarly narrow area-specific way of thinking. Thus, what we need is an overarching ‘criminal science’ which takes a more comprehensive view

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<sup>63</sup> See for preventive criminal law the references *supra* n. 6–9; for confiscation law *fn.* 21. Regarding public law, see, in particular, the work concerning the relationship between police law, intelligence law, and criminal law by *Bäcker, M.*, *op. cit.* (n. 55); also *Brodowski, D.*, *op. cit.* (n. 53); *Wolff, H.A.*, *Verfassung in ausgewählten Teilrechtsordnungen: Konstitutionalisierung und Gegenbewegungen – Sicherheitsrecht*, DVBl. 2015, 1076–1084, as well as *Müller, T.*, *Präventiver Freiheitsentzug als Instrument der Terrorismusbekämpfung*, Duncker & Humblot, Berlin 2011; regarding the constitutional limits, see *Tanneberger, S.*, *Die Sicherheitsverfassung*, Mohr Siebeck, Tübingen 2014.

of its field of research as pertaining to the task of ‘crime control’ and which examines it on the basis of a functional comparison of its different regimes in a factual, interdisciplinary, and cross-border fashion. That aside, comparable deficits also exist in criminology: for example, research on prognosis was for a long time focused on the areas of parole, release from prison, and preventive custody, and has only recently started placing a greater emphasis on procedures of ‘predictive analysis’.

Especially criminal law science should therefore no longer ignore or summarily reject the development of the new, comprehensive security law. This is based not just on the obvious: that the ‘programme’ of substantive criminal law fails when it comes to suicide attackers, that the law of criminal procedure often only provides for weak investigative means when it comes to perpetrators who radicalize quickly over the internet and which use their opponents’ infrastructure as low-cost weapons, and that we therefore, on the whole, need new answers to these threats. What is in fact crucial is that the present self-limitation to traditional criminal law leads to considerable deficits concerning the guarantee of civil liberties in the much broader field of security law: by means of the present self-limitation, criminal law science may be able to maintain its dogmatic principles in traditional criminal law. But it cannot, by simply closing its eyes, escape or prevent the fact that in important areas the tasks of criminal law are being fulfilled by other legal regimes and that its key guarantees are being circumvented under a different label (e.g. administrative sanctions or civil law-based confiscation). If it did, then it would be akin to a person who defends their front door by all means possible while failing to notice that their back door is standing wide open.

## **B. The need for a complementary architecture of civil liberties**

Criminal law experts and criminologists are particularly important for the development of the new security architecture due to their special knowledge about crime and crime control. They are especially cognizant of the importance that rule of law guarantees have for the prevention of abuses, the like of which have haunted, during certain periods even characterized, criminal law for centuries of its history, and which – even in the present day – still exist in a good many legal orders. For criminal law science, it was and is self-evident that the legal control of deviant behaviour always involves two equal yet frequently conflicting aims: the guarantee of security and the protection of liberty. Ever since the Enlightenment, it has therefore tried to develop and enforce appropriate guarantees. And it should, therefore, continue to do so in the future – albeit within the much broader framework of criminal sciences and of security law. In doing so, it should not, however, overlook the fact that – at a minimum since the 19<sup>th</sup> century – administrative law and especially police science have also done much to guarantee security and liberty, and that the German Federal Constitutional Court and the European Court of Human Rights



nowadays have a leading role when it comes to the protection of civil liberties – in particular regarding the law of criminal procedure.

Thus, there is a need for the cooperation of representatives from these different disciplines. This cooperation should not only lead to an analysis of the various legal regimes of the new security law and their interaction. In the legal sphere, the research should be mainly focused on developing the new architecture of civil liberties, which must accompany and counterbalance the emerging new regimes of crime control. This new architecture of civil liberties and human rights guarantees must be based on three pillars:

- First, the new legal regimes must be analysed with respect to whether the traditional guarantees of criminal law also apply to the new regimes in question. In this respect, the Engel criteria of the ECtHR provide for a broad conception of criminal law, the scope of which is then compensated for by the fact that the ECtHR allows an adaptation of these traditional guarantees in specific cases, e.g. with regard to minor sanctions.<sup>64</sup>
- Second, and especially if safeguards of criminal law cannot be applied, one must analyse to what extent legal safeguards similar to the safeguards of criminal law originate from general (non criminal law-specific) constitutional or other human rights-based guarantees. For example: if a certain type of confiscation of proceeds of crime cannot be regarded as a criminal sanction, is it still possible to apply the general (non criminal law-specific) safeguards of constitutional law and the human rights-based principle protecting the property of citizens against state intervention?<sup>65</sup>
- Third, if a state intervention is based on a specific legal regime, such as the laws of armed conflict, it must be ascertained whether the basic requirements of the relevant regime are fulfilled for the respective intervention. I.e. one must make sure that specific powers (e.g. in the laws of armed conflict or in intelligence law) justified in very specific situations (such as in armed conflicts or with respect to threats to the existence of the state) are not simply used for the control of ordinary crimes.

This approach of a security law that is at once comprehensive yet limited by constitutional law and human rights is much superior to the differentiation between ‘criminal law’ and ‘enemy criminal law’<sup>66</sup> developed heretofore. The doctrine of

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<sup>64</sup> See for the application of the Engel criteria in the present context *Rui, J.P./Sieber, U.*, Non-Conviction-Based Confiscation in Europe, in: J.P. Rui/U. Sieber (eds.), op. cit. (n. 21), pp. 256–273; *Sieber, U.*, op. cit. (n. 17), pp. 301–331 (326–328).

<sup>65</sup> See for this aspect of human rights outside the sphere of criminal law and regarding this specific example *Rui, J.P./Sieber, U.*, Non-Conviction-Based Confiscation in Europe, in: J.P. Rui/U. Sieber (eds.), op. cit. (n. 21), pp. 265–273.

<sup>66</sup> *Jakobs, G.*, op. cit. (n. 7), pp. 751–785; *Jakobs, G.*, Das Selbstverständnis der Strafrechtswissenschaft vor den Herausforderungen der Gegenwart, in: Eser et al. (eds.), Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende, Beck, Munich 2000, p. 47.

enemy criminal law focuses primarily on traditional criminal law. It closed off its conception of criminal law corresponding to this doctrine vis-à-vis the ‘new approaches’ and then, on this basis, defined the self-conception of its criminal law science accordingly, which did not deal with the ‘new approaches’ (since they were consequently beyond the scope of criminal law science as now defined). It has so far also failed to provide appropriate legitimation criteria for establishing when a rule constitutes illegitimate ‘enemy criminal law’. Also, being a special criminal law against the ‘enemies’ of society already renders it unsuitable since the determination of these enemies does not occur until the end of a criminal proceeding. Whether one is dealing with an ‘enemy’ is not yet clear during the investigative stage, which is the point at which one must decide, say, whether to use telecommunication surveillance in the case at hand.

Therefore, the research programme of the Max Planck Institute for Foreign and International Criminal Law in Freiburg<sup>67</sup> responded 15 years ago to the new developments of risk society, information society, and globalization with a different approach: it sought to determine the limits of criminal law not only from a doctrinal perspective of criminal law but to broaden the view and to include the various functional equivalents of crime control (an obvious approach for a comparative legal scholar). The legal policy aim was to not surrender in face of an ‘enemy criminal law’, in which the guarantees of criminal law do not apply, but instead to analyse the various types of crime control and their consistency with constitutional and human rights law as part of the development of a rule of law-based security law.

This broader approach has the potential to replace the unsatisfactory dogma of enemy criminal law with new, innovative approaches to crime control and to develop a broad concept for the respective limits and legal safeguards. Thus, the emerging architecture of security law must not only be analysed as such but must be complemented from the beginning by the development of a new architecture of the respective civil liberties.

### List of abbreviations

ASOG	Allgemeines Sicherheits- und Ordnungsgesetz
BayPAG	Bayerisches Polizeiaufgabengesetz
BPolG	Gesetz über die Bundespolizei
BKAG	Gesetz über das Bundeskriminalamt
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)

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<sup>67</sup> *Sieber, U.*, op. cit. (n. 1), pp. 1–68.

BVerfSchG	Gesetz über die Zusammenarbeit des Bundes und der Länder in Angelegenheiten des Verfassungsschutzes und über das Bundesamt für Verfassungsschutz
DOJ	US Department of Justice
DÖV 1992	Die Öffentliche Verwaltung (law journal)
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FIUs	Financial Investigation Units
GA	Goldammer's Archiv für Strafrecht (law journal)
ICC	International Criminal Court
IT	information technology
JuS	Juristische Schulung (law journal)
NJW	Neue Juristische Wochenschrift (law journal)
NSA	National Security Agency
NStZ	Neue Zeitschrift für Strafrecht (law journal)
NZKart	Neue Zeitschrift für Kartellrecht (law journal)
PAG	Polizeiaufgabengesetz
PNRs	Passenger Name Records
PIUs	Passenger Information Units
SEC	US Securities and Exchange Commission
StGB	Strafgesetzbuch (German Penal Code)
StPO	Strafprozessordnung (German Code of Criminal Procedure)
StV	Strafverteidiger (law journal)
OWiG	Gesetz über Ordnungswidrigkeiten (German Law on Administrative Offences)
UN	United Nations
US	United States of America
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft (law journal)



**Part 2**  
**National Justice Systems**



# **Alternative Types of Procedure and the Formal Limits of National Criminal Justice: Aspects of Social Legitimacy**

*Emmanouil Billis and Nandor Knust*

## **I. Introduction**

Modern legal systems, irrespective of their historical origins and different traditions but particularly those belonging to the Western legal world, are gradually departing from the ideal concept of delivering criminal justice through the strict application of substantive criminal law and the classic mechanisms and guarantees of the archetypal criminal procedure. Instead, contemporary national legal systems tend to adopt, even in criminal matters, notably on grounds of procedural economy, less formal, discretionary, and consensual tools as well as other alternative procedural mechanisms, structures, and arrangements for simplifying, abbreviating, or avoiding the traditional conflict-resolution processes.

The principles, rules, and institutions of conventional criminal procedure aim at the truthful and fair resolution of ‘disputes’ between nation states and (primarily natural) persons. Substantive criminal law ‘disputes’ involve the violation of socio-ethical values considered fundamental by the states or the international community and in need of extended protection, which, presumably, can only be fragmentarily achieved by the prescription of heavy penalties and their imposition by the state as a last resort. Apart from the trial as the forum *per se* for such state-driven case resolutions, various multi-level concepts are currently being developed in theory and applied in practice. Their approach to criminal justice issues is less formalistic compared to the narrow technicalities and bureaucratic restrictions of traditional penal systems.

The potential lowering of human rights standards and the major horizontal shift away from classic protective criminal law principles in numerous judicial and legal policy sectors are frequent topics of discussion in this context.<sup>1</sup> As a result, even international courts of quasi-constitutional impact like the European Court of Human Rights have become more actively engaged in relevant debates.<sup>2</sup> Still, the question remains whether the investigation and prosecution of crime within the framework of the criminal trial continues to enjoy the broadest legitimacy, at least in democratically organized societies and justice systems. Accordingly, the search

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<sup>1</sup> See the contribution by *Ulrich Sieber* in this book.

<sup>2</sup> See the contribution by *Christos Mylonopoulos* in this book.

for ‘good practices’ and models of legal policy aimed at refurbishing old and developing new (alternative) procedures, in which state enforcement and judicial actors still control the inquiring and crime-combating mechanisms, is at the epicentre of contemporary (comparative)<sup>3</sup> legal research. One aspect of fundamental interest and significant practical importance involves the consensual, abbreviated, and simplified procedures envisioned or already applied that are about to replace the traditional (but virtually outdated) criminal trial and its evidentiary mechanisms.

The present article focuses on national legal orders and has as its main point of reference the criminal trial as a system of conflict resolution aimed at guaranteeing social order and peace within a specific social context. It starts out with important normative-theoretical distinctions – with paradigmatic references to known Western legal orders – in order to examine basic systemic assumptions and internal dogmatic contradictions in terms of the complex definitional background (of the purposes and problems) of contemporary forms of alternative, informal, and abbreviated criminal procedure. Based on this exploration of the formal limits of criminal justice, the study then addresses the problem of social legitimacy in applying alternative procedural mechanisms. The recent Hollywood and *Harvey Weinstein* cases of sexual misconduct in the workplace serve as examples. Special attention is paid to the fundamental principles and human rights guarantees of criminal law, such as the principles of legality and culpability, the rule-of-law and separation-of-powers principles, the public nature of the criminal process, and other important fair-trial elements. For this purpose, central aspects of the socio-legal theory by *Niklas Luhmann* on legitimacy through process are explored. The paper closes by discussing the importance of the compatibility of the traditional objectives and protective principles of a criminal trial with the new and alternative types of national criminal procedure.

## **II. Alternative proceedings and the formal limits of criminal justice: normative-theoretical considerations**

It is not news that the trial-centred systems of criminal procedure as we know them have reached their functional and logistical limits around the globe. Plea bargaining mechanisms and other procedural arrangements used to shorten and ‘simplify’ the criminal process have emerged at unprecedented levels in legal orders affiliated with legal traditions that were once very distinct from each other. The promotion of alternative, consensual, and/or less formal tools within or at the mar-

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<sup>3</sup> On the merits and methods of comparative legal research in the field of criminal law, see *Billis, E.*, On the methodology of comparative criminal law research: Paradigmatic approaches to the research method of functional comparison and the heuristic device of ideal types, *Maastricht Journal of European and Comparative Law*, issue 6, 2017, pp. 864–881, with further references.



gins of the criminal process has become a common, system-wide phenomenon. Examples of different types of such mechanisms include prosecutorial discretion tools and out-of-court settlements/penalties, consensual settlements of trials (e.g. deals, plea bargaining), internal conflict resolution techniques and compliance strategies for (informally) disposing corruption and corporate crime cases, or even truth commissions in the context of transitional justice.

However, not only national but international judicial systems are undergoing similar transitions as well. One interesting example: at the level of the International Criminal Court (ICC), the focus in terms of procedural law is not only on matters of international criminal jurisdiction and transnational cooperation, but, lately, increasingly on prosecutorial discretion and alternative forms of conflict resolution and transitional justice.<sup>4</sup> The main problems in this regard are similar to those in national justice systems and involve the relationship between the practical needs of criminal justice systems on the one hand and the normative objectives and regulations promoted by the national and international communities on the other.

### A. The example of discretionary prosecutions

Discretionary decisions in the commencement of investigations and prosecutions may serve as an interesting first illustration. At the national level, let's take the common law example of the English legal system: English prosecuting authorities may decide not to bring a prosecution and may offer opportunities for out-of-court disposals even when the evidential stage is met, due to lack of public interest or for the purpose of securing the effectiveness of the judicial system. In some cases, the competent authorities may be satisfied that the public interest can be properly served by offering the person under consideration the opportunity of an out-of-court disposal rather than bringing a prosecution before a court.<sup>5</sup> Important legal tools in this context are (informal) warnings, formal (police or conditional) cautions, and out-of-court penalties.<sup>6</sup>

At the level of international criminal procedure, the normative system of the International Criminal Court provides various opportunities for discretionary prose-

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<sup>4</sup> See *Billis, E.*, The Limits of 'Discretion' in the Investigation and Prosecution at the International Level (forthcoming).

<sup>5</sup> See § 4.8 Code for Crown Prosecutors 2013: 'It has never been the rule that a prosecution will automatically take place once the evidential stage is met. A prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour. In some cases the prosecutor may be satisfied that the public interest can be properly served by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal rather than bringing a prosecution.' See in overall §§ 3.3, 4.1–5.12, 7.1–7.2 Code for Crown Prosecutors 2013.

<sup>6</sup> For details, see *Sprack, J.*, A Practical Approach to Criminal Procedure, 14th ed., Oxford University Press, Oxford et al. 2012, n. 5.01–5.41.

utorial decisions. Discretion in the selection of situations to be investigated and cases to be prosecuted before the ICC based on criteria such as the general interests of justice and the gravity of the incidents is an explicit but definitely not undisputed object of official prosecutorial policy for the Office of the Prosecutor (OTP) of the ICC.<sup>7</sup>

However, one major difference between national and international systems is that national legal orders usually allow discretionary prosecutorial decisions only for minor crimes, whereas the nature of conduct in most cases under international criminal law is serious or grave. Additionally, unlike in some national legal orders, in cases before the ICC, the approval of the suspect and/or the victims for not initiating (for suspending) a criminal investigation or prosecution is not presupposed, and the parties do not need to meet special conditions thereto.<sup>8</sup>

By contrast, take the example of Germany, a civil law country, where the principle of legality prevails with regard to the prosecution of crime. Nevertheless, the German Code of Criminal Procedure sets out several possibilities and specific conditions that allow the prosecutor to make a discretionary, an ‘opportunity decision’, which, in most cases, requires the consent or approval of the suspect and/or the court. Typically, the decision is about the (conditional or unconditional) abstention from prosecuting minor crimes based on public interest considerations and gravity assessments of the guilt of the perpetrator.<sup>9</sup>

In general, the fact that a criminal ‘dispute’ is settled by early prosecutorial termination of inquiries, even though this usually occurs according to formal rules of discretion, actually reverses or nullifies, *in concreto* and according to *ad hoc* criteria, general decisions on criminalization taken by the legislative power. This may serve, for example, contemporary political agendas or overarching purposes of national and international law. In most cases, this type of settlement takes place after weighing the public interest, the interests of victims and offenders, and issues of procedural economy. Such case disposals are almost always not immediately con-

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<sup>7</sup> See Policy Paper on Case Selection and Prioritisation, 15 September 2016, [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf), (accessed April 2018) and Policy Paper on Preliminary Examinations, November 2013, [https://www.legal-tools.org/uploads/tx\\_ltpdb/OTP\\_-\\_Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-2.pdf](https://www.legal-tools.org/uploads/tx_ltpdb/OTP_-_Policy_Paper_Preliminary_Examinations_2013-2.pdf) (accessed April 2018). For a brief historical overview of prosecutorial discretion at international level, see *Schabas, W.*, Prosecutorial Discretion v. Judicial Activism at the International Criminal Court, 6 Journal of International Criminal Justice (2008) 731–733.

<sup>8</sup> See, with further references, *Billis, E.*, op. cit. (n. 4).

<sup>9</sup> See §§ 151–152, 153–154f, 170, 376–377 German Code of Criminal Procedure. *Roxin, C./Schünemann, B.*, Strafverfahrensrecht, 28th ed., Beck, Munich 2014, § 13 n. 4–9, § 14 n. 5–27, § 40 n. 1–13. See also *Schroeder, F.-C./Verrel, T.*, Strafprozessrecht, 6th ed., Beck, Munich 2014, n. 85–92. For further comparative remarks, see *Kuczyńska, H.*, The Accusation Model Before the International Criminal Court, Springer, Cham et al. 2015, pp. 94–110. See also *Nsereko, D.*, Prosecutorial Discretion before National Courts and International Tribunals, 3 Journal of International Criminal Justice (2005) 126–134.

nected to concrete evidentiary difficulties or to situations where confessions are negotiated for the purpose of shortening and simplifying trials that have not even formally started.

### B. The example of deals and plea bargaining

The picture is somewhat different when it comes to deals following prosecution and to plea-bargaining mechanisms. For purposes of analytical clarity, the exploration of 'alternative' procedural tools such as these should be removed from standard notions about the objectives and structures of full-scale inquiring trials and the role allocation in public evidentiary proceedings.<sup>10</sup> In the context of deals and plea bargaining, the decisions of prosecutorial and judicial organs are instead primarily guided by plain procedural economy and, in the worst-case scenario, by statistical efficiency. Plea bargains are not excluded even when the most inhumane acts are involved, not only at the level of the ICC.<sup>11</sup> This also applies at the national level. Upon commencing prosecution, many national systems allow plea bargains even for very serious, even capital crimes.<sup>12</sup> We may recall the *Alford* case in the US and the difficulties the criminal court faces in terms of individual autonomy and free will if a defendant who pleads guilty openly confesses that he does so not because

<sup>10</sup> See *Billis, E.*, op. cit. (n. 3), pp. 879–880, with further references.

<sup>11</sup> On plea-bargaining practices in international criminal justice, see, for example, *Combs, N.*, Obtaining Guilty Pleas for International Crimes: Prosecutorial Difficulties, in: E. Luna/M. Wade (eds.), *The Prosecutor in Transnational Perspective*, Oxford University Press, Oxford et al. 2012, pp. 332–347; *Rauxloh, R.*, Plea Bargaining in National and International Law, Routledge, London/New York 2012, pp. 204–247; *Turner, J./Weigend, T.*, Negotiated Justice, in: G. Sluiter et al. (eds.), *International Criminal Procedure*, Oxford University Press, Oxford 2013, pp. 1377–1413. See also *Damaška, M.*, Negotiated Justice in International Criminal Courts, 2 *Journal of International Criminal Justice* (2004) 1030–1039.

<sup>12</sup> On plea-bargaining mechanisms at national level from a comparative perspective, see, among others, *Langer, M.*, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, 45 *Harv. Int'l L. J.* (2004) 39–64; *Thaman, S.*, A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial, in: S. Thaman (ed.), *World Plea Bargaining. Consensual Procedures and the Avoidance of the Full Criminal Trial*, Carolina Academic Press, Durham, NC 2010, pp. 331–396. On different legal orders, see also *Jung, H./Nitschmann, K.*, Das Bekenntnis zum Schuldbekenntnis – zur Einführung des plaider coupable im französischen Strafprozess, *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 116, 2004, 785–795; *Navarro, A.*, Absprachen im spanischen Strafverfahren, *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 123, 2011, 163–178; *Parlato, L.*, Ein Blick auf den italienischen Strafprozess: Vorbild oder abschreckendes Beispiel? Die aktuelle Situation und Gedanken zur Reform, *Zeitschrift für Internationale Strafrechtsdogmatik*, 2012, 517–518; *Peters, J.*, Urteilsabsprachen im Strafprozess. Die deutsche Regelung im Vergleich mit Entwicklungen in England & Wales, Frankreich und Polen, Universitätsverlag, Göttingen 2011, pp. 101–129.

he committed the crime but simply because he is afraid to be sentenced to death if the jury finds him guilty.<sup>13</sup>

In Europe we may point to examples such as the *Newton hearings*<sup>14</sup> in England and the judgment on deals by the German Constitutional Court in 2013<sup>15</sup>: they are further illustrations of the existing confusion especially in terms of the goals of the criminal process when it comes to the coexistence of the traditional trial on the one hand and deals or plea-bargaining mechanisms on the other. In the area of criminal justice and the case of *quid pro quo* agreements, serious ‘discounts’ on the search for the substantive truth and the principle of culpability or guilt, as well as the risk that indirect coercion will undermine the individual’s free will, may become unavoidable.<sup>16</sup> Nevertheless, there is no ignoring the real-life support expressed by prosecutorial and judicial authorities around the world in favour of plea-bargaining mechanisms and consensual arrangements for reasons of procedural economy and heavy workloads.

It should be mentioned that even in the common-law world legal scholars have different opinions on the relationship between plea bargains and adversarial and inquisitorial types of procedure. For example, *Maximo Langer* holds that

[p]lea bargains seem to have their origin in a criminal procedure system understood as a dispute between parties ... Plea bargains can also be explained through the dispute model because it is natural in any dispute that the parties can negotiate a resolution. ... In the model of the official investigation ... there are no plea bargains, not only because there are no guilty pleas but also because the truth cannot be negotiated or compromised.<sup>17</sup>

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<sup>13</sup> U.S. Supreme Court, *North Carolina v. Alford*, 400 U.S. 25, 31, 32, 40 (1970). See *Billis, E.*, Die Rolle des Richters im adversatorischen und im inquisitorischen Beweisverfahren, Duncker & Humblot, Berlin 2015, pp. 106–108, with further references. On US plea bargaining in general, see *Turner, J.*, Plea Bargaining Across Borders, Wolters Kluwer/Aspen Publishers, Austin et al. 2009, pp. 7–72.

<sup>14</sup> See *Ashworth, A./Redmayne, M.*, The Criminal Process, 4th ed., Oxford University Press, Oxford et al. 2010, pp. 291–293, 300–301; see also *Doran, S.*, The Necessarily Expanding Role of the Criminal Trial Judge, in: S. Doran/J. Jackson (eds.), The Judicial Role in Criminal Proceedings, Hart, Oxford/Portland 2000, p. 5. For details on guilty pleas and the plea-bargaining and fact-bargaining practice in England, see *Sanders, A./Young, R./Burton, M.*, Criminal Justice, 4th ed., Oxford University Press, Oxford et al. 2010, pp. 438–498. See also *Rauxloh, R.*, op. cit. (n. 11), pp. 25–60.

<sup>15</sup> BVerfG, 2 BvR 2628/10, 19 March 2013, [http://www.bverfg.de/entscheidungen/rs20130319\\_2bvr262810.html](http://www.bverfg.de/entscheidungen/rs20130319_2bvr262810.html) (accessed April 2018).

<sup>16</sup> See *Ashworth, A./Redmayne, M.*, op. cit. (n. 14), pp. 308–320; *Billis, E.*, op. cit. (n. 13), pp. 106–110, 134–137; *Mylonopoulos, C.*, Zur Möglichkeit einer theoretischen Begründung des plea bargaining, in: R. Esser et al. (eds.), Festschrift für Hans-Heiner Kühne zum 70. Geburtstag am 21. August 2013, C.F. Müller, Heidelberg et al. 2013, pp. 259–262; *Neumann, U.*, Materiale und prozedurale Gerechtigkeit im Strafverfahren, Zeitschrift für die gesamte Strafrechtswissenschaft, vol. 101, 1989, 52, 71; *Scott, R./Stuntz, W.*, Plea Bargaining as Contract, 101 Yale Law Journal (1992) 1909.

<sup>17</sup> *Langer, M.*, op. cit. (n. 12), pp. 20, 22 (see also at 35–37).

By contrast, *John Langbein* points out that plea bargaining concentrates effective control of criminal procedure in the hands of a single officer, in line with the historical tradition of European inquisitorial procedure:

Our law of plea bargaining has not only recapitulated much of the doctrinal folly of the law of torture, complete with the pathetic safeguards of voluntariness and factual basis ... but it has also repeated the main institutional blunder of the law of torture. ... Plea bargaining merges these accusatory, determinative, and sanctional phases of the procedure in the hands of the prosecutor. Students of the history of the law of torture are reminded that the great psychological fallacy of the European inquisitorial procedure of that time was that it concentrated in the investigating magistrate the powers of accusation, investigation, torture, and condemnation. ... The dominant version of American plea bargaining makes similar demands: it requires the prosecutor to usurp the determinative and sentencing functions, hence to make himself judge in his own cause. I cannot emphasize too strongly how dangerous this concentration of prosecutorial power can be.<sup>18</sup>

An interesting development is the fact that some civil-law systems, such as the German legal order, try to correct systemic shortcomings of plea-bargaining mechanisms by referring in the respective legal provisions to the obligation of the prosecutorial and judicial organs to uphold the search for the truth even in deal making.<sup>19</sup> In practice, however, this dedication to the truth in the context of deals and plea bargains may be a contradiction in itself, even though the German Constitutional Court declared in its judgment on deals in 2013 that if anything is supposed to fail, it should be the negotiations, not the search for the truth.<sup>20</sup> However, it would definitely not be practical to conduct extensive hearings during plea-bargaining proceedings in order to establish the truth of each controversial or uncertain issue. Such scenarios challenge the point of deals and plea bargaining mechanisms in the first place. That is why it has become routine in Germany for judges conducting the plea bargains to address a few simple, standard questions to just one witness, such as the police officer involved in the investigation; then the court proceeds with verifying the agreement and imposing the reduced punishment. Another peculiarity of the German system is that not only the prosecutor and the defence play a major part in negotiations but judges as well, and the defendant has extensive freedoms to appeal previous agreements. Most importantly, in Germany the presiding judge is allowed to initiate the negotiations him- or herself and to participate, behind closed doors, in all respective discussions. This can prove to be a problem in many respects. For example, if the negotiations fail, the judge will have a hard time to remain objective for the remainder of the trial, since in Germany the presiding judge

<sup>18</sup> *Langbein, J.*, Torture and Plea Bargaining, 46 U. Chi. L. Rev. (1978) 17–18.

<sup>19</sup> See §§ 244(2), 257c German Code of Criminal Procedure. For details on the procedural aspects of the German ‘deals’, see, among others, *Altenhain, K./Haimerl, M.*, Die gesetzliche Regelung der Verständigung im Strafverfahren – eine verweigerter Reform, *JuristenZeitung*, 2010, 327–333; *Malek, K.*, Verteidigung in der Hauptverhandlung, 4th ed., C.F. Müller, Heidelberg et al. 2012, pp. 132–153; *Rauxloh, R.*, op. cit (n. 11), pp. 61–105.

<sup>20</sup> BVerfG, 2 BvR 2628/10, 19 March 2013, n. 71–72, [http://www.bverf.de/entscheidungen/rs20130319\\_2bvr262810.html](http://www.bverf.de/entscheidungen/rs20130319_2bvr262810.html) (accessed April 2018).

always participates in final deliberations and decisions of guilt or innocence of the accused, even in cases involving mixed jury courts.

Germany, being a civil law system that allows discretionary prosecutorial decisions in the pre-trial stages and has a thirty-year history of deals that were formally and legally recognized only in 2009,<sup>21</sup> is a really interesting example for the exploration of the formal limits of national criminal justice. This is especially so in terms of distinguishing between the initial substantive criminal law requirements for prosecution and punishment, the possibilities provided by procedural law for bypassing the strict limits of substantive criminal law (for example to ‘correct’ overcriminalization), and any other informal practical dynamics that may develop to overcome the inflexibilities and formalities of positive procedural law itself (for example regarding crimes such as terrorism or economic and company crime). In common-law countries and case-law based systems, deviations from the requirements of substantive law such as these and adaptations of law and prosecutorial practice to the needs of modern globalized societies may be more easily promoted and even socially accepted.

But even in old-fashioned continental systems such as the Greek legal system, where the principle of legality governs most of the prosecutorial decisions to this day, the adoption of full-fledged plea-bargaining solutions is currently extensively debated. Up until now, the Greek criminal justice system provides only specific out-of-court mediation mechanisms for domestic violence cases and a mixed system combining elements of plea bargaining and out-of-court mediation between defendant and victim for economic crime cases – a system that has proven to be virtually unfeasible.<sup>22</sup> How the proposed less-formal solution of full plea bargaining could actually work within a system riddled with crime and corruption phenomena, sometimes even at the level of justice administration, and whether the Greek public would prefer alternative solutions as opposed to a supposedly more transparent but overly formalized, inflexible, bureaucratic, and already overloaded trial system (with felony trials lasting eight to ten years to completion), are definitely interesting topics of debate for the Greek legislature.

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<sup>21</sup> See *Altenhain, K./Haimerl, M.*, op. cit. (n. 19), pp. 327–333; *Fezer, G.*, Inquisitionsprozess ohne Ende? Zur Struktur des neuen Verständigungsgesetzes, *Neue Zeitschrift für Strafrecht*, 2010, 178–183; *Murmann, U.*, Reform ohne Wiederkehr? – Die gesetzliche Regelung der Absprachen im Strafverfahren, *Zeitschrift für Internationale Strafrechtsdogmatik*, 2009, 526–534.

<sup>22</sup> See *Billis, E.*, Introduction to the basic characteristics and fundamental principles of the criminal law and Penal Code of Greece, in: *E. Billis* (ed.), *The Greek Penal Code*, Duncker & Humblot, Berlin 2017, p. 8 and *Billis, E.*, National characteristics, fundamental principles, and history of criminal law in Greece, in: *U. Sieber et al.* (eds.), *National Criminal Law in a Comparative Legal Context* vol. 1.2., Duncker & Humblot, Berlin 2013, pp. 196–197, 199–200, 238–239, 276–277.

### C. Common assumptions and dangers

To sum up, from a normative-theoretical perspective, in terms of the realities inherent in the nature of alternative (consensual, formal/informal, and simplified) mechanisms for shortening or avoiding criminal proceedings, the following thoughts are particularly important for purposes of the present study:

- First, in alternative (formal as well as informal) dialogical procedures and *quid pro quo* ‘transactions’ prior to the final disposition of the case, the presumption of innocence as an overarching fundamental legal-ethical cornerstone of rule-of-law systems may at some point be compromised by the judicial organs, the press, and/or by large parts of society. What a pressing<sup>23</sup> situation like this means for the social status and, most importantly, for the *de facto* position of the suspect/defendant as a (supposedly) autonomously acting individual within the criminal justice system cannot be emphasized enough.
- Second, the legal orders that widely use alternative, simplified, and consensual dispute arrangements are progressively departing from the traditional understanding of truth (‘what really happened’)<sup>24</sup> as an important legitimizing pillar of the criminal justice system.<sup>25</sup> It may be fair to assume that the ultimate ideal of the very societies that accept the authoritative fragmentary penalization of the most serious types of legal interest violations as a measure of last resort for preserving social peace is to resolve the respective ‘conflicts’ in a fair and truthful manner.<sup>26</sup> However, informal, simplified, and consensual mechanisms of proce-

<sup>23</sup> See, for example, the English cases *R v. Clark a.o.*, [2008] EWCA Crim 3221, n. 48, and *McKinnon v. US*, [2008] UKHL 59, n. 38.

<sup>24</sup> The search for truth with regard to a criminal dispute means, in its simplest form, that the facts of the case, i.e. what really happened, must be sought and validated as accurately as possible in order to convict the guilty and acquit the innocent. In this context, the theoretical and philosophical foundations of the correspondence theory of truth seem to be closer to what the average person perceives to be the truth. On the correspondence theory in a legal-procedural context, see, among others, *Damaška, M.*, *Evidence Law Adrift*, Yale University Press, New Haven/London 1997, pp. 94–95; *Ho, H.L.*, *A Philosophy of Evidence Law. Justice in the Search for Truth*, Oxford University Press, Oxford et al. 2008, pp. 56–57; *Hörnle, T.*, *Justice as Fairness*, *Rechtstheorie*, vol. 35, 2004, 175, 177–179; *Jung, H.*, *Über die Wahrheit und ihre institutionellen Garanten*, *JuristenZeitung*, 2009, 1129, 1130; *Volk, K.*, *Wahrheit und materielles Recht im Strafprozess*, Universitätsverlag, Konstanz 1980, p. 7. See also *Damaška, M.*, *Truth in Adjudication*, 49 *Hastings Law Journal* (1998) 289, 291.

<sup>25</sup> For the concept of truth in criminal proceedings, see also *Billis, E.*, *op. cit.* (n. 13), pp. 93–120.

<sup>26</sup> See also *Roberts, P./Zuckerman, A.*, *Criminal Evidence*, 2n ed., Oxford University Press, Oxford et al. 2010, p. 9; *Jackson, J./Doran, S.*, *Judge Without Jury. Diplock Trials in the Adversary System*, Clarendon Press, Oxford 1995, pp. 103–104; *Jung, H.*, *op. cit.* (n. 24), p. 1130; *Weigend, T.*, *Is the Criminal Process about Truth?*, 26 *Harv. J. L. & Pub. Pol’y* (2003) 157–158, 169, 172–173; *Bradley, C./Hoffmann, J.*, *Public Perception, Justice, and the ‘Search For Truth’ in Criminal Cases*, 69 *S. Cal. L. Rev.* (1996) 1267. See also UK Auld Report 2001, p. 9.



dural economy will at some point inevitably enable *ex-post-facto* circumventions and agreements referring to the factual basis and/or the results of the dispute resolution; therefore, such agreements can no longer always meet the programmatic procedural aim of a full search for the ‘true events’, at least according to the correspondence theory of truth.

- Third, the results of alternative, informal, and *quid pro quo* settlements may at times fail to take the perpetrator’s actual level of guilt sufficiently into account. This triggers some interesting questions: for example, even if many legal systems apply penalty reductions for various personal reasons, how can it be justified to reduce a penalty below the actual level of guilt mainly for reasons of procedural economy? Furthermore: assuming that the creation of a (quasi-historical) record of guilt in the public trial is *per se* an immanent purpose of criminal justice systems, how can such a record, only accompanied (if at all) by limited considerations of facts, logically be taken as accurate if it only refers to the result of (not necessarily transparent) guilty-plea agreements?

### III. Alternative criminal proceedings and social legitimacy

#### A. Setting the stage: the Harvey Weinstein example

The above-mentioned examples reveal, at the normative-theoretical level, some interesting initial distinctions, which lend themselves to our holistic exploration of the various phenomena of alternative and informal criminal justice. From a sociological point of view, however, the key questions tend to have a somewhat different point of reference, that is, the relationship between law and society. In this context, the question that needs to be addressed is this: how are different societies coping with alternative conflict resolution mechanisms in criminal law? For Western societies in particular, the logical assumption is to respond by saying that the key question raised by the gradual abandonment of the centuries-old criminal trial and its protective principles is the question of legitimacy.

Take, for example, the recent Hollywood and *Harvey Weinstein* incidents<sup>27</sup> and the formation of the ‘me-too movement’ in the area of sex crimes, particularly in the workplace. Today, more than ever, the alleged conduct is socially totally unacceptable; it is conduct already criminalized decades ago, in one form or another, in many national rule-of-law systems. Real-life needs, fears, and problems may have prevented many of these victims from trusting the criminal justice system to resolve their ‘conflicts’. It cannot be ruled out that the closed social groups that formed in different business sectors even encouraged the silence that surrounded these incidents for so many years. Perpetrators and victims may sometimes feel

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<sup>27</sup> See <http://www.bbc.com/news/entertainment-arts-41594672> (accessed May 2018).



safer by resolving their conflicts – in fact, criminal law disputes – behind closed doors, out of the public eye, and based on out-of-court settlements. But what about the future victims of criminal misconduct by the same perpetrator? Ultimately, the question is, what is the protective role of the state's criminal law? Do we need to redefine the purposes of criminal procedure and punishment in this context?

There is, however, the other side of the picture. It involves phenomena such as the public reporting of relevant criminal behaviour without engaging the proper criminal justice institutions or engaging them too late – after all, there is a reason for limitation periods in most rule-of-law systems – and, sometimes, without supportive evidence (only one person's word against another). Occasionally, one may get the impression that vast sectors of society are promoting *en masse* courts of public opinion. These 'courts', however, are not bound to consider each individual case *in concreto* and within the particular context of each conduct in the way a criminal court is. Today's courts of public opinion may take a stronger punitive stance than even ordinary criminal justice systems. At the same time, human lives may be subjected to socially deconstructive procedures much too quickly and without the guarantees of the conventional criminal trial. In our context, this begs *inter alia* questions such as where the proper place for alternative dispute resolution mechanisms is and whether modern societies should, at some point, fully embrace or even prefer informal and out-of-court case disposals over full-scale public trials and the need of victims to actively participate in the judicial proceeding and be publicly heard.

The problems posed by these scenarios for scientific (comparative) research are significant, especially since questions of this nature are very difficult to answer empirically. In the following chapter, we attempt to identify sociological aspects and factors of legitimacy with regard to the conventional and the alternative resolution of criminal 'conflicts', in hopes that this will also facilitate the design of pertinent empirical projects in the future.

## B. Legitimacy through process

### 1. The concept of legitimacy

In the present context, our approach to the concept of legitimacy is based on relevant definitions by Niklas Luhmann and Max Weber. Thus, legitimacy is the *de facto* belief in the validity of the law, which also includes the binding nature of norms, procedures, and decisions, and the values underpinning those decisions.<sup>28</sup> Individual subjects under the law willingly acknowledge, to a certain extent, given

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<sup>28</sup> Luhmann, N., *Legitimation durch Verfahren*, 1st ed., Suhrkamp, Frankfurt am Main 1983, pp. 27–37; Luhmann, N., *Rechtssoziologie*, 3d ed., Westdeutscher Verlag, Opladen 1987, pp. 259–266; Weber, M., *Wirtschaft und Gesellschaft*, 5th ed., Mohr, Tübingen 1980, pp. 123 ff., 424 ff.

rules without personal consideration for their content and are ready to adjust their own expectations and actions to these guidelines.<sup>29</sup>

This in turn raises the following question: how is it possible that these decisions are taken by only a few, but these few disseminate them throughout their sphere of action? Two key factors are involved: *coercion* on the one hand and *consensus* on the other.<sup>30</sup> In terms of *consensus*, *Niklas Luhmann* goes even further than *Max Weber* and requires in his definition of legitimacy only presumable consensus rather than actual consensus.

## 2. *Traditional criminal procedure and legitimacy*

For the purposes of our study we examine the concept of legitimacy from the perspective of judicial proceedings as conflict resolution mechanisms. Criminal and court proceedings, in particular, constitute an institutionalized frame of action in the form of a social system in which the parties participate by performing certain predefined roles.<sup>31</sup> Procedures can be understood as social systems whose function is to generate a (binding) decision within a certain timeframe; as such, they are limited in time from the outset.<sup>32</sup> The procedure must allow those involved in the proceedings to actively influence the process by participation. The active participation of all parties in the proceedings tends to eliminate alternative courses of events, so that, ultimately, a comprehensible concrete result is disseminated. The respective conflicts of interest within the procedure and the applicability of the legal norms need to be recast into 'terms' compatible with the procedure to enable decision-making by the procedure itself.<sup>33</sup>

This means that the 'coding' of the conflict must be such that the selected conflict resolution mechanism can understand the 'terms' and use them.<sup>34</sup> The result, which is ultimately disseminated, must subsequently be 'de-coded' again for all participants to understand and adjust their own conception accordingly. The 'coding' and 'juridification' of the conflict generate a derived 'meta-conflict'.<sup>35</sup> As such, the procedure represents an autonomous system that restructures the original conflict, thereby allowing it to be identified and applied to the procedure itself. The 'feeding' of the conflict into the process results in changing the form of the con-

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<sup>29</sup> *Luhmann, N.*, *Legitimation durch Verfahren*, 1st ed., Suhrkamp, Frankfurt am Main 1983, p. 28.

<sup>30</sup> *Luhmann, N.*, op. cit. (n. 29), p. 28.

<sup>31</sup> *Raiser, T.*, *Grundlagen der Rechtssoziologie*, 4th ed., Mohr Siebeck, Tübingen 2006, p. 297.

<sup>32</sup> *Luhmann, N.*, *Rechtssoziologie*, 3d ed., Westdeutscher Verlag, Opladen 1987, p. 218.

<sup>33</sup> *Raiser, T.*, op. cit. (n. 31), p. 297.

<sup>34</sup> *Raiser, T.*, op. cit. (n. 31), p. 297.

<sup>35</sup> *Raiser, T.*, op. cit. (n. 31), p. 297.

flict, which is negotiated only based on certain complexity-reducing elements but which provides a result all parties involved can understand.<sup>36</sup>

And what are the mechanisms for establishing legitimacy? According to *Luhmann*, legitimacy is established through the process itself, by participating in the procedure, and by the symbolically generalizing effect of power.<sup>37</sup>

Conventional criminal proceedings are based on the strict application of formal rules, on the participation of the parties in the process, and on an authority with *de facto* power to enforce the judgments. Thus, the focus is on the formal (procedural) rules on the one hand and the judge on the other, as well as on the element of power itself. This type of criminal proceedings, which strictly follows pre-defined formal requirements, concludes with the judgment (and sentence) pronounced by a public authority in the form of a judge, a panel of judges, or a jury.

In modern rule-of-law systems operating on the basis of the separation-of-powers principle, the independent authority of criminal courts and prosecutors is distributed by the state as the legitimate owner of the monopoly of power. Based on their authority, these state institutions must prosecute in a public procedure and disseminate a decision in the form of a judgment. The distinctive feature in the context of such conventional state-driven conflict resolution mechanisms is that the public authorities remove the defendant and, along with him/her, the conflict from their original context and 'feed' them into the constructed context of the social system of criminal proceedings. The conflict is removed from its natural environment and an 'artificial', 're-coded' conflict is established between the defendant and the judicial and law enforcement authorities. This is done by way of a normative re-evaluation, in which the victim (individual persons or society as a whole) is actually dispossessed of the conflict,<sup>38</sup> and an 'artificial' conflict is produced between the defendant and the state. The lack of normative integration of the victims and the community affected by the original conflict into the criminal process make them almost disappear in this transposed state-conflict-resolution mechanism.

### 3. *Factors of legitimacy: recognition and acceptance of the decision*

As we have seen, in order to achieve legitimacy, criminal procedure as a social system must be designed such that the dispute resolution mechanisms do not require a long and tedious process to arrive at a consensus. Moreover, steps must be taken to ensure that decisions are accepted as normative behavioural premises – even if the outcome of the proceedings is initially unpredictable and unclear. Legit-

<sup>36</sup> See *Luhmann, N.*, op. cit. (n. 29), pp. 59–68; *Raiser, T.*, op. cit. (n. 31), p. 297.

<sup>37</sup> *Luhmann, N.*, *Das Recht der Gesellschaft*, 1st ed., Suhrkamp, Frankfurt am Main 1993, p. 261; *Luhmann, N.*, op. cit. (n. 32), p. 262.

<sup>38</sup> *Christie N.*, Conflict as property, *The British Journal of Criminology*, vol. 17, issue 1, 1977, 1–15.

imacy through process displaces the old natural law position which only requires decisions by consensus. In this context, the participants in the proceedings (and society as a whole) are called to recognize and accept their outcome, independent of the 'correctness' of individual decisions.

This, however, raises the question of the definition of 'recognition and acceptance' by the parties to the proceedings (and, ultimately, by society as a whole). It should be noted that it is not possible to focus here on the accuracy of the values and content involved, as this is something procedures as social systems cannot accomplish. Rather, the high complexity and variability of the topics and decision premises in criminal trials require a generalization of the recognition and acceptance of decisions.<sup>39</sup> Generalized acceptance does not require an individually motivated belief but rather a non-motivated acceptance dissociated from the personality or the social standing of the individual.<sup>40</sup> Acceptance must be formalized to the extent that the person concerned adopts the decision as the premise of his or her own behaviour and, if in doubt, adapts and corrects his/her expectations accordingly.<sup>41</sup> The main question is how this adaptation of expectations will be achieved.

According to *Luhmann*, consensus and coercion are not the only components that legitimize decisions and lead to their acceptance. Further, recognition and acceptance are based on a process of learning, which the participants must undergo.<sup>42</sup> As a result of this educational process, individuals understand and transform these decisions into normative premises for their own behaviour and adjust their expectations accordingly. The focus here is on external success, that is, the parties act in compliance with the decision; the actual internal acceptance of the disseminated decision is secondary. The outcome of the process does not need to reflect individual or personal beliefs, because the process and the outcome themselves will rebuild the expectations of the affected persons in such a way that the parties to the proceedings have no choice but to recognize the outcome. Particularly in the modern globalized world, this can be effectively achieved if the acceptance of the decisions is institutionalized, which is precisely the effect of state criminal proceedings.

This kind of acceptance cannot be achieved in isolation; preferably, it has to be accomplished within a social fabric. The affected person is not supposed to view it as a change of his/her (normative) expectations or a break with his/her previous life. Rather, a strong external manifestation is required, so that the change in (normative) expectations is imposed as an official 'authoritative' decision from the out-

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<sup>39</sup> *Luhmann N.*, op. cit. (n. 29), p. 32.

<sup>40</sup> *Luhmann N.*, op. cit. (n. 29), p. 32.

<sup>41</sup> *Luhmann N.*, op. cit. (n. 29), p. 33.

<sup>42</sup> See also *Raiser, T.*, op. cit. (n. 31), p. 132.

side and is not perceived as an individual, personal decision.<sup>43</sup> This 'transmission' of (normative) expectations is not only achieved by threat or by imposing (state) power but also by creating a *social fabric* that leaves a potential protester alone in his/her (normative) notion of right and wrong and, thus, socially isolated. In the context of criminal proceedings, the construction of this kind of social fabric is intensified by the principle of public trials because it allows the other members of the social fabric to understand the procedure and comprehend its components, thereby facilitating obtaining their consent, and, as a result, isolating more effectively the protesting party and his/her 'dissenting' opinion.<sup>44</sup>

Thus, conventional criminal proceedings and trials are not based on individual belief in the correctness of the judicial outcome but rather create a social environment in which the parties at the end of the proceedings have no choice but to recognize the decision. The new models of alternative conflict resolution discussed in this contribution, such as discretionary case disposals and deals, are, of course, not easily compatible with the legitimacy components of this socio-legal approach, especially with the aspect of publicity.

Another legitimacy-reinforcing factor essential for the effective recognition and acceptance of criminal decisions is the allocation of procedural roles to the participants. By assigning participants specific procedural roles, the content in dispute is removed from the social background of the interested parties, who no longer appear in their social roles but simply as participants in the criminal process. In these proceedings, the parties are subject to specific procedural rules and have the opportunity to participate within the formal limits of their predefined role. Communication in the proceedings is limited to the language used in the (social) system of a criminal trial, so that the real-life social position outside the trial is immaterial. These clearly defined positional restrictions tend to reduce the complexity of the criminal trial as a social system, so that only the facts and arguments necessary for the criminal trial are integrated into the procedure. An individual's social and power positions in 'everyday life' have no direct impact on the outcome of the criminal trial.

#### 4. *Legitimacy and alternative proceedings*

As we have seen, in conventional criminal proceedings, the above-described reduction of information and communication is stringently imposed, since only information central to the conflict is integrated into the procedure in the form of coded, 'legal' language. By limiting all communication to information relevant to the process, the discretionary capacity of the decision-making body is narrowed. At the same time, the parties cannot escape their role in the proceedings. If, at this stage,

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<sup>43</sup> Luhmann N., op. cit. (n. 29), p. 35.

<sup>44</sup> Luhmann N., op. cit. (n. 29), pp. 107–120.

one of the parties were to voice its opposition to the procedure and attempt to break away from its role in it, this party would be socially isolated in its protest and would lose its credibility. This social isolation ties into the above-mentioned aspect of the publicity of proceedings: criminal proceedings and their outcome receive public approval based on logic and normative expectations. A party who criticizes either the procedure itself or a resulting decision is socially isolated, the criticism being declared unreasonable.

But there are situations where parts of the criminal process may take place in closed session, excluding the general public. These situations, however, are very limited, due to long-established defence rights and fair-trial reasons. The main purposes hereto include the protection of specific types of participants, such as minors, victims of sexual violence, etc., and the protection of national security. Whenever this kind of conflict of interest arises, law enforcement and judicial authorities must decide in each case individually whether the circumstances justify excluding the public from the proceedings.<sup>45</sup> In such cases, society exercises its control only indirectly.

In the context of the general research question of the present study, the above analysis raises a plethora of questions regarding the social legitimacy of applying alternative procedural mechanisms in national criminal justice systems. A comparison of the alternative (discretionary) disposals of criminal cases and 'informal' agreements explored in this article with 'conventional' public criminal proceedings reveals several differences directly related to the above-mentioned aspect of publicity and to other minimum human rights and fair-trial guarantees. In alternative and informal disposals – as in exceptional cases involving the already mentioned protection of important legal interests – the general public is, in most instances, denied access to substantial parts of the procedure. Along with practical reasons of procedural economy, the underlying idea is to avoid phenomena of retribution and/or the public stigmatization of the victim. However, a lack of institutionalized public access (participation in the broad sense) also means the absence of a fully comprehensible outcome of the proceedings for the general public. In this way, neither the proceedings nor their outcome can be subject to full public approval. Thus, the normative expectations (of the general public) may not be satisfied.

In modern rule-of-law societies, individuals are guided in their actions by a certain legal framework, which defines the 'rights' and 'wrongs' as the basis of normative expectations. Whenever a person commits an 'unlawful' act, the other members of society need to witness a clear, final, and institutionalized response to such misconduct. In criminal 'conflicts', the lack of a visible and comprehensible response by *state* authorities means the failure to satisfy the specific normative ex-

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<sup>45</sup> See, e.g., Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

pectations of society. This may lead to a lack of trust in state institutions and in the state's monopoly of power (macro level) and may challenge the normative expectations of individuals in society (micro level).

Public criminal trials allow wide parts of society to monitor a 'fair' procedure and the production of a visible and comprehensible outcome. This facilitates broad approval and the satisfaction of society's normative expectations. The public perception that 'court decisions are made through processes that are fair is the strongest predictor by far of whether members of the public approve of or have confidence in ... courts'.<sup>46</sup> The transparent application of procedures and formal rules – and the fair and comprehensible production of an outcome in form of a judgment – by recognized judicial bodies such as criminal tribunals stabilize the normative expectations within society. Therefore, the public perception of how the criminal process and the criminal justice system as a whole actually operate is critical to their mission.<sup>47</sup>

In the *Weinstein* incidents we were able to witness how 'secrecy', the lack of access to investigations and/or closed-doors deliberations, and the ensuing non-satisfaction of normative expectations over time built up immense social pressure, resulting in a widespread media debate labeled *#metoo*. The absence of an overt response on behalf of the (criminal) justice authorities to a presumably 'hidden/unspoken' everyday reality – conduct that was clearly in violation of the normative framework society recognizes as substantive criminal law – gave rise to a social-media court of public opinion. The moment the first sexual misconduct victim went public, a novel communication channel was opened, which prompted other victims of *Harvey Weinstein* to break the seal of silence. Hush money and 'behind closed door deals' suddenly lost their validity, and, as a result, the wider societal problem of sexual misconduct against women began to be addressed in a public forum.<sup>48</sup> The 'victims', whose identity, in conventional criminal proceedings, would have been protected by in-camera proceedings to avoid public stigmatization, went public on their own to address this problem via the (social) media. The public debate also generated a noticeable change in linguistic labels: the word 'victim' changed to denote 'survivor'. The stigma of being a 'victim' turned into a label of (self-) empowerment, which implied strength and the will to survive.<sup>49</sup> While the absence

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<sup>46</sup> Rottmann, D., Trust and Confidence in the California Courts: A survey of the Public and Attorneys, p. 6 ([http://www.courts.ca.gov/documents/4\\_37pubtrust1.pdf](http://www.courts.ca.gov/documents/4_37pubtrust1.pdf), accessed April 2018).

<sup>47</sup> Gilchrist, G.M., Plea Bargaining, Convictions and Legitimacy, 48 American Criminal Law Review (2011) 162.

<sup>48</sup> The same discourse could be observed in the *Larry Nassar* and *Bill Cosby* cases.

<sup>49</sup> See Judge Rosemarie Aquilina's statement in the *Larry Nassar* case: 'I want to talk about a couple of things and first, I have said what I need to say to the victims. I have a little more to say. You are no longer victims, you are survivors. You're very strong and I

of an institutionalized answer facilitated the wide social approval of this movement, it is doubtful whether this case would have caused the same massive social response if the state authorities had handled it by means of alternative, quick, and cost-effective but not exactly transparent ‘conflict’ resolution mechanisms such as plea bargains and other forms of deals. While the *Weinstein* case reveals once again the societal need for openly hearing and creating a public record for these kinds of incidents, the conventional criminal trial still appears to be the most appropriate solution, at least from the perspective of social legitimacy.

With sexual harassment against women in the workplace a widespread, structural, and systemic problem in many societies around the globe, the public debate and discourse on the *Weinstein* incident turned very quickly into a court of public opinion. As the anger and frustration associated with the conflict failed to be channelled into institutionalized (state) conflict-resolution procedures such as criminal trials, a highly emotional and unstructured social climate took hold, in which minimum fair-trial guarantees, such as the presumption of innocence, lost their normative power. As described above, the idea of a criminal trial is to provide a more neutral and less emotional setting for dispute resolution by ‘removing’ the conflict from the two parties and transposing it into a state-driven procedure.<sup>50</sup> Within the controlled environment of institutionalized conflict-resolution mechanisms compliance with minimum standards and fair-trial principles is crucial, not only with respect to the conventional criminal trial but also in the context of contemporary alternative forms of proceedings.

The principal reason why compliance with minimum procedural standards is essential for justice and social legitimacy is because it provides all participants the possibility to interact in predefined roles in the procedure.<sup>51</sup> The application of formal procedural rules offers participants the option to actively shape the outcome of the proceedings in a sustainable and structured way by using the neutral platform of judicial institutions to present their side of the story (e.g. by producing their arguments, evidence, etc.).<sup>52</sup> The urgent necessity to strictly apply minimum procedural standards and guarantees in order to secure fair, effective, and sustainable proceedings is nowadays evident not only at the national but also the international level,<sup>53</sup> where the particular nature of crimes of international criminal law more than ever demands publicly open and socially acceptable conflict resolutions.

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have addressed you individually’ (<https://edition.cnn.com/2018/01/24/us/judge-rosemarie-aquilina-full-statement/index.html>, accessed April 2018).

<sup>50</sup> *Christie N.*, op. cit. (n. 38), pp. 1–15.

<sup>51</sup> *Gilchrist, G.M.*, op. cit. (n. 47), pp. 161–162.

<sup>52</sup> *Gilchrist, G.M.*, op. cit. (n. 47), pp. 161–162.

<sup>53</sup> See for International Criminal Trials: *Henham, R.*, Plea Bargaining and Legitimacy of International Trial Justice: Some Observations on the Dragan Nikolic Sentencing Judgement of the ICTY, *International Criminal Law Review*, 2005, 601–607.



#### IV. Concluding thoughts

This study addressed the reasons why, in our time, alternative types of case disposals, by necessity, exist side by side with conventional criminal trials. It also explored aspects of social legitimacy in connection with the alternative and informal disposal of ‘penal conflicts’: such disposals must take the form of transparent, institutionalized proceedings rather than private, behind-closed-doors deliberations or spontaneous courts of public opinion. Like the conventional criminal trial, alternative mechanisms require minimum procedural standards and fair-trial principles as essential for justice and social legitimacy. Arguably, not all of the high minimum standards of a conventional, full criminal trial can be applied to the different types of alternative and informal disposals of criminal cases. Yet, judicial mechanisms that are open and fair (especially in terms of procedural participation) will always lead to a much wider social acceptance of the outcome of the conflict resolution process.<sup>54</sup> In this sense, the factors involved in what is termed procedural justice include:<sup>55</sup>

- Impartiality (no self-interest, no favouritism by the deciding authority)
- Consistency (same procedure for different people, different times, and different places)
- Accuracy/Truth (maximum integration of existing information)
- Review (possibility to change or annul a decision)
- Representativeness (possibility of incorporating/integrating the interests and views of the parties and participants)
- Ethical appropriateness (compatibility of procedures and decisions with moral values and principles)
- Transparency (public process and clear and comprehensible communication of the rationale by the decision-making instance)
- Respectful treatment of those affected by the conflict and the procedure.<sup>56</sup>

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<sup>54</sup> See *Rawls, J.*, *A Theory of Justice*, Belknap Press of Harvard University Press, Cambridge, Massachusetts 1971; *Thibaut, J.W./Walker L.*, *Procedural Justice: A psychological analysis*, Erlbaum, Hillsdale, NJ, 1975.

<sup>55</sup> See *Rehbinder, M.*, *Rechtsoziologie*, 6th ed., Beck, Munich 2007, p. 118.

<sup>56</sup> See also *Tyler, T.R.*, *Why people obey the law*, Princeton University Press, Princeton 2006, pp. 163–165; *Tyler, T.R.*, *Does the American Public Accept the Rule of Law?: The Findings of Psychological Research on Deference to Authority*, 56 *DePaul Law Review* (2007) 664: (1) ‘people want to have an opportunity to state their case to legal authorities. They want to have a forum in which they can tell their story; they want to have a “voice” in the decision-making process’. (2) ‘people react to signs that the authorities with whom they are dealing are neutral. Neutrality involves making decisions based upon consistently applied legal principles and the facts of the case rather than personal opinions and biases. Transparency and openness foster the belief that decision-making procedures are neutral’. (3) ‘people are sensitive to whether they are treated with dignity and politeness and to whether their rights as citizens and as people are respected’. (4) ‘people focus on cues that

**List of abbreviations**

ICC	International Criminal Court
OTP	Office of the Prosecutor
US	United States of America

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communicate information about the intentions and character of the legal authorities with whom they are dealing'. For the discussion within settings of post-conflict justice, see: *Knust, N.*, *Strafrecht und Gacaca*, Duncker & Humblot, Berlin 2013, pp. 403–409.

# Prosecutorial Sanctions in the Netherlands

*Chrisje Brants*

## I. The nature of Dutch criminal procedure

This contribution is concerned with prosecutorial penal sanctions in the Netherlands as an alternative to court procedure, in the light of the fundamental tenets of Dutch criminal procedure and the checks and balances that these imply. The Netherlands is a civil-law country with an inquisitorial style of criminal process.<sup>1</sup> This means that truth-finding in criminal cases is based not on the classic adversarial ‘clash of opinions’ between prosecution and defence in open court but on the notion of a thorough and impartial pretrial investigation by state officials (the police and the prosecution service), with all evidence collected in a written dossier that also contains a record of all investigative steps taken and is sent to the court before trial. Judges are expected to examine the dossier as to its completeness, to check whether it shows that the investigation has been undertaken according to the law and to take an active investigative role during proceedings. The investigative role of the defence is secondary to that of the prosecution: defence lawyers do not undertake their own investigations nor present an alternative case in court. Rather, they are expected to alert the prosecution during pretrial investigation and the court at trial to any lacunae in the dossier or avenues of investigation that have been left unexplored.

It follows from these basic tenets that there is no separation of investigation and prosecution as in the adversarial process and that much trust is placed in the prosecutor to conduct or oversee an investigation that is impartial in the sense that both inculpatory and disculpatory evidence is considered and that the interests of the accused in a fair trial are respected. A prosecutor is therefore expected to adopt a quasi-judicial role, a magisterial stance that will allow him or her<sup>2</sup> to rise above any

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<sup>1</sup> Cf. *Merryman, A.*, *The Civil Law Tradition*, 2d ed., Stanford University Press, Stanford, CA, 1985. See for the classic description of the features of the inquisitorial process that distinguish it from the adversarial: *Damaska, M.*, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, Yale University Press, New Haven et al. 1986; and for the specific features of Dutch criminal procedure in relation to its legal cultural tradition: *Brants, C./Field, S.*, *Political Cultures and Procedural Traditions*, in: D. Nelken (ed.), *Contrasting Criminal Justice. Getting from here to there*, Ashgate, Aldershot 2000, pp. 77–107.

<sup>2</sup> For the sake of brevity, from now on I will use the masculine form to denote the prosecutor, although nowadays women are very much in evidence in the prosecution service. The same applies to judges, the courts, and suspects/offenders/defendants.

partisan notion that the defence is an adversary and the trial a contest to be won. As the prosecutor also directs and monitors the police who do the actual investigative work and holds the final responsibility for the legality of the investigation, the professional ethics of the magisterial prosecutorial role are also seen as applying to that of the police (albeit that the latter require prosecutorial and in the final event, through scrutiny of the dossier, judicial supervision).

It also follows that such a system leaves little room for plea bargaining, the default setting of the adversarial system when it comes to relieving the burden of the courts. It is the duty of prosecutors to investigate and bring to trial those suspected of breaking the law and of judges to find the substantive truth about those suspicions, i.e. to pronounce on guilt or innocence (although technically an acquittal is not a pronouncement on innocence, it merely means there is not enough evidence to come to a guilty verdict). It is not for the accused and the prosecution to agree on what that truth may be but for the court to find out. Of course, suspects in a Dutch trial may confess – and indeed, most do so – and a confession forms compelling evidence (although corroboration is always required), but the trial must still go ahead and the court must still examine the evidence.

Nevertheless, plea bargaining as a means of relieving the workload of the courts has often been discussed in the Netherlands. At the beginning of the 1990s, a government commission charged with a total revision of the Code of Criminal Procedure proposed introducing a simplified procedure for defendants who had confessed. Legal scholars, politicians, and legal practitioners, however, opposed the proposal on the grounds that this would essentially be introducing plea bargaining, a *corpus alienum* from adversary systems that would undermine the foundations of Dutch inquisitorial procedure.<sup>3</sup> Although at the same time the media were wont to reject what was perceived as ‘American stuff’, especially after several Dutch criminals were extradited to and convicted in the United States in what were regarded as unfair trials involving plea bargains, in the years that followed, the idea of plea bargaining remained an apparently attractive option as public and political pressure mounted to ‘do something’ about the overburdened justice system. In 2003 Parliament adopted a motion asking the government to look into the possibility of an amendment to the Code of Criminal Procedure, allowing the Public Prosecutor to propose to the defendant charged with a simple criminal offence a way of settling the case; the result, a joint proposal, would then be presented for scrutiny to the court in a public session and, if accepted, be incorporated into the verdict.<sup>4</sup> The government commissioned research into the pros and cons of plea bargaining in

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<sup>3</sup> Commissie Herijking Wetboek van Strafvordering (o.l.v. Ch. M.J.A. Moons), De herziening van het gerechtelijk vooronderzoek, Gouda Quint, Arnhem 1992. See on the Commission (so-called *Commissie Moons*) and the reactions to the plea bargaining proposal: Herijken van Strafvordering, Justitiële Verkenningen, vol. 19, issue 8, 1993, pp. 21–25.

<sup>4</sup> *Kamerstukken II* (Parliamentary Documents second Chamber), 2002/03, 28 600 VI. Nr. 127.

a Dutch setting<sup>5</sup> and eventually rejected the idea once again, opting instead for a well-trying solution: prosecutorial discretion.

## II. Prosecutorial discretion

As in all jurisdictions, Dutch criminal justice produces more cases than the courts can process so that it has to resort to out of court procedures to deal with the most frequently committed offences that form the bulk of all criminal cases. Although the legitimacy of criminal justice is premised on the notion that the state has an obligation to bring offenders to a public trial where impartial and independent judges are guided by a process surrounded by safeguards guaranteeing that both the truth will be found and that the trial will be fair, over time there has been a marked shift, away from the courts as the symbolic location where an accused is tried and justice is done and towards the prosecution service. Prosecutorial power has been considerably reinforced in other ways too.<sup>6</sup> Despite constitutional arrangements that place the imposition of penal sanctions exclusively in the hands of judges (art. 113 GW [Constitution for the Kingdom of the Netherlands]), out of court settlements between prosecutor and accused are part of a long tradition in the Netherlands. Such powers are embedded in the exclusive authority of the prosecutor not only to initiate a prosecution (monopoly principle) but also to decide whether the general interests of society require him to do so (the principle of expediency as opposed to the legality principle); this authority is justified by the quasi-judicial position of the impartial inquisitorial prosecutor.

Already under the Dutch Republic in the 17th and 18th centuries, the prosecutor had the power to demand payment from offenders in exchange for dropping the

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<sup>5</sup> Brants, C.H./Stapert, B., Plea bargaining, Report on behalf of the Minister of Justice, available at: <https://www.wodc.nl/onderzoeksdatabank/plea-bargaining.aspx> (accessed April 2018).

<sup>6</sup> Prior to a fairly recent change in the law (*Wet herziening gerechtelijk vooronderzoek*, *Stb.* 1999, 243 and *Stb.* 2004, 243) that coincided with a desire to strengthen the leading position of the public prosecutor with regard to the police in pretrial investigation, especially where the use of covert investigative methods is concerned, it was not unusual for the prosecutor to involve an investigating magistrate (*rechter-commissaris*) and request the opening of judicial pretrial investigation (*gerechtelijk vooronderzoek*). Indeed, he was obliged to do so if he wished to employ certain investigative powers, such as a house search. Originally, judicial pretrial investigation was conceived of as an extra guarantee that the investigation would be impartial, investigating magistrates being ordinary judges at the district court acting by rote in the role of judicial investigators. Since January 1 2013, judicial pretrial investigation no longer features in the Code of Criminal Procedure (*Wet van 1 december 2011 tot wijziging van het Wetboek van Strafvordering, het Wetboek van Strafrecht en enige andere wetten tot versterking van de positie van de rechter-commissaris*, *Stb.* 2011, 600). Although the investigating magistrate has retained a supervisory task in the pretrial investigation, his role has declined markedly in comparison to that of the prosecutor.

prosecution, a system known as *compositie* (composition). Abolished during the Napoleonic occupation of the Netherlands (1806–1813) as a recipe for corruption – prosecutors being dependent on such payments for their livelihood – composition re-emerged in a different guise in the 19th century after the French had left. Prosecutors, who by then had become career officials in the judiciary, were empowered to drop the prosecution conditionally (*voorwaardelijk sepot*). In 1926, a new Code of Criminal Procedure (still in force, though much amended) introduced the legal institute of *transactie* (transaction): this meant that the suspect could ‘buy off’ the prosecution by paying a sum of money in exchange for the prosecutor losing the right to prosecute.<sup>7</sup> Restricted to misdemeanours, transaction was subject to judicial scrutiny only if an interested party complained.<sup>8</sup>

Transaction is an alternative to trial, but it is not, strictly speaking, a form of diversion as the concept is generally understood, for example in the United Kingdom, as it does not divert away from criminal justice, but, in the hands of the prosecutor, is very much part of it.<sup>9</sup> Neither is transaction considered an act of prosecu-

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<sup>7</sup> See on the history of the role of the prosecution service in Dutch criminal procedure: Brants, C.H., *Legal Culture and Legal Transplants*, in: J.H.M. van Erp/L.P.W. van Vliet (eds.), *Netherlands Reports to the Eighteenth International Congress of Comparative Law*, Intersentia, Antwerp et al. 2010, pp. 1–192. And on the figure of *transactie* in particular: Corstens, G.J.M., *Transactie bij misdrijven*, in: P.C. Vegter (ed.), *Straffen in gerechtigheid. Opstellen over sancties en executie*, uitgegeven ter nagedachtenis aan prof. mr. W.H.A. Jonkers, Gouda Quint, Arnhem 1987, pp. 73–82.

<sup>8</sup> Because of the prosecutor’s monopoly of prosecution and the exclusively professional system of Dutch criminal procedure, there is little scope for participation by citizens, be they victims or otherwise. There is no lay-participation at trial – no jury or mixed tribunal – and there is, among most legal scholars and professionals what can only be described as a distinct aversion to the idea that the public should participate in any way in a criminal case, other than as defendants or witnesses. That also applies to decisions on (non) prosecution: victims or interested parties have no way of forcing the prosecution of an offender. Even cases that can only be prosecuted on complaint (such as libel) do not breach the monopoly principle: once received, the complaint in no way obliges the prosecutor to prosecute, it merely enables him to do so. The only way that the prosecutor’s decision not to prosecute can be reversed is through a so-called art. 12-complaint procedure. Art. 12 Sv (Code of Criminal Procedure) gives any person with a reasonable interest in prosecution the right to apply to the appeal court to have the prosecutor’s decision to either drop the case or to deal with it himself out of court overturned. A ‘person with a reasonable interest’ not only (obviously) includes the victim (or surviving relatives) but also legal persons such as corporations or interest groups (the latter if they can show a durable existence combined with a specific interest in the case). Under art. 12 Sv, the appeal court reviews the complete case, hears all concerned (including the defendant), and then takes the decision on whether prosecution should follow as if it were the prosecutor; i.e. the court must take all the interests involved into consideration and then decide, on the basis of the opportunity principle, whether prosecution is in the public interest. If it so decides, it may then order the prosecutor to prosecute. Whatever it decides (to order prosecution or to uphold the original decision) is open to appeal to the Supreme Court on points of law (cassation). Art. 12 Sv applies to all decisions not to prosecute, including conditional waivers and transaction.

<sup>9</sup> Such sanctions are somewhat akin to fiscal fines in Scotland, but much wider in scope; they also resemble (*polizeiliche*) *Strafverfügung* in Austria and Germany (now defunct in both countries).

tion or the sum involved a penal sanction. Formally, transaction is a figure of civil law, a contract with the prosecutor whereby the offender waives the right to a public trial before a court and the prosecutor waives the right to prosecute; the money is therefore not regarded as a fine but as a contractual condition. It is for the prosecutor to decide to offer transaction in lieu of prosecution, after impartially weighing the interests involved. In a substantive sense, however, the condition of payment is a criminal sanction, being punitive and deterrent in nature and aim,<sup>10</sup> and is certainly regarded as such by those offenders who enter into a transaction with the prosecutor.

In 1951, transaction was extended to serious crimes of a socio-economic nature. In the mild and tolerant Dutch penal climate of the 1960s and 70s,<sup>11</sup> criminal law, and in particular prison sentences, were increasingly regarded as a last option (*ultimum remedium*), to be applied only if all else had failed, and in this climate the principle of expediency was reinterpreted from 'prosecution unless the public interest requires otherwise' to 'no prosecution, unless the public interest so requires'.<sup>12</sup> In 1983, transaction was once again extended, now beyond misdemeanours to include crimes under the Criminal Code (felonies) carrying a maximum sentence of not more than six years (this ruled out offences such as murder, but included, e.g. theft, burglary, and assault). The preparatory legislative committee was clearly influenced by the ideology of the Sixties and Seventies in its desire to reduce prison sentences and especially in stressing that transaction would spare a suspect the painful public stigma of standing trial.<sup>13</sup> It mentioned in passing that this would also save time and money. Within a few years, the primary goal became to streamline criminal justice by using transaction to lighten the case load of the courts, while giving the prosecutor, whose only other option would have been to drop the case, a means of sanctioning unsocial behaviour.

While this arrangement gives the individual prosecutor a great deal of leeway, subject only to the very generally worded considerations of public interest, he is not entirely free in the way he uses this discretionary power. Public prosecutors in the Netherlands are not only quasi-judicial figures but the prosecution service to which they belong is also very much part of the executive civil service, answerable in the final event to the minister of justice and greatly involved in shaping criminal policy. This has resulted in an elaborate system of internal policy directives (*Aanwijzingen* issued by the heads of the prosecution service, the so-called council

<sup>10</sup> See ECtHR *Öztürk vs. Germany*, App. no. 8544/79.

<sup>11</sup> Cf. Downes, D., *Contrasts in Tolerance: Post-war Penal Policy in the Netherlands and England and Wales*, Oxford University Press, Oxford et al. 1993.

<sup>12</sup> Simmelink, J.B.H.M., *Rondom de vervolgingsbeslissing*, in: M.S. Groenhuijsen/G. Knigge (eds.), *Afronding en verantwoording, eindrapport Strafvordering 2001*, Kluwer, Deventer 2004, pp. 189–242.

<sup>13</sup> *Eindrapport van de Commissie-Vermogensstraffen: commissie, ingesteld bij besluit van de Minister van Justitie van 9 mei 1966*, Stafafdeling Wetgeving Publiekrecht no 178/666, 's-Gravenhage: Staatsuitgeverij, 1972.

of procurators general – *procureurs-generaal* in Dutch). For many sorts of crime, these stipulate that the prosecutor must, or must not, prosecute under certain circumstances. A defendant may invoke them in court if he considers he has been prosecuted in violation of a specific directive, and the court will dismiss the case unless the prosecutor can show why, despite the directive, special circumstances warranted prosecution.<sup>14</sup> Conversely, if the prosecutor does not prosecute while a directive stipulates that he should, this could play a part if a victim or other interested party should attempt to compel prosecution through an art. 12 Sv (Code of Criminal Procedure) procedure.<sup>15</sup>

Despite the existence of directives, in theory a prosecutor's decision is always taken after a judicial weighing of interests in individual cases on whether to take a case to the full-blown trial phase or not. Since the scope of transaction was broadened, there has been a policy that it must be used instead of simply dropping the case. While penal policy in the 1970s combined with the new interpretation of the expediency principle dictated that dropping the case was the preferable option, in 1985 a government policy document stated that the number of unconditional waivers of prosecution should be reduced by 50% and replaced by transactions.<sup>16</sup> By then, transaction was well-established as a conditional waiver of prosecution with mutual rights and obligations: the prosecutor waiving his right to prosecute, saving time and trouble, and the suspect waiving his right to a fair and public trial before an independent and impartial tribunal, saving himself public humiliation. Seen as a contract, Dutch legal theory has it that transaction thus meets the criteria of the European Court of Human Rights (ECtHR) that conditional waivers of the right to a public trial before an independent tribunal require informed consent and are not 'tainted by constraint'.<sup>17</sup> There is also a notion of judicial control of the prosecutor's decision residing in the consent of the suspect, who need not accept the prosecutor's offer of transaction, whereupon the case will be brought before a court.<sup>18</sup>

Transaction is a specific form of conditional waiver of prosecution. The same applies to community service orders, which may be imposed by the courts but also offered to the suspect by the prosecutor as an alternative to prosecution during a special session with prosecutor and suspect (so-called TOM-session). This is regarded as a special form of transaction and, again, as a contract. As the website of the prosecution service puts it: 'At a TOM-session, the court does not impose a penalty, but the prosecutor offers a penalty. If the suspect does not accept the offer,

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<sup>14</sup> See decisions by the Dutch Supreme Court (*Hoge Raad*): HR 19.06.1990, NJ 1991, 119; also HR 22.02.2000, NJ 2000, 557.

<sup>15</sup> See n. 8 *supra*.

<sup>16</sup> *Kamerstukken II*, 1984/85, 18 995, pp. 44–45.

<sup>17</sup> ECtHR *De Weer vs. Belgium*, 27 February 1980, App. no. 6903/75.

<sup>18</sup> See *van Kalnouthout, A.M./Groenhuijsen, M.*, *De wet vermogenssancties en de kwaliteit van de rechtsbedeling*, *Delikt en delinkwent*, vol. 13, issue 1, 1983, 8–31 (at 13).



he or she will be summoned to appear before the court.’<sup>19</sup> In Parliament, the minister also insisted that the aim of these prosecutorial powers is to prevent prosecution and judgment by the court.<sup>20</sup> The principle of *ne bis in idem* applies not only to prosecutions but also to conditional waivers and will prevent further prosecution as soon as the agreement has been reached and the conditions fulfilled.

### III. Not ‘real’ punishment

We have seen that the aim of conditional waivers, including transaction and community service orders, changed over the decades in a form of mission creep. While their advantages of avoiding the *social* costs of prosecution for the accused and his/her family (stigma and humiliation, criminal record) and for society (criminal prosecution is an expensive, conflict-laden, and not very effective way of solving social conflict) have never been denied, the main aims gradually became to reduce the *financial* costs of prosecution and to relieve the caseload of the courts. Yet, by the new millennium it had become clear that the courts were still seriously overburdened. Moreover, public fear of crime and political demands for more severe criminal justice led to a rethinking of the system of out of court settlement by the prosecutor. The perceived problems involved notions that it was not ‘real punishment’, that it ‘let the offender off’, and that it was invisible to the public at large. In this, the government was responding to public opinion and media pressure in a changing penal climate. As in most western countries, from the 1980s onwards, the social climate was governed by fear of crime, punitive sentiments, and concern for victims, with the media stressing rising crime rates and violence and, in the name of the public at large and victims in particular, berating courts for being too lenient. This had a profound effect on the traditional notion that criminal prosecution should be the solution of last resort to crime.<sup>21</sup> There were also financial considerations: non-payment of transactions by the offender was rife and could only be solved by the prosecutor prosecuting the case in court, so that the system was becoming self-defeating.

In 2008, the latest alternative to trials came into force, empowering the prosecutor (and for some lesser crimes, the police) to impose what is known in Dutch as prosecutorial penal orders for the same offences as were eligible for transaction, i.e. offences carrying a maximum penalty of not more than six years (art. 257a WvS [Criminal Code]). The penalty imposed by prosecutorial order can be a fine or a community service order, a withdrawal of a driving license, or the destruction of

<sup>19</sup> <https://www.om.nl/onderwerpen/begrippenlijst/?BegripLtr=t> (accessed April 2018).

<sup>20</sup> *Kamerstukken II*, 1979/80, 16 162, no. 8, p. 8.

<sup>21</sup> See on the changes in Dutch penal policy: *Pakes, F.*, Penalisation and retreat: the changing face of Dutch criminal justice, *The Howard Journal of Criminal Justice*, vol. 5, issue 2, 2005, 145–161.

confiscated goods. Conditions (in the form of additional instructions) may also include reparation of damages. The main difference between a prosecutorial penal order and a transaction is that such orders are not the result of any contractual relationship between prosecutor and offender but flow from the establishment of guilt by the prosecutor, which is why they are the same as any punishment imposed by a court. They are directly enforceable without court intervention (thereby relieving the prosecution of the burden of prosecution in case of non-payment), and the suspect has recourse to a judge only if he or she appeals the prosecutor's decision within two weeks. In that case, the order becomes void and the court will look into the case as into any other brought before it. Thus, the court does not examine the legality or any other aspect of the order itself, or of the prosecutor's actions in bringing it.

The Explanatory Memorandum to the Bill on penal orders explains the difference between these and transaction as follows:

The new prosecutorial penal order is an adaptation of the legal basis for dealing with offences out of court. The legal construction of transaction implies that the offence is not 'punished'. Indeed, the whole idea is that if transaction conditions are met, prosecution and punishment become impossible. ... The penal order is different. It does not aim to prevent prosecution but is a form in which the prosecutor can prosecute the case and punish the offender. Indeed, the prosecutorial order is based on an establishment of guilt. That means that no order may be issued if it cannot be established that the suspect committed the crime or if it can be assumed that he has recourse to a defence. This implies that a prosecutorial penal order is more akin to a judicial sentence.<sup>22</sup>

Moreover, art. 78b Sr determines that 'where the Criminal Code refers to "conviction", this includes the prosecutorial penal order'. As a result, such orders bring with them a criminal record.

Even before penal orders were introduced, there was much criticism of the proposal, ranging from the constitutional (only a judge can impose punishment; trials are public and criminal process transparent), to art. 6 ECHR-issues (the right to have one's case heard in public by an independent judge; the right to know the evidence; the right to legal assistance) and to specific safeguards built into Dutch procedure (monitoring and supervision of prosecution and police by the courts). Recent research commissioned by the procurator-general at the Dutch Supreme Court has shown that prosecutorial orders are indeed far from unproblematic.<sup>23</sup>

The situation is compounded by new institutional arrangements which have partly centralized and computerized much work done by the police and prosecution service. Since 1989, most common traffic offences have been removed from the

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<sup>22</sup> *Kamerstukken II*, 2004–2005, 29 849, no. 3.

<sup>23</sup> The two reports on this research can be found at: <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Documents/Rapport%20Besluit%20en%20Gewogen.pdf> (accessed April 2018); and <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Over-de-Hoge-Raad/Publicaties/Rapporten%20en%20adviezen/HR-Rapport-Beproefd-Verzet.pdf> (accessed April 2018).

Criminal Code, and (appeals against) traffic fines and many prosecutorial penal orders are handled by a centralized organ, the CVOM (*Centrale Verwerking Openbaar Ministerie*) – now a division of the prosecution service. With regard to penalties – whether demanded in court or imposed by penal order – prosecutors are bound by centralized digital instructions emanating from the procurators-general, while all prosecutorial penal orders must conform to the framework set out in a directive.<sup>24</sup> A centralized organ, the CJIB (*Centraal Justitieel Incassobureau*), is charged with the execution and collection of financial penalties, including those imposed by the prosecutor. Moreover, although the criminal justice system rests to a great extent on the concept of the quasi-judicial prosecutor, it is commonplace to mandate all prosecution decisions to clerks or entire divisions of legally unqualified personnel. In such cases, decisions to prosecute, to waive prosecution, to offer transactions, community service orders, or any other conditions, or to issue penal orders are essentially taken by an administrative staff operating a computer programmed to take certain facts of the case into account and to come up with a solution that meets the requirements of directives. The police also have a mandate to take decisions that, formally speaking, are the prerogative of the prosecutor, including, since 2011, the imposition of penal orders for misdemeanours.

Despite centralization and computerization, in effect, efficiency measures, the administrative burden on the police is heavy and the time it takes to process a case in the prosecution service is long. For that reason and to improve public confidence in criminal justice, the government undertook in 2010 a ‘reshaping of the “chain of criminal enforcement”’, aimed at permanently improving and speeding up the process, from the police to the courts. Part of this reshaping has been the introduction of ZSM (which in Dutch stands for *Zo Selectief, Snel, Simpel, Slim, Samen Mogelijk*: Selectively, Quickly, Simply, Cleverly as Possible Together). Prosecutors, police, probation, and child protection officers work together out of a police station (or another location, a recent addition being the so-called ‘security houses’ in the towns) to deal with offenders brought in by the police. The aim is to give all arrestees the prosecutor’s decision on release and to complete cases by holding a person for questioning within six hours’ time. Almost all simple criminal cases are now processed this way, and the idea is that most should end with a prosecutorial penal order and not be dropped or turned into court case (in fact, originally, an imposed fine could be settled immediately by electronic payment).

#### IV. How effective?

The legislature had high expectations of the prosecutorial penal order in general and in particular that it would reduce the workload of the courts while not increas-

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<sup>24</sup> <https://www.om.nl/organisatie/beleidsregels/overzicht-0/index/@88217/aanwijzing-kader-0/> (accessed April 2018).

ing that of the prosecution service. Any extra work involved in dealing with appeals against a penal order would be easily offset by the reduced number of cases the prosecution would be taking to court. The expected reduction was 21,000 cases at the district courts and 44,000 cases at the cantonal courts (which handle the very simple cases). Although penal orders are directly enforceable, it is of course always possible that the suspect does not appeal but also does not pay or comply with another aspect of the order. In that case, the CJIB may attempt to collect the penalty with the aid of a bailiff armed with a writ of execution. If this doesn't work, the prosecutor may ask a cantonal court to imprison the offender until the fine is paid (but not if it is known that the offender simply cannot pay). In the final event, the prosecutor may bring the case before a court and prosecute, and demand a more severe or different penalty than originally imposed by order. The latter option is not open if the case comes before a court on appeal by the offender, unless the appeal was made to slow the case down or for some other vexatious reason, and/or the offender cannot state the grounds for the appeal.

Gradually, the prosecutorial penal decision was to replace transaction (which has remained on the statute books) with a view to increasing the efficiency of criminal justice by keeping cases away from the courts and yet making sure that offenders were punished. The question is whether this operation has been successful. Research has shown that the prosecutorial penal order substantially reduced the number of transactions, but at the same time the total number of cases in which either transaction was offered or a penal order imposed dropped in the case of felonies but not with regard to misdemeanours.<sup>25</sup> Enforcement of penal orders proved easier than enforcing agreed transactions, at least in the beginning until 2012. In 2015, however, the percentage of paid transactions and penal orders was 50–60% lower than that of paid transactions in 2008 when penal orders were introduced. The number of appeals against penal orders is rising (in 2015: 23% for misdemeanours and 15% for felonies), as is the number of non-enforced penal orders (51% and 33% respectively). The courts imposed a penalty in 70% of appeal cases; the percentage rises to 80 if penal orders have not been obeyed for other reasons than non-payment. That means the court rejected about 25% of penal orders it has judged in appeal. At the same time, penalties imposed by the appeal court are likely to be (much) less severe than the original penal order. In cases that are taken to court – only if the offender has not appealed but also not obeyed the penal order – it is not unusual for courts to impose conditional rather than unconditional penalties, so that simply not paying up after a penal order has been imposed and waiting for prosecution would seem to have a more favourable outcome for defendants.

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<sup>25</sup> The following figures are taken from: *van Tulder, F./Meijer, R./Kalidien, S., Van schikking naar strafbeschikking?: Een eerste balans*, Nederlands Juristenblad, vol. 6, 2017, pp. 383–392.

All in all, *Van Tulder et al.* conclude that the enforcement of penal orders does not seem to be more successful than the enforcement of transactions. But this has come at the cost of an increased workload. Courts are regularly asked to consider penal order cases on appeal and their number has risen rather than decreased as had been expected. The authors point to the problems highlighted in research commissioned by the procurator-general at the Supreme Court,<sup>26</sup> which found the legal quality and practice of penal orders sadly lacking. As a result, the prosecution service has introduced a number of measures of improvement – better development of the dossier, better information for the suspect and the victim, better determination of guilt and, prior to any direct payment, legal assistance. All of this is likely to increase the workload of the prosecutor. ‘If penal orders lead to more work for the prosecution and not to less work for the courts, it must be concluded that increasing the effectiveness of (out of court) criminal justice – the most important goal for the legislature – has not been attained yet.’<sup>27</sup> At the same time, government expectations that there would be fewer cases of appeals against penal orders than would otherwise have been prosecuted because of non-payment of transactions have been realized and appeals have remained at less than 25%.<sup>28</sup>

## V. How fair?

With the introduction of prosecutorial penal orders and the arguments used to justify them, it appears that the Dutch government, faced with waning public confidence in criminal justice was putting effectiveness before all other considerations; what was needed, so the argument went, was a more efficient criminal justice system to alleviate fear of crime, to pacify victims’ groups and the media by providing the means of swift and effective punishment, and to shore up the legitimacy of the system. This is the ratio of both penal orders and the ZSM-procedure. However, legitimacy depends on more than just effectiveness. All concerned also need to know that justice has actually been done: that ‘the truth’ arrived at in a criminal case can be assumed to be the truth because it was reached in a fair manner with regard to all the due process safeguards that surround legal truth finding, and that the penalty was imposed with due regard for all the circumstances of the case. Efficiency and effectiveness do not seem to be the hallmarks of prosecutorial penal sanctions in the Netherlands, but how do they stand up in the light of fairness?

Regardless of theoretical dogmas that insist that transaction – indeed any conditional waiver of prosecution – is a contract entered into willingly and knowingly, there have always been concerns about out of court settlements by the prosecutor,

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<sup>26</sup> See n. 23 *supra*.

<sup>27</sup> *Van Tulder, F./Meijer, R./Kalidien, S.*, op. cit. (n. 25), p. 392.

<sup>28</sup> Research report *Beproeft verzet*, see note 23 *supra*.

most importantly regarding the possibility that decisions by an offender to settle are in some way 'tainted by constraint'. How could it be otherwise, when settlement provides a means of avoiding the stressful and sometimes frightening prospect of standing trial, especially if the offender is suddenly confronted by the prosecutor (or the police, or someone mandated by the prosecutor) waving a piece of paper to be signed,<sup>29</sup> or if, as is more usual, a letter from the prosecution service arrives a few weeks or months after one has been arrested proposing that the prosecution be dropped in return for a transaction sum? In any event, in order to induce the suspect to agree, the transaction-proposal is always less than the maximum fine allowed but is accompanied by the warning that, should the prosecutor bring the case before a court, he will then ask for a much higher penalty.

Although the law stipulates that the prosecutor may not refuse when the suspect offers to pay the maximum fine if the offence is punishable by a fine only, and also offers to fulfil any other conditions the prosecutor may wish to impose, thereby implying agreed consent, in practice, transaction is very much a matter of 'take it or leave it'. There is, however, one category of offenders who are in a position to negotiate and it is here, in the field of white collar and corporate crime, that we find what amounts to plea and sanction/sentence bargaining in Dutch procedure. Finding enough evidence for a conviction, however, has proved considerably more difficult than taking corporations and their executives to court. Such crimes will usually fall within the category for which transaction is allowed, but there is little 'take it or leave it' in these cases. The defendants are often as powerful as the prosecution, for they can engage specialized – and expensive – legal counsel, as well versed in the legal ins and outs of fraud as any prosecutor. Increasingly, such lawyers are becoming specialized in bargaining techniques too, skills not normally needed in the Dutch inquisitorial setting and that many 'ordinary' criminal lawyers lack. Moreover, the difficulties of proof mean that such cases require a great amount of time and manpower on the part of the prosecution, with no certainty of conviction – indeed, they have very often resulted in (partial) acquittals.

These are cases that attract a great deal of publicity once they reach the court stage. Corporate criminals are keen to avoid negative publicity, both for themselves and for their business, and would rather not stand on their right to a public hearing and an impartial tribunal. They are also prepared to pay to stay out of court, sometimes regardless of whether or not they consider themselves guilty, or indeed are guilty; however, the very fact that they may have a chance of successfully contesting the case gives them a powerful means of persuading the prosecutor to be flexible. Prosecutors, if they fail to win the case, will find their shortcomings splashed across the front pages of the national press, will have wasted an enormous amount of time, and will have lost face within the prosecution service – not a good thing for a career civil servant. Both sides therefore have much to lose by letting a case

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<sup>29</sup> *Corstens, G.*, *Het Nederlands strafprocesrecht*, Kluwer, Deventer 2008, p. 825.

go to court. In these cases, negotiations about the transaction sum, about the confiscation of illegal assets, about the charge (with the defendants agreeing not to contest a lesser charge if others are dropped, or agreeing to part transaction, part minor charge) are not at all unusual. The frequency of such deals was unknown for a long time, for transaction is not subject to any public judicial scrutiny and takes place behind closed doors. The fact that they occurred, however, was public knowledge, and the remit of many an investigative journalist.

These cases have always been regarded as inherently unfair because such bargaining opportunities are obviously not open to everyone, and each new scandal in the press was a blow to the legitimacy of criminal justice, the more so because there was always something of the backroom deal about each case. For that reason, the procurators-general issued a directive, ordering prosecutors to make public all deals involving large sums.<sup>30</sup> Since then lists have been available for public and media scrutiny. Prosecutorial penal orders do not allow for bargaining; and, while the (perhaps rather naïvely benevolent) idea behind them is that offenders will pay because they will agree with the sanction imposed, a penal order with its direct enforcement is not a 'take it or leave it' affair. Indeed, in this regard critical questions have been asked of the penal order practice: how voluntary is compliance with the order if the suspect without the presence of a lawyer paid immediately after receiving the order? As a result of this criticism, the opportunity for direct payment was stopped as of 1 October 2015.<sup>31</sup> However, it is still assumed that the prosecutor will have looked into the matter of the suspect's guilt and into all the circumstances of the case, and that the resulting order is a just punishment *imposed*, not a condition 'offered'.<sup>32</sup> The justification for this assumption is the prosecutor's assumed quasi-judicial stance and professional ethics, and it is upon this that all the other rules concerning penal orders are based.

The question is whether a prosecutor or any other functionary issuing penal orders will indeed have looked into the case as much as necessary in order to establish guilt and come to a fitting and carefully thought out penalty. Given that courts do not examine or pronounce upon the legality of penal orders, there is no judicial scrutiny of the prosecutor's decision. This was the subject of the first round of the research commissioned by the procurator-general at the Supreme Court.<sup>33</sup> It found a percentage of 8% of cases (one in thirteen) in which, based on the dossier and the facts available to the prosecutor (or other deciding agency) at the time, proof of

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<sup>30</sup> *Aanwijzing hoge transacties en transacties in bijzondere zaken*, 22.01.2002, Stcrt. 2002, 39.

<sup>31</sup> Aangepaste werkwijze ZSM en rechtsbijstand, 19 October 2015, [www.om.nl](http://www.om.nl).

<sup>32</sup> This is the gist of the latest directive concerning penal orders: *Aanwijzing OM-strafbeschikking (2017A005)*.

<sup>33</sup> The report, *Beschikt en gewogen*, can be found at <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Documents/Rapport%20Beschikt%20en%20Gewogen.pdf> (accessed April 2018).

guilt was decidedly insufficient. 'The results of this research may therefore be taken as a serious indication that in practice the degree of thoroughness and due care by means of which guilt should be established, is not being attained ... It means that in a large number of cases, legal guarantees that directly affect the (reliability) of the evidence, were lacking.'<sup>34</sup> It also found that most of the penal orders issued by CVOM did not derive from a functionary empowered to issue such orders and that there was therefore a substantial body of cases of which it could not be said that guilt had been established by a due authority. In most of these cases, the order had been issued anonymously, i.e. not signed, and such orders were simply sent on and enforced by CJIB.

Obviously, the centralization and computerization of criminal justice has compounded the weaknesses inherent in the regulation of penal orders, as has the introduction of ZSM. Offences for which directives have established fixed tariffs are all dealt with by CVOM, in which case the computer simply produces a penal order and sends it off via CJIB. There is no guarantee that anyone with discretionary competences or authority has actually looked at the case. The researchers conclude that while in many instances a penal order should never have been issued, this is probably the result of insufficient awareness of the difference between a penal order and transaction. ZSM triggers different problems. Here, a prosecutor will examine the case, but at a very early stage so that there will not be a complete police dossier to support it. It is not necessary that the offender be heard in person or even by telephone in every case, but it is mandatory if the offender is a minor, the sanction is to be loss of a driving license or a financial penalty of more than €2,000, in which case the offender must also have legal assistance (if he has no lawyer, the directive suggests that the case should be taken to court). Because ZSM is geared towards increasing the celerity of criminal proceedings, the most likely outcome will be transaction or penal order (the latter being the preferred option). However, because of the short time involved, an offender will have very little opportunity to think the options over. Indeed, lawyers have voiced many complaints that offenders are being pressured into either accepting a transaction or paying an order up front. The latter is problematic because it implies a waiver of the right to appeal and is also considered an admission of guilt (leading to a criminal record). Some lawyers maintain that penal orders are imposed even if a presumed offender has denied guilt and that many are accepted by the offender 'just to be rid of the hassle'.<sup>35</sup> Others warn (potential) clients never to accept before they have been able to speak to a lawyer but point at the same time to the police practice of persuading suspects that asking for a lawyer will hold up proceedings and cost a lot of money, and to the lawyer's difficulty of judging the case because of incomplete dossiers. In any

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<sup>34</sup> Ibid.

<sup>35</sup> De Vries, W., weblog: De verschrikking van de strafbeschikking, 14 February 2014, <https://blog.jaeger.nl/nl/de-verschrikking-van-de-strafbeschikking> (accessed April 2018).



event, in the words of one lawyer, if you let the case come to court, the penalty will always be less severe.<sup>36</sup> Such observations indicate that the practice of penal orders and ZSM in such truncated procedures as ZSM may well contravene art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as the suspect is pressured into waiving an essential right, namely to have his case heard by an independent court. Whatever the Dutch prosecutor is and however quasi-judicial his attitude, he is not an independent judge.

## VI. Conclusions

Until well into the 1980s, the Dutch enjoyed the reputation of having one of the mildest penal climates and lowest rates of incarceration in the world. This state of affairs stands in direct relation to the way in which prosecutorial discretion was used to ensure a pragmatic criminal policy of regulation through non-prosecution. Indeed, it was the stated policy of the prosecution service to increase the number of criminal cases in which no action was taken at all: prosecutors were encouraged to drop cases if at all possible, and to reserve the weight and social cost of any criminal sanction for the most serious only. The public interest in prosecution was then seen as easily outweighed by other factors, among other things that prosecution and punishment were unlikely to lead to rehabilitation and that a tolerant society should be measured by the way in which it managed to avoid what was regarded as the socially and individually damaging solution of criminal law.

When the possibility of transaction for felonies was introduced in 1986, it was still very much with this idea in mind. However, the tide was already turning, with prosecutors being urged to use transaction (rather than unconditional waivers) in order to streamline the criminal process but not let crime go unpunished, and an increasing number of prosecutorial directives setting out rules about which cases were eligible and what the transaction sum should be. Efficiency arguments were beginning to take precedence over traditional ideological notions that criminal law should be used as a last resort only. Moreover, the development of a coherent policy of what has been called regulated tolerance through the use of non-prosecution and transaction put the emphasis less on tolerance than on regulation, although not necessarily through using the full weight of the criminal law.<sup>37</sup> By the middle of the 1990s, however, public and political debate on crime and criminal law had become dominated by the perceived need not only for less tolerance but also for greater punitive regulation.

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<sup>36</sup> *Vlug, J.*, weblog, Ga nooit akkoord met een strafbeschikking, <http://janvlug.com/ga-nooit-akkoord-met-een-strafb> (accessed April 2018).

<sup>37</sup> *Brants, C.H.*, The fine art of regulated tolerance. Prostitution in Amsterdam, *Law and Society*, vol. 25, issue 4, 1998, 621–635.

The Netherlands did not escape the general trend in Western Europe towards tougher crime control and harsher sentencing in the wake of growing (and media-fueled) feelings of insecurity in society and/or rising levels of crime (any causal relationship is not necessarily present, simply assumed by public and politicians). An insecure public makes for lack of confidence in criminal justice, but visible crime control through criminal trials and punishment had become less and less the norm. Although the prosecution service stepped up the number of prosecutions and sentencing became harsher in the courts, this resulted primarily in overburdening the courts and the prison system. However, the traditional means of relieving that burden – transaction and other conditional waivers – were no longer considered a real option; indeed, they were seen as one of the causes of declining public confidence in criminal justice, because they are invisible and give neither offenders nor society the feeling that ‘real’ punishment has been meted out. For some time, politicians had been pushing for other solutions that would provide a coherent security policy, reinforce waning confidence in the criminal justice system, and at the same time reduce the overload of cases facing the courts.<sup>38</sup>

One such solution has been the latest alternative to court trials, prosecutorial penal orders, combined with a new procedure designed to produce swift, if not immediate, justice: ZSM. This has perhaps brought the system of Dutch justice full circle, with the prosecutor now taking the place of the inquisitorial investigating court; or rather, as in old inquisitorial procedure, the two figures have merged.<sup>39</sup> We may question whether this state of affairs is likely to address the problems of a modern criminal justice system and produce the desired outcome of greater public confidence and legitimacy.

In the case of ZSM, penal orders, computerization, and centralization, all projects to enhance the legitimacy and credibility of Dutch criminal justice, the swift disposal of criminal cases has become a goal in itself. It is said to promote effective and credible criminal justice, faith in the authorities who dispense it, and also to have a deterrent effect, although this has never been demonstrated and is merely assumed.<sup>40</sup> The efficiency of penal orders can certainly not be taken for granted after the severe criticism voiced in the research outlined above. Moreover, the desire for swift action seems to have led to a decrease in the guarantees provided by

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<sup>38</sup> See *Pakes, F.*, The Politicis of Discontent. The Emergence of a New Criminal Discourse in the Netherlands, *Howard Journal*, vol. 43, issue 3, 2004, pp. 284–298.

<sup>39</sup> For this reason, it has been suggested that the investigating judge, a member of the independent judiciary, would be a better choice than the prosecutor to execute out of court procedures such as the imposition of penal orders, see *Mevis, P.A.M.*, Niet bij snelheid alleen: hoe snelrecht een toegevoegde waarde kan krijgen, in: *Snelrecht: Hoe sneller, hoe beter?*, Openbaar Ministerie, s.l., 2010, pp. 39–49.

<sup>40</sup> *Bruinsma, G.J.N.*, Snel straffen vanuit criminologisch perspectief: een paradox in de strafrechtspraktijk, in: *Snelrecht: Hoe sneller hoe beter?*, Openbaar Ministerie, s.l., 2010, p. 13; see also *Thoone, M.L.W.*, Project ZSM en de beginselen van behoorlijk proces, thesis Tilburg University, available at <http://arno.uvt.nl/show.cgi?fid=129593> (accessed April 2018).

Dutch criminal process, which are meant to ensure that the guilty – and only the guilty – will be punished by imposing fair and fitting penalties. Researchers have found that in many cases the police do not always establish the identity of the suspect according to the law and that in ZSM procedures in more than half of all cases the guilt of a presumed offender is established based on anonymous police reports or verbal information provided by police officers, neither of which are legally acceptable as evidence in a court of law. This contravenes not only Dutch criminal procedure but also art. 6 ECHR, which gives every defendant the right to know and contest the evidence brought against him; moreover, the obligation to hear the offender that derives from that right is not always mandatory if penal orders are imposed, and even when it is, e.g. if the suspect is a minor, it is not always observed.

While the government has insisted that the right to appeal a penal order and have the case heard by a court is compliant with art. 6(1) ECHR and some authors agree that a procedure designed to keep offenders away from the courts is perfectly legitimate,<sup>41</sup> the way in which appeals operate demonstrates that this cannot be taken for granted. Although a voluntary waiver of the right to appeal must be made in writing with the assistance of a lawyer, voluntary compliance with a penal order implies that the suspect has, at the same time, waived the right to appeal. Both possibilities are laid out in art. 257e, sub 1 of the Code of Criminal Procedure, with the possibility of a voluntary waiver in writing almost as an afterthought. The very celerity of a ZSM procedure also means that suspects have very little time to consider their course of action even if they are properly informed about the consequences of compliance with a penal order (loss of the right of appeal, a legal presumption of guilt leading to a criminal record); and, given that the order is issued at an early stage in the investigation when there has not yet been time to compile a complete dossier of evidence, they will have no means of knowing what evidence is being brought against them. The pressure to comply is no different from that in other out of court settlements, but in cases of transaction or conditional waivers of prosecution settled outside of the ZSM procedure, the suspect has the opportunity to inform himself of the consequences – which are in any event less severe than those of a penal order. It has also been pointed out that such out of court settlements require that any damages be established, but the early stages in which ZSM procedures take place make it very difficult to take more than an educated guess. If, at a later stage, the damage turns out to be much greater or if there are more victims than originally assumed, reparation is no longer possible in a criminal justice setting.<sup>42</sup> ZSM restricts all of these possibilities, and suspect and victim(s) alike simply have to trust the prosecutor.

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<sup>41</sup> *Groenhuijsen, M.S./Simmelink, J.B.H.M.*, Het wetsvoorstel OM-afdoening op het grensvlak van juridische techniek en strafprocessuele uitgangspunten, in: A.H.E.C. Jordaans et al. (eds.), *Praktisch Strafrecht. Liber Amicorum J.M. Reijntjes*, Wolf Legal Publishers, Nijmegen, 2005, pp. 171–196 (at pp. 187–188).

<sup>42</sup> *Thoone, M.L.W.*, op. cit. (n. 40).

Trust in the professional ethics of the quasi-judicial prosecutor has always been the fallback position in Dutch criminal justice, from the justification of the extension of his authority in pretrial procedure over and above that of the investigating magistrate to the current position in which his powers of punishment almost equal those of the independent judiciary. Whatever we may think of the assumption that Dutch prosecutors are neutral and quasi-judicial, these values are under a great deal of pressure if they are enlisted to fulfil capacity and efficiency considerations. Moreover, the possibilities of computerization and the mandating of prosecutorial powers to other agencies and functionaries mean that assumedly quasi-judicial decisions are produced automatically by computers operated by unauthorized functionaries, often with no legal training, a situation hardly conducive to increased confidence in and legitimacy of the criminal justice system, however quickly such decisions are taken.

### **List of abbreviations**

CJIB	Centraal Justitieel Incassobureau (Central Judicial Collection Agency)
CVOM	Centrale Verwerking Openbaar Ministerie (Central Processing, Public Prosecution Service)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GW	Grondwet voor het Koninkrijk der Nederlanden (Constitution for the Kingdom of the Netherlands)
Sv	Wetboek van Strafvordering (Dutch Code of Criminal Procedure)
WSr	Wetboek van Strafrecht (Dutch Criminal Code)
ZSM	Zo Selectief, Snel, Simpel, Slim, Samen Mogelijk (Selectively, Quickly, Simply, Cleverly as Possible Together)

## **Crime-Fighting and Prevention as Competing Approaches to Collective Juvenile Violence – A Comparative Study of the United States and France**

*Thierry Delpuech and Jacqueline Ross\**

In 1999, a *Newsweek* article touted the success of Chicago's federal prosecutors in bringing down the leadership of the Gangster Disciples in Chicago. The article was titled 'Winning a Gang War', and it reported that federal prosecutors had

put away 80 of the gang nation's top operatives ... By early November, the Justice Department is expected to indict a new crop of about 20 GD's, and prosecutors promise still more indictments. [The lead prosecutor] is the first to admit that remnants of the GDs are still selling drugs. But the group's death grip on black neighborhoods is much looser. 'There used to be lawlessness on those streets,' [a Chicago gang investigator] says. 'It's just not like that anymore.'<sup>1</sup>

Given the tsunami of gang-related violence that has engulfed Chicago in the years since then, and in the last twelve years in particular, that article could not be written today about Chicago. Few commentators today would equate successful prosecutions with 'winning' a 'war' against gangs. This does not mean that Chicago's police and prosecutors have stopped building criminal cases against gang leaders drawn from lists of 'top 10' or 'top 20' offenders. But in the last twelve years, they have subordinated complex criminal prosecutions of gang members to ongoing efforts to interrupt escalating cycles of gang-related violence and retribution. These bear some striking similarities to the efforts of the French police to reduce collective juvenile violence, including retaliatory shootings by rival drug trafficking empires and fights between fans of rival soccer clubs, which have likewise emphasized on preventing violence from escalating rather than breaking up and prosecuting the underlying organizations themselves. This similarity in approach is all the more striking because American criminal law disposes of racketeering laws that have made it far easier in the United States (US) than in France to hold individual gang members to account for the crimes of their organization. At the same time, while violence prevention in Chicago and elsewhere in the US tends to focus on gang-related violence, much of the collective violence by young people that

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<sup>1</sup> *McCormack, J.*, Winning a Gang War, *Newsweek*, 31.10.1999.

mobilizes the preventive resources of the French police are not attributed to gangs at all but to other collectivities such as clan-run drug organizations and soccer fan clubs. Gangs themselves are rarely treated as criminal organizations in France, and French initiatives against local drug trafficking organizations or soccer clubs rarely try to break the organizations themselves but instead focus on disrupting and abating their resort to violence.

These findings draw on our own empirical research into French and American policing, in which we investigated the ways in which police analysts in both countries make sense of a variety of crime problems, including collective delinquency by young people.<sup>2</sup> From 2007 to 2017, we conducted 500 open-ended qualitative interviews with a wide range of knowledge workers within the police (to take up a phrase coined by *Haggerty* and *Erikson*<sup>3</sup>), including understudied policing actors such as intelligence analysts, partnership liaisons, as well as middle managers and chiefs of the command hierarchy. We also reviewed the characteristic written output of different policing units, observed internal meetings of the general staff as well as the meetings of local security partnerships, and conducted ride-alongs with ground-level personnel in multiple cities in the United States and France, including Chicago, Marseille, and St. Etienne, which are further discussed below.

## **I. The appeal and the limitations of the criminal law framework for reducing gang violence in the US**

In the United States, the RICO statute<sup>4</sup> has often been mobilized for use against street gangs, like the Gangster Disciples in Chicago, by casting the gang itself as a racketeering enterprise and by allowing prosecutors to portray the various criminal activities of the organization as a pattern of racketeering activity. The RICO statute not only carried enhanced penalties but provided prosecutors with many appealing

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<sup>2</sup> The present contribution is part of a series of articles stemming from this research. See: *Delpeuch, T./Ross, J.*, The Co-Production of Security in the United States and France, 44 *American Journal of Criminal Law* 2 (2017) 187; *Delpeuch, T./Ross, J.*, Outils policiers d'intelligence et rapports police-population, *Cahiers de la sécurité justice*, vol. 40, 2017, 34; *Delpeuch, T./Ross, J.*, Les instruments policiers d'intelligence influencent-ils sur les relations police-population?, *Droit et société*, vol. 97, issue 3, 2017, 537; *Delpeuch, T./Epstein, R./Ross, J.*, The Joint Production of Intelligence in Local Security Partnerships: French Initiatives in Local Risk Management, in: *T. Delpeuch/J. Ross (eds.), Comparing the Democratic Governance of Police Intelligence*, Elgar, Cheltenham, UK et al. 2016, pp. 43 ff.; *Delpeuch, T./Ross, J.*, Findings of the CODISP Project – Concept and Tools for the Development of Intelligence-Led Policing, *CEPOL European Police Science and Research Bulletin*, vol. 14, 2016, 18.

<sup>3</sup> *Ericson, R.V./Haggerty, K.D.*, *Policing the Risk Society*, Clarendon Press, Oxford et al. 1997.

<sup>4</sup> RICO stands for the Racketeer Influenced and Corrupt Organization Act of 18 U.S.C. 1961.

procedural advantages. The rules for joinder of charges and defendants are more generous for racketeering than for conspiracy, allowing federal prosecutors to reap the benefits of trying all criminal defendants together in a single trial, even if the underlying criminal activity involves more than a single conspiracy. Charging everyone with racketeering expanded the range of hearsay activity that would be admitted against fellow gang members, making it possible to use hearsay even against those gang members who were not part of a given conspiracy, so long as they were part of the gang.

The racketeering statute also allows prosecutors to link weapons offences, drug trafficking, and homicides as part of an overarching 'pattern of racketeering activity', even in the absence of a single conspiracy involving all of the gang's members. This is advantageous, as juries are more likely to convict any individual defendant if they have been exposed to the cumulative weight of the evidence against the organization as a whole. According to a former prosecutor who pioneered use of the statute in federal prosecutions, participants can be held vicariously liable for the crimes of the racketeering enterprise 'without one overarching agreement ... [so long as] all the participants are collectively engaged in crime together'. Vicarious liability in turn makes it easier to charge relatively low-level members of a racketeering enterprise, and the enhanced penalties for RICO violations in turn make it easier to elicit their cooperation against the leaders. If they testify, the former prosecutor explained, 'we can have them describe the whole organization at trial, and not just, say, the sale of numbers' in which they themselves were involved. 'It's trial advantages that were the most important to us [in the Department of Justice]', he explained, because the government had only to allege that each defendant had committed two crimes on behalf of the organization in order to link them to the overarching enterprise and to try them jointly with the others. The resulting prosecutions made it possible to convict not only much of the leadership of drug-dealing street gangs but much of the rank and file as well.

Intelligence analysts within the police cite a number of reasons why putting more gang leaders in jail has not brought the Chicago homicide rate under control. Several supervisors and analysts in an Illinois fusion center voiced the opinion, in interviews, that the spike in Chicago's gang-related shootings was the result of the Chicago gangs' increased fragmentation after the prosecution of their leaders. Following the arrest of their people at the top of the gang hierarchy, the analysts reported, gangs broke into smaller units, controlling smaller areas. In an attempt to fill the leadership vacuum, many of the younger, lower-level dealers started to fight each other over turf. As older leaders emerged from jail, they came into conflict with the new generation of dealers who had taken over the turf and who did not recognize the old leaders' authority.

## II. Preventive policing in Chicago

Accordingly, despite the procedural advantages of the RICO statute, along with the successes prosecutors had already scored in prosecuting street gangs as racketeering enterprises, the Chicago police has, since 2007, opted to emphasize a systematic effort to predict and interrupt gang-related violence, subordinating even the continuing effort to convict individual ringleaders of gang violence to the larger preventive aim. Chicago's decision to subordinate criminal prosecutions to the preventive and predictive aims of the public safety regime is all the more striking given that federal prosecutors in Chicago can draw on the twin strengths of the RICO statute and of undercover operations – neither of which the French may deploy against gangs – alongside their long experience in prosecuting Chicago street gangs as racketeering enterprises. But it was precisely this success that led to the fragmentation of Chicago street gangs and the increase in gang-related shootings.

At the same time, the urgency of the gang problem was such that the city tried its hand at something different, in the form of its public safety approach to gang violence. Gang-related shootings have dominated the headlines for so long that the Chicago police now treats the problem as a fundamental challenge to the mayor's authority and to his political survival, much in the same way that public riots galvanize the Renseignements Territoriaux (one of France's domestic intelligence agencies) to 'take back the streets', in the common parlance of public safety officers from both countries.

A supervisor of the Chicago intelligence unit mentioned that his unit is, among other things, responsible for planning how much manpower to allocate to public protests and demonstrations – much like the French analysts of the Renseignements Territoriaux, who seek to predict the magnitude of impending protests and riots so the police can know ahead of time how many units to deploy. But the Chicago intelligence unit redeploys many of the technologies it developed for the surveillance of social networks and uses them, with the same public safety orientation, to identify links between gang members who are known to be involved in violence, to assist in predicting and suppressing future outbreaks. For example, an analytic software called 'link analysis' makes it possible to identify the members of any targeted network, and this has often been used to monitor networks of protesters. A supervisor in the Chicago intelligence unit reported that 'we have a small group of officers monitoring labor protests but [that is] not a big problem here. [We use link analysis] more for gang violence than for protests, except the NATO summit,' for which the analysts used it as well.

Public safety concerns mobilize the command hierarchy, intelligence analysts, and rapid intervention teams around intensive efforts to predict and prevent violent events that challenge their authority over the public realm, and the Chicago intelligence unit focuses largely on predicting where and when the next gang-related shooting will occur and on preventing it. Already in 2009, the intelligence unit mo-



bilized rapid intervention teams to respond to gang-related shootings by saturating the neighbourhoods where retaliatory violence was expected.

According to a supervisor, predictions about imminent violent acts are based on 'arrest records, crime records, calls for service', which analysts combine with geographical information and map out visually to reveal, for example, 'two gang locations and a conflict area in the middle, which overlaps with a spike' in the violence. Judging intelligence as relevant only when it fits within quantifiable parameters that correspond to levels of risk, analysts break gang-related shootings down by district, so trends can be identified spatially through statistical analysis.

We use [the] intel to predict where the [next] crime is going to happen and saturate there ... We use 911 calls about gang activity, about shots fired ... we vet calls for what we want [i.e. information about shootings or gang members]. We have a baseline, spokes, so analysts know when to follow up.

Based on a statistical anomaly 'we saturate and lock down the area'. The focus is on the immediate future, based on 'real time analysis of stats infused with up to the minute information'.

Threat analysis also triggers the deployment of mobile units to at-risk areas. Like the technologies the analysts use to collect and analyse intelligence, the methods of acting on this intelligence to reduce gang violence are quite deliberately modeled on peacekeeping tactics for public events. They include the use of so-called targeted response units that a supervisor described as a 'highly mobile police force' or 'mobile strike force' held in reserve so it can be deployed as needed anywhere in the city. The supervisor described the rapid intervention units as 'a supplemental force for large scale events, such as election night...to deal with large crowds', and as 'trained in civil unrest tactics and procedures'. The primary use for these targeted response units, however, became that of preventing retaliatory violence after a gang-related shooting, with an emphasis on 'suppressing movement in cars ... [so] they can use guns less'.

In Chicago, gang violence is thus analysed with a primarily preventive aim, through a largely predictive lens. To interrupt imminent violence, the Chicago Police Department's intelligence unit has worked closely with criminologists who have developed an algorithm that assigns each known gang member a numerical value that reflects the probability that he or she will either kill or be killed within the next six months. The police use this algorithm to stage a variety of interventions. The intelligence unit uses the so-called 'heat score' to enhance charges and punishment. District commanders meet with the twenty highest scoring gang members in their area to warn them that 'you're gonna end up in jail or dead'. The police accompanies these warnings with an offer to 'help you with housing, G.E.D. [a high school equivalency certificate], charities for clothing'. But the carrot comes with a stick. 'If you refuse [help], we'll come down on you hard. Any little thing you can be charged with, you will be charged with', and the police will seek enhanced parole conditions to maximize supervision. 'We'll sit them down with parents and grandparents to reinforce the message: Stay off that corner, don't talk

to any gang members.’ People on the list are subjected to drug tests if they are on parole and to the threat that they may be returned to custody if they violate the conditions of their parole. The police stage a similar intervention when a gang member with a high score is released from prison, and federal prosecutors hold a meeting with recently released gang members to warn them about the severe penalties facing career offenders who use weapons to commit a crime.

The predictive algorithm is only one of a slew of technical tools that Chicago’s public safety regime uses to collect and analyse information; but all of its tools serve the prediction and abatement of gang violence. A triangulation technology called Shotspotter has been linked with microphones in two high-crime police districts, showing intelligence unit analysts the location of an event within a ten-foot radius. This in turn allows analysts to activate their video surveillance system so they ‘can see video in real time for [the] beat where shots are fired, and [it] will show [the] nearest video link to [the] shots fired’. Electronic license plate readers allow the police to locate cars and drivers to locate cars used in recent shootings. Analysts comb through social media postings to identify gang members who boast of their access to weapons and of their exploits doing battle with rivals. Analysts use this information to deploy investigative resources in a highly targeted way. An intelligence unit supervisor reported:

If we see a Twitter Instagram, or photos, Youtube videos, of [gang members] posting themselves rapping ‘I have this gun, I will come shooting’, we send the information to our gang intelligence unit to go knock on the door or make an undercover buy [either of guns or of drugs.] ... If there’s an immediate threat, we act right away.

But making the case is just a way of preventing the planned attack from taking place; even when a case is built, the aims of the criminal intelligence regime are subordinated to the public safety aims of the unit.

The Chicago Police Department for a while also worked closely with a group of so-called ‘violence interrupters’, staffed by former gang members and criminals who seek to intervene with rival factions to reduce retaliatory violence. The Chicago Police Department initially placed great hopes in the collaboration with this volunteer organization. According to an intelligence analyst, ‘Ceasefire talks to the victim’s brother after [a] shooting to avoid retaliation. Ceasefire might get information from witnesses on who did this and what’s [the] likely next step’. Ceasefire at one point attended meetings at the intelligence unit to be briefed by the district commanders about where the unit would be sending its mobile strike force. Ceasefire was supposed coordinate with the police in their own outreach to victims’ families. The district commander would also inform Ceasefire of ‘the five top bad guys in the area ... Ceasefire would come and get documentation’ so they could develop their own intervention strategies in the entourage of these targets. According to the analyst, however, the Chicago Police Department (CPD) stopped meeting with Ceasefire and sharing sensitive intelligence because ‘some Ceasefire gang members were being arrested for gun activity. We’re now negotiating which information we give [them]’.

### III. French gangs and preventive policing in Marseille

In France, prosecutors have no equivalent to the RICO statute that they could mobilize against gang members. A powerful new statute, enacted in 2004 and known as the Loi Perben II, first introduced the notion of an ‘organized gang’ into the criminal code as an aggravating factor that could justify the deployment of listening devices and undercover agents to investigate the commission of serious offences by criminal organizations, along with enhanced criminal penalties. But the statute is aimed at international organized crime and has never been applied to French street gangs, which are not treated as criminal organizations. Prosecutors do not routinely charge gang members with criminal association, though they may charge them with committing other collective offences such as *vol en réunion* (or ‘stealing together with others’), which carries heavier penalties than committing a theft on one’s own.

The chief of a French detective unit in the north of Paris echoed the chief of a French intelligence unit in the same area when he asserted that, while French street gangs exist in the north of Paris and are sometimes very violent, they tend not to be criminal organizations conducting business for the profit of the gang:

There might be ten in a gang that sell drugs and others that steal, but they often won’t do that with each other. They hang out and listen to the same music. It’s a way of life, but it’s not profit-driven. Then there are drug dealers who hang out together, but they aren’t really street gangs.

Gangs of young men, he reported, fight each other, and often with knives, iron bars, and even guns, but when the police arrive, he asserted, they tend to unite and turn on the police as their preferred target, often stashing weapons in different locations to have them at hand when needed. Accordingly, the police tend to classify this kind of violence as violence against the police, not as inter-gang conflict, applying the riot-control techniques it has developed as part of the public safety regime rather than the interpretive framework of criminal intelligence analysts.

Indeed, supervisors in the Marseille intelligence unit responsible for anticipating urban riots and in the Marseille unit that investigates organized crime asserted that outbursts of violence between street gangs in large cities like Paris and Marseille are rarely planned and rarely concern disputed drug locations, while many drug traffickers who do kill each other during turf battles belong to criminal organizations that are more like businesses than street gangs. A supervisor of a Marseille-based criminal intelligence unit claimed that the city did not have organized gangs ‘like those of Chicago’. Local drug trafficking networks, he said, functioned like ordinary businesses, hiring employees from outside of the neighbourhood where they sold drugs, usually under short-term contracts, on an arms-length basis. ‘There are no gang colors, and there’s no neighbourhood loyalty’, he insisted. The bosses who run the business hire young people from outside the neighbourhood, the supervisor reported. The people they hire do not know each other before they start

working for the business. ‘Bosses tell the dealers to try to sell to people who are not from the neighbourhood. It’s best for them not to know the buyers. And the bosses themselves don’t live in the neighbourhoods where their drugs are sold’. The criminal organizations themselves are anchored by family ties, intelligence supervisors report, not by gang affiliation. Moreover, most criminal cases against gang members are made by street-level units who arrest offenders caught in the act of committing a crime (i.e. *en flagrant délit*) such as the illegal possession of drugs or weapons, and such arrests are rarely the culmination of long-running criminal investigations.

In practice, this means that French prosecutors charge gang members for individual crimes without reference to their gang affiliation. At the same time, police and prosecutors reported, gang members can be investigated jointly, without need for an organized crime designation to ensure joinder of the cases against them in a *single dossier*. When charged with collective endeavours, like drug trafficking or forms of concerted offending that would be called ‘mob action’ in the United States, such as theft with others (*vol en réunion*), they nonetheless avoid being lumped together with organized crime. The crimes for which gang members are prosecuted are rarely classified as having been committed *en bande organisée* (by an organized gang); prosecutors tend to reserve this aggravating factor as well as the crime of criminal association for transnational criminal organizations investigated by the judiciary police rather than for local street gangs investigated by the *Sécurité Publique*.

But the police are not the only ones to distinguish local drug organizations that employ young people from gangs. Sociologists *Marwan Mohammed* and *Laurent Mucchielli* likewise differentiate between the criminal activities of individual gang members, including their frequent involvement in local drug sales, and the street gang itself, both because gangs sponsor a variety of other, more spontaneous, and opportunistic crimes, such as assaults and property crimes, and because street gangs are social groupings that often take the place of families and serve as a locus of solidarity and friendship, not just crime.<sup>5</sup>

Leaving such gangs as there were to the *Sécurité Publique*, the Marseille judiciary police did gather criminal intelligence on the trafficking networks – as distinct from gangs – that employed young people across the suburbs of Marseille. But because the focus of French investigators is not on the local foothold of a criminal organization – as it might be if the focus were on street gangs – criminal investigators instead seek to work their way up the chain of distribution to foreign importers and French wholesalers. According to a supervisor of the judiciary police in Marseille, his unit works with criminal investigators who ‘go to buy drugs abroad, and

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<sup>5</sup> *Mohammed, M./Mucchielli, L.* (eds.), *Les bandes de jeunes: Des ‘blousons noirs’ à nos jours*, La Découverte, Paris 2007; *Mohammed, M.*, *La Formation des Bandes. Entre la famille, l’école*, PUF, Paris 2011.

then [we investigate] the chain of distribution. We're interested in the importation and the organization's foreign liaisons'. The organized crime approach of the Marseille judiciary police thus leaves it to the French 'public security' police to investigate local distribution chains, and the public security police do not mobilize the special statute prosecuting crimes *en bande organisée*, which is within the near-exclusive purview of the judiciary police.

Instead, the Public Security police in Marseille, like the Chicago police, have adopted an approach that emphasizes prevention and disruption of gun violence in an effort to intervene in escalating cycles of violence. To be sure, Marseille has not developed a predictive algorithm like that in use in Chicago. Nor does it view its local drug organizations as gangs. But like Chicago, local anti-violence initiatives focus on prevention rather than criminal prosecution to 'take back control of the streets' and to disrupt the escalation in retaliatory shootings. In particular, a period of intensive surveillance of open-air drug markets was followed by targeted sweeps of local drug-dealers. France's anti-riot police – the CRS<sup>6</sup> – conducted searches of the cellars and common areas of public housing projects, seizing drugs, weapons, and drug paraphernalia. The CRS saturated the targeted neighbourhoods for long enough to disrupt the profits of local drug traffickers, doing so against most of the clans simultaneously to avoid having any one organization derive a benefit from the setbacks of its rivals. The arrested dealers did not remain in jail for long, as no French equivalent of racketeering charges could be brought against them. But the presence of the riot police and their repeated sweeps of cellars and other known caches forced the dealers to operate more discreetly and to tamp down on shootings, at least for a while. The plan – never fully realized in practice – was for the municipality to invest in improvements to public housing and the recreational infrastructure of high-crime neighbourhoods in order to displace open-air drug markets once the CRS left, in order to keep drug dealers from returning. The municipality instead concentrated its investments and renovations in the city's harbour, which has become a major tourist attraction, to the detriment of the more troubled neighbourhoods in the city's peripheries.

#### IV. Preventive policing in St. Etienne

In France, public safety intelligence in fact targets many potentially explosive forms of collective action by juveniles that do not involve gangs. Other forms of association that analysts view as potential security threats include groups of youngsters who band together for riots, protests, celebrations, organized drug dealing, and soccer hooliganism involving soccer fan clubs who challenge rival fan clubs to fight them before or after soccer matches between their teams. (However, intelli-

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<sup>6</sup> CRS stands for Compagnies Républicaines de Sécurité.

gence analysts for the French police tend to analyse Islamicist radicalization as an individual phenomenon, not a collective one.) In each French city with major soccer teams, the Renseignements Territoriaux employs specialists on soccer hooliganism to monitor local fan clubs and their rivalries with the fan clubs of teams from other cities. These forms of association can intersect with political conflicts, as some fan clubs are associated with the political right and others with the political left, with conflicting political ideologies fueling the enmity of their fan clubs. ('The Magic Fans are a right-wing club, the Green Angels are a left-wing club', a St. Etienne analyst explained in distinguishing the fan clubs of St. Etienne and Lyon.) Fan clubs for cities like St. Etienne and Lyon have long-standing feuds that can erupt into violence whenever their cities' soccer teams play each other. For this reason, hooliganism experts within the Renseignements Territoriaux in St. Etienne and Lyon monitor their respective teams' fan clubs, obtaining the fan clubs' data bases with the names and photos of members (which the fan clubs obtain from their base in exchange for lower ticket prices offered to registered fans).

Monitoring the collective activities of potential soccer hooligans, an analyst reported, required analysts to get to know the fans so they can identify them in the stadium and to follow the buses that take fans to and from matches. Analysts are concerned above all with threats to public safety, as they must advise the command hierarchy on how many fans will be expected at any particular game, how likely they are to engage in violence, and how to contain the risk that fans will detonate incendiary devices or meet in secret for fights with rival fan clubs.

The intelligence these analysts collect is entirely geared toward anticipating and managing these risks to public safety. Analysts monitor social media to identify where and when rival fan clubs are planning to meet and fight each other. According to hooliganism analysts in multiple French cities, they maintain institutional contacts with fan club presidents and even recruit informants to let them know what fans are planning. ('I had to find out if a fan club was going to see the women's soccer final in Lyon', an analyst reported. '*I'm not going,*' is what my source told me, so this meant that others *were* going. They went there to fight the Lyon fans, anticipating a small police presence for what was usually a relatively obscure match, by soccer fan standards.) In some cities, analysts also use administrative wiretaps (as opposed to evidence-gathering wiretaps), which help analysts anticipate how many fans will show up at matches, in what secret locations rival fan groups are planning to meet up before or after matches to fight each other, and whether any of the fans who are planning to attend have a violent past. Analysts also get to know fans personally and address fan groups before and after matches to let them know how many flares they are allowed to set off and how many banners they are allowed to display during a match.

Functioning as intermediaries with the commanders or anti-riot police units, analysts sometimes convince commanders to keep their units in readiness at some distance from the stadium, to avoid provoking a conflict, while the analysts them-

selves take on the task of guiding fans from buses into stadiums at a safe distance from rival fan clubs. Fans who engage in violence can be banned from the stadium and required to report to a police station during the duration of a match involving their team. The analysts don't seek to suppress the fan clubs per se. 'Our city's whole life is organized around soccer', a St. Etienne analyst explained. 'The fan club is the only place where many of these kids experience any kind of *esprit de corps*', he stated, adding that 'breaking up the extreme fan clubs isn't good, because it makes it harder to manage' their more violent members.

Indeed, in another city in which the municipality had formally disbanded one of the more violent fan clubs and banned it from the stadium, an intelligence analyst complained that the club had fractured into smaller violent nuclei, who were harder to track outside the stadium than when they were inside. In St. Etienne, which did not seek to disband such fan clubs, an analyst of soccer hooliganism instead reported that

the fans will be herded somewhere and will need us [the analysts from the intelligence unit] if they need something. We might say to them you only get one or two signs or flags, or you can bring in a drum but not drumsticks. We see their psychology, if they drink, and we follow their convoy and can see that they missed the highway exit and if they do something dumb, we'll be there to say this and that guy did this or that stupid thing, because we recognize them all. They try to fight outside the stadium [of the city where the match is being held] the night before the match, or in second division matches, women's matches. They will give each other a rendezvous for a fight, but not here ... When we had twenty-year anniversary of rival associations, there was a march and we were asked, should the CRS go to set up a security perimeter, and we said that would create too much tension. So it was just the two of us with the CRS in the background but not visible, and we met and warned the fan clubs and told them, we have to know the itinerary [of the march], and when it will take place.

So long as the fan club complied and cooperated with the analysts 'we let them light their flares, but we kept the associations apart'.

Though analysts reported that prosecutors were more than willing to sentence violent soccer hooligans to significant prison terms, building criminal cases was not what the analysts were trying to accomplish; their aim, instead, was to channel the enthusiasms of even the most violent fan clubs into non-threatening forms of expression while sidelining only individual catalysts of group violence through stadium bans or criminal prosecution.

## V. Conclusion

In the United States, violence reduction efforts are far more likely to target street gangs than they are in France, where eruptions of collective violence by young people are not only the result of membership in competing street gangs but also of turf wars between family-run drug trafficking organizations, of conflict between fans of rival soccer clubs, and of street protests and urban riots. American efforts to

reduce violence by young people have also, for many years, relied heavily on statutes designed for organized crime, which the police used to break up street gangs, while the French do not deploy their organized crime statute against gangs or even against local drug distribution networks, let alone soccer fan clubs. Yet despite the powerful tools that racketeering laws provide to American police and prosecutors, in some American cities, like Chicago, increasing violence that followed the fragmentation of powerful street gangs has encouraged the police to experiment with violence reduction efforts that focus less on convicting organizations for their past offences than on anticipating and preventing future violence. France, too, has tended to favour efforts to disrupt and thereby prevent organized mayhem over the use of criminal sanctions to punish local collectivities of young people for past offences. Despite the asymmetry between the legal tools available to French and American police, a paradigm that seeks to manage conflict without targeting the underlying forms of social organization now challenges the punishment-oriented, crime-fighting paradigm in both countries.

### **List of abbreviations**

CPD	Chicago Police Department
CRS	Compagnies Républicaines de Sécurité
G.E.D.	General Equivalency Diploma
NATO	North Atlantic Treaty Organization
RICO	Racketeer Influenced and Corrupt Organization Act
US	United States of America
U.S.C.	United States Code



# Bargain Practices and the Fundamental Values of the ECHR

*Christos Mylonopoulos*

An examination of the relationship between bargain practices and the principles established by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, Convention) requires a few clarifications. First, the term ‘practices’ encompasses not only the plea bargaining used in the common law countries but also a large number of alternative forms of criminal procedure, including bargaining procedures in civil law countries, the ‘*Verständigung*’ and the ‘*Einstellen des Verfahrens*’ of the German law, and other similar forms of non-traditional procedures. Second, a satisfactory understanding of the issue cannot be restricted to the question whether a concrete bargaining procedure is or can be compatible with the Convention. Furthermore, it is necessary to examine whether bargain practices are compatible with the Convention *at all*, and whether the principles established in the Convention are of any consequence to the substantial number of non-adjudicated cases or whether they affect merely a small number of individual cases.

## **I. Rules established by the Convention and deemed to be contrary to bargaining**

As several significant guarantees in the Convention are often cited as impediments to practically any kind of bargaining, we will address some by way of example.

### **A. The beyond-reasonable-doubt requirement**

According to the precedents set by the European Court of Human Rights (ECtHR), the standard of proof for the formation of a judicial conviction is ‘beyond reasonable doubt’. This standard, first established in *Ireland vs. UK* (1978) in the evaluation of facts by the ECtHR itself,<sup>1</sup> is also regarded as a guideline for decisions of the national courts of Member States.<sup>2</sup>

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<sup>1</sup> ECtHR *Ireland vs. UK*, 18.1.1978, § 161; *Janis, M./Kay, R./Bradley, A.*, *European Human Rights Law*, 2d ed., Oxford University Press, Oxford et al. 2000, p. 161.

<sup>2</sup> *Kühne, H.*, in: K. Pabel et al. (eds.), *Internationaler Kommentar zur Europäischen Menschenrechts-Konvention*, Heymanns, Köln et al. 2009, Art. 6 n. 444.

## B. The presumption of innocence

According to the presumption-of-innocence rule, as established in art. 6 para. 2 of the Convention, proof of guilt is a condition *sine qua non* for any criminal conviction. This means: (a) no sentence without guilt, (b) no sentence without proof, (c) no proof that was not obtained ‘according to the law’, (d) no proof that was not obtained by a Court. The presumption of innocence leads to the obligation of proving the guilt exclusively within a legal trial.<sup>3</sup> The criminal trial is an essential condition of the criminal conviction. In other words: *nulla poena sine processu*.

## C. *Untermassverbot*

Since the intrinsic nature of bargaining consists precisely in the imposition of a sentence significantly more lenient than one corresponding to the harm inflicted and to the culpability of the accused, this constitutes a transgression of the lowest limit of the sanction provided for (*Untermassverbot*), which means that the recommended protection of the respective legal interest is not sufficiently ensured. The decisions of the ECtHR in *X and Y vs. Netherlands* and *Siliadin vs. France* are highly indicative and corroborate the existence of the problem. On the other hand, as it has been empirically ascertained, many innocent people tend to accept bargaining not only because they are apprehensive at the prospect of an unfair sentence (the so-called ‘trial penalty’) but also because they cannot bear the hardship of the entire procedure, the uncertainty of its outcome, the custody, or other procedural measures of constraint that may be imposed, the social reproach associated with the whole procedure, etc. Innocent accused are typically ‘highly risk averse’. Hence the question: to what extent is the accused entitled to waive his or her rights? Is the accused free to dispose of his or her rights and, if not, on the grounds of what principle?

## II. The Convention’s paradigm: the traditional form of trial

We cannot fail but notice that the Convention, in establishing the rights of the accused, clearly refers to the traditional form of trial, both in the sense of the adversarial and the inquisitorial system, but not to any form of bargaining procedure.<sup>4</sup> The Convention presupposes the functioning of the guarantees provided for within the framework of a *trial*. Although the Convention does not explicitly determine

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<sup>3</sup> ‘*Exklusivität der verfahrensmäßigen Schuld festgestellt*’: Marxen, K., *Straftatsystem und Strafprozeß*, Duncker & Humblot, Berlin 1984, p. 345; Stuckenberg, C., *Untersuchungen zur Unschuldsvermutung*, De Gruyter, Berlin et al. 1998, p. 68.

<sup>4</sup> Jörg, N./Field, S./Brants, C., *Are Inquisitorial and Adversarial Systems Converging?*, in: Phil Fennell et al. (eds.), *Criminal Justice in Europe: A Comparative Study*, Clarendon Press, Oxford 1995, pp. 41–56.

the kind of trial it regulates, it is obvious that whenever the term ‘trial’ is used in the Convention, it implies the ‘traditional’ one, which seeks the administration of justice and the discovery of truth in the case at issue. This is so irrespective of whether the court follows the adversarial or the accusatorial system. As already noted, the Convention incorporates elements of both systems and it is impossible to discern which one applies.<sup>5</sup>

In other words, the guarantees established by the Convention are not specific to a particular trial system. They can be applied to both of them,<sup>6</sup> but either way they presuppose a trial. On the other hand, both systems are more or less bound to the investigation of the truth as the cornerstone of a fair adjudication and evaluation of the case.

That said, the concept of ‘trial’ as espoused by the Convention is unequivocally conceived as a procedure seeking the full discovery of truth while taking into consideration all guarantees and the evaluation of all parameters of the facts. In regulating the conditions of a fair trial, the Convention does not envisage any kind of bargaining. Bargaining is not regulated by the Convention. The guarantees of the Convention are tailored on the basis of and in accordance with the paradigm of the ‘traditional’ criminal trial and not of plea bargaining.

In view of the above, the problem is not only whether the waiver of the guarantees established by the Convention is compatible with it. The reason is that the bargaining issue simultaneously raises a correlated question: can we truly claim that plea bargaining is a kind of trial? And if not: is the adjudication of an offence compatible with the Convention, even if it takes place outside the framework of trial as envisaged by the traditional systems?

The plea-bargaining procedure *is not* a criminal trial<sup>7</sup> because:

- a criminal trial focuses on truth and justice. The bargaining procedure focuses on speed, alleviation and decongestion of the Criminal Justice System, and restoration of social peace.<sup>8</sup>

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<sup>5</sup> Kühne, H., in: K. Pabel et al. (eds.), *Internationaler Kommentar zur Europäischen Menschenrechts-Konvention*, Heymanns, Köln et al. 2009, Art. 6 n. 435.

<sup>6</sup> Billis, E., *Die Rolle des Richters im adversatorischen und im inquisitorischen Beweisverfahren*, Duncker & Humblot, Berlin 2015, p. 395.

<sup>7</sup> See *The Fair Trials report*, *The Disappearing Trial*, written with the law firm Freshfields Bruckhaus Deringer, Fair Trials. See also *The Guardian*, 27.4.2017: ‘Global epidemic of US-style plea bargaining prompts miscarriage warning-Human rights group says use of trial-waiver procedures has increased by 300% worldwide since 1990’. See also Tzannetis, A., *Plea bargaining*, *Poinika Chronika* 2017, 13 (in Greek): ‘The concessional trial is not a variation of the classical adversarial trial but a substantively different kind of procedure’.

<sup>8</sup> See e.g. ECtHR *Natsvlishvili and Togonidze vs. Georgia*, 29.4.2014, § 90: ‘Important benefits of speedy adjudication of criminal cases and alleviating the workload of courts, prosecutors and lawyers, can also be, if applied correctly, a successful tool in combating

- a criminal trial is bound by the culpability principle, which prohibits a penalty much lower than the guilt of the accused (*Untermassverbot*), while plea bargaining is not.
- a criminal trial requires an exhaustive and thorough examination of the case and the formation of judicial conviction beyond a reasonable doubt. Plea bargaining avoids precisely this very stage of the trial.
- a criminal trial is *anthropocentric* while plea bargaining is *sociocentric*.
- a criminal trial is generally independent of any *dispositional power* of the accused. It is a public law relationship between the accused and the legal order.
- a criminal trial focuses on justice while bargaining focuses on efficiency.

That bargaining is not a trial has already been admitted by the US Supreme Court in the *Alford* case: ‘Ordinarily, a judgment of conviction resting on a plea of guilty is justified by the defendant’s admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind ...’<sup>9</sup>

It is worth mentioning, however, that even within the framework of bargaining, a minimum of fairness standards is required as well as the intrinsic necessary precondition of proving/finding the truth. In this vein, the Supreme Court in the above-mentioned *Alford* case stated that the plea by the accused ‘represents a voluntary and intelligent choice’, that it ‘was the product of free and rational choice’, and that the Court, in addition to the defendant’s consent to be sentenced, ‘had heard an account of events on the night of the murder, including information from Alford’s acquaintances that he had departed from his home with his gun stating his intention to kill and that he had later declared that he had carried out his intention’.<sup>10</sup>

### **III. The point of the European Court of Human Rights – the Natsvlishvili decision**

Nevertheless, the ECtHR, in its famous judgment in *Natsvlishvili and Togonidze vs. Georgia*, declines to cover the legitimacy conditions of bargain practices.<sup>11</sup> As the Court states, ‘neither the letter nor the spirit of Article 6 prevents a person from waiving these safeguards of his or her own free will’.<sup>12</sup> On the contrary, the Court

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corruption and organized crime and can contribute to the reduction of the number of sentences handed down and as a result to the number of prisoners’.

<sup>9</sup> US Supreme Court *North Carolina vs. Alford* 400 U.S. 25, 32 (1970).

<sup>10</sup> See op. cit. (n. 9).

<sup>11</sup> See ECtHR *Natsvlishvili and Togonidze vs. Georgia*, 29.4.2014, § 87: ‘it cannot be its task to review whether the relevant domestic legal framework was, per se, incompatible with the Convention standards’.

<sup>12</sup> See *Meyer, F.*, Plea bargaining und EMRK, in: D. Jositsch et al. (eds.), *Festschrift für Andreas Donatsch, Schulthess, Zürich 2017*, pp. 427, 429.

underlines that in principle ‘the waiver of a number of procedural rights cannot be a problem in itself’ (§ 88)<sup>13</sup> and recognizes the importance of the ‘normative power of the factual’ (*‘Die normative Kraft des Faktischen’*), stating that bargain practices are a ‘common feature of European criminal-justice systems’ (§ 87). The Court finally proceeds to an exaggerated non-normative praise of the practical importance and effectiveness of these practices, noting that

... plea bargaining, apart from offering the *important benefits of speedy adjudication* of criminal cases and *alleviating the workload of courts*, prosecutors and lawyers, can also, if applied correctly, be a successful tool in *combating corruption* and *organized crime* and can contribute to the *reduction of the number of sentences imposed* and, as a result, the number of *prisoners*.

The Court comes to the conclusion that ‘there cannot be anything improper in the process of charge or sentence bargaining in itself’ (§ 87).<sup>14</sup> One could therefore say that the ECtHR not only forestalls any challenge to the legitimacy of the bargaining but extends its impact even to the prison population. In view of this position of the Court, raising the question of whether bargain practices are in principle compatible with the Convention appears to be rather futile.<sup>15</sup>

On this basis, the Court limited itself to merely examining the conditions under which the waiver of certain concrete procedural rights is in conformity with the Convention. For example, it considers it ‘a cornerstone principle that any waiver of procedural rights must always ... be established in an unequivocal manner’, that any waiver must be ‘attended by minimum safeguards commensurate with its importance’ and, finally, that ‘it must not run counter to any important public interest’.<sup>16</sup>

Based on the above decisions, it is argued that the waiver of these rights guaranteed by art. 6 of the Convention is valid under three conditions: the statement must be clear and voluntary,<sup>17</sup> the accused must have the right to dispose of the respective right, and the waiver must not be contrary to the public interest.<sup>18</sup> In any case, a *sine die* waiver of all the rights granted to the accused by the Convention is deemed to be *a priori* unacceptable.<sup>19</sup> This is the framework for the examination of

<sup>13</sup> See also ECtHR *Babar Ahmad a.o. vs. UK*, 6.7.2010, § 168.

<sup>14</sup> See also ECtHR *Babar Ahmad and Others vs. the United Kingdom*, 6.7.2010.

<sup>15</sup> As the Court observed (§ 51) as early as 1987, the Committee of Ministers of the Council of Europe called upon the Member States to take measures aimed at the simplification of ordinary judicial procedures by resorting, for instance, to abridged, summary trials. See also, in this connection, *Scoppola vs. Italy* (no. 2) [GC], 17.9.2009, § 135; *Slavcho Kostov vs. Bulgaria*, 27.11.2008, § 17.

<sup>16</sup> See, amongst others, *Scoppola vs. Italy* (no. 2), §§ 135–36; *Poitrimol vs. France*, 23.11.1993, § 31; and *Hermi vs. Italy* [GC], no. 18114/02, § 73, ECHR 2006-XII.

<sup>17</sup> See *Pishchalnikov vs. Russia*, § 77; *Pavlenko vs. Russia*, § 102.

<sup>18</sup> *Meyer, F.*, op. cit. (n. 12), p. 432.

<sup>19</sup> *Meyer, F.*, op. cit. (n. 12), p. 432; *Esser, R.*, in: E. Löwe/W. Rosenberg (eds.), *Großkommentar StPO*, 26th ed., De Gruyter, Berlin 2012, Art. 1 n. 59.

the conditions of voluntary consent as defined in the respective decisions of the Court: the accused must be aware of the content and the consequences of the waiver and must make his/her decision without any threat, deception, or false promises.<sup>20</sup> In a similar manner, the German Constitutional Court (BVerfG) stated in a well-known decision<sup>21</sup> that bargaining (in the form of '*Verständigung*') has to comply, among others, with the following principles protected by the Convention: the *nemo tenetur* principle, the publicity principle, the immediacy principle, the fair trial principle, the culpability principle, and the inquisitorial principle, i.e. the reliability of the confession has to be examined. Additionally, according to the BVerfG, the Court has to ensure a) that all parties involved participate in the procedure, b) that the accused will not waive his/her right of appeal, and c) that any confession will not be used for any other purpose than that for which it was offered, e.g. in case the bargaining fails.

#### **IV. Two preliminary issues: the confession of the accused and the investigation of the truth as factors influencing the debate on bargaining**

In view of the above decisions, two preliminary issues need to be discussed: the role of the confession of the accused in the bargaining (A) and the importance of the investigation of the truth for the criminal system (B).

##### **A. The confession of the accused**

The obstacle created by the wording of the Convention, stating in art. 6 that guilt must be proved *according to the law*, may be overcome, according to some authors, with the help of *the confession*. The confession by the accused is considered to be a sufficient condition for satisfying the proof of guilt requirement in compliance with art. 6 of the Convention.<sup>22</sup>

There is also no doubt that the confession may be satisfactory and reliable evidence in the traditional trial as well. The confession is considered the 'queen of the evidence' and can play virtually the same role in the bargaining procedure as in the traditional trial. According to this point of view, the confession not only satisfies

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<sup>20</sup> Meyer, F., op. cit. (n. 12), p. 434; *Natsvlishvili a. Togonidze vs. Georgia*, §§ 91, 97; *Deweere vs. Belgium*, §§ 49, 51; *Marpa Zeeland B.V. a. Metal Welding B.V. vs. Netherlands*, §§ 47, 50.

<sup>21</sup> BVerfGE 133, 19.3.2013, 168–241.

<sup>22</sup> See Tzannetis, A., op. cit. (n. 7), 21; Trüg, G., Quo curris, Strafverfahren? – Zum Verhältnis der objektiven Dimension der Beschleunigungsmaxime zur Wahrheitsfindung, StV 2010, 533; Meyer, F., Die faktische Kraft des Normativen – Das BVerfG und die Verständigung im Strafverfahren, NJW 2013, 1851.

the presumption of innocence, but it is argued that it also operates as a factor that ensures the investigation of the substantive truth.<sup>23</sup>

However, this view may be overly optimistic. In the context of the bargaining procedure, the confession can only lead to a proof ‘beyond reasonable doubt’ in a limited number of cases if it is corroborated by all other evidence available (e.g. the accused additionally points out the location of body, the hiding place for the gun, etc.). The accordance of the confession with the truth is not necessary but symptomatic. *The truth is no conceptual element of the confession.* On the contrary, a confession (and therefore the bargaining) may be in obvious contradiction to the truth. This was the scenario in a famous case mentioned by *Langbein*,<sup>24</sup> where the reduction in sentence for indecent assaults against minors was accompanied by an increase in sentence for the far less grave offence of ‘loitering near a schoolyard’, even though the accused had never approached a school or a school yard. Thus, the bottom line is that confession cannot operate as a substitute for full evidence and cannot be logically equivalent to any form of substantive truth. Moreover, the real prerequisite of bargaining is not a confession per se but any kind of guilty plea, even in the form of a statement on the part of the accused containing a submission to the relevant procedure (‘*Unterwerfungserklärung*’).

Even the Supreme Court in the *Alford* decision required in addition to the defendant’s confession further evidence corroborating the confession, as noted above. This means that even in the heart of the bargaining practice, whose constitutionality has not been in dispute since the decision in *Brady vs. US*, 397 U.S. 742 (1970), the confession per se is not a sufficient condition to prove guilt ‘beyond a reasonable doubt’ and a sufficient means to overcome the obstacle of the presumption of innocence, unless it is accompanied by other evidence.

## B. The procedural truth as a relativized form of truth

It is evident that any form of bargaining is incompatible with the principle of substantive truth. This disparity between bargaining and truth constitutes a conceptual condition of bargaining. But truth is not always sought at any price, even in the traditional trial. We know that the so-called ‘procedural’ truth does not always coincide with the substantive truth. Rules pertaining to state secrets, exclusionary rules on evidence regulating the admissibility of evidence, and the *in dubio pro reo* rule contribute to the relativization of truth in the criminal process.

Furthermore, the effect produced by the rules on *res judicata* is that even a false decision may be binding if it is based on a judicially correct procedure, even if it

<sup>23</sup> *Tzannetis, A.*, op. cit. (n. 7).

<sup>24</sup> *Langbein, J.*, Plea bargaining and the disappearance of the criminal trial, Lecture presented at the Max Planck Institut für ausländisches und internationales Strafrecht, 10.1.2011, p. 4 (unpublished).

does not coincide with the substantive truth. In such cases the protection of the social peace takes precedence over the discovery of the truth at any price. As stated in the due process clause of the 14th Amendment of the US Constitution, 'society is the ultimate loser when in order to convict the guilty, it uses methods that lead to decreased respect for the law'. The objective of the protection of social peace is therefore more valuable than that of the absolute truth and the latter is sacrificed (according to the already existing views of the legislator) when both values cannot be upheld simultaneously. Thus, the legal system proceeds to a balancing of these two values.

## **V. Change of the reference point: towards a sociocentric approach of the criminal trial**

### **A. The practicability principle**

The requirement of the substantive truth in all criminal trials is furthermore contrary to the economy of the criminal trial system and as such contrary to a principle indispensable for every scientific theory: the practicability principle. A criminal law theory is only satisfactory if and only if it fulfils the precondition of practicability. By contrast, if the costs incurred for its implementation are unacceptable, the theory is inadequate.

### **B. The sociocentric concept**

The lack of practicability is obvious with regard to the traditional, anthropocentric trial system. When the workload of the criminal courts does not permit the processing of all pending criminal cases while applying all the rule of law principles in a complete and proportional manner, a *sociocentric* orientation of the criminal process would appear preferable, at least in some cases. According to this point of view, the cautious and meticulous application of bargaining procedures is not incompatible with the aim of the criminal trial. The principles of the criminal trial must therefore be assessed on a macroscale basis, i.e. with regard to the total social profit of the bargaining. This means that there can be no satisfactory solution without changing the frame of reference. Thus, the question is not: is bargaining more preferable *in concreto*? but: is bargaining preferable in the totality of the pending cases?

Having to wait for an extremely long time before the court process even begins constitutes for the accused an unbearable violation not only of art. 6 para.1 of the Convention, which prescribes trial within a reasonable time, but also of constitutionally established principles, such as the principle of human dignity. This means that the absolute and meticulous implementation of all principles ruling the traditional process in every case is to the detriment of the entire criminal justice system,



which is an empirically well-known fact. On a macroscale it leads to an even more serious and extensive violation of human rights and of the principles the state aims to protect because of the excessive demands made on the criminal law system and, therefore, to more serious social harm. For example, somebody who has the status of the accused for a long time (maybe for as long as ten years, as often happens in Greece), may suffer attacks on his/her reputation in the mass media, especially in internet blogs (e.g. the 'world check') disseminating negative information on his/her reliability as a businessperson, which may leave his/her professional life in total ruin. Therefore, bargaining presents a further aspect in relation to the Convention. Bargaining must be assessed not only in relation to the rights of the particular and concrete person who stands accused but also in relation to the rights of all other people who participate in the criminal system as accused or as civil parties. The criminal system affects all participants, and the full application of all procedural formalities in every case violates the rights of numerous parties, who are either utterly deprived of the right to a trial (because of limitation periods) or prevented from having their case heard within a reasonable period of time.

## **VI. Antagonism of criminal justice goals and the proportionality principle**

This wider, sociocentric view of the issue introduces another parameter into the discussion affecting our line of arguments: the fact that the proportionality principle and human dignity are intolerably violated if all other members of society are de facto prevented from reasonable access to the court.

It must be admitted that the Convention does not ignore these fundamental principles of law, especially the *proportionality principle*. Further, the Convention, as a legal text, is not unaware of an essential characteristic of legislation: the existing *antagonism* between the principles of law and the need to reach partial satisfaction whenever full satisfaction is out of reach.

### **A. Antagonism of goals**

The reason is well known: the multiplicity and heterogeneity of purposes and the needs of criminal law are in an ongoing antagonistic relationship. Rules and principles tending to one end are counterbalanced by others (e.g. safety vs. freedom). In such cases no goal and no principle can be entirely satisfied. 'The criminal law requires the criminal process to fulfill conditions beyond its possibilities according to its functional destination.'<sup>25</sup> Thus, since the finding of truth is not an end in itself

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<sup>25</sup> Neumann, U., Wahrheit im Recht, Zur Problematik und Legitimität einer fragwürdigen Denkform, Nomos, Baden-Baden 2004, pp. 31 ff.; Savigny, E., in: E. Savigny et al. (eds.), Juristische Dogmatik und Wissenschaftstheorie, C.H. Beck, München 1976, pp. 144 ff.

but, on the contrary, conducive to the administration of justice in the case at hand and, through this, to the protection of social peace, it may be justified to abandon substantive truth if the specific judicial act does not coincide with the protection and preservation of social peace.

By revisiting the principles that should permeate the '*Verständigung*' according to the decision by the German Constitutional Court mentioned above, we can see that the first four principles can be easily followed without prolonging the procedure. Publicity and immediacy are not only harmless for bargaining but rather useful and recommendable. For example, publicity can protect the accused from any entrapments and unlawful pressure. Immediacy helps both the accused and the prosecuting authorities. The *nemo tenetur* principle is indispensable, as mentioned. Finally, the fair trial principle is a quasi-logical premise of bargaining because nobody can plead guilty or bargain without knowing the charges and the consequences of both the prosecution and the waiver. On the other hand, of course, the inquisitorial principle, the full and unconditional investigation of the truth, is exactly what the bargaining procedure seeks to avoid, due to the fact that the thorough investigation of the truth and the formation of judicial conviction are factors prolonging the trial. It is therefore an illusion to insist on the truth of the confession. On the contrary, the truth of the confession is not a conceptual element in the bargain. It may occur in the course of the bargaining process and is of course desirable. We may recall the 'loitering near a schoolyard' example by *Langbein* mentioned above.<sup>26</sup> This highly instructive case clearly shows that truth is not only dissociated from the concept of bargaining but that it impedes the acceleration of trials, a fact well known to both sides in the case, the prosecutors and the accused.

The culpability principle (*Schuldprinzip*) cannot be fully observed. The reward for abbreviating the procedure lies exactly in the mitigation of the sanction. Nevertheless, on the macroscale, the violation of the *Untermassverbot* is counterbalanced by the safeguarding of the human rights of numerous other members of society.

## B. Weighing up

Counterbalancing, however, requires a *weighing up*. We need to examine the cases in which compliance with the *Untermassverbot* is not subject to negotiation (e.g. in cases of homicide, rape, and so on) and those in which it is. This weighing up, which leads to a partial disposition of the truth, is not the only form of weighing up, at least within the continental European criminal law system. Several other institutions fulfil the same function as bargaining: limitation periods, the withdrawal from the incomplete attempt, the active repentance and the offer of total satisfaction to the victim, they all manifest the legal system's preference for social peace even in cases where the perpetrator's guilt evidently leads to a lawful procedural

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<sup>26</sup> See *Langbein, J.*, op. cit. (n. 24).

distortion of the truth. Such weighing ups are not unknown in legal theory and practice. For instance, drug addiction is assessed by the use of this criterion: The more indications we are given, the firmer we are in our belief that this criterion is valid. In the same manner, the law weighs between antagonistic values or principles, e.g. between protecting the young and freedom of the arts, between liberty and security, etc.

But weighing up has also its normative foundation. It is well known that when two antagonistic law principles collide, weighing up is not just a possibility but is highly recommended. It is necessary because of the limited nature of legal possibilities, which requires one of the colliding principles to yield somewhat to enable the partial satisfaction of the other principle. In this case 'the legal possibility of the realization of the first principle depends on the contrary one'.<sup>27</sup> This point of view is not new. The weighing up derives from the significant and well-known principle of proportionality, which requires the optimization of the relationship between two antagonistic principles.<sup>28</sup> In our case the collision does not involve two different principles but two requirements of the same principle; the implementation of the ECHR in each case on the one hand, the implementation on a general scale (=with regard to the general population) on the other. The bargaining solution is much closer to the proportionality principle than the requirement of absolute implementation of the principles of the traditional trial in all criminal cases. This is so because the bargaining solution achieves an optimization in a criminal justice system that does not allow the satisfactory processing of all cases, and because it leads to the partial satisfaction of the human rights postulates for both categories, the specific and the general, whereas without bargaining the human rights of a large part of the second category are violated (many prosecutions succumb to the lapse of time and the offences go unpunished, a great number of other cases are tried many years after the perpetration of the offence, etc.). Here too, we have to take into consideration the fact that the more the ECtHR principles are observed *in concreto*, the more they are abandoned on the macroscale. An optimization is therefore necessary in order to safeguard the proportionality principle.

## VII. Limits of the dispositional freedom of the accused – on the usefulness of the comparative concepts

But what about the prosecution of *innocent persons*? On a macroscale the social cost incurred by the prosecution of innocent persons decreases significantly when bargaining is allowed for acts of minor gravity, but it is intolerably high in more serious criminal offences, such as charges for felonies against life, for rapes, robberies, drug offences, etc. Is it possible to draw a rational demarcation line?

<sup>27</sup> Alexy, R., *Theorie der Grundrechte*, Suhrkamp, Frankfurt 1986, p. 101.

<sup>28</sup> Alexy, R., *op. cit.* (n. 27), pp. 101, 147.

As we have seen, the starting point is that the defendant has the right to dispose of his/her guilt as a matter of principle. We have also seen that this freedom to dispose is not unlimited. An acceptable method to localize the point of disposability could be the use of comparative concepts (*Komparative Begriffe*). The obvious question is where this point starts. This question addresses the conditions under which the state's duty to suppress a criminal offence is absolute, disregarding any other expediencies and objectives.

In this context it is worthy to note that the transition from the conditional to the unconditional prosecution of an offence is not unknown to the criminal systems. A very clear (but not unique) example is the prosecution upon criminal complaint (*Strafantrag*). In cases of minor importance, the legal order leaves it to the victim to decide whether the threshold of socially intolerable conduct has been crossed or not. In the same way and *mutatis mutandis*, the defendant's right to waive the unconditioned investigation of the truth to the detriment of his or her rights is not alien to the criminal system.

But just as the victim cannot dispose of his/her protection in more serious cases, and the offence is prosecuted *ex officio*, in the same vein the offender, as bearer of certain rights, cannot dispose of these rights beyond a certain point. Thus we may conclude that bargaining is possible but only to the extent the accused is permitted to dispose of his/her own rights. In this connection the use of *comparative concepts* and preferences rules could be useful indeed. This, however, presupposes additional information, which would allow us to decide with absolute certainty whether a concept is given. In analytic philosophy this information is called a 'point of departure',<sup>29</sup> a *standard*,<sup>30</sup> which permits us to gauge the degree of similarity between the standard or 'point of departure' and the case in question.

### VIII. The inalienable core of human rights

A fundamental decision of the German Federal Administrative Court (*Bundesverwaltungsgericht*) of 1981 provides such a sure 'point of departure'. This decision addressed the question of whether a woman who exposes herself in a so-called 'peep show' can legitimately waive her right to dignity. The Court held that at least the core of human dignity cannot be waived in the individual case, and stated:<sup>31</sup>

<sup>29</sup> Sapir, E., Grading. A Study in Semantics, *Philosophy of Science* 11, no. 2, 1944, 93.

<sup>30</sup> See Baier, K., *Der Standpunkt der Moral. Eine rationale Grundlegung der Ethik*, Patmos Verlag, Düsseldorf 1974, p. 64; Cooper, N., *Scale Words, Analysis*, vol. 27, issue 5, 1967, 154. See also Mylonopoulos, C., *Komparative und Dispositionsbegriffe im Strafrecht*, Peter Lang Verlag, Frankfurt 1996, p. 50.

<sup>31</sup> BVerwG I C 232.79 – Urteil des 1. Senats vom 15. Dezember 1981 (Peep-Show-Urteil BVerwGE 64, 274).

This violation of the human dignity is not waived or justified by the fact, that the woman who appears in a peep show acts on her free will. Human dignity is an objective, inalienable value and it is not in the remit of the individual to give up respect for it.

It is worth mentioning that according to the spirit of the decision, the prohibition affects not only the bearer of the right but also the state itself. Thus, the crucial issue is to identify the cases in which the accused does not have the right to give up the full protection the Convention provides to him or her and the cases in which he or she is not allowed to do so based on other factors. As already stated, the Court held that the accused may waive a series of rights granted by the Convention. For instance, one may waive the investigation of substantive truth, the proof of guilt, the right to appeal, the right to a public hearing, the right to personal presence, and the right to effective defence.<sup>32</sup> All these conditions, however, presuppose that all the aforementioned rights can be waived in all cases and to any extent. However, this is neither obvious nor obligatory. A preliminary question must be answered first: can the accused dispose of all these rights in all cases, irrespective of the specifics of the particular case? In this context and with regard to the conditions of a valid waiver of the rights of the accused, the decision of the German Court allows us to infer that the effectiveness of the waiver must have its limit where the core of human dignity or of a fundamental right is infringed.<sup>33</sup>

Hence, the accused does not have the right to proceed to bargaining if he/she will be exposed to dangers graver than he/she is permitted to accept. In such a case, the accused must be protected from him- or herself, which is the case in serious offences.<sup>34</sup> Furthermore, he/she cannot accept a bargain if the court or other judicial authorities are not impartial or if he/she is exposed to inhuman or degrading treatment. One such example of impartiality is the case of *overcharging*, i.e. when the public prosecutor deliberately upgrades the degree of gravity of the nature of the offence perpetrated by the accused. A degrading treatment is inflicted on the defendant when the judicial authorities act in a spirit of revenge, i.e. when they 'punish' the accused with a heavier sentence, because he/she did not make use of the bargain system, thereby forcing the court to follow the regular, time-consuming procedure. The message of an American judge to the accused who had rejected the bargaining is famous with good reason: 'He takes some of my time – I take some of his.'<sup>35</sup>

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<sup>32</sup> Meyer, F., op. cit. (n. 12), p. 430, with further citations; ECtHR *Natsvlishvili a. Tagonidze vs. Georgia* Nr. 9043/05, § 92; *Deweer vs. Belgium* Nr. 6903/75 § 42, 49; *Hakanson a. Sturesson vs. Sweden* Nr. 11855-85 § 66.

<sup>33</sup> Meyer, F., op. cit. (n. 12), p. 436: 'der Menschenwürdekern eines Grundrechts'.

<sup>34</sup> Meyer, F., op. cit. (n. 12), p. 438; *Donatsch, A.*, Der Strafbefehl sowie ähnliche Verfahrenserledigungen mit Einspruchsmöglichkeit, insbesondere aus dem Gesichtswinkel von Art. 6 EMRK, ZStR 1994, 331.

<sup>35</sup> See *Alschuler, A.*, The Trial Judge's Role in Plea Bargaining, 76 Columbia Law Review (1976) 1089–1090; *Tzannetis, A.*, op. cit. (n. 7), p. 3 ff., fn. 97.

By way of example, the Court in the *Satsvlishvili* case had to examine *ex officio* the circumstances surrounding the consent of the accused to decide whether they were compatible with the essential human dignity requirements instead of limiting itself to the issue whether the consent was truly voluntary. In other words, it had to inquire into the circumstances under which consent was given and into the extent they were compatible with the core of the human dignity. From this point of view, it is obvious that, by making the accused fully aware of the consequences of the bargaining and of the fact that he was free to decide, the prerequisite of a consent compatible with human dignity was not fulfilled because the circumstances influencing this aspect of the decision were not taken into consideration. The court ignored the fact that the accused was jailed in the same cell with the man who had attempted to kill him in the past and with another criminal and the fact that he knew that the outcome of a trial would be vain as well, apparently because these facts do not affect the freedom of the defendant's decision. This is true. Nevertheless, the dignity of the accused does not remain intact under these circumstances.

Furthermore, other reasons are provided, independently of the dignity issue. For example, if society is so deeply concerned that only a thorough investigation of the case can restore social peace, the free decision of the accused to enter into bargaining must not have legal effect in order to prevent more serious developments. It is far preferable for society to bear the cost of long trials for murder, rape, or indecent assault against a minor than to permit the imposition of a harsh sentence on a potentially innocent person. Besides, in case of waiver human dignity is hurt at its core and the state itself does not have the right to violate it, even if the accused consents to it. This implies that there is a *core of human rights* that cannot be waived in the bargaining process.

In this legal and conceptual framework, even a clear and voluntary consent of the accused may be invalid if it was given under circumstances that precluded a *reasonable* decision. For example, if the accused knows that the judicial system is biased, that 90% of trials lead to conviction, that public opinion is strongly against him/her, and that the court takes this into consideration, the margin of free decision-making decreases dramatically.

Although bargaining is, in principle, in conformity with the legal order, the law does have the right to prevent the accused from waiving his/her rights if such waiver infringes the core of his/her human dignity. In this case no bargaining is permitted according to the Convention and the constitutions of the Member States, which are intended to protect human dignity.

Thus, the institution of bargaining is consistent with the Convention only if the rules and values of the latter are sufficiently observed. For example, *overcharging* is a form of entrapment or extortion. In the case of overcharging, the authorities compel the accused to plead guilty for something the accused actually did not do in

order to avoid trouble he does not deserve. They knowingly expose the accused to a prosecution that does not correspond to the unlawful nature of the act he/she committed, which is an action that constitutes in several legal orders the offence of *abuse of power*.<sup>36</sup>

## IX. Mutual recognition of the bargaining procedure?

Another problem emerging in connection with the bargaining practice is as follows: while it is evident that the confession of the accused in the context of a bargaining process does not pertain to the discovery of the truth but to the amelioration of his/her position, the sole purpose of the legislator is the immediate acceleration of the procedure. This in turn raises the question: is it in conformity with the Convention if a confession given during a bargaining procedure is used as evidence in another trial to the detriment of the accused who did not participate in the first trial?<sup>37</sup>

The German Supreme Court<sup>38</sup> ruled in an interesting decision that evidence obtained based on the ‘*Verständigung*’ procedure cannot be taken into consideration if the procedure was unsuccessful or invalid.<sup>39</sup> It is therefore obvious that facts confessed to or admitted during the bargaining procedure can be taken *pro veritate* only with respect to the accused participating in this procedure. Further, we should under no circumstances overlook the fact that bargaining entails the acute risk that the accused accepts a case disposition unfavourable to him or her.<sup>40</sup> It is a matter of daily experience that many factors may push the accused during a police investigation to give in to pressure and agree to a settlement of the case or to provide a false confession, and that bargaining often compels the accused to accept untrue facts to their detriment. But it may also coerce them to confess facts that may be

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<sup>36</sup> See e.g. art. 239 Greek PC, § 344 German Penal Code (*Verfolgung Unschuldiger*), art. 312 Swiss Penal Code (*Amtsmissbrauch*), art. 432-4 French Penal Code (Section II. *Des abus d'autorité commis contre les particuliers- § 1. Des atteintes à la liberté individuelle*), and art. 323 Italian Penal Code (*abuso d'ufficio*).

<sup>37</sup> See Kühne, H., *Strafprozessrecht*, 9th ed., C.F. Müller, Heidelberg 2015, n. 748.2, 3; Mylonopoulos, C., Alternative forms of conclusion of the criminal trial in Germany (*Einstellen des Verfahrens, Verständigung*) and their importance for the Greek legal order, *Poiniki Dikaiosi*, 2015, 433 (in Greek).

<sup>38</sup> BGH NSTZ 2013, 353.

<sup>39</sup> See Bundestag-Drucksachen 16/12310, p. 15; OLG Karlsruhe NSTZ 2014, 294; KG StV 2012, 654, OLG Düsseldorf StV 2011, 80; Niemöller, M./Schlothauer, R./Weider, H., *Gesetz zur Verständigung im Strafverfahren*, C.H. Beck, München 2010, Teil C n. 98; Schneider, H., *Verständigung in der Berufungsinstanz*, NZWiSt 2015, 1, 2; Wenske, M., *Das Verständigungsgesetz und das Rechtsmittel der Berufung*, NSTZ 2015, 141.

<sup>40</sup> Roxin, C./Schünemann, B., *Strafverfahrensrecht*, 29th ed., C.H. Beck, München 2017, p. 103.

detrimental to third persons in order to avoid a much harsher sentence. Since bargaining often leads to ‘virtual sentencings’,<sup>41</sup> facts accepted by the accused cannot be taken *pro veritate* against another accused in another trial. The third person who did not participate in the bargaining proceedings neither gave his or her consent to it nor did he or she waive his/her rights stemming from the guarantees provided for by arts. 5 and 6 of the Convention, nor did he/she enjoy the opportunity to interrogate witnesses under the same conditions as the prosecution, or to participate in person in the procedure exercising all the rights of the Convention or challenge the allegations against him or her.<sup>42</sup>

Besides, as already said, the bargaining procedure is a valid procedure between the accused and the state, with features of a private statement. Bargaining constitutes a convention (a *contract*)<sup>43</sup> and any confession given based on such convention amounts to a declaration of the accused person’s will (*Willenserklärung*). It is not obtained as part of the free evaluation of evidence nor based on an *ex officio* investigation of the truth. Therefore, facts confessed and allegedly proven in a bargaining procedure may not be used as evidence in another trial,<sup>44</sup> since this would be contrary to art. 6 para. 3 of the Convention.

## X. Conclusion

The European Convention of Human Rights protects not only the rights of the specific person accused in a particular trial but also the rights of anonymous parties whose timely access to the court system is impeded and whose cases are tried either after a long waiting period or not tried at all. The antagonism between these two groups of rights may be attenuated on the basis of the proportionality principle by weighing up the concurrent needs. Nevertheless, the core of human dignity remains inalienable. It may not be disposed of, neither by the accused him- or herself nor

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<sup>41</sup> See *Langbein, J.*, op. cit. (n. 24); *Weigend, T.*, Is the criminal process about truth?, 23 Harvard JLPP (2003) 170–172; *Mylonopoulos, C.*, Zur Möglichkeit einer theoretischen Begründung des plea bargaining, in: R. Esser et al. (eds.), Festschrift für Hans-Heiner Kühne zum 70. Geburtstag, C.F. Müller, Heidelberg 2013, p. 259.

<sup>42</sup> See ECtHR *Karaman vs. Germany*, 27.2.2014 Nr. 17103/2010 [60]: ‘In circumstances such as this, it was important to remember that a separately prosecuted accused who is not a party to the proceedings against his co-accused is deprived of any possibility to contest allegations with respect to his participation in the crime made during such proceedings’. With regard to the confrontation principle (art. 6 para. 3d of the Convention), see ECtHR *Unterpretinger vs. Austria*, 24.11.1986; *Kostovski vs. Holland* 20.11.1989; *Barbera, Messeque and Jabardo vs. Spain*, 6.12.1988; *Solakov vs. Yugoslavia*, 31.10.2001; *Asch vs. Austria*, 26.04.1991; *Haas vs. Germany*, 17.11.2005; *Bonev vs. Bulgaria*, 8.6.2006; *Sapunarescu vs. Germany*, 11.9.2006. See also Kühne, op. cit. (n. 2), Art. 6 n. 582.

<sup>43</sup> *Niemöller, M./Schlothauer, R./Weider, H.*, op. cit. (n. 39), p. 61.

<sup>44</sup> *Mylonopoulos, C.*, op. cit. (n. 37).



even by the legal order. Consequently, a counterbalancing and, therefore, alternative proceedings such as plea bargains are acceptable only in cases of minor importance not affecting the accused's inalienable core of human dignity.

### **List of abbreviations**

BVerfG	Bundesverfassungsgericht (German Constitutional Court)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
Harvard JLPP	Harvard Journal of Law & Public Policy
NJW	Neue Juristische Wochenschrift (law journal)
NStZ	Neue Zeitschrift für Strafrecht (law journal)
NZWSt	Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht (law journal)
StV	Strafverteidiger (law journal)
UK	United Kingdom
US	United States of America
ZStR	Schweizerische Zeitschrift für Strafrecht (law journal)



**Part 3**  
**International Justice Systems**



# Reparation Proceedings at the International Criminal Court – A Means to Repair or Recipe for Disappointment?

Philipp Ambach\*

## I. Introduction

Those most responsible for the worst crimes against mankind merit being sanctioned individually through retributive justice. This has been the *acquis* since the International Military Tribunal in Nuremberg in 1945<sup>1</sup> and was powerfully affirmed by the two United Nations-established *ad hoc* tribunals, the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), between 1994 and 2017.<sup>2</sup> As a logical consequence of these tribunals and in order to establish a more permanent justice solution for large-scale atrocities, the International Criminal Court (ICC)<sup>3</sup> was established in 1998 through an international treaty, the Rome Statute, to try individuals for the core international crimes: war crimes, crimes against humanity, genocide, and the crime of aggression. However, a more modern view of the international criminal justice paradigm has shifted the focus also to a comparatively new feature in the criminal justice debate: victims who suffer from such evil as sanctioned in the ICC catalogue of crimes deserve justice that goes beyond the mere retributive aspect and instead encompasses victim-centred features such as participation in the proceedings as well as reparations for harm suffered.<sup>4</sup>

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<sup>1</sup> The International Military Tribunal (IMT) was constituted by the victorious axis powers UK, France, the US, and Russia. On 18 October 1945, the chief prosecutors of the IMT read the indictments against 24 leading Nazi officials. The judges delivered their verdict on 1 October 1946, see at: <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007069> (accessed April 2018).

<sup>2</sup> For the ICTY: UN S/RES/827 (1993) of 25 May 1993; for the ICTR: UN S/RES/955 (1994) of 8 November 1994. Both tribunals served as judicial solutions to immediate threats to international peace and security. Their jurisdiction entailed war crimes, crimes against humanity, and the crime of genocide.

<sup>3</sup> General information on the ICC is available at: <https://www.icc-cpi.int> (accessed April 2018).

<sup>4</sup> Donat-Cattin, D., in: O. Triffterer/K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3d ed., C.H. Beck, Munich 2016, art. 68, paras. 3 ff.

Subsequent to the ICC's creation, a number of international(ized) justice mechanisms were established, mostly for crime complexes outside of the ICC's jurisdictional reach. All these courts also included victim participation regimes with more or less comprehensive reparations provisions. The Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, the Kosovo Specialist Chambers, and the Cour pénale spéciale Centrafricaine as well as the African Union-sponsored *Chambres africaines extraordinaires* all address the issue of reparations subsequent to the accused's conviction. Similar features can be expected from the future hybrid tribunal for South Sudan.

At the same time the ICC, with its very elaborate reparations regime and – importantly – an increasing body of jurisprudence, continues to face a number of key challenges relating to its reparations regime. These challenges are not specific to the ICC; rather, they concern internationalized *ad hoc* justice solutions operating in singular situations alongside the ICC just as much. After a brief outline of the ICC reparations regime, the present contribution will address these challenges, with a view to tackling problems relevant not only for the ICC but for the international criminal justice system more globally. The fundamental question will always stand in the centre of the analysis: whether the ICC reparations system will be able to live up to its promise and deliver meaningful reparations to victims.

## II. The reparations regime at the ICC

### A. Article 75 and the definition of 'victim'

The concept of reparations at the end of a criminal process and issued by the *same* court is alien to many national jurisdictions and surely a novelty on the international criminal justice platform. The ICC has the most elaborate set of provisions in this regard. Art. 75 of the Rome Statute enables the competent Chamber to

make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.<sup>5</sup>

In its order, it has to 'determine the scope and extent of any damage, loss and injury to, or in respect of, victims' and outline the 'principles relating to reparations'<sup>6</sup> that it bases its ruling upon. In addition, Rule 85 of the ICC Rules provides a definition of the term 'victim', which has since been refined and elaborated upon in the ICC's jurisprudence for the purpose of reparations:

Pursuant to Rule 85 of the Rules, reparations may be granted to direct and indirect victims, including the family members of direct victims ...; anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who

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<sup>5</sup> Art. 75(2) of the Rome Statute.

<sup>6</sup> Ibid.

suffered personal harm as a result of these offences, regardless of whether they participated in the trial proceedings.<sup>7</sup>

In order to determine whether an ‘indirect victim’ is linked closely enough to the direct victim(s) in order to benefit from the reparations scheme, Chambers have held that there needs to be a ‘close personal relationship between the indirect and direct victim, for instance as exists between a child soldier and his or her parents.’<sup>8</sup> This definition is in line with relevant international conventions.<sup>9</sup>

## B. Key aspects of victim participation

As for victims’ participation in the proceedings preceding potential reparations, art. 68(3) of the Rome Statute stipulates that ‘[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’. Rule 89 outlines the application process for participation of victims in the proceedings and codifies the victims’ right to make opening and closing statements, as appropriate.<sup>10</sup> Rule 90 provides a multi-

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<sup>7</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on victims’ participation, ICC-01/04-01/06-1119, 18 January 2008, paras. 87–94; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Establishing the Principles and Procedures to be Applied to Reparations, ICC-01/04-01/06-2904, 7 August 2012, para. 194; see also in the same case Judgment on the Appeal of The Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432; Redacted Version of ‘Decision on indirect victims’, 8 April 2009, ICC-01/04-01/06-1813. Regarding reparations, see *The Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, 7 August 2012, paras. 194–201. See also generally *Dumont, H.*, Requirements for Victim Participation, in: K. Tibori-Szabó/M. Hirst (eds.), *Victim Participation in International Criminal Justice*, International Criminal Justice Series, vol. 11, Asser Press, The Hague 2017, pp. 45 ff.

<sup>8</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, 7 August 2012, para. 195, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of The Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, para. 32. However, the Appeals Chamber has also clarified that the victim definition in Rule 85 ‘emphasises the requirement of the existence of harm rather than whether the indirect victim was a close or distant family member of the direct victim’: *The Prosecutor v. Germain Katanga*, Appeals Chamber, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled ‘Order for Reparations pursuant to Article 75 of the Statute’, ICC-01/04-01/07-3778-Red, 9 March 2018, para. 5.

<sup>9</sup> See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by UN General Assembly resolution 60/147 of 16 December 2005, principle V, para. 8.

<sup>10</sup> Rule 89(1) of the ICC Rules.

step approach on the assignment of legal representation to victims.<sup>11</sup> Rule 91 outlines to some degree the specific participatory rights of victims through their legal representatives in the proceedings.<sup>12</sup> Rule 131(2) adds to this by providing victims with access to the case record. The exact outline of victim participation has been left to the Chambers' determination, and a number of different approaches have been tested by the Chambers to date, within the confines of the governing legal framework.<sup>13</sup>

### C. Key aspects of the reparations framework

The ICC reparations framework follows a comparable logic in that the normative texts provide a framework that, however, caters for a wide margin of discretion –

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<sup>11</sup> On a critical analysis of the ICC Chambers' approach in applying the procedural regime encompassed in Rule 90 of the ICC Rules, see Human Rights Watch, *Who Will Stand for Us? Victims' Legal Representation at the ICC in the Ongwen Case and Beyond*, 29 August 2017, available at: <https://www.hrw.org/report/2017/08/29/who-will-stand-us/victims-legal-representation-icc-ongwen-case-and-beyond> (accessed April 2018).

<sup>12</sup> For an early discussion of the applicable legal framework to victims before the ICC, see *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008, paras. 20 ff. Rule 91 grants legal representatives (i) participation in hearings, (ii) the right to make oral and written submissions, (iii) the questioning of witnesses, an expert or the accused (upon application to the Chamber), and (iv) the introduction of documents.

<sup>13</sup> Pursuant to Rule 89(1) of the Rules, the Chamber shall specify 'the proceedings and manner in which participation is considered appropriate', in keeping with art. 68(3) of the Rome Statute (as 'determined to be appropriate by the Court'; see also similar language in Rule 91(3)(b) of the ICC Rules and Regulation 24(2) of the Regulations of the Court, ICC-BD/01-01-04, as amended on 12 July 2017, ICC-BD/01-05-16, available at: [https://www.icc-cpi.int/resource-library/Documents/RegulationsCourt\\_2017Eng.pdf](https://www.icc-cpi.int/resource-library/Documents/RegulationsCourt_2017Eng.pdf) (accessed April 2018)) ('[v]ictims or their legal representatives may file a response to any document when they are permitted to participate in the proceedings ..., subject to any order of the Chamber' (emphasis added)). As for jurisprudential approaches, see *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008, paras. 20 ff.; see, e.g., ICC, Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008; *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008; *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Trial Chamber V, Decision on victims' representation and participation, ICC-01/09-02/11-498, 3 October 2012; *The Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015, paras. 27 ff., Chamber IX, *Public Redacted Version of Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests*, ICC-02/04-01/15-1199-Red, 6 March 2018, fn. 22, and paras. 17–23, 78–83; *The Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, Decision on victims' participation in trial proceedings, ICC-01/04-02/06-449, 6 February 2015 (followed up by multiple decisions further qualifying the applicable regime of victim participation).



both in terms of procedure and implementation.<sup>14</sup> As regards the procedure, during the reparations phase victims are given an essential role in the proceedings since they are direct potential beneficiaries of any reparation orders.<sup>15</sup> Procedural rights are comparable to those of the defence.<sup>16</sup> Rule 91(4) of the ICC Rules lifts victim legal representatives' restrictions on the questioning of witnesses during hearings on reparations; furthermore, victims are allowed to submit 'relevant supporting documentation, including names and addresses of witnesses' when submitting a request for reparations.<sup>17</sup> This stands in contrast to the mere 'views and concerns' permitted in trial proceedings, where the onus remains on the Prosecutor to prove the guilt of the accused.<sup>18</sup> At the reparations stage, questions regarding the accused's guilt and mode(s) of criminal liability are no longer at issue.

In addition, trial chambers are vested with the possibility to 'appoint appropriate experts to assist [the judges] in determining the scope, extent of any damage, loss and injury to, or in respect of victims, and to suggest various options concerning the appropriate types and modalities of reparations'.<sup>19</sup> It has done so already in two

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<sup>14</sup> *The Prosecutor v. Germain Katanga*, Appeals Chamber, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute', ICC-01/04-01/07-3778-Red, 9 March 2018, para. 64.

<sup>15</sup> See generally as to the victims' role and relevance in reparations proceedings before the ICC: Office of the Prosecutor, Policy Paper on Victims' Participation, April 2010, pp. 9/10, 18 ff., available at: <https://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/281751/PolicyPaperonVictimsParticipationApril2010.pdf> (accessed April 2018).

<sup>16</sup> See art. 75(3) of the Rome Statute (see *infra*); Rules 94 ff. of the ICC Rules. See also *Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007, ICC-01/04-01/06-925, 13 June 2007, para. 28.

<sup>17</sup> Rule 94(1)(g) of the ICC Rules.

<sup>18</sup> Disclosure obligations regarding evidence in the proceedings *a priori* only apply to the parties to the proceedings; in this light, the assumption of an unfettered right of victims to introduce additional evidence in the (trial) proceedings *without* being subjected to such obligations may collide with fair trial rights of the accused. In *Lubanga*, the Appeals Chamber therefore held that for victim representatives to lead evidence, the latter needs to, *inter alia*, provide notice to the parties and be in 'compliance with disclosure obligations ...': *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, para. 3. See also ICC OTP Policy Paper on Victims' Participation, p. 19; *Prosecutor v. Thomas Lubanga Dyilo*, Partly Dissenting Opinion of Judge Georgios M. Pikis to the 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008', ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008; Partly Dissenting Opinion of Judge Philippe Kirsch to the 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008', ICC-01/04-01/06-1432-Anx, 23 July 2008.

<sup>19</sup> Rule 97(2) of the ICC Rules. The provision also obliges the chamber to invite observations from the convicted person, victims, or their legal representatives, and other interested persons or States.

out of four reparation proceedings, namely in *Al Mahdi* and in *Bemba*.<sup>20</sup> Finally, a chamber, before issuing a reparations order, ‘may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States’.<sup>21</sup>

#### D. Content of a reparations order

As regards the content of the reparations order and award, the ICC differentiates explicitly between individual and collective reparation awards and provides also for a combination of the two in a single order.<sup>22</sup> While in *Lubanga*, the Trial Chamber only catered for collective (including symbolic) reparations,<sup>23</sup> both *Katanga* and *Al Mahdi* made provision for individual reparations in conjunction with collective (again including symbolic) measures.<sup>24</sup> However, also the Chambers’ approach in determining appropriate reparations has varied quite substantially. Of note, in *Lubanga* and *Katanga*, the Chamber engaged in an evidentiary assessment of each individual victim application for reparations previously submitted to the Registry and issued individual findings on these individuals’ eligibility for reparations.<sup>25</sup> This process has proven time- and resource consuming and, while not erroneous, was considered by the Appeals Chamber as probably not ‘the most appropriate in this regard as it has led to unnecessary delays in the award of reparations’.<sup>26</sup> An

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<sup>20</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Trial Chamber VIII, Public redacted version of ‘Decision Appointing Reparations Experts and Partly Amending Reparations Calendar’, ICC-01/12-01/15-203-Red, 19 January 2017; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Public redacted version of ‘Decision appointing experts on reparations’, 2 June 2017, ICC-01/05-01/08-3532-Red, 2 June 2017.

<sup>21</sup> Art. 75(3) of the Rome Statute.

<sup>22</sup> Rule 97(1) of the ICC Rules.

<sup>23</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber II, Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu, ICC-01/04-01/06-3379-Red, 15 December 2017, Disposition, p. 123, preceded by an order authorizing symbolic reparations, *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber II, Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations, ICC-01/04-01/06-3251, 21 October 2016.

<sup>24</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236, 17 August 2017, Disposition; *The Prosecutor v. Germain Katanga*, Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07-3728-tENG, 24 March 2017, Disposition, p. 118.

<sup>25</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber II, Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu, ICC-01/04-01/06-3379-Red, 15 December 2017, p. 123 (considering 425 out of 473 victims eligible based on the proof submitted), and *ibid.*, Annex II; *The Prosecutor v. Germain Katanga*, Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07-3728-tENG, 24 March 2017, p. 118 (‘[finding] that 297 of the 341 Applicants have shown to the standard of proof of a balance of probabilities that they are victims of Mr. Katanga’s crimes’), and *ibid.*, Annex II.

<sup>26</sup> *The Prosecutor v. Germain Katanga*, Appeals Chamber, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled ‘Order for

analysis for each individual victim application may be problematic particularly where subsequent reparation awards are ‘only’ collective and therefore not (necessarily) responding to the individual victims’ claims or simply wherever a subsequent individual award bears no relation to the individualized analysis. The Appeals Chamber held regarding the latter situation in *Katanga* that such an individualized approach ‘appears to be contrary to the need for fair and expeditious proceedings’.<sup>27</sup> At the same time, the need for the Registry to still collect sufficient reparations-related data from individual victims<sup>28</sup> should not be underestimated, to enable the Chamber to make a ruling on appropriate reparations based on solid data and statistics.

A number of other fundamental issues are still to be – and in some respects have recently been<sup>29</sup> – decided upon by the Appeals Chamber. Equally, while all ICC Trial Chambers to date have referred the implementation of reparations to the ICC’s Trust Fund for Victims (TFV),<sup>30</sup> the details and effects on beneficiaries and the affected communities more broadly are still to be analysed as implementation efforts in various reparations proceedings have only just commenced.

Yet, the legal framework and jurisprudence of the ICC focusing on reparations for victims who suffered harm as a result of crimes subject to the conviction of an individual before the Court also provides a notable difference between the ICC

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Reparations pursuant to Article 75 of the Statute’, ICC-01/04-01/07-3778-Red, 9 March 2018, para. 1 (‘[t]here may be circumstances where a trial chamber finds it necessary to individually set out findings in respect of all applications in order to identify the harms in question (for example, if there is a very small number of victims to whom the chamber intends to award individual and personalised reparations). However, when there are more than a very small number of victims, this is neither necessary nor desirable’, *ibid.*, para. 3); see also *ibid.*, paras. 65 ff.

<sup>27</sup> *The Prosecutor v. Germain Katanga*, Appeals Chamber, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled ‘Order for Reparations pursuant to Article 75 of the Statute’, ICC-01/04-01/07-3778-Red, 9 March 2018, paras. 3, 65 ff.

<sup>28</sup> Rule 94(1) of the ICC Rules provides a catalogue of relevant victim data collected by the Registry through individual victims’ applications. Such data may be highly relevant for the Chamber’s subsequent determination of reparations. See in this regard the Registry’s *Transmission of Experts’ Joint Report pursuant to Trial Chamber Decision ICC-01/05-01/08-3559-Red of 30 August 2017*, available in public redacted version of 30 November 2017: ICC-01/05-01/08-3575-Anx-Corr2-Red.

<sup>29</sup> This relates to, e.g., the victim screening process or the interpretation of the term ‘victim’ in Rule 85 of the ICC Rules (see *The Prosecutor v. Germain Katanga*, Appeals Chamber, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled ‘Order for Reparations pursuant to Article 75 of the Statute’, ICC-01/04-01/07-3778-Red, 9 March 2018); or the confidentiality of victim data in reparations proceeding, or a right to appeal an eligibility assessment by the Trust Fund for Victims where entrusted by the Chamber (see *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Appeals Chamber, Public redacted Judgment on the appeal of the victims against the ‘Reparations Order’, ICC-01/12-01/15-259-Red2, 8 March 2018).

<sup>30</sup> See *infra* for a detailed description of the mandates of the TFV.

process and national compensation systems for victims of atrocities: in the former, reparations are (1) potentially tailored to an individual victim's loss and suffering (and at least to a specific group of victims of Rome Statute crimes), thus potentially focusing on individualized restorative justice; and (2) tied to an other individual's criminal responsibility, which, while a natural consequence of the criminal process, bears challenges as to the inclusiveness of the system. Salient challenges will be discussed following a brief outline of the TFV.

### E. Trust Fund for Victims

The TFV represents one of the most important features of the ICC reparations regime. The establishment of a trust fund to assist in or entirely facilitate reparations to victims is a novel idea first tested at the ICC: art. 79(1) of the Rome Statute entrusts the Assembly of States Parties (hereinafter 'Assembly')<sup>31</sup> with the establishment of a trust fund 'for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims',<sup>32</sup> clearly pointing at the Court's core crimes under art. 5 of the Rome Statute as well as the definition of victims as outlined in Rule 85 of the Rules.<sup>33</sup> In other words, the TFV can only operate in situations where ICC crimes have been committed. It has four possible funding sources:

- (1) Voluntary contributions from governments, international organizations, individuals, corporations, and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties;
- (2) Money and other property collected through fines or forfeiture transferred to the Trust Fund if ordered by the Court pursuant to art. 79(2) of the Rome Statute;
- (3) Resources collected through awards for reparations if ordered by the Trial Chamber pursuant to Rule 98 of the ICC Rules;
- (4) Resources other than assessed contributions 'as the Assembly of States Parties may decide to allocate to the Trust Fund'.<sup>34</sup>

These funding sources serve to enable the TFV to carry out its two institutional mandates as set out in its Regulations:

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<sup>31</sup> The Assembly of States Parties is the founding and overall governing body of the ICC. Pursuant to art. 112 of the Rome Statute, it carries out a number of essential governing tasks such as management oversight to the organs of the ICC, the decision over the Court's annual budget, and any other function conferred to it by the Rome Statute or the ICC Rules (arts. 112(2)(b), (d), and (g)).

<sup>32</sup> Art. 79(1) Rome Statute (emphasis added).

<sup>33</sup> See also Regulations 20, 42, 48 (with regard to the 'other resources' under Rule 98(5) of the ICC Rules) of the Regulations of the Trust Fund.

<sup>34</sup> Resolution ICC-ASP/1/Res.6, para. 2, and Regulation 21 of the Regulations of the Trust Fund.

1. to provide physical or psychological rehabilitation or material support for the benefit of victims and their families ('assistance mandate'),<sup>35</sup> and
2. when the Court makes an order for reparations against a convicted person and orders that the award be deposited with or made through the Trust Fund<sup>36</sup> ('reparations mandate').<sup>37</sup>

Art. 75(2) provides that '[w]here appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79'. In these cases, the TFV first assesses what resources it has at its disposition (including any property and proceeds from the convicted person) and then proposes to the Chamber how to distribute them to the victims through an implementation plan.<sup>38</sup> In three currently ongoing reparations proceedings at the ICC, the TFV has been tasked with the implementation of relevant awards. The same can be expected in a fourth reparations case, against *Jean-Pierre Bemba*, where a reparations order will be issued later in 2018.

#### F. Other international(ized) courts with similar mandates

As briefly alluded to *supra*, the ICC is not alone with its reparation framework for victims of Rome Statute crimes. A number of subsequent hybrid tribunals have adopted reparation regimes to various levels of detail and inclusiveness, thus demonstrating that any reparation-related challenges at the ICC will most probably also apply to these other courts and tribunals and thus pose a much more global systemic challenge than one just confined to the ICC's specific framework and situation.

The statute of the Special Tribunal for Lebanon (STL)<sup>39</sup> recognizes the institute of compensation to victims in its art. 25. Accordingly, the STL may identify victims who have suffered harm as a result of the convict's crimes and submit this information to national authorities so that a victim (or persons claiming through the victim) 'may bring an action in a national court or other competent body to obtain

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<sup>35</sup> Regulation 50(a) of the Regulations of the Trust Fund.

<sup>36</sup> Pursuant to Rule 98(2)–(4) of the ICC Rules.

<sup>37</sup> Regulation 50(b) of the Regulations of the Trust Fund.

<sup>38</sup> Regulations of the Trust Fund, paras. 43–44. When drafting an implementation plan, the TFV takes into account, *inter alia*, 'the nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries, as well as the size and location of the beneficiary group'; the plan also outlines the suggested methods for implementation, Regulations of the Trust Fund, paras. 54, 55, 69.

<sup>39</sup> The STL was established by United Nations Security Council Resolution 1757 of 30 May 2007 following an Agreement between the United Nations and the Lebanese Republic pursuant to Security Council Resolution 1664 (2006) of 29 March 2006; see S/RES/1757 as well as the STL's Statute at: <https://www.stl-tsl.org/en/documents/statute-of-the-tribunal/223-statute-of-the-special-tribunal-for-lebanon> (accessed April 2018).

compensation’.<sup>40</sup> This reparation regime is arguably the least inclusive as it merely refers victims to compensation systems fully outside of its normative framework or influence.

At the Extraordinary Chambers in the Courts of Cambodia (ECCC),<sup>41</sup> victims participate in the proceedings as so-called ‘Civil Parties’. They are vested with the right to seek collective and moral reparations in case of a conviction of an accused.<sup>42</sup> Pursuant to Rule 23*quiquies* of the Internal Rules,<sup>43</sup> such collective and moral reparations need to ‘acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted and ... provide benefits to the Civil Parties which address this harm’.<sup>44</sup> Any monetary payments to Civil Parties are explicitly excluded by the Internal Rules.<sup>45</sup>

The statute of the Extraordinary African Chambers (EAC)<sup>46</sup> provides that reparations measures awarded by the chambers are restitution, compensation, and rehabilitation.<sup>47</sup> Awards can be individual or collective, or both.<sup>48</sup> Importantly, the statute also provides that ‘they are open to all victims, individually or collectively, whether or not they participated in the proceedings before the Extraordinary African

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<sup>40</sup> Art. 25(3) of the STL Statute. For the purpose of reparations in national proceedings, art. 25(4) of the STL Statute is to be considered as final and binding for national authorities. See also Rule 86(G) of the STL Rules of Procedure and Evidence.

<sup>41</sup> The ECCC were created by the Cambodian government and the United Nations as a national court with international participation to try the most responsible perpetrators for alleged crimes committed between 17 April 1975 and 6 January 1979 during the leadership of the Khmer Rouge in Democratic Kampuchea.

<sup>42</sup> Rules 23(b), 23*quiquies*(1) of the ECCC Internal Rules.

<sup>43</sup> Internal Rules, Rev. 9, of 16 January 2015. The statute of the ECCC (‘Law on the Establishment of the Extraordinary Chambers as amended, 27 October 2004’, available at: <https://www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended>, accessed April 2018) does not have any provision spelling out victims’ right to reparations; this is exclusively regulated in the Internal Rules.

<sup>44</sup> Rule 23*quiquies*(2) of the ECCC Internal Rules.

<sup>45</sup> Rule 23*quiquies*(2) of the ECCC Internal Rules.

<sup>46</sup> The EAC were created pursuant to an agreement between Senegal and the African Union in February 2013 to prosecute the ‘person or persons’ most responsible for international crimes committed in Chad between 7 June 1982 and 1 December 1990, which corresponds to the period when former Chadian President Hissène Habré was in office. The trial judgment has been confirmed on appeal on 27 April 2017. See generally Human Rights Watch, Senegal: New Court to Try Chad Ex-Dictator in Senegal, 22 August 2014, available at: <https://www.hrw.org/news/2012/08/22/senegal-new-court-try-chad-ex-dictator-senegal> (accessed April 2018).

<sup>47</sup> Art. 27 Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (hereinafter: ‘EAC Statute’), available at: <https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers> (unofficial translation of the French original, accessed April 2018).

<sup>48</sup> Art. 28(2) EAC Statute.

Chambers'.<sup>49</sup> This provision shows that the EAC was heavily inspired by the ICC reparations regime.<sup>50</sup> A chamber, before issuing a reparations order, may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons, or interested States. In addition, art. 28 of the EAC Statute stipulates that '[a] Trust Fund shall be established for the benefit of victims of crimes within the jurisdiction of the Extraordinary African Chambers, and of the beneficiaries of such victims. The Trust Fund shall be financed by voluntary contributions from foreign governments, international institutions, non-governmental organizations and other entities wishing to support the victims'.<sup>51</sup> The chamber may order that a reparations award for compensation be made by the Trust Fund as an intermediary, as provided for in art. 28 of the EAC Statute.

The statute of the 'Specialist Chambers and Specialist Prosecutor's Office' (KSC)<sup>52</sup> outlines that '[a] Victim's personal interest and rights in the criminal proceedings before the Specialist Chambers are notification, acknowledgement and reparation'.<sup>53</sup> As at the ICC, where the KSC issues a guilty verdict, it may make an order directly against that accused specifying appropriate reparation to, or in respect of, victims collectively or individually.<sup>54</sup> However, comparable to the STL, '[w]here appropriate, the [KSC] may refer the Victims to civil litigation in the other courts of Kosovo'.<sup>55</sup> Possible reparations measures encompass restitution, compensation, and rehabilitation – comparable to the ICC.<sup>56</sup> The statute also provides that 'they are open to all victims ..., whether or not they participated in the proceedings before the Extraordinary African Chambers'.<sup>57</sup> This provision shows that the EAC

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<sup>49</sup> Art. 28(2) EAC Statute.

<sup>50</sup> Of note, the entitlement to reparations is as per the statute independent from the participation at trial – another key element conceptually linking the EAC with the ICC.

<sup>51</sup> Art. 28(1) EAC Statute.

<sup>52</sup> The KSC have jurisdiction over crimes against humanity, war crimes, and other crimes under Kosovo law committed between 1 January 1998 and 31 December 2000 in relation to allegations reported in the Council of Europe Parliamentary Assembly Report of 7 January 2011 on 'Inhuman treatment of people and illicit trafficking in human organs in Kosovo' (available at: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=12608&lang=en>, accessed April 2018). They are embedded into the national court system of Kosovo. See the 'Law on Specialist Chambers and Specialist Prosecutors Office', Law No.05/L-053, arts. 1(2), 3(1) (hereinafter: 'KSC Law'), available at: <https://www.scp-ks.org/en/documents/law-specialist-chambers-and-specialist-prosecutors-office-3-aug-2015> (accessed April 2018).

<sup>53</sup> Art. 22(3) of the KSC Law.

<sup>54</sup> Art. 22(8) of the KSC Law. See also *ibid.*, art. 44(6), speaking of a 'Reparation Order', comparable to art. 75(2) of the Rome Statute. Pursuant to Rule 168 of the KSC Rules, the chamber may appoint experts to assist in determining the scope of any damage and suggest options of appropriate – individual or collective – reparations; this follows the relevant provision of Rule 97(2) of the ICC Rules.

<sup>55</sup> Art. 22(9) of the KSC Law.

<sup>56</sup> Art. 27(1) EAC Statute.

<sup>57</sup> Art. 28(2) EAC Statute.



was heavily inspired by the ICC reparations regime which likewise applies also to victims that did not participate in the proceedings.

For the Special Criminal Court in the Central African Republic (SCC)<sup>58</sup>, arts. 56 to 62 of the national code of criminal procedure<sup>59</sup> stipulate that reparation measures can be sought through civil action claims before national courts.<sup>60</sup> Yet, no specific rights and obligations of such civil parties are defined. At present, rules of procedure and evidence are being drafted, and it can be expected that, as is the case at the ECCC, the reparations regime will be further defined.<sup>61</sup> It is also being discussed to establish a trust fund to the benefit of victims of the SCC.<sup>62</sup>

In conclusion, two general regimes can be identified: first, there are the more inclusive reparations regimes of the ICC, ECCC, KSC, and the EAC with their own statutory means to (a) issue a reparations order and (b) award reparations. For the ICC and the EAC,<sup>63</sup> this is being carried out through a trust fund for victims. Second, there are internationalized court systems that merely refer to national courts and (potential) national compensation programmes, such as the STL and the KSC.<sup>64</sup> While a final judgment can be used as an executable title ('final and binding'<sup>65</sup>) for compensation claims in national proceedings (before civil law courts), the internationalized courts play no further role.

The present cursory review also shows that the reparation mandates of these courts are either modeled after the ICC example or at least pick up on the ICC's idea to join retributive and reparative justice in one single institution and in one

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<sup>58</sup> The SCC was created through the *Loi Organique No 15.003 portant création, organisation et fonctionnement de la cour pénale spéciale* of 3 June 2015, available at: [https://www.fidh.org/IMG/pdf/loi\\_organique\\_portant\\_cre\\_ation\\_organisation\\_et\\_fonctionnement\\_de\\_la\\_cps.pdf](https://www.fidh.org/IMG/pdf/loi_organique_portant_cre_ation_organisation_et_fonctionnement_de_la_cps.pdf) (accessed April 2018).

<sup>59</sup> *Loi N°10.002 du 6 janvier 2010, code de procédure pénale centrafricain*, in: Journal Officiel de la République Centrafricaine, J.O.R.C.A. 15 janvier 2010, available at: <http://www.ilo.org/dyn/natlex/docs/SERIAL/88120/100660/F498635820/CAF-88120.pdf> (accessed April 2018). This law is applicable by virtue of art. 5 of the *Loi Organique No 15.003* ('[s]ous réserve des dispositions spécifiques contenues dans la présente loi et dans les règlements pris pour son application, les règles de procédure applicables devant la Cour Pénale Spéciale sont celles prévues par le Code de Procédure Pénale de la République Centrafricaine').

<sup>60</sup> *Ibid.*, art. 2.

<sup>61</sup> See RFI, Cour pénale spéciale en RCA: 'Nous avons les moyens pour mener nos enquêtes', 13 November 2017, available at: <http://www.rfi.fr/emission/20171113-cour-penale-speciale-rca-moyens-enquetes-toussaint-muntazini-mukimapa> (accessed April 2018).

<sup>62</sup> Regarding the potential outline of such a trust fund, see *infra*.

<sup>63</sup> Art. 28 EAC Statute, see also *supra*.

<sup>64</sup> STL: art. 25(3) of the STL Statute and Rule 86(G) of the STL Rules; KSC: art. 22(8); as outlined *supra*, the Rules of the KSC provide for (a) transmission of the judgment to national authorities for the purpose of a compensation claim (Rule 167 of the KSC Rules); and (b) a reparation order against the convicted person (Rule 168 of the KSC Rules).

<sup>65</sup> Rule 167(2) of the KSC Rules.



single process. It is therefore all the more important to assess what the potential pitfalls of the system are at the ICC; this will simultaneously highlight potential challenges for the other reparations regimes.

### III. Challenges

#### A. Equal treatment of victims of all sides of a conflict?

War and armed conflict victimize thousands if not millions; the ICC will always concentrate on the small margin of key/lead perpetrators most responsible for the worst crimes committed. This may capture a great many victim communities but surely not all. To the contrary, it may actually depict just a small window of criminality for those crimes that are easiest to be proven in court, following a prosecutorial strategy to take out fast certain key perpetrators of mass crimes.<sup>66</sup> Examples are the *Lubanga* and *Bemba* cases, concentrating on a limited number of crime sites and incidents in a much bigger context of armed violence. Of particular note, in the *Lubanga* case, the charges excluded victims of sexual violence despite these crimes being quite notorious in that situation.<sup>67</sup> This has led to some frustration amongst affected communities.<sup>68</sup> The Prosecutor has since amended her strategy towards a more inclusive, in-depth, and open-ended approach, flanked by a 'building upwards' strategy in cases where culpability of the most responsible persons could not be sufficiently proven from the outset.<sup>69</sup> Yet, proceedings at the ICC will always only relate to *parts* of the events that triggered victims' suffering due to the ICC's limited capacity; even a more inclusive prosecutorial strategy will focus on

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<sup>66</sup> This was notably the case for the first ICC Prosecutor's strategy, see Prosecutorial Strategy 2009–2012, 1 February 2010, at paras. 19, 20, available at: <https://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf> (accessed April 2018).

<sup>67</sup> In the course of presentation of evidence, witnesses repeatedly raised the abuse of girls and women as sex slaves, see *Swart, M.*, The Lubanga Reparations Decision: A Missed Opportunity?, *Polish Yearbook of International Law*, vol. 32, 2012, 173.

<sup>68</sup> *Merope, S.*, Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC, *Criminal Law Forum*, vol. 22, issue 3, 2011, 311; *De Vos, C.*, Someone Who Comes Between One Person and Another: Lubanga, Local Cooperation and the Right to a Fair Trial, *Melbourne Journal of International Law*, vol. 12(1), 2011; see also International Justice Monitor, Reflection: Gender Issues and Child Soldiers – The Case of Prosecutor v Thomas Lubanga Dyilo, 31 August 2011, at: <https://www.ijmonitor.org/2011/08/reflection-gender-issues-and-child-soldiers-the-case-of-prosecutor-v-thomas-lubanga-dyilo-2/> (accessed April 2018).

<sup>69</sup> See International Criminal Court Office of the Prosecutor, Strategic plan 2016–2018, 6 July 2015, paras. 13 ff. and Annex 1, available at: <https://www.legal-tools.org/doc/7ae957/pdf/> (accessed April 2018); in addition, the Office has since issued a Policy Paper on Sexual and Gender-Based Crimes, June 2014, available at: <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> (accessed April 2018).

no more than a handful of perpetrators per situation. In comparison, the ICTY indicted no less than 161 individuals for international core crimes in what could be considered one (extensive) situation. The ICTR indicted ninety-three individuals regarding the Rwandan genocide; the Special Court for Sierra Leone still indicted thirteen individuals in relation to the Sierra Leonean civil war in the early 2000s.<sup>70</sup> All these courts expressly targeted only the most responsible individuals for relevant international crimes.

In addition, prosecutorial strategy will often dictate a sequencing of cases in a situation of armed conflict where relevant international crimes have been committed by all sides. This inevitably means that victims of one side of the violence see a ‘faster’ redress than victims of the other side. Yet, often these victims all live in the same community and have become victims of violence from all sides. Examples are victim communities in Uganda or in Ivory Coast. Citizens of the same villages may have been victimized by similar crimes, only at different occasions; one citizen may find him- or herself in the remit of an ICC case, while the other is not able to participate since the relevant crime has not (yet) been charged by the Prosecutor. If judicial proceedings before the ICC in The Hague result in reparation measures being issued to one half of a community but leave the other half unaccounted for, this may generate re-traumatization, tension, and potentially even resurgence of violence.

The reparations process is triggered by the outcome of the trial as a closely connected annex to the traditional retributive criminal justice model, since it comes into play only when the accused person is convicted and only regarding the crimes subject to conviction. This means, however, that victims go through three key stages of potential frustration:

- (1) at the issuance of an arrest warrant by the Prosecutor (‘Does the Prosecutor charge the crimes that I am a victim of?’);
- (2) at the issuance of the Pre-Trial Chamber’s decision on the confirmation of charges (‘Will the Pre-Trial Chamber authorize the Prosecutor to present the charges at trial which gave rise to my victimhood?’); and
- (3) at the final conviction stage of an accused (‘Will the court convict the accused of the crime(s) that I am a victim of?’).

Parts of affected victim communities will therefore almost unavoidably find themselves outside the remit of ICC-ordered reparations. One potentially powerful feature of the Rome Statute system to tackle this problem could be the TFV’s possibility to fund certain measures to the benefit of victims through its assistance mandate.<sup>71</sup> The only qualifying requirement for victims to receive redress by this

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<sup>70</sup> For statistics relating to the Special Court for Sierra Leone, see at: <http://www.rscsl.org> (accessed April 2018).

<sup>71</sup> Activities in the field pursuant to this mandate can start as early as the situation stage when the Prosecutor has commenced an investigation into possible crimes under the Rome

token is that they have to be victims of Rome Statute crimes. The TFV could devise a reparation implementation model that is comprehensive in terms of victim mapping through a mix of reparations and assistance-mandated awards in order not to create imbalances which could lead to new tension, frustration, and harm – the opposite of what is intended by the Rome Statute’s reparation regime. This model seems to have been contemplated first by the Appeals Chamber (*Lubanga*) and again by Trial Chamber II (both *Lubanga* and *Katanga*) when it ordered the TFV to consider the possibility of including persons who do not fulfil the required criteria in order to benefit from the reparations ordered in this case in assistance programs.<sup>72</sup> In a similar vein, in *Al Mahdi* the Chamber tasked the TFV to carry out an eligibility screening of potential unidentified victims during the implementation phase, thus extending the circle of potential beneficiaries substantially beyond those victims already identified in the proceedings.<sup>73</sup>

## B. Resources

In many if not most cases, the accused will have spent all funds and assets for his/her defence, which is a heavy cost driver in an international trial (think of a lead counsel, a legal assistant, a case manager, and an investigator as a standard defence team). A year of trial is likely to cost hundreds of thousands of Euros. At the ICTY, a defence team for a legally aided accused could receive (much) more than €30,000 per month during the trial phase.<sup>74</sup>

If a trial chamber makes a reparation order against an ‘indigent’ convict, this has a huge frustration potential for participating victims who have waited for years to finally receive redress from the person found most responsible for their suffering.

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Statute in a certain situation before the ICC pursuant to art. 13 of the Rome Statute. They are thus not connected to any case-related definition of victim communities and merely require that beneficiaries are victims of Rome Statute crimes.

<sup>72</sup> *The Prosecutor v. Germain Katanga*, Trial Chamber II, Ordonnance de réparation en vertu de l’article 75 du Statut, ICC-01/04-01/07-3728, 24 March 2017, para. 344; *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber II, Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu, ICC-01/04-01/06-3379-Red, 15 December 2017, para. 301 (‘... à envisager la possibilité d’inclure les personnes qui ne remplissent pas le critère requis afin de bénéficier des réparations ordonnées dans la présente affaire dans les programmes d’assistance’), referring to *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Order for Reparations (amended), ICC-01/04-01/06-3129-AnxA, 3 March 2015, para. 55.

<sup>73</sup> *The Prosecutor v. Ahmad Al Faki Al Mahdi*, Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236, 17 August 2017, para. 144. The possibility to task the TFV with such a screening process was subsequently validated by the Appeals Chamber: *The Prosecutor v. Ahmad Al Faki Al Mahdi*, Appeals Chamber, Public redacted Judgment on the appeal of the victims against the ‘Reparations Order’, ICC-01/12-01/15-259-Red2, 8 March 2018.

<sup>74</sup> See the ICTY Trial Legal Aid Policy, available at: <http://www.icty.org/en/sid/163> (accessed April 2018).

In these cases, the TFV can again play an essential role: if ordered to facilitate reparations, it can complement – or fund entirely – reparation awards from its own resources (obtained predominantly through voluntary contributions, see *supra*). This has been the case for the first three reparation cases before the ICC where the convicted individuals had no assets to contribute to reparation awards.

Yet, such reparation awards will in most cases be in the millions: for example, in *Katanga*, the Chamber considered the total monetary value of the extent of the harm suffered by the victims to be US\$3,752,620 and set Mr. *Katanga's* liability for reparation at US\$1,000,000.<sup>75</sup> In *Al Mahdi*, the Chamber set Mr. *Al Mahdi's* liability for reparations at €2.7 million.<sup>76</sup> In *Lubanga*, the Chamber held that it requires US\$10 million to express Mr. *Lubanga's* overall liability.<sup>77</sup> In *Bemba*, an even higher amount can be expected with more than ten times as many identified and participating victims.

The TFV faces a serious challenge in this respect: while between 2004 and 2014 the accumulated total of contributions from countries amounted to over €20.4 million,<sup>78</sup> the flow of contributions has significantly decreased in the past four years, amounting to less than €2 million per year.<sup>79</sup> The TFV's reparations reserve of presently €5.5 million<sup>80</sup> will not suffice to complement all the presently standing awards in full. The TFV's limited capacity in this regard carries a strong risk of frustrating many victims' expectations.

The EAC are likely to meet a similar fate, with a Trust Fund that has to find the best part of approximately US\$154 million (for altogether 7,396 named victims),<sup>81</sup> following the Chamber's decision on *Hissene Habré's* overall liability for the crimes he was convicted of.

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<sup>75</sup> *The Prosecutor v. Germain Katanga*, Trial Chamber II, Ordonnance de réparation en vertu de l'article 75 du Statut, ICC-01/04-01/07-3728, 24 March 2017, para. 264, and Disposition at page 118.

<sup>76</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236, 17 August 2017, para. 134, and Disposition, p. 60.

<sup>77</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber II, Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu, ICC-01/04-01/06-3379-Red, 15 December 2017, para. 281.

<sup>78</sup> See at: <https://trustfundforvictims.org/en/financial-information> (accessed April 2018).

<sup>79</sup> TFV Annual Report 2016, p. 31, available at: [https://www.trustfundforvictims.org/sites/default/files/reports/Annual%20Report-2016\\_ENG\\_September\\_Online.pdf](https://www.trustfundforvictims.org/sites/default/files/reports/Annual%20Report-2016_ENG_September_Online.pdf). (accessed April 2018).

<sup>80</sup> Report of the Board of Directors of the Trust Fund for Victims Sixteenth Session of the Assembly of States Parties, New York, 4 December 2017, p. 7, available at: <https://www.trustfundforvictims.org/sites/default/files/reports/ASP-16-BDTFV.pdf>. (accessed April 2018).

<sup>81</sup> See Human Rights Watch, *Hissène Habré Case: Trust Fund for Victims*, 7 February 2018, available at: <https://www.hrw.org/news/2018/02/07/hissene-habre-case-trust-fund-victims> (accessed April 2018).

For those courts that, other than the ICC, do not feature their own reparations regime but rather refer victims to national compensation regimes, the victims' situation may turn out no less problematic. As an example, in case of the EAC, in July 2013, after the arrest of Mr. *Habré*, Chadian President *Déby* declared that his government would compensate surviving victims of *Habré* crimes. In a Chadian domestic court ruling in 2015 against twenty *Habré*-era security agents on charges of murder, torture, kidnapping, and arbitrary detention, the court ordered the convicted persons and the Chadian government to jointly pay reparations to altogether 7,000 victims.<sup>82</sup> To date, these compensatory measures still remain to be implemented.

Also, even where a trust fund for victims exists, given the probable scarceness of funds of the convict, compromise solutions need to be developed where these trust funds operate within the margins of what they can obtain through voluntary (State) contributions in order to live up to demands. National compensation programmes should be factored into such awards<sup>83</sup> as far as such programmes can reasonably be expected to ever materialize. For both, voluntary contributions to a trust fund and/or State commitment to fund national compensation/reparation programmes in conjunction with trust fund activities, State support is necessary. In addition, where the number of victims surpasses the assets available for their relief, a sound strategy of managing expectations will be crucial. Victims need to be informed at the earliest stages on what they can expect from the applicable reparations regime as well as the trust fund, if there is one.

### C. Duration of proceedings

International criminal proceedings are lengthy, often spanning more than five years between the first appearance of an accused and the confirmation of the final verdict on appeal, as the case may be.<sup>84</sup> Naturally, the implementation of reparations depends on that final verdict because reparations are linked to the convicted person's individual guilt. This means that victims need to be very patient. Considering the circumstances of many victim communities, often living in poverty, on war-torn strips of land with a weak or even entirely demolished infrastructure,

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<sup>82</sup> Human Rights Watch, Chad: Court Order, But No Cash, for Ex-Dictator's Victims, 24 March 2016, available at: <https://www.hrw.org/news/2016/03/24/chad-court-order-no-cash-ex-dictators-victims> (accessed April 2018). Chad's responsibility under international law to provide reparations to victims of gross human rights violations is distinct from reparations afforded to victims by the accused or through funds of the accused.

<sup>83</sup> In a similar vein, *Lubanga*, where the Chamber invited the TFV to contact the Government of the DRC to determine how it could contribute to the reparations process: *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber II, Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu, ICC-01/04-01/06-3379-Red, 15 December 2017, para. 299.

<sup>84</sup> Report of the Court on the Basic Size of the Office of the Prosecutor, ICC-ASP/14/21, 17 September 2015, p. 4.

some in camps of internally or internationally displaced persons, there are multiple challenges:

- victims may have little comprehension for the rather complex judicial process and, as a result, feel increasingly frustrated after a certain time of waiting; and
- owing to the often very bad medical care at victims' disposition, they may simply not live to see the final verdict and any reparations that may follow.

Yet, international criminal trials are lengthy by virtue of their elevated complexity, and, while improvements have been made, this will remain a fact. Efforts need to be expended not only to further accelerate the criminal process (while guaranteeing the defendant's right to a fair trial) but also to focus on expectation management through a comprehensive outreach strategy. The latter needs to keep victim communities abreast of relevant developments and cater for intensified engagement with victims at all key milestone events during the process.

#### **D. Reaching out to victims**

Other than the majority of hybrid international justice solutions, the ICC, through its permanent nature, has the capacity to interact in ongoing conflict situations. Examples range from the Democratic Republic of the Congo (DRC) over Central African Republic (CAR) to Mali or Afghanistan. However, ongoing conflict situations pose a fundamental challenge to the ICC, which has no police or other armed protection force of its own. Reaching out to victim communities in more remote areas of relevant countries will be extremely difficult when even United Nations peacekeepers are no longer in a position to provide sufficient protection.

And even where windows of opportunity open up due to the (temporary) cessation of hostilities, it may prove extremely difficult to trace victim communities that have moved to new, safer locations over the years, dispersed, or otherwise disappeared from the locations last registered by the ICC victim section. Here, close collaboration with UN missions, grassroots NGOs on the ground, community leaders, and other regional actors is crucial, alongside a robust ICC presence on the ground – which, in turn, feeds into the resource challenge. Any implementation of reparation measures needs to be closely monitored in order not to create a security threat for any potential victim recipients of reparations.

For hybrid tribunals, the challenge will remain confined to a single situation. Yet, depending on the specifics of the conflict and stability of the region where victim communities reside, a constant line of communication to these affected communities may prove difficult to maintain. One example is the Central African Republic, where the technical infrastructure does not allow public media to reach the more remote areas of the country; security concerns may prevent public outreach officials of the SCC from travelling to meet victim communities. Comprehensive monitoring of the implementation of reparations will pose a major challenge for the ICC, the TFV, and the SCC alike.

### E. Determination of reparations

As regards the appropriate kind and amount of reparations, the regulatory framework of international(ized) courts to date is rather scarce. The ICC has the most far-reaching set of provisions in this regard. Art. 75 of the Rome Statute provides the fundamental premise, stipulating that there shall be ‘principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation’<sup>85</sup> on the basis of which the relevant chamber is to determine the scope and extent of any damage, loss, and injury to victims.

Pertaining to the array of potential reparation awards (in the first place restitution, compensation, and rehabilitation), the EAC is more restrictive than the ICC.<sup>86</sup> Its Statute excludes – unlike the ICC<sup>87</sup> – items like satisfaction, e.g. through a public apology, commemorations of the victims, or the likes. The term ‘including’ in the ICC’s art. 75 is much broader and, in fact, includes the whole array of the most recent UN conventions and guidelines on the matter.<sup>88</sup> Regarding the ‘principles relating to reparations’ that art. 75(1) of the Rome Statute seems to require the Judiciary to establish, no such stand-alone document has been created as yet.<sup>89</sup> Still, guidance can be found in the relevant jurisprudence on the international level to date. On 7 August 2012, Trial Chamber I of the ICC issued its decision on principles and procedures for reparations in the *Lubanga* case.<sup>90</sup> The decision defined a number of principles regarding reparations<sup>91</sup> on a variety of sub-topics, including a number of procedural issues, covering the ground in a rather comprehensive manner.<sup>92</sup>

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<sup>85</sup> Art. 75(1) of the Rome Statute.

<sup>86</sup> Art. 27(1) EAC Statute.

<sup>87</sup> Art. 75(1) and (2) of the Rome Statute use the word ‘including’, therefore suggesting that the list of reparation measures enunciated in that article (‘restitution, compensation and rehabilitation’) is non-exhaustive: ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Trial Chamber VIII, Reparations Order, ICC-01/12-01/15, 17 August 2017, para. 46.

<sup>88</sup> See, e.g. United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, United Nations General Assembly, Resolution A/RES/60/147, 21 March 2006, Annex. For a detailed analysis of the ICC reparations regime, see *Ambach, P.*, *The ICC Reparations Scheme: Promise for Victims or Recipe for Failure?*, in: P. Ambach/F. Bostedt/G. Dawson/S. Kostas (eds.), *The Protection of Non-Combatants During Armed Conflict and Safeguarding the Rights of Victims in Post-Conflict Society*, Brill/Nijhoff, Leiden/Boston 2015, Chapter 15, pp. 461 ff.

<sup>89</sup> For details regarding reparations principles and States Parties’ repeated requests to the ICC to establish those in one form or another, see *Ambach, P.*, op. cit. (n. 87), pp. 463 ff.

<sup>90</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904.

<sup>91</sup> *Ibid.*, paras. 182–259. The Chamber underlined that the principles are ‘limited to the circumstances of the present case’; however, an analysis of the authorities used and the manner in which the principles were formulated shows that the Chamber has in fact creat-



Subsequent reparation orders in the *Lubanga*, *Katanga*, and *Al Mahdi* cases have sought to refine the basis on which to determine reparations. In *Lubanga*, the Trial Chamber's reparations order is still under appeal,<sup>93</sup> including on the issue of exactly how the Chamber calculated the amount of liability of the convict.<sup>94</sup> At the same time, the different Chambers dealing with reparations have applied a common definition of 'harm',<sup>95</sup> the 'proximate cause' linkage requirement between the crimes of the convict and the harm to the victim,<sup>96</sup> and the appropriate types and modalities of reparations: (i) reparations can either be individual or collective; (ii) they are not mutually exclusive and can be awarded concurrently;<sup>97</sup> (iii) reparations, both collective and individual, can also be awarded through the TFV to both individuals and organizations.<sup>98</sup> As for the scope of liability, ICC trial chambers have held that '[t]he convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, to his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case'.<sup>99</sup>

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ed a rather robust set of principles that find general application because they display many essential principles already enshrined in a number of international treaties.

<sup>92</sup> *Ibid.*, paras. 260–288. See Ambach, P., op. cit. (n. 87), pp. 466–469.

<sup>93</sup> ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber II, Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu, ICC-01/04-01/06-3379-Red, 15 December 2017.

<sup>94</sup> ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Defence, Notice of Appeal by the Defence for Mr Thomas Lubanga Dyilo against the "Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu" Handed Down by Trial Chamber II on 15 December 2017 and Amended by way of the Decisions of 20 and 21 December 2017, ICC-01/04-01/06-3388-tENG, 15 January 2018.

<sup>95</sup> ICC, *The Prosecutor v. Ahmad Al Fagi Al Mahdi*, Trial Chamber VIII, Reparations Order, ICC-01/12-01/15, 17 August 2017, para. 43 ('denoting "hurt, injury and damage". For individuals, the harm does not necessarily need to have been direct, but it must have been personal to the victim. Harm may be material, physical or psychological. Organisations must demonstrate direct harm to their properties. For moral harm specifically, moral harm should be estimated without consideration of the economic situation of the local population'); see also ICC, *The Prosecutor v. Germain Katanga*, Trial Chamber II, Ordonnance de réparation en vertu de l'article 75 du Statut, ICC-01/04-01/07-3728, 24 March 2017, para. 189.

<sup>96</sup> ICC, *The Prosecutor v. Ahmad Al Fagi Al Mahdi*, Trial Chamber VIII, Reparations Order, ICC-01/12-01/15, 17 August 2017, para. 44 (i.e. whether it was reasonably foreseeable that the acts and conduct underlying the conviction would cause the resulting harm on a balance of probabilities); ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, 3 March 2015, paras. 22 and 65.

<sup>97</sup> ICC, *The Prosecutor v. Ahmad Al Fagi Al Mahdi*, Trial Chamber VIII, Reparations Order, ICC-01/12-01/15, 17 August 2017, para. 45. For example, individual businesses and families may also receive financial support in the implementation of collective reparations, see ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, ICC-01/04-01/06-3129, 3 March 2015, para. 155.

<sup>98</sup> Rule 98 of the ICC Rules.

<sup>99</sup> ICC, *The Prosecutor v. Ahmad Al Fagi Al Mahdi*, Trial Chamber VIII, Reparations Order, ICC-01/12-01/15, 17 August 2017, para. 50; ICC, *The Prosecutor v. Thomas*



However, as to the calculation of the convict's liability and the determination of the appropriate reparations, ICC trial chambers have not only applied slightly different approaches but also left it, to varying degrees, to the TFV to carry out a determination of which reparation measures, individual or collective, or both, are appropriate. This approach makes sense in a system of a permanent nature like the ICC which can try different approaches, adjust, and fine-tune as it moves along through the cases. Yet, for hybrid courts, a decision on reparations will often be a single shot with not much internal jurisprudence to rely on and not much longevity of the institution that would justify a trial and error approach. Therefore, there is much merit in establishing certain standards regarding reparations and in working towards commonly agreed standards between the different international(ized) justice institutions with a view to providing a somewhat solid legal basis for future trial chambers of these courts and tribunals.

On the question of how broad the range of potential reparation measures should be defined, relevant legal texts recommend it to be as inclusive as possible: experience of reparation proceedings and awards at the ECCC<sup>100</sup> as well as the expected rather frequent lack of means of the convict for reparations awards at any of the international(ized) courts<sup>101</sup> demonstrate that reparation measures requiring monetary funds to realize (compensation, restitution) will often be the more difficult to award evenly to an *entire* victim community due to scarceness of funds – even with the TFV possibly adducing some funds from its voluntary contribution funds. Symbolic reparations, however, often require only limited financial means, if any at all: take ‘satisfaction’ measures such as full public disclosure in the judgment of the facts subject to the case, thus restoring victims’ dignity in recounting their suffering, public apology of the perpetrator(s), publication of the victims’ names in the news (papers), or the naming of streets or monuments after victims or victim groups.<sup>102</sup> It follows that symbolic reparations measures that can be subsumed under the ‘satisfaction’ heading could become a standard ingredient of a reparations award package in future reparations proceedings, flanked – as far as funds are

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*Lubanga Dyilo*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, 3 March 2015, paras. 20–21; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber II, Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu, ICC-01/04-01/06-3379-Red, 15 December 2017, para. 269.

<sup>100</sup> Extraordinary Chambers in the Courts of Cambodia, *The Prosecutor v. Kaing Guek Eav alias Duch*, Trial Judgment, Case File/Dossier No. 001/18-07-2007/ECCC/TC, 26 July 2010, Section ‘Civil Party Reparations’, at 217–243.

<sup>101</sup> More than 60% of all ICTY and ICTR accused have been declared indigent either at the outset or at some time during their proceedings. See the Section on Legal Aid on the ICTY’s homepage at <http://www.icty.org/sid/163> (accessed April 2018).

<sup>102</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber II, Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations, ICC-01/04-01/06-3251, 21 October 2016.

available – by measures enabled through available funds.<sup>103</sup> This, again, has to be communicated to victim communities from the early stages of proceedings onwards in order to manage expectations – an item that is at the very heart of the ICC's and indeed any hybrid tribunal's operations in the field.

#### IV. Conclusion

It can be established without a doubt that reparations are an essential novel feature in an emerging restorative/reparative justice facet in the international criminal justice context. The ICC provides the most elaborate regime amongst the presently operating international criminal justice mechanisms, with a trust fund to cater for victims' redress even where the convicted person is unable to offer any funds to reparations awards issued by the Chamber. Yet, the international justice system remains comparably slow and highly selective and funds, even if topped up by the TFV, will often not suffice when measured against the liability of the convict. Then again, there is presently no alternative as many national systems are incapable of entertaining national compensation regimes for atrocity victims; hybrid tribunals that provide for referral mechanisms to domestic court systems are likely to point victims to deception.

For a meaningful reparations mechanism, the availability of funds will be essential. If the system is properly funded and if victim redress projects are well chosen, the system can work. It is often underestimated with how little money meaningful projects can be carried out that make a real difference to victim communities. For hybrid *ad hoc* courts, the collection of funds needs to commence early, particularly if the reparations regime is based on voluntary contributions. For the TFV of the ICC, aggressive fundraising and honest State support will be decisive on the key question underlying this contribution: whether meaningful redress can be brought to victims or whether disappointment will be the prevailing sentiment. What's more, a failed reparations process may retroactively delegitimize the entire criminal process carried through by the court in question, be that the ICC or a hybrid court.

Regarding the determination of reparations, some general principles have been established through ICC and ECCC jurisprudence. It can be expected that present and future reparations proceedings at the ICC will further shape the process and carve out the trial chambers' options depending on the circumstances of the case. Further fine-tuning, also in light of what has and what has not worked in terms of implementation, will further decrease the potential of disappointment – provided,

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<sup>103</sup> See, as an example, the *Lubanga* case at the ICC, where Trial Chamber II already in 2016 authorized symbolic reparations in addition to subsequent collective reparations programmes not of a symbolic nature: *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber II, Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations, ICC-01/04-01/06-3251, 21 October 2016.

again, there are sufficient funds to carry out at least *some* relevant reparation projects. The TFV's role as the main implementing body will remain crucial. Connected to this, the ICC – and any hybrid court with a reparations component – should carry out comprehensive outreach and expectation management in order to notify victims of what the new, victim-centred approach to international(ized) justice for mass crimes is: work in progress.

### **List of abbreviations**

CAR	Central African Republic
DRC	Democratic Republic of the Congo
EAC	Extraordinary African Chambers
ECCC	Extraordinary Chambers in the Courts of Cambodia
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal
KSC	Specialist Chambers and Specialist Prosecutor's Office
NGO	non-governmental organization
SCC	Special Criminal Court in the Central African Republic
STL	Special Tribunal for Lebanon
TFV	Trust Fund for Victims
UN	United Nations
US	United States of America

# **The Imposition of Penal Sanctions at the Level of the International Criminal Court and Its Relationship to Other Forms of Justice Delivery**

*James K. Stewart\**

## **I. Introduction**

Contemporary international criminal justice – constituting *per se* quasi an alternative to national criminal justice at least in terms of complementarity – has evolved into a sharp-edged system for addressing violations of human rights on the scale and intensity represented by the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression. How does the International Criminal Court (ICC), which is the central pillar of international criminal justice, connect with other models of justice delivery at the international level? This short note will examine this question briefly by touching upon the relationship of the imposition of classic penal sanctions by the ICC, essentially a function of punitive or retributive justice, to other, ‘alternative’ forms of justice delivery, such as reparative and rehabilitative justice.

## **II. Relationship of the ICC to other forms of justice delivery**

The ultimate objective set for the ICC by its internationally widely agreed upon ‘constitution’, the Rome Statute, is to contribute to the prevention and repression of war crimes, crimes against humanity, genocide, and the crime of aggression by means of the effective investigation and prosecution of such crimes at the international level. Rome Statute crimes are so serious that it may be difficult to envisage any effective response to them other than the punitive investigation/prosecution model for the delivery of criminal justice. This model may be the most appropriate one to deal with conduct that is at the extreme end of the spectrum of human evil. Victims who suffer from such evil deserve reparative justice; those who are the most responsible for their suffering merit retributive justice.

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\* The author is Deputy Prosecutor of the International Criminal Court in The Hague, The Netherlands, but speaks in his personal capacity and not on behalf of the Office of the Prosecutor. The views expressed are his own. The author acknowledges the background legal research conducted for this paper by Ms. *Zhengqi Liu*, an intern in the Office of the Prosecutor, and expresses to her his gratitude.

Nevertheless, the investigation/prosecution model at the ICC does not stand in isolation from other methods of justice delivery but is connected, as a function of the provisions of the Rome Statute and the practical application of those provisions, to other justice delivery concepts. So, for example, as we will see below, the ICC is unique, in the administration of international criminal justice, in the provision made for reparations to victims of Rome Statute crimes. The reparations process, however, is triggered by the outcome of the operation of the more traditional punitive criminal justice model, since it comes into play only when the accused person is convicted.

Further discussed below is the possibility of a 'plea resolution' of charges against an accused under the Statute, which provides for proceedings on an admission of guilt. Various factors can then come into play to mitigate the sentence. While the backdrop to such proceedings remains the investigation/prosecution response to international crimes, the provisions for admission of guilt proceedings may offer greater scope for reparative and rehabilitative justice to the benefit of both victims and convicted persons.

Ultimately, the ICC is a court of last resort, only required to intervene where responsible national authorities of relevant States either cannot or will not discharge their responsibilities under the Statute, by initiating genuine investigations and prosecutions of international crimes. However, in determining whether the Court's jurisdiction should be engaged in a given situation, the Office of the Prosecutor (OTP) may properly take into account the requirements of transitional justice concepts in assessing whether the most responsible perpetrators are being held genuinely accountable, to ensure justice for victims, and contribute to prevention.

At international level, tension between peace and justice is sometimes invoked in favour of less punitive means of justice delivery, such as truth and reconciliation commissions. However, the framers of the Rome Statute may have resolved that supposed tension by 'making' justice an integral component of peace. As a practical consideration, failing to deliver justice may only set the stage for future conflict.

### **III. ICC model of criminal justice delivery**

Responding to the plight of the 'victims of unimaginable atrocities', and aware of the danger to the 'peace, security and well-being of the world' posed by such atrocity crimes, the framers of the Rome Statute set as their objectives putting an end to impunity and contributing to the prevention of war crimes, crimes against humanity, genocide, and now the crime of aggression. These objectives are to be accomplished by the 'effective prosecution' of the perpetrators of such crimes.<sup>1</sup> Thus, as already mentioned, the means chosen under the Rome Statute to end im-

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<sup>1</sup> Preamble and arts. 1 and 5 RS.

punish and contribute to prevention of crimes under international criminal law is the investigation/prosecution model of retributive justice.

Perpetrators who are successfully prosecuted are condemned before the eyes of the world and punished as an expression of that condemnation and the need for accountability for awful crimes. Condemnation and punishment mechanisms take into account the suffering of victims and are intended to deter the commission of crimes, offering vulnerable populations greater protection under the law.

The ICC is a court of last resort, which may only intervene in the event national authorities fail to discharge their responsibilities under the Rome Statute by initiating their own investigations and prosecutions of international crimes. Thus, the repression of Rome Statute crimes is a shared responsibility, with States having the primary role.<sup>2</sup> The ICC is the default option, the failsafe, when States themselves either cannot or will not discharge that role.<sup>3</sup>

The Rome Statute does not prescribe the sanctions that States Parties should impose upon perpetrators of international crimes. States thus have considerable scope and flexibility in administering justice in such cases. In determining whether State response to Rome Statute crimes is genuine or merely meant to shield perpetrators from justice, the OTP of the ICC will assess whether the objectives of ending impunity and contributing to prevention set by the Rome Statute are being reasonably met, according to the situation.

For the ICC itself, of course, the Rome Statute provides an array of traditional punitive sanctions, including imprisonment, fines, and forfeiture of assets, to be imposed as a function of the gravity of the crimes and the individual circumstances of the convicted person.<sup>4</sup> Indeed, it may be difficult to see how any other alternative approach can be justified when one is dealing with conduct at the extreme end of the spectrum of human evil. Nevertheless, as will be seen below, severe penal sanctions may not suit all situations and may combine, in less drastic form perhaps, with other means of delivering justice to form part of a set of transitional justice measures.

#### IV. Reparations for victims

Unique among international criminal tribunals and courts, the ICC provides for the participation of victims in its proceedings and that from the very start of those proceedings.<sup>5</sup> The OTP and the Court are also responsible under the Rome Statute

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<sup>2</sup> Arts. 1, 17, 18, and 19 RS.

<sup>3</sup> *Sikkink, K./Hun Joon, K.*, The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations, *Annual Review of Law and Social Science*, 2013, 269–285, 272.

<sup>4</sup> Arts. 77 and 78 RS; Rules 145, 146, and 147 RPE.

<sup>5</sup> Arts. 15(3) and 68(3) RS; Rules 86 et seq. RPE.

for seeing to the well-being and security of victims and witnesses.<sup>6</sup> Numerous provisions of the Rome Statute address the participation and welfare of victims and witnesses, but the focus here will be on the matter of reparations.

As a feature of sentencing, a Trial Chamber may order the ‘forfeiture of proceeds, property and assets derived directly or indirectly from [Rome Statute crimes], without prejudice to the rights of bona fide third parties’.<sup>7</sup> To that end, as one feature of the assistance they must provide to the Court, States Parties are required to identify, trace and freeze, and seize ‘proceeds, property and assets and instrumentalities of crimes’ against eventual forfeiture orders.<sup>8</sup>

Following a conviction at trial, the Trial Chamber embarks upon reparations hearings to establish the degree of liability of the convicted person for the harm done to victims. This is the newest feature of the Court’s proceedings, and it also involves the direct participation of victims.<sup>9</sup>

Under the Rome Statute, the States Parties have established a Trust Fund for Victims (TFV), to which State and private donors may contribute.<sup>10</sup> In the words of the TFV itself, the ‘pursuit of reparative justice is a truly innovative feature of the Rome Statute’.<sup>11</sup> The Trust Fund provides assistance to victims, their families, and affected communities in situations under the jurisdiction of the ICC. Central to the aims of reparative justice, the Trust Fund also implements Court-ordered reparations awards in favour of victims where the convicted person is indigent.

## V. Plea resolutions

The ICC applies, with respect to admissions of guilt, a blended procedural regime based on the various components the Rome Statute has adopted from the major legal systems of the world. There are, as well, human factors that go into the resolution of charges through an admission of guilt, a practical feature that might too easily be overlooked when one considers plea resolutions. However, an analysis of the ICC’s blended procedural regime and the human factors involved in plea resolutions, while a worthy project, is not the focus of this short paper.

The Statute and the Rules of Procedure and Evidence (RPE) provide for admissions of guilt.<sup>12</sup> The Court now has the practical experience of the application of

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<sup>6</sup> Arts. 53 and 68 RS.

<sup>7</sup> Art. 77(2)(b) RS; Rule 147 RPE.

<sup>8</sup> Art. 93(1)(k) RS.

<sup>9</sup> Arts. 68(3), 75, and 76 RS. An analysis of the ICC reparations regime and the complex evolving jurisprudence relating to it will not be attempted here.

<sup>10</sup> Arts. 75 and 79 RS.

<sup>11</sup> ICC, Trust Fund for Victims website: [www.icc-cpi.int/tfv](http://www.icc-cpi.int/tfv) (accessed April 2018).

<sup>12</sup> Art. 65 RS; Rule 139 RPE.

these provisions in one case, that of *Al Mahdi*, where the accused was convicted, as a co-perpetrator, of the war crime of intentionally directing an attack against historic monuments and buildings dedicated to religion, and sentenced to nine years in prison.<sup>13</sup> For the purposes of this paper, what is important is that this procedure provides scope for rehabilitative justice for the convicted person as well as reparative justice for victims.

The Trial Chamber in the *Al Mahdi* case considered the admission of guilt to be a mitigating factor in sentencing to which it gave substantial weight, especially since the accused – in the Court’s opinion – had made an early, genuine admission of responsibility, showing honest repentance. By admitting his guilt, *Al Mahdi* may also have contributed in saving the Court’s time and resources and relieved witnesses and victims from the burden of testifying. The Chamber further felt that the admission might contribute to reconciliation in northern Mali and might also serve as a deterrent to others. The Chamber was aware, however, that *Al Mahdi*’s admission was made against a backdrop of overwhelming evidence of his guilt.<sup>14</sup>

It has rightly been observed that an admission of guilt does not lessen the gravity of the crime, that being one factor a sentencing Chamber must take into account, but it does relate to the individual circumstances of the convicted person, which is another factor the Chamber must consider in imposing a sentence.<sup>15</sup> Thus, while the gravity of Rome Statute crimes will call for deterrent sentences, cooperation with the Court and an admission of guilt, in circumstances that offer hope of genuine rehabilitation, will mitigate a sentence. The *Al Mahdi* case is now in the reparations phase.

## VI. Transitional justice

As noted earlier, the ICC is a court of last resort, with States Parties bearing the primary responsibility for the repression of war crimes, crimes against humanity, genocide, and the crime of aggression. In order to intervene in any given situation, the ICC Prosecutor must satisfy herself – and, if she is required to obtain judicial authorization to open an investigation, a Pre-Trial Chamber of the Court – that any case she would bring is admissible before the Court, in the sense that it is not substantially the subject of genuine national proceedings.<sup>16</sup>

<sup>13</sup> ICC-01/12-01/15-171: Judgment and Sentence, 27 September 2016 (*Al Mahdi* Judgment), paras. 7, 29–30, 42–44, 62–63, and 109.

<sup>14</sup> *Al Mahdi* Judgment, paras. 74, 98, 99, and 100.

<sup>15</sup> Khan, K.A., Article 78: Determination of the Sentence, in: O. Triffterer/K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck, Munich 2016, p. 1900. See also *Prosecutor v. Babic*, Judgment on Sentencing Appeal, IT-03-72-A, 18 July 2005, para. 43, and *Prosecutor v. Bralo*, Judgment on Sentencing Appeal, IT-95-17-A, 2 April 2007, para. 85.

<sup>16</sup> Arts. 1, 17, 18, and 19 RS. See ICC Policy Paper on Preliminary Examinations, [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf) (accessed April 2018), paras. 43–46, and references cited therein.



The Rome Statute, while prescribing sentencing sanctions for its own proceedings, does not prescribe what penalties States should mete out in relation to Rome Statute crimes. In considering the matter of admissibility, to determine whether a reasonable basis exists to open an investigation, the Prosecutor must assess the genuineness of any national proceedings. However, this allows for a degree of individualization of the State response to particular situations, the primary question being whether the State is meeting Rome Statute objectives of ending impunity and promoting prevention.

The assessment of this issue may require the Prosecutor to take into account the requirements of transitional justice in a given situation. The concept of 'transitional justice' embraces a range of processes that are employed to address a legacy of human rights abuses and to achieve accountability, justice, and reconciliation. To achieve these objectives, transitional justice commonly resorts to a variety of traditional and 'alternative' measures, such as criminal prosecutions, truth commissions, reparations programs, and institutional reforms. One goal of institutional reform is to prevent the recurrence of crimes. Overall, transitional justice is an approach to achieving justice in a time of transition from State oppression or a condition of armed conflict to a time of hoped for peace and stability.

In assessing a particular situation, the ICC Prosecutor bears in mind the role of other components of transitional justice, such as truth commissions or reparations programs, in ensuring accountability. However, her mandate obviously relates to the component of criminal prosecutions, specifically, the prosecution of criminal conduct amounting, for example, to war crimes or crimes against humanity. Nevertheless, a situation of transitional justice only engages the mandate of the Prosecutor if the authorities of the situation State are not themselves conducting genuine proceedings for Rome Statute crimes.

The Prosecutor is only under a duty to intervene when the State is unable or unwilling to act. Thus, in a situation of transitional justice, effective penal sanctions may take many different forms and be combined with a variety of other measures. They should, however, serve appropriate sentencing goals in relation to international crimes, such as public condemnation of the criminal conduct, recognition of the suffering of victims, and deterrence of further criminal conduct. Such goals, in the context of international criminal law, protect the interests of victims and vindicate basic human rights. In any given situation, the ultimate question for State authorities is, just as it is for the ICC Prosecutor, whether Rome Statute objectives of accountability and prevention are being served.

## VII. Peace and justice

The framers of the Rome Statute have resolved, at least conceptually, the supposed tension between peace and justice. The preamble to the Statute links the danger to the peace, security, and well-being of the world posed by the crimes falling within the scope of the Statute to the objective of prevention through their effective prosecution. This means that justice and accountability must form an integral part of any peace process.<sup>17</sup>

The relationship between peace and justice is not without its complications: while international criminal justice has been applied in situations where an armed conflict is still hot, the ability to investigate may depend, to a degree, upon there being a modicum of stability and security in the area of investigative operations. The OTP has ways of working around situations where insecurity is too great or where it is denied access to the terrain, but these situations pose real challenges. Moreover, in order to prosecute successfully, the ICC depends upon States to arrest suspects, and this ability may depend upon many factors, such as political will but also on conditions on the ground. These, however, are simply practical considerations. The Rome Statute resolves the tension that is supposed to exist between peace and justice by recognizing that each needs the other.

On the issue of the relationship between peace and justice, it is useful to recall the situation of *Milošević* and the dire consequences some predicted for the peace process in Bosnia should he be indicted by the International Criminal Tribunal for the former Yugoslavia. None of these consequences materialized. From the perspective of the ICC OTP, failure to address justice and accountability issues in any peace process only allows feelings of injustice to fester and sets the stage for future conflict down the line.

One of the objectives the OTP keeps in view when conducting preliminary examinations of situations is a preventive one, to contribute, by the OTP's very presence, to a ratcheting down of violence and a calming of crisis situations.<sup>18</sup> This helps sometimes; at other times, not. The ultimate goal is to ensure that any peace process provides for a measure of accountability.

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<sup>17</sup> Jo, H./Simmons, B.A., Can the International Criminal Court Deter Atrocity?, s.l., 2014, pp. 1–53 [electronic copy available at: <http://ssrn.com/abstract=2552820> (accessed April 2018)], p. 5, where the authors suggest that ‘as a general matter there is little evidence to suggest the peace *versus* justice trade-off is anything other than a false dichotomy.’ Moreover, in its 2007 Policy Paper on the Interests of Justice, relating to how it interprets the concept of ‘the interests of justice’ appearing in art. 53(1)(c) and (2)(c) RS, the OTP observed that ‘there is a difference between the concepts of the interests of justice and the interests of peace and ... the latter falls within the mandate of institutions other than the Office of the Prosecutor’; see also p. 3 (especially footnote 5) and pp. 8–9 of this policy paper.

<sup>18</sup> ICC Policy Paper on Preliminary Examinations, [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf) (accessed April 2018), paras. 100–106.

## VIII. Conclusion

To conclude, the ICC, by virtue of the provisions of the Rome Statute and the clear intention of its framers, applies a model of punitive or retributive justice with respect to the need to combat impunity and contribute to prevention, thus promoting a rules-based international order. However, the Court is also connected with other forms of justice delivery, involving especially its innovative efforts to realize reparative justice for the victims of the crimes it was designed to repress. Furthermore, the possibilities for mitigation of sentence under the Rome Statute's regime in case of admissions of guilt show that rehabilitative justice for convicted persons, although less important perhaps as a relevant sentencing principle, does have a place in the assessment of what sanctions the Court should impose.

The OTP is also sensitive to the role of transitional justice in particular situations, the fundamental question simply being whether national authorities are genuinely addressing Rome Statute objectives of accountability, justice for victims, and prevention. In sum, while traditional retributive justice lies at the heart of the Rome Statute system of international criminal justice, given the nature of the crimes the Statute addresses, it is also part of a broader system of (alternative) conflict resolution and enforcement models and does not stand in isolation from other forms of justice delivery.

## List of abbreviations

ICC	International Criminal Court
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
RS	Rome Statute
TFV	Trust Fund for Victims

# **Transitional Criminal Justice in Colombia and Complementarity Policy under the Rome Statute of the International Criminal Court**

*John Vervaele*

## **I. Introduction: internal armed conflict and political violence in Colombia**

Restorative and transitional justice has many definitions but is largely seen as ‘the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation’.<sup>1</sup> These measures include traditional domestic and international(ized) trials, as well as alternative mechanisms such as truth commissions, historical commissions, reparation programmes, vetting and lustration practices, documentation, memorialization, and other efforts to promote reconciliation.<sup>2</sup> In the context of the current situation in Colombia we will be looking specifically at various adjusted forms of criminal justice simultaneously aimed at truth finding, judicial adjudication, and victim reparation in a transition to sustainable peace. The transitional justice scheme contains a set of standards, mainly based upon international human rights law (IHRL), which provides a normative framework for the peace negotiations on the balancing of justice-truth-victim compensation and its implementation in practice.

In the last seventy years, Colombia was and, to a certain extent, continues to be the arena of a devastating internal armed conflict. Although empirical data is not always available and reliable, several official and non-governmental organization (NGO) sources indicate a possible number of more than five million victims of the

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<sup>1</sup> UN SG report, The rule of law and transitional justice in conflict and post-conflict societies, para. 8, August 2004, <https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/> (accessed April 2018), further elaborated in the Guidance note of the SG on the UN Approach to Transitional Justice, March 2010, [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf) (accessed April 2018).

<sup>2</sup> See *Teitel, R.G.*, *Transitional Justice*, Oxford University Press, Oxford et al. 2000; *Roht-Arriaza, N.*, *The New Landscape of Transitional Justice*, in: N. Roht-Arriaza/J. Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century*, Cambridge University Press, Cambridge 2006. See also *Lambourne, W.*, *Transitional Justice and Peacebuilding after Mass Violence*, *International Journal of Transitional Justice*, vol. 3, issue 1, 2009, 28.

armed conflict (more than 10% of the population),<sup>3</sup> around 250,000 of whom were killed and 30,000 were forcibly disappeared. Around 5,000 massacres have been reported. Another seven million people have been forcibly displaced, the second highest figure worldwide behind Sudan. Serious criminal conduct, such as large-scale kidnappings for ransom, drug trafficking, and organised crime, has also been part of this dangerous mix.

This longest-running conflict in Latin America is very complex and involves different actors and drivers. Its origins can be traced back to the lack of equality in the distribution of land and the lack of land reform in a country where economic and political power is in the hands of the oligarchy and the military, and where the gap between the rich and the poor is one of the largest in the world.<sup>4</sup> As a result, two left-wing rebel armed groups have been active since the 1960s: the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN). The Colombian state began an internal war against them and the land oligarchies started their dirty war by setting up right-wing paramilitary forces. The collusion between the government, the military, and paramilitary forces has always been very intense. This resulted in a radicalization of the conflict, making Colombia the world leader in homicide rates from 1990 to 2002. From the late 1980s onwards the FARC and ELN used kidnapping and the drug trade as financial tools; in 1997, some thirty-four right-wing paramilitary groups formed an umbrella organization, the United Self-Defense Forces of Colombia (AUC), intending to protect different local economic, social, and political interests by fighting the rebel armed groups in their areas. The AUC had about 20,000 members and was heavily financed through the drug trade and the support from landlords, the mining and petroleum industry, large agro-industrial companies, and politicians. The Colombian military have been accused of delegating to AUC paramilitaries the task of murdering local environmental, human rights, and union activists suspected of supporting the rebel movement. Moreover, the AUC committed very violent massacres of rural and indigenous communities, killing large numbers of people. The Inter-American Court of Human Rights (IACtHR) found Colombia guilty in five cases for massacres committed by armed paramilitary groups<sup>5</sup> because of the State's functional control over the paramilitary groups. Both the AUC and the guerrilla movements were designated as

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<sup>3</sup> The Central Register of Victims even indicates almost 8 million victims, see <https://rni.unidadvictimas.gov.co/RUV> (accessed April 2018).

<sup>4</sup> Colombia's Gini coefficient is 55.9, reflecting the worst income inequality among countries with a high human development index.

<sup>5</sup> A notorious example is the Mapiripán Massacre, carried out by the AUC during 5 days in July of 1997. In proceedings before the IACtHR, the government of Colombia admitted that members of its military forces also played a role in the massacre, by omission. For the ruling of the Court, see *Caso de la masacre de Mapiripán*, 15 September 2005. The other rulings are *Caso de la masacre de 19 Comerciantes*, 5 July 2004, *Caso de la masacre de Pueblo Bello*, 31 January 2006, *Caso de las masacres de Ituango*, 1 July 2006, and *Caso de la masacre de la Rochela*, 11 May 2007.

terrorist organizations by the United Nations (UN) and by several countries using the blacklisting system.

This brief insight leaves no doubt that the situation in Colombia cannot be qualified as a classic armed conflict between two actors but as one involving a variety of actors, including state agents (military and civilian), paramilitary forces, businesses, and rebels. Since the 1990s the main victims in this armed conflict<sup>6</sup> have been the non-combatants, thereby creating a veritable humanitarian crisis. The actors in the armed conflict committed serious human rights violations that may certainly qualify as war crimes and crimes against humanity. This view has also been shared, on a regular basis, by the national prosecutor's office, the Supreme Court and the Constitutional Court, and the IACtHR. This mapped reality involves several forms of conduct that could qualify as situations and cases coming under the jurisdiction<sup>7</sup> of the International Criminal Court (ICC) due to their gravity. In 2004, the ICC prosecutor (Office of the Prosecutor, OTP) gave a clear signal that potential cases could trigger ICC jurisdiction by opening a preliminary examination<sup>8</sup> of possible crimes against humanity from 2002 onwards and war crimes from 2009 onwards committed by the government and by rebel groups. This means that several situations linked to activities both by the army and related paramilitary groups and by the FARC and ELN have been under OTP scrutiny for thirteen years now. The OTP has also been closely monitoring the Colombian peace process to ensure that justice measures are genuine and to hold those accountable who bear the greatest responsibility for breaches of international criminal law and serious human rights violations.

There is no doubt that Colombia has a positive duty to protect against serious human rights violations and core international crimes, and to protect victims in that respect.<sup>9</sup> Conventional treaties, the Rome Statute of the ICC, customary international law norms, and the case law of the IACtHR referring to *ius cogens* norms compel Colombia to comply with a general duty to investigate, prosecute, and pun-

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<sup>6</sup> The term 'armed conflict' is politically sensitive in Colombia. Some qualify it as civil war, others as terrorism.

<sup>7</sup> Colombia signed the Rome Statute in 1998 and ratified it in 2002. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Colombia or by its nationals from 1 November 2002 onwards. However, the Court may exercise jurisdiction over war crimes committed since 1 November 2009 only, in accordance with Colombia's declaration pursuant to art. 124 of the Rome Statute.

<sup>8</sup> The preliminary examination of a situation is an information-gathering phase, not a formal judicial investigation, but may lead – if admissible – to a formal investigation by the OTP/ICC of concrete criminal cases against suspects of international core crimes.

<sup>9</sup> *Gil Gil, A./Maculan, E.* La influencia de las víctimas en el tratamiento jurídico de la violencia colectiva, Dykinson, Madrid 2017, p. 392. See also Principles Relative to the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. res 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52 U.N. Doc E/1989 (1989) and IACtHR, *La Rochela Masacre v. Colombia*, 11 May 2007, paras. 196–203.

ish these serious violations.<sup>10</sup> In the case of state inaction, an inability or unwillingness related to state action, or an enforcement deficit, Colombia could run into problems related to state liability under the Inter-American Convention of Human Rights and actors could face criminal investigation, prosecution, and punishment by the ICC under the trigger mechanism for complementarity of the Rome Statute. Colombia, however, is neither a failed state nor a state in which a (military) dictatorship prevails.<sup>11</sup> Peace agreements and related transitional justice systems do not aim primarily at restructuring the entire fabric of the State.

Colombia has attempted on several occasions to disarm, demobilize, and reintegrate (DDR) the actors involved in the armed conflict. The most important DDR schemes have been elaborated within the framework of peace negotiations and forms of restorative and transitional justice, aimed at achieving peace in combination with truth, justice, and victim reparation. The transitional justice systems in Colombia provide for reduced punitive justice and, in some cases, also for amnesty and pardon as a trade-off for truth, victim compensation, and sustainable peace. The question arises whether, from a normative and practical point of view, these restorative and transitional justice systems are in line with the obligations that arise from the IHRL and the ICC Rome Statute and have enough flesh on their bones to avoid the OTP/ICC triggering criminal cases from the ongoing preliminary examination of Colombian situations since 2004. Does the Colombian transitional justice system comply with the positive duties (in law and in practice) to effectively investigate, prosecute, and punish serious human rights violations/international core crimes and with the complementarity test under the Rome Statute, which would mean that the ICC does not have to activate jurisdiction in concrete criminal cases? And how does the OTP/ICC elaborate criminal policy under the complementarity assessment of situations in order to steer Colombia into genuine compliance?

In this article, we will first provide insight into the two main models of restorative and transitional criminal justice of 2005 and 2016. This is followed by an explanation of the gravity and the negative and positive complementarity test of the ICC. Subsequently, we will look at the application of this test in the OTP's prosecutorial practice in terms of situations under preliminary examination in Colombia. Finally, an assessment is made in order to answer the question of whether the restorative and transitional justice schemes comply with the complementarity test, based on the strong interaction of the ICC preliminary examination of Colombian situations and the political and legal action in the domestic legal order.

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<sup>10</sup> *Vervaele, J.A.E.*, Graves violaciones de derechos humanos y delitos internacionales: del ius (non) puniendi del Estado-Nación a un deber puniendi imperativo de ius cogens?, in: F. Velasquez, e.a. (coordinadores), *Derecho penal y crítica al poder punitivo del Estado. Libre homenaje a Nodier Agudelo Betancur*, vol. 2, Bogotá, Colombia, pp. 1233–1266.

<sup>11</sup> However, some qualify the situation as an endangered democracy. See *Uprimny, R./Saffon, M.P.*, Usos y Abusos de la Justicia Transicional en Colombia, *Anuario de Derechos Humanos* 2008, p. 170.

## **II. Criminal liability for international core crimes and models of restorative and transitional justice in Colombia**

### **A. Restorative and transitional criminal justice under the Justice and Peace Law of 2005**

Since 1982 Colombia has entered into peace negotiations with the actors involved in the armed conflict on five occasions and all of them included some forms of amnesty or a pardon for crimes that might come under the ICC's material jurisdiction. In 1985 the FARC and the Colombian Communist Party founded a political party, the Unión Patriótica, as part of the peace negotiations held by President Belisario Betancur. Demobilized fighters who became presidential candidates, members of parliament, city counsellors, and around 3,500 party members, however, were assassinated in a violent campaign set up by the paramilitary with support of the army and drug traders. This led to the complete extermination of the Unión Patriótica. In 1991 the small city-guerrilla movement M-19 was willing to demobilize and surrender its weapons in exchange for a blanket amnesty.

The 1999–2002 peace process under President Pastrana, who had conceded a demilitarized zone to the FARC, finally failed. It also had a twofold reverse effect. The paramilitary increased their activity against the guerrillas and, in 2002, President Uribe was elected. As a political hardliner, who had been in favour of the paramilitary groups, he elaborated a policy of so-called democratic security. He relabeled the conflict with the rebels as a war against terrorism and drug trafficking, and launched a military offensive resulting in a drastic reduction in the FARC's military capacity. However, the militarization of the conflict also led to an increase in grave human rights violations by the armed forces. The case of the 'false positives' is the most well-known example. Members of the military first kidnapped or attracted poor or mentally impaired civilians in the cities, then transferred them to remote conflict areas and killed them. They presented them to the authorities as FARC members killed in battle, for which they received bonuses on top of their salaries and other benefits.<sup>12</sup> Around 4,000 such cases have recently been investigated by the judicial authorities.

On the other hand, Uribe adopted a demobilization programme for the paramilitary groups that resulted in the 2003 Alternative Sentencing Law,<sup>13</sup> which provided for the suspension of criminal sentences of up to a maximum of five years under judicial control. Due to the severe criticism and doubts about the Law's compatibility with the case law of the IACtHR, which rejects blanket amnesties by means of suspended sentences, the government withdrew it from the Colombian Congress in

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<sup>12</sup> See Human Rights Watch, <https://www.hrw.org/report/2015/06/24/their-watch/evidence-senior-army-officers-responsibility-false-positive-killings> (accessed April 2018).

<sup>13</sup> Explanatory Statement of the Proposed Statutory Law 85 of 2003, Cong. Gazette, 436 (2003) (Colom.).



2003. Subsequently, the Government changed tactics and elaborated the first concept of restorative and transitional justice for actors who had been involved in international core crimes and grave human rights breaches: the Justice and Peace Law (Law 975 of 2005<sup>14</sup>). The principal aims of Law 975 are to disarm, demobilize, and reintegrate 'groups operating outside the law', especially targeting the right-wing paramilitary umbrella group AUC, and to achieve sustainable peace. The Justice and Peace Law 975 of 2005, part of the negotiated outcome with the so-called 'organized armed groups outside the law',<sup>15</sup> contains investigative, retributive, and reparatory elements.<sup>16</sup> Thus, Law 975 is a typical DDR framework<sup>17</sup> and is also considered a transitional criminal justice measure and compatible with the Colombian Constitution.<sup>18</sup>

The backbone of Law 975 is a favourable criminal punishment regime of alternative sentencing, with a minimum of five and a maximum of eight years' imprisonment (instead of the fifty to sixty years in ordinary criminal proceedings), including for core international crimes, committed during the time of membership in the group, subject to the condition that those being punished contribute to truth, justice, and victim reparation. An amnesty or other forms of exemption from punishment cannot be applied to core international crimes, even if they are considered 'political offences' under Law 782 of 2002, as the Supreme Court<sup>19</sup> decided that acts committed by paramilitary groups cannot qualify for the concept of 'political offences'.

It is also important to note that due to a reform of the Code of Criminal Procedure in 2004 (Law 906 of 2004) prosecutorial discretion was extended such that simple membership in a paramilitary group could be waived from prosecution. Law 975 provides for an administrative and judicial phase. During the administrative phase the government selects those members of the paramilitary groups considered eligible for the DDR regime. This administrative phase is not subject to judicial control, but the selection mechanism for the judicial phase occurs under the leadership of the Prosecutorial Office. Demobilized AUC members can only qualify under the special regime of Law 975 if they collaborate effectively with the administration of justice (disclosure of facts and admission of charges), compensate the victims morally and materially, and reintegrate into society. In order to speed up the

<sup>14</sup> [https://www.cejil.org/sites/default/files/ley\\_975\\_de\\_2005\\_0.pdf](https://www.cejil.org/sites/default/files/ley_975_de_2005_0.pdf) (accessed April 2018).

<sup>15</sup> Based on Law 418/1997.

<sup>16</sup> Uprimny, R./Saffon, M.P./Botero, C./Restrepo, E., *Justicia transicional sin transición? Verdad, justicia y reparación para Colombia*, Dejusticia, Bogotá 2006.

<sup>17</sup> For a more detailed analysis, see Uprimny R./Saffon, M.P., ¿Al fin, ley de justicia y paz? La ley 975 tras el fallo de la Corte Constitucional, in: R. Uprimny (ed.), *Justicia Transicional sin transición*, Dejusticia, Bogotá 2006, p. 201; K. Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court. An Inductive Situation-based Approach*, Springer, Berlin 2010.

<sup>18</sup> Corte Constitucional, Decisión C-370, 2006.

<sup>19</sup> Corte Suprema de Justicia – Sala de Casación, 11 July 2007, Rad. 26945.

process, Law 1592 was introduced in 2014 to prioritize macro-criminality committed by private armies and to align victim reparation with Law 1148 of 2011 on the restitution of land, and to limit the inflow of new cases until one year from then.

The Inter-American Commission on Human Rights<sup>20</sup> has been quite critical of the implementation of Law 975 in the initial stages, and the IACtHR also ruled negatively on the extradition of the leaders of the paramilitary to the US while under the jurisdiction of Law 975.<sup>21</sup> Recent data both from NGOs<sup>22</sup> and the Colombian government about the impact of Law 975 speak for themselves. A very exhaustive study by the Contraloría General de la República<sup>23</sup> of February 2017 provides a very interesting overview of the impact of the transitional justice scheme from 2006 to 2016. Between 2005 and 2009 around 36,000 paramilitary were demobilized, thereby removing important paramilitary groups in several regions. Almost 5,000 members requested to be considered under the beneficiary regime of Law 975. Also, around 500,000 victims were registered. A very small minority of the demobilized were willing to fully cooperate and confess their crimes, which is why more than 50% of cases were transferred to the ordinary criminal justice system.

Of the confessed crimes, just to give an idea about the type of confessions, 30,000 relate to murder, 13,000 to forced displacements, 5,000 to forced disappearances, 2,900 to kidnappings, 2,200 to illicit recruitment, and 1,300 to massacres. After ten years the Prosecutor's Office has only been able to formally accuse 1,124 members of the paramilitary; of these, charges have only been confirmed in 370 cases. In 2017 only 195 members of paramilitary groups were convicted under the Law 975 scheme in forty-seven court decisions involving around 1,000 criminal acts, including, however, several high-level massacres. Overall there have only been fourteen final verdicts at the time of writing. Only around 8% of the potential offenders under the Law 975 transitional scheme have been convicted. Unfortunately the Uribe government negotiated an extradition agreement with the US for

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<sup>20</sup> Informe sobre la Implementación de la Ley de Justicia y Paz: Etapas Iniciales del Proceso de Desmovilización de las AUC y Primeras Diligencias Judiciales, OEA/SER.L/V.II.129 Doc. 6.2, October 2007.

<sup>21</sup> *Case of Manuel Cepeda Vargas v. Colombia*, 26 May 2010, paras. 165–166. The OTP/ICC had already written a letter to the Colombian government asking for further explanation of the relation between the extradition and the investigation under Law 975 (published by El Espectador, 16 August 2008).

<sup>22</sup> Comisión Colombiano de Juristas, Colombia: la metáfora del desmantelamiento de los grupos militares, Segundo informe de balance sobre la aplicación de la Ley 975 de 2005, Bogotá, 2010, [http://www.coljuristas.org/documentos/libros\\_e\\_informes/la\\_metafora.pdf](http://www.coljuristas.org/documentos/libros_e_informes/la_metafora.pdf) (accessed April 2018); <http://www.verdadabierta.com/cifras/3825-estadisticas-justicia-y-paz> (accessed April 2018); Uprimny Yepes, R./Sánchez Duque, L.M./Sánchez León, N.C., Justicia para la paz. Crímenes atroces, derecho a la justicia y paz negociada, Dejusticia, Bogotá 2014.

<sup>23</sup> <http://www.contraloria.gov.co/documents/20181/466201/An%C3%A1lisis+sobre+los+resultados+y+costos+de+la+Ley+de+Justicia+y+Paz/dcce2907-f669-42b8-8857-7e14750cc467?version=1.0> (accessed April 2018).

additional high-level paramilitary commanders to be extradited to the US for drug trafficking, thereby de facto shielding them from further investigation and prosecution under Law 975.<sup>24</sup> By doing this the government attempted to avoid further confessions about the relationships between the paramilitary and the military, and the intertwining with business and politics (the so-called parapolitics scandal).

Of the registered victims (around 500,000) only 5% were recognized as such in the verdicts. Moreover, only 6% of all victim compensation payments came from assets belonging to the convicted. Of the 440,000 hectares of land claimed for restitution, fewer than 1,000 have been effectively restituted. This demonstrates a strong reluctance by the demobilized to fully compensate the victims. In 2017 there were still around 4,500 persons and 2,500 cases awaiting trial proceedings involving confirmed charges for 76,000 offences committed by the private armies and affecting around 185,000 victims. Given the deadlock of cases, it may be assumed that the application of Law 975 may still take more than five years.

Many sources, including the Contraloría General de la República, maintain that Law 975 has been very instrumental in uncovering, even though only in part, the truth about important serious human rights violations and core crimes, such as the massacres of the civilian population and the intrinsic links between politics, the army, and the paramilitary, for which members of the military and of parliament had to face ordinary criminal proceedings in several hundred cases. Law 975 has also enabled the discovery of mass graves, the identification of victims, and the return of the bodies of victims of forced disappearances to their families. This is of intrinsic value for truth finding and historical memory. However, they also indicate that, the results are very modest or weak both in terms of the dimensions of justice and victim reparation, certainly in terms of the expectations and financial investment.<sup>25</sup> Even academics who defended the transitional scheme of Law 975 qualify it as a failure due to manipulation by the government in the implementation phase, making it completely impossible to comply with the standards of victim reparation, and due to decrees favourable to the paramilitary seeking to circumvent rulings by the Constitutional Court.<sup>26</sup>

Even more worrying, however, is that several high-level leaders of the former AUC, including those who were demobilized and convicted under Law 975, have

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<sup>24</sup> This practice was severely criticized by the IACtHR in *Case Masacre de la Rochela v. Colombia*, 11 November 2007.

<sup>25</sup> In the same vein UN HRC, Informe situación en Colombia, A/HRC/16/22, p. 9; *Raiser, J.M.*, Das Opportunitätsprinzip im kolumbianischen Friedensprozess, Schriften zum internationalen und europäischen Strafrecht, Nomos, Baden-Baden 2017, pp. 180–187.

<sup>26</sup> See *Uprimny, R./Saffon, M.P.*, Usos y Abusos de la Justicia Transicional en Colombia, Anuario de Derechos Humanos 2008, 177–178. The paramilitary openly defended Law 975 and were not willing to accept the de facto increase in penalties imposed by the Constitutional Court, which ruled against the practice of reduced imprisonment by deducting the time of demobilization awaiting trial, as this resulted in de facto non-imprisonment.

not integrated into society but established very violent organized criminal groups (known as BACRIM). A good example is the so-called ‘Clan del Golfo or Autodefensas Gaitanistas de Colombia’ with around 3,000 members active in drug trafficking, illegal mining, extortion, and illegal poaching, who frequently kill opponents and members of local communities. This means that despite the initial success in demobilization and disarmament, several persons in leadership positions failed to reintegrate and re-established similar organized violent groups. Thus, transitional justice without flanking security measures is undermining the concept of sustainable peace and risks triggering new armed conflicts. The Justice and Peace restorative and transitional justice scheme could not fully manage the DDR requirements and has been weak on several crucial points of the restorative and transitional justice scheme itself, given the low conviction rate and the dramatic lack of victim compensation. It is a clear sign that a transitional justice scheme based on a peace settlement will not prosper in the presence of renewed armed groups (also called criminalized power structures) capable of enriching themselves from transactions in the grey and black markets, criminalizing state institutions, and perpetuating a culture of impunity.<sup>27</sup>

### **B. Restorative and transitional criminal justice under the 2016 Peace Agreement**

In 2010, after two terms of Uribe, the former defence minister Santos was elected president with Uribe’s support. Santos formally engaged in a peace process with the FARC that resulted in a peace agreement in 2016, following four years of negotiations. However, in a plebiscite in 2016, in which Uribe campaigned against the agreement, the Colombian voters rejected, by a slim majority, the initial peace agreement.<sup>28</sup> The subsequent renegotiation of the most controversial topics resulted in a new peace agreement that was signed by the parties in November 2016<sup>29</sup> and enacted by Law 1820 of 2016 and Law 01 of 2017.<sup>30</sup> It creates a comprehensive system for truth, justice, reparation, and non-repetition.<sup>31</sup> One of the most crucial and controversial parts of the agreement is the judicial component in chapter V (‘justice agreement/victims agreement’), dealing with liability for international core

<sup>27</sup> *Dziedzic, M.*, *Criminalized Power Structures. The Overlooked Enemies of Peace*, Rowman & Littlefield, Maryland 2016.

<sup>28</sup> The Santos government is still negotiating a potential peace agreement with the ELN.

<sup>29</sup> See <http://www.altocomisionadopalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf> (accessed April 2018).

<sup>30</sup> Law 1820 of 2016 (Amnesty Law) and Law 01 of 2017 are further complemented by various decrees. In November 2017, the Constitutional Court announced its decision on the overall enforceability of Legislative Act 01. At the time of writing, the Constitutional Court’s full decision is yet to be published.

<sup>31</sup> For an in-depth analysis of the comprehensive approach, see *Olasolo, H./Ramirez Mendoza, J.M.F.*, *The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition*, *Journal of International Criminal Justice*, vol. 15, 2017, 1011–1047.

crimes to be handled by a Special Jurisdiction for Peace (SJP). The SJP is the central backbone of a system complemented by non-judicial entities like the Commission for the Clarification of the Truth, Social Harmony, and Non-repetition, and the Special Unit for the discovery of persons who disappeared in the context of the conflict.

Let us now take a closer look at the design of this new<sup>32</sup> transitional criminal justice model and then see whether and to what extent lessons have been learned from Law 975. The aim of Law 01 is similar to that of Law 975, i.e. to disarm, demobilize, and reintegrate ‘groups operating outside the law’, but this time with FARC as the special target (and hopefully, after a peace agreement, also the ELN), and to achieve sustainable peace. However, it also substantially extends to state agents (including the military) and third persons involved in the armed conflict (such as the paramilitary and any business involvement in the financing). Law 01 also contains investigative, retributive, and reparatory elements. As such, Law 01 is a typical DDR framework and involves transitional justice. It does provide for a criminal liability regime but with reduced punishment in exchange for contributions to the truth and to victim compensation.

There are, however, also substantial differences as the SJP does not primarily aim at finding the truth. The majority of perpetrators will not face an investigation or a trial either by the ordinary criminal justice system or by the SJP as they will be exempted through an amnesty or a pardon by the government. The SJP itself includes a system in which case selection and prioritizations are key features. The SJP is allowed to focus on the most serious and representative crimes committed by those who had control and effective command over the conduct in question.<sup>33</sup> This material and personal scope was adjusted after the negative referendum at the Army’s request.

To give an example, the material scope of war crimes has been limited to ‘serious war crimes’, defined as breaches of *derecho internacional humanitario* (DIH) committed in a systematic way or as part of a plan or policy. The Final Agreement also includes that personal liability for command will not be defined exclusively on the basis of hierarchy and rank. Superior criminal liability can only be based on effective control over the relevant conduct, the knowledge available based on information before, during, and after the relevant conduct, and the tools available for prevention and, in the case of commission, for the triggering of investigations. This definition has prompted criticism by NGOs in the field of international humanitari-

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<sup>32</sup> Gil Gil, A./Maculan, E./Ferreira, S., Colombia como nuevo modelo para la justicia de transición, IUGM, Madrid 2017.

<sup>33</sup> The determination of the severity and representativeness as a criterion for prioritization was concretized by Directive 001 of 2012 of the Public Prosecutor’s Office.

an law (IHL) and IHRL<sup>34</sup> as it seems to limit the scope of application compared to the *mens rea* element of international core crimes in the Rome Statute that does provide for a broader concept of *mens rea* (should have known). The case law of the ICC also does not require effective control over the specific conduct but rather effective control over subordinates. This means that a substantial group of actors and of punishable criminal conduct will by definition be excluded from the SJP's competence. Secondly, both persons who do accept responsibility as well as those who do not can stand trial under the SJP regime. Thirdly, imprisonment for those who do accept responsibility can be executed *extra-muros* in the form of community service. Finally, extradition is excluded for those who are under the SJP's jurisdiction; also, they do not lose their political rights. On the whole, the SJP is more focussed on sustainable peace and an appropriate transitional criminal justice scheme than on finding the truth and providing compensation.

The SJP is based on a specialised jurisdictional competence. While it upholds the primacy of the ordinary criminal jurisdiction, it also provides a proper system of jurisdiction *ratione temporis*, *materiae*, and *personae*. As regards jurisdiction *ratione materiae*, all core international crimes are included. Moreover, this jurisdiction also includes some other serious crimes committed during the armed conflict provided they are not considered political crimes such as rebellion or are directly connected thereto. As regards jurisdiction *ratione personae*, SJP has competence over all persons directly or indirectly involved in the conflict. This means that all members of 'groups operating outside the law' that signed peace agreements with the government, state agents, and other third persons linked to the armed conflict can qualify (such as those who financed the armed conflict or directly supported it, for example the paramilitary groups). For the armed groups it is a mandatory requirement to leave the zone of conflict, to settle temporarily in special territorial zones, and to disarm.

The SJP has three preliminary chambers: the Chamber for the Acknowledgment of the Truth, Responsibility, and the Establishment of Facts and Conduct; the Chamber for Amnesty or Pardon, and the Chamber for the Definition of Legal Situations. It provides for a proper Investigation and Indictment Unit. The Peace Tribunal itself has five subsections, being a court of first instance for those who accept responsibility and a court of first instance for those who do not accept responsibility, with Appeal, Revision (in relation to former decisions by the ordinary criminal justice system), and Stability and Efficiency Sections (the execution of rulings and sentencing once the SJP has come to an end).

The point of departure is that certain forms of conduct and potential crimes will be excluded from the SJP and the ordinary criminal jurisdiction through an amnesty or a pardon. In fact, there is a double regime. For those who do not qualify for

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<sup>34</sup> See Human Rights Watch, 25 January 2017, Carta sobre "responsabilidad de mando" en la legislación de implementación del acuerdo de paz.

the jurisdiction of the SJP (crimes that are not serious or suspects who are too low in the chain of command), the government will apply a wide amnesty/pardon policy. For those who may qualify, the Chamber for Amnesty or Pardon will have to decide. The Chamber has to apply DIH, IHRL, international criminal law, and the Colombian Constitution (which does provide for the possibility of amnesty and pardon for political offences and connected offences). All international core crimes, forced disappearances, torture, etc. and related ordinary crimes not connected to rebellion are excluded from an amnesty or pardon if they were committed by those who had functional command. Crimes that can qualify for an amnesty and pardon are rebellion and related crimes (such as the illegal possession of weapons, killing on the battlefield in line with DIH). For certain crimes (like drug trafficking) committed in order to finance rebellion it remains to be seen how the Chamber will deal with them, as the Peace Agreement gives no further guidance.

Following this overview, we can now tackle the question of whether and to what extent lessons have been learned from the Justice and Peace model of 2005. As already mentioned above, it is very clear that the drafters of Law 01 took advantage of the reforms in the Justice and Peace model of 2014 in order to prioritize case selection and to prevent the whole system from collapsing because of case overload. Secondly, in Law 01 a model was chosen in which truth finding and historical memory are not central to the justice scheme, so that procedures can be more effective. Thirdly, Law 01 provides for a double-track chamber system, distinguishing between those who accept criminal liability and those who do not, with a very different set of criminal sanctions. This means that the type of jurisdiction and related sanctions depend primarily on the procedural decision of the suspect, not on the type of allegation. For those who accept liability for exhaustive truth disclosure, the Chamber for the Acknowledgment of the Truth, Responsibility, and the Establishment of Facts and Conduct will impose so-called ‘proper sanctions’. These sanctions are based on community service (such as working as guards protecting the environment, participation in infrastructure projects, in the destruction of illicit crops, and in alternative agricultural activity, etc.) and will last for between five and eight years. Although no custodial sanctions will be imposed, these sanctions do include the restriction of liberty and rights (such as one’s residence and mobility) to the extent necessary for the execution of the sanctions. For those who only admit their responsibility at the first instance of the Peace Tribunal, the Tribunal will impose ‘alternative sanctions’, ranging from five to eight years of imprisonment or two to five years in the case of minor participation in the recognized acts. Finally, for those unwilling to accept liability, the Peace Tribunal will impose criminal sanctions ranging between fifteen and twenty years’ imprisonment.

As for the implementation aspect, it is of course still very early, certainly in regard to the SJP, as it still has to be established. However, after twelve months of the peace agreement we can already tell whether the broader implementation of DDR and the peace agreement is working well and will facilitate the functioning of the



SJP. One of the most interesting reports in that sense is the one by the Secretary-General of the UN Mission in Colombia of September 2017.<sup>35</sup> The Report underlines the importance of the underlying legislative work to enable the achievement of the main aims of the Peace Agreement. Examples include legislation for the establishment of a sub-directorate of the National Protection Unit to provide security to members of the former Revolutionary Armed Forces of Colombia – People’s Army (FARC-EP) and its successor political party under a mixed protection scheme with the national police and legislation prohibiting illegal armed civilian groups of any type. What is of concern, however, is that the legislative design of the SJP has still not been fully accomplished and that the Special Tribunal may not start its activities before the summer of 2018, which is too much of a delay.<sup>36</sup> On the basis of Law 1820 on Amnesty and special treatment, and following demobilization and disarmament, the President granted an executive amnesty to a total of 6,005 FARC-EP members and special treatment (equivalent to an amnesty) to 1,153 state agents. Meanwhile, the secretariat of the SJP has registered around 3,500 applications for a judicial amnesty for FARC members currently in prison and around 1,700 applications for special treatment for state agents who are also imprisoned.<sup>37</sup> These applications have to be decided by the Chamber for Amnesty or Pardon. At the same time the FARC transformed itself into a political party.<sup>38</sup>

The Report, however, is highly critical about the reintegration of FARC members. Armed dissidents and illegal actors who are attracting former combatants with the prospect of high benefits from organized crime are causing some serious problems. The Report indicates that these problems are aggravated by the fact that the Colombian Government has not been able to elaborate an overall strategy for the reintegration process, which lacks a strategy for socio-economic reintegration and access to land. Finally, it should also be mentioned that in the rural areas abandoned by FARC several organized armed groups have taken advantage of the situation and enforced their presence and their engagement in illegal activities related to the drug trade and illegal mining. Armed groups such as ‘el Clan del Golfo, Los Puntilleros and Los Pelusos’ are active in about half of the country. In December 2017

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<sup>35</sup> S/2017/801 Security Council Distr.: General 26 September 2017 Original: English 17-16445 (E) 280917 \*1716445; see [https://colombia.unmissions.org/sites/default/files/last\\_sg\\_report\\_on\\_the\\_un\\_mission\\_in\\_colombia\\_eng\\_0.pdf](https://colombia.unmissions.org/sites/default/files/last_sg_report_on_the_un_mission_in_colombia_eng_0.pdf) (accessed April 2018).

<sup>36</sup> Meanwhile several demands have been instigated against the nomination of the judges and foreign amicus curiae at the Constitutional Court. The reasoning in the demands corresponds to the opposition by the armed forces that warned against an anti-patriotic composition in favour of the IACtHR. This might further delay the start of the SJP.

<sup>37</sup> <http://www.eltiempo.com/justicia/conflicto-y-narcotrafico/solicitudes-de-libertad-por-jep-han-sido-resueltas-en-un-90-por-ciento-165476> (accessed April 2018).

<sup>38</sup> The transformation of the FARC into a political party (Fuerza Alternativa Revolucionaria del Común) is the first step in their participation in the general elections in May 2018.



the UN Mission in Colombia also warned against the high number of killings<sup>39</sup> of local community leaders, human rights activists, and politicians by hired killers.

### **III. Restorative and transitional criminal justice and complementarity under the Rome Statute**

#### **A. International core crimes and negative complementarity**

It is important to underline at the outset that not all crimes linked to the internal armed conflict in Colombia qualify for assessment under the ICC's competence. However serious the human rights violations committed by rebel groups, the military, paramilitary, and related third parties may be, most of them will also be Rome Statute crimes. We certainly do not aim at elaborating here all the details of ICC complementarity<sup>40</sup> but merely at explaining the main features in order to have a legal assessment framework for the Colombian situations under preliminary investigation by the OTP.

The ICC model is based on the primary responsibility and jurisdiction of sovereign states for preventing and punishing international core crimes. This duty is not only based upon the Rome Statute but also derives from IHRL and specific treaty and/or customary obligations. This means that states have a whole set of obligations within the law and in practice to meet this responsibility. This duty to exercise criminal jurisdiction over these offences does in fact exist independently of the ICC. Only if states are unwilling or unable to genuinely investigate and prosecute crimes in their own jurisdiction can the ICC trigger its complementary jurisdiction as a last resort. As outlined in art. 17 of the Rome Statute, this negative complementarity can thus be considered a mechanism for the allocation of jurisdiction in the case of failing domestic jurisdiction.<sup>41</sup> But even if the domestic jurisdiction is unwilling or unable to impose domestic jurisdiction, there is still another threshold before ICC competence is triggered. Cases that are not of sufficient gravity to justify further action by the ICC will be declared inadmissible. This criterion is mentioned both under art. 17 and art. 53 of the Rome Statute. Thus, the ICC prioritizes the cases that fall under its temporal, personal, and material jurisdictional requirements.

From the OTP guidelines we know that the factors relevant for the gravity threshold include 'the scale of the crimes, the nature of the crimes, the manner of

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<sup>39</sup> The number indicated is more than 100 persons since the Peace Agreement.

<sup>40</sup> See *Olasolo, H.*, The Triggering Procedure of the ICC, *Procedural Treatment of the Procedure of the Complementarity*, *International Criminal Law Review*, vol. 5, issue 1, 2005, 121; *Stahn, C.*, Complementarity: A tale of two notions, *Criminal Law Forum*, vol. 19, 2008, 87–113.

<sup>41</sup> For a detailed analysis of all criteria, see *Ambos, K.*, *Treatise on International Criminal Law*, vol. III: *International Criminal Procedure*, part III *Jurisdiction and Admissibility*, Oxford 2016, especially pp. 266–326.

the commission of the crimes, the impact of the crimes and the number of victims, particularly for the most serious crimes'.<sup>42</sup> Pre-Trial Chamber I<sup>43</sup> assessed the gravity threshold of art. 17 in combination with the gravity-driven selection of crimes under art. 53. The gravity threshold is based both on the conduct and the actor of the crime. Applicable conduct must be systematic or large-scale, and the social alarm caused to the international community has to be taken into account. With regard to the actors, priority has to be given to the most senior commanders, determined by their position, their acts in relation to the suspected crimes, and the role of their organization in the overall commission of the crimes in question. Based on these criteria of arts. 17 and 53, the related practice of the OTP, and the ICC's judicial practice, it must be assessed whether the criminal conduct is:

- a. of sufficient gravity
- b. admissible due to total state inaction (normative and/or factual)
- c. inadmissible due to state action
- d. admissible due to unwillingness or inability.

This gravity and complementarity test is relevant for the opening of a preliminary examination of a situation as well as for the investigation of a criminal case; however, in the Colombian situation we will apply it only to ongoing situations under preliminary examination that could trigger the opening of criminal cases. In this context it is important to underline that full and unconditional amnesties (as part of normative state (in)action), even if democratically legitimized (by parliament and/or referendums) are incompatible with public international law and IHRL.<sup>44</sup> There is, however, space for partial and conditional amnesties if they are related to truth and peace building. Art. 53 of the Rome Statute also refers to the 'interest of justice' as one of the criteria for triggering or terminating the investigation into a situation. Partial and conditional amnesties as part of a global peace agreement can be a decisive factor in the interest of justice.

Finally, even if the ICC could trigger jurisdiction it might not do so in 'the interest of justice' (art. 53 Rome Statute). The OTP, however, has clarified that this justice criterion for opening an investigation is only considered after a positive assessment of admissibility (including non-compliance with complementarity). The

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<sup>42</sup> Paper on some Policy Issues before the OTP, ICC-OTP 2003, p. 5, ICC-OTP Policy Paper on Preliminary Examinations, 2013, and ICC-OTP Policy Paper on Case Selection and Prioritisation, 2016.

<sup>43</sup> *Prosecutor v. Thomas Lubanga Dyilo* (Decision on the Prosecutor's Application for a Warrant of Arrest) ICC-01/04-01/06-08, 10 February 2006, paras. 45–62.

<sup>44</sup> See Vervaele, J.A.E., Graves violaciones de derechos humanos y delitos internacionales: del ius (non) puniendi del Estado-Nación a un deber puniendi imperativo de ius cogens?, in: F. Velasquez, e.a. (coordinadores), *Derecho penal y crítica al poder punitivo del Estado. Libre homenaje a Nodier Agudelo Betancur*, vol. 2, Bogotá 2013, pp. 1233–1266; Mallinder, L., Amnesties, Victim's Rights, in: C. Bassiouni (ed.), *The Pursuit of International Criminal Justice*, vol. I, Intersentia, Cambridge 2010, pp. 900–922.

OTP is aware of the impact of peace agreements on its prosecutorial policy but clearly views non-prosecution in the interest of justice as a last resort.<sup>45</sup>

## B. Positive complementarity

In practice the ICC does not wait until states ‘fail’ before stepping in but tries to achieve complementarity through active monitoring and assistance, mostly through the OTP.<sup>46</sup> The OTP elaborated this concept in its 2003 Informal Expert Paper on Complementarity<sup>47</sup> and adopted it in 2006<sup>48</sup> as the main principle in its policy approach. In the prosecutorial strategy of 2009–2012,<sup>49</sup> positive complementarity was emphasized as one of four fundamental principles of the OTP’s tasks. In the OTP Strategic Plan 2012–2015<sup>50</sup> it became one of the six main strategic goals and should play an essential role in situations under preliminary examination or investigation. In the current OTP Strategic Plan 2016–2018<sup>51</sup> it has been upgraded to one of the three main policy axes as ‘contributing to a coordinated investigative and prosecutorial strategy to further close the impunity gap for ICC crimes’.

Positive complementarity can be defined as a proactive policy of the OTP<sup>52</sup> by which states are enabled to meet complementarity in practice. In the Strategic Plan 2016–2018 the OTP mentions different tools such as knowledge centres, evidence sharing, open-source crime databases, platforms for exchanging confidential information, and capacity building by third parties. A rather new dimension of positive complementarity is the OTP’s growing awareness of the interconnection between ICC crimes and other related crimes, such as organized, transnational, and financial crimes as well as terrorism that pose an increasing challenge to closing the impuni-

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<sup>45</sup> See ICC-OTP Policy Paper on the Interests of Justice, 2007, <https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf> (accessed April 2018).

<sup>46</sup> *Stahn, C.*, Complementarity: A tale of two notions, *Criminal Law Forum*, vol. 19, 2008, 87–113.

<sup>47</sup> Informal Expert Paper, The principle of complementarity in practice, ICC-01/04-01/07-1008-Ann.A 30-03-2009 1/37 CB T, ICC-OTP 2003.

<sup>48</sup> ICC-OTP, Report on Prosecutorial Strategy, 14 September 2006.

<sup>49</sup> ICC-OTP, Prosecutorial Strategy, 2009–2012, <https://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> (accessed April 2018).

<sup>50</sup> ICC-OTP, Strategic Plan, 2012–2015, <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf> (accessed April 2018).

<sup>51</sup> ICC-OTP, Strategic Plan, 2016–2018, [https://www.icc-cpi.int/iccdocs/otp/EN-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf) (accessed April 2018).

<sup>52</sup> *Burke-White, W.*, Proactive Complementarity. The ICC and National Courts in the Rome System of Justice, 49 *Harvard International Law Journal* (2008) 53–108; *Zhao, C.*, The ICC and China. The Principle of Complementarity and National Implementation of International Criminal Law, Duncker & Humblot, Berlin 2017.

ty gap. As the ICC has no jurisdiction to investigate and prosecute these crimes,<sup>53</sup> the OTP 'is willing to contribute, within its mandate, by sharing information and evidence that may be relevant to these interconnected areas of criminality (reverse cooperation). At the same time, the Office would be interested in exploring how it can utilize and exploit existing information or evidence held by other jurisdictions or organisations on these other types of criminality that may be relevant to establishing the criminal liability of alleged perpetrators under the Rome Statute for either the core crimes of genocide, crimes against humanity and war crimes or with respect to offences against the administration of justice under Article 70.<sup>54</sup>

This clearly shows that positive complementarity is based upon a cooperation model of information sharing and good practices that can, however, also trigger the jurisdiction of the ICC. It could work both ways. Positive complementarity has its limits, of course, as it cannot deal with unwilling jurisdictions and can also endanger the independence and neutrality of the OPT in assessing the need to trigger ICC jurisdiction under art. 17.

#### **IV. OTP and the assessment of situations under examination in Colombia**

Since the ICC Chief Prosecutor opened a preliminary examination in 2004 concerning the alleged commission by state agents and rebel groups of crimes against humanity from 2002 onwards and of war crimes from 2009 onwards, the OTP has constantly scrutinized and monitored, under negative and positive complementarity, the law on the books and in action in Colombia.<sup>55</sup> This means that several situations linked to activities both by the army and related paramilitary groups and by the FARC and ELN have by now been subjected to the scrutiny of the OTP for thirteen years. The OTP has also been closely monitoring the Colombian peace process to ensure that justice measures are genuine and to hold accountable those who bear the greatest responsibility for the breaches of international criminal law and serious human rights violations. The OTP qualifies it as an ongoing admissibility assessment of concrete and progressive investigative steps and prosecutorial activities undertaken with respect to potential cases it has identified.<sup>56</sup> This is done in a proactive way, including by means of site visits and information requests to the

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<sup>53</sup> *Roksandić Vidlička, S.*, Filling the void: the case for international economic criminal law, *ZStW*, vol. 129, issue 3, 2017, 851–884.

<sup>54</sup> OTP, Strategic Plan 2016–2018, Point 94, [https://www.icc-cpi.int/iccdocs/otp/EN-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf) (accessed April 2018).

<sup>55</sup> For an overview, see <https://www.icc-cpi.int/colombia> (accessed April 2018).

<sup>56</sup> ICC-OTP Report on Preliminary Examination Activities of 14 November 2016, point 262.

government, and, of course, also by assessing the notifications the OTP receives from different governmental and civil society sources.

In November 2012 the OTP published an important Interim Report on the Situation in Colombia,<sup>57</sup> which summarized the Office's findings with respect to jurisdiction and admissibility. Although the Report indicated several enforcement gaps and delays, it also acknowledged the complexity of the endeavour, certainly in relation to demobilization and the transitional justice scheme of Law 975. The Report did not point out any lack of willingness or ability on behalf of the Colombian state and the judiciary, and considered the national proceedings to be genuine, subject to the appropriate execution of sentences. The Report did, however, clearly outline these priority areas for the future assessment of the preliminary examination: (i) proceedings relating to killings and enforced disappearances, commonly known as 'false positives' cases; (ii) proceedings relating to forced displacement; (iii) proceedings relating to sexual crimes; (iv) national proceedings relating to the promotion and expansion of paramilitary groups; and (v) legislative developments that could impact the conduct of national proceedings, including the Legal Framework for Peace and others, as well as jurisdictional aspects relating to the emergence of 'new illegal armed groups'. By setting these priorities, the OTP in fact also indicates an assessment of potential criminal cases for which it could trigger jurisdiction.

That the OTP's monitoring and supervision of the transitional justice schemes is not a random exercise is reflected in the OTP's statements and opinions in relation to Law 975. In 2013<sup>58</sup> the OTP clearly expressed in a letter to the Colombian Constitutional Court the view that although it regarded Colombia a pioneer in complying with the complementarity principle, it considered the suspension of criminal sanctions or manifestly inadequate sanctions for international core crimes incompatible with the Rome Statute given the seriousness of the crimes and could thus trigger the complementarity mechanism. The OTP underlined that this conclusion is not one of public policy but one based on legal standards in the Rome Statute and the IHRL aimed at preventing impunity. However, the OTP is open to a reduction in sanctions in combination with a confession of liability, truth finding, and guarantees of non-repetition. That the sentencing policy is a crucial topic can also be deduced from the Deputy ICC Prosecutor's published speech given at a conference in Colombia in 2015.<sup>59</sup> In 2016 the OTP expressed a positive opinion<sup>60</sup> concerning the Peace Agreement of August 2016 and accepted an amnesty and a par-

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<sup>57</sup> ICC-OTP Interim Report, Situation in Colombia, November 2012.

<sup>58</sup> See <http://www.derechos.org/nizkor/colombia/doc/cpicol7.html> (accessed April 2018).

<sup>59</sup> *Stewart, J.*, Transitional Justice in Colombia and the role of the ICC, <https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf> (accessed April 2018).

<sup>60</sup> Statement of the ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army, 1 September 2016, <https://www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia> (accessed April 2018).

don for some individuals suspected of having committed international core crimes but insisted on the rights of victims and their justice aspirations and, related thereto, the importance of criminal liability for the senior commanders. The OTP expressed the hope that the SJP would be able to meet this standard and would concentrate its efforts on the chief commanders involved in the most serious international core crimes. Thus, the OTP accepts the prioritization and does not question that sanctions for this criminal liability may be different from those imposed in the ordinary criminal justice system.

As for the other priority areas indicated in the 2012 Interim Report, they have been assessed by the OTP in the annual Reports on Preliminary Activities. In its most recent Report of 2017, the OTP very clearly indicates the crimes at issue:

127. The Office has determined that the information available provides a reasonable basis to believe that crimes against humanity under article 7 of the Statute have been committed in the situation in Colombia by different actors, since 1 November 2002, including murder under article 7(1)(a); forcible transfer of population under article 7(1)(d); imprisonment or other severe deprivation of physical liberty under article 7(1)(e); torture under article 7(1)(f); rape and other forms of sexual violence under article 7(1)(g) of the Statute.

128. There is also a reasonable basis to believe that since 1 November 2009 war crimes under article 8 of the Statute have been committed in the context of the non-international armed conflict in Colombia, including murder under article 8(2)(c)(i); attacks against civilians under article 8(2)(e)(i); torture and cruel treatment under article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(c)(ii); taking of hostages under article 8(2)(c)(iii); rape and other forms of sexual violence under article 8(2)(e)(vi); and conscripting, enlisting and using children to participate actively in hostilities under article 8(2)(e)(vii) of the Statute.<sup>61</sup>

As for the false positives scandal, the OTP was still very critical about the situation in 2015, stating that:

... the Office of the Attorney-General reported having initiated preliminary investigations against a number of current and retired generals of the armed forces, four of which have been reportedly called for questioning (*indagatorias*) for their alleged involvement in *false positives* cases. No material information about the suspects, scope of the investigations, nature of charges or the investigative steps taken thus far has been provided to the Office in spite of repeated requests.<sup>62</sup>

For this reason the OTP deepened its own investigation and identified at least five potential cases relating to false positives killings allegedly committed by members of eleven brigades acting under five divisions of the Colombian armed forces between 2002 and 2010. For the purpose of assessing whether relevant national proceedings are ongoing, the OTP even identified a number of commanding officers in charge of relevant divisions and brigades under whose command the

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<sup>61</sup> OTP Report on Preliminary Examination Activities, 4 December 2017, [https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf) (accessed April 2018).

<sup>62</sup> ICC-OTP Report on Preliminary Examination Activities, 2015, point 158.

greatest number of false positives killings were allegedly committed.<sup>63</sup> In its 2016 Report the OTP is clearly much more positive as it underlines that the Colombian authorities had carried out a significant number of investigations and prosecutions against mid and low-level members of the Colombian army, that the Colombian courts had rendered 817 convictions against 961 members of the armed forces for false positives cases, and that the Attorney General's Office (AGO) was investigating another 2,241 cases of extrajudicial killings by members of the armed forces, amounting to a total number of 4,190 victims.<sup>64</sup> Nevertheless, the OTP is monitoring the situation in detail. In July 2017 the newspaper *El Espectador*<sup>65</sup> published a detailed overview of the twenty-nine generals and colonels under OTP scrutiny,<sup>66</sup> relating to over 1,000 cases. The OTP stated in December 2017:

135. Based on information from multiple sources, it appears that the Colombian authorities have instituted proceedings against 17 of the 29 commanders identified, albeit there is conflicting information about the status of some of the reported cases. The OTP has yet to receive detailed information from the Colombian authorities on the cases being reportedly investigated and on whether concrete and progressive investigate steps have been or are being taken.<sup>67</sup>

As for forced displacements, the OTP underlines that the macro-judgments under Law 975, resulting from the policy of prioritizing cases against those most responsible within the paramilitary structures, are important achievements. However, the OTP remains critical about the lack of similar proceedings for forced displacements against FARC commanders.<sup>68</sup>

Whereas the OTP had been highly critical in the past about the progress of proceedings relating to sexual and gender-based crimes,<sup>69</sup> it was satisfied in 2017 with the judgments against the paramilitary for these crimes under Law 975 but remained critical of the lack of investigations and prosecutions of these crimes committed by the FARC and by state agents.<sup>70</sup>

Finally, as for Law 01 and the SJP, the OTP has not yet adopted a specific or final position, stating:

The SJP seems designed to establish individual criminal responsibility, bring perpetrators to account and to fully uncover the truth, while also seeking to fulfil sentencing ob-

<sup>63</sup> ICC-OTP Report on Preliminary Examination Activities, 2016, point 242.

<sup>64</sup> ICC-OTP Report on Preliminary Examination Activities, 2016, point 243.

<sup>65</sup> <https://colombia2020.elespectador.com/jep/29-generales-y-coroneles-en-la-mira-de-la-cpi-por-ejecuciones-extrajudiciales> (accessed April 2018).

<sup>66</sup> This information is confirmed in the ICC-OTP Report on Preliminary Examination Activities, 2017, point 134.

<sup>67</sup> OTP Report on Preliminary Examination Activities, 4 December 2017, [https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf) (accessed April 2018).

<sup>68</sup> ICC-OTP, Report on Preliminary Examination Activities, 2017, point 138.

<sup>69</sup> ICC-OTP, Report on Preliminary Examination Activities, 2016, point 251.

<sup>70</sup> ICC-OTP, Report on Preliminary Examination Activities, 2017, points 140–142.



jectives of deterrence, retribution, rehabilitation and restoration. Fulfilment of these objectives will not only depend on the procedures and conditions set forth in the Agreement, but also on the effectiveness of restrictions on liberty imposed on individuals, the nature of which have yet to be clearly laid out. The OTP would also have to consider whether any substantive lacunae in the laws applied by the competent SJP authorities, including in relation to command responsibility, could hinder their ability to genuinely proceed in relation to the potential cases which are likely to arise from an investigation into the situation.<sup>71</sup>

In an exclusive statement in the weekly *Semana* in January 2017,<sup>72</sup> the OTP did, however, provide a critical assessment of the revised Peace Agreement of November 2016 as a result of the negative referendum vote.<sup>73</sup> The OTP was positive about the fact that Colombia had incorporated commander responsibility for the first time in domestic legislation. However, the Prosecutor was worried about the fact that all references to art. 28 of the Rome Statute on the responsibility of commanders and other superiors had been eliminated and replaced by proper definitions. The OTP referred primarily to war crimes and crimes against humanity committed by the military, the political leadership, and rebel commanders. The OTP clearly explained in the statement that the definitions and judicial practice of the SJP will have to apply the concepts of the ICC in accordance with the complementarity principle. The Prosecutor underlined that command responsibility under the Rome Statute applies when a commander has ‘under his or her command and effective control’ subordinates who committed the crimes. In that sense, the commander in question is not required to exercise effective control over the criminal conduct.

The question of whether a commander exercised effective command or control is answered simply by asking whether the superior had the material capacity to prevent or punish crimes committed by his or her subordinates. As for the *mens rea* requirement, the responsibility of the commander would be activated in those cases where the commander had actual knowledge of the crimes of his or her subordinates or should have known about them. A commander may be prosecuted if he or she had information at the disposal that would have alerted him or her to the crimes but also if he or she failed to use the means available to him or her to take cognizance of the crimes. The Chief Prosecutor also insisted that the obligation to take all necessary and reasonable measures to prevent or punish the commission of an offence is not only limited to direct commanders. When a commander with a higher rank does not adopt such measures on the basis of information available to him or her, the criminal responsibility of this commander is also activated. These statements by the Chief Prosecutor are clear warnings to the SJP about the scope of the *mens rea* requirement.

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<sup>71</sup> ICC-OTP, Report on Preliminary Examination Activities, 2016, point 257.

<sup>72</sup> <http://www.semana.com/nacion/articulo/deseo-corte-penal-internacional-justicia-transicional-en-colombia/512820> (accessed April 2018).

<sup>73</sup> The referendum to ratify the Peace Agreement on 2 October 2016 was unsuccessful, with 50.2% of voters voting against and 49.8% voting in favour.



In September 2017 the Chief Prosecutor personally visited Colombia with the aim of obtaining clarification on certain aspects of the future SJP as well as information about the status of relevant national proceedings relating to the extrajudicial killing of civilians (false positives), sexual and gender-based crimes, and forced displacement. She also underlined that the determination of Colombia's courts 'to ensure genuine accountability for the most serious crimes and respect for the rights of victims will be essential to overcome the challenges in implementing the Comprehensive System of Truth, Justice, Reparation and Non-Repetition called for by the peace agreement'. During this visit the President of the Constitutional Court of Colombia invited the Prosecutor to present the OTP's views on the legislation implementing the SJP. Subsequently, on 18 October 2017, the Prosecutor submitted an *Amicus Curiae* brief to the Constitutional Court<sup>74</sup> summarizing the Office's views on certain aspects of Law 01 and the Amnesty Law. The essence of its content is also the backbone of the assessment of the SJP legislative framework in the OTP 2017 Report on Preliminary Examinations, in which the OTP points out four aspects<sup>75</sup> that may raise issues of consistency or compatibility with customary international law and the Rome Statute, namely, the definition of command responsibility, the definition of 'grave' war crimes, the determination of 'active or determinative' participation in the crimes, and the implementation of sentences involving 'effective restrictions of freedoms and rights'.

To start with, the OTP underlines that the definition of command responsibility included in art. 24 of Law 01 departs from customary international law and may therefore frustrate Colombia's efforts to meet its obligations to investigate and prosecute international crimes. Under customary international law, the superior's duty and responsibility to prevent or punish the crimes committed by subordinates does not arise from his or her *de jure* authority but rather from his or her material abilities. By contrast, a tribunal applying the transitory art. 24, as worded, could find itself powerless to enforce customary international law against superiors with *de facto* but not *de jure* powers if it could only accept a formal appointment as evidence of the requisite degree of command. This would mean that persons with the material ability to prevent or punish the crimes of subordinates and who knowingly failed to do so could escape liability. This would significantly undermine the application of the principle of responsible command and could call into question whether those proceedings were vitiated by an inability or an unwillingness to genuinely carry them out.

The second point of concern is the scope of amnesties and pardons in relation to war crimes that are grave but were not committed in a systematic manner. Amnesty can be granted for these crimes if they fall under the ICC's jurisdiction. This wide

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<sup>74</sup> ICC-OTP, Escrito de Amicus Curiae de la Fiscal de la CPI sobre la jurisdicción especial para la paz, 18 October 2017, RPZ-0000001 & RPZ-003.

<sup>75</sup> ICC-OTP, Report on Preliminary Examination Activities, 2017, points 144–148.

scope of the amnesty law could render any attendant case(s) admissible before the ICC – as a result of domestic inaction or else an unwillingness or inability on the part of the State concerned to genuinely carry out proceedings – and may also violate rules of customary international law.

The third point pertains to the participation concept for international core crimes. Art. 16 of Law 01 refers to ‘active or determinative’ participation. The OTP insists that this provision must have a clear scope, as it should also include serious contributions to these crimes in the form of indirect participation or culpable omission, for which a waiver of criminal prosecution cannot be granted.

Point four concerns art. 13 of Law 01 in relation to the implementation of sentences involving ‘effective restrictions of freedoms and rights’. The OTP states that the Rome Statute does not prescribe specific criminal sanctions nor does it impose a specific duration of these sanctions on the domestic jurisdiction, but it does preempt the suspension of sanctions as this would be equivalent to impunity. The OTP warns that the effectiveness of the SJP sentences will depend on the nature and the scope of the measures that, in combination, would form a sanction and whether, in the particular circumstances of a case, they adequately serve sentencing objectives and provide redress for the victims. Important for the OTP is also the verification of effective implementation and whether there are activities that are not part of the sanction, such as participation in political affairs, which could frustrate the object and purpose of the sentence.

From this analysis we can clearly deduce that the assessment of complementarity by the OTP is much more than a simple exercise of ticking the boxes. It is a genuine criminal policy strategy<sup>76</sup> combining elements of negative and positive complementarity, thereby guiding and constantly scrutinizing the legal activities of the legislators and the courts, including the transitional justice schemes and their implementation.<sup>77</sup> Prioritization and case selection,<sup>78</sup> and thus prosecutorial management, have become decisive in assessing a State’s willingness and ability to deal with international core crimes.

## V. Assessment and concluding considerations

Due to the fact that primary jurisdiction for Rome Statute crimes lies with the Colombian state, the ICC criminal justice system is *de iure* and *de facto* first and

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<sup>76</sup> ICC-OTP, Policy Paper on Preliminary Examinations, November 2013.

<sup>77</sup> *Urueña, R.*, Prosecutorial Politics: The ICC’s Influence in Colombian Peace Processes, 2003–2017, 111 *American Journal of International Law* 1, (2017) 104–125.

<sup>78</sup> In the same vein *Raiser, J.M.*, op. cit. (n. 27). For a critical view on prioritization and the use of the opportunity principle: *Gaitán Torres, K.*, Los límites a la aplicación del principio de oportunidad y los beneficios punitivos otorgados a Las FARC-EP, Cuadernos de Derecho Penal, 2017, January–June, 101–129.

foremost an integral part of the Colombian criminal justice system. The ordinary and special transitional criminal jurisdictions in Colombia must comply with IHRL standards, especially the ones elaborated by the IACtHR, and with ICC standards (in order to avoid triggering case investigations by the ICC). These obligations are fairly in alignment when it comes to international core crimes committed by state agents, private agents, or structures (like paramilitary groups) under the functional control and/or command of state agents. Amnesties or suspended sentences are incompatible with these standards (the Barrios Altos<sup>79</sup> doctrine).<sup>80</sup>

However, these obligations may differ when it comes to liability for international core crimes for which a transitional criminal justice system has been negotiated with the aim of sustainable peace. The IACtHR dealt with this situation for the first time in the case of the *Massacres of El Mozote vs. Salvador*. In his concurring opinion, President *D. García-Sayán* clearly indicated the challenges of amnesties in relation to transitional justice in cases of non-international armed conflict that involve a large number of non-state actors. He insisted on the fact that the rights of the victims to truth, justice, and reparation must be understood as interdependent factors. In this context he advocated a differentiated approach<sup>81</sup> to amnesties and sentencing policy:

... in the difficult exercise of weighing and the complex search for this equilibrium, routes towards alternative or suspended sentences could be designed and implemented; but, without losing sight of the fact that this may vary substantially according to both the degree of responsibility for serious crimes and the extent to which responsibility is acknowledged and information is provided about what happened. This may give rise to important differences between the “perpetrators” and those who performed functions of high command and gave the orders. It is relevant to consider the shared responsibilities of those involved in an armed conflict with regard to serious crimes. The acknowledgment of responsibility by the most senior leaders can help promote a process of clarifying both the facts and the structures that made such violations possible. Reduction of sentences, alternative punishments, direct reparation from the perpetrator to the victim, and public acknowledgment of responsibility are other ways that can be considered.<sup>82</sup>

This raises questions concerning the fair balance between justice, peace, and truth finding (and related victim compensation) in the transitional justice schemes. Does the peace agreement offer sufficient justice (including punishment) for serious human rights violations that qualify as international core crimes allegedly committed by the military, paramilitary, and rebels? This question is directly related to the questions underpinning this article. Do the Colombian transitional justice

<sup>79</sup> IACtHR, *Barrios Altos v. Peru*, 14 March 2001 (Judgment).

<sup>80</sup> This does not apply to the rebels, as they are by definition anti-systemic and cannot trigger conventional state liability.

<sup>81</sup> See also in this respect *Zeitschrift für Internationale Strafrechtsdogmatik*, issue 7–8, 2017, Sonderausgabe zum Kolumbianischen Friedensprozess, <http://www.zis-online.com> (accessed April 2018).

<sup>82</sup> IACtHR, *Case of the Massacres of El Mozote and nearby places v. El Salvador*, 25 October 2012, points 30–31 of the concurring opinion of Judge Diego García-Sayán.

systems comply with the positive duties (in law and in practice) to effectively investigate, prosecute, and punish serious human rights violations/international core crimes and with the complementary assessment under the Rome Statute? And how does the OTP/ICC elaborate criminal policy under the complementarity assessment of situations in order to steer Colombia towards genuine compliance?

Although many sources<sup>83</sup> are quite critical about the accomplishment of the transitional justice goals by Law 975 and although the IACtHR critically assessed the implementation of Law 975, the OTP explicitly accepted the transitional scheme of Law 975 and qualified the proceedings as genuine. In an in-depth study<sup>84</sup> of Law 975 in light of the complementarity of the ICC, *K. Ambos* concluded along the same lines in 2010. In his view there is neither a factual nor a normative scenario of state inactivity, and there seems to be little doubt that the procedures under Law 975 comply with both the investigative/prosecutorial and trial-related requirements of art. 17 of the Rome Statute. *Ambos* also does not perceive a general unwillingness on the part of the Colombian state to investigate and prosecute international crimes,<sup>85</sup> nor does he consider the reduced sentencing to between five and eight years a manifestation of a general unwillingness, however subject to the condition that the State effectively contribute to a more comprehensive restorative approach, in the sense that demobilized persons must contribute effectively to truth and reconciliation and must reintegrate into society. In our opinion as of 2017, it is precisely the compliance with this conditional sentencing that remains highly problematic. This compliance issue is also the reason why the OTP has consistently focused on particular situations (such as the false positives and those involving sexual crimes) and conditioned the triggering of ICC jurisdiction on the progress made in these cases. It is exactly here where the combination of negative and positive complementarity leads to a clear criminal policy by the OTP.

All in all, it is our view that we cannot call the transitional justice system in Colombia a success story when it comes to reconciliation and reintegration into society, as many demobilized paramilitary actors have become active leaders of organized criminal groups. Nor is it a success story in regards to victim reparation. To that extent Law 975 has only achieved part of its objectives under transitional and restorative justice.

Although we have seen that Law 01 took advantage of the difficulties and failures of Law 975 with regard to its legislative design, there are many issues that raise substantial questions both *de iure* and *de facto* and are all related to the complementarity assessment by the OTP and the prioritization of case selection by the

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<sup>83</sup> See *supra* under point II.A.

<sup>84</sup> *Ambos, K.*, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court. An Inductive, Situation-based Approach*, Springer, Berlin 2010.

<sup>85</sup> *Kai Ambos* does, however, insist on the need for a comprehensive prosecutorial strategy and a better use of the opportunity principle.

SJP. The first set of questions pertains to jurisdiction *ratione personae*. Does Law 01 offer a transitional scheme in which the most responsible person will face criminal responsibility for the alleged international core crimes? First off, Law 01 introduces a differentiated treatment of state agents, rebels, and third persons (e.g. corporate agents), including in regard to amnesty and pardon. This contains the risk of unequal treatment in criminal matters. Secondly, the most senior rebel leaders are likely to end up in Congress and, as MPs, will be granted immunity. Thirdly, Law 01 does not offer a clear theoretical or dogmatic concept of leadership (conspiracy, joint enterprise, etc.) and participation, which can undermine the prioritization of cases. Moreover, Law 01 favours a concept of *mens rea* that could lead to impunity for leadership members not directly or indirectly involved in the illegal conduct.

The second batch of questions relates to jurisdiction *ratione materiae*. First, although international core crimes are excluded from an amnesty and a pardon, criminal conduct related to political crimes, such as rebellion and sedition, is not. This means that criminal conduct such as the financing of international core crimes (for instance through the drug trade or the trade in cultural heritage) could be exempted from criminal liability. Since there is no clear definition of related offences, the precise set of international core crimes excluded from an amnesty and a pardon remains unclear. For instance, is the corporate financing of the FARC and thus of the armed conflict by the Brazilian corporation Odebrecht a related offence? Secondly, an amnesty and a pardon can be granted for grave war crimes not committed in a systematic matter. This wide scope of exemption from criminal liability could qualify as unwillingness or inability on the part of the State and also violate the rules of IHRL and customary international law. Thirdly, cases of extrajudicial killings (such as the false positives scandal) can qualify for the SJP's jurisdiction if the cases are directly or indirectly linked to the armed conflict. The Supreme Court has decided that this is the case even if the victims were not combatants and the conduct did not take place on the battlefield; this is the case when the perpetrator acted under the guise of armed conflict and where the conflict was not necessarily the cause of the commission of the crime but where the existence of the conflict did play at least a substantial part in the perpetrator's ability to commit the crime, in the way it was committed or the purpose for which it was committed.<sup>86</sup> It remains to be seen if this wide scope of application of the favourable regime of the SJP is justified in the light of the Rome Statute.

The third set of questions is related to the type and level of the penalties. Neither the IHRL nor the international human rights (IHR) case law establishes specific penalties for serious human rights violations. Although the Rome Statute does provide sentencing provisions for international core crimes, they do not bind states

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<sup>86</sup> Corte Suprema de Justicia, Sala de Casación Penal, 24 July 2017, <http://www.cortesuprema.gov.co/corte/wp-content/uploads/2017/07/AP4688-2017.pdf> (accessed April 2018), pp. 13–14.

concerning domestic proceedings. However, the gravity and complementarity test is relevant for the opening of a preliminary examination of a situation as well as for the investigation of a criminal case. The OTP clearly indicated that alternative sentences as such are not incompatible with the Rome Statute but that a number of factors have to be considered for evaluating whether a sentence is manifestly inadequate. These factors include, *inter alia*, the usual national practice in sentencing for Rome Statute crimes; the proportionality of the sentence in relation to the gravity of the crime and the degree of responsibility of the offender; the type and degree of restrictions on liberty; any mitigating factors; and the reasons given by the sentencing judge for imposing the particular sentence. The OTP indicates that ‘the crucial question will be whether alternative sentences, in the context of a transitional justice process, adequately serve appropriate sentencing objectives for the most serious crimes. The answer will depend on the sort of sentences, weighed against the gravity of the crimes and the role and responsibility of the convicted persons in their commission.’<sup>87</sup> This raises the question whether the conditional reduced penalties under the SJP can and will meet this criterion. All this will depend, in my view,<sup>88</sup> on the selection of cases (those who were most responsible for the most serious crimes) and on the effective implementation of sentencing in practice.

The fourth set of questions relates to the effective remedy and redress or compensation for victims and thus to the aims of restorative justice. The lack of victim participation can undermine the discovery of the truth but can also have negative consequences for the gathering of evidence in criminal proceedings. It remains to be seen how the separation between truth finding by the non-judicial units, for example the Commission for the Clarification of the Truth, Social Harmony, and Non-Repetition, and the judicial proceedings of the SJP will interrelate. Victim protection and the discovery of the truth are essential aims of the ICC’s jurisdiction and therefore relevant for the complementarity assessment.

The fifth and final set of questions goes beyond the performance of the SJP and relates to the transitional and restorative justice scheme with reduced liability and reduced penalties as such. The OTP complementarity assessment is and should be conditional upon the realization of the aims of Law 01, being reintegration, victim compensation, and sustainable peace. As we have seen, this was and remains very problematic under Law 975. There is little reason to believe that this will be any different under Law 01. The conflict in Colombia unfolded in the context of a strong state with a high military expenditure (though clouded by corruption and illegal activities) but weak in the country’s extensive rural areas. In these rural are-

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<sup>87</sup> Stewart, J., *Transitional Justice in Colombia and the role of the ICC*, <https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf> (accessed April 2018).

<sup>88</sup> Some authors responded negatively to the design of the penalties as such in relation to the ratio of penalties in criminal justice. See, e.g., Velásquez, F., *El nuevo Acuerdo Final y los fines de la pena*, *Rivista Digital, Derecho Penal*, January 2018, Freiburg, Switzerland, <http://perso.unifr.ch/derechopenal/novedades> (accessed April 2018).

as authority was assumed by rebels, paramilitary forces, and related parapolitical structures involved in coca cultivation and drug processing and trading. Where the rebels lost territory due to military successes, the paramilitary took over, forced local communities to leave their land, engaged in illegal mining and in the palm oil agro-industry, with strong financial involvement of corporate business and with the deliberate killing of opponents.

With the demobilization of the FARC, these so-called criminalized power structures<sup>89</sup> took over the territory, engaged in illegal conduct and organized crime, and perpetuated a culture of impunity. These renewed armed groups are very attractive to ex-rebels, the ex-military, and the ex-paramilitary. The nexus between illicit wealth and political power is the central defining characteristic of these criminalized power structures that may either capture the state<sup>90</sup> or may constitute armed opposition thereto. Without safeguards for the performance of the institutional capacity to establish genuine and integral state authority in the regions of conflict, there is the risk is that state authority will be captured by groups engaging in illegal organized conduct, colluding with the state authorities, and generating new violence, thereby undermining the main aims of the transitional and restorative justice model and of sustainable peace as a whole. The Colombian state will only be successful if it is able to diminish the drivers of violent conflicts and to institutionalize more attractive peaceful alternatives for the pursuit of wealth and power in the regions.

The complementarity policy by the OTP has to put pressure on the Colombian state and guide it in retaining and guaranteeing state authority so that the conditional punitive scheme under Law 01 can actually be implemented and executed. Above all, this means that demobilized persons under Law 01 must not get reinvolved in the conflict and must comply with the conditions under Law 01. It also means that the State has to guarantee security in the regions and prevent the commission of further international core crimes and/or serious human rights violations. If not, complementary ICC jurisdiction will and must be triggered as the conditions for peace implementation would have been breached.

### List of abbreviations

AGO	Attorney General's Office
AUC	Autodefensas Unidas de Colombia (United Self-Defense Forces of Colombia)

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<sup>89</sup> *Dziedzic, M. (ed.), Criminalized Power Structures. The Overlooked Enemies of Peace, Rowman & Littlefield, Maryland 2016.*

<sup>90</sup> See *Castresana, C., Guatemala: Illegal Entities and the Clandestine Security Apparatus, in: M. Dziedzic (ed.), Criminalized Power Structures. The Overlooked Enemies of Peace, Rowman & Littlefield, Maryland 2016, pp. 53–81.*

BACRIM	bandas criminales (violent organized criminal groups)
DDR	disarm, demobilize, and reintegrate
DIH	derecho internacional humanitario
ELN	Ejército de Liberación Nacional (National Liberation Army)
FARC	Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia)
FARC-EP	Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (Revolutionary Armed Forces of Colombia – People’s Army)
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
IHL	international humanitarian law
IHR	international human rights
IHRL	international human rights law
IUGM	Instituto Universitario General Gutiérrez Mellado
NGO	non-governmental organization
OTP	Office of the Prosecutor of the ICC
SJP	Special Jurisdiction for Peace
UN	United Nations
US	United States of America
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft (law journal)



**Part 4**  
**Special Regimes: Anti-Terrorism Measures**  
**and Security Law**



# Countering Terrorism: Suspects without Suspicion and (Pre-)Suspects under Surveillance

*Lorena Bachmaier*

## I. Introduction

Terrorism and transnational organized crime are included under art. 4 (2) of the Treaty on European Union (TEU) as ‘national security crimes’, which is the responsibility of the Member States, but which also requires coordinated action at the European Union (EU) level.<sup>1</sup> Fighting terrorism – together with organized crime and cybercrime – is one of the core priorities of the European Security Agenda. The EU Council Counter-Terrorism Strategy of 2005<sup>2</sup> already mentioned, as one of its main objectives, to ‘impede terrorists’ planning, disrupt terrorist networks, and the activities of recruiter of terrorism and access to attack materials ... while continuing to respect human rights and international law’. In order to counter terrorism, it is unanimously recognized that preemptive action is necessary,<sup>3</sup> and to that end national authorities need to have the necessary tools ‘to collect and analyse intelligence’ for pursuing and investigating terrorists.<sup>4</sup>

Intelligence is not only necessary and useful but it is also indispensable to act effectively in the fight against terrorism. However, in view of the dimensions of the gathering of information and the information technology (IT) possibilities of mass surveillance, an important question arises: whether an alternative or additional system of crime prevention (and even sanctioning) is being silently introduced, perme-

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<sup>1</sup> See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Agenda on Security COM (2015) 185 final, Strasbourg, 28.4.2015, p. 2.

<sup>2</sup> Council of Ministers, The European Union Counter-Terrorism Strategy, Document 14469/4/05, Brussels 30 November 2015, p. 12. The document defines the four pillars of the strategy: ‘prevent, protect, pursue and respond’ to the international terrorism threat.

<sup>3</sup> Directive (EU) 2017/541, of 15 March 2017, on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 31.3.2017, Explanatory Memorandum (32): ‘Member States should pursue their efforts to prevent and counter radicalisation leading to terrorism by coordinating, by sharing information and experience on national prevention policies, and by implementing or, as the case may be, updating national prevention policies taking into account their own needs, objectives and capabilities building on their own experiences. The Commission should, where appropriate, provide support to national, regional and local authorities in developing prevention.’

<sup>4</sup> Ibid., p. 12, para. 24.

ating procedural structures, and without a proper and transparent legal framework. In this context, the possibilities offered by the use of mass communications surveillance systems cannot be ignored. As set out by the European Parliament: ‘mass-surveillance is incompatible with the cornerstones of democracy’<sup>5</sup> if such mass surveillance is not limited to exceptional cases and done in accordance with the law.<sup>6</sup> Therefore, the need to prevent and pursue terrorism and the use of surveillance tools are just as necessary as ensuring full compliance with fundamental rights.<sup>7</sup>

For several years now there have been lively discussions on the role of criminal law in preventing terrorism and on the measures and mechanisms adopted by States that exceed the traditional boundaries of criminal law and criminal proceedings.<sup>8</sup> The topic is not completely new. This is why I will not delve into the fact that, in

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<sup>5</sup> European Parliament Resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens’ fundamental rights and on transatlantic cooperation in Justice and Home Affairs, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0230> (accessed April 2018).

<sup>6</sup> See also the CoE Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to Human Rights for Internet Users (Adopted by the Committee of Ministers on 16 April 2014 at the 1197th meeting of the Ministers’ Deputies): ‘4. You must not be subjected to general surveillance or interception measures. In exceptional circumstances, which are prescribed by law, your privacy with regard to your personal data may be interfered with, such as for a criminal investigation. Accessible, clear and precise information about the relevant law or policy and your rights in this regard should be made available to you’, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804d5b31> (accessed April 2018).

<sup>7</sup> See also UN World Conference on Human Rights, Vienna Declaration of Action 1993, para. 17; and the CoE Recommendation R(96)8 of the Committee of Ministers to the Member States on ‘Crime Policy in Europe in a Time of Change’, (Adopted by the Committee of Ministers on 5 September 1996 at the 572nd meeting of the Ministers’ Deputies), <https://rm.coe.int/16804f836b> (accessed April 2018).

<sup>8</sup> There is a large academic literature on this issue. See, for example, *Sieber, U.*, Legitimation und Grenzen von Gefährdungsdelikten im Vorfeld terroristischer Gewalt – Eine Analyse der Vorfeldtatbestände im „Entwurf eines Gesetzes zur Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten“, *NStZ* 2009, 353–364; *Sieber, U.*, Risk prevention by means of criminal law – On the legitimacy of anticipatory offenses in Germany’s recently enacted counter-terrorism law, in: F. Galli/A. Weyembergh (eds.), *EU counter-terrorism offences: What impact on national legislation and case-law?*, Editions de l’Université de Bruxelles, Brussels 2012, pp. 251–279; *Hirsch Ballin, M.F.H.*, Anticipative Criminal Investigation. Theory and Counterterrorism Practice in the Netherlands and the United States, Springer, TMC Asser Press, The Hague et al. 2012; also *Hirsch Ballin, M.F.H.*, Terrorism Causing a Shifting Responsibility in Criminal Pre-Trial Investigation: from Repression to Prevention, in: M.F.H. Hirsch Ballin et al. (eds.) *Shifting Responsibilities in Criminal Justice. Critical Portrayals of the Changing Role and Content of a Fragmented Globalizing Law Domain*, Eleven International Publishing, The Hague 2012, pp. 9–29, 21 ff.; *Ashworth, A./Zedner, L.*, *Preventive Justice*, Oxford University Press, Oxford et al. 2014, pp. 13–26, 179 ff.; *Sieber, U./Vogel, B.*, *Terrorismusfinanzierung – Prävention im Spannungsfeld von internationalen Vorgaben und nationalem Tatstrafrecht*, Duncker & Humblot, Berlin 2015.

fighting terrorism, the borderline between prevention and repression tends to be blurred, as criminal law has shifted in the area of terrorism from repression to prevention, and administrative law measures tend to have a punitive effect.<sup>9</sup> My aim in this paper is to highlight some of the problems that the increasing use of prevention measures beyond the criminal law have caused in the sphere of fundamental rights, as well as its impact upon the conception of the criminal procedure. While the criminal procedure has been traditionally conceived as a framework of safeguards to protect the individual from undue intrusions by the State into the sphere of rights of the individual and to prevent the abusive use of the *ius puniendi*, we are witnessing equally intrusive measures and sanctions outside the criminal law sphere, and thus outside the guarantees provided by criminal procedure.<sup>10</sup>

Resorting to extensive preventive measures has also caused the appearance of a new category of persons who do not qualify as suspects for the criminal procedure: the so-called ‘persons of interest’. It is worth questioning how individuals become pre-suspects or ‘preventive suspects’, and especially what their rights are. In that context, I will address the limits and safeguards of mass surveillance tools and refer to some of the administrative measures applied to these pre-suspects with the aim of discussing not only whether we are facing a new model of preventive justice based on security but also whether such a model complies with due process standards. I will leave aside debates about the concept of terrorism, and I will assume the broad notion of terrorism offences adopted in EU Directive 2017/541.<sup>11</sup> Moreover, I will only refer to the European landscape with focus on the fight against jihadist terrorism.

<sup>9</sup> See, for example, *Ojanen, T.*, Administrative counter-terrorism measures – a strategy to circumvent human rights in the fight against terrorism?, in: D. Cole et al. (eds.), *Secrecy, National Security and the Vindication of Constitutional Law*, Edward Elgar, Cheltenham et al. 2013, pp. 249–267, 251, 254; *Galli, F.*, The Law on terrorism: The UK, France and Italy compared, Bruylant, Brussels 2015, pp. 56 ff.; and *Galli, F.*, The freezing of terrorists’ assets: preventive purposes with a punitive effect, in: F. Galli/A. Weyembergh (eds.), *Do labels still matter?*, Ed. de L’Université de Bruxelles, Brussels 2014, pp. 43–68, 51 ff.; *Mitsilegas, V.*, The Security Union as a paradigm of preventive justice: Challenges for citizenship, fundamental rights and the rule of law, in: S. Carrera/V. Mitsilegas (eds.), *Constitutionalising the Security Union. Effectiveness, Rule of Law and Rights in Countering Terrorism*, CEPS, Brussels 2017, pp. 5–21.

<sup>10</sup> See *Ashworth, A./Zedner, L.*, op. cit. (n. 8), pp. 181–190, focusing on the preventive measures adopted in the UK against terrorism outside the criminal procedure.

<sup>11</sup> See Directive (EU) 2017/541, which has to be transposed by the Member States by 8 September 2018.

## II. Suspects of terrorism and ‘persons of interest’: the present challenges

After the adoption of United Nations (UN) Resolution 2178 (2014) of 24 September 2014, where the UN Security Council expressed its concern over the growing threat posed by foreign terrorist fighters and required all Member States of the UN to ensure that offences related to this phenomenon were punishable under national law, Europe reacted with the Additional Protocol to the Council of Europe (CoE) Convention on the Prevention of Terrorism of 22 October 2015, and the CoE adopted the EU Directive 2017/541 of 15 March 2017.<sup>12</sup> Since the adoption of all these legal instruments, the number of terrorism suspects has continuously increased.

In its Annual European Union Terrorism Situation and Trend Report (TE-SAT) of 2017 (covering the years 2014–2016),<sup>13</sup> Europol stated that, while the numbers of individuals travelling to the conflict zones in Syria/Iraq to join the jihadist terrorist groups as foreign fighters had decreased, ‘the number of returnees is expected to rise’.<sup>14</sup> It offered the following figures: in 2014, 395 suspects were arrested as religiously inspired jihadist terrorists, but the number grew up to 687 in 2015 and up to 718 in 2016 (the latter figure represents 72% of the people arrested for terrorism or terrorism related offences). France, Spain, Belgium, and the UK are the countries that reported the highest numbers of arrests for jihadist terrorism crimes.<sup>15</sup> It is interesting to mention that, while there is a decrease of 50% in the number of individuals arrested for separatist terrorism, there is a continuing increase in the number of individuals arrested for jihadist terrorism; and, although the overall number of terrorist attacks has decreased in those three years, the number of persons arrested for being suspects of terrorism-related offences has increased.<sup>16</sup>

This is the logical consequence of expanding the notion of acts considered as criminal offences, i.e. the result of the preventive or anticipatory criminal law.<sup>17</sup> In

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<sup>12</sup> 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.

<sup>13</sup> Europol Annual European Union Terrorism Situation and Trend Report (TE-SAT) 2017, <https://www.europol.europa.eu/activities-services/main-reports/eu-terrorism-situation-and-trend-report-te-sat-2017> (accessed April 2018).

<sup>14</sup> *Ibid.*, pp. 12–14.

<sup>15</sup> According to the TE-SAT report, the number of arrests were France, 429; Spain, 69; Belgium, 62; and UK, 149, although this last figure comprises all kind of terrorist related arrests and, thus, does not differentiate jihadist terrorism from other types of terrorism.

<sup>16</sup> The total number of attacks was 226 in 2014, 211 in 2015, and 142 in 2016. See TE-SAT, (n. 13), p. 10. See also the Study for the LIBE Committee ‘The European Union’s Policies on Counter-Terrorism’, 2017, pp. 30–42, [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL\\_STU\(2017\)583124\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU(2017)583124_EN.pdf) (accessed April 2018).

<sup>17</sup> *Ashworth, A./Zedner, L.*, op. cit. (n. 8), pp. 95 ff. See also *Zedner, L.*, Seeking Security by Eroding Rights: The Side-stepping of Due Process, in: B.J. Goold/L. Lazarus (eds.),

view of the increasing numbers of terrorism suspects in the EU, it is of great importance to analyse what criteria are used for identifying a person as a terrorism suspect and what rights are granted to these persons.

### A. Who are suspects?

The numbers in the Europol report refer to persons who have been arrested as suspects of terrorism or terrorism-related offences and therefore only to those who are subject to the criminal justice system. But the report does not mention individuals who are subject to closer surveillance either by intelligence services or law enforcement units. However, the Study for the European Parliament on persons suspected of terrorism (covering only ten countries of the EU),<sup>18</sup> points out the difficulties in defining who is a suspect and what are the rights of persons ‘suspected’ of intending to commit terrorism or terrorism crimes in the future. There is no common definition in the EU, and the package of Directives on rights of suspects in criminal proceedings does not include a definition either.<sup>19</sup>

Although many Member States do not have a formalized definition of a suspect of terrorism, all of them refer to ‘a situation where it is reasonable to believe that a person has committed terrorism or a terrorism related crime’. However, in many cases a suspect is also a person who is suspected of intending to commit a terrorism crime in the future. These persons against whom there are no clear indications of having committed a crime, or where those indications are not enough to trigger the criminal response, usually fall under the the police or intelligence law: they are ‘persons of interest’ – *Gefährder* in German. The problem is that the law of many Member States does not establish a clear distinction between criminal investigative measures and law enforcement prevention measures. The German law is different in this regard. It distinguishes clearly between criminal justice, aimed at repression and governed by the *Strafprozessordnung*, and the sphere of prevention or security, regulated by the *Polizeirecht*.<sup>20</sup> Such differentiation and clear set of rules on the powers of the police in the realm of prevention is not in force in most countries, where a definite regulation on the surveillance measures that can be applied to persons who are considered dangerous is lacking. This poses a challenge to the transparency of such preemptive measures.

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Security and Human Rights, Hart, Oxford 2007, pp. 257–275, 259, analysing the shift from a ‘post-crime’ society to a ‘pre-crime’ society, where the perspective is focused on anticipating and forestalling ‘that which has yet to occur’.

<sup>18</sup> See the Study for the LIBE Committee, ‘EU Member States’ policies and laws on persons suspected of terrorism-related crimes’, Committee on Civil Liberties, Justice and Home Affairs, November 2017, p. 38, [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596832/IPOL\\_STU\(2017\)596832\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596832/IPOL_STU(2017)596832_EN.pdf) (accessed April 2018).

<sup>19</sup> Ibid., p. 11.

<sup>20</sup> For a dogmatic analysis, see *Poscher, R.*, *Gefahrenabwehr. Eine dogmatische Rekonstruktion*, Duncker & Humblot, Berlin 1999.

European countries have not yet adopted the system of *risk scores* (as has occurred in some pilot projects in the US<sup>21</sup>), where the police identify areas at risk by way of predictive policing with the aid of algorithms and the use of Big Data ITS (social networks, geo-data, finance transactions, mobile information).<sup>22</sup> But in the field of terrorism prevention such risk assessments have been in place for a long time.

The current situation in countering terrorism shows that there are a number of persons identified as potential terrorists or at risk of becoming linked to terrorist activities, individuals who fall into the category of persons of interest or pre-suspects and who may be subject to permanent surveillance precisely to gather intelligence and analyse the risks. A 'person of interest' comes under the radar of the police or the intelligence service precisely because of the elements of risk identified in connection with possible terrorist groups or terrorist activities. As long as there are no indications or suspicions of having committed a criminal offence, such individual is not a suspect in the traditional sense. Therefore, the machinery of the criminal justice system cannot be activated, but the rights granted to suspects in the traditional sense do not apply either.

However, such persons may be subject to certain surveillance measures that can affect their privacy<sup>23</sup> and data protection rights. In most cases they will not even know that they have been under surveillance or monitoring. Only if they are subject to administrative measures entailing a major restriction of their fundamental rights – such as the prohibition to cross State borders or enter a certain country, or the freezing of their assets – will they become aware of their condition as 'persons of interest' or terrorism 'pre-suspects' posing a sufficient threat to national security. This is precisely the point when it is appropriate to consider the type of safeguards that must be accorded to these 'preventive suspects', to those individuals intelligence services have identified as posing a certain risk of possibly attempting to commit a terrorist offence in the future. Since these individuals are not suspects under a criminal investigation and the criminal procedure formally has not begun,

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<sup>21</sup> See *McLaughlin, T.*, As shootings soar, Chicago police use technology to predict crime, Reuters, <https://www.reuters.com/article/us-chicago-police-technology/as-shootings-soar-chicago-police-use-technology-to-predict-crime-idUSKBN1AL08P> (accessed April 2018).

<sup>22</sup> On predictive policing, see *Ferguson, A.G.*, Big Data and Predictive Reasonable Suspicion, 163 University of Pennsylvania Law Review (2015) 327–410. In Germany, see *Gless, S.*, Predictive policing and operative Verbrechensbekämpfung, in: F. Herzog et al. (eds.), *Rechtsstaatlicher Strafprozess und Bürgerrechte: Gedächtnisschrift für Edda Weßlau*, Duncker & Humblot, Berlin 2016, pp. 165–180; *Rademacher, T.*, Predictive Policing im deutschen Polizeirecht, *Archiv des öffentlichen Rechts*, 2017, 366–416.

<sup>23</sup> 'The right to privacy is not easy to be defined as it is composed by a cluster of rights, we refer here precisely to the privacy as the control of personal information and the right of individuals to determine for themselves when, how and to what extent information about them is communicated to others', following *Westin, A.*, *Privacy and Freedom*, Atheneum, New York 1967, pp. 7 ff.



those guarantees do not apply. But their situation is not the same as that of an ordinary citizen who has no relationship with the security or criminal justice systems.

The borderline is not clear, and security agencies obviously have margin of appreciation to decide whether a person should be considered as ‘person of interest’ or not, based on the information gathered, with or without the use of software based on algorithms that identify risks.<sup>24</sup> Let us look at a hypothetical example. A male citizen from a Maghreb country residing in the South of Spain, who expresses opinions in which he criticizes Western life values, is unemployed, regularly visits the mosque, and comments in his social environment that he would like to travel to Istanbul. Would this person fall under the category of ‘person of interest’? Could he even be classified as a suspect if he also borrowed money to take that trip and previously served in the army of his country of origin as a soldier? The answer, undoubtedly, is not easy, and the profiling may have important repercussions in the sphere of the citizens’ freedom and privacy, although it has to be accepted that security may require invading the privacy of the individuals.<sup>25</sup>

## B. What are their rights?

The rights of suspects in criminal proceedings are defined in the codes of criminal procedure at national level, with the minimum harmonization within the scope of the European Union provided by the various Directives adopted in that area.<sup>26</sup> But what are the rights recognized for pre-suspects or ‘preventive suspects’? Admittedly, this question is not new, since from the point of view of national security – and even public safety in general – there have always been surveillance mecha-

<sup>24</sup> On the differences between predictive policing based on algorithms and the traditional risk assessment carried out by officials, see *Rademacher, T.*, op. cit. (n. 22), pp. 391–393.

<sup>25</sup> In the same sense *Galison, P./Minow, M.*, *Our Privacy, Ourselves in the Age of Technological Intrusions*, in: R. Ashby Wilson (ed.), *Human Rights in the ‘War on Terror’*, Cambridge University Press, Cambridge 2005, p. 260, stating that the conflict between privacy and the demands of security is inevitable. Nevertheless, I consider that both notions, rather than being in conflict, have to go hand in hand in order to address the needs for security in a comprehensive sense: restrictions and limitations do not necessarily mean conflicts.

<sup>26</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; Directive 2016/243/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; and Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016, on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

nisms to identify risks for security purposes. While this is true, if we consider the huge expansion of surveillance possibilities through IT and sophisticated computer programmes, the scope of preventive surveillance offers quite a different picture when compared to information gathered in the past by way of informants or police surveillance. Since complex computer systems use a series of algorithms to develop predictive policing in order to identify the risks by means of IT mechanisms capable of processing enormous amounts of data of individual persons, the number of persons who may fall under the category of 'person of interest' increases. And the capacity to subject them to intrusive electronic monitoring increases as well, which entails higher risks to their privacy.

In this context, two categories of 'persons of interest' or *Gefährder* could be differentiated. One category includes people who, in application of certain risk assessment or threat criteria, should be monitored because they represent a potential risk. The other includes people who represent a potential risk and are not only subject to surveillance but also to administrative preventive measures. Although it seems clear that these persons with the status of 'person of interest', 'preventive suspect', or pre-suspect should be granted certain rights, such rights are not clearly defined in most Member States.

The current trend, at the preemptive level, is to focus on countering the terrorist threats and on taking action long before the criminal procedure formally starts. And, as technology offers the possibility of identifying – with more or less errors – subjects at risk and put them under electronic surveillance or apply administrative prevention measures, it seems that the protection of citizens in this preemptive stage must also be redefined. It is necessary to regulate the rights of those individuals who have become a 'person of interest' and who, therefore, may be subject to an array of measures for the purpose of preventing a terrorist risk. The case law of the European Court of Human Rights (ECtHR) has set out the minimum standards of rights such persons should be guaranteed.

### **III. National security, mass surveillance, and minimum safeguards in the case law of the ECtHR**

The ECtHR affords States a wide margin of appreciation in assessing national security risks and choosing the instruments or mechanisms to deal with them.<sup>27</sup> However, art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is an absolute boundary that cannot be crossed. With regard to secret surveillance, it has been the approach of the ECtHR

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<sup>27</sup> *Leander v. Sweden*, 26 March 1987, App. no. 9248/81. See generally *Cameron, I.*, *National Security and the European Convention on Human Rights*, Kluwer Law, The Hague 2000, pp. 74 ff.

since *Klass and Others v. Germany*<sup>28</sup> to put particular emphasis on the safeguards that must accompany surveillance and the keeping of records. But the Court has hardly questioned the relevance of a situation for the interests of national security, although the interest in the protection of national security must always be balanced against the seriousness of the interference with the individual's right to respect for his [or her] private life.<sup>29</sup> This means that, in practice, the requirement of 'strict necessity' is being defined together with the existence of adequate and effective guarantees against abuse and the exercise of supervision.<sup>30</sup> Although the term 'necessary' in art. 8 ECHR with reference to the limitation on the rights was initially considered by the Strasbourg Court as not amounting to 'indispensable', its case law has evolved to require that secret surveillance be justified by 'strict necessity' to protect democratic institutions.

In this context, the judgment in *Szabó and Vissy v. Hungary*<sup>31</sup> set out the main requirements for secret surveillance through the interception of electronic communications. In *Szabó* the Court decided on a case of secret intelligence gathering for purposes of national security. Under section 7/E 3 of the anti-terrorism law of Hungary (as of 2011), the police could undertake surveillance, including interception of electronic and computerized communications under the National Security Act, on the condition that the necessary intelligence could not be obtained in any other way; thus, a certain suspicion of serious crimes was not required.<sup>32</sup> Neither was judicial authorization required; an order of the Government Minister was deemed sufficient. Furthermore, the general rules provided for the destruction of the data collected only if the data were unnecessary for purposes underlying the gathering of intelligence. Staff members of a 'watchdog' non-governmental organization (NGO) critical of the government filed an application at the ECtHR on the basis that such a law infringed their constitutional right to privacy.<sup>33</sup> The analysis

<sup>28</sup> *Klass and Others v. Germany*, 6 September 1978, Series A no. 28: In accordance with the law (which must comply with the requirements of accessibility and foreseeability), justified by a legitimate aim and be necessary in a democratic society. See the landmark cases, *Malone v. UK*, 2 August 1984, App. no. 8691/79; *Kruslin v. France*, 24 April 1990, App. no. 11801/85, and *Huvig v. France*, 24 April 1990, App. no. 11105/84. Later see also *Liberty and Others v. the United Kingdom*, 1 July 2008, App. no. 58243/00; *Roman Zakharov v. Russia* 4 December 2015, App. no. 47143/06.

<sup>29</sup> *Leander v. Sweden*, op. cit. (n. 27), para. 59.

<sup>30</sup> *Kennedy v. United Kingdom*, 18 May 2010, App. no. 26839/05, para. 153. *Weber and Saravia v. Germany*, inadmissibility decision 29 June 2006, App. no. 54934/00. On the requirement of 'strictly necessary', see also ECJ case C-293/12 and C-594/12 *Digital Ireland v. Minister for Communications and Others*, 8 April 2014; ECJ case C-473/12 *Institut professionnel des agents immobiliers (IPI)*, 7 November 2013.

<sup>31</sup> *Szabó and Vissy v. Hungary*, 12 January 2016, App. no. 37138/14.

<sup>32</sup> *Ibid.*, para. 12.

<sup>33</sup> Based on the ECtHR case law granting status to victims and therefore standing to apply to the ECtHR to every citizen who could have been subjected to surveillance measures at any point and at any time without any notification. The Court has accepted that an indi-

was particularly interesting as it did not address a particular infringement but examined whether the law conformed to the requirements of the ‘necessity test’, i.e. whether the law not only complied with the accessibility and foreseeability requirements but also ensured that secret surveillance measures were applied only when ‘necessary in a democratic society’, providing effective safeguards and guarantees against abuse.

The Court found in this case a violation of art. 8 ECHR based on of the following five arguments: 1) The legislation did not describe the categories of persons who in practice might have their communications intercepted (para. 66), and ‘there is no requirement of any kind for the authorities to demonstrate the actual or presumed relation between the persons ‘concerned’ and the prevention of any terrorism threat.’ 2) The Court accepted that governments resort to ‘massive monitoring of communications’ and ‘cutting-edge technologies’ in preempting terrorist attacks, but the law did not require the requesting authority to ‘produce supportive materials or, in particular, a sufficient factual basis for the application of secret intelligence gathering measures which would enable the evaluation of necessity of the proposed measure’; and this did not guarantee an assessment on the ‘strict necessity’ of the surveillance measure (para. 71). 3) The law did not clarify whether the time limit of ninety days for the surveillance measure was repeatedly subject to renewal or not. 4) The absence of supervision of the strict necessity requirement by the judiciary or any other independent body; for the Court, the absence of judicial control cannot be overlooked ‘in view of the magnitude of the pool of information retrievable by the authorities applying highly efficient methods and processing masses of data’ (para. 79); although such judicial control may not be granted in exceptional emergency situations *ex ante*, a *post factum* judicial review should be provided as a rule (para. 81), the parliamentary control by a specific committee twice a year not being enough. 5) Finally, the Hungarian law did not provide for the notification of the surveillance measures to the persons concerned after the measures were terminated (para. 86). Having regard to all these reasons, the Court was not convinced that the Hungarian law provided sufficient safeguards against the mass surveillance measures foreseen to prevent terrorist attacks.

At present there is another important case pending before the ECtHR dealing with mass surveillance and privacy rights: *10 Human Rights Organisations v. UK*.<sup>34</sup> This case challenges the interception warrant regime under section 8 of RIPA (Regulation

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vidual can, under certain conditions, claim to be the victim of a violation caused by the mere existence of secret measures of legislation allowing for secret measures, without having to allege that those measures have been applied to him or her in a particular case. See *Klass and Others v. Germany*, *Weber and Saravia v. Germany*, *op. cit.* (n. 28, 30), and *Case of the Association for European Integration and Human Rights Ekimdhiev v. Bulgaria*, 28 June 2007, App. no. 62540/00.

<sup>34</sup> App. no. 24960/15.

of Investigatory Powers Act 2000) for infringing arts. 8 and 10 of the ECHR. The applicants claim that this regime, which allows bulk interception surveillance (KARMA POLICE, Black Hole programmes, and TEMPORA), does not meet the standards set out by the ECtHR in *Weber and Saravia v. Germany*, *Zakharov v. Russia* and in *Szabó & Vissy v. Hungary*. These NGOs, under the lead of Big Brother Watch, consider that in order to apply the bulk surveillance measures, at least the following requirements and safeguards should be in place: objective evidence of reasonable suspicion of a serious crime or conduct amounting to a specific threat to national security in relation to the persons for whom the data is being sought; prior independent judicial authorization; and finally, notification to enable the affected persons to exercise their right to challenge the interception (interception and storage of data).

From these cases it appears that national laws should at least provide for minimum safeguards in the intelligence gathering process and in the application of preventive measures against terrorism. The first and foremost requirement for the lawfulness of such a system of surveillance that is outside of criminal procedure is that those measures be underpinned by enough supportive material amounting to a factual basis for assuming that, if not a crime, at least a certain risk exists, and that such risk justifies the monitoring measures. Secondly, there has to be a legal framework establishing those requirements, the authorities allowed to order such measures, and the maximum time limits and conditions for extension. The law should also provide for the possibility of notifying the person *ex post*, if such notification does not have a negative impact on security.<sup>35</sup> Finally, judicial oversight by an independent body should be established, although restrictions to the right to a public hearing may be allowed, and the possibility of security-cleared defence lawyers could also be accepted.<sup>36</sup> As to judicial control, while in the Big Brother case against the RIPA rules (*10 Human Rights Organisations v. UK*) the applicants also claim that the mass surveillance measures be subject to a previous judicial warrant when journalists and other relevant civil society actors are involved, this requirement is not explicitly mentioned in the *Szabó* case.

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<sup>35</sup> Although not directly addressing the obligation to notify, but regarding the obligation of the intelligence service to provide the information requested concerning the number of people who had been placed under electronic surveillance, see *Youth Initiative for Human Rights v. Serbia*, 25 June 2013, App. no. 48135/06.

<sup>36</sup> See the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/13/37, 28 December 2009, paras. 59–71. See also Venice Commission Report on Counterterrorism measures and human rights, Strasbourg, 5.7.2010, CDL-AD(2010)022.

#### **IV. Mass surveillance and the challenges for criminal procedure**

Identifying individuals as ‘persons of interest’ based on their potential risk of committing criminal offences and putting them under continuous surveillance makes them not only a source of information but also a source that might have evidentiary relevance. Through the monitoring mechanisms that are activated without previous suspicions but based on profiling, predictive policing, or risk assessment programmes, evidence against such individuals can be gathered. So far, it can be said that this scheme and way of proceeding has always existed.

The current problem lies in the fact that massive data surveillance allows defining profiles of potential people at risk who can be subjected to a much more intrusive surveillance than traditional physical surveillance. In addition, this massive analysis of data – through the interception of communications and remote search of computers – can be triggered based only on a computerised risk assessment. Therefore, the traditional criminal investigation systems have been completely altered by new ‘rules of the game’: first, communications are intervened based on a risk assessment established through massive data analysis systems; then pre-suspects are identified, and, upon such profiling, they may be labelled as persons of interest and be subject to even more intensive surveillance to obtain evidence. Once such evidence is obtained, the elements that prove suspicions are presented to the judicial authority for obtaining the judicial warrant to undertake communications interceptions that will then be admissible as evidence. In the end, an intrusive investigation is initiated without any previous suspicion, by labelling it as surveillance measures on persons of interest. In such a context, there is the risk to subject any individual to surveillance and wait until he/she commits an act of criminal relevance to prosecute him or her criminally.

I am not stating that this way of acting is taking place in a generalized way or that intelligence services are acting outside the law. In fact, all the information available indicates that secret services, even if they were able to collect massive data, do not have enough time, resources, or interest to act in the way described above; normally, targets are in fact selected based on objective criteria and surveillance is in fact only activated after a proper control of the risk assessment.

Nevertheless, even admitting that this is true and that all these activities are carried out within the legal limits – and I am not aware of any data that would contradict this – the truth is that any surveillance system that lacks transparency and publicity has to be closely scrutinized. There is always the risk that, without enough controls in the process of obtaining intelligence and in the selection of the targets or individuals to be monitored, the safeguards of the criminal justice system may be circumvented. The conquest of fundamental rights for which the criminal procedure stands could be tricked by the Big Brother model.

In this context, it may be useful to recall the European Parliament Resolution of 12 March 2014, warning about the risks of mass surveillance and referring to the standards set out by the German Constitutional Court. Under para.12, the European Parliament stated:

[it] sees the surveillance programmes as yet another step towards the establishment of a fully-fledged preventive state, changing the established paradigm of criminal law in democratic societies whereby any interference with suspects' fundamental rights has to be authorised by a judge or prosecutor on the basis of a reasonable suspicion and must be regulated by law, promoting instead a mix of law enforcement and intelligence activities with blurred and weakened legal safeguards, often not in line with democratic checks and balances and fundamental rights, especially the presumption of innocence; recalls in this regard the decision of the German Federal Constitutional Court on the prohibition of the use of preventive dragnets ('*präventive Rasterfahndung*') unless there is proof of a concrete danger to other high-ranking legally protected rights, whereby a general threat situation or international tensions do not suffice to justify such measures.<sup>37</sup>

It will also be interesting to follow the *Carpenter v. United States* case pending before the US Supreme Court, whose oral hearing was held on 29 November 2017. In this case, the Federal Bureau of Investigation (FBI) applied for an order to obtain the geo-location data of Carpenter under the Stored Communications Act. This Act does not require 'probable cause' but only 'reasonable grounds to believe' that the evidence sought is relevant and material for an ongoing investigation. Based on the location data the cell phone company provided, it was possible to establish the appellant's proximity to a series of robberies, and, on this evidence, he was sentenced to 116 years imprisonment. Carpenter challenged this conviction invoking the Fourth Amendment protection.

The core issue in this case is whether individuals using a cell phone have a reasonable expectation of privacy in their location data or whether the third party doctrine should apply. Under the third party doctrine, the US Supreme Court had established, back in the 1970s, that individuals lack an expectation of privacy in information they voluntarily conveyed to third parties. Under this rule, the government has often been able to obtain communication data of individuals when they had provided such information to the ICT's service provider companies. Nevertheless, current digital devices allow generating substantially more data compared with the situation at the time the third party doctrine was established. In the judgment in *United States v. Jones*<sup>38</sup> of 23 January 2012 on the issue of whether a warrantless use of a tracking device violated the Fourth Amendment, it was already questioned whether the third party doctrine was 'ill-suited to the digital age'. If the decision in *Carpenter* ultimately abandons the third party doctrine with regard to information provided to cell phone companies, this would mean that access to such data will always require proof of probable cause in order to obtain the judicial order. It

<sup>37</sup> European Parliament, op. cit. (n. 5). See also the judgments of the German Constitutional Court *BVerfGE* 115, 320/360 and *BVerfGE* 141, 220.

<sup>38</sup> US Supreme Court judgment, 23 January 2012, 565 US (2012).



would recognize that, although users of cell phones provide such data to their companies, there is still an expectation of privacy with regard to the location data, which is why probable cause is necessary in order not to violate the Fourth Amendment.

It could be argued that bulk surveillance is not aimed at producing evidence but is only used for purposes of prevention. Nevertheless, does this mean that the expectation of privacy does not apply? And if, finally, those data are used to trigger a criminal investigation, and if therefore those data are precisely what facilitates to establish probable cause and obtain the judicial order to obtain evidence, is this not a vicious circle? First, the communications are intercepted; based on those communications, probable cause is established; and then the judicial warrant is obtained. Is this not a way of circumventing the procedural guarantees aimed precisely at avoiding that people are subject to intrusive measures when there is no probable cause?

Curiously, both the ECtHR and the US Supreme Court were hearing, in November 2017, cases relevant for the right to privacy in the digital age. Although the case before the US Supreme Court is not related to the prevention of terrorism and mass surveillance (as the measure is adopted within an ongoing criminal investigation), as it deals directly with the right to privacy and its expectations, has therefore a potential impact on bulk surveillance. At the moment of writing this paper, neither the ECtHR nor the Supreme Court have ruled yet on the *Big Brother (10 Human Rights Organisations v. UK)* and the *Carpenter* cases respectively, but I still decided to mention them due to their potential impact on the problems addressed here.

## V. ‘Suspects’ under surveillance and preventive administrative measures

As mentioned above, some individuals are considered to pose a threat that might justify applying certain monitoring or even restrictive measures upon them even though they did not commit a criminal offence. These measures are usually adopted by the security authorities and thus fall within the category of administrative measures. They are not defined as sanctions, as they are adopted only with the aim to prevent a potential act. The element that triggers the adoption of these measures is the assessment of a risk, for they are adopted before any crime is committed; thus, a lower degree of suspicion is required and the standard of proof is certainly also much lower than the evidence required to impose a criminal sanction. As some scholars have already pointed out, there are obvious problems surrounding these security measures, which are defined as administrative in nature but have a punitive effect, with significant consequences in the legal, social, reputational, as well as financial sphere.<sup>39</sup>

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<sup>39</sup> On the reasons that explain the increased use of administrative measures, either as an addition or an alternative to criminal law, and the advantages of administrative measures



They clearly represent the blurring of the divide between criminal and administrative procedures at the cost of diminishing the rights of the individuals affected by such measures. The following administrative measures may serve as examples: a ban to enter the country (e.g. Great Britain) or to leave the country by revocation of travel documents (Law of 13 November 2014, France);<sup>40</sup> to be a continued target of surveillance (via electronic bracelet, Germany); the freezing of assets (in terrorist blacklists); a ban to approach places (e.g. the Netherlands, under the Interim Act Counterterrorism administrative measures); to be registered as possible risk terrorist (Poland Police Act 2016); the loss of citizenship (in the Netherlands, Dutch Passport Act, art. 23; in France only with regard to naturalized citizens); or to be subject to an order to report one's whereabouts. As of last year, the *Bayerisches Polizeigesetz* (as amended by Law of 24 July 2017) also allows, in that German state, to apply preventive detention in cases where there is a *drohende Gefahr* (imminent danger).<sup>41</sup> Interestingly, while it is claimed that all these measures pursue a preventive and not a punitive aim, at the UN level some of them are explicitly called 'sanctions'.<sup>42</sup>

These measures have one common feature: they are adopted for pre-emption, quite often without an adversarial hearing and upon intelligence information, and usually by a non-judicial authority. Despite their impact on the fundamental rights of the individuals – and a *de facto* punitive nature –, their adoption is subject to a much lower level of safeguards, not only at the level of standards of proof but also

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over criminal action, see *Ojanen, T.*, op. cit. (n. 9), pp. 252–253. See *Ashworth, A./Zedner, L.*, op. cit. (n. 8), pp. 5 ff., and the extensive literature cited there. As these authors recognize, 'the potential for uncertainty in respect of preventive justice is even greater since its object – the harm to be prevented – is inherently unknowable' and 'the risk calculation is an uncertain science', p. 265. See also *Zedner, L.*, op. cit. (n. 17), pp. 262–270.

<sup>40</sup> See generally *Galli, F.*, The law on terrorism, op. cit. (n. 9), pp. 186 ff.; *Ojanen, T.*, op. cit. (n. 9), pp. 250–251; *Boutin, B.*, Administrative Measures in Counter-Terrorism and the Protection of Human Rights, ASSER Research Paper No. 2017–01, <https://ssrn.com/abstract=2954541> (accessed April 2018), pp. 1–18; *Kubiciel, M.*, Grund und Grenzen des Präventivgewahrsams für Terrorverdächtige, ZRP, 2017, 57–60; LIBE Study on Suspects (n. 18), pp. 45 ff. See also Study for the LIBE Committee 'The European Union's Policies on Counter-Terrorism', op. cit. (n. 16), p. 63.

<sup>41</sup> *Gesetz zur effektiveren Überwachung gefährlicher Personen* of 24 July 2017, which regulates preventive measures applicable not only to terrorists even if there is no concrete danger but upon elements that indicate an 'imminent danger'. It provides not only for secret electronic surveillance of the communications (art. 32) but also foresees possible preventive detention up to 3 months renewable, although this measure requires judicial control. The law is accessible at <https://www.verkuendung-bayern.de/gvbl/jahrgang:2017/heftnummer:13/seite:388> (accessed April 2018).

<sup>42</sup> See, for example, Resolution 2368(2017), upon which the Security Council imposes targeted sanctions (an assets freeze, travel ban, and arms embargo) upon individuals, groups, undertakings and entities designated on the ISIL (Da'esh) & Al-Qaida Sanctions List. And previously UN Resolution 1267(1999), which set up the sanctioning regime against Al-Qaeda, EU Council Regulation (EC) 337/2000 of 14 February 2000, later repealed by Council Regulation (EC) 467/2001, which was repealed by Council Regulation 881/2002 of 27 May 2002.

at the level of judicial oversight and the possibility to have those measures reviewed.<sup>43</sup> An indication that an individual is linked to another individual who is under suspicion might be enough to trigger certain administrative measures. In that sense, such measures should be closely scrutinized under art. 47 (right to an effective remedy and to a fair trial) and art. 48 of the Charter of Fundamental Rights (right to the presumption of innocence and right of defence), as well as art. 5 (right to liberty), and arts. 7 (no punishment without law) and 8 ECHR (right to privacy and data protection).<sup>44</sup> In so far as the administrative measures are not always imposed by an independent authority, are not subject to the fair trial rights, do not comply with the right to presumption of innocence, and are not always subject to judicial oversight or review, they raise concerns about the protection of fundamental rights.

As recognized in the study of the Committee on Civil Liberties, Justice and Home Affairs (LIBE), 'there appears to be a gap where fundamental rights and secondary legislation may not be fully accessible for those that have had administrative measures imposed upon them, as well as those who are persons of interest ... given that there appears to be a trend across EU Member States for the use of administrative measures instead of pursuing criminal convictions, it may lead to an erosion of the rights of individuals who now fall into a category of suspicion where there is a clear gap in human rights safeguards'.<sup>45</sup> Although the ECtHR has stated that inclusion in a blacklist or the freezing of assets or confiscation do not fall into the category of 'criminal charge' for applying all the safeguards of art. 6 ECHR,<sup>46</sup> following *Kadi* judgments of the European Court of Justice,<sup>47</sup> certain safeguards,

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<sup>43</sup> LIBE Study, op. cit. (n. 18), p. 44: The Netherlands, UK, France, Belgium, Germany, and Italy have introduced legal provisions for the use of administrative measures as counter-terrorism measures.

<sup>44</sup> In the same sense, see *Carrera, S./Mitsilegas, V.*, *Constitutionalising the Security Union*, in: S. Carrera/V. Mitsilegas (eds.), *Constitutionalising the Security Union. Effectiveness, Rule of Law and Rights in Countering Terrorism*, CEPS, Brussels 2017, pp. 113–147, p. 137.

<sup>45</sup> LIBE Study, op. cit. (n. 18), p. 40.

<sup>46</sup> See *Ojanen, T.*, op. cit. (n. 9), p. 254; *Galli, F.*, op. cit. (n. 9), pp. 51–52.

<sup>47</sup> ECJ *Kadi and Al Barakaat International Foundation*, C-402/05 and C-415/05 of 3 September 2008, setting aside the judgments of the Court of First Instance of the European Communities of 21 September 2005 in Case T-315/01 *Kadi v. Council and Commission* and Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission*. As is known Mr. Kadi appealed the decision that included him in the list of administrative sanctions of the United Nations on the basis that the Regulation had infringed his fundamental rights to be heard and the right to an effective judicial review. Case T-85/09 *Kadi v. Commission* [2010] ECR II-5177, 30 September 2010, by which the Court annulled Commission Regulation (EC) No. 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban (OJ 2008 L 322, p. 25) in so far as that measure concerns Mr Kadi. And finally *Kadi II* C-584/10, C-593/10 and C-595/10 of 18 July 2013, where the ECJ concluded 'that none of the allegations presented against Mr Kadi in the

such as the right to a judicial remedy, have to be applied to these administrative measures.<sup>48</sup> As set out in the *Hamas* judgment of 26 July 2017<sup>49</sup>: ‘the person or entity concerned is protected, inter alia, by the possibility of bringing an action before the Courts of the European Union. These are required to determine, in particular, first, whether the obligation to state reasons laid down in Article 296 TFEU has been complied with and, therefore, whether the reasons relied on are sufficiently detailed and specific, and, second, whether those reasons are substantiated.’<sup>50</sup>

According to the ECtHR, intelligence materials that are used as evidence or as supportive material should be revealed to the defendant or the person concerned in order to protect the equality of arms, and this does not apply only to criminal proceedings,<sup>51</sup> although non-disclosure of confidential material on national security grounds is not as such a violation of the Convention, as some exceptions are allowed if the defence rights are counter-balanced.

As has been expressively written, ‘when the measures impose burden equal or more than those characteristic of criminal sanctions, the argument against criminalisation begins to look less convincing’ and changing the labels ‘only undermines the protections of due process’.<sup>52</sup> Does the need to prevent terrorism justify this

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pean Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.’ (para.163). On the *Kadi* saga, see *Murphy, C.*, Secret evidence in the EU security law: special advocates before the Court of Justice?, in: D. Cole et al. (eds.), *Secrecy, National Security and the Vindication of Constitutional Law*, Edward Elgar, Cheltenham 2013, pp. 268–283.

<sup>48</sup> See ECtHR judgment of the Grand Chamber *Nada v. Switzerland*, 12 September 2012, App. no. 10593/08, para. 214.

<sup>49</sup> Case C-79/15, *Council of the European Union v. Hamas*, 26 July 2017.

<sup>50</sup> Para. 49: ‘In that context, it must be made clear that the person or entity concerned may, in the action challenging their retention on the list at issue, dispute all the material relied on by the Council to demonstrate that the risk of their involvement in terrorist activities is ongoing, irrespective of whether that material is derived from a national decision adopted by a competent authority or from other sources. In the event of challenge, it is for the Council to establish that the facts alleged are well founded and for the Courts of the European Union to determine whether they are made out (see, by analogy, judgments of 18 July 2013, *Commission and Others v Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraphs 121 and 124, and of 28 November 2013, *Council v Fulmen and Mahmoudian*, C-280/12 P, EU:C:2013:775, paragraphs 66 and 69).’

<sup>51</sup> See *Chahal v. UK*, 15 November 1996, App. no. 22414/93; *Al-Nashif and others v. Bulgaria*, 20 September 2002, App. no. 50963/99. As stated in the Venice Commission Report on Counter-terrorism measures and human rights, Strasbourg, 5 July 2010, CDL-AD(2010)022, para. 69: ‘The problem of revealing, or refusing to reveal, intelligence and proactive policing material in judicial proceedings is not limited to the issue of fair trial in criminal cases, but can apply to other procedures, in particular deportation procedures. The ECtHR has required that mechanisms be in place to guarantee fair, quasi-judicial procedures in such cases.’

<sup>52</sup> *Zedner, L.*, op. cit. (n. 17), p. 266; *Ashworth, A./Zedner, L.*, op. cit. (n. 8), p. 195, do even claim that fair trial rights (right to be informed, open access to evidence, rights to

approach? Or should safeguards equivalent to those applicable to criminal measures be applicable also to administrative measures imposed for preventative purposes?

When determining the level of guarantees that should govern the imposition of administrative sanctions, in addition to the provision of legal basis and the quality of the law,<sup>53</sup> the *Engel criteria*<sup>54</sup> defined by the ECtHR permit to identify when a case is ‘criminal in nature’ despite the national categorization, with the consequence that the rights of art. 6.3 ECHR are applicable. The first *Engel* criterion is the categorization of an alleged offence in the domestic law as criminal in nature; the second is the very nature of the offence, the aim sought by it; and the third is the nature and degree of severity of the penalty. Art. 6.3 ECHR is applicable if any of these three elements are fulfilled, as the *Engel* criteria are non-cumulative. The courts have to perform an overall consideration when deciding whether a certain act meets one of these criteria.

After the jurisprudence of the ECtHR in *Jussila*<sup>55</sup> and *Engel*, it was clear that art. 6 ECHR also covers a wide range of administrative proceedings: road offences,<sup>56</sup> prison disciplinary proceedings,<sup>57</sup> customs law,<sup>58</sup> and penalties imposed by a court with jurisdiction in financial matters.<sup>59</sup> The ECtHR also broadened the area of criminality, stating that competition law is an example of a field of law that falls inside the boundaries of criminal law for the purposes of considering applicable art. 6 ECHR.<sup>60</sup>

Despite this expansion of the notion of ‘criminal charge’ to administrative proceedings that would qualify as ‘criminal in nature’ according to the *Engel* criteria, it should be still reconsidered whether certain administrative measures such as blacklisting and the freezing of assets due to links with terrorists’ risk should not

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challenge and appeal, legal assistance, presumption in favour of open hearing, and a high standard of proof) should be applicable.

<sup>53</sup> See *Kaya v. Romania*, 12 October 2006, App. no. 33970/05, dealing with the expulsion from the country of a Turkish citizen upon sufficient and serious information that the person concerned represented a danger to the national security. The Court found violation of art. 8 ECHR on the basis of lack of accessible and foreseeable legal basis.

<sup>54</sup> *Engel and others v. Netherlands*, 23 November 1976, App. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

<sup>55</sup> In *Jussila v. Finland*, 23 November 2006, App. no. 73053/01, a case related to an administrative tax offence, the Court held that when the incriminating statement, in accordance with applicable law, was obtained under compelling means, this information could not be admitted as evidence in the subsequent criminal procedure against the taxpayer concerned. See also *Saunders v. UK*, 17 December 1996, App. no. 43/1994/490/572; *IJL et al. v. United Kingdom*, 19 September 2000, App. no. 29522/95, 30056/96, 30574/96; *Weh v. Austria*, 8 April 2004, App. no. 38544/97.

<sup>56</sup> *Öztürk v. Germany*, 21 February 1984, App. no. 8544/79.

<sup>57</sup> *Campbell and Fell v. the United Kingdom*, 28 June 1984, App. no. 7819/77; 7878/77.

<sup>58</sup> *Salabiaku v. France*, 7 October 1988, App. no. 10519/83.

<sup>59</sup> *Guisset v. France*, 26 September 2000, App. no. 33933/96.

<sup>60</sup> *Société Stenuit v. France*, 27 February 1992, App. no. 11598/85.

also fall within the notion of ‘criminal in nature’. These measures have a punitive effect, and perhaps this element should suffice to increase the level of standards despite being labelled as preventive measures. Even if their aim falls within the realm of prevention, if their consequences can be equalled to a sanction, should not such system be treated as any other sanctioning system? Should not the level of guarantees be determined by the punitive effect of a measure, regardless of its theoretical categorization as preventive measure? Would it not be time to revisit the *Engel* criteria after more than forty years? It does not seem reasonable that a person who causes damage to a parked car and is sanctioned for careless driving with a fine (DM60, equivalent to €30,<sup>61</sup> while his income at the time was approximately €1000, about DM2000) is entitled to all criminal procedural safeguards, because such infringement is considered ‘criminal in nature’ because of the punitive aim of the fine; and at the same time a person whose total assets are frozen, who is not allowed to travel, and is made a ‘prisoner of the State’,<sup>62</sup> is not granted the same fair trial rights.

Ultimately, regardless of whether they are considered ‘criminal in nature’, clear procedural safeguards amounting to those granted to suspects and defendants in criminal proceedings should be granted.

## VI. Concluding remarks

The security demands have generated an expansion of the preventive criminal law, while the preemptive security measures of an administrative nature have also increased. This results not only in an increase in the number of individuals who are suspected of a crime but also of individuals who are put in a position of pre-suspect, preventive suspect, or person of interest. Even if the criminal investigation can now be triggered at a very early stage – and upon quite weak suspicion – to have an anticipatory effect in countering terrorism, the truth is that criminal procedure, with all its guarantees, is not always adequate enough to respond to the needs of security and prevention in terrorism matters.

States have resorted to preventive surveillance systems and the adoption of administrative control measures applied to certain individuals who match specific risk parameters. There are three main challenges to face in the current scenario. First, to define and implement rules on bulk surveillance for the purpose of preventing terrorism. Second, how to shield the criminal procedure from information obtained in an intrusive manner in relation to individuals subject to surveillance because of being considered as a potential risk. And third, to determine which due process

<sup>61</sup> See *Öztürk v. Germany*, 21 February 1984, App. no. 8544/79.

<sup>62</sup> This expression is used by *Sedley, S.*, *Terrorism and security: back to the future?*, in: D. Cole et al. (eds.), *Secrecy, National Security and the Vindication of Constitutional Law*, Edward Elgar, Cheltenham 2013, pp. 13–21, 18.

rights should be guaranteed to persons subject to administrative measures. In the latter case, it seems clear that, even if the aim of such measures is defined as preventive, as long as the consequences have a punitive effect, i.e. an effect similar to that of a criminal sanction, safeguards applicable in criminal proceedings should not be excluded. Ensuring human rights also serves a general prevention function, and therefore prevention of terrorism should always take into account the need to protect fundamental rights. New ways or new models for tackling terrorism are welcome as long as they provide enough safeguards for the citizens.

The risk of labelling the aim differently results in a lowering of certain rights (for example, the right to access to the file, the right to a public hearing, the right to the presumption of innocence, and the right to a judicial remedy, in addition to *ne bis in idem*, the right to avoid self-incrimination, and the standard of proof), and, nevertheless, the measures to be applied would ultimately have an equally punitive effect. Finding a solution that restores some balance between the need for security in the prevention of terrorism and the due process rights is all but easy. But it is questionable whether we can achieve such balance by multiplying the number of suspects, creating a new category of preventive suspects, and invoking criteria elaborated in a different context to exclude any measure that is not ‘criminal in nature’ according to elements defined in the 1970s – and defined precisely to expand the criminal safeguards to administrative proceedings.

### List of abbreviations

CoE	Council of Europe
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FBI	Federal Bureau of Investigation
ICT	Information Communication Technologies
IT	information technology
ITS	Intelligent Transportation Systems
LIBE	Committee on Civil Liberties, Justice and Home Affairs
NGO	Non-governmental organization
NSA	National Security Agency
NStZ	Neue Zeitschrift für Strafrecht (law journal)

RIPA	Regulation of Investigatory Powers Act 2000
TE-SAT	Europol Annual European Union Terrorism Situation and Trend Report
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
US	United States of America
ZRP	Zeitschrift für Rechtspolitik (law journal)

# **‘It Is Not a Crime to Be on the List, but ...’ – Targeted Sanctions and the Criminal Law**

*Florian Jeßberger and Nils Andrzejewski*

## **I. Introduction**

*Itemising our ideas, plans and reminders can be useful in so many ways. Whether you’re a long-time list lover or are yet to be converted, scroll down for some surprising revelations about the benefits of the bullet point.*<sup>1</sup>

Human beings love making lists. Shopping lists, to-do lists, life goals, work tasks, checklists. Organizing things, ideas, and persons in lists seems to be part of human nature. This also holds true when it comes to law enforcement. More often these lists are blacklists than whitelists.

The present contribution inquires into ‘blacklisting’ as a modern ‘alternative’ technique in international and domestic law to address dangerous behaviour, in particular terrorism. Blacklisting is based on the idea that one way to combat terrorism is to cut off access to funds. Arguably, this is still a plausible assumption – even though we know today that very little money is needed to create horrific harm, as we learned, for instance, from the attack on the Breitscheidplatz in Berlin or some of the recent incidents in London. Blacklisting in this context applies the idea of economic sanctions to the struggle against international terrorism. Unlike, however, the traditional sanctions regime, which targets states to change their behaviour, the present version of so-called smart sanctions targets individuals or groups that often enough are not linked to any defined geographical area.

The practice of ‘(black-) listing’ raises a number of questions. Some of them will be addressed in this paper from the specific perspective of the criminal law. In doing so, the paper aims to add a specific criminal law perspective to the debate about ‘listing criminal law’, which has focused so far primarily on issues of international and European law.<sup>2</sup>

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<sup>1</sup> Advertisement on the BBC website for a Radio 4 piece named ‘Seven ways making lists could change your life’, [www.bbc.co.uk/programmes/articles/5MxWDp6f9TN593WBhJKHv8c/seven-ways-making-lists-could-change-your-life](http://www.bbc.co.uk/programmes/articles/5MxWDp6f9TN593WBhJKHv8c/seven-ways-making-lists-could-change-your-life) (accessed April 2018).

<sup>2</sup> See, e.g., the discussion on European Court of Justice (Grand Chamber), Judgment of 3 September 2008 (C-402/05, *Kadi*). For a comprehensive analysis from the perspective of the criminal law, see the excellent monograph by Sieber, *U./Vogel, B.*, Terrorismus-



Let us start with three preliminary remarks. First, while blacklisting gained renewed currency in the recent fight against terrorism on a global and European level, it is, as a model, much older.<sup>3</sup> Historically, the blacklisting model as understood here made its way from certain domestic systems, typically common law systems, first to the international arena and then back into other domestic systems, often enough civil law systems. This historical perspective tells a lot about transnational law-making in a globalized world and raises, *inter alia*, the question of how the 'legal transplants' fit into their new environment: it may be argued, for instance, that in a system that adheres to the principle of mandatory prosecution greater scrutiny in defining the elements of a criminal offence is warranted than in discretionary systems, which may be a problem if rather vague definitions of crimes are transplanted from one system into another.<sup>4</sup>

Secondly, already today the blacklisting model extends beyond the international struggle against terrorism. For instance, the Specially Designated Nationals and Blocked Persons List, drafted by the Office of Foreign Assets Control with the US Department of the Treasury lists individual groups and entities including, for instance, narcotic traffickers. This makes it particularly relevant to analyse blacklisting as a general tool in the legislator's toolbox.

Thirdly, the discussion of terrorism embargoes typically revolves around the listings of individuals. Blacklisting individuals for their assumed connections to terrorist organizations raises a number of legal and political issues. Some of them are discussed in this paper. Comparatively uncontroversial are the embargoes against terrorist groups like al-Qaida. A practical problem with embargoes against terrorist groups is the ephemeral structure of such groups.<sup>5</sup> Often, terrorist groups consist of loosely connected cells, which are bound together more by a shared ideology than any organizational structure. Furthermore, terrorist groups are rarely stable organizations. New groups emerge from existing organizations or parts of an

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finanzierung, Duncker & Humblot, Berlin 2015. See also *Andrzejewski, N.*, Die Strafbewehrung des Terrorismusembargos im deutschen Außenwirtschaftsstrafrecht, Nomos, Baden-Baden (forthcoming).

<sup>3</sup> Historically, one is reminded of the mass conscriptions of the Roman dictator *Sulla* in 82 BCE.

<sup>4</sup> See *Cameron, I.*, European Union Anti-Terrorist Blacklisting, Human Rights Law Review, vol. 3, issue 2, 2003, 225, 242.

<sup>5</sup> This raises a number of legal questions in interpreting the 'organization' part of embargo regulations. Take for example the 'homegrown' terrorist group that pledges allegiance to al-Qaida: is it enough for becoming a 'part of al-Qaida' that a group describes itself as part of al-Qaida and endorses the ideology of al-Qaida, even if the members have no organizational connection to al-Qaida? In other words: is it possible to become part of al-Qaida without even knowing anyone who belongs to al-Qaida? If these questions are answered in the affirmative, the embargo on persons and organizations will turn into an embargo on a certain ideology. A very strict construction of the 'organization' on the other hand could possibly render this part of the embargo largely insignificant due to the decentralized and 'franchise' structure of terrorist groups.

association split off from the rest; sometimes formerly independent groups also merge into a new one. Trying to compile a list of terrorist organizations is therefore a bit like aiming at a moving target.

In this paper, we are not interested in the blacklisting itself. According to what criteria, on what factual bases, and by whom the lists are drafted, and whether there are adequate delisting procedures, is *not* what we are concerned about. We are interested in the indirect effects of blacklisting, that is what we here call blacklisting offences designed to safeguard the enforcement of the listing decision at the level of domestic law.

We will proceed in five steps. First, we will shed some light on the legal mechanism underlying blacklisting offences. Then we will try to identify what we think is a fundamental difference between blacklisting offences and terrorist crimes *stricto sensu*, in particular the crime of financing terrorism. In a third step we will point to concerns regarding the legitimacy of this technique from the perspective of fundamental principles and guarantees of the criminal law, such as the concept of legally protected interests ('Rechtsgut') and the principle of legality (*nullum crimen sine lege certa*). Subsequently, the practice of listing shall be analysed on the background of two larger paradigms: the notion of an 'enemy criminal law' (*Feindstrafrecht*) and the idea of a comprehensive 'security law'. We will conclude with a brief proposal for reform regarding the blacklisting offence under German law.

## II. So smart: how blacklisting operates

Let us briefly recall how the blacklisting model operates. We will take the European Union (EU) autonomous sanctions regime as an example. Art. 2 of Regulation 2580/2001<sup>6</sup> provides that

all funds, other financial assets and economic resources belonging to, or owned or held by, a natural or legal person, group or entity included in the list ... shall be frozen; no funds, other financial assets and economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity included in the list.

Subsection 2 extends the prohibition to the provision of services. Art. 9 provides that each Member State shall determine the sanctions to be imposed where the provisions of this Regulation are infringed. On this background and in order to comply with the EU sanctions regime in general and art. 9 of the Regulation in particular, the German legislator created a new criminal offence, not as part of the Criminal Code but of the Foreign Trade Act.<sup>7</sup> According to section 18 of this Act

a prison sentence from three months up to five years shall be imposed on anyone who violates a prohibition on export, import, transit, transfer, sale, acquisition, delivery, pro-

<sup>6</sup> OJ L 344/70.

<sup>7</sup> BGBl. 2013 I 1482.

vision, passing on, service or investment of a directly applicable act of the European Communities or the European Union published in the Official Journal of the European Communities or the European Union which serves to implement an economic sanction adopted by the Council of the European Union in the field of Common Foreign and Security Policy.

It becomes clear that the blacklisting model ultimately operates with two separate sets of sanctions, direct and indirect, criminal and non-criminal, depending on who is the addressee of the respective sanction.

First of all, and obviously, blacklisting results in a *direct* sanction ('freezing') against the blacklisted person or entity, the 'terrorist' or 'terrorist organization'. This sanction is, at least in a formal sense, not criminal. It is suspicion-based and grounded in information that may not be used in a criminal court. The latter, by the way, is one reason why blacklisting is attractive to law enforcement. There is a natural reluctance to 'burn' intelligence sources and sensitive information by exposing them at a criminal trial. So it may be wise to 'outsource' the handling of this information to an administrative body. If skilfully implemented, the effects of this sanction on the blacklisted person or entity may be devastating. As *Dick Marty* has put it, they result in a *mort civile*.<sup>8</sup> Therefore, as some argue,<sup>9</sup> this sanction substantially is at least quasi-criminal. Yet, it is not a crime to be on the list. But it feels like punishment.

In addition to the direct sanction against the listed person or entity, blacklisting operates with a second sanction, which depends on and is shaped by domestic implementation. This sanction is supposed to safeguard the proper enforcement of the direct sanction against the blacklisted person or entity; in this sense it is an *indirect* sanction. This sanction is applied to all those who do not comply with the prohibition of making funds available or providing services to a listed person or entity. This sanction typically is a criminal sanction in a formal sense and is part of domestic law. Section 18 of the above-mentioned German Act is the example we will use. In this paper, we refer to these indirect offences as blacklisting offences.

### III. Blacklisting offences and the crime of financing

When we discuss blacklisting offences it should be noted that the very same everyday or 'neutral' behaviour – the making available or provision of money to a person or organization – may also be a crime under a different heading. Indeed, independent of the blacklisting model, the financing of terrorism is a crime in many if

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<sup>8</sup> Cf. Meyer, F./Macke, J., Rechtliche Auswirkungen der Terroristenlisten im deutschen Recht, *Höchststrichterliche Rechtsprechung im Strafrecht*, vol. 8, issue 12, 2007, 445.

<sup>9</sup> Rackow, P., *Strafrechtsergänzende Europäische Terrorismusbekämpfung. Überlegungen aus Anlass der Entscheidung des EuGH v. 3. September 2008 in Sachen Kadi u. Al-Barakat (C-402/05 P u. C-415/05 P)*, *Strafverteidiger*, vol. 29, issue 12, 2009, 725.

not most domestic jurisdictions under what may be called the financing of terrorism model. This competing model is based on the 1999 International Convention for the Suppression of the Financing of Terrorism,<sup>10</sup> which has been endorsed in its operative parts by the Security Council<sup>11</sup> and which is reflected in various EU instruments, including the 2017 Directive on combating terrorism.<sup>12</sup>

In our view, it is important to understand that – notwithstanding that they overlap to a large extent as regards the objective requirements – there are fundamental differences between the two models, the blacklisting model on the one hand and the crime of terrorism financing model on the other. These differences apply particularly to the specific wrong the perpetrator is blamed for and the intent required for punishment: unlike the crime of financing, blacklisting offences provide for the punishment of mere disobedience to the decision of an administrative body (*Verwaltungsungehorsam*). No direct link to terrorism is required, neither objectively nor subjectively. And while the crime of financing requires intent or knowledge of the perpetrator that the funds are or are to be used for terrorist purposes, for blacklisting offences there is no need to prove that the person sending money knew or even intended that the money would be used for the commission of an act of terrorism. At this point it becomes clear why blacklisting is such an attractive model for law enforcement and terrorism prevention: as regards the enforcement of the sanctions regime against third parties through blacklisting offences, there is no need to show any link between the funds provided and the terrorist activity. We should keep in mind that in the case of blacklisting offences the criminalized behaviour is detached from the actual terrorist act and harm.

#### IV. Blacklisting offences and criminal law principles

Let us now turn to the principles of criminal law that may, arguably, be infringed by the blacklisting model. We will point to three principles, which become relevant here: proportionality (particularly in terms of the concept of ‘Rechtsgüterschutz’), culpability, and legality.

The idea that the purpose of criminal laws lies solely in the protection of ‘legal interests’ (‘Rechtsgüter’)<sup>13</sup> has been by far the most influential concept in German criminal law in the past sixty years. While the term ‘Rechtsgut’ was first mentioned in the academic debate in the 19<sup>th</sup> century, it was only in the 1960s and 1970s along

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<sup>10</sup> UNGA Resolution 54/109 (1999).

<sup>11</sup> UNSC Resolution 1373 (2001).

<sup>12</sup> See art. 11 of the 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.

<sup>13</sup> We will continue to use the German term ‘Rechtsgut’ and ‘Rechtsgütertheorie’ in this chapter.

with the decriminalization of ‘moral offences’ (such as homosexual conduct, adultery, procuration) that the idea that criminal law only serves to protect legally recognized interests gained traction. However, in the so-called incest decision,<sup>14</sup> the German Constitutional Court explicitly rejected the ‘Rechtsgütertheorie’ as a constitutional standard and allowed for criminal laws that do not particularly aim at the preservation of legally protected rights but serve different, more vague purposes. While the ‘Rechtsgutstheorie’ has thus been soundly dismissed at a constitutional level and to some extent been replaced by a test of proportionality, it is still the most important German academic theory on how to evaluate the legitimization of criminal laws.

In short, there are two different strands of ‘Rechtsgütertheorie’ that have to be kept apart. First, the term ‘Rechtsgut’ has become shorthand for the objective (or protective purpose) of a criminal law provision. This strand of ‘Rechtsgütertheorie’ does not offer any insight into the limitations of criminal law; its sole function is to serve as a tool of legal interpretation. The second strand of ‘Rechtsgütertheorie’ is more ambitious. This theory tries to develop a concept of legally protected interests independent of existing criminal legislation. The main tenet of this theory is the thesis that criminal laws are only legitimate if and insofar they serve to protect a legally protected interest.

If one accepts the premises of the second notion, a critical ‘Rechtsgütertheorie’, there are two questions one regularly does encounter: First, what exactly is the ‘Rechtsgut’ of a specific criminal law? And second, how close must be the link between the criminalized behaviour and the harm to the legally protected interest? Or, in other words: to what extent may behaviour be criminalized that in itself is harmless for the legally protected right but may lead to such harm in the future? The criminalization of breaches of ‘smart sanctions’ is closely intertwined with both questions.

So what interest, if any, is protected by blacklisting offences such as in section 18? A first set of possible candidates are ‘public’ or ‘general’ ‘Rechtsgüter’ (‘Allgemeinrechtsgüter’) such as public security or peace, the functions of the state and its organs, or the foreign relations of a state. However, this concept is, rightly so, contentious in academic debate because such a ‘public legally protected interest’ can be found for almost every criminal law in the books. If one accepted without questioning any ‘general’ or ‘public’ ‘Rechtsgut’ such as ‘public order’ or ‘public health’ (in the context of criminalization of drug possession), the critical potential of ‘Rechtsgutstheorien’ would be significantly diminished. Consequently, there are good reasons to hold that, ultimately, the protected interests are interests of individuals rather than collective interests. With regard to smart sanctions against ter-

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<sup>14</sup> BVerfGE 120, 224.

rorism as compared to state-on-state embargoes,<sup>15</sup> the quest for the ‘Rechtsgut’ is somewhat easier, because criminal laws penalizing breaches of those sanctions serve to prevent terrorist attacks and thus aim, ultimately, at protecting individual interests such as life, limb, and property. The crux with regard to these sanctions from the point of the ‘Rechtsgütertheorie’ is the nexus between the criminalized behaviour and the harm to the protected interest. Giving a listed person money is a far cry from actually committing or aiding and abetting the commission of a terrorist attack, especially as criminal liability for violations of terrorism embargoes does not require that a terrorist attack be committed or even planned. Thus, the question is: how far can criminal law go in punishing acts that in itself are neutral but, under some circumstances, could become preparatory acts for as yet unspecified atrocities? On this question, the ‘Rechtsgütertheorie’ can offer no definitive answers, but it might serve to highlight crucial issues concerning the legitimacy of punishing ‘remote’ contributions.

This is the point where the principle of culpability (‘*nullum crimen sine culpa*’) comes in. Indeed, punishing everyday behaviour far removed from the possible infliction of harm to the protected (individual) interest is problematic in a criminal law system based on the principle of culpability. This problem is exacerbated where, as in the case of blacklisting offences, the definition of the offence does not require to show any link, objective or subjective, to the behaviour (the terrorist act) that may ultimately result in harm to the protected interest.

But let us move to another, rather ‘classical’, concern: criminal laws punishing violations of embargo regulations are also contested due to concerns over the principle of legality or, more specifically, ‘*nullum crimen sine lege certa*’. For one thing, laws criminalizing breaches of smart sanctions within the EU typically refer in one way or another to the embargo regulations of the EU. This can be a problem in jurisdictions with some kind of constitutional rule against ‘outsourcing’ of criminal legislation. For example, in Germany, art. 104 of the *Grundgesetz* (and art. 79 as interpreted by the Federal Constitutional Court in the ‘Lisbon’ decision<sup>16</sup>) prohibits the legislature to abdicate its competences in criminal legislation. This means that – in Germany – the constitution requires the legislature to make the fundamental decisions on criminal liability and only allows for minor details to be decided by external agents such as the EU. In the case of an embargo regulation and accompanying criminal laws, the German legislature only decided that breaches of an em-

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<sup>15</sup> Also with regard to criminal laws against breaches of smart sanctions that are annexes to state sanctions (e.g. the Russia embargo), it is not easy to define the legally protected interest behind such a criminal law. Since an embargo does not possibly infringe on legally protected rights of individuals, one has to acknowledge public or general legally protected rights (‘*Allgemeinrechtsgüter*’) as legitimate. In case of punishing violations of state-on-state embargoes, the ‘Rechtsgut’ in question could be described as the ability of the state (or the EU) to achieve its foreign policy goals.

<sup>16</sup> BVerfGE 123, 267.

bargo should be punished, but the decision *who* is blacklisted (either on a terror list or on the annex of an embargo against a state) lies with the EU. It is doubtful whether the national legislatures can still claim to make the fundamental decisions on criminal liability for embargo breaches when the question of who is going to be listed is out of their hands.

Another possible source of tensions between the *lex-certa* rule and blacklisting offences concerns the foreseeability of criminal liability in a multi-level system. The direct incorporation of EU law arguably makes it more difficult for citizens to discern what kind of behaviour is prohibited due to the various languages of EU laws and the somewhat byzantine structure of EU regulations in conjunction with EU foreign policy instruments. However, these are typical problems whenever EU law triggers or determines criminal legislation and – unless one is prepared to cast doubt on a large portion of criminal legislation – this cannot in itself be sufficient to dismiss the criminalization of embargo violations.

## V. ‘Feindstrafrecht’ and ‘security criminal law’

In order to *explain* blacklisting offences and, more broadly, the blacklisting model and *situate* it in the broader discourse on the development of criminal law, let us conclude by briefly introducing two larger paradigms of criminal justice.

A first, influential strand of theory on criminal legislation in recent years has been the ‘security criminal law’ (‘Sicherheitsstrafrecht’) and the ‘preventive criminal law’ (‘Präventionsstrafrecht’).<sup>17</sup> These theories make a number of observations on the development of criminal law (and especially criminal legislation) in the past decades. First, they diagnose a shift in criminal legislation from retribution to the immediate solution of concrete problems. Criminal legislation is increasingly seen by lawmakers as an interchangeable method to achieve certain results in social reality. This is especially true in counter-terrorism legislation where the creation of new terrorism offences is less about pronouncing a value judgement about a certain kind of behaviour and more about giving law enforcement new ‘tools’ in the ‘war against terror’. Second, according to these theories, a typical feature of ‘security criminal law’ or ‘preventive criminal law’ is the increasing criminalization of preparatory acts such as in counter-terrorism laws or cyber crime. Third, it is argued under these theories that administrative law and criminal law increasingly blend together. Whatever the general merits of this observation, it holds true for the criminalization of blacklisting violations. Criminal laws against embargo violations do not exist because the proscribed behaviour is in itself deemed unacceptable by so-

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<sup>17</sup> See, inter alia, the contribution by *Ulrich Sieber* in this volume and *Naucke, W.*, Die robuste Tradition des Sicherheitsstrafrechts, *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, vol. 93, issue 2, 2010, 129–136.

ciety but because the embargoes would otherwise lack teeth. These laws are therefore a perfect example of the ‘hybrid’ nature of a ‘security criminal law’.

Although observations made by theories of security criminal law or preventive criminal law are at least partially accurate, it is less clear what the consequences of these observations are or ought to be. Take, for example, the issue of the increasing instrumentalization of criminal legislation. It is not necessarily a bad or illegitimate thing when the legislature uses criminal laws to achieve certain ends as opposed to more vague, retributive purposes. The real issue is therefore less the fact that criminal laws are deployed as means for a purpose but the inflationary use of criminal laws as such. Theories such as security criminal law or preventive criminal law can therefore explain certain lines of development in criminal law, but they are less suited to develop limits for criminal legislation or to offer a comprehensive explanation of criminal laws.

A second, competing concept or ‘theory’ we wish to introduce here and which, by the way, ranks among the most famous products of German criminal law scholarship in recent times is the concept or theory of an ‘enemy criminal law’ (‘Feindstrafrecht’). The emergence of this concept began – quite modestly – in 1985 with a paper by the German scholar *Günther Jakobs*, in which he diagnosed a shift in contemporary criminal law from punishing a certain conduct to combating perceived enemies.<sup>18</sup> This went – according to *Jakobs* – along with a growing number of criminal laws infringing personal privacy. The paper received little critical reception at the time. *Jakobs*’ thesis was perceived to be critical of contemporary criminal law activities and as such aligned with the prevailing academic consensus of the time. That changed in 2000 with a lecture in Berlin, which was later published,<sup>19</sup> and in which *Jakobs* for the first time offered an affirmative view of what he called ‘Feindstrafrecht’. In this lecture he claimed that there are certain groups of perpetrators whose tendency for criminal behaviour is so entrenched in their character or convictions that society cannot reasonably expect them to obey the law in the future. According to *Jakobs* these individuals have no claim to ‘personhood’ in the legal sense and are to be dealt with as ‘enemies,’ meaning they should be physically contained in the most effective way. This is the category – according to *Jakobs* – under which terrorists, drug traffickers, habitual sexual offenders, and career criminals fall. Unsurprisingly, this thesis led to widespread and outspoken condemnation. In a vast array of replies, *Jakobs*’ theories were denounced as unethical, implausible, and analytically flawed.<sup>20</sup>

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<sup>18</sup> *Jakobs, G.*, Kriminalisierung im Vorfeld einer Rechtsgutsverletzung, *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 97, issue 4, 1985, 751–785.

<sup>19</sup> *Jakobs, G.*, Selbstverständnis der Strafrechtswissenschaft, in: A. Eser et al. (eds.), *Die Deutsche Strafrechtswissenschaft vor der Jahrtausendwende*, C.H. Beck, Munich 2000, p. 47.

<sup>20</sup> For more details, see *Greco, L.*, *Feindstrafrecht*, Nomos, Baden-Baden 2010, p. 32.



So, does the concept of ‘Feindstrafrecht’ help us understand blacklisting? While an endorsement of ‘Feindstrafrecht’ as a guiding legal principle would be – for obvious reasons – a monstrosity, it is less clear whether the theory as understood by *Jakobs* in 1985 serves a useful purpose in analysing contemporary developments in criminal law. After all, the theory that parts of modern criminal law, especially counterterrorism law, are less focused on rehabilitating ‘citizen offenders’ but rather on containing ‘enemies’ appears to be a promising starting point in analysing the phenomenon of blacklisting. Singling out certain persons and listing them while at the same time prohibiting everyone else from financial interactions with these persons on pain of criminal punishment is – at first glance – a striking example of denying a person their basic rights as citizens.

However, it turns out that blacklisting and ‘Feindstrafrecht’ have less in common than one might initially think. On those counter-terrorists lists, persons are usually not listed because the state is certain that the listed person is a committed terrorist who cannot be expected to obey the law in the future but rather because there are – more or less strong – suspicions that the listed person has some involvement with terrorist groups. More often than not, these suspicions are insufficient to result in criminal proceedings, and in these cases the blacklisting is less an example of the state mercilessly striking against its enemies and more an expression of the states’ helplessness in dealing with persons suspicious enough to warrant blacklisting but not suspicious enough to procure convictions in criminal courts.

Secondly, the concept of ‘Feindstrafrecht’ is as vague as it is controversial. The protean nature of the theory becomes obvious when one tries to pin down who exactly qualifies as an ‘enemy’ under the theory and what it takes to become an enemy. *Jakobs*’ initial enumeration of terrorists, drug traffickers, habitual sex offenders, and career criminals is superficially plausible as a ‘list of universally acknowledged bad people’, but it offers little in the way of explaining why their treatment is a result of their status as ‘enemy’. After all, it is neither uncommon nor implausible that the criminal justice system reacts more strongly to those at risk of reoffending. Additionally, the legal framework for drug offences, terrorist crimes, and serial offences is quite diverse and it is unconvincing that these different legal rules can be adequately described as an ‘exclusion of enemies’. Thus, in our view, the theory of ‘Feindstrafrecht’ has little to offer from an analytical standpoint.

## VI. Conclusion

Let us conclude by returning to section 18 of the German Act, that is, the implementing legislation aiming to help enforce the prohibition determined at the European level. In our view, there are good reasons to ‘downgrade’ section 18 from a criminal offence to an administrative offence. This, we believe, would not only much better reflect the nature of the conduct in question; it would also ease some of

the tensions the current blacklisting criminal offence has caused with regard to the principle of culpability in particular. As an administrative offence, the provision would complement the crime of financing terrorism under section 89c of the German Penal Code.

Would such a ‘downgrading’ be in line with international obligations? Yes, it would. Art. 9 of the EU Regulation we mentioned above requires Member States to ‘determine sanctions that are effective, proportionate and dissuasive’. According to the general view, these sanctions do not have to be criminal sanctions. Would such a ‘downgrading’ not reduce the effectiveness of the blacklisting system as a whole? We believe not. Not only do we see, under the current framework, very few prosecutions, let alone convictions for the blacklisting offence under section 18. But, in our view, the (already far-reaching) crime of financing of terrorism would cover those cases where punishment is justifiable indeed.

### **List of abbreviations**

EU	European Union
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States of America

## **‘Security Law’ and Preventive Justice in the Legal Architecture of the European Union\***

*Valsamis Mitsilegas*

Security has been at the heart of European integration, in one way or another, since the entry into force of the Maastricht Treaty. A series of terrorist attacks in the 2000s, including 9/11, 7/7, and the Madrid bombings have been followed by a plethora of responses by the European Union (EU) legislator, with EU intervention being justified as emergency law and pushing boundaries in criminal law and constitutional systems of the Union and its Member States. This pattern of EU response has been replicated after successive terrorist incidents resulted in a patchwork of measures adopted swiftly, without detailed justification or impact assessment, and resembling at times kneejerk reactions or quick fixes to complex issues while presenting significant challenges to fundamental rights and the rule of law in Europe. In recent years, the development of a European security strategy and the publication of regular reports on the Security Union could be framed as an attempt to present a more strategic response. However the way in which Security Union reports are presented, they contain the risk for the Union to pursue relentlessly and uncritically a security agenda without due consideration for the protection of fundamental rights and the rule of law. The aim of this contribution is to distil the main features of the emergence of the EU security agenda in recent years and to outline the challenges for fundamental rights and the rule of law. A central element of the argument will be that the European Union has embraced a paradigmatic change from repression to prevention, marked by a shift from criminal to ‘security’ law, leading towards a paradigm of preventive justice. This chapter will highlight that in this process a number of boundaries have been blurred: the boundaries between migration and security, security and foreign policy, and internal security and militarization; the boundaries between internal and external security, and EU criminal law and external relations; the boundaries between public and private prevention, and the increasing role of the private sector in the EU security model; and the boundaries between suspicion and generalized surveillance, embracing surveillance of every day, perfectly legitimate activities by all of us. By highlighting these pa-

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\* This chapter is an updated version of *Mitsilegas, V.*, The Security Union as a Paradigm of Preventive Justice: Challenges for Citizenship, Fundamental Rights and the Rule of Law, in: V. Mitsilegas/S. Carrera (eds.), *Constitutionalising the Security Union. Effectiveness, Rule of Law and Rights in Countering Terrorism and Crime*, Centre for European Policy Studies, Brussels 2017, pp. 2–18.

these parameters of the EU preventive justice paradigm, the chapter will conclude by flagging up the profound challenges this paradigm poses for fundamental rights and the rule of law. The contribution will urge a rethink of the Security Union to place fundamental values of the Union at the heart of the European security strategy.

## I. The European Union and preventive justice

Preventive justice is understood here as the exercise of state power in order to prevent future acts deemed to constitute security threats. There are three main shifts in the preventive justice paradigm: a shift from an investigation of acts which have taken place to an emphasis on suspicion; a shift from targeted action to generalized surveillance; and, underpinning both, a temporal shift from the past to the future. Preventive justice is thus forward rather than backward looking; it aims to prevent potential threats rather than punishing past acts; and in this manner it introduces a system of justice based on the creation of suspect individuals premised on an ongoing risk assessment.<sup>1</sup>

This model of preventive justice has been a key post-9/11 response by the United States (US), linked with the evolution of a highly securitized emergency agenda,<sup>2</sup> and has been largely transposed to EU law since. Preventive justice can take the form of the state's intervention in the field of criminal law by extending the scope of criminal law to gradually remove the link between criminalization and prosecution on the one hand and the commission of concrete acts on the other,<sup>3</sup> placing criminal justice within the framework of the 'preventive state',<sup>4</sup> thus transforming criminal law into 'security law'.<sup>5</sup> The considerable extension of the criminalization of terrorism – as evidenced clearly in the recent amendment of the EU substantive criminal law on terrorism to address the phenomenon of 'foreign fighters' – is a key example.<sup>6</sup> But preventive justice can also extend – under the guise of the term 'border security' – to extensive monitoring of mobility via the use of immigration

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<sup>1</sup> Mitsilegas, V., *EU Criminal Law After Lisbon*, Hart, Oxford and Portland, Oregon 2016, chapter 9.

<sup>2</sup> See inter alia Cole, D., *The Difference Prevention Makes: Regulating Preventive Justice*, 9 *Criminal Law and Philosophy* (2015) 501–509; Ackerman, B., *Before the Next Attack*, Yale University Press, Yale 2006; Waldron, J., *Torture, Terror and Trade-Offs*, Oxford University Press, Oxford et al. 2010.

<sup>3</sup> Ashworth, A./Zedner, L., *Preventive Justice*, Oxford University Press, Oxford et al. 2014.

<sup>4</sup> See inter alia Albrecht, P.-A., *La Politique Criminelle dans L'État de Prévention, Déviance et Société*, vol. 21, 1997, 123.

<sup>5</sup> Sieber, U., *Der Paradigmenwechsel vom Strafrecht zum Sicherheitsrecht*, in: K. Tiedemann et al. (eds.), *Die Verfassung moderner Strafrechtspflege, Nomos, Baden-Baden* 2016, pp. 351–372.

<sup>6</sup> See Mitsilegas, V., op. cit. (n. 1).

control for security purposes<sup>7</sup> and can also take the form of generalized, pre-emptive surveillance.<sup>8</sup> The development of a number of EU databases, the widening of access to these databases (including immigration databases) for security authorities, and the introduction of systems of generalized surveillance under data retention and Passenger Name Record (PNR) regulatory frameworks are key examples of EU action in this context. Key to the development of preventive justice in this context is the collection, processing, and exchange of a wide range of personal data. All these parameters of the preventive justice paradigm can be found in the emergence of the Union’s security strategy building the Security Union.

## II. ‘Security law’ as a multi-purpose and cross-sectoral endeavour: blurring the boundaries between migration, crime, security, and foreign policy

The European Commission’s Communication on the European Agenda for Security emphasized the need for a joined-up inter-agency and cross-sectoral approach.<sup>9</sup> This approach reflects a blurring of the boundaries between different areas of EU law and policy, ranging from immigration to criminal justice to foreign policy to defence. A key laboratory in this context has been the development of EU policies aiming at controlling borders and mobility, where the traditional paradigm of immigration control has been replaced by an emphasis on border security.<sup>10</sup>

These developments mirror the US approach, where a key recommendation of the 9/11 Commission Report has been to target what was termed as ‘terrorist travel’,<sup>11</sup> resulting in the development of systems of generalized surveillance of mobility such as the establishment of PNR systems aimed to intervene in pre-departure

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<sup>7</sup> *Bigo, D./Guild, E.* (eds.), *Controlling Frontiers*, Ashgate, London 2005; *Mitsilegas, V.*, *Human Rights, Terrorism and the Quest for “Border Security”*, in: M. Pedrazzi et al. (eds.), *Individual Guarantees in the European Judicial Area in Criminal Matters*, Bruylant, Brussels 2011, pp. 85–112; *Mitsilegas, V.*, *Immigration Control in an Era of Globalisation: Deflecting Foreigners, Weakening Citizens, Strengthening the State*, 19 *Indiana Journal of Global Legal Studies* 3 (2012), 3–60.

<sup>8</sup> *Lyon, D.*, *Surveillance Society. Monitoring Everyday Life*, Open University Press, Buckingham/Philadelphia 2001; *Haggerty, K.D./Ericson, R.V.*, *The Surveillant Assemblage*, *British Journal of Sociology*, vol. 51, 2000, 605–622; *Amoore, L./de Goede, M.*, *Risk and the War on Terror*, Routledge, London 2008; *Mitsilegas, V.*, *The Transformation of Privacy in an Era of Pre-Emptive Surveillance*, *Tilburg Law Review*, vol. 20, issue 1, 2015, 35–57.

<sup>9</sup> COM(2015) 185 final, *The European Agenda on Security*, Strasbourg, 28.4.2015.

<sup>10</sup> *Mitsilegas, V.*, *Border Security in the European Union. Towards Centralised Controls and Maximum Surveillance*, in: E. Guild/H. Toner/A. Baldaccini (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Hart Publishing, Portland, Oregon, 2007, pp. 359–394.

<sup>11</sup> *National Commission on Terrorist Attacks 2004*, p. 385.

and prevent movement if necessary. In this paradigm, border control measures have thus been adopted and developed as security measures, and data obtained in the context of immigration and border control (e.g. data on visa applications or passenger information) are also viewed as security data which must be accessible not only to immigration authorities but also to intelligence and law enforcement authorities for security purposes.<sup>12</sup>

Recent developments on the use of Security Council Resolutions to boost EU Common Foreign and Security Policy (CFSP) action on border security under the banner of operation European Union Naval Force Mediterranean (EUNAVFOR Med) confirm the further blurring of boundaries between immigration, security, and defence, and result in the militarization of the border.<sup>13</sup> This cross-policy and inter-agency approach is based on maximum collection and exchange of personal data and access to EU databases irrespective of their main purpose or rationale. A constant theme in the seventh and eighth Commission progress report towards the Security Union has been the prioritization of the interoperability of databases.<sup>14</sup> A High Level Expert Group on Information Systems and Interoperability was established and reported in May 2017,<sup>15</sup> whereas the mandate of the EU IT-management system is currently being revised to include the specific task of enabling interoperability.<sup>16</sup>

The most recent report on the Security Union at the time of writing emphasizes yet again the need for enhancing information exchange and operational cooperation.<sup>17</sup> This blurring of boundaries between the use of various databases has significant consequences for fundamental rights and citizenship. Enabling access to immigration databases such as the Visa Information System (VIS) and European Asylum Dactyloscopy (EURODAC) for law enforcement and security authorities overlooks the purpose of immigration law and poses significant challenges to

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<sup>12</sup> Mitsilegas, V., *The Law of the Border and the Borders of Law. Rethinking Border Control from the Perspective of the Individual*, in: L. Weber (ed.), *Rethinking Border Control for a Globalizing World*, Routledge, London 2015, pp. 15–32.

<sup>13</sup> Bigo, D., *The (in)securitization practices of the three universes of EU border control: Military/Navy – border guards/police – database analysts*, *Security Dialogue*, vol. 45, 2014, 209–225.

<sup>14</sup> *Communication from the Commission to the European Parliament and the Council*, Seventh progress report towards an effective and genuine Security Union. Strasbourg, 16.5.2017, COM(2017) 261 final; *Communication from the Commission to the European Parliament and the Council*, Eighth progress report towards an effective and genuine Security Union, Brussels, 29.6.2017, COM(2017) 354 final.

<sup>15</sup> <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=32600&no=1> (accessed April 2018).

<sup>16</sup> Commission proposal for a new Regulation on EULisa, COM(2017) 352 final, Article 9.

<sup>17</sup> Ninth Progress Report towards an effective and genuine Security Union COM(217) 407 final, Brussels, 26.7.2017, p. 3.

privacy, data protection, and non-discrimination.<sup>18</sup> The shift from border control to the generalized surveillance of mobility further serves to extend control and surveillance to *all* travellers, including EU citizens, thus undermining fundamental principles of free movement and citizenship within the European Union.<sup>19</sup> Blurring boundaries in this manner results in an all-encompassing yet at the same time amorphous concept of security, which is constantly prioritized but may serve to undermine key distinctions and limits to the reach of the state into the lives of individuals.

### III. Blurring the boundaries between internal and external security

Another key element in the emergence of the preventive justice paradigm in the European Union as a Security Union, linked inextricably with calls for a multi-purpose and cross-cutting approach outlined above, is the merging of internal and external security. This trend is acknowledged by the European Agenda on Security, stating expressly that:

... we need to bring together all internal and external dimensions of security. Security threats are not confined by the borders of the EU. EU internal security and global security are mutually dependent and interlinked. The EU response must therefore be comprehensive and based on a coherent set of actions combining the internal and external dimensions, to further reinforce links between Justice and Home Affairs and Common Security and Defence Policy. Its success is highly dependent on cooperation with international partners. Preventive engagement with third countries is needed to address the root causes of security issues.<sup>20</sup>

The emergence of the EU as a global security actor is not a novel phenomenon. The Union has played a leading role in negotiating major international and regional conventions on transnational crime and security and its institutions, and certain Member States participate in non-traditional global security norm-setters such as the Financial Action Task Force (FATF) and the United Nations (UN) Security Council, both key actors in developing a paradigm of preventive justice in the field of terrorist sanctions.<sup>21</sup> The EU then revises its internal *acquis* to comply with the international standards it has contributed in shaping by claiming that it is essential

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<sup>18</sup> Vavoula, N., *Immigration and Privacy in the Law of the European Union. The Case of Databases*, PhD thesis, Queen Mary University of London 2017.

<sup>19</sup> Mitsilegas, V., *The Borders Paradox. The Surveillance of Movement in a Union without Internal Frontiers*, in: H. Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Faultlines of the EU's Area of Freedom, Security and Justice*, Hart, Oxford 2009, pp. 33–64.

<sup>20</sup> The European Agenda on Security, COM(2015) 185 final.

<sup>21</sup> Mitsilegas, V., *The European Union and the Globalisation of Criminal Law*, Cambridge Yearbook of European Legal Studies, vol. 12 (2009–2010), 337–407.

for the EU legal order to align with global norms.<sup>22</sup> There is thus a process of synergy, which can result in the introduction of far-reaching norms in the EU legal order which may challenge fundamental legal principles.

The example of the evolution of criminal law on ‘foreign fighters’ is a characteristic example in this context: norms initially developed by the UN Security Council have been transplanted into the legal orders of EU Member States first via the revision of the Council of Europe Counter-Terrorism Convention (Convention on the Prevention of Terrorism) and subsequently via the revision of EU substantive criminal law on terrorism.<sup>23</sup> As with the regular revisions of EU internal anti-money laundering and terrorist finance law (justified as essential to align the EU acquis with the new standards by the FATF),<sup>24</sup> the extension of EU substantive criminal law on terrorism has followed a paradigm developed initially by the Security Council. This internalization of external norms has also occurred in the context of transatlantic security cooperation. A key example in this context is the emergence of preventive legislation on PNR data. The conclusion of a series of EU-US international agreements enabling the transfer of PNR data to US authorities has been the outcome of the need for the EU to comply with unilateral US legal requirements and has been controversial in challenging fundamental rights in the EU legal order.<sup>25</sup> However, and notwithstanding these concerns, recent terrorist incidents in Europe have provided political justification for the internalization of this model of preventive surveillance in the EU via the adoption of an ‘internal’ PNR Directive. The challenges to EU values that this internalization of external standards in the field of security can pose should not be underestimated. The recent Opinion of the Court of Justice of the European Union (CJEU) on the EU-Canada PNR Agreement<sup>26</sup> confirms that PNR systems as currently devised fall foul of fundamental rights in the EU.

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<sup>22</sup> Mitsilegas, V., The EU and the Implementation of International Norms in Criminal Matters, in: M. Cremona/J. Monar/S. Poli (eds.), *The External Dimension of the Area of Freedom, Security and Justice*, Peter Lang, Brussels et al. 2011.

<sup>23</sup> Mitsilegas, V., The European Union and the Global Governance of Crime, in: V. Mitsilegas et al. (eds.), *Globalisation, Criminal Law and Criminal Justice. Theoretical, Comparative and Transnational Perspectives*, Hart, Oxford 2015, pp. 153–198.

<sup>24</sup> For the latest EU Directive, see Mitsilegas, V./Vavoula, N., The Evolving EU Anti-Money Laundering Regime. Challenges for Fundamental Rights and the Rule of Law, *Maastricht Journal of European and Comparative Law*, vol. 23, 2016, 261–293.

<sup>25</sup> Mitsilegas, V., Transatlantic Counter-terrorism Cooperation and European Values. The Elusive Quest for Coherence, in: D. Curtin/E. Fahey (eds.), *A Transatlantic Community of Law*, Cambridge University Press, Cambridge 2014, pp. 289–315.

<sup>26</sup> Opinion 1/15 on the EU-Canada PNR Agreement.



#### IV. Blurring the boundaries between the public and the private: everyday data and dangerousness

The model of preventive justice focuses increasingly on the collection of personal data by the state and the co-option of the private sector in the fight against crime. The collection of personal data involves data generated by ordinary, everyday life activities. This includes records of financial transactions,<sup>27</sup> of airline travel (PNR) reservations,<sup>28</sup> of mobile phone telecommunications,<sup>29</sup> and of digital evidence.<sup>30</sup> The focus on monitoring everyday life may thus result in mass surveillance, marked by the collection and storage of personal data in bulk. Inextricably linked with the focus on the monitoring of everyday life for preventive purposes is the privatization of surveillance under a model of what has been named a ‘responsibilization strategy’ aiming to co-opt the private sector in the fight against crime.<sup>31</sup> banks and other financial and non-financial institutions (including lawyers), airlines, mobile phone and internet providers, among others, are legally obliged to collect, store, and reactively or proactively transfer personal data to state authorities. The privatization of preventive justice in this manner expands considerably the reach of the state and poses grave challenges to fundamental rights. Everyday and sensitive personal data is now being collected *en masse* and legislation imposes growing demands for this data to be transferred from the private sector to state authorities in a generalized manner. This has led to what has been called ‘the “disappearance of disappearance”’ – a process whereby it is increasingly difficult for individuals to maintain their anonymity, or to escape the monitoring of social institutions’.<sup>32</sup> Thus, state authorities have access to a wealth of personal data, enabling practices such as profiling and data mining. As the Court of Justice has noted in the *Tele2* and *Watson* case regarding metadata retention,

That data, taken as a whole, is liable to allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as everyday habits, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them ... In particular, that data provides the means ... of establishing a

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<sup>27</sup> Mitsilegas, V., *Money Laundering Counter-Measures in the European Union: A New Paradigm of Security Governance versus Fundamental Legal Principles*, Kluwer Law International, The Hague 2003; de Goede, M., *Speculative Security*, University of Minnesota Press, Minneapolis 2012.

<sup>28</sup> Mitsilegas, V., *Contrôle des étrangers, des passagers, des citoyens: Surveillance et anti-terrorisme*, Cultures et Conflits, vol. 58, 2005, 155–182.

<sup>29</sup> Mitsilegas, V., *EU Criminal Law*, Hart, Oxford/Portland, Oregon 2009.

<sup>30</sup> CEPS, *Access to Electronic Data by Third-Country Law Enforcement Authorities. Challenges to EU Rule of Law and Fundamental Rights* (by S. Carrera, G. Gonzalez-Fuster, E. Guild and V. Mitsilegas), July 2015.

<sup>31</sup> Garland, D., *The Limits of the Sovereign State*, *British Journal of Criminology*, vol. 36 1996, 445–471.

<sup>32</sup> Haggerty, K.D./R.V. Ericson, R.V., *The Surveillant Assemblage*, *British Journal of Sociology*, vol. 51, 2000, 605–622.

profile of the individuals concerned, information that is no less sensitive, having regard to the right to privacy, than the actual content of communications.<sup>33</sup>

The impact of state intervention on the individual is intensified when one considers the potential of combining personal data from different databases collected for different purposes in a landscape of blurring of boundaries and interoperability described above in order to create a profile of risk or dangerousness. Mass surveillance is linked closely with ongoing risk assessment in the preventive justice model. As has been noted by a number of governments intervening in the CJEU EU-Canada litigation, the use of PNR data

is intended to identify persons hitherto unknown to the competent services who present a potential risk to security, while persons already known to present such a risk can be identified on the basis of advance passenger information data. If solely the transfer of PNR data concerning persons already reported as presenting a risk to security were authorised, *the objective of prevention could consequently not be attained*.<sup>34</sup>

## V. Caught between the public/private and internal/external divides: the challenges of digital evidence

In addition to existing statutory mechanisms requiring the collection and transfer of everyday information from the private sector to the state, a broader issue has arisen with regard to access by the state to personal data held by private companies in the context of cross-border investigations. The issue has been framed by EU institutions as one concerning ‘digital evidence’ in the context of the fight against ‘cybercrime’, although it actually concerns judicial cooperation in criminal matters. The Commission has published recently a so-called non-paper on improving cross-border access to electronic evidence.<sup>35</sup> The non-paper reiterates the Commission’s commitment in the Communication on a European Agenda on Security to reviewing obstacles to criminal investigations on cybercrime, notably on issues of access to electronic evidence, and sets out the issues as follows:

For most forms of crimes, in particular cybercrimes as witnessed recently, electronic evidence – such as account subscriber information, traffic or metadata, or content data – can provide significant leads for investigators, often the only ones. The electronic evidence connected to these crimes is often cross-jurisdictional, for example because the data is stored outside the investigating country or by providers of electronic communications services and platforms – whose main seat is located outside the investigating country, resulting in investigating authorities not being able to use domestic investigative tools.

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<sup>33</sup> Joined Cases C-203/15 and C-698/15, *Tele2 Sverige and Watson*, judgment of 21.12.2016, para. 99.

<sup>34</sup> Para. 58, emphasis added.

<sup>35</sup> Non-paper from the Commission services, Improving cross-border access to electronic evidence: Findings from the expert process and suggested way forward, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/docs/pages/20170522\\_non-paper\\_electronic\\_evidence\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/docs/pages/20170522_non-paper_electronic_evidence_en.pdf) (accessed April 2018).

The Commission's non-paper summarizes work undertaken by the Commission services and states that cross-border access to electronic evidence may be obtained in three ways:

- through formal cooperation channels between the relevant authorities of two countries, usually through Mutual Legal Assistance/European Investigation Order (MLA/EIO, where applicable) or police-to-police cooperation;
- through direct cooperation between law enforcement authorities of one country and service providers whose main seat is in another country, either on a voluntary or mandatory basis; notably service providers established in the US and Ireland reply directly to requests from foreign law enforcement authorities on a voluntary basis, as far as the requests concern non-content data;
- and through *direct access* from a computer, as allowed by a number of Member States' national laws.

The Commission claims that the current legal frameworks reflecting traditional concepts of territoriality are challenged by the cross-jurisdictional nature of electronic services and data flows, adding that a number of Member States and third countries have developed or are developing national solutions that might result in conflicting obligations and fragmentation, and create legal uncertainty for both authorities and service providers. It also claims that owing to the fact that the concept of territoriality is still based largely on the place where data is stored, any cross-border access to electronic evidence that is not based on cooperation between authorities may raise issues in terms of territoriality, with this applying to data storage both within the EU and in a third (non-EU) country.

The different scenarios for future action set out in the Commission's non-paper must be scrutinized fully and approached with caution at this stage. All three scenarios put forward direct cooperation between law enforcement authorities, direct cooperation between law enforcement authorities and the private sector, and, most importantly, direct access to private databases; challenge fundamental principles of judicial cooperation in criminal matters in the European Union; and serve to bypass recently adopted EU law containing a high level of fundamental rights protection, namely the Directive on the European Investigation Order. The Commission is pushing for broader availability of and accessibility to personal data under a model of prevention by framing an issue of judicial cooperation in criminal matters, requiring judicial authorization, as an issue pertaining to 'cyber-crime'. It thus seems to adopt an agenda privileging police efficiency at the expense of a number of safeguards for the individual.

The Commission claims in this context that the problem is territoriality, where in reality solutions can be found under the current European Investigation Order – and externally Mutual Legal Assistance – systems that endeavour to provide information in a speedy manner. In fact, one of the key aims of mutual recognition in criminal matters under the EIO is to secure this speed. The Commission also seems

to be keen to blur the boundaries between internal and external action in the field, disregarding the important and critical case law of the CJEU regarding the data protection and privacy benchmarks required by third countries – and in particular the US – for data exchanges to take place. Direct cooperation between law enforcement authorities and the private sector, and direct access to private databases cause a number of concerns in this context, in an era where the adequacy of US requirements is constantly being questioned in courts on both sides of the Atlantic. In view of the significant challenges that the proposed models pose upon fundamental rights and the integrity of the EU acquis, the justification for these new ideas seems to be limited. It is striking that the Commission seems to adopt, as a justification, piecemeal practice in a number of jurisdictions whose compatibility with EU law is questionable. This follows a similar pattern with the justification of the adoption of an internal EU PNR system, which was justified – notwithstanding the controversy regarding the transatlantic PNR agreements – on the basis that a small number of EU Member States operated internal PNR systems. The legality of the EU PNR Directive is currently questionable following the CJEU Opinion on the EU-Canada PNR Agreement.

## **VI. From ‘security law’ to preventive justice: challenges to fundamental rights, citizenship, and the rule of law**

The evolution of Europe’s Security Union within a paradigm of preventive justice poses significant challenges for the rule of law, for the protection of fundamental rights, and for the citizenship in the European Union. In terms of the rule of law, preventive justice poses serious challenges *ex ante* (at the stage of the adoption of EU rules in terms of the existence and exercise of EU competence to legislate and in terms of justification of EU action, transparency, and democratic control) and *ex post* (in terms of setting limits to the arbitrariness of state action and ensuring full and effective judicial scrutiny and control).<sup>36</sup> In terms of challenges to the rule of law *ex ante*, a key example is the recent introduction to EU law of the criminalization of conduct related to ‘foreign fighters’, with UN Security Council standards being transposed into EU law using the mechanism of amending the Council of Europe Convention in a 9/11 style emergency framing with no impact assessment or full scrutiny of the constitutional implications of these proposals.

Challenges to the *ex ante* rule of law are also posed by shifts in legality and the use of legal bases (with Area of Freedom, Security and Justice (AFSJ) legal bases being replaced by Common Foreign and Security Policy (CFSP) legal bases on

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<sup>36</sup> On the distinction between rule of law *ex ante* and *ex post*, see Mitsilegas, *V.*, Rule of Law: Theorising EU Internal Security Cooperation from a Legal Perspective, in: M. Rhinard/D. Bossong (eds.), *Theorising European Internal Security*, Oxford University Press, Oxford et al. 2016, pp. 113–114.

terrorist sanctions and border security), and by the shift from the adoption of legal standards as such to an emphasis on unregulated operational action and cooperation. Rule of law *ex post* is challenged by limits to effective judicial protection and state arbitrariness, as evidenced in relation to preventive terrorist sanctions by the extensive *Kadi* litigation in the CJEU. Rule of law *ex post* concerns are inextricably linked with fundamental rights challenges. A paradigm of security based upon preventive justice challenges a number of fundamental rights, including the principle of legality in criminal offences, sanctions, and the presumption of innocence (via the preventive criminalization of terrorism and organized crime), and the right to an effective remedy and effective judicial protection. It further challenges, in particular in the cases of generalized pre-emptive surveillance outlined in this chapter, the principle of non-discrimination and the rights to privacy and data protection. In a series of landmark rulings, the CJEU has upheld the importance of the rights to data protection and privacy and found generalized pre-emptive surveillance contrary to EU law.<sup>37</sup> The Court has further confirmed that the EU fundamental rights benchmark is also applicable in the Union’s external action, both in the field of judicial cooperation in criminal matters<sup>38</sup> and in the field of data exchange.<sup>39</sup>

Judicial interventions are important in this context in highlighting the close link between protecting the right to privacy and upholding citizenship ties by safeguarding trust in the relationship between the individual and the state.<sup>40</sup> This link between privacy and citizenship has been highlighted by constitutional courts in EU Member States in litigation over the constitutionality of preventive data retention measures. According to the German Constitutional Court,<sup>41</sup> ‘a preventive general retention of all telecommunications traffic data ... is, among other reasons, also to be considered as such heavy infringement because it can evoke a sense of being watched permanently ... The individual does not know which state official knows what about him or her, but the individual does know that it is very possible that the official does know a lot, possibly also highly intimate matters about him or her’ (para. 214). The Romanian Constitutional Court on the other hand noted that data retention addresses all legal subjects, regardless of whether they have committed criminal offences or whether they are the subject of a criminal investigation, which is likely to overturn the presumption of innocence and to transform a priori all users of electronic communication services or public communication networks into

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<sup>37</sup> Joined Cases C-293/12 and 594/12, *Digital Rights Ireland and Seitlinger*; Joined Cases C-203/15 and 698/15, *Tele2 Sverige and Watson*; Opinion 1/15 on the EU-Canada PNR Agreement.

<sup>38</sup> Case C-182/15, *Petruhhin*.

<sup>39</sup> Case C-362/14, *Schrems*.

<sup>40</sup> *Mitsilegas, V.*, The Value of Privacy in an Era of Security: Embedding Constitutional Limits on Preemptive Surveillance, *International Political Sociology*, vol. 8, issue 1, 2014, 104–108.

<sup>41</sup> Judgment of 2 March 2010, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08.

people susceptible of committing terrorism crimes or other serious crimes. According to the Romanian Court, continuous data retention is sufficient to generate in the mind of the persons legitimate suspicions regarding the respect of their privacy and the perpetration of abuses [by the state].<sup>42</sup>

These concerns have been reflected in the case law of the CJEU, where the adverse impact of generalized preventive surveillance without an explicit link to a specific suspicion has been highlighted.<sup>43</sup> In its recent ruling in *Tele2 and Watson*, which built upon the Court's ruling in *Digital Rights Ireland*, the CJEU noted that the interference of systematic and continuous data retention with the rights to privacy and data protection is very far-reaching and must be considered particularly serious, as the fact that the data is retained without the subscriber or registered user being informed is likely to cause the persons concerned to feel that their private lives are the subject of constant surveillance.<sup>44</sup> The Court noted that the legislation in question, which was found to be contrary to EU law, affects all persons using electronic communication services, even though those persons are not, even indirectly, in a situation liable to give rise to criminal proceedings. As such it applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious criminal offences.<sup>45</sup> Protecting the right to privacy is essential to upholding citizenship ties more broadly in this context.

## VII. The way forward: constitutionalizing 'security law'

The above analysis has cast light on the challenges that the evolution of the European Security Strategy and a Security Union relying increasingly on a paradigm of preventive justice poses for the rule of law, the protection of fundamental rights, and the citizenship in Europe. The management of Union security responses in recent months has taken the form of regular reports on the Security Union, combined – also in response to repeated terrorist incidents in major European cities – with separate communications by the European Council and the Commission. The ongoing

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<sup>42</sup> Decision no. 1258 from 8 October 2009.

<sup>43</sup> For an overview and on the specific link between surveillance and suspicion, see *Mitsilegas, V.*, Surveillance and Digital Privacy in the Transatlantic 'War on Terror.' The Case for a Global Privacy Regime, *Columbia Human Rights Law Review*, vol. 47, issue 3, 2016, 1–77.

<sup>44</sup> *Tele2 Sverige and Watson*, para. 100.

<sup>45</sup> *Tele2 Sverige and Watson*, para. 105. See also Opinion 1/15 on the EU-Canada PNR Agreement where the Court noted that 'as regards air passengers in respect of whom no such risk has been identified on their arrival in Canada and up to their departure from that non-member country, there would not appear to be, once they have left, a connection – even a merely indirect connection – between their PNR data and the objective pursued by the envisaged agreement which would justify that data being retained' (para. 205).

ing emphasis on the Security Union and the publication of Commission reports almost on a monthly basis serve to produce timely reactions to events on the one hand but on the other come with the risk of constantly promoting *new* EU action and the adoption of new legislation in the field of security, thus replicating earlier security responses of post-9/11 and post-7/7.

Calls for new measures and initiatives may present the political and symbolic advantage of being seen to be doing something and of responding urgently to terrorism. However, prior to the security imperatives resulting in yet more EU law in the field, detailed and serious thought should be given to three matters: the adequacy of the existing – and quite extensive – Union legal framework on security; the effectiveness of proposed new initiatives; and the compatibility of Union security measures with the European constitution and its key values, including fundamental rights and the rule of law. Overreacting on security and disregarding fundamental rights in the process pose a direct challenge to the very values upon which the Union is based, values which the Union is constitutionally bound to uphold and promote in its external action after Lisbon.

With EU law on the Area of Freedom, Security and Justice being based increasingly upon cooperation, interoperability, and the generalized collection and exchange of personal data under a model of pre-emptive surveillance, the challenges to fundamental rights but also to the essential bonds of trust and citizenship across the Union are acute. The Court of Justice’s rejection of generalized surveillance, in a series of landmark and consistent cases, should be taken fully into account by the other Union institutions in developing and rights-proofing the European Union in its ambitions to become a Security Union. In times of upheaval, it is the judiciary which has reminded us of the importance of fundamental rights guarantees in the process of constitutionalizing ‘security law’ and setting limits and parameters to an uncritical move towards prevention.

### List of abbreviations

AFSJ	Area of Freedom, Security and Justice
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
EIO	European Investigation Order
EU	European Union
EUNAVFOR Med	European Union Naval Force Mediterranean
EURODAC	European Asylum Dactyloscopy
FATF	Financial Action Taskforce

MLA/EIO	Mutual Legal Assistance/European Investigation Order
PNR	Passenger Name Record
UN	United Nations
US	United States of America
VIS	Visa Information System



# **The US Foreign Intelligence Surveillance Act and the Erosion of Privacy Protection**

*Stephen C. Thaman*

## **I. Introduction: the Fourth Amendment approach to invasions of privacy during the criminal investigation**

In this paper I compare the 1978 US Foreign Intelligence Surveillance Act (FISA) with the 1968 Federal Wiretap Law (called Title III) and other legislation applicable to accessing stored communications to show how the special rules relating to gathering foreign intelligence and evidence relating to international terrorism threaten to undermine the entire structure of privacy protection, rooted in the Fourth Amendment (4th Amend.) of the United States Constitution, which has been developed over the last 100 years. To set the stage here, it is important to briefly describe how courts in the United States of America (hereafter US) developed the 4th Amend. approach to privacy protection.

The US is made up of fifty-two different jurisdictions, fifty states, one federal jurisdiction, and the District of Columbia, which has its own laws. Each state has its own codes of criminal law and procedure, and constitutions, as does the federal system. Due to the multiplicity of jurisdictions, the approaches to privacy protection vary to some extent. The minimal standards relating to the protection of the right to privacy in the US are derived from the case law of the US Supreme Court (hereafter USSC) interpreting the Fourth Amendment of the US Constitution, which reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### **A. Definition of an evidentiary ‘search’ for purposes of the Fourth Amendment**

#### *1. The ‘reasonable expectation of privacy’ test*

Prior to 1967, the definition of what was a ‘reasonable search’ for criminal evidence under the 4th Amend. was governed by a ‘bricks and mortar’ approach based in property law.<sup>1</sup> Even an ‘unreasonable’ wiretap lacking ‘probable cause’ was not

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<sup>1</sup> *Brenner, S.W.*, The Fourth Amendment in an Era of Ubiquitous Technology, 75 Mississippi Law Journal (2005–2006) 1.

a 'search' as understood by the 4th Amend. if there was no physical intrusion onto the premises where the overheard conversations took place.<sup>2</sup> This changed with the decision of the USSC in 1967 in *Katz v. United States*,<sup>3</sup> where the court decided that the nature of the place where a private conversation takes place (in that case a phone booth on an open street that did not conceal the person talking therein) was not dispositive nor was the presence or not of a physical trespass but rather whether the person surveilled had a 'reasonable expectation of privacy' in the place surveilled and, in the case of wiretapping or other aural eavesdropping, in the contents of the conversations intercepted. The court enunciated that the 4th Amend.

protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment Protection. ... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

The definitive test from *Katz* was articulated in the concurring opinion of Justice Harlan, and it involved a two-step test: (a) that 'a person exhibits an actual (subjective) expectation of privacy'; and (b) 'that the expectation be one that society is prepared to recognize as "reasonable"'. Thus, if the person who is the object of the criminal investigation has no 'reasonable expectation of privacy' then police investigative activities are not 'searches' and are therefore not limited by the 4th Amend.

*Christopher Slobogin* has fashioned a handy list of factors which the USSC takes into consideration when determining whether police investigative activity constitutes a 'search' within the terms of the 4th Amend. These are: (1) the nature of the place observed or inspected; (2) the steps taken by the citizen to enhance privacy; (3) the degree to which the surveillance requires a physical intrusion (trespass) onto private property, in other terms, the location of the observer; (4) the nature of the object or activity observed; and (5) the availability to the general public of any technology used by the police to conduct the surveillance.<sup>4</sup>

*2. The nature of the place observed:  
reasonable expectation of privacy applied to activity in public and  
semi-public areas and steps by citizens to enhance privacy*

While the 4th Amend. specifically protects 'persons, houses, papers and effects' against 'unreasonable searches and seizures', the protection of the 'house' does not extend beyond the so-called 'curtilage', that is, the 'area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of

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<sup>2</sup> *Olmstead v. United States*, 277 U.S. 438 (1928); *Goldman v. United States*, 316 U.S. 129 (1942).

<sup>3</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>4</sup> *Slobogin, C.*, Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standard, 10 *Harvard Journal of Law and Technology* (1997) 383, 390–398.

life'. In USSC terminology that unprotected area is called 'open fields'.<sup>5</sup> This lack of constitutional protection is justified because

there is no societal interest in the privacy of those activities, such as the cultivation of crops, that occur in fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, and office or commercial structure would not be.<sup>6</sup>

But, as was noted in *Katz*, even *prima facie* protected areas, such as houses, lose their 4th Amend. protection if the owner allows access by, for instance, leaving a marijuana plant in front of an open window that can be viewed from the street. Even the protected backyard or curtilage, which is that area closest to the house, surrounded by a fence or other enclosure,<sup>7</sup> is not protected if police can see into it from public areas, even if the observation point is achieved from an airplane<sup>8</sup> or a helicopter flying at a permissible level.<sup>9</sup>

A workplace is a semi-public area where a worker may have an expectation of privacy in some areas, such as a personal desk or filing cabinet, but not in other areas where employers might need access for 'work-related purposes' or for the investigation of 'work-related' misconduct.<sup>10</sup> This precedent is important for interpreting when an employee's confidential communications might lack a protection they otherwise would enjoy. While courts have recognized that employees have a reasonable expectation of privacy in password-protected computer hard drives, some say searches of such computers may be 'reasonable' under the 4th Amend. if the company which provided the computer retained access thereto and 'consented' to the search by government officials.<sup>11</sup> Most courts, however, have found that employees have no expectation of privacy when using company computers for unauthorized purposes.<sup>12</sup>

### 3. *The loss of a reasonable expectation of privacy upon relinquishing control over private information to a third party*

#### a) Trash

Clearly, if one abandons an item or a container in public, one loses any reasonable expectation of privacy. Although household or business garbage or refuse con-

<sup>5</sup> *Hester v. United States*, 267 U.S. 57 (1924).

<sup>6</sup> *Oliver v. United States*, 466 U.S. 170 (1984).

<sup>7</sup> *United States v. Dunn*, 480 U.S. 294 (1987).

<sup>8</sup> *California v. Ciraolo*, 476 U.S. 207 (1986).

<sup>9</sup> *Florida v. Riley*, 488 U.S. 445 (1989).

<sup>10</sup> *O'Connor v. Ortega*, 480 U.S. 709 (1987).

<sup>11</sup> *United States v. Ziegler*, 474 F.3d 1184 (9th Cir. 2007).

<sup>12</sup> *United States v. Angevine*, 281 F.3d 1130 (10th Cir. 2002); *United States v. King*, 509 F.3d 1338 (11th Cir. 2007).

tains a wealth of information reflecting on the private personal and business life of persons, the USSC has held that a homeowner who abandons his or her garbage in opaque trashbags to the refuse collector has no expectation of privacy in the contents because ‘it is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.’<sup>13</sup>

- b) Giving information to current or would-be government informants:  
assumption of the risk of loss of confidentiality

American criminal investigators have long used undercover police or informants to penetrate into homes and other protected areas to observe activity and record conversations. Originally, a ‘wired’ informer who was invited into a private house was not a ‘trespasser’ and therefore the entry and use of recording devices was deemed not to violate the 4th Amend.<sup>14</sup> Later, however, the USSC deemed that a person who invites someone into a home or into a conversation, ‘assumes the risk’ that that person will disclose the contents of conversations or observations, and therefore has sacrificed any ‘reasonable expectation of privacy’.<sup>15</sup>

- c) Giving private information to a service provider for use only  
in providing the service

The USSC has long held that a person using a bank or other financial institution has no reasonable expectation of privacy in information about his or her financial dealings, because that information is communicated to bank personnel.<sup>16</sup> The same logic was then applied to deny citizens a reasonable expectation of privacy in the telephone numbers they dial.<sup>17</sup> This enables law enforcement authorities to use ‘pen registers’ to collect numbers dialled by a suspect and ‘trap and trace’ devices to find the numbers of those who telephone the suspect. The analogy has been made with letters mailed through the postal service. The sender has no expectation of privacy in ‘envelope information’, i.e. the address to which the letter is mailed, but does in the content.<sup>18</sup> We will discuss how this doctrine applies to the visiting of

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<sup>13</sup> *California v. Greenwood*, 486 U.S. 35 (1988).

<sup>14</sup> *On Lee v. United States*, 343 U.S. 747 (1952).

<sup>15</sup> *Lopez v. United States*, 373 US 427 (1963); *Lewis v. United States*, 385 U.S. 206 (1966); *Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. White*, 401 U.S. 745 (1971).

<sup>16</sup> *California Bankers Ass’n v. Shultz*, 416 U.S. 21 (1974); *United States v. Miller*, 425 U.S. 435 (1976).

<sup>17</sup> *United States v. New York Telephone Co.*, 434 U.S. 159 (1977); *Smith v. Maryland*, 442 U.S. 735 (1979).

<sup>18</sup> *Kerr, O.S.*, Applying the Fourth Amendment to the Internet: A General Approach, 62 *Stanford Law Review* (2010) 1005–1019.

Internet websites and to the acquisition of telecommunications metadata beyond the numbers involved in a phone conversation that are collected by telephone service providers. Although this area is heavily regulated, because accessing this information is not protected by the 4th Amend., even violation of the rules and regulations will not lead to exclusion of the evidence in a criminal trial.

d) Unknowingly allowing access to a third person

It has long been held that the 4th Amend. only restricts the actions of state officials and that, for instance, evidence stolen by a private party and given to the government would not violate the constitution.<sup>19</sup> The USSC has continued to recognize that a person's reasonable expectation of privacy in the contents of a container will also be lost if a private person accidentally gains access to the container, sees contraband, and then turns the container over to the police in a closed condition.<sup>20</sup> This doctrine has also been extended, for instance, to contraband in a person's home seen by a hired worker who had authorized access to the place where the illegal items were kept, when the worker tells the police about their existence without himself removing them from the house.<sup>21</sup>

This constitutes a dangerous undermining of the protection of the warrant requirement for searches of houses and other private spaces, such as computers. For instance, courts have allowed police to search the entirety of computer storage media after a private search detected child pornography in some of the files therein<sup>22</sup> even when the state agents were unaware that the private party had conducted such a search.<sup>23</sup> Some courts refuse to allow a warrantless search of a computer, however, after a private person has conducted a search thereof.<sup>24</sup>

4. *Sui generis* searches that do not implicate privacy concerns

If the nature of the activity observed by police is *only* criminal, then one can speak of a *sui generis* search. Most searches of 'bricks and mortar' houses or offices, or of containers (cars, suitcases, purses) or persons are generally exploratory and will uncover not only potential evidence of crime but also evidence unrelated to crime.

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<sup>19</sup> *Burdeau v. McDowell*, 256 U.S. 465 (1921). To my knowledge, only Texas courts would suppress evidence gathered by a private citizen in violation of the laws and constitution of the State. *State v. Johnson*, 939 S.W.2d 586 (Tex. Crim. App. 1996).

<sup>20</sup> *United States v. Jacobsen*, 466 U.S.109 (1984).

<sup>21</sup> *United States v. Paige*, 136 F.3d 1012 (5th Cir. 1998).

<sup>22</sup> *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001); *Rann v. Atchison*, 689 F.3d 832 (7th Cir. 2012).

<sup>23</sup> *United States v. Oliver*, 630 F.3d 397 (5th Cir. 2011).

<sup>24</sup> *United States v. Crist*, 627 F.Supp. 2d 575 (M.D. Pa. 2008).

The first articulation of the USSC in relation to a search which could theoretically only detect evidence of criminality dealt with the so-called ‘canine sniff’, i.e. the use of trained dogs to detect contraband, such as cocaine or marijuana. The USSC held that the use of such a dog to smell a suitcase was not a ‘search’ as one has no privacy interest in the location of contraband. The court also emphasized that such a search is much less intrusive than a normal search of a physical space.<sup>25</sup> Since no ‘search’ for evidence occurred, one did not need probable cause. The USSC later extended this rule to canine sniffs of automobiles.<sup>26</sup> The only other such *sui generis* search found by the USSC was that of testing a powder substance to determine if it contained cocaine or some other prohibited drug,<sup>27</sup> a rather banal application of the rule which is of little practical importance.

## **B. Development of the search clause and the reasonableness clause of the Fourth Amendment**

### *1. Requirement of probable cause and judicial authorization for evidentiary searches*

The 4th Amend. clearly requires that search warrants must be based on probable cause. In the seminal case of *Illinois v. Gates*<sup>28</sup>, the USSC stated:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or Evidence of a crime will be found in a particular place.

The requirement of ‘probable cause’ has been extended as well and is required for any searches for evidence of crime or criminal suspects, and any seizures of such evidence or arrests of such suspects, whether or not judicial authorization (a warrant) is required by the law.

A search warrant must also specifically describe the place to be searched and the items to be seized. This requirement is fairly self-explanatory when applied to a specific house and specific contraband, or fruits or instrumentalities of conventional crimes. It becomes more problematic when dealing with searches of ‘containers’ which may contain hundreds if not thousands of separate containers, such as the files in a lawyer’s office, as was the case in *Andresen v. Maryland*,<sup>29</sup> where a search warrant arguably did not narrow the search to the particular issues under

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<sup>25</sup> *United States v. Place*, 462 U.S. 696 (1983); *United States v. Wicks*, 73 M.J. 93 (C.A.A.F. 2014).

<sup>26</sup> *Illinois v. Caballes*, 543 U.S. 405 (2005).

<sup>27</sup> *United States v. Jacobsen*, 466 U.S. 109 (1984).

<sup>28</sup> *Illinois v. Gates*, 462 U.S. 213 (1983).

<sup>29</sup> *Andresen v. Maryland*, 427 U.S. 463 (1976).

investigation. The USSC held that police searchers may look superficially through all files to determine whether any actually pertain to the alleged criminality which gave rise to the search warrant because few people keep documents of their criminal transactions in a folder specifically marked, for instance, 'my criminal activity'. The implications of this opinion relating to a lawyer's office are evident in relation to computers, which might contain hundreds if not thousands of separate 'files' in any or none of which could be evidence of criminal activity.<sup>30</sup>

a) 'Staleness' of probable cause and tardiness of execution  
of search warrants

Another issue implicating the validity of search warrants for digital or computer-stored evidence is that of 'staleness'. Clearly, in relation to evidence of a violent crime or drug trafficking, information that items are at a particular location on one day does not mean they will be there ten days later. Search warrants are therefore sometimes found to be invalid because the evidence of probable cause is too old. In relation to possession of computer files, particularly those containing illegal child pornography, courts tend to stretch the limits of the 'staleness' doctrine by claiming that pedophiles or users of child pornography will seldom delete such files once they possess them. Thus courts have upheld searches of homes and computers located in homes many months after images were allegedly emailed to the computer or downloaded.<sup>31</sup>

Statutes also usually require a search to be conducted within ten days of the issuance of a search warrant.<sup>32</sup> Thus, when a search warrant authorizes the 'seizure' of a computer from a home and the 'search' of its contents, the question arises as to whether the search must also be within, say, ten days of the seizure of the computer.<sup>33</sup> Some courts, however, when issuing a warrant, will specifically give law enforcement additional time to conduct the search of the computer drives.<sup>34</sup> In some

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<sup>30</sup> *Clancy, T.K.*, The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and a Primer, 75 Mississippi Law Journal (2005–2006) 193, 195–198.

<sup>31</sup> 5 months in *State v. Felix*, 942 So.2d 5 (Fla. App. 2006); 5 ½ months in *United States v. Lamb*, 945 F.Supp. 441 (N.D.N.Y. 1996); 18 months in *United States v. Lemon*, 590 F.3d 612 (8th Cir. 2010). One court has said that a warrant should be denied in child porn cases only in 'exceptional cases', see *United States v. Seiver*, 692 F.3d 774 (7th Cir. 2012).

<sup>32</sup> Federal Rules of Criminal Procedure (Fed. R. Crim. P.) 41(c); Vernon's Annotated Missouri Codes § 542.276.8. 10 days is also the limit in California, whereas in Illinois, a search warrant must be served within 96 hours of issuance, see 725 ILCS 5/108-6.

<sup>33</sup> Whereas in the State of Washington, the computer search may take place after the 10 days have elapsed, see *State v. Grenning*, 174 P.3d 706 (Wash. App. 2008). One federal court suppressed evidence where police held computers over a year before searching them, see *United States v. Metter*, 860 F.Supp.2d 205 (E.D.N.Y. 2012).

<sup>34</sup> *United States v. Sypers*, 426 F.3d 461 (2nd Cir. 2005) (allowing a 5-month delay). Another 5-month delay was allowed in *United States v. Christie*, 717 F.3d 1156 (10th Cir. 2013). On the length of time required for computer experts to search a computer hard-drive

cases, police must also seek a separate search warrant to search the contents of a computer, which it might have lawfully seized pursuant to a broad search for ‘records’ or incident to arrest without a warrant.<sup>35</sup> Some courts have found violations of the 4th Amend. where officers did not get around to searching evidence from a validly seized and copied hard drive until long after the seizure of the evidence.<sup>36</sup>

b) Old restriction of seizure of ‘mere evidence’

Prior to 1967, the USSC recognized a prohibition on the seizure of any evidence that was not contraband, instrumentalities of crime, or fruits of crime (such as stolen goods). Thus, personal papers, diaries, even business records were subject to a *Beweiserhebungsverbot*. In a famous nineteenth century case, the USSC ruled that not only could private papers not be seized but that search warrants could not be issued to even look for them in a private dwelling. Looking at a man’s papers was also considered to violate the privilege against self-incrimination guaranteed by the Fifth Amendment of the US Constitution (5th Amend.) and the USSC felt that allowing the reading of private documents would hurt the innocent even more than the guilty.<sup>37</sup> This changed with the decision of *Warden v. Hayden*,<sup>38</sup> which held that any evidence, even circumstantial evidence of guilt, could now be seized if the 4th Amend. was not otherwise violated, for, since *Katz*, the emphasis had now shifted to protection of privacy and not property. This sea change obviously has opened the door to the seizure of digital evidence as long as there is no violation of the 4th Amend.

c) The ‘plain view’ doctrine: accidental discoveries during a legal search

If police are validly on a premises for purpose of making a search or validly searching a computer for specific material, whether as a result of a search warrant or another accepted ‘reasonable’ search under the 4th Amend., they may also seize evidence the search warrant or previous probable cause did not authorize them to seize, if, upon seeing it, it is clearly contraband, fruits, instrumentalities, or other obvious circumstantial evidence of crime.<sup>39</sup> If the searching officer has to do any

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and the problems of keeping within the 10-day rule, see *Kerr, O.S., Search Warrants in an Era of Digital Evidence*, 75 Mississippi Law Journal (2005–2006), 85, 92–95, 102–04.

<sup>35</sup> In one case, a search warrant was denied because the police waited 21 days after seizing the computer to apply for the warrant, see *United States v. Mitchell*, 565 F.3d 1347 (11th Cir. 2009).

<sup>36</sup> *United States v. Ganas*, 755 F.3d 125 (2d Cir. 2014) (2 and ½ year delay).

<sup>37</sup> *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>38</sup> *Warden v. Hayden*, 387 U.S. 294, 301–302 (1967).

<sup>39</sup> *Horton v. California*, 496 U.S. 128 (1990).



further 'search', no matter how minimal,<sup>40</sup> to determine whether the object is related to crime, then the seizure of the item is invalid and it may not be used in court. This doctrine is now crucial in determining whether officers searching for digital evidence may open other files in the same computer hard drive.

d) Exception for 'exigent circumstances'

As in all countries, if police have probable cause to enter or search a place but do not have time to get a search warrant due to emergency or exigent circumstances, then the search is still legal. This applies to entering a dwelling to arrest or 'seize' a fleeing person,<sup>41</sup> to arrest a person suspected of a dangerous crime if there is danger in delay of escape or violence,<sup>42</sup> or to search for evidence that might be easily destroyed.

The USSC has also recognized a general exception for automobiles, which was originally based on their 'moveability'<sup>43</sup> but now applies even if the automobile has been towed and otherwise immobilized by the police.<sup>44</sup> This exception for 'moveability' has never, however, been applied to smaller portable items, such as purses, suitcases, or computers.<sup>45</sup>

e) Consent search: exception to probable cause  
and warrant requirements

While consent searches are exceptions to the requirement of judicial authorization in all countries, they are facilitated in the US by the fact that the USSC does not require that police advise the person whose house, car, possessions, or person they want to search that the person has the right to refuse to consent.<sup>46</sup> If a person has been seized in violation of the 4th Amend., however, a subsequent consent to search will usually be deemed to be 'fruit of the poisonous tree' and the evidence seized will be inadmissible. Consent of one person who participates in a confidential conversation will also eliminate the requirement of a judicial order to intercept such conversation.

A person may also consent to the search of premises which he or she owns or controls along with third persons, inasmuch as the latter have 'assumed the risk' of

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<sup>40</sup> I.e. such as turning over a phonograph turntable to find a serial number, see *Arizona v. Hicks*, 430 U.S. 321 (1987).

<sup>41</sup> *Warden v. Hayden*, 387 U.S. 294, 301–302 (1967).

<sup>42</sup> *Minnesota v. Olson*, 495 US 91 (1990) (holding, however, that this does not apply to every murder case).

<sup>43</sup> *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>44</sup> *Chambers v. Maroney*, 399 U.S. 42 (1970).

<sup>45</sup> *United States v. Chadwick*, 433 U.S. 1 (1977).

<sup>46</sup> *Schneekloth v. Bustamante*, 412 U.S. 218 (1973).

that person giving others access to the jointly owned property. In the case of dwelling searches, however, the police may not rely on the authorization of one person to search jointly owned or occupied premises if another co-owner or co-occupier is present and objects to the search.<sup>47</sup> If the police arrest a non-consenting co-owner and remove him from the premises, however, they can rely on a consenting co-owner to justify a warrantless search.<sup>48</sup> Police may also rely on consent given by a person who appears to have control of property, as long as the police reasonably believe she does have such control.<sup>49</sup> Third-party consent is important in relation to searches of computers which are used by more than one party.

## 2. 'Reasonable' seizures and searches under the Fourth Amendment which do not require probable cause or judicial authorization

### a) Temporary detentions based on reasonable suspicion

One of the first interpretations of the 'reasonableness clause' of the 4th Amend. was in *Terry v. Ohio*,<sup>50</sup> in which the USSC, applying a proportionality test, declared that a short-term detention of a person for the purpose of investigating past or ongoing crime could be based on less suspicion than the 'probable cause' articulated in the 4th Amend, because such a detention was a lesser intrusion than a full-scale arrest. The standard for this lesser suspicion was called 'reasonable suspicion'. If, however, police detain a suspect without reasonable suspicion, i.e. just based on a hunch or stereotype, then any statements made by that person or evidence found as a result of a search can not be used in court, because the temporary detention violated the 4th Amend.

### b) Protective searches based on reasonable suspicion

In *Terry*, the USSC also held that police may, after they have lawfully detained a person for investigation upon reasonable suspicion, carefully pat-search the person's outer clothing for weapons if they can articulate a second 'reasonable suspicion' that the person is armed and dangerous. Again, the lesser-intrusion of a superficial pat-search of clothing could be justified on a lesser standard of suspicion than 'probable cause'.

With *Terry*, the USSC began to use the 'probable cause' standard for searches for evidence and the 'reasonable suspicion' standard for protective searches. The reasonable suspicion standard was also later applied to searches of vehicles for

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<sup>47</sup> *Georgia v. Randolph*, 547 U.S. 103 (2006).

<sup>48</sup> *Fernandez v. California*, 134 S.Ct. 1126 (2014).

<sup>49</sup> *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

<sup>50</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

weapons,<sup>51</sup> search of houses for dangerous accomplices following an arrest of a suspect in such a house,<sup>52</sup> or searches of dwellings for the purpose of protecting life or property rather than explicitly for criminal evidence.<sup>53</sup>

c) Searches incident to arrest

In America, a person arrested has traditionally been searched immediately following the arrest. However, the law was unclear as to the extent of such a search, especially when an arrest took place in a dwelling, until the USSC decided in 1969 that the police could search not only the person of an arrestee but also 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item.'<sup>54</sup> The rationale was the 'exigent circumstance' of preventing an arrestee from reaching either a weapon to use against the arresting officer or evidence that could be destroyed.

The USSC later dropped the 'exigent circumstance' underpinning of the rule and allowed officers to automatically search the person of all arrestees<sup>55</sup> and, if they were arrested either in or shortly after having exited an automobile, the entire passenger compartment of the automobile, including containers therein, whether or not the officer was in fear of a weapon or of evidence being destroyed.<sup>56</sup>

USSC opinions which permitted custodial arrests following violations of minor traffic offences<sup>57</sup> and the stopping of cars involved in minor traffic violations as a pretext to investigate narcotics offences<sup>58</sup> enabled police to very easily convert a minor traffic stop into a full evidentiary search of the driver and all containers in the passenger compartment of a car without any reasonable suspicion or probable cause. This doctrine was used, as well, to search electronic apparatuses, such as computers, cell phones,<sup>59</sup> and pagers,<sup>60</sup> although some courts felt the very personal nature of the contents of such 'containers' protected them from the reach of the exception for searches incident to arrest.<sup>61</sup> In 2009, however, the USSC placed

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<sup>51</sup> *Michigan v. Long*, 463 U.S. 1032 (1983).

<sup>52</sup> *Maryland v. Buie*, 494 U.S. 325 (1990).

<sup>53</sup> *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006).

<sup>54</sup> *California v. Chimel*, 395 U.S. 752 (1969).

<sup>55</sup> *United States v. Robinson*, 414 U.S. 218 (1973).

<sup>56</sup> *New York v. Belton*, 453 U.S. 454 (1981); *Thornton v. United States*, 541 U.S. 615 (2004).

<sup>57</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

<sup>58</sup> *Wrenn v. United States*, 517 U.S. 806 (1996).

<sup>59</sup> *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007).

<sup>60</sup> *United States v. Chan*, 830 F.Supp. 531 (N.D.Cal. 1993); *United States v. Ortiz*, 84 F.3d 977 (7th Cir. 1996).

<sup>61</sup> *State v. Smith*, 920 N.E.2d 949 (Ohio 2009).

stricter limitations on searches of automobiles incident to arrest, holding that if the arrest took place while the person was in the car, the police could search the passenger compartment of the car for weapons, but that if the arrest was made outside the car, the police could only search the passenger compartment if there were reasonable suspicion that evidence *of the crime for which the person was arrested* could be found therein.<sup>62</sup>

This stricter rule would, in my opinion, make searches of computers, cell phones, or pagers illegal if the arrest were for something like a violation of the rules of the road or was based on an old arrest or bench warrant. Recently, the USSC explicitly held that police may not access stored digital information on cell phones incident to a lawful arrest but must get a search warrant to do so.<sup>63</sup> The content of most containers is restricted, however, to their physical space. In this sense, computers, I-phones, etc. are different, as one can use them to access information in the ‘cloud’, which is not contained within the physical confines of the electronic hardware. It appears, however, that no court has yet allowed police to use a computer or I-phone seized incident to arrest to access contents that are not contained in the hard drive of the computer itself.<sup>64</sup>

#### d) Individual searches based on less than probable cause

The USSC has allowed searches based on less than probable cause but has two theories justifying them. The first is that administrative ‘special needs’ not related to criminal law enforcement justify certain searches based on less than probable cause.<sup>65</sup> The second theory uses simple proportionality analysis, as was used in *Terry v. Ohio*, to determine whether a search is ‘reasonable’, i.e. if there is a lesser expectation of privacy or a less intrusive search, it may be based on less than probable cause.

#### e) Administrative ‘special needs’ analysis

The USSC has allowed public school officials to authorize the search of minor students on school campuses if they have an ‘individualized’ reasonable suspicion that the student is committing a crime or otherwise violating school rules. This lower standard for a search that could produce criminal evidence was justified by the ‘special need’ to maintain order and an environment conducive to learning in the schools.<sup>66</sup> The USSC also found that a ‘special need’ justified the warrantless

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<sup>62</sup> *Arizona v. Gant*, 556 U.S. 332 (2009).

<sup>63</sup> *Riley v. California*, 134 S.Ct. 2473 (2014).

<sup>64</sup> *Brenner, S.W.*, Encryption, Smart Phones, and the Fifth Amendment, 33 Whittier Law Review (2012) 525, 533–534.

<sup>65</sup> *New York v. Burger*, 482 U.S. 691 (1985) (involving administrative searches of auto junkyards).

<sup>66</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

searches of the houses and effects of persons on probation based only on 'reasonable suspicion' to facilitate probation supervision and based the lesser standard on the lesser expectation of privacy a probationer enjoys due to his or her status.<sup>67</sup> Such a 'special needs' rationale has been used to justify, as a condition of probation in a child pornography case, the installation of a device that would monitor or filter the probationer's computer use.<sup>68</sup>

In a 2006 case, the USSC held that persons on parole after having served part of a prison sentence could be searched without any suspicion at all because of their greater propensity to commit future offences. The Court did not justify this search on the 'special need' to supervise parolees but simply found it to be 'reasonable' under the 4th Amend.<sup>69</sup> This is one area where some courts rely on the 'special need' to ensure an effective operation of the parole system<sup>70</sup> and others just base the decision on proportional 'reasonableness'. One court also deemed that protection of a government email server qualified as a 'special need' justifying a warrantless remote accessing of a personal computer in the dormitory room of a state university student suspected of being a hacker.<sup>71</sup>

f) Individual searches based on reasonableness  
clause balancing (proportionality)

In a recent case, the USSC held that a search conducted by a government employer (in this case a police department) of an employee's pager is simply 'reasonable' under the 4th Amend. if done 'for non-investigatory, work-related purposes as well as for investigations of work-related misconduct'. Such a search of work-related spaces or electronic tools such as pagers or computers is 'reasonable' if 'the measures adopted are reasonable related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search'.<sup>72</sup>

Although some states, including New York, Delaware, and Connecticut, have recently passed statutes requiring employers to notify employees when monitoring their electronic communications, the USSC in *Quon* did not say this was required.

Another long-recognized 'reasonable' search which does not require any particularized suspicion or a warrant is a customs search of mail, packages, or persons and their belongings when entering or leaving the US.<sup>73</sup> There was a time when it was thought

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<sup>67</sup> *United States v. Knights*, 534 U.S. 112 (2001).

<sup>68</sup> *United States v. Lifshitz*, 69 F.3d 173 (2d Cir. 2004); *United States v. Yuknavich*, 419 F.3d 1302 (11th Cir. 2005).

<sup>69</sup> *Samson v. California*, 547 U.S. 843 (2006).

<sup>70</sup> *People v. McCullough*, 6 P.3d 774 (Colo. 2000).

<sup>71</sup> *United States v. Heckenkamp*, 482 F.3d 1142 (9th Cir. 2007).

<sup>72</sup> *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010)

<sup>73</sup> *United States v. Ramsey*, 431 U.S. 606 (1977).

that a letter could be opened to discover whether it contained contraband, upon entering the country, but not that it could be read. Today, however, some courts allow customs officials to actually read the contents of letters which enter the US.<sup>74</sup>

Some courts also deem that a search of a laptop, its hard drive, and computer disks is justified without particularized suspicion under the exception for customs searches if a person is carrying them when entering the country.<sup>75</sup> Other courts, however, require that there at least be an individualized reasonable suspicion for a search of laptop computers, smartphones, or other digital media brought across the border by travellers.<sup>76</sup>

It is also now clear that the government will target people before they make a border crossing in order to get access to their electronic devices and hard drives without probable cause or a search warrant. From 1 October 2012 through 31 August 2013, 4,957 people crossing the US border had their computers or other electronic devices searched, about fifteen per day.<sup>77</sup> This was about the same rate as between 1 October 2008 through 2 June 2010, when 6,671 travellers, 2,995 of them American citizens, had electronic gear searched upon entering or leaving the US. Sometimes the electronic hardware is kept for weeks to do a thorough analysis of its contents.<sup>78</sup>

### **C. The inadmissibility of evidence seized in violation of the Fourth Amendment**

#### *1. History of the Fourth Amendment exclusionary rule and its extension to the 'fruits of the poisonous tree'*

Traditionally in common law countries, courts did not inquire into the means by which otherwise relevant and material evidence was acquired.<sup>79</sup> But in 1914 the USSC noted the expansive violations of constitutional rights by federal officials both in conducting searches and seizures, and during police interrogations and decided that without a rule mandating exclusion of evidence seized in violation of the

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<sup>74</sup> *United States v. Seljan*, 547 F.3d 993 (9th Cir. 2008).

<sup>75</sup> *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005); *United States v. Arnold*, 533 F.3d 1003 (9th Cir. 2008); *United States v. Stewart*, 729 F.3d 517 (6th Cir. 2013). One court recently upheld this doctrine despite the USSC's decision requiring warrants to search electronic devices when seized incident to arrest, see *United States v. Saboonchi*, 990 F.Supp.2d 536 (D.Md. 2014).

<sup>76</sup> *United States v. Cotterman*, 709 F.3d 952 (9th Cir. en banc 2013).

<sup>77</sup> *Stellin, S.*, The Border Is a Back Door for U.S. Device Searches, NYT, September 10, 2013, p. B1, <https://www.nytimes.com/2013/09/10/business/the-border-is-a-back-door-for-us-device-searches.html> (accessed April 2018).

<sup>78</sup> *Shipler, D.K.*, Can You Frisk a Harddrive?, NYT, February 20, 2011, p. WK 5, <http://www.nytimes.com/2011/02/20/weekinreview/20laptop.html> (accessed April 2018).

<sup>79</sup> *Adams v. New York*, 192 U.S. 585 (1904).

4th Amend. 'the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.'<sup>80</sup>

Some states followed the USSC and also excluded evidence gathered in violation of their own constitutional protections against unreasonable searches and seizures and others did not, but in 1961 the USSC made the *Weeks* exclusionary rule binding on the states in *Mapp v. Ohio* after determining that other remedies, such as suits in tort or police discipline, were ineffective means of deterring police violations.<sup>81</sup> The *Mapp* court based the exclusionary rule on the need for deterring police illegality but also on 'the imperative of judicial integrity', emphasizing that 'nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.'

Even before *Mapp* the USSC coined the term 'fruits of the poisonous tree' to indicate that evidence seized as the indirect result of a 4th Amend. violation would also have to be excluded from the trial unless the connection between violation and 'fruit' may 'have become so attenuated as to dissipate the taint'.<sup>82</sup> Again in 1954, the USSC emphasized that, in regard to evidence seized in violation of the 4th Amend., the government cannot

make indirect use of such evidence for its case, or support a conviction on evidence obtained through leads from the unlawfully obtained evidence. All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men.<sup>83</sup>

Some common potential applications of the doctrine of the fruits of the poisonous tree in relation to electronic eavesdropping would be: (1) when an illegal search, arrest, or interrogation leads to evidence that constituted the probable cause for either a warrant to seize and search a computer or a warrant under Title III or FISA to intercept confidential communications; (2) when an illegal arrest or detention leads to the seizure and search of a computer, cell phone, or I-Phone; (3) when an unlawful interception of communications leads to the discovery of witnesses or physical evidence that is used against the subject of the interception or a third party.

## 2. Modern exceptions to the Fourth Amendment exclusionary rule

### a) The 'independent source' exception

Evidence is deemed not to be the 'fruit' of a 4th Amend. violation if a second, sufficiently independent legal investigative action actually led to the seizure of the

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<sup>80</sup> *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>81</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>82</sup> *United States v. Nardone*, 308 U.S. 338 (1938).

<sup>83</sup> *Walder v. United States*, 347 U.S. 62 (1954).

evidence after an unlawful investigative act had discovered its existence.<sup>84</sup> This does not mean, however, that officers may make an illegal ‘preview search’ of a suspect’s computer in order to obtain information for a search warrant that later seizes the files in the computer.<sup>85</sup> Some jurisdictions have limited the exception for ‘independent source’ to cases where there is no connection between the initial illegality and the subsequent legal measure, i.e. when it is not the same police unit that is involved in both illegal and legal measures.<sup>86</sup>

#### b) The ‘inevitable discovery’ exception

If there is only one search or seizure and it violates the 4th Amend., or even if there is an illegal interrogation that leads to the discovery of physical evidence, the physical evidence will not be inadmissible if the court determines that the physical evidence would inevitably have been discovered by legal means regardless of the violation that actually led to its discovery.<sup>87</sup> The same is true if, as a result of an illegal wiretap, police get the information related to a drug sale, if police were already zeroing in on the drug sale independently of the illegal wiretap.

#### c) The ‘good faith’ exception

The USSC has also denied exclusion of illegally gathered evidence when the police officer acted in ‘good faith’ in conducting the investigative measure that discovered the evidence because excluding the evidence would thus not serve to deter future police misbehaviour. In *United States v. Leon*,<sup>88</sup> the USSC first applied this doctrine to a case where the judge blundered by issuing a search warrant based on insufficient probable cause. In *Leon*, the USSC abandoned the ‘judicial integrity’ reason for the exclusionary rule in favour of focusing solely on police deterrence. The USSC has also applied this exception to errors made in describing the things to be seized or the premises to be searched, as well as other technical errors in warrants.<sup>89</sup> In applying these exceptions, for instance, a computer search based on an overbroad warrant in violation of the 4th Amend. might not lead to suppression of the incriminating files discovered due to the ‘good faith’ exception.<sup>90</sup>

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<sup>84</sup> *Murray v. United States*, 487 U.S. 533 (1988) (illegal entry of warehouse due to lack of exigent circumstances led to discovery of marijuana but search warrant based on independent evidence of the presence of the marijuana subsequently led to its seizure).

<sup>85</sup> *State v. Nadeau*, 1 A.3d 445 (Me. 2010).

<sup>86</sup> *Commonwealth v. Melendez*, 676 A.2d 226 (Pa. 1996); *State v. Wagoner*, 24 P.3d 306 (N.M.App. 2001).

<sup>87</sup> *Nix v. Williams*, 467 U.S. 431 (1984).

<sup>88</sup> *United States v. Leon*, 468 U.S. 897 (1984).

<sup>89</sup> *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

<sup>90</sup> *United States v. Otero*, 563 F.3d 1127 (10th Cir. 2009).



‘Good faith’ led in *Arizona v. Evans* to admission of evidence seized as the result of an error in information conveyed by a court computer system that indicated that a warrant existed to arrest a suspect.<sup>91</sup> Justice Ginzburg in *Evans* dissented, claiming that the widespread use of computers by courts and police departments and the unreliability of much information contained in them could lead to a huge amount of unlawful arrests.

Originally courts would not apply ‘good faith’ if it was the errors in police or other executive branch computer systems that led to an unlawful arrest<sup>92</sup> but only when the error was attributable to a court computer system. However, in a 2009 case the USSC found ‘good faith’ even when the arresting officers’ negligence played a role in the mistaken arrest.<sup>93</sup>

d) ‘Standing’ limitations on ability to move to suppress evidence

In 4th Amend. case law, following the *Katz* decision, one has ‘standing’ to litigate a search only when one has a ‘reasonable expectation of privacy’ in the place searched, whereas prior to that decision it was sufficient to assert a property interest in the item seized.<sup>94</sup> As the California Supreme Court once stated, this doctrine ‘virtually invites a law enforcement officer to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them.’<sup>95</sup>

In the context of wiretapping, the USSC held in 1969 that only those whose rights were violated by a wiretap had the standing to move to suppress illegally gathered information but not those who were solely damaged by the introduction of the evidence in court. Standing would be accorded to anyone who participated in the conversation or whose telephone was actually tapped.<sup>96</sup>

However, a slightly different issue arises with respect to text messages. Recently the Rhode Island Supreme Court held that a person who texts another has no reasonable expectation of privacy in that text message when stored in another’s phone, therefore allowing the police to use such a message against the sender in a criminal case.<sup>97</sup> Another court has denied an expectation of privacy for text messages stored

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<sup>91</sup> *Arizona v. Evans*, 514 U.S. 1 (1995).

<sup>92</sup> *State v. White*, 660 So.2d 664 (Fla. 1995); *State v. Hisey*, 723 N.W.2d 99 (Neb. App. 2006).

<sup>93</sup> *Herring v. United States*, 555 U.S. 135 (2009).

<sup>94</sup> *Rakas v. Illinois*, 439 U.S. 128 (1978).

<sup>95</sup> *People v. Martin*, 290 P.2d 855, 857 (Cal. 1955) (no longer good law).

<sup>96</sup> *Alderman v. United States*, 394 U.S. 165 (1969).

<sup>97</sup> *State v. Patino*, 93 A.3d 40 (R.I. 2014).

on the service provider of the recipient of the message.<sup>98</sup> On the other hand, other jurisdictions have recognized an expectation of privacy in text messages.<sup>99</sup>

In relation to searches of homes (including installation of bugs or secret cameras), the USSC accords standing to the legal residents of the home as well as any overnight visitors<sup>100</sup> but not necessarily to short term visitors in a home or other private spaces, especially when they are conducting illegal business.<sup>101</sup> Some courts have, however, accorded short-term business visitors to a hotel room a reasonable expectation that they will not be videotaped in the host's absence.<sup>102</sup>

In relation to automobiles, although the *Rakas* majority would only have accorded standing to the owner of a vehicle and not to invited passengers, other courts extend a right of privacy to non-owner drivers and sometimes to passengers as well. The standing issues relating to automobiles are important in an era where Global Positioning Systems (GPS) monitoring of automobiles and even the use of built-in monitoring devices to record conversations in automobiles are tools of law enforcement.

Fraudulent acquisition or possession of an automobile or computer, however, has been held to deprive the possessor of any expectation of privacy in the vehicle or in the contents of the computer.<sup>103</sup> One court, however, has held that obtaining telephone service through use of a false name did not deprive the person of an expectation of privacy or protection of the state's wiretap laws.<sup>104</sup>

#### e) Use of illegally seized evidence to impeach a testifying defendant

The USSC has allowed evidence seized in violation of the 4th Amend. to be used to impeach the testimony of the defendant,<sup>105</sup> but, oddly enough, has not allowed such use to impeach the testimony of a witness.<sup>106</sup>

#### f) Limitations on the Fourth Amendment exclusionary rule to the first instance trial

Generally speaking, evidence gathered in violation of the 4th Amend. is inadmissible at trial in the first instance but is admissible in a number of other judicial and

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<sup>98</sup> *State v. Marcum*, 319 P.3d 681 (Okla. Crim. App. 2014).

<sup>99</sup> *State v. Hinton*, 319 P.3d 9 (Wash. 2014); 14, and *State v. Roden*, 321 P.3d 1183 (Wash. 2014) (cited the privacy guarantee of the state constitution).

<sup>100</sup> *Minnesota v. Olson*, 495 U.S. 91 (1990).

<sup>101</sup> *Minnesota v. Carter*, 525 U.S. 83 (1998).

<sup>102</sup> *United States v. Nerber*, 222 F.3d 597 (9th Cir. 2000).

<sup>103</sup> *United States v. Caymen*, 404 F.3d 1196 (9th Cir. 2005).

<sup>104</sup> *People v. Leon*, 32 Cal. Rptr. 3d 421 (Cal. App. 2005).

<sup>105</sup> *United States v. Havens*, 446 U.S. 620 (1980).

<sup>106</sup> *James v. Illinois*, 493 U.S. 307 (1990).

non-judicial proceedings. Thus, at proceedings before a grand jury, the purpose of which is to assess the sufficiency of evidence to charge a suspect, illegally seized evidence may be used.<sup>107</sup> The exclusionary rule also does not apply in some cases to sentencing proceedings<sup>108</sup> or to proceedings on *habeas corpus* to challenge final convictions.<sup>109</sup> It also does not apply to hearings to violate a person's probation or parole,<sup>110</sup> or to non-criminal deportation<sup>111</sup> or military discharge<sup>112</sup> proceedings.

### 3. Exclusionary rule conflicts between states and between state and federal courts

#### a) Approach of federal courts where state law is more protective than the Fourth Amendment

Many states have stricter protections against government search and seizure than the minimum requirements imposed by the USSC. However, nearly all federal courts will still accept evidence gathered in accordance with the minimal 4th Amend. norms, even though state officials violated their state's stricter rules, and turned the evidence over to the federal officials.<sup>113</sup>

#### b) Approach of states where state law gives no more protection than federal law

In the 1980s, the people of California, through a referendum, decided that the California constitution could give no greater protection than the minimal protection determined by the USSC in its interpretation of the 4th Amend. Thus, even when California police violate a California law which gives more protection than the 4th Amend. as interpreted by the USSC, the California courts will not exclude the evidence illegally gathered.<sup>114</sup>

<sup>107</sup> *United States v. Calandra*, 414 U.S. 338 (1974).

<sup>108</sup> *United States v. Tejada*, 956 F.2d 1256 (2d Cir. 1992); *United States v. Brimah*, 214 F.3d 854 (7th Cir. 2000). The exception is when officers obtained the evidence specifically to enhance an upcoming sentence, see *Verdugo v. United States*, 402 F.2d 599 (9th Cir. 1968).

<sup>109</sup> *Stone v. Powell*, 428 U.S. 465 (1976).

<sup>110</sup> *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998). Some states, however, do not allow use of illegally gathered evidence at parole or probation hearings, see *State v. Marquart*, 945 P.2d 1027 (N.M. App. 1997); *State v. Scarlet*, 800 So.2d 220 (Fla.2001).

<sup>111</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

<sup>112</sup> *Garrett v. Lehman*, 751 F.2d 997 (9th Cir. 1985).

<sup>113</sup> *United States v. Bell*, 54 F.3d 502 (8th Cir. 1995); *United States v. Appelquist*, 145 F.3d 975 (8th Cir. 1998); *United States v. Vite-Espinoza*, 342 F.3d 462 (6th Cir. 2002); *United States v. Laville*, 480 F.3d 187 (3d Cir. 2007); *United States v. Graham*, 553 F.3d 6 (1st Cir. 2009); *United States v. Beals*, 698 F.3d 248 (6th Cir. 2012).

<sup>114</sup> *People v. McKay*, 41 P.3d 59 (Cal. 2002).

c) Approach of states which give more protection than federal law  
or the law of other states

Some states which accord more protection than the federal government or other states will still allow its courts to use evidence gathered by officials of the less-protective jurisdictions, even if the gathering of the evidence would have violated its state constitution, because the chief purpose of their stricter exclusionary rules is to deter their own state officials from violating state law.<sup>115</sup> If officers of a state granting more protection participate in a search in a jurisdiction according less protection, then these states will apply their own exclusionary rule.<sup>116</sup> Other states will exclude the fruits of searches conducted in a jurisdiction the standards of which give less protection than their constitutions, regardless of whether the search was carried on by the less-protective jurisdiction's officers.<sup>117</sup>

## II. The interception of private communications and metadata

### A. Wiretapping and bugging

#### 1. History

Early federal and state law prohibited wiretapping or any interception and divul-gation, or publishing of contents of any communications by telegraph or tele-  
phone.<sup>118</sup> Even though federal and state officials engaged in massive illegal wire-  
tapping unbeknownst to the citizenry,<sup>119</sup> the USSC early held that the tapping of  
telephone conversations did not constitute a violation of the 4th Amend. as long as  
federal officials did not actually trespass on the suspect's property.<sup>120</sup> Justice  
Brandeis, in one of the most famous dissents in USSC history, claimed that the  
content of a telephone conversation should have the same protection already given  
by the USSC to the contents of letters.<sup>121</sup>

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<sup>115</sup> *State v. Bridges*, 925 P.2d 357 (Haw. 1996); *State v. Torres*, 252 P.3d 1229 (Haw. 2011).

<sup>116</sup> *State v. Mollica*, 524 A.2d 1303, 1305-06 (N.J.App 1987); *State v. Torres*, 252 P.3d 1229 (Haw. 2011).

<sup>117</sup> *Brenner, S.W.*, Law, Dissonance, and Remote Computer Searches, 14 North Carolina Journal of Law and Technology (2012) 43, 56, 59.

<sup>118</sup> § 605 Federal Communications Act of 1934; *Nardone v. United States*, 302 U.S. 379 (1937) (case famous for the coining of the term 'fruits of the poisonous tree').

<sup>119</sup> This was documented in a famous investigation published in 1959. *Dash, S./Schwartz, R.F./Knowlton, R.E.*, The Eavesdroppers (1959), cited in *Freiwald, S.*, Online Surveillance: Remembering the Lessons of the Wiretap Act, 56 Alabama Law Review (2004) 9, 11-12.

<sup>120</sup> *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>121</sup> *Ex parte Jackson*, 96 U.S.727 (1877).

Brandeis noted that: 'As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.' In his dissent, he made the most eloquent defense of citizen privacy against illegal government meddling therein:

(The) makers of our Constitution ... conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the govt upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth Amendment.

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the governmentt will be imperiled if it fails to observe the law scrupulously. Our governmentt is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Illegal wiretapping was often conducted with the cooperation of local phone companies, who conspired with agents to keep surveillance secret in order to maintain public confidence in the telephone networks. This rampant and widespread illegal use of wiretapping by both federal and state law enforcement agents reflects the historical ambivalence towards electronic surveillance in the US.<sup>122</sup> With the decision in *Katz*<sup>123</sup> in 1967, which held that the wiretapping of the suspect in a telephone booth would have been legal had the police acquired judicial authorization, and another case in the same year, which invalidated New York State's wiretap statute due to the vagueness of the prerequisites it imposed,<sup>124</sup> the stage was set for legislation regulating the government's use of wiretapping and bugging, which would come one year later in 1968.

## 2. Title III: the federal wiretap law

In 1968 Congress enacted the Omnibus Crime Control and Safe Streets Act, Title III of which contained the new wiretap legislation, which thereafter was simply known as 'Title III'.<sup>125</sup> Title III pre-empted the field, setting guidelines not only for the federal government but also for the states. State wiretap law may not impose less control over the use of wiretaps and bugs than does federal law.

<sup>122</sup> *Freiwald, S.*, op. cit. (n. 119), pp. 11–12, 26–27.

<sup>123</sup> *Katz*, 389 U.S. 347.

<sup>124</sup> *Berger v. New York*, 388 U.S. 41 (1967).

<sup>125</sup> Pub. L. 90-351, 82 Stat. 197.

In 1986 Congress amended Title III with the Electronic Communications Privacy Act (ECPA) to modernize the law and make it applicable to the advent of cell phones and Internet communication. Title I of ECPA included the provisions for interceptions of wire and electronic communications, Title II of ECPA dealt with stored communications and is known as the Stored Communications Act (SCA), and Title III of ECPA deals with accessing communications metadata and is known as the 'Pen Register Act'.<sup>126</sup>

Title III imposes a felony sanction of up to five years imprisonment or a fine, or civil sanctions for the illegal interception or divulgence of any wire, oral, or electronic communications through wiretaps, installation of bugs (listening devices), or any other means,<sup>127</sup> as well as for possessing, transporting, or even advertising devices that can be used for illegal interceptions of such conversations.<sup>128</sup> 'Electronic communication', within the meaning of Title III, includes 'any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system', but does not include wire or oral communication, communications made through a tone-only paging device,<sup>129</sup> or from a tracking device.<sup>130</sup> Title III explicitly does not apply to the use of pen registers or trap and trace devices which record external telecommunications data, such as numbers dialed.<sup>131</sup>

'Interception' within the meaning of Title III includes eavesdropping contemporaneous with the transmission of communications<sup>132</sup> but not the accessing of stored

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<sup>126</sup> *Solove, D.J.*, Digital Dossiers and the Dissipation of Fourth Amendment Privacy, 75 Southern California Law Review (2002) 1083, 1139–1140.

<sup>127</sup> 18 U.S.C. §§ 2511(1)(a) and (4)(a).

<sup>128</sup> 18 U.S.C. § 2512.

<sup>129</sup> Otherwise a Title III order is needed to access a pager, see *Adams v. Battle Creek, Mich.*, 250 F.3d 980 (6th Cir. 2001); *Brown v. Waddell*, 50 F.3d 285 (4th Cir. 1995). Cellular phone conversations have been protected by Title III since amendments to the law in 1994. Prior to that, police in some jurisdictions used scanners to intercept cell phone calls and did not need a warrant.

<sup>130</sup> 18 U.S.C. § 2510(12).

<sup>131</sup> 18 U.S.C. § 2511(2)(h).

<sup>132</sup> *United States v. Turk*, 526 F.2d 654 (5th Cir. 1976). Though not if carried out in the back of a police car containing arrested suspects, due to the lack of a reasonable expectation of privacy, see *United States v. Turner*, 209 F.3d 1198 (10th Cir. 2000); *United States v. Clark*, 22 F.3d 799 (8th Cir. 1994); *State v. Timley*, 975 P.2d 264 (Kan. App. 1998); *State v. Torgrimson*, 637 N.W.2d 345 (Minn. App. 2002). Even if the arrested suspects asked to speak privately, see *State v. Scheineman*, 77 S.W.3d 810 (Tex. Crim. App. 2002). Prisoners also have no right to privacy in their telephone calls, and therefore no 'interception' is recognized, see *United States v. Hammond*, 286 F.3d 189 (4th Cir. 2002). Lawyers, however, who receive calls from imprisoned clients have a reasonable expectation of privacy in these phone calls and a civil cause of action against prison officials who overhear them, see *United States v. Novak*, 453 F.Supp.2d 249 (D. Mass. 2006); *Lonegan v. Hasty*, 436 F.Supp. 2d 49 (E.D.N.Y. 2006).

private email sent to a service provider that had not yet been retrieved<sup>133</sup> nor the recording of an instant message (IM), because an IM service creates a paper trail of a dialogue, and thus using that form of communication amounts to giving implied consent for the other party to record the stream of the conversation.<sup>134</sup>

There has been some dispute as to whether electronic communications in the form of email or text messages can actually be ‘intercepted’ under Title III. As one court asserted, there is only a ‘narrow window during which an E-mail interception may occur – the seconds or milli-seconds before which a newly composed message is saved to any temporary location following a send command’ and thus held interception to be virtually impossible ‘unless some type of automatic routing software is used’.<sup>135</sup> One court, however, did rule that the unauthorized interception of an electronic mail message in temporary, transient storage violated Title III,<sup>136</sup> though the prevailing view is that its seizure is governed by the SCA. A state court has also ruled that software that surreptitiously captures images on computer screens, records chat conversations, instant messages, emails sent and received, and websites visited, unlawfully ‘intercepted’ electronic communications in transmission in violation of its wiretap act, holding that these electronic communications fell within the ‘umbra’ of the wiretap law because the communications were not retrieved from storage, and thus they were ‘intercepted communications’.<sup>137</sup>

#### a) Catalogue of offences

Wiretaps in the state courts are permissible in relation to the ‘commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses’.<sup>138</sup> Because of the specialized, sprawling, and duplicative nature of federal criminal law, the list of offences for which wiretapping may be employed covers several pages of the federal code. Included, other than those in the state list above, are offences relating to atomic energy, nuclear facilities, biological weapons, espionage, sabotage, trade secrets, treason, riots, destruction of property and maritime vessels, piracy, corruption dealing with labor unions, bribery of public officials and bank officials, and involving sports events, violence at international airports, domestic terrorism, unlawful use of

<sup>133</sup> *Steve Jackson Games, Inc. v. U.S. Secret Service*, 36 F.3d 457 (5th Cir. 1994).

<sup>134</sup> *State v. Lott*, 879 A.2d 1167 (N.H. 2005).

<sup>135</sup> *United States v. Steiger*, 318 F.3d 1039 (11th Cir. 2003).

<sup>136</sup> *United States v. Councilman*, 418 F.3d 67 (1st Cir. 2005).

<sup>137</sup> *O’Brien v. O’Brien*, 899 So.2d 1133 (Fla. App. 2005).

<sup>138</sup> 18 U.S.C. § 2516(2).

explosives, tax evasion, gambling, terrorist threats, various types of fraud, obstruction of justice, human trafficking, organized crime and racketeering, money laundering, sexual exploitation of children and child pornography, torture, counterfeiting or production of false documents and identifications, narcotics offences, extortionate credit transactions and bank reporting violations, firearms violations, anti-trust violations, and any conspiracy to commit any of the above crimes.<sup>139</sup> While simple prostitution is not a catalogue offence, one court has held that wiretaps may be used to investigate prostitution if it is connected with organized crime.<sup>140</sup>

Although the original version of Title III permitted wiretapping only for serious crimes that were typical of organized crime activities, Congress made no such restrictions when it came to intercepting electronic communications when it passed the ECPA in 1986. Interceptions of content may proceed in relation to the investigation of any federal felony. There are no restrictions whatsoever when it comes to accessing stored communications or installing pen registers or trap and trace devices other than that there be a 'criminal investigation' even if it is for a misdemeanour.<sup>141</sup>

#### b) Requirement of probable cause and judicial control

Title III imposes stricter judicial control on interceptions of private communications than does the 4th Amend. on search warrants,<sup>142</sup> and some call the Title III order, for this reason, a 'super warrant'. Only high-level prosecutors or US Attorneys (in the federal system) may apply for a judicial wiretap order under Title III, whereas any police officer may apply for a search warrant. In addition, only high court felony trial judges may issue such an order, whereas even lower courts and magistrates, or even justices of the peace can issue a normal search warrant.<sup>143</sup>

Although the definition of 'probable cause' for obtaining an interception of communications is considered to be identical with that for obtaining a search warrant,<sup>144</sup> the application presented by prosecutors for an interception order is in other ways stricter than that required for a normal search warrant. It must include, besides a 'full and complete statement' which amounts to probable cause and a description of the communications facilities or locations to be intercepted, 'a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous', and a statement of the period of time for which the intercep-

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<sup>139</sup> 18 U.S.C. § 2516(1).

<sup>140</sup> *State v. Otte*, 887 So.2d 1186 (Fla. 2004).

<sup>141</sup> *Freiwald, S.*, op. cit. (n. 119), p. 52.

<sup>142</sup> *Ibid.*, pp. 47–48.

<sup>143</sup> 18 U.S.C. § 2516(1)(2)(3).

<sup>144</sup> *United States v. Falcone*, 505 F.2d 478 (3d Cir. 1974).



tion is required to be maintained. Finally, the affidavit must include information regarding all previous applications made under the law.<sup>145</sup>

In articulating the necessity for the interception, the government, for instance, must explain why less intrusive ‘traditional investigative techniques’ would not have exposed the crime.<sup>146</sup> Many cases involve assertions that the use of undercover informants had been tried, unsuccessfully, or would have been ineffective<sup>147</sup> or too dangerous to employ. The government need not use all potential confidential informants or prove that the informants would be completely useless in order to make the necessity showing.<sup>148</sup> The government must also indicate why less intrusive electronic means, such as pen registers or trap-and-trace devices, were not used.<sup>149</sup>

No order to intercept confidential communications under Title III may be approved for longer than is necessary to achieve the objective of the order, and, in any case, not longer than thirty days. Extensions may be obtained by again submitting a new request to a judge to prolong the interception. The law does not limit the number of extensions.<sup>150</sup> Title III also, in its current version, allows so-called ‘roving wiretaps’ when it is not possible to specify with particularity the telephone or communications media the suspect will allegedly use in the suspected criminal enterprise.<sup>151</sup>

The law provides for judicial control also after the wiretap has been undertaken. The prosecutor may be required to submit reports to the judge on the ongoing status of the intercept.<sup>152</sup> The intercepted communications must also be recorded and made available to the judge after the intercept has been completed. They must be kept for ten years, unless a judge orders their destruction. Within ninety days of the filing of an application that was denied or the termination of the authorized interception, the judge must notify the persons affected of the fact of the order or application, the time of the interception, and whether or not conversations were intercepted and recorded. The judge may ‘in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice.’<sup>153</sup> Judges must report the number of requests for wiretaps they have received, how many were granted or extended, and the competent prosecutor’s office is also

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<sup>145</sup> 18 U.S.C. § 2518(1)(b).

<sup>146</sup> *United States v. Kahn*, 415 U.S. 143, 153 (1974).

<sup>147</sup> *United States v. Thompson*, 944 F.2d 1331 (7th Cir. 1991).

<sup>148</sup> *United States v. Canales-Gomez*, 358 F.3d 1221 (9th Cir. 2004).

<sup>149</sup> *United States v. Dumes*, 313 F.3d 372 (7th Cir. 2002).

<sup>150</sup> 18 U.S.C. § 2518(5).

<sup>151</sup> 18 U.S.C. § 2518(11).

<sup>152</sup> 18 U.S.C. § 2518(6).

<sup>153</sup> 18 U.S.C. § 2518(8)(a,d).

obligated to keep detailed statistics related to the interception of confidential communications.<sup>154</sup> All law enforcement officials involved in executing the wiretap laws are allowed to share the information they have gained in a legal wiretap or bug with other law enforcement officials for a valid law enforcement purpose.<sup>155</sup>

### c) The execution of interceptions under Title III

#### aa) Covert entry to instal listening devices

Although Title III nowhere mentioned how ‘bugs’ or secret listening devices are to be planted in the house or business of a suspect, the USSC has held that Title III must have envisioned that this would be necessary and has thus held that it would not violate the 4th Amend. for officers who had been issued an order under Title III to ‘bug’ a particular space to secretly enter the space to plant the microphones.<sup>156</sup>

#### bb) The minimization requirement

All wiretaps authorized by Title III must ‘be conducted in such a way as to minimize the interception of communications not otherwise subject to interception’.<sup>157</sup> This command was designed to prevent ‘rummaging’ during wiretaps or bugging operations by preventing the executing officers from listening to conversations obviously not included in the wiretap authorization. The USSC has not interpreted the ‘minimization’ requirement rigidly, however, holding that the statute does not forbid the interception of all non-relevant conversations but rather instructs the agents to conduct the surveillance in such a manner as to ‘minimize’ such interceptions. Much like with searching of computer files, the USSC majority held that in a complicated conspiracy case where there were a high number of non-relevant calls, ‘many of the nonpertinent calls may have been very short. Others may have been one-time only calls. Still other calls may have been ambiguous in nature or apparently involved guarded or coded language. In all these circumstances agents can hardly be expected to know that the calls are not pertinent prior to their termination.’<sup>158</sup>

In an unusual interpretation of the minimization requirement, a court order that required an automobile service company to allow the Federal Bureau of Investigation (FBI) to use the company’s in-car wireless emergency communication system to listen to oral conversations in a suspect’s car was invalid because the FBI’s surveillance completely disabled portions of the communications system which se-

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<sup>154</sup> 18 U.S.C. § 2519.

<sup>155</sup> 18 U.S.C. § 2517.

<sup>156</sup> *Dalia v. United States*, 441 U.S. 238 (1979).

<sup>157</sup> 18 U.S.C. § 2518(5).

<sup>158</sup> *Scott v. United States*, 436 U.S. 128 (1978).

verely hampered emergency capabilities, thus violating the ‘minimization’ requirement.<sup>159</sup>

#### d) Statistics on use of Title III

From 1968 to 2011, 44,256 wiretaps were authorized, 14,549 by federal judges and 29,707 by state court judges. In those forty-three years, only thirty-two applications were denied.<sup>160</sup>

In 2011, 2,732 wiretaps were authorized, 792 by federal judges, the rest by state court judges. 2,189 intercepts were actually installed, 367 in the federal system. The average number of conversations intercepted for each wiretap was 3,716, involving an average of 118 persons. 868 of the 3,716 intercepts were incriminating in nature.<sup>161</sup>

In 2012, there was a sharp rise to 3,395 wiretaps authorized, 1,354 by federal judges and the rest by state judges. 1,932 extensions were granted, 521 by federal judges. 3,292 of the wiretaps were for portable phones and only fourteen for personal residences. Only seven were ‘roving’ wiretaps. 2,967 of the wiretaps, around 87 per cent, were in narcotics cases.<sup>162</sup>

In 2006, at the federal and state levels, four states, California (430), New York (377), New Jersey (189), and Florida (98) accounted for 59 per cent of all wiretap orders.<sup>163</sup>

### 3. *The Foreign Intelligence Surveillance Act (FISA)*<sup>164</sup>

#### a) History

It has always been recognized in the US that the president may conduct ‘national security’ surveillance without court authorization. Title III even provided that ‘nothing in this statute shall limit the constitutional power of the President to protect the national security of the US.’<sup>165</sup> However, the limits between ‘intelligence’ gathering and criminal prosecution became blurred. Since the 1940s the Federal Bureau of Investigation (FBI) and Central Intelligence Agency (CIA) col-

<sup>159</sup> *In re United States for an Order Authorizing Roving Interception of Oral Communications*, 349 F.3d 1132 (9th Cir. 2003).

<sup>160</sup> [http://epic.org/privacy/wiretap/stats/wiretap\\_stats.html](http://epic.org/privacy/wiretap/stats/wiretap_stats.html) (accessed April 2018).

<sup>161</sup> <http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2011/Table4.pdf> (accessed April 2018).

<sup>162</sup> <http://www.uscourts.gov/Statistics/WiretapReports/wiretap-report-2012.aspx> (accessed April 2018).

<sup>163</sup> *Schwartz, P.M.*, Reviving Telecommunications Surveillance Law, 75 *University of Chicago Law Review* (2008) 287, 292.

<sup>164</sup> 50 U.S.C. §§ 1801 et seq.

<sup>165</sup> 18 U.S.C. § 2511(3).

laborated in secret domestic intelligence operations. During the late 1960s and early 1970's, the FBI's investigations extended to prominent members of the women's liberation movement, the Black Power movement, and critics of the Vietnam War. Between 1967 and 1970, the US Army conducted wide-ranging surveillance, amassing extensive personal information about a broad group of individuals. In 1970, Congress significantly curtailed the Army's programme, and the records of personal information were eventually destroyed.<sup>166</sup>

In 1972, the USSC held that the president did not have power to intercept private conversations in cases of domestic security threats without judicial authorization and basically limited this authority to the surveillance of foreign agents.<sup>167</sup> FISA, which was finally promulgated in 1978, was an attempt to delineate the extent of presidential powers to intercept confidential communications and basically introduced a warrant requirement where surveillance could affect US citizens or permanent residents.

b) The power of the US president to issue wiretaps without judicial control

The president of the US, acting through the Attorney General, may authorize electronic surveillance without a court order to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that the electronic surveillance is solely directed at: (a) the acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers; or (b) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power. There must also be no substantial likelihood that the surveillance will acquire the contents of any communication to which a 'US person' is a party.<sup>168</sup>

For the purposes of FISA, a 'foreign power' includes not only a foreign government or an entity under the control of a foreign government, or a foreign-based political organization but also 'a group engaged in international terrorism or activities in preparation thereof' and 'an entity not substantially composed of US citizens or residents that is engaged in the "international proliferation of weapons of mass destruction."<sup>169</sup> For the purposes of FISA, a 'US person' refers to US citizens, those admitted for permanent residence ('green card' holders), or US legal entities or non-incorporated associations of which a substantial part are US citizens.<sup>170</sup>

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<sup>166</sup> *Solove, D.J.*, op. cit. (n. 126), pp. 1107–1108.

<sup>167</sup> *United States v. United States District Court*, 407 U.S. 297 (1972).

<sup>168</sup> 50 U.S.C. § 1802(a)(1).

<sup>169</sup> 50 U.S.C. § 1801(a).

<sup>170</sup> 50 U.S.C. § 1801(i).

Furthermore, for the purposes of FISA, ‘foreign intelligence information’ refers to information that relates to, and if concerning a US person is necessary to, the ability of the US to protect against military attack, sabotage, international terrorism, the international proliferation of weapons of mass destruction, clandestine intelligence activities, or information that is otherwise necessary for the national defense or the conduct of US foreign affairs.<sup>171</sup> Similar to Title III, violations of FISA are subject to penal and civil sanctions.<sup>172</sup>

### c) Judicial control under FISA

#### aa) The Foreign Intelligence Surveillance Court: its constitution, powers, and jurisdiction

In general, the US president need only seek authorization from a judge if the proposed surveillance measure is aimed at or may affect the interests of a ‘US person’.<sup>173</sup> FISA established a special secret court, Foreign Intelligence Surveillance Court (FISC), to receive requests for foreign intelligence surveillance which might include US persons. It consists of eleven federal district court judges appointed by the Chief Justice of the USSC, of whom no fewer than three shall reside within twenty miles of Washington D.C.<sup>174</sup> The Chief Justice also selects a three judge FIS Court of Appeal to hear appeals from denials of requests for surveillance by the FISC.<sup>175</sup> The decisions of the FISC are also generally classified, though occasionally they are released to the public. After the revelations of Edward Snowden, beginning in June 2013, and the release of two decisions critical of the NSA, a FISC judge in September 2013 called for the release of all the past decisions related to NSA petitions for FISC orders, and it appears that the US Director of Intelligence supported a loosening of the secrecy requirement.<sup>176</sup>

#### bb) Requirements of an affidavit for a FISC warrant

Every application for a FISC warrant must be approved by the US Attorney General in the federal system and by an equivalent official in a state system. It must include the identity, if known, of the target of the surveillance, a statement of the facts and circumstances going to show that the target is a foreign power or an agent

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<sup>171</sup> 50 U.S.C. § 1801(e).

<sup>172</sup> 50 U.S.C. §§ 1809, 1810.

<sup>173</sup> 50 U.S.C. § 1802(b).

<sup>174</sup> 50 U.S.C. § 1803(a)(1).

<sup>175</sup> 50 U.S.C. § 1803(b).

<sup>176</sup> *Shane, S.*, Judge Urges U.S. to Consider Releasing N.S.A. Data on Calls, NYT, September 14, 2013, p. A11, <http://www.nytimes.com/2013/09/14/us/judge-urges-us-to-consider-releasing-nsa-data-on-calls.html> (accessed April 2018).

of a foreign power, and that each of the facilities or places at which the electronic surveillance is directed is being used or is about to be used by a foreign power or an agent of a foreign power. There must be a statement of the proposed minimization procedures, a description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance, and a sworn statement by a national security official that the information sought is 'foreign intelligence information' and that a 'significant purpose of the surveillance is to obtain foreign intelligence information'.

The affidavit must also assert that such information cannot reasonably be obtained by normal investigative techniques and must list a summary of the facts concerning all previous applications that have been made to any judge under FISA involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application.<sup>177</sup> The affidavit may also request the inclusion of provisions to install pen registers and trap and trace devices against the same targets for which the electronic surveillance has been authorized.<sup>178</sup>

Prior to 11 September 2001 (9/11), the affidavit for a FISA wiretap had to assert that foreign intelligence information was the 'primary purpose' of the interception.<sup>179</sup> Although one federal court found that this watered-down provision violated the 4th Amend.,<sup>180</sup> the new language has been upheld by the federal courts of appeal.<sup>181</sup>

#### 4. Length of surveillance

Orders for surveillance involving US persons may be approved for the period necessary to achieve its purpose or for 90 days, whichever is less, while an order targeted against a foreign power may extend for up to one year, and one targeted against an agent of a foreign power who is not a US person may be for no longer than 120 days. Extensions may be applied for under the same procedures as for the initial order.<sup>182</sup>

In amendments to FISA in 2008, special provisions were added for the issuance of FISC warrants for the surveillance of US persons living overseas, which may

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<sup>177</sup> 50 U.S.C. § 1804(a)

<sup>178</sup> 50 U.S.C. § 1805(i).

<sup>179</sup> The language 'significant purpose' was added by § 218 US PATRIOT Act in 2001. This broader language was upheld by the FISC Appellate Court in *In re Sealed Case*, No. 02-001, 310 F.3d 717 (USFIS App. 2002).

<sup>180</sup> *Mayfield v. United States*, 504 F.Supp.2d 1023 (D.Ore. 2007).

<sup>181</sup> *United States v. Duka*, 671 F.3d 329 (3d Cir. 2011).

<sup>182</sup> 50 U.S.C. § 1805(d)(1,2).

also be authorized for no longer than ninety days.<sup>183</sup> The FISC may also issue a joint authorization for surveillance both within and without the US.<sup>184</sup>

##### *5. Minimization requirements and other factors relating to execution*

‘Minimization’ procedures under FISA must be adopted by the Attorney General to the end of minimizing the acquisition and retention, and of preventing the dissemination of non-publicly available information concerning non-consenting US persons, ‘consistent with the need of the US to obtain, produce, and disseminate foreign intelligence information’. They must prohibit the dissemination of any information about a non-consenting US person ‘unless such person’s identity is necessary to understand foreign intelligence information or assess its importance’.<sup>185</sup>

If the government wants to intercept communications or conduct other FISA-related procedures in relation to foreigners living abroad, they must also engage in procedures to minimize conduct which affects US persons, including targeting a foreigner abroad, where the actual target would be a US person, whether living abroad or in the US. Such surveillance must in general comply with the 4th Amend. The FISC must approve these minimization measures.<sup>186</sup>

Unbeknownst to the public, the FISC, beginning in 2002 at the request of the administration of George W. Bush, began to authorize large-scale seizure of telecommunications data involving US persons and allowed free sharing of this information within the intelligence and law-enforcement communities. The so-called ‘Raw-Take’ Order of 22 July 2002 also relaxed the limits on sharing information about US persons with foreign governments.<sup>187</sup>

##### *6. FISA statistics*

From 1979 through 2008 there were more than 14,000 applications for FISA wiretaps and not one was denied through 2003. Between 1978 and 1995 there were more than 500 applications or extensions per year.<sup>188</sup> After 1995 the yearly number began to rise, reaching 932 in 2001, a high of 2,371 in 2007, and thereafter drop-

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<sup>183</sup> 50 U.S.C. § 1881b(a).

<sup>184</sup> 50 U.S.C. § 1881d.

<sup>185</sup> 50 U.S.C. § 1801(h).

<sup>186</sup> 50 U.S.C. § 1881a(b).

<sup>187</sup> *Savage, C./Poitras, L.*, How a Court Secretly Evolved, Extending U.S. Spies’ Reach, NYT, March 12, 2014, p. A1, <http://www.nytimes.com/2014/03/12/us/how-a-courts-secret-evolution-extended-spies-reach.html> (accessed April 2018).

<sup>188</sup> *Abrams, N.*, Anti-Terrorism and Criminal Enforcement, 3d ed., Thomson-West, St. Paul 2008, pp. 419–420.

ping.<sup>189</sup> In 2012 the FISA approved all but one of the 1,856 applications submitted to it.<sup>190</sup> The bulk of these warrants were sought by NSA and the FBI.<sup>191</sup>

## 7. Application of Fourth Amendment doctrine to wiretapping and bugging

### a) The ‘third party consent’ doctrine

Title III provides that it is not unlawful for state officials to intercept a confidential communication if a participant in the communication has given prior consent to the interception.<sup>192</sup> It is also not unlawful for a citizen, who is not working with law enforcement, to intercept or record a conversation to which the citizen is a party or where one of the parties has given their consent, unless such communication is intercepted for the purpose of committing any crime or civil wrong.<sup>193</sup>

Most states follow Title III in this respect, and some states even allow children to consent to police eavesdropping.<sup>194</sup> Some jurisdictions will also allow parents to ‘consent’ to police overhearing the confidential conversations of their minor children.<sup>195</sup> A minority of states, however, require a judicial order even when a participant in a telephone conversation consents, thus giving more protection than federal law.<sup>196</sup> Similarly, some states will not allow secret tape recording of conversations unless all parties to the conversation consent.<sup>197</sup>

Thus, when an arrested person allows a police officer to use his or her phone to exchange text messages with an unwitting criminal confederate, this would not normally fall within the prohibitions of US wiretap statutes.<sup>198</sup> The same is true if a

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<sup>189</sup> *Savage, C.*, Documents Released on U.S. Wiretapping Since Sept. 11 Terrorist Attacks, NYT, March 3, 2014, <http://www.nytimes.com/2014/03/03/us/politics/documents-released-on-us-wiretapping-since-sept-11-terrorist-attacks.html> (accessed April 2018).

<sup>190</sup> [http://epic.org/privacy/wiretap/stats/fisa\\_stats.html](http://epic.org/privacy/wiretap/stats/fisa_stats.html) (accessed April 2018).

<sup>191</sup> *Lichtblau, E./Schmidt, M.S.*, Other Agencies Clamor for Data N.S.A. Compiles, NYT, August 4, 2013, p. A1, <http://www.nytimes.com/2013/08/04/us/other-agencies-clamor-for-data-nsa-compiles.html> (accessed April 2018).

<sup>192</sup> 18 U.S.C. § 2511(2)(c).

<sup>193</sup> 18 U.S.C. § 2511(2)(d).

<sup>194</sup> *Malone v. State*, 541 S.E.2d 431 (Ga. 2000).

<sup>195</sup> *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998); *State v. Spencer*, 737 N.W.2d 124 (Iowa 2007); *State v. Whitner*, 732 S.E.2d 861 (S.C. 2012); *People v. Badalamenti*, 54 N.E.3d 32 (N.Y. 2016). Some states extend more protection, however, and do not allow parents to give vicarious consent for the overhearing and recording of their children’s conversations, see *Bishop v. State*, 526 S.E.2d 916 (Ga. App. 1999); *State v. Christensen*, 102 P.3d 789 (Wash. 2004).

<sup>196</sup> *State v. Allen*, 241 P.3d 1045 (Mont. 2010).

<sup>197</sup> *McDade v. State*, 154 So.3d 292 (Fla. 2014). However, criminalizing such recording in every case may violate the First Amendment protection of free speech, see *People v. Clark*, 6 N.E.3d 154 (Ill. 2014); *People v. Melongo*, 6 N.E.3d 120 (Ill. 2014).

<sup>198</sup> *Commonwealth v. Cruttenden*, 58 A.3d 95 (Pa. 2012).



citizen, using a speaker phone, allows the police to listen in to a conversation.<sup>199</sup> Some courts also allow police to answer a call to a lawfully seized cellular telephone, even without the consent of the owner, because the caller sacrificed any reasonable expectation that his or her call would remain private by not confirming the identity of the person who answered the phone.<sup>200</sup> The third party consent doctrine also applies to FISA intercepts.

#### b) Exception for exigent circumstances

An order need not be obtained, however, when the prosecutor, otherwise possessing the requisite probable cause required by Title III, determines that an 'emergency situation' exists that involves: (1) immediate danger of death or serious physical injury to any person; (2) conspiratorial activities threatening the national security interest; or (3) conspiratorial activities characteristic of organized crime. When this occurs, the prosecutor must, within 48 hours, get *post facto* authorization from a judge. If this is not obtained, the results of the interception are inadmissible in any legal proceeding as provided by the statutory exclusionary rule discussed below.<sup>201</sup>

Under FISA, the Attorney General may authorize the emergency employment of electronic surveillance if he/she gets retroactive approval of the FISC within seven days after the surveillance was authorized. In the event that such application for approval is denied or in any other case where the electronic surveillance is terminated and no order is issued approving the surveillance, the evidence may not be used.<sup>202</sup> After a congressional declaration of war, the president may also authorize interceptions involving US persons for fifteen days without a warrant.<sup>203</sup>

#### c) Exclusionary rules and other sanctions for violations of the wiretap laws

Title III empowers any person whose conversations were overheard to move to suppress their use if (1) the communication was unlawfully intercepted; (2) the order of authorization or approval under which it was intercepted is insufficient on its face; or (3) the interception was not made in conformity with the order of authorization or approval. The same is true for FISA.<sup>204</sup>

<sup>199</sup> *Commonwealth v. Spence*, 91 A.3d 44 (Pa. 2014).

<sup>200</sup> *State v. Gonzalez*, 898 A.2d 149 (Conn. 2006).

<sup>201</sup> 18 U.S.C. § 2518(7).

<sup>202</sup> 50 U.S.C. § 1805(e)(1). A seven-day emergency period is also allowed for the use of pen registers and trap-and-trace devices, see 50 U.S.C. § 1843.

<sup>203</sup> 50 U.S.C. § 1811. This also applies to pen registers and trap and trace devices, see 50 U.S.C. § 1845.

<sup>204</sup> 18 U.S.C. § 1806(c,e).

If the motion is granted, the contents of the intercepted communication or evidence derived therefrom (i.e. the ‘fruit of the poisonous tree’) are inadmissible in court. The prosecutor has a right to appeal a decision suppressing evidence within thirty days of the decision.<sup>205</sup>

Evidence derived from a wiretap that was not authorized by the federal or state attorney general or authorized delegates must be suppressed.<sup>206</sup> Fruits of illegal wiretaps may also not be used to impeach a testifying defendant, as may the fruits of a search made in violation of the 4th Amend.<sup>207</sup> Some courts have also held that there is no ‘good faith’ exception to the Title III exclusionary rule, unlike the 4th Amend. exclusionary rule. However, if US attorneys ‘in good faith’ secure a Title III order to investigate a catalogue crime, they may still use conversations intercepted to prove guilt of a non-catalogue crime, even if they are aware that they may discover such evidence. Thus, evidence of securities fraud, not a catalogue crime, would be admissible in a prosecution for securities fraud where the US attorney honestly told the judge issuing the order for ‘wire fraud’ that it was possible that evidence of security fraud might be discovered. In such a case, the US attorney was not using the wiretap in a deceptive manner to circumvent the law.<sup>208</sup>

Violations of provisions of Title III that were not ‘intended to play a central role’ in the regulatory scheme will not, however, necessarily lead to suppression of evidence otherwise legally gathered.<sup>209</sup> Examples are violations of the recordation and sealing requirements,<sup>210</sup> violation of the notice provision,<sup>211</sup> and violation of the minimization requirements. Recently, however, a federal appeals court has ruled that it constitutes a ‘core’ violation of Title III for a judge in one judicial district to order a wiretap in another district and that there is also no ‘good faith’ exception to exclusion in such cases.<sup>212</sup>

The 4th Amend. does not require exclusion of evidence gathered illegally by private persons who are not working with the police. This regime is different in relation to wiretaps, however, as a private person may violate Title III by intercepting conversations. The courts, are divided as to the extent the government may use evidence gathered through illegal wiretaps or buggings by private persons.

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<sup>205</sup> 18 U.S.C. § 2518(10).

<sup>206</sup> *United States v. Reyna*, 218 F.3d 1108 (9th Cir. 2000); *State v. Bruce*, 287 P.3d 919 (Kan. 2012).

<sup>207</sup> *People in re. A.W.*, 982 P.2d 842 (Colo. 1999).

<sup>208</sup> *United States v. Goffer*, 721 F.3d 113 (2d Cir. 2013).

<sup>209</sup> *United States v. Giordano*, 416 U.S. 505 (1974); *United States v. Chavez*, 416 U.S. 562 (1974).

<sup>210</sup> *United States v. Amanuel*, 615 F.3d 117 (2d Cir. 2010); *United States v. Ojeda Rios*, 495 U.S. 257 (1990).

<sup>211</sup> *People v. Rodriguez*, 970 N.E.2d 816 (N.Y. 2012); *United States v. Donovan*, 429 U.S. 413 (1977).

<sup>212</sup> *United States v. Glover*, 736 F.3d 509 (D.C.Cir. 2013).

Some courts say that if the government has ‘clean hands’ in the affair, the evidence may be used.<sup>213</sup> Some even allow evidence from private hackers whose activities the government has approved of after the fact.<sup>214</sup> Others will allow evidence if the private person inadvertently overhears a conversation.<sup>215</sup> Some states will exclude privately gathered evidence by applying state privacy laws and even the fruits gathered lawfully by the police after using the illegally intercepted conversations.<sup>216</sup> A minority of federal courts also reject the ‘clean hands’ doctrine and will exclude information gathered through illegal private wiretaps.<sup>217</sup> The victim of an unlawful interception of communications in violation of Title III also has a statutory right to bring a civil action against the government, and the court may impose administrative sanctions on the government as well.<sup>218</sup>

If the FISC refuses to approve an emergency wiretap, then no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a state, or political subdivision thereof, and no information concerning any US person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person.<sup>219</sup>

When evidence is gathered overseas, the US courts have developed a nuanced approach to whether such evidence can be used in trials taking place in the US in cases not deemed to be covered by FISA. In general, these cases revolve around interpretations of the 4th Amend. When the US participates in the search of a foreigner’s residence abroad, then the 4th Amend. is not applicable and the evidence may be used in US courts.<sup>220</sup>

If the US, however, is involved in a joint investigative operation with a foreign law enforcement agency and the target is a US person, then the 4th Amend. will be applicable. But in a case involving Danish wiretaps of a suspected American drug dealer in Denmark, a federal court held that if the foreign investigators followed

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<sup>213</sup> *United States v. Murdock*, 63 F.3d 1391 (6th Cir. 1995).

<sup>214</sup> *United States v. Jarrett*, 338 F.3d 339 (4th Cir. 2003) (a Turkish ‘unknown user’ case).

<sup>215</sup> *Adams v. Sumner*, 39 F.3d 933 (9th Cir. 1994) (switchboard operator at hotel overhears conversation).

<sup>216</sup> *State v. Faford*, 910 P.2d 447 (Wash. 1996).

<sup>217</sup> *Chandler v. Simpson*, 125 F.3d 1296 (9th Cir. 1997); *Berry v. Funk*, 146 F.3d 1003 (D.C.Cir. 1998); *United States v. Crabtree*, 565 F.3d 887 (4th Cir. 2009).

<sup>218</sup> 18 U.S.C. § 2520.

<sup>219</sup> 18 U.S.C. § 1805(e)(5).

<sup>220</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

their own laws, and they did not radically depart from American practices in a manner that would ‘shock the conscience’, then the evidence would be usable.<sup>221</sup> When the 4th Amend. is applicable to a search involving an American citizen abroad, courts are flexible in relation to the warrant requirement, because there is not always an ability to obtain a warrant abroad in such situations.<sup>222</sup>

When it comes to the interception of electronic communications, their acquisition from storage, the installation of pen registers, etc., the ECPA and the SCA provide for no exclusionary rules. And even if police ignore the minimal requirements for getting a court order in these cases, the federal courts have held that there is no provision for suing the officers who willfully violated the law.<sup>223</sup>

## B. Government access to stored communications

### 1. Introduction

The SCA was passed in 1986 to deal with the problems that arose when electronic communications began to replace wire communications. As was mentioned above, it is virtually impossible, without hacking into a computer, to intercept an email message simultaneously with its transmission. Email and voicemail are invariably stored with the Internet or telecommunications service provider immediately after they are sent and then downloaded by the intended recipient.

Thus, in a sense, one has entrusted these conversations to a third party, which under 4th Amend. analysis might mean there is no reasonable expectation of privacy in their contents. However, one does the same with a posted letter, the contents of which are protected by the 4th Amend. As we will see, the SCA gives these stored communications less protection than Title III does to simultaneously ‘intercepted’ communications but does not fully deprive them of 4th Amend. protection.

### 2. The Stored Communications Act (SCA)

For the government to access the content of stored voicemail or email messages, a search warrant is needed if the communication has been held in storage with the provider for 180 days or less, whereas a subpoena or court order without a showing of probable cause is sufficient if it has been held more than 180 days.<sup>224</sup>

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<sup>221</sup> *United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995).

<sup>222</sup> *In re Terrorist Bombings of U.S. Embassies in East Africa: US v. Odeh*, 552 F.3d 157 (2d. Cir. 2008); *United States v. Stokes*, 726 F.3d 880 (7th Cir. 2013).

<sup>223</sup> *Tucker v. Waddell*, 83 F.3d 688, 693 (4th Cir. 1996), cited in *Freiwald, S.*, op. cit. (n. 119), p. 59.

<sup>224</sup> 18 U.S.C. § 2703(a). According to the legislative history, Congress analogized the short-term storage of electronic contents to a safety-deposit box, long-term storage, on the other hand, to business records held by third parties, see *Freiwald, S.*, op. cit. (n. 119), p. 50.

The standard for such a subpoena or order is that ‘there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.’<sup>225</sup>

The federal government maintains, however, that the rules change if the recipient has actually accessed a message before the 180 days have elapsed. Once an email is opened, the government maintains, though this is not specified in the law, that it may access the content with a subpoena.<sup>226</sup> There is, however, disagreement among the federal courts on this ‘open and unopened’ communications distinction.<sup>227</sup> A congressional inquiry determined that cell phone carriers responded in 2011 to 1.3 million demands from law enforcement agencies for text messages and other information about subscribers.<sup>228</sup>

### 3. *Exclusionary rules and notice provisions*

Unlike Title III and FISA, the SCA contains no exclusionary rule to deter violations of the statute.<sup>229</sup> If the government or the service provider violates the provisions of the SCA, only civil or administrative remedies are available.<sup>230</sup> However, where the statute requires a search warrant (for conversations held less than 180 days), the 4th Amend. applies, and exclusion would be the result of a violation.<sup>231</sup> Unlike with the wiretap statutes, the SCA also explicitly excuses the government from providing notice to targets whose stored communications have been accessed.<sup>232</sup>

## C. Government access to communications metadata

### 1. *Introduction*

Since the 4th Amend. does not protect communications metadata, i.e. the ‘external’ or ‘envelope’ information regarding communications, such as the telephone

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<sup>225</sup> 18 U.S.C. § 2703(d).

<sup>226</sup> This interpretation is expressed in US DOJ training materials. *Freiwald, S.*, op. cit. (n. 119), p. 57.

<sup>227</sup> *Young, M.D.*, Electronic Surveillance in an Era of Modern Technology and Evolving Threats to National Security, 22 Stanford Law and Policy Review (2011) 26–27.

<sup>228</sup> *Sengupta, S.*, Courts Divided Over Searches of Cellphones, NYT, November 26, 2012, p. A1, <http://www.nytimes.com/2012/11/26/technology/legality-of-warrantless-cell-phone-searches-goes-to-courts-and-legislatures.html> (accessed April 2018).

<sup>229</sup> 18 U.S.C. § 2708.

<sup>230</sup> 18 U.S.C. §§ 2707, 2712.

<sup>231</sup> *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010).

<sup>232</sup> *Freiwald, S.*, op. cit. (n. 119), pp. 64–65.

numbers involved in confidential communications,<sup>233</sup> the 4th Amend. exclusionary rule plays no role in this area, and authorities do not need probable cause to access such information through the use of pen registers, trap and trace devices (for contemporaneous interception), or court orders, subpoenas, or other requests for stored records of this information. The rules pertaining to this area are contained, however, in the ‘Pen Registers Act’ section of the ECPA.

## 2. *The Pen Registers Act*

A ‘pen register’ is defined as a ‘device or process which records or decodes dialing, routing, addressing, or signalling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted’. A ‘trap and trace device’ is defined as ‘device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication ...’. Both definitions exclude the content of communications.<sup>234</sup>

Federal courts have interpreted these definitions to also include the ‘envelope’ data related to email and Internet surfing, i.e. the ‘uniform resource locators’ (URLs) of websites a person visits or the email addresses involved in electronic communications.<sup>235</sup> The majority of courts have held that, as with telephone numbers dialled, a person has no reasonable expectation of privacy in the websites they visit.<sup>236</sup> Nearly all courts have also held that Internet subscriber information is not protected by the 4th Amend.<sup>237</sup>

A pen register or trap and trace order can be issued by a federal judge and must state (1) the person in whose name the telephone line to which the device will be attached is listed, (2) the identity of the target of the investigation, (3) the telephone number and physical location of the telephone line to which the device will be attached, and (4) a statement of the offence to which the telephone numbers likely to

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<sup>233</sup> See above, citing *United States v. New York Telephone Co.*, 434 U.S. 159 (1977); *Smith v. Maryland*, 442 U.S. 735.

<sup>234</sup> 18 U.S.C. § 3127(3, 4).

<sup>235</sup> *In re Application of the United States for Order Authorizing Installation and Use of Pen Register and Trap & Trace Device on E-Mail Account*, 416 F.Supp.2d 13 (D.D.C. 2006).

<sup>236</sup> *Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001); *United States v. Forrester*, 512 F.3d 500 (9th Cir. 2008); *State v. Mello*, 27 A.3d 771 (N.H. 2011).

<sup>237</sup> *United States v. Perrine*, 518 F.3d 1196, 1204–1205 (10th Cir. 2008) (surveying cases); *United States v. Bynum*, 604 F.3d 161, 164 (4th Cir. 2010), cited in: *McAllister, M.*, The Fourth Amendment and New Technologies: The Misapplication of Analogical Reasoning, 36 Southern Illinois University Law Journal (2012) 475, 479.

be obtained relate.<sup>238</sup> The pen/trap order is good for sixty days but may be renewed.<sup>239</sup> A pen/trap order may be issued for any crime, unlike a wiretap, and there is no provision to notify those whose communications have been identified by a pen or a trap.<sup>240</sup>

– *Judicial control*

Under the Pen Registers Act, the court makes no independent findings of the basis for the order but need only find that ‘the prosecuting officer has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.’<sup>241</sup> It is not clear whether courts are even supposed to review pen register applications. In a report, the Senate explained that the ‘provision does not envision an independent judicial review of whether the application meets the relevance standard, rather the court needs only to review the completeness of the certification submitted’.<sup>242</sup>

Violations of the Pen Registers Act do not lead to exclusion of the evidence and no provision is made for any civil suits by those whose privacy has been violated. The sanctions for violations are fines and imprisonment for less than one year.<sup>243</sup>

A number of states, however, provide more protection than the 4th Amend. and the Pen Register Act and require probable cause or judicial authorization under their statutes.<sup>244</sup> Some states also recognize an expectation of privacy under their state constitutions in relation to websites visited.<sup>245</sup>

The FBI has used special software and hardware called ‘Carnivore’ to collect information from email messages travelling through the email server of an Internet service provider, especially if the provider is unwilling to comply with a court

<sup>238</sup> 18 U.S.C. § 3123(b).

<sup>239</sup> 18 U.S.C. § 3123(c).

<sup>240</sup> 18 U.S.C. § 3123(d) prohibits service providers from notifying those whose phones have been targeted.

<sup>241</sup> 18 U.S.C. § 3123(a)(1).

<sup>242</sup> *Freiwald, S.*, op. cit. (n. 119), p. 62.

<sup>243</sup> 18 U.S.C. § 3121(d). Apparently, no one has ever been charged under this section. *Freiwald, S.*, op. cit. (n. 119), pp. 64–65.

<sup>244</sup> *State v. Thompson*, 760 P.2d 1162 (Idaho 1988); *People v. Sporleder*, 666 P.2d 135 (Colo. 1983); *State v. Rothman*, 779 P.2d 1 (Haw. 1989); *State v. Hunt*, 450 A.2d 952 (N.J. 1982); *Commonwealth v. Melilli*, 555 A.2d 1254 (Pa. 1989); *Richardson v. State*, 865 S.W.2d 944 (Tex. Crim. App. 1993); *State v. Gunwall*, 720 P.2d 808 (Wash. 1986).

<sup>245</sup> *State v. Reid*, 945 A.2d 26 (N.J. 2008). One court said there was a difference between a website, such as that of a newspaper, and an URL, which could reveal which article the person read on the website. *Doe v. Prosecutor Marion County, Indiana*, 566 F.Supp.2d 862, 880 (S.D. Ind. 2008), discussed in *McAllister, M.*, The Fourth Amendment and New Technologies: The Misapplication of Analogical Reasoning, 36 Southern Illinois University Law Journal (2012) 475, 479–840.

order. Carnivore scans the ‘smallest subset’ of information from incoming and outgoing email messages and duplicates it, while letting the stream continue to flow. Extraneous information will remain only temporarily in random access memory and will not be fixed in a stable, recorded format. The FBI maintained already in 2000 that section 18 of the United States Code (U.S.C.) and § 3121 of the pen register and trap-and-trace law and wiretap law authorize the use of Carnivore.<sup>246</sup> Since passage of the Patriot Act in 2001, agents may now instal Carnivore by simply obtaining an order from a US or state attorney general – without going to a judge. After-the-fact judicial oversight is still required. Voices in the literature have pointed out that it is incorrect to analogize a telephone number dialled with modern devices such a Carnivore, which collect all exterior data associated with the visiting of a website.<sup>247</sup>

### 3. *Statistics and transparency*

The government is also not obligated to publish each year the number of pen registers or trap and trace devices used, as it is with wiretaps. There is a vague requirement to inform Congress,<sup>248</sup> but the figures, when and if conveyed to Congress, are seldom made public. A leak, however, did reveal some data for the years 1999–2003. In 1999, there were 6,502 orders; in 2000, 6,079; in 2001, 5,683; and in 2002, 5,311. Then, there was a dramatic rise in 2003 with 7,258 pen/trap orders. The 2003 amount represents an 11.6 per cent increase in federal use of pen/trap orders over the five-year period that began in 1999, and, more dramatically, a 29.9 per cent increase from the preceding year. Federal use of wiretaps declined over a similar period between 1999 and 2006.<sup>249</sup>

In response to a request under the Freedom of Information Act, the government for the first time revealed how often it requested pen registers or trap and trace devices from the FISC. There were only two such orders in the first half of 2001, but by that time in 2002, the number had risen to twenty-nine. By late 2004 the number had risen to 184 but subsequently fell and has not reached 100 since.<sup>250</sup>

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<sup>246</sup> 69 U.S.L.W. 2053 (2000).

<sup>247</sup> *Freiwald, S.*, op. cit. (n. 119), p. 61.

<sup>248</sup> 18 U.S.C. § 3126.

<sup>249</sup> *Schwartz, P.M.*, op. cit. (n. 163), p. 297.

<sup>250</sup> *Savage, C.*, Documents Released on U.S. Wiretapping Since Sept. 11 Terrorist Attacks, NYT, March 3, 2014, <http://www.nytimes.com/2014/03/03/us/politics/documents-released-on-us-wiretapping-since-sept-11-terrorist-attacks.html> (accessed April 2018).



4. *Exceptions to the subpoena requirement for national security:  
National Security Letters (NSL)*

a) Section 215 of the Patriot Act

The federal government's ability to use National Security Letters (NSLs) to force private businesses to turn over records of transactions with citizens, whether it be telephone and email records, financial records, or credit records, without the judicial control required for subpoenas, was greatly expanded by § 215 of the Patriot Act, passed in a hurry after the attacks of 9/11 in October of 2001.<sup>251</sup> The Patriot Act amended FISA to authorize not only the seizure of 'business records' but also 'any tangible thing from any third party record holder (including books, records, papers, documents, and other items', and lowered the standard for gathering such items from the requirement of alleging 'specific and articulable facts' relating to terrorist activity to a mere assertion that the items are 'relevant to the investigation' of terrorism and necessary to 'protect against international terrorism or clandestine intelligence activities'.

FISA also includes provisions for the issuance of NSLs based on an assertion that 'the tangible things sought are relevant to an authorized investigation' under the terms of FISA,<sup>252</sup> but they may not be issued for records of US persons for items which would be protected under the First Amendment of the US Constitution protecting freedom of speech and association.<sup>253</sup> The law also originally provided that anyone receiving a NSL was prohibited from disclosing 'to any other person that the [FBI] has sought or obtained tangible things under this section'. After law-suits challenged the anti-disclosure provision,<sup>254</sup> the law was amended to require the government to assert in relation to a particular NSL that disclosure would endanger national security.<sup>255</sup>

b) Extent of use of NSLs

The FBI issued around 8,500 NSLs in 2000, with the number increasing to 39,000 in 2003, 56,000 in 2004, and 47,000 in 2005. The overwhelming majority sought telephone toll billing records, subscriber information (telephone or email), or electronic communication transactional records under the SCA. The reason for the increase was attributed to the lessened suspicion required for issuing the NSL. The FBI claimed the most common use of the NSLs was to support FISA applica-

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<sup>251</sup> Pub. L. 107-296 (2001). § 215 is now codified in 18 U.S.C. § 2709 of the SCA.

<sup>252</sup> 50 U.S.C. § 1861(b)(2)(A).

<sup>253</sup> 50 U.S.C. § 1861(a)(2)(A).

<sup>254</sup> *John Doe Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008).

<sup>255</sup> 50 U.S.C. § 1861(f)(C); 18 U.S.C. § 2709(c)(1).

tions for electronic surveillance, physical searches, or pen register/trap and trace orders.

NSLs were used to get library and bookstore records, until an uproar from library professionals got that section removed from § 215 in amendments in 2006. It was also used with sellers and rentals of scuba diving equipment when government agents feared terrorists might swim ashore in California to wreak havoc.<sup>256</sup>

Of the 143,074 NSLs issued from 2003–2005, approximately half concerned US citizens. None of the information obtained by NSLs was required to be destroyed even after the information was determined to concern innocent Americans. During the same period, 34,000 law enforcement and intelligence agents had unrestricted access to phone records collected through NSLs. Subscriber information in relation to 11,100 different phone numbers were turned over to the FBI in response to only nine NSLs. Despite the huge amount of information gathered, the FBI only referred forty-three cases to prosecutors, nineteen of which involved fraud, seventeen immigration violations, and seventeen money laundering. Only one referral resulted in a terrorism-related conviction, for material support.<sup>257</sup>

In 2012, the government issued more than 1,850 requests under FISA and 15,000 NSLs. Between 2008 and 2012, only two of 8,591 applications under FISA were rejected.<sup>258</sup>

#### **D. The National Security Agency's worldwide electronic surveillance and data-collection operations**

##### *1. The National Security Agency (NSA)*

The National Security Agency (NSA) is the largest US intelligence agency with the largest budget. It is responsible for collecting and analysing foreign intelligence. The Armed Services Security Agency was created in 1949 and was rebaptized as the NSA in 1951. Its headquarters is located in Fort George G. Meade in Maryland, not far from Baltimore.

NSA has a huge new storage center for data, a one million square-foot fortress in the little city of Bluffdale, Utah. Since 2006, NSA has employed 15,986 military

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<sup>256</sup> Moss, M./Fessenden, F., New Tools for Domestic Spying, and Qualms, NYT, December 10, 2002, pp. A1, A18.

<sup>257</sup> Wells, D.L., National Security Letters: Why Reform is Necessary, 2012 Cardozo Law Review de novo 216, 232.

<sup>258</sup> Miller, C.C., Secret Court Ruling Put Tech Companies in Data Bind, NYT, June 14, 2013, p. A1, <http://www.nytimes.com/2013/06/14/technology/secret-court-ruling-put-tech-companies-in-data-bind.html> (accessed April 2018).

personnel and 19,335 civilians with a yearly budget of US\$6,115,000,000.<sup>259</sup> NSA has also created intercept stations across the country and helped build one of the world's fastest computers to crack the codes that protect information.<sup>260</sup>

## 2. *The NSA's secret wiretapping operations (2001–2008)*

In the wake of the 9/11 attacks, President George W. Bush authorized the NSA to conduct warrantless wiretapping of telephone and email communications where one party to the communication was located outside the US and a participant in 'the call was reasonably believed to be a member or agent of al Qaeda or an affiliated terrorist organization.' This secret practice, which circumvented FISA because it involved tapping of US persons, was revealed in 2005 by the New York Times and other newspapers and originally caused an uproar in the public and in Congress.<sup>261</sup>

In this programme, NSA accumulated the phone records of millions of Americans in order to conduct 'link analysis', another term for event-driven data mining, to sift through the numbers to find those that fit certain profiles, which would then be cross-checked with other intelligence databases.<sup>262</sup> The secret NSA wiretaps were finally evaluated by the FISC in January of 2007, and the practice earlier conducted without the knowledge of FISC got its blessing in a secret opinion.<sup>263</sup>

Congress finally yielded to pressure from the executive branch and enacted the FISA Amendments Act of 2008, which established broader authority for intelligence collection overseas than originally provided in FISA and created a new framework for targeting the communications of non-US persons located abroad. Under the new provision, the government is not required to demonstrate probable cause that the target of the electronic surveillance is a foreign power or its agent,

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<sup>259</sup> Poitras, L./Rosenbach, M./Schmid, F./Stark, H./Stock, J., *Angriff aus Amerika*, Der Spiegel, July 1, 2013, 76, 82

<sup>260</sup> Risen, J./Lichtblau, E., *How the U.S. Uses Technology to Mine More Data More Quickly*, NYT, June 9, 2013, p. A1, <http://www.nytimes.com/2013/06/09/us/revelations-give-look-at-spy-agencys-wider-reach.html> (accessed April 2018).

<sup>261</sup> This program was called "Stellarwind." Savage, C., *Declassified Report Shows Doubts About Value of N.S.A.'s Warrantless Spying*, NYT, April 25, 2015, p. A12, <http://www.nytimes.com/2015/04/25/us/politics/value-of-nsa-warrantless-spying-is-doubt-ed-in-declassified-reports.html> (accessed April 2018)

<sup>262</sup> Slobogin, C., *Government Data Mining and the Fourth Amendment*, 75 *University of Chicago Law Review* (2008) 317, 338–339; Ross, J.E., *The emergence of foreign intelligence investigations as alternatives to the criminal process: a view of American counter-terrorism surveillance through German lenses*, in: Ross, J.E./Thaman, S.C. (eds.), *Comparative Criminal Procedure*, Elgar, Cheltenham, UK et al. 2016, pp. 491–492.

<sup>263</sup> *Clapper v. Amnesty International*, U.S.A., 133 S.Ct. 1138 (2013).

nor does it require the government to specify the nature and location of each of the particular facilities or places at which the surveillance will occur.<sup>264</sup>

Under this new regime, electronic surveillance is freed of FISA constraints if the surveillance is ‘directed at a person reasonably believed to be located outside of the United States’. Thus, this telecommunications surveillance can include communications with a US person as long as the surveillance itself is not ‘directed at’ that person.<sup>265</sup>

It is also important that Section 206 of Patriot Act provided for roving wiretaps under FISA to include not only any telephones a ‘foreign agent’ uses. The order need not identify any particular provider and the facility to be monitored may be defined not as a particular telephone line but as any international gateway or switching station through which calls of a targeted organization, such as al Qaeda, are believed to pass. Thus, the NSA is empowered to literally vacuum up all telecommunications passing through international gateways and store them for future analysis.<sup>266</sup>

### 3. The NSA ‘Prism’ programme and the revelations of 2013

#### a) ‘Prism’ and programmes aimed at collecting information on foreigners

In the wake of the revelations made by Edward Snowden to the British newspaper *The Guardian* in June of 2013, officials in the administration of President Barack Obama admitted that NSA has been secretly collecting information on foreigners overseas for nearly six years. The programme is called ‘Prism’ and relies on the nation’s largest Internet companies to supply the NSA with information in relation to national security threats. It appears that the surveillance has gone beyond what was done in the administration of George W. Bush. The Internet surveillance programme employs NSLs authorized by FISA to collect data from online providers including email, chat services, videos, photos, stored data, file transfers, video conferencing, and log-ins. The Prism programme grew out of NSA’s desire to take advantage of the use of social media in its surveillance programmes. Although all three branches of government supported the programme in relation to gathering communications metadata, Prism appears to be eavesdropping on the contents of communications of foreigners, not just the ‘envelope’ material. The government asserts that ‘Prism’ has been authorized by the FISC and comports with the FISA blanket surveillance of foreigners abroad without individualized

<sup>264</sup> 50 U.S.C. § 1881a. *Clapper*, 133 S.Ct. at 1144.

<sup>265</sup> *Schwartz, P.M.*, op. cit. (n. 163), p. 308.

<sup>266</sup> *Ross, J.E.*, op. cit. (n. 262), p. 486.

warrants even if the interception takes place on American soil. The emails and phones of US persons can be swept into the database without an individualized court order when they communicate with people overseas.<sup>267</sup>

Besides capturing communications metadata, the NSA was also using its unlimited powers under FISA to wiretap and bug ‘foreign agents’ to monitor the offices of the European Union (EU) and many embassies and diplomatic missions in New York and Washington, including those of France, Italy, Greece, South Korea, and Turkey. The monitoring included wiretaps, bugs, the use of antennas, and even tapping into the EU’s computer network and copying everything on computer hard drives. NSA also apparently secretly eavesdropped on the Justus Lipsius Building in Brussels, where the EU member nations have offices.<sup>268</sup> Private communications of the presidents of Mexico and Brazil were also intercepted.<sup>269</sup> Secret documents have revealed more than 1,000 targets of American and British surveillance in recent years, including the office of Israeli Prime Minister Ehud Olmert, heads of international aid organizations, foreign energy companies, and Joaquin Almunia, Vice-President of the European Commission, who was involved in antitrust battles with American technology businesses.<sup>270</sup> President Obama has claimed that he was unaware of at least one programme, ‘Head of State Collection’, which raised a special stink when it was revealed that the cell phone of German Chancellor Angela Merkel had been routinely tapped.<sup>271</sup>

This programme, called ‘Boundless Informant’, intercepts in real time all telephone data going in and out of the countries affected. For instance, every month NSA stores the data from around one-half billion communications from Germany, which amounts to the metadata of around fifteen million telephone conversations and ten million Internet connections each day. The programme spares the US’s

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<sup>267</sup> *Savage, C./Wyatt, E./Baker, P.*, U.S. Says It Gathers On-Line Data Abroad, NYT, June 7, 2013, p. A1, <http://www.nytimes.com/2013/06/07/us/nsa-verizon-calls.html> (accessed April 2018).

<sup>268</sup> *Castle, S./Schmitt, E.*, Europeans Voice Anger Over Reports of Spying by U.S. on Its Allies, NYT, July 1, 2013, p. A9, <https://www.nytimes.com/2013/07/01/world/europe/europeans-voice-anger-over-reports-of-spying-by-us-on-its-allies.html> (accessed April 2018); *Poitras, L./Rosenbach, M./Stark, H.*, Codename „Apalachee“, Der Spiegel, August 26, 2013, pp. 85–89.

<sup>269</sup> Associated Press, N.S.A. Said to Have Spied on Leaders of Brazil and Mexico, NYT, September 2, 2013, <https://www.nytimes.com/2013/09/03/world/americas/brazil-angered-over-report-nsa-spied-on-president.html> (accessed April 2018).

<sup>270</sup> *Glanz, J./Lehren, A.W.*, N.S.A. Dragnet Included Allies, Aid Groups and Business Elites, NYT, December 20, 2013, <http://www.nytimes.com/2013/12/21/world/nsa-drag-net-included-allies-aid-groups-and-business-elite.html> (accessed April 2018).

<sup>271</sup> *Wilson, S./Gearan, A.*, Obama didn’t know about surveillance of U.S.-allied world leaders until summer, officials say, Wash. Post, October 29, 2013, [http://www.washingtonpost.com/politics/obama-didnt-know-about-surveillance-of-us-allied-world-leaders-until-summer-officials-say/2013/10/28/0cbacefa-4009-11e3-a751-f032898f2dbc\\_story.html](http://www.washingtonpost.com/politics/obama-didnt-know-about-surveillance-of-us-allied-world-leaders-until-summer-officials-say/2013/10/28/0cbacefa-4009-11e3-a751-f032898f2dbc_story.html) (accessed April 2018).

‘good friends,’ the United Kingdom, Australia, Canada, and New Zealand.<sup>272</sup> For example, in March 2013, 97 billion pieces of data were collected worldwide, about 14 per cent from Iran, much from Pakistan, and about 3 per cent from inside the US.<sup>273</sup>

NSA, which currently touches about 1.6 per cent of all Internet activity on a daily basis, according to its director Keith Alexander, wanted to radically expand its surveillance of incoming email in order to stop cyberattacks. It wanted to latch into the giant ‘data pipes’, which serve the biggest email providers and scour all emails for indications that they might contain viruses (‘malware’) or other means of cyberattack. However, the revelations of Snowden turned Congress against this idea, for fear that this broadening of its surveillance will be used against US citizens.<sup>274</sup>

#### b) The gathering of information on US persons

During the Obama Administration, Attorney General Eric Holder advised the NSA that the conversations of US persons could be preserved if NSA agents believe they contain information on a ‘threat of serious harm to life or property’ or shed light on technical issues like encryption or vulnerability to cyberattacks. Current and former NSA officials acknowledge that ‘incidental’ collection of Americans’ communications occurs more often today than in the past because of the proliferation of cell phones and email, which can make it harder to determine a person’s identity and location.<sup>275</sup>

Even before the revelation of the extent of the secret NSA operations by Snowden, the Obama administration revealed it had obtained the metadata of more than twenty telephone lines used by Associated Press journalists, including their home and cell phones to investigate so-called ‘leaks’ of information relating to national security issues. The Obama security state has pursued leakers of secret information much more vigorously than have previous administrations.<sup>276</sup>

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<sup>272</sup> *Poitras, L./Rosenbach, M./Schmid, F./Stark, H./Stock, J.*, op. cit. (n. 259), pp. 77–78.

<sup>273</sup> *Risen, J./Lichtblau, E.*, How the U.S. Uses Technology to Mine More Data More Quickly, NYT, June 9, 2013, p. A1, <http://www.nytimes.com/2013/06/09/us/revelations-give-look-at-spy-agencys-wider-reach.html> (accessed April 2018).

<sup>274</sup> *Sanger, D.E.*, N.S.A. Leaks Make Plan for Cyberdefense Unlikely, NYT, August 13, 2013, p. A6, <http://www.nytimes.com/2013/08/13/us/nsa-leaks-make-plan-for-cyberdefence-unlikely.html> (accessed April 2018).

<sup>275</sup> *Shane, S.*, Documents Detail Restrictions on N.S.A. Surveillance, NYT, June 21, 2013, p. A9, <http://www.nytimes.com/2013/06/21/us/politics/documents-detail-nsa-surveillance-rules.html?ref=worldShane> (accessed April 2018).

<sup>276</sup> *Savage, C./Kaufman, L.*, Phone Records of Journalists Seized by U.S., NYT, May 14, 2013, p. A1, <http://www.nytimes.com/2013/05/14/us/phone-records-of-journalists-of-the-associated-press-seized-by-us.html> (accessed April 2018).

In more than a dozen classified rulings, the FISC has created a secret body of law giving the NSA the power to amass vast collections of data on Americans while pursuing not only terrorism suspects but also people possibly involved in nuclear proliferation, espionage, and cyberattacks, officials say. The rulings, some nearly 100 pages long, reveal that the court has taken on a much more expansive role by regularly assessing broad constitutional questions and establishing important judicial precedents, with almost no public scrutiny.

No longer limited to ruling on wiretaps, the FISC, since the 2008 amendments to FISA, has become the ultimate arbiter on surveillance issues. In one important case, the FISC employed the 'special needs' doctrine to validate the collection of enormous volumes of communications metadata without probable cause, reasonable suspicion, or a warrant requirement. To actually access the content of the communications, however, they would have to find a justification for a FISA interception. Thus, one official says, the 'huge pond of data' can be created without individualized suspicion based on 'special needs' but you have to establish a reason to 'stick your pole in and start fishing'. An example can be seen in one recent FISC case, where intelligence officials were able to get access to an email attachment sent within the United States because they said they were worried that the email contained evidence relating to Iran's nuclear programme because 'weapons of mass destruction' are now considered to be 'foreign intelligence' within the meaning of FISA.<sup>277</sup> In an opinion of 29 August 2013, the FISC again reaffirmed the constitutionality of the massive collection and storage of all telephone metadata of US citizens.<sup>278</sup>

Despite the relatively compliant attitude of the FISC to requests by the NSA, an internal audit leaked to the press showed that NSA violated the rules on surveillance at least 2,776 times in a one-year period. The NSA tried, after the leak, to reassure the public that only 872 of the violations involved US persons and the rest related to 'roamers' or foreigners who, while being subject to long-term tapping, came to the US.<sup>279</sup>

In a secret 2009 FISC decision recently made public, the NSA was chastised for misleading the court on the criteria it used for mining the five year reservoir of all telephone calls made in the US that it maintains. It claimed that it only checked each in- or out-going call with an 'alert list' of thousands of suspected terrorists, yet it was later revealed that only 10 per cent of the 17,800 numbers on the 'alert

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<sup>277</sup> *Savage, C./Wyatt, E./Baker, P.*, op. cit. (n. 267).

<sup>278</sup> *Savage, C.*, Extended Ruling by Secret Court Backs Collection of Phone Data, NYT, September 18, 2013, p. A1, <http://www.nytimes.com/2013/09/18/us/opinion-by-secret-court-calls-collection-of-phone-data-legal.html?ref=usSavage> (accessed April 2018).

<sup>279</sup> *Savage, C.*, N.S.A. Often Broke Rules on Privacy, Audit Shows, NYT, August 16, 2013, p. A12, <http://www.nytimes.com/2013/08/16/us/nsa-often-broke-rules-on-privacy-audit-shows.html> (accessed April 2018).

list' were actually related to suspected terrorism.<sup>280</sup> In another FISC opinion in 2011, the reporting judge rebuked the NSA for repeatedly misleading the court as to how NSA's use of the massive reservoir of metadata, the capture of which the FISC had earlier authorized, violated the 4th Amend. Apparently the terms used to query the data were much broader than those authorized and did not minimize the gathering of communications with purely domestic non-security related content.<sup>281</sup>

The FISC has also supported the 'Mosaic' theory of evidence and has indicated that, while individual pieces of data may not appear 'relevant' to a terrorism investigation, the total picture that the bits of data create may in fact be relevant.<sup>282</sup> The compliant stance of the FISC in rubber stamping the NSA's massive spy efforts may be attributed to the fact that Chief Justice of the USSC, John Roberts, has appointed ten of the eleven judges, all of whom were Republican nominees and six of whom were former executive department employees, usually federal prosecutors.<sup>283</sup>

On 18 November 2013, the USSC declined to review an order of the FISC requiring telecommunications giant Verizon to turn over to NSA all communications metadata relating to telephone calls by US citizens abroad pursuant to NSA's bulk collection efforts revealed by Edward Snowden.<sup>284</sup> On the other hand, at least one federal court has ruled that the NSC programme is likely illegal.<sup>285</sup>

In 2015, however, the U.S. Court of Appeals for the Second Circuit ruled that the mass gathering of telephone data by the NSA was illegal because Section 15 of the Patriot Act could not be interpreted to allow it.<sup>286</sup> Two months later, however, the FISC reauthorized NSA's bulk collection of Americans' domestic phone calls.<sup>287</sup>

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<sup>280</sup> *Shane, S.*, Court Upbraided N.S.A. On Its Use of Call-Log Data, NYT, September 11, 2013, p. A14, <http://www.nytimes.com/2013/09/11/us/court-upbraided-nsa-on-its-use-of-call-log-data.html> (accessed April 2018).

<sup>281</sup> *Savage, Ch./Shane, S.*, Secret Court Rebuked N.S.A. on Surveillance, NYT, August 22, 2013, p. A1, <http://www.nytimes.com/2013/08/22/us/2011-ruling-found-an-nsa-program-unconstitutional.html> (accessed April 2018).

<sup>282</sup> *Lichtblau, E.*, In Secret, Court Vastly Widens N.S.A. Powers, NYT, July 7, 2013, p. A1, <http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html> (accessed April 2018).

<sup>283</sup> *Savage, C.*, Roberts' Picks Reshaping Secret Surveillance Court", NYT, July 26, 2013, p. A1, <http://www.nytimes.com/2013/07/26/us/politics/robertss-picks-reshaping-secret-surveillance-court.html> (accessed April 2018).

<sup>284</sup> *In re Elec. Privacy Info. Ctr.*, 134 S.Ct. 638 (2013).

<sup>285</sup> *Klayman v. Obama*, 957 F.Supp.2d 1 (D.D.C. 2013).

<sup>286</sup> *Savage, C./Weisman, J.*, N.S.A. Collection of Bulk Call Data Is Ruled Illegal, NYT, May 8, 2015, p. A1, <http://www.nytimes.com/2015/05/08/us/nsa-phone-records-collection-ruled-illegal-by-appeals-court.html> (accessed April 2018).

<sup>287</sup> *Savage C.*, Surveillance Court Rules That N.S.A. Can Resume Bulk Data Collection, NYT, July 1, 2015, p. A19, <http://www.nytimes.com/2015/07/01/us/politics/fisa-surveillance-court-rules-nsa-can-resume-bulk-data-collection.html> (accessed April 2018).



In 2015, as well, Congress reacted to the NSA's mass collection of data by stripping the agency of the power to itself store bulk telephone metadata. The service providers will now hold the bulk phone records – logs of calls placed from one number to another and the time and the duration of those contacts but not the content of what was said. A new kind of court order will permit the government to swiftly analyse them. The 'USA Freedom Act', as the legislation was called, also requires declassification of important opinions of the FISC and will allow *amicus curiae* and other private parties to sometimes argue before the court.<sup>288</sup>

At the same time Congress imposed these limitations, however, it became known, also through documents revealed by *Snowden*, that the Obama administration, in mid-2012, began permitting the NSA to begin hunting on Internet cables, without a warrant, and on American soil, for data linked to computer intrusions originating abroad – including traffic that flows to suspicious Internet addresses or contains malware. The NSA also sought permission to target hackers even when it could not establish any links to foreign powers.<sup>289</sup> These disclosures came at a time of unprecedented cyberattacks on American financial institutions, businesses, and government agencies, and as we all now know, later on the Democratic National Committee, by Russia, to try to influence the 2016 presidential election. The ultimate embarrassment for the NSA, however, has been the fact that its own codes, used to hack into foreign computer systems for purposes of espionage and counterterrorism have been stolen, either through (perhaps Russian) hackers or due to a security breach by an NSA official. These codes have already been used by the so-called 'Shadow Brokers' to shut down millions of computers through the use of 'ransomware' and to wreak havoc, as an example, in hospital systems in Pennsylvania, Britain, and Indonesia.<sup>290</sup>

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<sup>288</sup> *Steinhauer, J./Weisman, J.*, U.S. Surveillance in Place since 9/11 Is Sharply Limited, NYT, June 3, 2015, p. A1, <http://www.nytimes.com/2015/06/03/us/politics/senate-surveillance-bill-passes-hurdle-but-showdown-looms.html> (accessed April 2018).

<sup>289</sup> *Savage, C./Angwin, J./Larson, J./Moltke, H.*, Hunting for Hackers, U.S. Secretly Expands Internet Spying at U.S. Border, NYT, June 5, 2015, p. A1, <http://www.nytimes.com/2015/06/05/us/hunting-for-hackers-nsa-secretly-expands-internet-spying-at-us-border.html> (accessed April 2018).

<sup>290</sup> *Shane, S./Pearlroth, N./Sanger, D.E.*, Security Breach and Spilled Secrets Have Shaken the N.S.A. to Its Core, NYT, November 12, 2017, <https://www.nytimes.com/2017/11/12/us/nsa-shadow-brokers.html> (accessed April 2018).

## **E. The cooperation of communications service providers in the implementation of the Law**

### *1. The Communications Assistance for Law Enforcement Act (CALEA)*

CALEA, passed in 1994,<sup>291</sup> requires telecommunications providers to ensure that their facilities are capable of ‘expeditiously isolating and enabling the government, pursuant to a court order or other lawful authorization, to intercept, to the exclusion of any other communications, all wire and electronic communications’ to or from a subscriber and to access call-identifying information that is reasonably available to the service provider, before, during, or immediately after the transmission of a communication. These provisions do not, however, expressly include, in relation to pen registers and trap and trace devices, information that may disclose the physical location of the customer other than what can be determined from the telephone number.<sup>292</sup>

At one time the government sought to compel telecommunications providers to instal a so-called ‘clipper chip’, which would enable the government to decipher encrypted texts, but, following pressure from civil liberties organizations, this idea was shelved and CALEA specifically provides that telecommunications carriers ‘shall not be responsible for decrypting, or ensuring the government’s ability to decrypt, any communication encrypted by a subscriber or customer, unless the encryption was provided by the carrier and the carrier possesses the information necessary to decrypt the communication’.<sup>293</sup>

CALEA also requires telecommunications providers to expand their capacity for allowing wiretaps, trap and trace and pen register devices, and other interception modalities to accommodate law enforcement requirements and to inform the government about the capacity they have achieved.<sup>294</sup> To accommodate the demands of CALEA, the government was authorized to reimburse telecommunications carriers for reasonable expenses that were incurred before 1 January 1995, but such reimbursement now is discretionary.<sup>295</sup> In 2005, the Federal Communications Commission (FCC) extended its interpretation of CALEA and required non-commercial Internet providers such as universities, schools, and libraries to aid the government in wiretapping and data collection, and extended the duties to Voice over Internet telephone services, such as Vonage and Skype.<sup>296</sup>

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<sup>291</sup> Pub. L. No. 103-414, 108 Stat. 4279, codified at 47 USC §§ 1001–1010.

<sup>292</sup> 47 U.S.C. § 1002(a).

<sup>293</sup> 47 U.S.C. § 1002(a)(3).

<sup>294</sup> 47 U.S.C. § 1003.

<sup>295</sup> 47 U.S.C. § 1008.

<sup>296</sup> *Palfrey, J.*, *The Public and the Private at the United States Border with Cyberspace*, 78 *Mississippi Law Journal* (2008) 241, 253.

If a court authorizing an interception or pen/trap order under ECPA, FISA, or state statutes finds that a service provider has failed to comply with the requirements of CALEA, the court may order the server to comply. Compliance may also be effected through a civil action filed by the Attorney General. The court may impose a civil penalty of up to US\$10,000 per day for each day in violation.<sup>297</sup>

## *2. Provisions of other statutes requiring cooperation of service providers*

Pursuant to Title III and FISA, communications service providers must provide information, facilities, or technical assistance necessary for law enforcement to intercept wire, oral, or electronic communications, or to conduct electronic surveillance, if the service providers have been served with a court order directing such assistance or certification in writing by an authorized prosecutor that no warrant or court order is required by law. No communications service provider may disclose the existence of any interception or surveillance upon penalty of civil damages. No cause of action shall lie in any court against any communications service provider for providing information, facilities, or assistance in accordance with the terms of a court order, statutory authorization, or certification.<sup>298</sup> The service provider will be compensated for reasonable expenses incurred in providing such facilities or assistance.<sup>299</sup>

A particularly startling example of the closeness with which the communications providers work with law enforcement is the ‘Hemisphere Program’, where the Drug Enforcement Administration (DEA) has, for at least six years, had routine access through subpoenas to decades of records of US telephone data collected and conserved by communications giant AT&T. The US government pays AT&T employees to work alongside DEA agents and supply them with data going back as far as 1987. The archives of AT&T are even bigger than those of NSA and, if AT&T could be considered to be an agent of the government, 4th Amend. issues would be more probably implicated.<sup>300</sup>

## *3. Cooperation of communications service providers with the secret NSA surveillance and data collection operation*

The revelations in 2005–06 about the NSA’s secret programme exposed a close cooperation between the NSA and service providers, especially the giant AT&T, which had allowed NSA to attach a ‘black box’ to its incoming cable, enabling it to

<sup>297</sup> 18 U.S.C. § 2522.

<sup>298</sup> 18 U.S.C. § 2511(2)(a); 50 U.S.C. §§ 1802(a)(4); 1805(h).

<sup>299</sup> 18 U.S.C. § 2518(4); 50 U.S.C. § 1805(c)(2).

<sup>300</sup> *Shane, S./Moynihan, C.*, Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.’s, NYT, September 2, 2013, p. A1, <http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nas.html> (accessed April 2018).

mine the entire content of information channeled by AT&T.<sup>301</sup> AT&T also provided NSA with the telephone calling records of tens of millions of Americans. This eavesdropping went as far as to use computers to actually listen to the content of calls and collect key words, which, if found, would give rise to a more traditional investigation.<sup>302</sup> Some service providers fought the FISA amendments legislation in 2008, however, which ended up giving the government and NSA the ability to expand its data mining to the extent as revealed by Edward Snowden in June 2013.<sup>303</sup> The extent of AT&T's co-operation with NSA was made even more evident by recent revelations showing that, in 2001, AT&T began handing over 1.1 billion domestic cell phone calling records a day to the NSA.<sup>304</sup>

Snowden brought the world's attention to the NSA's current 'Prism' programme, which relies on the nation's largest Internet companies like Google, Facebook, Apple, Yahoo, Microsoft, Paltalk, AOL, Skype, and YouTube to supply the NSA with information in relation to national security threats. While the Snowden revelations indicate that NSA obtained direct access to the companies' servers, several of the companies – including Google, Facebook, Microsoft, and Apple – denied that the government could do so.<sup>305</sup> Another NSA programme, called 'Muscular', is directed towards tapping into the worldwide cable connections of Internet giants Google and Yahoo in order to siphon off huge amounts of communications megadata.<sup>306</sup>

Microsoft, despite its denials, has been providing NSA with up-to-date access to its customer data whenever the company changes its encryption and related software technology, especially as it relates to its Outlook and Hot Mail services. It also has provided the FBI with access to its SkyDrive service, a cloud storage ser-

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<sup>301</sup> *Palfrey, J.*, op. cit. (n. 296), pp. 244, 254.

<sup>302</sup> *Schwartz, P.M.*, op. cit. (n. 163), p. 307.

<sup>303</sup> *Miller, C.C./Perlroth, N.*, Secret Court Declassifies Yahoo's Role in Disclosure Fight, NYT, June 29, 2013, <http://bits.blogs.nytimes.com/2013/06/28/secret-court-declassifies-yahoos-role-in-disclosure-fight> (accessed April 2018).

<sup>304</sup> *Angwin, J./Savage, C./Larson, J./Moltke, H./Poitras, L./Risen, J.*, AT & T Helped NSA Spy on Internet on a Vast Scale, NYT, August 16, 2015, p. A1, <http://www.nytimes.com/2015/08/16/us/politics/att-helped-nsa-spy-on-an-array-of-internet-traffic.html> (accessed April 2018).

<sup>305</sup> *Savage, C.*, op. cit. (n. 267). On 8 January 2010, the Office of Legal Counsel in USDOJ issued a memo which gave a basis in legality for telecommunications service providers to turn over communication metadata without requiring a subpoena or national security letter. Courts have prevented disclosure of this secret memo, see *Savage, C.*, Court Grants Secrecy for Memo on Phone Data, NYT, January 4, 2014, p. A10, <http://www.nytimes.com/2014/01/04/us/court-backs-shielding-of-legal-memo-on-phone-records.html?ref=usSavage> (accessed April 2018).

<sup>306</sup> *Gellman, B./Soltani, A.*, N.S.A. infiltrates links to Yahoo, Google data centers worldwide, Snowden documents say, Wash. Post, October 31, 2013, [http://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51d661e-4166-11e3-8b74-d89d714ca4dd\\_story.html](http://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51d661e-4166-11e3-8b74-d89d714ca4dd_story.html) (accessed April 2018).

vice with millions of users. The information collected through the Prism programme was shared with the FBI and the Central Intelligence Agency (CIA).<sup>307</sup>

However, a US expert in surveillance has indicated that the denials of active support by service providers is unimportant if NSA actually controls the cables through which all of the service provider's communications flow. NSA separates the fiberglass cables and divides them; one goes into the service provider and the other to the NSA control room, where filters produced by the firm Narus and programmed by the NSA commence to filter the massive amounts of information.<sup>308</sup> It has also been reported that Verizon had set up a dedicated fibre-optic line running from New Jersey to Quantico, Va., home to a large military base, allowing government officials to gain access to all communications flowing through the carrier's operations center.<sup>309</sup>

Lawyers working for service providers who handle NSLs rarely fight in court, as they are not allowed to reveal the existence of the NSLs, but frequently push back privately by negotiating with the government, even if they ultimately have to comply. In addition to Yahoo, which fought disclosures under FISA, other companies, including Google, Twitter, and smaller communications providers have challenged the NSL procedures in court.<sup>310</sup> Small companies are more likely to take the government to court, because they have less to lose than the big actors.<sup>311</sup> FISC has recently, however, compelled service providers to cooperate with NSA's bulk data collection.<sup>312</sup>

The NSA's relationships with service providers goes further than mere reliance on their facilities. It also engages in aggressive campaigns to lure their most talented cadre to switch allegiances from their private employers to the NSA itself. An example is the chief security officer of Facebook, Max Kelly, who left the social media giant to work for the NSA in 2010. The NSA and private Silicon Valley firms have similar interests, that is, to collect, analyse, and exploit large pools of

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<sup>307</sup> *Risen, J.*, Report Indicates More Extensive Cooperation by Microsoft on Surveillance, NYT, July 12, 2013, p. A1, <http://www.nytimes.com/2013/07/12/us/report-indicates-more-extensive-cooperation-by-microsoft-on-surveillance.html> (accessed April 2018).

<sup>308</sup> *Levine, R.*, Die NSA hat Zugang zu unseren Gedanken, Die Zeit, June 20, 2013, p. 4.

<sup>309</sup> *Risen, J./Lichtblau, E.*, How the U.S. Uses Technology to Mine More Data More Quickly, NYT, June 9, 2013, p. A1, [http://www.nytimes.com/2013/06/09/us/revelations-give-look-at-spy-agencys-wider-reach.html?ref=world&\\_r=0](http://www.nytimes.com/2013/06/09/us/revelations-give-look-at-spy-agencys-wider-reach.html?ref=world&_r=0) (accessed April 2018).

<sup>310</sup> A recent attempt by Facebook to oppose a government order to turn over information was rejected by the New York's highest court. *In the Matter of 381 Search Warrants Directed to Facebook, Inc.*, 78 N.E.3d 141 (N.Y. 2017).

<sup>311</sup> *Miller, C.C.*, Secret Court Ruling Put Tech Companies in Data Bind, NYT, June 14, 2013, p. A1, <http://www.nytimes.com/2013/06/14/technology/secret-court-ruling-put-tech-companies-in-data-bind.html?ref=us> (accessed April 2018).

<sup>312</sup> *Savage, C.*, Company Lost Secret 2014 Fight Over 'Expansion' of N.S.A Surveillance, NYT, June 15, 2017, <https://www.nytimes.com/2017/06/14/us/nsa-surveillance.html> (accessed April 2018).

data about millions of Americans. NSA wants access to the data stored by the private firms and is perhaps the biggest customer for data analytics software produced in Silicon Valley. US intelligence agencies have invested in Silicon Valley start-ups also for this purpose. In fact, Paladin Capital Group, a venture capital firm based in Washington, D.C., specializes in investing in start-ups that offer high-tech solutions for NSA and other intelligence agencies, and its managing director was the director of NSA during the Clinton Administration. Another venture capital company doing the same work as Paladin is In-Q-Tel, which is financed by the CIA.<sup>313</sup>

Service providers are also exploring ways to better help the government in its spying operations. Skype, the Internet-based calling service, began its own secret programme, Project Chess, to explore the legal and technical issues in making Skype calls readily available to intelligence agencies and law enforcement officials. Project Chess began around 2008, before Skype entered the Prism programme in February 2011 and was ultimately acquired by Microsoft in October 2011. One of the documents about the Prism programme made public by Mr Snowden says Skype joined Prism on 6 February 2011.<sup>314</sup>

In the first public accounting of its kind, cell phone carriers reported that they responded to a startling 1.3 million demands for subscriber information in 2012 from law enforcement agencies seeking text messages, caller locations, and other information in the course of investigations. This constitutes an explosion in cell phone surveillance in the last five years, with the companies turning over records thousands of times a day in response to police emergencies, court orders, law enforcement subpoenas, and other requests. The total number of law enforcement requests in 2012 was almost certainly much higher, and the total number of people whose customer information was turned over could be several times higher than the number of requests because a single request often involves multiple callers. For instance, when a police agency asks for a cell tower ‘dump’ for data on subscribers who were near a tower during a certain period of time, it may get back hundreds or even thousands of names. Of its monstrous reservoir of domestic metadata, NSA acquires 90 per cent from providers and only 10 per cent from its own tapping into the cables entering the country.<sup>315</sup>

The reports also reveal a sometimes uneasy partnership with law enforcement agencies, with the carriers frequently rejecting demands that they considered legally questionable or unjustified. AT&T alone now responds to an average of more

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<sup>313</sup> *Risen, J./Wingfield, N.*, Silicon Valley and Spy Agency Bound by Strengthening Web, NYT, June 20, 2013, p. A1, <http://www.nytimes.com/2013/06/20/technology/silicon-valley-and-spy-agency-bound-by-strengthening-web.html?ref=us> (accessed April 2018).

<sup>314</sup> *Ibid.*

<sup>315</sup> *Savage, C./Shane, S.*, Secret Court Rebuked N.S.A. on Surveillance, NYT, August 22, 2013, p. A1, <http://www.nytimes.com/2013/08/22/us/2011-ruling-found-an-nsa-program-unconstitutional.html?ref=world> (accessed April 2018).

than 700 requests a day, with about 230 of them regarded as emergencies that do not require the normal court orders and subpoenas. That is roughly triple the number it fielded in 2007. Sprint reported an average of 1,500 requests per day. There has also been a rise in requests from other providers, with annual increases of between 12 per cent and 16 per cent in the last five years.<sup>316</sup>

In 2006, phone companies that cooperated in the Bush administration's secret NSA wiretaps in violation of FISA were sued and were ultimately given immunity by Congress with the backing of the courts.<sup>317</sup> The surging use of cell surveillance was also reflected in the bills the wireless carriers reported sending to law enforcement agencies to cover their costs in some of the tracking operations. AT&T, for one, said it collected US\$8.3 million last year compared with US\$2.8 million in 2007, and other carriers reported similar increases in billings.<sup>318</sup>

Clearly, if an ISP has a reputation of secretly divulging information to the government or even of giving the government access to its encryption software, they will lose business. After the first NSA scandal, Google made public its resistance to a Department of Justice (DOJ) request for a large amount of data on search queries. Other firms, such as AOL, Yahoo!, and Microsoft, complied without a battle in court.<sup>319</sup> Indeed, a judge of the FISC reported in a decision of 29 August 2013: 'To date, no holder of records who has received an order to produce bulk telephony metadata has challenged the legality of such an order.'<sup>320</sup>

However, it was recently reported that two small email providers closed down rather than comply with government subpoenas. Lavabit, from Texas, which was used by Edward Snowden, said it would rather cease doing business than 'be complicit in crimes against the American people,' and the other company, Silent Circle, went as far as to destroy its email servers.<sup>321</sup>

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<sup>316</sup> *Lichtblau, E.*, Wireless Firms Are Flooded by Requests to Aid Surveillance, NYT, July 9, 2012, p. A1, <http://www.nytimes.com/2012/07/09/us/cell-carriers-see-uptick-in-requests-to-aid-surveillance.html?ref=us> (accessed April 2018).

<sup>317</sup> *Hepting v. AT&T Corp.*, 671 F.3d 881 (9th Cir. 2011) (this case involved the secret wiretapping of calls coming in and out of the US in violation of FISA conducted by the administration of George W. Bush).

<sup>318</sup> *Lichtblau, E.*, op. cit. (n. 316).

<sup>319</sup> *Palfrey, J.*, op. cit. (n. 296), p. 283.

<sup>320</sup> *Savage, C.*, Extended Ruling by Secret Court Backs Collection of Phone Data, NYT, September 18, 2013, p. A1, <http://www.nytimes.com/2013/09/18/us/opinion-by-secret-court-calls-collection-of-phone-data-legal.html?ref=us> (accessed April 2018).

<sup>321</sup> *Sengupta, S.*, 2 E-Mail Services Close and Destroy Data Rather than Reveal Files, NYT, August 10, 2013, <http://bits.blogs.nytimes.com/2013/08/08/two-providers-of-encrypt-e-mail-shut-down/?ref=us> (accessed April 2018).



### III. Collecting information as to movements and activities in public spaces – use of tracking devices

#### A. The ‘Beeper’ cases

No 4th Amend. implications arose, traditionally, from police following suspects in public. In a couple of cases, police attached an electronic tracking device, or ‘beeper,’ to containers of precursor chemicals used in manufacturing illegal narcotics and then trailed the purchaser of the containers by activating the ‘beeper.’ The USSC found no illegal search or seizure in the act of attaching the ‘beeper’ to the container, because it did not yet belong to the suspect and he therefore had no reasonable expectation of privacy in its interior. The Court also deemed that trailing suspects in public did not violate the 4th Amend., because police could have used more traditional methods to do the same surveillance.<sup>322</sup>

If police, however, use the devices to track locations inside of the home, judicial authorization would be needed, because it would be a ‘search’ in violation of a reasonable expectation of privacy.<sup>323</sup> Recently, the New York Police’s strategy of putting tracking devices in decoy pill bottles to deter pharmacy robberies was upheld by the courts for the same reason.<sup>324</sup>

#### B. The use of Global Positioning Systems (GPS) technology for tracking

Although lower courts had applied the rationale of the ‘beeper’ cases to the use of GPS technology, a recent decision by the USSC has cast doubt on the continued validity of their earlier approach. In *United States v. Jones*,<sup>325</sup> the USSC held, however, that the 4th Amend. was violated when police attached a GPS device to a suspect’s automobile and engaged in a four-week surveillance of the suspect’s movements. The majority did not, however, find that judicial authorization was needed for the long-term surveillance but only that the act of attaching the device to the suspect’s property was an unlawful ‘seizure’ and violated the 4th Amend, as the automobile belonged to the suspect at the time the device was attached. Five justices, however, writing in different opinions, did seem to hint that long-term surveillance might violate the 4th Amend.<sup>326</sup> Justice Sotomayor opined:

GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious,

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<sup>322</sup> *United States v. Knotts*, 460 U.S. 276 (1983).

<sup>323</sup> *United States v. Karo*, 468 U.S. 705 (1984).

<sup>324</sup> *Goldstein, J.*, Police to Put GPS Devices in Pill Bottles to Stop Theft, NYT, January 16, 2013, p. A18.

<sup>325</sup> *United States v. Jones*, 565 U.S. 400 (2012).

<sup>326</sup> *McAllister, M.*, op. cit. (n. 245), 493.



and sexual associations ... [such as] trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on. The Government can store such records and efficiently mine them for information years into the future ... And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: such as limited police resources and community hostility ... Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring – by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track – may alter the relationship between citizen and government in a way that is inimical to democratic society. I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.<sup>327</sup>

Justice Alito, in another concurring opinion, also questioned whether the old USSC approach to public tracking could still stand in the modern technological era:

Recent years have seen the emergence of many new devices that permit the monitoring of a person's movements. In some locales, closed-circuit television video monitoring is becoming ubiquitous. On toll roads, automatic toll collection systems create a precise record of the movements of motorists who choose to make use of that convenience. Many motorists purchase cars that are equipped with devices that permit a central station to ascertain the car's location at any time so that roadside assistance may be provided if needed and the car may be found if it is stolen.

Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users – and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States. For older phones, the accuracy of the location information depends on the density of the tower network, but new 'smart phones', which are equipped with a GPS device, permit more precise tracking. For example, when a user activates the GPS on such a phone, a provider is able to monitor the phone's location and speed of movement and can then report back real-time traffic conditions after combining ('crowdsourcing') the speed of all such phones on any particular road. Similarly, phone-location-tracking services are offered as 'social' tools, allowing consumers to find (or to avoid) others who enroll in these services. The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements.

Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.<sup>328</sup>

Some US courts had already adopted the position of Justices Sotomayor and Alito that long-term tracking is not 'reasonable' under the 4th Amend. before the

<sup>327</sup> *Jones*, 132 S.Ct. at 955–956.

<sup>328</sup> *Jones*, 132 S.Ct. at 963.

*Jones* decision,<sup>329</sup> but others have followed the *Sotomayor* approach after the decision.<sup>330</sup> Several states require a warrant before GPS devices may be used.<sup>331</sup>

### C. Cell phone site location tracking

As was noted by Justice Alito, as a cell phone moves, its signals are picked up by different cell phone towers located within close geographic proximity. Precise locations can be determined by analyzing signals from such towers, their strength, and the angle of signal reception.<sup>332</sup> Courts have generally applied the same rationale in *Knotts* to allow police to secure from a cell phone service the location of a subscriber's phone without requiring a warrant for the purpose of tracking the person's movements.<sup>333</sup>

New technology in the form of 'cell site simulators' has, however, been used by law enforcement to track cell phone-using suspects, which obviates the necessity of requesting the assistance of telephone service providers. Some courts, however, have found that the use of cell site simulators to 'ping' the location of a cell phone would violate the 4th Amend. and therefore require judicial authorization before its implementation as the cell phone user did not voluntarily give up the information to a service provider.<sup>334</sup> Other courts, however, hold that since the information would have been available from the provider with only a court order, the evidence gained by 'pinging' will not be suppressed.<sup>335</sup>

Service providers maintain records of cell phone site location information (CSLI). Historical CSLI refers to the records maintained by providers that list the cell sites with which a subscriber's cell phone communicated at previous points in time, whereas prospective CSLI refers to the cell sites that a subscriber's cell phone

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<sup>329</sup> *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007); *State v. Jackson*, 76 P.3d 217 (Wash. 2003); *People v. Weaver*, 909 N.E.2d 1195 (N.Y. 2009); *United States v. Maynard*, 616 F.3d 544 (D.C.Cir. 2010); *Jones*, 132 S.Ct. 945 (2012).

<sup>330</sup> *State v. Zahn*, 812 N.W.2d 490 (S.D. 2012); *State v. Brereton*, 826 N.W.2d 369 (Wis. 2013); *Commonwealth v. Rousseau*, 990 N.E.2d 543 (Mass. 2013).

<sup>331</sup> See *McAllister, M.*, op. cit. (n. 245), 506, with statutory cites from California, Utah, Minnesota, Florida, South Carolina, Oklahoma, Hawaii, and Pennsylvania.

<sup>332</sup> *Casey, T.*, Electronic Surveillance and the Right to Be Secure, 41 U.C. Davis Law Review (2008) 977–1033.

<sup>333</sup> *United States v. Forest*, 355 F.3d 942 (6th Cir. 2004); *Devega v. State*, 689 S.E.2d 293 (Ga. 2010); *In re Application of United States of America for Order Directing Provider of Electronic Communication Service to Disclose Records to Government*, 620 F.3d 304 (3d Cir. 2010); *State v. Subdiaz-Osorio*, 849 N.W.2d 748 (Wis. 2014); *United States v. Guerrero*, 768 F.3d 351 (5th Cir. 2014); *United States v. Riley*, 858 F.3d 1012 (6th Cir. 2017).

<sup>334</sup> *United States v. Lambis*, 197 F.Supp.3d 606 (S.D.N.Y. 2016); *Jones v. United States*, 168 A.3d 703 (D.C.App. 2017).

<sup>335</sup> *State v. Hosier*, 454 S.W.3d 883 (Mo. 2015).

will communicate with at a future point in time. Under the SCA, law enforcement agencies may compel service providers to disclose prospective or historical CSLI for a particular cell phone in the course of a criminal investigation.<sup>336</sup>

The government began to use simple pen register orders, which do not require probable cause, not only to gain access to numbers called but also to track the location of the cell phone user. In 2005, however, a federal judge rejected the government's application to track the cell phone location of a suspect, claiming that the authorities needed a normal search warrant based on probable cause due to the increased interference with privacy.<sup>337</sup> This decision was followed by fifteen 'pen register' decisions in other lower federal courts. In eleven of these cases, the courts have refused to issue the order, and in four, they have allowed gathering the cell site information. The government appealed none of these decisions. One New York State court has itself issued contradictory decisions. One panel required 'probable cause' for disclosure of historical CSLI,<sup>338</sup> whereas the other required only 'reasonable grounds' for the discovery of prospective CSLI, which involved monitoring future movements of the suspect.<sup>339</sup> On the other hand, the federal district court in Maryland has indicated that historical CSLI is not protected by the 4th Amend., because the defendants in that case 'voluntarily transmitted signals to cellular towers in order for their calls to be connected', and the service provider 'then created internal records of that data for its own business purposes'.<sup>340</sup> A federal appeals court recently adopted this argument and held that historical CSLI held by service providers are 'business records' and not protected by the 4th Amend.<sup>341</sup>

The trend appears to be in the direction of requiring a probable cause warrant to disclose cell site location.<sup>342</sup> However, when police are using cell site location to

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<sup>336</sup> 18 U.S.C. §§ 2701–2712. See discussion in *Fox, Chr.*, Checking In: Historic Cell Site Location Information and the Stored Communications Act, 42 Seton Hall Law Review (2012) 769–792.

<sup>337</sup> *In re Application of the United States for an Order Authorizing the Use of a Pen Register & a Trap & Trace Device & (2) Authorizing Release of Subscriber Info. & Cell Site Info.*, 384 F. Supp. 2d 562 (E.D.N.Y. 2005).

<sup>338</sup> *Fox, Chr.*, op. cit. (n. 336), p. 783.

<sup>339</sup> *Ibid.*, citing *In re Application of the U.S. for an Order Authorizing the Use of Two Pen Register and Trap and Trace Devices*, 632 F. Supp. 2d 202, 211 (E.D.N.Y. 2008).

<sup>340</sup> *Graham*, 846 F.Supp.2d 384. Cf. *ACLU v. Clapper*, 959 F.Supp.2d 724 (S.D.N.Y. 2013). This is the majority approach, see *McAllister, M.*, op. cit. (n. 245), 518–520. For recent cases following this line: *United States v. Davis*, 785 F.3d 498 (11th Cir. (en banc) 2015); *United States v. Graham*, 824 F.3d 421 (4th Cir. en banc 2016); *Taylor v. State*, 371 P.3d 1036 (Nev. 2016); *State v. Jenkins*, 884 N.W.2d 429 (Neb. 2016); *Zanders v. State*, 73 N.E.3d 178 (Ind. 2017); *United States v. Stimler*, 864 F.3d 253 (3d Cir. 2017).

<sup>341</sup> *In re Application of United States for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013).

<sup>342</sup> *Casey, T.*, op. cit. (n. 332), pp. 2010, 2016. For cases requiring a warrant and probable cause, see *In re Application of the United States*, 809 F.Supp.2d 113 (E.D.N.Y. 2011); *In re Application of the United States*, 747 F.Supp.2d 827 (S.D. Tex. 2010); *In re Applica-*

actually find and arrest a dangerous criminal, some courts have said that exigent circumstances will permit the investigative measure, thus obviating the necessity for securing a warrant.<sup>343</sup> Bills have been proposed in the US Congress and in Delaware, Maryland, and Oklahoma that would require police to obtain judicial authorization before demanding location records from cell phone carriers, and California passed such a law, but it was vetoed by the governor.<sup>344</sup>

Sophisticated new technology has now given the NSA the ability to track the activities and movements of people almost anywhere in the world without actually watching them or listening to their conversations. When separate streams of data are integrated into large databases – matching, for example, time and location data from cell phones with credit card purchases or E-ZPass use – intelligence analysts are given a mosaic of a person's life that would never be available from simply listening to their conversations. Just four data points about the location and time of a mobile phone call make it possible to identify the caller 95 per cent of the time. Intelligence and law enforcement agencies also use a new technology, known as trilaterization, which allows tracking of an individual's location, moment to moment. The data, obtained from cell phone towers, can track the altitude of a person, down to the specific floor in a building.<sup>345</sup>

In addition, NSA, working with its British counterpart, have expanded their surveillance in a programme called 'mobile surge', to include the many 'leaky apps' used by smartphone and android phone users which spew out information, accessible by NSA, not only about the user's location, sex, and age but which also make accessible address books, buddy lists, telephone logs, and the geographic data embedded in photographs when someone sends a post to the mobile versions of Facebook, Flickr, LinkedIn, Twitter, and other Internet services. A special target of the programme is also 'Google maps', which reveals a large amount of information about the movements of those spied upon.<sup>346</sup> The NSA and the British have also been infiltrating the world of video games, because they think that potential terror-

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*tion of the United States*, 736 F. Supp. 2d 578 (E.D.N.Y. 2010), cited in *McAllister, M.*, op. cit. (n. 245), 520. See also *State v. Earls*, 70 A.3d 630 (N.J. 2013); *State v. Lunsford*, 141 A.3d 270 (N.J. 2016); *United States v. Davis*, 754 F.3d 1205 (2014); *Commonwealth v. Augustine*, 4 N.E.3d 846 (Mass. 2014); *Tracey v. State*, 2014 WL 5285929 (Fla. 2014).

<sup>343</sup> *United States v. Caraballo*, 831 F.3d 95 (2d. Cir. 2016); *United States v. Gilliam*, 842 F.3d 801(2d Cir. 2016).

<sup>344</sup> *Sengupta, S.*, Courts Divided Over Searches of Cellphones, NYT, November 26, 2012, p. A1, <http://www.nytimes.com/2012/11/26/technology/legality-of-warrantless-cell-phone-searches-goes-to-courts-and-legislatures.html?ref=us> (accessed April 2018).

<sup>345</sup> *Risen, J./Lichtblau, E.*, How the U.S. Uses Technology to Mine More Data More Quickly, NYT, June 9, 2013, p. A1, [http://www.nytimes.com/2013/06/09/us/revelations-give-look-at-spy-agencys-wider-reach.html?ref=world&\\_r=0](http://www.nytimes.com/2013/06/09/us/revelations-give-look-at-spy-agencys-wider-reach.html?ref=world&_r=0) (accessed April 2018).

<sup>346</sup> *Glanz, J./Larson, J./Lehren, A.W.*, Spy Agencies Tap Data Streaming From Phone Apps, NYT, January 28, 2014, p. A1, [http://www.nytimes.com/2014/01/28/world/spy-agencies-scour-phone-apps-for-personal-data.html?ref=world&\\_r=0](http://www.nytimes.com/2014/01/28/world/spy-agencies-scour-phone-apps-for-personal-data.html?ref=world&_r=0) (accessed April 2018).

ists use these games to communicate. The spy agencies have themselves created make-believe characters in the games they hope will be attractive to terrorists.<sup>347</sup>

#### **IV. The problem of secret interception of data with no notification provisions and its shared use by national security and criminal enforcement organs**

##### **A. The right to discover whether one was a target of secret surveillance**

As has been noted above, the government need not inform a person that he or she has been the subject of FISA surveillance nor whether the government has installed pen/trap devices, or gathered stored communications metadata or electronic communications by subpoena or NSL directed to service providers. As a matter of fact, no lawyer has ever gotten discovery of the records that gave rise to a FISA search since the promulgation of FISA in 1978.<sup>348</sup>

In the wake of the revelation of the secret NSA interceptions during the administration of George W. Bush, several lawsuits were filed by non-governmental organizations (NGOs) on behalf of persons attempting to ascertain whether they had their confidential communications intercepted during that long-term operation. An Islamic charity sued President Bush and other executive branch entities, alleging that it was subjected to warrantless electronic surveillance under the NSA programme, but the government claimed that the ‘state secrets’ privilege prevented it from revealing the information for the purposes of the lawsuit.<sup>349</sup>

The American Civil Liberties Union (ACLU) sued the government on behalf of a group of lawyers and journalists alleging that the programme violated FISA and that they had likely had their conversations intercepted thereunder, and another group of citizens sued AT&T on account of its collaboration with the allegedly illegal NSA programme. In both cases, the government moved to dismiss the suits, either on the ground that the plaintiffs lacked standing, i.e. could not prove their conversations were intercepted, or because ‘state secrets’ would have to be re-

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<sup>347</sup> *Mazzetti, M./Elliot, J.*, Spies Infiltrate a Fantasy Realm of Online Games, NYT, December 10, 2013, p. A1, <http://www.nytimes.com/2013/12/10/world/spies-drag-net-reaches-a-playing-field-of-elves-and-trolls.html?ref=world> (accessed April 2018).

<sup>348</sup> *Savage, C.*, Lawyer Not Entitled to See Classified Surveillance Material, Court Says, NYT, June 18, 2014, <http://www.nytimes.com/2014/06/18/us/lawyer-not-entitled-to-see-classified-surveillance-material-court-rules.html?ref=us> (accessed April 2018).

<sup>349</sup> *Al-Haramain Islamic Foundation Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007).

vealed in defending the suit. In both cases, the plaintiffs were ultimately denied relief based in the allegation of ‘state secrets’.<sup>350</sup>

The US chapter of Amnesty International challenged the NSA wiretap programme on behalf of certain lawyers, human rights, labor, legal, and media organizations whose work requires them to engage in sensitive and sometimes privileged telephone and email communications with colleagues, clients, sources, and other individuals located abroad. The complaint alleged that some of the persons with whom the plaintiffs communicated could be people that the government believes are associated with terrorist organizations and that the provision of the 2008 amendments of FISA, 50 U.S.C. §1881a, which allow such surveillance, would prevent them from engaging in their livelihood through the use of international correspondence by telephone or email. The USSC denied the plaintiffs standing, claiming they could present no clear evidence that their conversations had been intercepted or that future threatened injury was ‘certainly impending’, and thus no ‘case or controversy’ existed which the court could entertain.<sup>351</sup>

The government’s lawyer in *Clapper*, in his arguments, alleged that the only way a person could have ‘standing’ to challenge secret NSA wiretaps and to find out if her communications were intercepted in the first place would be if she were charged in court and the government filed a notice of intent to use the intercepted communications in its case. Nevertheless, in subsequent prosecutions, federal prosecutors have refused to make the promised disclosures, even after charges have been filed, thus undercutting the assurances the government lawyer had made to the USSC in *Clapper*.<sup>352</sup> This situation is now changing, and the government has notified some defendants in pending and final cases that they were subjected to the secret wiretapping.<sup>353</sup> But lawsuits seeking to reveal attempts by the government to access stored communications, for instance, are still being dismissed by the courts.<sup>354</sup>

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<sup>350</sup> *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007); *Hepting v. AT&T*, 439 F.Supp.2d 974 (N.D.Cal. 2006). See discussion in *Casey, T.*, op. cit. (n. 332), p. 979–980, 1020.

<sup>351</sup> *Clapper*, U.S.A., 133 S.Ct. at 1148–1149.

<sup>352</sup> *Liptak, A.*, A Secret Surveillance Program Proves Challengeable in Theory Only, NYT, July 16, 2013, p. A11, <http://www.nytimes.com/2013/07/16/us/double-secret-surveillance.html?ref=us> (accessed April 2018).

<sup>353</sup> See *Savage, C.*, Justice Department Informs Inmate of Pre-Arrest Surveillance, NYT, February 26, 2014, p. A3, [http://www.nytimes.com/2014/02/26/us/justice-dept-informs-inmate-of-pre-arrest-surveillance.html?ref=us&\\_r=0](http://www.nytimes.com/2014/02/26/us/justice-dept-informs-inmate-of-pre-arrest-surveillance.html?ref=us&_r=0) (accessed April 2018), describing a case where a convicted defendant, who was not informed of the wiretapping, probably will have no recourse as he had waived his right to appeal in a plea bargain.

<sup>354</sup> See *United States v. Appelbaum (In re Application of the United States of America for an Order Pursuant to 18 U.S.C. Section 2703(d))*, 707 F.3d 283 (4th Cir. 2013), denying an attempt to get records of government attempts to get information from ‘Twitter’ related to a Wiki-Leaks investigation.

### **B. 'Hand-off' procedures to avoid notification requirements of Title III or other laws**

The wiretap 'hand-off' procedure was used by investigators in Los Angeles beginning in the 1980s. It involves an initial issuance of a wiretap order by a judge. Once the wiretap yields evidence of criminal conduct, the investigating agents would then transmit the information to another unit without expressly stating that the information was discovered through a wiretap. The receiving unit then conducts further investigation. Evidence gathered during that second investigation would yield independent probable cause to arrest the targets. The defendant would be prosecuted without ever knowing that he was subjected to the wiretap surveillance.<sup>355</sup>

'Hand off' procedures were also apparently the main tool used to develop the material gathered in the secret NSA surveillance programmes. This arguably illegally gathered information was secretly fed back into the established legal system of telecommunications surveillance. It has been estimated that from 10 to 20 per cent of FISA warrants annually are based on information gathered in the secret NSA domestic surveillance programme.<sup>356</sup>

The secret NSA programme has led, in the words of one commentator, to a 'secret parallel system of telecommunications surveillance', where information collected in it is fed back into the official system in a fashion that leaves no traces. The system is 'built on secret presidential authorizations, secret DOJ legal opinions; non-binding presidential promises; an executive that refuses to provide Congress and the public with necessary information; and, most recently, acquiescent congressional legislation enacted in ignorance of the true dimensions of NSA activities'.<sup>357</sup>

### **C. Concluding remarks: the problem of removing the 'wall' between traditional law enforcement and national security information gathering**

Ever since the involvement of the Army and CIA in domestic surveillance of anti-Vietnam-War and Black Power activists in the 1960s and 1970s, there was a concerted effort to separate traditional law enforcement from intelligence gathering. This so-called 'wall' between the two arms of government meant that only FISA would be used for intelligence wiretaps and Title III for conventional organized crime investigations. Although the president had authority prior to the enactment of FISA to conduct national security wiretaps, federal courts would exclude evidence gained from such wiretaps when it turned out that the investigation had become, primarily, a conventional criminal enforcement operation.<sup>358</sup>

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<sup>355</sup> *Whitaker v. Garcetti*, 291 F.Supp.2d 1132 (C.D.Cal. 2003).

<sup>356</sup> *Schwartz, P.M.*, op. cit. (n. 163), p. 307.

<sup>357</sup> *Ibid.*

<sup>358</sup> *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980).



Even before 9/11, however, evidence legally gathered through a FISA wiretap could be used in a criminal prosecution against a US person.<sup>359</sup> After 9/11, however, the standard for a FISA wiretap was lowered to require only that a ‘significant purpose’ of the wiretap was aimed at foreign intelligence instead of the ‘primary purpose’ language that existed in the original version of FISA. The Patriot Act intentionally aimed at removing the so-called ‘wall’. This made it easier for FISA wiretaps to be simultaneously used for foreign intelligence as well as for conventional criminal investigation. With the lower threshold, as long as the wiretap can be justified under FISA, the evidence may be used in a conventional criminal prosecution as well.<sup>360</sup> The FISA Appeals Court has also ruled conclusively that there is no harm in ‘sharing’ of material between law enforcement and intelligence operatives, and that no such ‘wall’ ever really existed.<sup>361</sup>

This relaxing of prohibitions on sharing foreign intelligence information with conventional law enforcement agencies was expanded by the Obama administration, when, in early 2016, it allowed the NSA to share the bulk communications metadata it had been vacuuming up since 2002 with a wider range of law enforcement agencies.<sup>362</sup> In November 2015, the FISC allowed the FBI to read emails gathered in the NSA bulk data collection programme when investigating conventional criminal cases. The secret ruling was only revealed in April of 2017.<sup>363</sup> In its final days in power, the Obama administration again expanded the power of NSA to share its bulk data with fourteen other intelligence agencies.<sup>364</sup> Because of the more flexible rules for FISA wiretaps, metadata orders, and NSA letters, the bulk of which are acquired by NSA and FBI, lesser law enforcement entities, such as the DEA, seek to tailor their requests for wiretaps to fall within the categories of terror-

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<sup>359</sup> *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984); *United States v. Nicholson*, 955 F.Supp. 588 (E.D.Va. 1997); *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987); *United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988).

<sup>360</sup> *United States v. Ning Wen*, 471 F.3d 777 (7th Cir. 2006).

<sup>361</sup> *In re: Sealed Case No's 02-001, 02-002*, 310 F.3d 717 (USFIS App. 2002).

<sup>362</sup> *Savage, C.*, Obama Administration Set to Expand Sharing of Data that N.S.A. Intercepts, NYT, February 26, 2016, p. A15, <https://www.nytimes.com/2016/02/26/us/politics/obama-administration-set-to-expand-sharing-of-data-that-nsa-intercepts.html> (accessed April 2018).

<sup>363</sup> *Savage, C.*, Judge Rejects Challenge to Searches of E-Mails Gathered Without Warrant, NYT, April 20, 2016, p. A7, [http://www.nytimes.com/2016/04/20/world/judge-rejects-challenge-to-searches-of-emails-gathered-without-warrant.html?ref=world&\\_r=0](http://www.nytimes.com/2016/04/20/world/judge-rejects-challenge-to-searches-of-emails-gathered-without-warrant.html?ref=world&_r=0) (accessed April 2018).

<sup>364</sup> *Savage, C.*, N.S.A. Gets More Latitude to Share Intercepted Communications, NYT, January 12, 2017, <https://www.nytimes.com/2017/01/12/us/politics/nsa-gets-more-latitude-to-share-intercepted-communications.html> (accessed April 2018).



ism or national security, but the NSA is often reluctant to allow more conventional law enforcement agencies access to its huge archives of electronic metadata.<sup>365</sup>

From individualized suspicion and the assembly of proof for individual prosecutions to an emphasis on the aggregation of vast quantities of data about people who are not themselves suspected terrorists for the purpose of making predictive judgments about what kinds of patterns of activity may characterize incipient terrorist plots, what kinds of individuals may be particularly susceptible to recruitment as future terrorists, and what patterns of spending and communication tend to be associated with ongoing terrorist conspiracies: This, according to *Jacqueline Ross*, is the new ‘surveillance paradigm’.<sup>366</sup>

### List of abbreviations

4th Amend.	Fourth Amendment of the United States Constitution
ACLU	American Civil Liberties Union
CALEA	Communications Assistance for Law Enforcement Act
CIA	Central Intelligence Agency
CSLI	cell phone site location information
DEA	Drug Enforcement Administration
DOJ	Department of Justice
ECPA	Electronic Communications Privacy Act
FBI	Federal Bureau of Investigation
FCC	Federal Communications Commission
FISA	1978 US Foreign Intelligence Surveillance Act
FISC	Foreign Intelligence Surveillance Court
GPS	Global Positioning Systems
IM	instant message
NGOs	non-governmental organizations
NSA	National Security Agency
NSLs	National Security Letters

<sup>365</sup> *Lichtblau, E./Schmidt, M.S.*, Other Agencies Clamor for Data N.S.A. Compiles, NYT, August 4, 2013, p. A1, <http://www.nytimes.com/2013/08/04/us/other-agencies-clamor-for-data-nsa-compiles.html?ref=us> (accessed April 2018).

<sup>366</sup> *Ross, J.E.*, op. cit. (n. 262), p. 494.

NYT

New York Times

SCA

Stored Communications Act

US

United States of America

U.S.C.

United States Code

USSC

US Supreme Court

# **Legitimacy, Effectiveness, and Alternative Nature of Sanctioning Procedures in the UN Sanctions Committees and within the EU Common Foreign and Security Policy**

*Nikolaos Theodorakis*

## **I. Introduction: a primer on sanctions**

The present chapter focuses on the sanctions regimes adopted for the purpose of maintaining international peace and security and, especially, for preventing and combating terrorism by the Security Council (SC) under Chapter VII of the United Nations (UN) Charter, and, at European level, through decisions taken by the Council of the European Union (EU).<sup>1</sup> Sanctions, also known as restrictive measures, are legally binding measures that can be taken against state entities, non-state entities, and individuals. Sanctions aim to change the target's policy and/or behaviour – as such they are in principle preventive tools and not punitive. They are a significant foreign policy tool and form part of an integrated and comprehensive strategic approach in the pursuit of foreign policy objectives.

Sanctions have proven to be more efficient when they are targeted rather than comprehensive. Targeted sanctions, also known as 'smart sanctions', minimize the consequences for innocent third parties not involved in any friction, such as the local civilian population. Despite the regular revision of sanctions to ensure they are in line with the developments, the sanctions may be strengthened or, if circumstances improve, relaxed. As a key principle, sanctions must respect fundamental human rights and freedoms, with particular emphasis on the right to due process.

UN imposed sanctions are binding on each UN Member State – however, as we will discuss later in the paper, the lack of comprehensive enforcement often weakens the sanctions' effectiveness. On top of the UN sanctions, the EU can also impose other sanctions, typically through Council Decisions and Council Regulations, in an effort to ensure consistent implementation throughout. These 'autonomous' EU sanctions are issued through the Common Foreign and Security Policy framework<sup>2</sup> and in respect of preventing and combating terrorism, and related activities.<sup>3</sup>

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<sup>1</sup> *Hakimdavar, G.*, A Strategic Understanding of UN Economic Sanctions, Routledge, New York 2015, pp. 19–45.

<sup>2</sup> Art. 215 TFEU.

<sup>3</sup> Art. 75 TFEU.

Both the UN and the EU publish a list of sanctioned individuals and entities; this list is updated regularly and allows individuals to notice a possible enlistment and request to be delisted. However, the delisting process is often flawed and the procedural rights of the defendant are not fully respected.

Overall, sanctions are increasingly used as an alternative tool to generate pressure in international law and diplomacy. The sanctions that both the UN Sanctions Committees and the EU Council within the framework of the Common Foreign and Security Policy have issued over the past years are increasing in volume and in severity. Global interconnectivity, alliances, and trade connections also make sanctions more effective than in the past. The constantly changing modes of terrorism further make sanctions the preferred preventive measure, which several countries use at national level as well.

Along with the increased number of sanctions, there are increased concerns about their legitimacy. Arbitrary, unilateral sanctions are often criticized as violating human rights, defying the rule of law, and potentially harming innocent people. Several states have contested how tailored and ‘smart’ sanctions actually are, as well as whether they are truly effective in deterring terrorism. Smart and targeted sanctions have been in the forefront of foreign policy in describing the concept of such sanctions.

States have also supported that targeted sanctions must be used as a last resort after having exhausted all means of a peaceful settlement, whereas they have recently often been the first formal way to punish individuals or states. The obscurity about how and when sanctions are imposed adds to the debate regarding their legitimacy since they practically work like global court orders except that there is no court and no formal legal process is being followed.

Other structural hurdles include that sanctions do not have a finite nature, and that they are not necessarily lifted immediately after their objectives have been achieved. The obscurity of their imposition translates into a subjectivity in terms of their length and the criteria used as such. Instead of using dubious methods, states posit that, for instance, a convention on terrorism would better serve the values of legal certainty and lead to the deterrence of crime.

The same criticisms relate to the EU Common Foreign Security Policy. In times when the legitimacy of EU institutions is overall criticized, the imposition of sanctions is a topic on the agenda that makes things even more burdensome. EU member states regularly disagree with sanctions imposed and even question their legitimacy. The nature and effect of a sanction is *de facto* legal; the imposition by non-judicial bodies creates a factual inconsistency and a natural question as per their legitimacy.

This paper discusses relevant aspects of legitimacy that pertain to the aforementioned sanctioning procedures, as well as the normative and factual effectiveness of

such sanctions regimes. Alternative procedures and methods are also discussed for the sake of completeness.

## II. Sanctions in the UN and the EU, and issues of legitimacy

### A. Framework and history of sanctions in the UN

The United Nations can impose sanctions as provided by art. 41 of Chapter VII of the UN Charter. The Charter authorizes the SC to take appropriate action that will help enforce positive behaviour. This provision does not expressly use the word ‘sanctions’ but practically describes it.

The UN Charter drafters avoided the League of Nations pitfalls. In particular, art. 16 of the Covenant of the League of Nations had three weaknesses: (i) the sanctions’ scope of application was limited to interstate war; (ii) the form of sanctions was limited, namely to comprehensive diplomatic and economic measures; (iii) the decision-making system was not centralized. Art. 41 of the UN Charter has proven to be quite flexible since it provides adequate leeway to allow for sanction imposition. However, this procedural flexibility and wide scope of applicability creates issues of legitimacy, as further discussed below.

The first Security Council sanctions related to the apartheid regimes, namely in South Africa (1963) and Southern Rhodesia (1965).<sup>4</sup> The initially voluntary sanctions then became mandatory, particularly as a way to exercise further pressure and trigger compliance with international community expectations. Sanctions were then not introduced for a long time, particularly due to the Cold War that would not allow for a consensus in the Security Council. Right after the end of the Cold War, sanctions were first applied to Iraq in response to its 1990 invasion of Kuwait and the further plans of developing weapons of mass destruction (1990–2003), and during the breakdown of the former Yugoslavia (1991–1996).<sup>5</sup>

A sanctions regime that raised several concerns was the 1990 comprehensive economic sanctions against Iraq. The ban included all trade with Iraq and an embargo on its oil exports, and became the focal point to assess sanctions regimes altogether. In particular, the sanctions were ineffective since they did not affect the then current regime, while they severely affected the population. As a result of this inefficiency, the Security Council adopted a more ‘targeted’ approach on sanctions. These sanctions aimed at specific commodities (e.g. arms and diamonds), travel bans, asset freezing, and other individual fines. This policy change was further con-

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<sup>4</sup> *Orkin, M.*, *Sanctions Against Apartheid*, Palgrave Macmillan, Cape Town 1990, pp. 164 ff.

<sup>5</sup> *Herik, L.* (ed.), *Research Handbook on UN Sanctions and International Law*, Edward Elgar Publishing Ltd, Cheltenham 2017, pp. 35 ff.

firmed by establishing the so-called Sanctions Committees to have an oversight of sanctions implementations. Each Committee deals with a specific sanctions regime, and it comprises Security Council representatives. Committees are practically organized to supervise sanctions on most of the affected countries, namely:

- Somalia
- Rwanda
- Sierra Leone
- al-Qaeda and the Taliban
- Liberia
- the Democratic Republic of Congo
- Côte d'Ivoire
- Sudan.

The Iraq sanctions regime was the turning point since targeted sanctions became the norm thereafter. The perceived inefficiency of comprehensive sanctions, primarily because they failed to adequately contain the most threatening individuals and due to the devastating humanitarian impact, led to the boom in targeted sanctions. Indicative targeted sanctions regimes include: 751 Somalia (1992–present), 788 Liberia (1992–2001), 820 Yugoslavia (1993–1996), 864 Angola (1993–2002), 918 Rwanda (1994–2008), 1132 Sierra Leone (1997–2010), and 1160 Kosovo (1998–2001).<sup>6</sup>

### **B. The scope and authority of the Security Council**

The Security Council is the body that investigates situations that can lead to international dispute. The Security Council acts on behalf of all United Nations members regarding the maintenance of international peace and security. It therefore uses mandatory sanctions as a tool to force nations to comply with its decisions.

According to the United Nations:

the Council has resorted to mandatory sanctions as an enforcement tool when peace has been threatened and diplomatic efforts have failed. ... The range of sanctions has included comprehensive economic and trade sanctions and/or more targeted measures such as arms embargoes, travel bans, [and] financial or diplomatic restrictions.<sup>7</sup>

In general, UN member states disfavour sanctions since they can adversely impact developing countries, can affect diplomatic relations and allies, and can create a domino effect of humanitarian crises.<sup>8</sup> Art. 42 of the Charter recognizes the right

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<sup>6</sup> By convention, UN sanctions regimes are known by the number of the SC resolution that establishes the respective sanctions committee.

<sup>7</sup> Source: UN website on Security Council Subsidiary Bodies, <https://www.un.org/sc/suborg/en/> (accessed April 2018).

<sup>8</sup> *Gordon, R./Smyth, M./Cornell, T.*, *Sanctions Law*, Hart Publishing, Portland, Oregon 2017, pp. 246 ff.

to take necessary action by air, sea, or land forces to maintain or restore international peace and security. These actions may include demonstrations, blockade, and other operations.

There are several issues that are connected with UN targeted sanctions. In principle, when the Security Council drafts a resolution it specifies:

- the reasons and purposes of the sanctions
- the targets of the sanctions and the exact designation criteria
- the types of sanctions to be imposed and the combination of measures (if more than one) that are likely to be effective
- the institutional mechanisms needed for implementation (e.g. creation of sanctions committee, monitoring group, etc.)
- the longevity of the sanctions (e.g. fixed term or open-ended, sunset clauses, etc.).<sup>9</sup>

Art. 48 of the Charter describes the procedural method to enforce such decisions:

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 Security Council may determine.

Whereas pursuant to art. 35 of the Charter

any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council ... A state which is not a Member of the United Nations may bring to the attention of the Security Council ... any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the [U.N.] Charter.<sup>10</sup>

When voting on a sanctions regime, at least nine out of the fifteen members of the Security Council need to vote in favour, provided that no member of the Permanent Five (US, Russia, China, France, UK) has exercised its veto. In practice, permanent members have abstained in the past to avoid blocking a decision to which they are not *per se* favourable. The decision can then still pass with this abstention, provided that at least nine members vote in favour of the resolution.

Apart from UN Charter provisions used for sanctions, other articles (e.g. art. 41) have been used to create international tribunals like the International Criminal Court (ICC). The major difference, however, is that sanctions are supposed to be preventive, whereas tribunals are primarily supposed to be punitive. To what extent this is indeed observed in practice is a question that we will attempt to answer later in this contribution. The main premise is that sanctions are more punitive than they

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<sup>9</sup> Farrall, J.M., *United Nations Sanctions and the Rule of Law: UK & DE*, Cambridge University Press, Cambridge 2009, pp. 79 ff.

<sup>10</sup> Source: UN website on Security Council Subsidiary Bodies, <https://www.un.org/sc/suborg/en/> (accessed April 2018).

are designed to be and less effective in terms of their preventive value compared to the intention.

### C. Types of targeted sanctions

The main categories of UN sanctions include: diplomatic sanctions, travel ban, asset freeze, arms embargo, and commodity ban. We will briefly discuss below the main elements of each of these sanctions.<sup>11</sup>

#### 1. *Diplomatic sanctions*

UN Charter art. 41 refers to diplomatic sanctions as “severance of diplomatic relations”. Historically, they are considered an easy and frequently used way to communicate to the other party that they must change their policy. They are considered one of the least aggressive sanctions since disruption of diplomatic ties is a frequent phenomenon.<sup>12</sup>

This provision is more complicated when sanctions are imposed on non-recognized states or non-state entities. Overall, diplomatic sanctions have declined in popularity, following the reduced use of comprehensive sanctions against state actors. Since sanctions tend to be more targeted, diplomatic sanctions are used less widely and are considered less efficient.

#### 2. *Travel ban*

The travel ban is a common form of targeted sanctions, essentially a development of comprehensive travel bans imposed against all nationals of a country or a certain region of a country. Previous bans that totally prohibited aviation or similar activity were found to be inefficient due to their broad range. Due to the personal nature of a targeted travel ban, committees can consider exceptions for a number of reasons (e.g. humanitarian, religious, participation in peace and stability process, and justice or judicial process).

Travel bans are a widely imposed sanction; however, they are also widely violated. A number of reasons contribute to this: (i) the scale of listings is so extensive that the committees find it difficult to process and manage it effectively; (ii) as with every sanction, the implementation rests with the UN member states, which means that when certain member states do not readily abide by the travel ban, the ban is

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<sup>11</sup> Marossi, A.Z./Bassett, M.R., *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, T.M.C. Asser Press, The Hague 2015, pp. 71–81.

<sup>12</sup> They have been previously applied in a number of regimes, namely Southern Rhodesia 253, Libya 748, Yugoslavia 757, Angola 864, Sudan 1054, and Afghanistan/Taliban/AI-Qaida 1267.



inefficient; (iii) widespread identity theft and fake documentation create a relatively easy path to circumvent travel bans for individuals who have the financial resources to buy such counterfeit documentation. Ultimately, it is very difficult to measure the enforcement efficiency of travel bans, and there is a risk that lack of compliance could damage the UN's institutional credibility.

### 3. *Asset freeze*

Asset freezes are the successor of general financial sanctions, which were widely imposed in a number of cases (e.g. Southern Rhodesia 253, Iraq 661, Libya 748, Yugoslavia 757, Yugoslavia 820, and Haiti 841). They are quite a popular sanction imposed by the EU, on top of any UN related asset freezes. The underlying reasons for such asset freezes are asset recovery, non-proliferation, and counter-terrorism.

Asset freezes are not comprehensive: they include certain exceptions depending on their nature and the need to protect vulnerable social groups, e.g. for humanitarian assistance. There are also exceptions for unforeseen circumstances like medical expenses and legal costs connected to a delisting request. Targeted asset freezes are overall considered to be an improvement compared to their predecessor, which were general financial sanctions with significant side effects particularly for developing economies<sup>13</sup> by sustaining all encompassing financial drainage.

The main concern with the implementation of asset freezes relates to the same obstacles experienced with anti-money laundering initiatives. In essence, a large amount of money is lost annually through illicit activities, which led the World Bank to establish the Stolen Asset Recovery Initiative. This does not *per se* mean that UN asset freezes are non-enforceable. However, the flexibility and options provided to sanctioned individuals or entities allows non-compliance since they can circumvent the process. As such, effective implementation can be quite burdensome.

### 4. *Arms embargo*

Arms embargo is a widely used sanctions measure, which has taken both general and targeted forms. For instance, the Democratic People's Republic of Korea (DPRK) sanctions include a ban on heavy conventional weapons and materials, equipment, goods and technology related to nuclear programmes, ballistic missile programmes, and other Weapons of Mass Destruction (WMD).

Another example is the sanctions against Iran that relate to the enrichment of nuclear materials. The conventional arms prohibition, therefore, extends to nuclear

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<sup>13</sup> Norris, J./Phillips, J., *The Law of Regulatory Enforcement and Sanctions: A Practical Guide*, Oxford University Press, Oxford et al. 2011, pp. 111 ff.

materials. Also, two-way arms embargoes have been applied in certain cases such as on the regimes in Eritrea (1907) and Libya (1970). As is the case with asset freezing however, arms embargoes also include reasonable exceptions.

#### **D. Procedure: listing and delisting**

As discussed earlier, the main pattern for UN sanctions is to shift from comprehensive sanctions against an entire state to targeted sanctions against individuals. Changes connected to targets have also been the criteria under which these targets are designated. Naturally, the procedures to be followed when individuals are listed and delisted were equally developed. The more targeted the sanctions became, the more apparent was the need to ensure that individuals have an effective judicial remedy and can resort to a specific, defined, and objective mechanism that will evaluate their claim to be delisted.<sup>14</sup>

Non-state actors usually fall into the following categories: sub-state actors, extra-state actors, individuals in decision-making positions, individual arms dealers, and private-sector actors. There are two main routes through which individuals and entities can become designated for sanctions listing: via resolution or through a sanctions committee. The exact list of sanctioned individuals may be specified within the authorizing resolution, or, alternatively, the relevant sanctions committee can create the list later using the appropriate designation criteria. The common practice is for member states to propose candidates to the sanctions committees that are included if there are no objections within the committee within a specified timeframe.

Currently, the following criteria are used to designate states and non-state actors for sanctions:

- threat to peace, security, or stability
- violation of an arms embargo
- conducting illicit commodity trade
- hamper disarmament, demobilization, and reintegration
- violation of international human rights or humanitarian law
- obstructing access to humanitarian assistance
- target civilians for human rights violations
- recruit child soldiers
- commit rape and gender-based violence
- misappropriation of public assets

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<sup>14</sup> *Shojai, S./Root, P.*, Effectiveness Of Economic Sanctions: Empirical Research Revisited, *International Business & Economics Research Journal*, vol. 12, issue 11, 2013, 1479–1490.

- obstruction of, or attack on, peacekeepers
- incite public hatred and violence
- support proliferation of nuclear weapons
- associated with or support of a terrorist group
- engage in terrorist bombings or political assassinations
- prevention of the restoration of constitutional order.

Notably, there has been increasing use of these criteria, particularly for purposes of protecting human rights and civilians in armed conflict. The UN also encourages such use since it creates consistency and allows for a more fair review process of delisting requests. As far as procedure is concerned, once the targets have been identified, the permanent mission to the country of residence (or incorporation in case of entities) notifies the involved individual.<sup>15</sup>

Delisting has overall been controversial since several allegations relate to an assumed lack of effective judicial remedy. The approach currently followed is that the individual asks to be delisted by the committee or by the petitioner's state of nationality or residency. Therefore, the Focal Point for Delisting can directly contact the individual or entity for the delisting request. The Focal Point for Delisting, which is essentially a dedicated staff member in the Secretariat, was created through resolution 1730 of 19 December 2006 in order to facilitate communication during the delisting process. The first decision to delist, however, was issued after a few years and as a result of intense advocacy by several member states, the Secretary-General, the High Commissioner for Human Rights, and a number of civil society actors.

The most important development in delisting was a result of the Al-Qaida 1267 regime. Due to this regime, the Office of the Ombudsperson was created to explicitly review delisting requests. The authority of the Ombudsperson was widened since removal from listing became final. This means that if the Office of the Ombudsperson considers that an individual must be delisted, such decision is final and automatic. The only exception to this is a unanimous vote of the Sanctions Committee or a referral to the SC by an affected committee member.

## **E. Framework of sanctions in the EU**

### *1. EU Common Foreign and Security Policy*

On the EU side, the Common Foreign and Security Policy (CFSP) is the organized, agreed foreign policy that relates to security and defence diplomacy, and

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<sup>15</sup> *The Graduate Institute of Geneva*, The Effectiveness of United Nations Targeted Sanctions: Findings from the Targeted Sanctions Consortium (TSC), 2013, available at: [http://repository.graduateinstitute.ch/record/287976/files/effectiveness\\_TCS\\_nov\\_2013.pdf](http://repository.graduateinstitute.ch/record/287976/files/effectiveness_TCS_nov_2013.pdf) (accessed April 2018).

actions. CFSP handles issues that include Trade and Commercial Policy, and other matters of funding towards third countries.<sup>16</sup>

Overall, the EU, like the UN, aims to use sanctions for preventive purposes, namely to promote the objectives of the CFSP. The ultimate goal is to promote peace, democracy, the rule of law, and human rights. Ultimately, sanctions do not aim to be punitive, however, in practice this is often the case.

The EU implements all sanctions imposed by the UN and, in addition, may reinforce UN sanctions by applying stricter and additional measures. Finally, where it deems fit, the EU can impose separate measures from the UN. A recent comprehensive sanctions map depicts in detail the sanctions regimes the EU has implemented to date.<sup>17</sup> Autonomous EU sanctions are particularly imposed for actions related to the fight against terrorism, the proliferation of weapons of mass destruction, and as a restrictive measure to uphold respect for key EU priorities.<sup>18</sup>

## 2. Process

In terms of the process followed, the Council imposes EU sanctions through a unanimous Council decision. The decision contains all measures imposed; however, often additional legislation is required to fully enforce the sanctions.

Arms embargoes and travel bans are types of sanctions the member states implement directly. These measures only require a Council decision, which then is directly binding on EU member states. However, economic measures that include asset freezes and export bans fall under the competence of the Union and require separate implementing legislation.

Once the sanctions have been voted on, the Council notifies the persons and entities targeted by the asset freeze or travel ban. It also brings to their attention the available legal remedies: individuals can ask the Council to reconsider its decision, and they can also challenge the measures before the General Court of the EU.<sup>19</sup>

Since sanctions do not have a punitive aim but rather a policy changing target, they are directed, even if not applicable, towards non-EU countries, entities that are suspected of engaging in illicit activity, groups suspected of terrorist activity, and individuals who are also supporting illegal activities. They are developed in a way to minimize adverse consequences for those not responsible for the policies or

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<sup>16</sup> Bendiek, A., A Paradigm Shift in the EU's Common Foreign and Security Policy: From Transformation to Resilience, SWP Research Paper, <https://www.swp-berlin.org/en/publication/eus-common-foreign-and-security-policy/> (accessed April 2018).

<sup>17</sup> <https://www.sanctionsmap.eu/#/main> (accessed April 2018).

<sup>18</sup> All these measures are taken in accordance with art. 11 TEU.

<sup>19</sup> In accordance with the conditions laid down in the second paragraph of art. 275 and the fourth and sixth paragraphs of art. 263 TFEU.

actions leading to the sanctions. Specific care is exercised to ensure that the local civilian population and minorities are not affected.<sup>20</sup>

### 3. *Frequent measures*

In essence, the same measures are introduced at EU level as those found at the UN level, the main ones being:

- arms embargo
- asset freeze
- visa or travel ban.

### 4. *Scope and application*

As discussed earlier in this paper, EU sanctions are targeting individuals and entities with a preventive effect in mind. That said, they are not as wide as the UN sanctions since, naturally, they only apply within the EU territory and jurisdiction. This includes the EU geographical borders, the EU nationals, the companies incorporated under EU law, the businesses that are somehow connected to the EU, and the aircrafts or vessels under the jurisdiction of an EU member state.<sup>21</sup> This means that all the EU sanctions-related decisions do not have an extra-territorial application.

## F. How do the UN and EU systems conform to legitimacy?

Legitimacy in law relates to the rule of authority, the perception of such legal action, and the compliance as a deterrent structure. It is often the case that individuals do not perceive the state or the lawmakers as legitimate actors of enforcement.<sup>22</sup> This is due to a number of factors including the inconsistent nature of regulations across states, the neutralization of harm, and the belief that individuals form part of the legitimacy regime.

Etymologically, legitimacy derives from *legitimus*, denoting lawful, appropriate, or just.<sup>23</sup> Legitimacy may refer to both the basic meaning of legitimate, that being a

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<sup>20</sup> Cardwell, J.P., *The Legalisation of European Union Foreign Policy and the Use of Sanctions*, Cambridge Yearbook of European Legal Studies, vol. 17, 2015, 287–310 (ResearchGate, doi:10.1017/cel.2015.11).

<sup>21</sup> Portela, C., *European Union Sanctions and Foreign Policy*, Routledge, London/New York 2011, pp. 19–34.

<sup>22</sup> Beetham, D., *The Legitimation of Power*, 2d ed., Palgrave Macmillan, London/New York 2013, pp. 65 ff.

<sup>23</sup> Tankebe, J./Liebling, A., *Legitimacy and criminal justice: An introduction*, in: J. Tankebe/A. Liebling (eds.), *Legitimacy and Criminal Justice: An International Exploration*, Oxford University Press, Oxford et al. 2013, pp. 1–6.

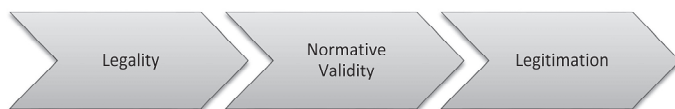
particular enforcement policy, and the criteria that have to be met by a rule or decision to be legitimate in a relevant sense. There are two different concepts of legitimacy, the empirical, used in the social sciences, and the normative, used in political philosophy.<sup>24</sup> Political philosophers claim that power is legitimate if it meets certain criteria of good, whereas for the social scientist it is legitimate if it is acknowledged as rightful by those involved in a relevant interaction.<sup>25</sup>

While international laws and norms converge cross-jurisdictionally, enforcement contexts and responses can diverge, formally creating dilemmas over how to establish the relative legitimacy of different enforcement frameworks. The framework most commonly cited in literature to explain legitimacy is the one proposed by *David Beetham*, namely legality, normative validity, and legitimation.<sup>26</sup>

For the purposes of legal control, the following steps are important:

– Legality of rule conformity: this step describes the rightful authority that controls a specific rule of law. In this case, any competent authority that may exercise power to investigate international disputes. This legality derives from relevant texts, both of international standing and domestic scope. The competent authorities translate this legality that is bestowed upon them and are the legal bearers and enforcers of the rules.

– Normative validity: this step describes the justifiability of established rules and their enforcement by competent authorities perceived as the rightful owners of legality. This normative validity relates to certain shared moral, ethical, and just values and standards. It is the bridge between successful and unsuccessful legitimacy since it signals compliance, depending on the normative value. Due to the normative validity, individuals comply and refrain from actions that would trigger sanctions, or further sanctions, against them.



There is a clear interplay between normative and empirical approaches to legitimacy. For instance, normative legitimacy refers to whether an institutional arrangement attracts the perception of the legitimate authority to regulate and enforce specific rules and regulations. The UN Security Council Sanctions Committee meets the substantive criteria of legitimacy (step 1 of 3) since they have been im-

<sup>24</sup> *Clark, I.*, *International Legitimacy and World Society*, Oxford University Press, Oxford et al. 2007, pp. 1–18.

<sup>25</sup> *Cameron, I.* (ed.), *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures*, Intersentia Ltd, Cambridge et al. 2013.

<sup>26</sup> *Beetham, D.*, *The Legitimation of Power*, 2d ed., Palgrave Macmillan, London/New York 2013, pp. 65 ff.

bued with specific duties. This is irrespective of whether people believe that it is a legitimate institution or not. If they do, the normative aspect of legitimacy is fulfilled (step 2 of 3). It is also called empirical legitimacy since it reflects the subjective beliefs of relevant stakeholders that evidence approval of a given institutional arrangement. If, as a result of this perception, they comply and do not commit an offence, then full legitimization is achieved (step 3 of 3).

The main concern regarding sanctions is that in most cases only step 1 of 3 is fulfilled, that being the substantive legitimacy that state authorities have.<sup>27</sup> It is less often the case that normative validity and, hence, legitimization are met. Interactive processes are instrumental in explaining how different stakeholders perceive who or what is legitimate or illegitimate, and how these perceptions may render the enforcement responses legitimate or delegitimate.

Why do we observe this disconnexion between legitimacy and sanctions? Essentially due to the varying context of legitimacy. For instance, there are differences over enforcement strategies that are more legitimate when revolving around compliance and self-regulation than around criminal prosecution and sanctioning. The same applies to whether legal or natural persons, or both, should be liable. In essence, a normative framework for legitimacy is empirically informed through different methodologies from different cultures. Ultimately, the purpose is to establish common understandings of norms, standards, values, and principles. In the next subsections we will examine why legitimacy is rather problematic with regard to sanctions.

### *1. The varying contexts of legitimacy*

Legitimacy, particularly in the normative and legitimization steps, greatly depends on the legal, institutional, political, and economic variables. It is shaped by geographical and historical developments, as well as specific jurisdictions. As a result, the notion of legitimacy changes throughout time and from one country to the other.<sup>28</sup> This is very evident in the field of sanctions, since international legal convergence is rather challenging. Despite efforts to harmonize legislation so as to prosecute specific offences consistently, cross-country inconsistencies do exist.

For instance, despite comparable legal frameworks that provide for the need to criminalize sanctions, most of the countries still diverge in terms of normative legitimacy, even the ones that share several values. This legitimacy deficit, compared

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<sup>27</sup> *Bottoms, A./Tankebe, J.*, Beyond procedural justice: A dialogic approach to legitimacy in criminal justice, *Journal of Criminal Law and Criminology*, vol. 102, issue 1, 2012, 119–170.

<sup>28</sup> *Coicaud, J.-M.*, Legitimacy, across borders and over time, in: H. Charlesworth/J.-M. Coicaud (eds.), *Fault Lines of International Legitimacy*, Cambridge University Press, Cambridge 2010, pp. 17–29.

to international conventions, relates to the way each country chooses to deal with sanctions, and how strongly it wishes to signal the illegality of certain acts. As a natural result, the perceptual legitimacy varies.

Semantics is a useful tool in how citizens perceive legitimacy, and providing a criminal framework leads to greater normative association of legitimacy. The same does not hold true for administrative liability. The varying context of legitimacy in international sanctioning dilutes its effectiveness.

## *2. Neutralization of harm that erases legitimacy*

Another issue relates to the neutralization of harm inflicted. Following a mix of rational choice theory and neutralization of harm received, sanctioned individuals and entities feel that they may not be punished and sanctioned for specific actions they may commit in the future. This reasoning means that there is reduced legitimacy since individuals lack a belief in normative legitimacy and legitimation.<sup>29</sup> As a result, legitimacy will be less effective in a sanctioning regime.

# **III. Review, effectiveness, and compliance of sanctions at the levels of the UN and EU**

## **A. Main framework**

As discussed above, the initial sanctioning regimes did not have an independent reviewer, which in turn led to considerable debate as to their legitimacy. In response to this, the Security Council created the Office of the Ombudsperson to independently review the petitioners wishing to be removed from the sanctions list.

The Sanctions Committees are often supported by a Panel of Experts. The Panel operates independently from the UN Secretariat but is attached to the UN Department of Political Affairs. The Sanctions Committees and Expert Panels cooperate with UN related missions who can provide an insight into specific situations. Further, the teams have the oversight and monitoring capacity to implement these sanctions, as appropriate.<sup>30</sup>

Monitoring these regimes and investigating related activities is crucial. Panels of Experts often face considerable obstacles to their work since sanctions are usually imposed on countries that emerge from conflict. Weak institutional capacities,

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<sup>29</sup> Lord, N., Responding to transnational corporate bribery using international frameworks for enforcement, *Criminology and Criminal Justice*, vol. 14, issue 1, 2014, 100–120.

<sup>30</sup> Tzanakopoulos, A., *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions*, Reprint edition, Oxford University Press, Oxford et al. 2013, pp. 141–153.



borders, and a lack of resources are elements that pose challenges in effective implementation. Further, the likelihood that other members will not implement the sanctions creates additional compliance issues in practice.

Imposing sanctions is a serious legal process that comes with certain legal complications. For instance, sanctions may interfere with, or seriously hamper, human rights including the right to life, the right to health, property rights, the liberty of movement, and the freedom to choose a residence. Equally, the right to a fair trial and the right to an effective judicial remedy may be also affected. In fact, most of the legal challenges against a sanction pertain to these procedural rights.

The procedural element is overall quite important since targeted individuals have no instruments to defend themselves against SC action. The Ombudsperson processes requests to delist; however, the process itself is often not transparent or is inadequate given the severity of the question at hand.

Lastly, there are certain pros and cons associated with sanctions that are open-ended. Scholars and practitioners have argued that such sanctions are effective only shortly after their imposition. Individuals quickly find a way to circumvent the sanctions after they have been authorized.<sup>31</sup> Either way, the more time and scope specific a SC resolution is, the more the signaling capacity and the potential for compliance are achieved.

Every sanction also needs to fit in a specific strategic pillar and make sense. The strategic and operational linkages with existing UN operations are deployed. The potential for coordinating sanctions with other UN operations is important to ensure coordination and for the overall feasibility of sanctions. This includes aspects like the probability of compliance, the impact of sanctions on the country's budget, potential methods of sanctions evasion, and the Council's countermeasures. The Council should also consider unintended consequences that can result from the imposition of sanctions and plan on appropriate mitigating measures accordingly.<sup>32</sup>

## **B. Sanctions Committees – accountability**

The Sanctions Committees operate under art. 29 of the UN Charter or Rule 28 of the Provisional Rules of Procedure. UN sanctions regimes in force have a sanctions committee.<sup>33</sup> Overall, sanctions committees do not have formal authority to make

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<sup>31</sup> *Figuerola, P.*, Economic Sanctions' Effectiveness in a World with Interdependent Networks and Powerful MNCs: The Role of Governance in the Target State, CUREJ Electronic Journal, 2015, available at: <https://repository.upenn.edu/cgi/viewcontent.cgi?article=1226&context=curej> (accessed April 2018).

<sup>32</sup> *Happold, M./Eden, P.* (eds.), *Economic Sanctions and International Law: Studies in International Law*, Hart Publishing, Oxford/Portland, Oregon 2016.

<sup>33</sup> A number of them, namely Somalia 751, Iraq 1518, DRC 1533, and DPRK 1718 initially did not.

binding decisions. In essence, they have delegated substantial tasks, including monitoring, reporting, managing exemptions, and managing designation lists. The decision-making mechanism operates through consensus, whereas in case of disagreement, a member can always escalate the matter to the SC to make the final call.

In practice, committees meet in a five-day session that is governed by a no objection procedure, which is used by nine out of the twelve sanctions committees. Reporting to the Council also varies, common options being either a 90-day cycle, a 120-day cycle, or as needed. Briefing of committee chairs also varies, since it is sometimes done publicly and at other times in consultations. Practically, submitting an annual report has become standard practice for certain committees.

### **C. Panels/groups of experts and monitoring groups**

The role of panels/groups of experts is to assist the sanctions committees, particularly regarding monitoring and reporting. The Commission of Inquiry established in 1995 related to the arms embargo on Rwanda was the first expert group to be established by the SC. Eventually, panels/groups of experts and monitoring groups are appointed from a list of experts through the Secretariat. They are all independent and impartial, as appropriate.

The de facto power of the panels/groups with regard to sanctions committees has been used to delay reports and potentially compromise the integrity of the process. As a result of this scrutiny, reports have been delayed several times in the past.<sup>34</sup> The majority of sanctions committees are assisted by a panel/group of experts or monitoring groups. These groups vary in size depending on the nature and complexity of the committee.

Each panel/group of experts or monitoring group is renewed by the Council annually. The general practice is that these groups report to the Council indirectly through their committee; notable exceptions include the Al-Qaida and Taliban reports, which are submitted just to the committees, and the Libya reports, which are submitted directly to the Council.<sup>35</sup> The chain of reporting can affect the efficiency of the process; if a group reports to the Council, a vote may be requested. However, if it reports to the committee, there is no record of the decision making processes, which are consensus based. There are also three sanctions committees without a panel/group, Iraq 1518, Lebanon 1636, and Guinea-Bissau 2048.

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<sup>34</sup> For instance, the 2010 report on the DPRK 1718 Committee was delayed by four months; the 2010 report for Sudan was delayed by six months while the 2011 report was never released. Similar delays have been witnessed in similar reports.

<sup>35</sup> *Giumelli, F.*, *Coercing, Constraining and Signalling: Explaining UN and EU Sanctions After the Cold War*, ECPR Press, Colchester 2011, Chapter Two: Framing the Problem: the Fallacies in the Debate of Sanctions.

Overall, expert and monitoring bodies have become a standard component of sanctions committees over the last years. As such, it is almost a prerequisite that a committee will have a group of experts. The absence thereof may be indicative of a lack of commitment by the Security Council toward implementation.

#### **D. Compliance and evasion**

Measuring compliance is particularly difficult in sanctions cases, since reliable data on contemporary sanctions evasions is difficult to find. The simplest example of this is that acts of non-compliance are not publicized. It would be rather unorthodox to expect that someone who escapes the UN sanctions openly brags about it. Sanctions busting is similar to what is generally understood as transnational organized crime, including black-market trading. On an individual level, these individuals usually have extended personal networks, which help them assume a false identity or otherwise avoid sanctions.

Compliance is often undermined by the fact that individuals subjected to UN sanctions may not even be aware that they have been listed. Under the current regime, targets need to be notified via the permanent mission to the UN, but in practice this does not always happen. Target awareness of sanctions imposition should be a minimum prerequisite for effective implementation of said sanctions.<sup>36</sup>

A way to increase implementation and coordinate within the UN system has highlighted the potential synergies of greater cooperation between panels/groups of experts and UN peacekeeping operations. Peace operations could facilitate implementation of recommendations from the panels/groups.

It is also essential to secure comprehensive SC engagement so that findings and recommendations are updated and retained. Other possibilities to increase coordination and sanctions compliance include: linkages with Special Representatives of the SC; coordination among sanctions committee chairs; communication between the SC and UN country teams; cooperation among departments in the Secretariat, and information-sharing among panels/groups.

Compliance is also affected by the cooperation between the UN and other inter-governmental organisations, such as INTERPOL and the Financial Action Task Force (FATF). Another factor that affects sanctions regimes is the role that neighbouring states and regional organizations play. It is often the case that neighbouring states are allies to a sanctioned entity or individual, which reduces the level of compliance. At the end of the day, UN sanctions require two fundamental components: state capacity and political will. Typically, implementation can collapse in

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<sup>36</sup> "How Effective Are Economic Sanctions?", World Economic Forum, <https://www.weforum.org/agenda/2015/02/how-effective-are-economic-sanctions/> (accessed April 2018).

the absence of either. For instance, if states fail to enforce a UN sanctions regime, the impact of measures that include a travel ban will be significantly reduced.<sup>37</sup>

Lack of capacity and infrastructure is another reason that leads to reduced compliance. The political will may be there; however, the state may lack the means to enforce the sanction. UN sanctions regimes are primarily located in the developing world. State capacity to enforce sanctions is therefore key to enforcement. Another important issue is the credible intent to implement UN sanctions.<sup>38</sup> This is not only an issue of geostrategic correlation but also a cost-benefit analysis, perception of the UN instruments' legitimacy to impose sanctions, or a matter of regional balance.

Compliance is more likely to achieve high rates where UN measures are compatible with regional and subregional measures. Harmonization between sanctions regimes, for instance, is a way to increase compliance. At the same time, compliance and political will among the SC permanent members is a critical variable affecting the implementation of UN sanctions. The fact that Permanent Five members have often been accused of lack of compliance and enforcement also does not create a positive precedent of consistent implementation.

Institutional learning and adjustment also affect even those known as smart or targeted sanctions. Besides, targeted sanctions can often have adverse consequences like a humanitarian impact on civilian populations, high economic costs for neighbouring countries, and the criminalization of basic economic activities. This at least partly explains non-compliance with sanctions. Sanctions work like an antibiotic. Perpetrators adjust to the new sanctions, and sanctions therefore either need to evolve or adjust to this new environment.

Also, when it comes to primary commodity sanctions, there is a risk of criminalizing the main source of income for poor populations, like farmers and miners. The UN therefore needs to fully assess the impact a sanction has in such societal strata prior to authorizing a sanction. Finally, sanctions imposed to promote democratization after a coup may backfire, since isolation may internally strengthen the state regime. Signalling illegitimacy to the military junta should be weighed against the drawbacks, in essence allowing the new regime to internally establish its authority and corrupt core parts of the society. Even though the UN has tried to exhibit a strong degree of innovation and improve the effectiveness of UN sanctions regimes, this has not always been successful.

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<sup>37</sup> Yoon, Y., Assessment of the effectiveness of economic sanctions: The cases of Iran, North Korea, Myanmar, and Cuba, Calhoun: The NPS Institutional Archive DSpace Repository, 2017, available at: [https://calhoun.nps.edu/bitstream/handle/10945/55561/17Jun\\_Yoon\\_Yesun.pdf?sequence=1](https://calhoun.nps.edu/bitstream/handle/10945/55561/17Jun_Yoon_Yesun.pdf?sequence=1) (accessed April 2018).

<sup>38</sup> Giumelli, F., EU Restrictive Measures on the Transnistrian Leaders: Assessing Effectiveness in a Strategy of *Divide and Influence*, European Foreign Affairs Review, vol. 16, issue 3, 2011, 359–378.

The use of secondary sanctions<sup>39</sup> is not often invoked. Transparency in sanctions is overall a constant item on the agenda, since effectively communicating the sanctions and their consequences with further measures is part of an overall process. Transparency does not, of course, mean getting rid of confidentiality. Rather, it means that transparency should be achieved, where possible, through measures like higher compliance and further changes in the sanctions' legitimacy.

### E. Discussion on legitimacy and effectiveness

A recent study on several UN targeted sanctions regimes concluded that:<sup>40</sup>

- The UN targeted sanctions are effective in achieving at least one of the three intended purposes approximately one in five times (22%).
- The UN targeted sanctions are three times more effective in signalling or constraining (approximately one in three cases) than they are in coercing (approximately one in ten cases) a change of behaviour.
- Previous results regarding imposing sanctions are not indicative regarding future results. In essence, we cannot extract a specific pattern to predict how sanctions operate.
- Sanctions are more effective the more they are combined with other measures. In other words, when applied on their own, they are highly inefficient. As such, they must be evaluated and integrated within the overall approach of sanctions management.
- Arms embargoes are among the least effective sanctions when applied alone. Despite their very wide usage (they were used in 87% of cases) embargoes need to be complemented with individual or commodity sanctions in order to be efficient. In particular, commodity sanctions, and, even more specifically, diamond trade sanctions, appear to be highly effective.
- Secondary sanctions on other countries, although applied infrequently, appear to be quite effective.
- Targeting is an exercise that needs to be undertaken with great caution. Otherwise, too many, too few, or simply wrong targets can easily undermine the credibility of the measures imposed.
- The main effect of UN sanctions when imposed alone is signalling. There is no coercion due to alternative routes of trade.

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<sup>39</sup> For instance, when the President Charles Taylor of Liberia was targeted for violating the Sierra Leone sanctions regime.

<sup>40</sup> *The Graduate Institute of Geneva*, The Effectiveness of United Nations Targeted Sanctions: Findings from the Targeted Sanctions Consortium (TSC), 2013, available at: [http://repository.graduateinstitute.ch/record/287976/files/effectiveness\\_TCS\\_nov\\_2013.pdf](http://repository.graduateinstitute.ch/record/287976/files/effectiveness_TCS_nov_2013.pdf) (accessed April 2018).

At an EU level, the Kadi case is probably the best known challenge against sanctions to date. In 2010, the European Court of Justice ruled in the Kadi II case on the legitimacy of EU regulations enacted to implement UN sanctions. At the same time the court discussed the right to a fair trial and the right to an effective judicial remedy, both of which had not been respected in Kadi's case. This created a case about the non-application of human rights and, even worse, the non-enforcement of a judicial decision. Why? Because once the court ruled that the individuals needed to be delisted because their procedural rights had not been respected, the EU Council reintroduced the sanctions with some threads of additional information.<sup>41</sup> In fact, the EU Council circumvented the decision by reintroducing a punitive sanction with new evidence.

The case was appealed and the Grand Chamber ruled in 2013 that despite the improvements in the delisting procedure, which now included the Ombudsperson, the process still did not guarantee effective judicial protection. At a national level, the most recent report listed cases challenging individual listings under the Al-Qaida 126/71989 sanctions regime: two in Pakistan, two in the UK, and one in the US.<sup>42</sup> It is worth keeping in mind that implementation of UN sanctions also depends on compatible national legislation and enforcement.<sup>43</sup>

We discussed earlier in the chapter that sanctions are meant to be preventive whereas other international institutions such as the International Criminal Court are meant to be punitive. Conversely, there have been individuals who have not been designated for listing under UN sanctions but have been indicted by the ICC. Different listings practically call for the need to better regulate and further harmonize the process. As an example, sanctions committees could update designation criteria for listed individuals.

However, full harmonization may be difficult and undesirable for a number of reasons. Primarily, the function of the ICC and UN sanctions regimes are inherently different. The ICC indicts individuals who have allegedly committed the gravest international crimes, including genocide and crimes against humanity, whereas the SC imposes sanctions upon threats to international peace and security, and aims to alter the target's behaviour. In other words, the ICC is reactive, whereas the UN is proactive. Further, the ICC is a judicial instrument and needs to operate as an inde-

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<sup>41</sup> *Thavarajah, S.*, *EU Counter-Terrorism Sanctions and International Human Rights Law: A Comparative Analysis of Due Process Rights*, AV Akademikerverlag, Saarbrücken 2014, pp. 64 ff.

<sup>42</sup> *Portela, C.*, *The EU's Use of 'Targeted' Sanctions: Evaluating Effectiveness*, Centre for European Policy Studies, 11 Mar. 2014, available at: <https://www.ceps.eu/publications/eu%E2%80%99s-use-%E2%80%98targeted%E2%80%99-sanctions-evaluating-effectiveness> (accessed April 2018).

<sup>43</sup> *Tamada, D./Achilleas, P.* (eds.), *Theory and Practice of Export Control: Balancing International Security and International Economic Relations*, Springer, Singapore 2017, pp. 65–73.

pendent and impartial body that follows strict rules of procedure and evidence, particularly regarding the presumption of innocence, which could be compromised with harmonization and information sharing. Another factor to consider is, of course, the political nature of UN sanctions.<sup>44</sup>

#### IV. Alternatives to increase efficiency

A number of alternatives to increase the efficiency of sanctions must be discussed. However, most of these solutions are either non-enforceable or difficult to enforce. We will primarily focus on measures enforceable in the short to medium term.

UN sanctions and their procedural structure have improved over the past decades; however, a lot remains to be done for further improvement. These are some options that may fit this objective:<sup>45</sup>

- Enhancing the processes that lead to authorization and evaluation of sanctions, particularly the assessment of the target and the most efficient approach to achieve it. As discussed, a lack of a solid procedure can lead to the invalidity of the sanctions or can hamper and neutralize their effect. Strict scrutiny of the procedures with particular emphasis on the right to an effective judicial remedy is instrumental to this end.
- Laying out specific criteria, strategic objectives, and measurable outcomes when issuing a sanctions decision. Clarity and specificity will help assess the effectiveness of a sanctions regime and will better crystallize the reasoning and specific target in question. This consistency will further help introduce conformity and legitimacy with the issued sanctions.
- The Security Council should be open to explore options to impose secondary sanctions and improve effectiveness in repeated non-compliance.
- Related recommendations by relevant actors should be considered and embraced. These recommendations will feed into the transparency and procedural safeguards discussion mentioned above.
- Regularly consulting with states adversely affected by sanctions regimes. Cooperation and dialogue can have a surprisingly positive impact and return dialogue to the forefront.

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<sup>44</sup> For instance, the Panel of Experts in the Sudan 1591 Committee recommended that Bashir be able to be added to the travel ban list several times, unsuccessfully. Ultimately attributing this to the presence of complex political factors and dynamics and listing process.

<sup>45</sup> *UN Sanctions*, Research Report: Security Council Report, <http://www.securitycouncilreport.org/research-reports/un-sanctions.php> (accessed April 2018).

- Introducing key steps to improve sanctions communication and coordination. Involved stakeholders determine how, and to what extent, communication and coordination are best achieved.
- The appointment of experts to panels and monitoring groups is a significant part of the sanctioning process. As such, every appointment needs to take into account the balances and the particularities when introducing sanctions. It is equally important to incorporate the findings of these expert panels into sanctions policy making so that their role is adequately fulfilled. A formal review mechanism could assist towards this target.
- Transparency is a term we have discussed throughout the paper. The more transparent and open the sanctions meetings and results are, the greater the outreach and legitimacy of decisions made. Save for sensitive and confidential information that cannot be communicated publicly, sanctions committees should be steered towards communicating as many things as possible. Further, using media outlets as a hub to communicate decisions will add to the legitimacy discussed.
- On-site visits to affected regions will increase both the understanding of how things are unfolding in the region and improve the assessment of implementation and compliance with the sanctions.

These options focus on the short-to-medium term and may be easier to implement than more structural changes. Of course, major reforms may have a greater impact, but they will require more time to implement and may be subject to strict scrutiny and debate since several member states may push back for reasons of internal politics.

Overall, there has been much deliberation over the past decades towards improving the UN sanctions regime. Much of the work was state-led and involved countries including Germany, Switzerland, and Sweden. This collaboration led to a number of reports, manuals, and processes on the design and implementation of sanctions, protocols, and strategies on making sanctions more effective, guidelines for the implementation of UN policy options, and the report of the Security Council, and to several instruments.

At the same time, a number of non-governmental organizations (NGOs) and civil society stakeholders often draft white papers and guidelines on how to achieve more efficient sanctions. Examples of this effort include the white paper by the Watson Institute.<sup>46</sup> Similar groups, often backed by their national governments, have been conducting studies that focus on sanctions implementation and efficiency.

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<sup>46</sup> Strengthening Targeted Sanctions through Fair and Clear Procedures, transmitted to the General Assembly and the Security Council on 19 May 2006 (A/60/887-S/2006/331).



## V. Concluding remarks

This paper has widely discussed the imposition of sanctions, their efficiency, and has suggested alternative ways towards increased compliance. Some key factors in this discussion need to be summarized.

First, the discussion on legitimacy demonstrated that when it comes to sanctions, the main issue is not one of questioning the authority *per se* but rather questioning the due process. There seems to be a consensus that, lacking a global tribunal that can issue preventive orders that take the form of sanctions, the UN Security Council has adequate legitimacy to pursue this activity. However, the lack of transparency with which the sanctions are decided upon and the overall flawed due process hamper said legitimacy. Sanctions discussions are always held behind closed doors, and the rights to a fair trial and effective judicial remedy are often not fully taken into account. As such, it is crucial that transparency, communication, and focus on due process will improve moving forward. This will give adequate leeway to the Security Council to pursue its activities with legitimacy.

Another point relates to the nature of sanctions itself. Are sanctions punitive or preventive in practice? Their nature and designation is preventive, but they rarely have a preventive function. They more likely have a punitive effect, they produce effects that are relevant to criminal law, and their impact is similar to one of a criminal sanction. At the same time the courts that have ruled on the legitimacy of sanctions designation take into account the fact that the results they produce, primarily asset freezing, relate to the human right to property. If we accept that sanctions are punitive, the ensuing question is why does not the ICC as the instrument enshrined with international criminal law issues take care of these sanctions instead of the Security Council?

An issue related to legitimacy is the signalling capacity of the sanction. Sanctions sometimes do not have a strong signalling capacity, either because they are not combined with other measures that would ensure holistic signalling, or because regional politics and balancing procedures may lead to weak signalling in specific regions. Ultimately, this boils down to the institutional willingness to enforce a sanction. If the states do not wish to collaborate or have other priorities, or diplomatic ties that make enforcement burdensome to them, the signalling effort will be weak.

Lastly, there are definitional issues that make sanctions not fully agreeable or understandable all over the world. For instance, terrorism does not have a universal definition, which creates tension depending on its different uses for sanctions purposes. In combination with the fact that non-legal institutions like the SC produce legal effects with serious individual consequences, one can clearly see why compliance and effectiveness is problematic.

When all is said and done, sanctions regimes such as those analysed in the present paper have been around for a while and it appears that their use will keep in-

creasing in the following years. It is therefore important to examine whether they have been efficient so far and what the required steps are to achieve even greater efficiency. This paper has aimed to make a contribution towards this purpose.

### **List of abbreviations**

CFSP	Common Foreign and Security Policy
DRC	Democratic Republic of the Congo
DPRK	Democratic People's Republic of Korea
FATF	Financial Action Task Force
ICC	International Criminal Court
NGOs	non-governmental organizations
SC	Security Council
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
WMD	Weapons of Mass Destruction

# **Prevention, Surveillance, and the Transformation of Citizenship in the ‘Security Union’: The Case of Foreign Terrorist Fighters**

*Niovi Vavoula*

## **I. Introduction**

In the aftermath of the terrorist events in Paris in 2015, a new securitization impetus has been created with governments of European Union (EU) Member States and EU institutions calling for the strengthening of security measures within a framework of national and European emergency. A multi-faceted EU response to the phenomenon of the so-called ‘foreign terrorist fighters’ (FTF) has thus been developed with the ultimate aim of establishing a ‘Security Union’.<sup>1</sup> This response is underpinned by the perceived urgency to address the issue that has justified both the acceleration of negotiations on legislative dossiers that had been in the legislative drawer prior to the events and the insertion of new measures building upon existing – not necessarily related to security aspects – EU legislation.

This chapter critically assesses the emerging EU legal framework aimed at eradicating the FTF phenomenon by focusing on three key strands of action: a) the criminalization of travelling for the purpose of terrorism; b) the corrective approach towards the second generation Schengen Information System (SIS II) by optimizing the alerts registered therein and intensifying border controls for EU citizens; and c) the surveillance of mobility via the setting up of an EU Passenger Name Records (PNR) system. In examining the implications of these developments for the protection of fundamental rights and citizenship in the EU, this contribution analyses anti-FTF legislation as a primary example of a model of preventive justice at EU level. Preventive justice is understood here as the exercise of state power in order to prevent future acts deemed as constituting security threats. As such, preventive justice is forward thinking and singles out individuals in terms of riskiness and suspicion following an ongoing risk assessment.<sup>2</sup> The emerging model of pre-

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<sup>1</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Agenda on Security, COM(2015) 185 final.

<sup>2</sup> *Mitsilegas, V.*, EU Criminal Law after Lisbon, Hart, Oxford 2016, Ch. 9. For the US approach post 9/11, see *Ackerman, B.*, Before the Next Attack: Preserving Civil Liberties

ventive justice can take various forms: from the state extending its reach to gradually remove the link between criminalization and prosecution on the one hand and the commission of concrete acts on the other,<sup>3</sup> to conflating immigration control with crime prevention under the guise of the term ‘border security’,<sup>4</sup> and the deployment of generalized surveillance mechanisms.<sup>5</sup> In this framework, the present chapter analyses these three legal developments with a view to highlighting the challenges posed to the transformation of fundamental rights and citizenship in the EU in an era of emergency and pre-emption.

## II. The criminalization of ‘Foreign Terrorist Fighters’

On 15 March 2017, Directive 2017/541 on combating terrorism<sup>6</sup> was adopted replacing the pre-existing legal framework<sup>7</sup> with a view to broadening the scope of terrorism offences by criminalizing a series of acts. In particular, under the revised rules training or being trained for terrorism purposes and providing or collecting funds with the intention or the knowledge that they are to be used to commit terrorist offences and offences related to terrorist groups or terrorist activities constitute

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in an Age of Terrorism, Yale University Press, New Haven 2006; *Waldron, J.*, Torture, Terror and Trade-Offs: Philosophy for the White House, Oxford University Press, Oxford et al. 2010; *Cole, D.*, The Difference Prevention Makes: Regulating Preventive Justice, *Criminal Law & Philosophy*, 2015, 510–519.

<sup>3</sup> *Ashworth, A./Zedner L.*, Preventive Justice, Oxford University Press, Oxford et al. 2014, pp. 121–134.

<sup>4</sup> *Bigo, D.*, Frontier Controls in the European Union: Who Is in Control?, in: D. Bigo/E. Guild (eds.), *Controlling Frontiers: Free Movement Into and Within Europe*, Ashgate, Aldershot et al. 2005, pp. 49–99; *Mitsilegas, V.*, Human Rights, Terrorism and the Quest for “Border Security”, in: M. Pedrazzi et al. (eds.), *Individual Guarantees in the European Judicial Area in Criminal Matters*, Bruylant, Brussels 2011, pp. 85–112.

<sup>5</sup> For an overview regarding the shift towards generalized surveillance mechanisms in the post-9/11 era, see *Ericson, R.*, The State of Preemption: Managing Terrorism Risk through Counter Law, in: L. Amoore/M. De Goede (eds.), *Risk and the War on Terror*, Routledge, Abingdon 2008, pp. 57–76; *Lyon, D.*, Surveillance Society: Monitoring Everyday Life, Open University Press, Oxford 2001; *Haggerty, K./Ericson, R.*, The Surveillant Assemblage, *British Journal of Sociology*, vol. 51, issue 4, 2000, 605–622; *Mitsilegas, V.*, The Borders Paradox: The Surveillance of Movement in a Union without Internal Frontiers, in: H. Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Faultlines of the EU’s Area of Freedom, Security and Justice*, Hart, Oxford 2009, pp. 33–64; *Mitsilegas, V.*, The Transformation of Privacy in an Era of Pre-Emptive Surveillance, *Tilburg Law Review*, vol. 20, issue 1, 2015, 35–37.

<sup>6</sup> Directive (EU) 2017/541 of the European Parliament and 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 L 88/6. The deadline for implementation is 8 September 2018. The UK, Ireland and Denmark do not participate in this Directive.

<sup>7</sup> Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [2002] OJ L164/3 and Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism [2008] OJ L330/21.

criminal offences.<sup>8</sup> Importantly, the revised rules expressly require EU Member States to prevent individuals from travelling to conflict zones by penalizing travelling within, outside, or to the EU for terrorist purposes, as well as organizing and facilitating such travel, including through logistical and material support. The insertion of terrorism travel as a criminal offence at EU level is anything but an isolated phenomenon; therefore, it must be viewed within a broader global security context. This section will explore the genesis and the evolution of the criminal offence of ‘travelling abroad for the purposes of terrorism’ from its original global context to its latest incarnation in EU rules.

### A. Global actors ‘setting the scene’

The first step taken in this respect originated in the United Nations (UN) Security Council’s acting as a norm entrepreneur in ‘global administrative law’.<sup>9</sup> Resolution 2178 (2014) on the phenomenon of ‘foreign terrorist fighters’ urged participating states to adopt a series of wide-ranging measures,<sup>10</sup> stressing that

all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense:

- (a) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories 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;

...

- (c) the wilful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, plan-

<sup>8</sup> Arts. 7, 8 and 11 of Directive 2017/541.

<sup>9</sup> *Krisch, N.*, Beyond Constitutionalism: The Pluralist Structure of Postnational Law, Oxford University Press, Oxford et al. 2010, pp. 177–178; *Mitsilegas, V.*, The European Union and the Global Governance of Crime, in: V. Mitsilegas et al. (eds.), Globalisation, Criminal Law and Criminal Justice: Theoretical, Comparative and Transnational Perspectives, Hart, Oxford 2015, pp. 153–198; *Krisch, N./Stewart R.*, The Emergence of Global Administrative Law, Law and Contemporary Problems, vol. 68, issue 3, 2005, 15–61.

<sup>10</sup> Resolution 2178 (2014) of 24 September 2014. This Resolution follows up to Resolution 1373 (2001) of 28 September 2001, where the UN Security Council *inter alia* decided that all States should prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures aimed at preventing the counterfeiting or fraudulent use of identity papers and travel documents. Notably, prior to the adoption of Resolution 2178 (2014), Resolution 2170 (2014) of 15 August 2014 was adopted calling upon Member States to take national measures to suppress the flow of FTF. In addition, that Resolution reiterated the obligations to prevent the movement of terrorists or terrorist groups, to expeditiously exchange information, and to improve cooperation among competent authorities to prevent such movement.

ning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training.<sup>11</sup>

Along the same lines, Resolution 2195 (2014) reaffirmed Member States' obligation to prevent the movement of terrorists or terrorist groups in accordance with applicable international law, by, inter alia, effective border controls.<sup>12</sup> In the aftermath of the Paris events in November 2015, the UN Security Council adopted Resolution 2249 (2015) that called for the intensification of participating States' efforts to stem the flow of FTF to Iraq and Syria and for preventing and suppressing the financing of terrorism.<sup>13</sup> In addition, implementation of previous resolutions was identified as a key priority.

The key provisions in the Resolution 2178 (2014) are transplanted into the Additional Protocol to the Council of Europe Convention on Prevention of Terrorism adopted by the Council of Europe (CoE).<sup>14</sup> At the heart of the Protocol is the implementation at the regional level of the acts of travelling abroad, which defines 'travelling abroad for the purpose of terrorism' as travelling to a State 'which is not that of the traveller's nationality or residence, for the purpose of the commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism'.<sup>15</sup> Member States were thus called to adopt measures so as to establish that travelling abroad for the purpose of terrorism from its territory or by its individuals, when committed unlawfully and intentionally, constitutes, in line with the States' constitutional principles, a criminal offence under their domestic law.<sup>16</sup> Attempt is also penalized.<sup>17</sup> The explanatory report accompanying the Protocol illustrates the prerequisites to be fulfilled for prosecuting travels: a) the real purpose of the travel must be to commit or participate in terrorist offences, or to receive or provide terrorism training in a state other than that of their nationality or residence; b) the perpetrator must commit the offence intentionally and unlawfully; c) the act of travelling must be criminalized under very specific conditions and only when the terrorism purpose is proven on the basis of evidence submitted to an independent court for scrutiny pursuant to national law, the specific applicable crimi-

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<sup>11</sup> For criticism on the preparatory offences such as terrorist recruitment and funding, which raise fundamental challenges to freedom of expression, non-discrimination and the respect of political rights, see *Scheinin, M.*, Back to Post-911 Panic? Security Council Resolution on Foreign Terrorist Fighters, in *JustSecurity.org*, 23 September 2014, <https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/> (accessed April 2018).

<sup>12</sup> Resolution 2195 (2014) of 19 December 2014.

<sup>13</sup> Resolution 2249 (2015) of 20 November 2015, point 6.

<sup>14</sup> For an overview of the background leading up to the drafting of the Additional Protocol see *Piacente, N.*, The Contribution of the Council of Europe to the Fights against Foreign Terrorist Fighters, *eucri*, issue 1, 2015, 12–15.

<sup>15</sup> Art. 4(1) of the Additional Protocol.

<sup>16</sup> Art. 4(2) of the Additional Protocol.

<sup>17</sup> Art. 4(3) of the Additional Protocol.

nal procedures, and the rule of law.<sup>18</sup> In addition, arts. 5 and 6 of the Protocol further penalize funding travelling abroad for the purpose of terrorism and organizing or otherwise facilitating travelling abroad for the purpose of terrorism.

From a comparative standpoint, it is noteworthy that the Protocol envisages certain terminological differences in comparison to Resolution 2178 (2014) (e.g. substitutions of the terms ‘perpetration’ and ‘planning and preparation’ with the terms ‘commission’ and ‘contribution’ respectively). Astonishingly, the drafters of the Protocol understood the wording of the Resolution as not imposing an obligation for States to criminalize terrorist travel. Instead, states could treat such act as a preparatory offence to the main terrorist offence and possibly as an attempt to commit a terrorist offence. However, the intervention of the CoE in this context has acted as a legitimizing catalyst granting legally binding force to the UN initiatives, which originated outside traditional public international law fora. At the same time, the weight of the UN Security Council Resolutions and consequently the role of the UN Security Council in adopting global standards seem to be somewhat underestimated by the CoE, which wishes to retain for itself the role of a pivotal regional actor in standards setting and not merely as a middleman.

### **B. Digesting international standards at EU level**

The CoE involvement served as a benchmark for the EU in an area where the EU itself was perhaps reluctant to legislate, particularly due to the fundamental significance of the free movement principle.<sup>19</sup> Soon after its release on 22 October 2015, the Protocol was signed by the EU. In parallel, the Commission tabled a proposal for a directive repealing Framework Decision 2002/475/JHA (as amended in 2008) to internalize the rules criminalizing FTF.<sup>20</sup> Reforming the legal framework on terrorism had been under way already since 2014, when in its conclusions of 13 October 2014, the Council invited the Commission to explore ways to overcome possible shortcomings of the Framework Decision particularly in the light of Resolution 2178 (2014).<sup>21</sup> After the Justice and Home Affairs (JHA) Council Meeting in Riga in the wake of the Charlie Hebdo events, EU Ministers agreed on the importance to consider possible legislative measures so as to establish a common understanding

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<sup>18</sup> Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (Riga, 22.10.2015).

<sup>19</sup> On the relationship between CoE and EU in addressing the phenomenon of foreign terrorist fighters, see *Mitsilegas, V.*, Transnational Criminal Law and the Global Rule of Law, in: G. Capaldo (ed.), *The Global Community Yearbook of International Law and Jurisprudence*, Oxford University Press, Oxford et al. 2017, p. 72.

<sup>20</sup> European Commission, 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) 625 final.

<sup>21</sup> Council of the European Union, Document 16880/14 (18.12.2014).

of terrorism offences in the light of the UN Resolution.<sup>22</sup> Soon afterwards, in its Resolution of 11 February 2015, the European Parliament highlighted the need to harmonize criminalization of FTF-related offences and eliminate prosecution gaps through an update to the Framework Decision.<sup>23</sup> Along the same lines, the European Agenda on Security adopted in April 2015 encompassed a reform of the terrorism legislation, though not to match the CoE Protocol but rather to implement the UN Resolution, which supposedly helped to ‘build a common understanding of the offences of foreign terrorist fighters’.<sup>24</sup>

In the aftermath of the Paris events in November 2015, the reform of the Directive gained significant impetus and the alleged increase of FTF as evidenced by the Europol analysis<sup>25</sup> was central in justifying their criminalization. According to the Commission,

While the phenomenon as such is not new, the scale and scope of people travelling to conflict zones, in particular to Syria and Iraq, to fight or train with terrorist groups is unprecedented. The latest Europol EU Terrorism Situation and Trend Report (TE-SAT) analysed that the current scale of the phenomenon is growing: by late 2014, the overall number of people who have departed from the EU to conflict areas was estimated to have exceeded 3000 and is now assessed to have reached 5000, while at the same time the number of returnees was reported to have increased in some Member States. Member States have reported that this represents a significant threat to security.<sup>26</sup>

To that end, and in order to match the international responses to the phenomenon, art. 9 of the proposal stipulated that

Member States shall take the necessary measures to ensure that travelling to *another country* for the purpose of the *commission of or contribution* to a terrorist offence ..., the participation in the activities of a terrorist group ... or providing or receiving of training for terrorism ... is punishable as a criminal offence when committed intentionally.<sup>27</sup>

Furthermore, according to art. 10 organizing or facilitating such travel is also to be considered a criminal offence when knowing the assistance thus rendered is for that purpose.

The proposal was rightly criticized as having a poor and vague understanding of the constituent elements of terrorism travel as developed by international and global actors. In particular, the reference to ‘travelling to another country’ left the clarifications found in the Resolution and the Protocol outside the definitional scope. Besides, the proportionality and necessity of this criminalization had not been substantiated; despite having promised otherwise, the Commission did not deliver an

<sup>22</sup> Council of the European Union, Document 5855/15 (2.2.2015).

<sup>23</sup> European Parliament, Resolution of 11 February 2015 on anti-terrorism measures, P8\_TA(2015)0032.

<sup>24</sup> European Commission (n. 1), p. 14.

<sup>25</sup> Europol, EU Terrorism Situation & Trend Report (TE-SAT), 2014.

<sup>26</sup> European Commission (n. 20), p. 2.

<sup>27</sup> Emphasis added.



Impact Assessment. As a result, the need to adopt specific provisions in this regard was primarily justified in view of the existence of international standards. In that respect, both the existence of rules at the national level dealing with this issue and the possibility of alternative administrative sanctions such as the forfeiture of passports were not taken into consideration.<sup>28</sup> After speedy negotiations,<sup>29</sup> the final text was reformulated to take into account the European Parliament's comments that suggested adapting the provisions to the UN and CoE texts by clarifying that the travel should involve own nationals or any individual travelling from their territory to another country that is not the traveller's nationality or residence.<sup>30</sup>

The final text constitutes a merging of previous wordings with a few tweaks that distinguish the EU from other norm creators. In particular, art. 9 penalizes outbound travelling to a country *other than that Member State*<sup>31</sup> when committed intentionally for three purposes: a) to commit or contribute to the commission of a terrorist offence; b) for the purpose of 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*;<sup>32</sup> c) or for the purpose of providing or receiving training for terrorism. This provision renders the actual perpetration of the criminal offence irrelevant and requires Member States to criminalize travels from their territory to other states, which may not constitute conflict zones, not excluding other EU Member States. What is left outside the scope of the Directive is the travelling of returnees from other states to the EU Member States. To fill that gap, the Directive allows discretion to Member States to address terrorist threats arising from inbound travel either by criminalizing preparatory acts undertaken by a person entering that Member State with the intention to commit or contribute to the commission of a terrorism offence.<sup>33</sup> Such preparatory acts may include planning or conspiracy with a view to committing or contributing to a terrorist offence. As for the attempt, art. 14(3) stipulates that it covers inbound travel and outbound [travel] only when the purpose is to commit or contribute to the commission of a terrorist offence.

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<sup>28</sup> Standing Committee of Experts on International Immigration, Refugee and Criminal Law (Meijers Committee), Note on a Proposal for a Directive on combating terrorism, CM1603, 16.3.2016, pp. 6–7.

<sup>29</sup> See Council of the European Union, Document 6655/16, 3.3.2016; European Parliament, Draft Report on the 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 – C8-0386/2015 – 2015/0281(COD)), 9.3.2016.

<sup>30</sup> European Parliament (n. 29), pp. 26–27.

<sup>31</sup> Emphasis added. See Council of the European Union, Document 6655/16 (n. 29), p. 16, where the Council suggested to specify that the travel should involve a country outside the EU, directly or by transiting through one or several Member States.

<sup>32</sup> Emphasis added.

<sup>33</sup> Recital 12.

From the aforementioned analysis it is evident that the EU legislator has diverted its way from the previous regime and further refined the scope of the definition by considerably expanding criminalization. With the exception of delimiting the cases where the attempt of terrorist travel is criminalized, the Directive expands the scope of criminalization by introducing another criminal act, namely of travelling abroad for the purpose of participating in the activities of a terrorist group. This addition is particularly far-reaching, particularly since it is unclear under which threshold and benchmark the determination that a group constitutes a terrorist one will be made.<sup>34</sup> Furthermore, it remains unclear what type of activities will fall under the umbrella of a terrorist group. Also, since the list of terrorism groups is a moving target, it is uncertain at which stage the terrorist nature of the groups will be determined. In this case, the threshold for criminal liability is higher, requiring knowledge by the individual of the fact that such participation will contribute to the criminal activities of such group. At the same time, criminalization is not limited to outbound travelling, but EU Member States are expressly entitled to adopt measures targeting returnees.<sup>35</sup>

Overall, the elevation of an otherwise ordinary activity of travelling abroad to a criminal offence is a clear example of preventive justice that results in overcriminalization.<sup>36</sup> As the CoE states, in many States such acts may constitute preparatory acts rather than criminal offences as such. The aforementioned analysis demonstrates the increased difficulty in defining such criminal offences. In other words, it is unclear what is criminalized and whether this is justified. The acts prescribed in the Directive are too loosely defined for such far-reaching implications of the right to free movement, which encompasses the right to leave any country, including one's own.<sup>37</sup> Indeed, the terms chosen in the final text arguably do not provide for a clear understanding of what is criminalized. In particular, the replacement of terms 'planning and preparation' with the term 'contribution' results in a wording that is vague and unclear, as it is not explained in the Directive what this could entail. Furthermore, the term 'facilitation' of travelling abroad is also unduly vague and significantly expands the scope of the offences.<sup>38</sup> According to the Commission, this 'is used to cover any other conduct than those falling under "organisation"

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<sup>34</sup> European Economic and Social Committee, Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament and the Council implementing the European Agenda on Security: EU action plan against illicit trafficking in and use of firearms and explosives' (COM(2015) 624 final) and the '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) 625 final – 2015/0281(COD)), OJ C177/51.

<sup>35</sup> On criticism see Meijers Committee (n. 28), p. 7.

<sup>36</sup> *Mitsilegas, V.*, op. cit. (n. 2).

<sup>37</sup> See art. 2 of the Fourth Protocol to the ECHR.

<sup>38</sup> Meijers Committee (n. 28), pp. 6–7. In that respect, see European Court of Human Rights, *Nada v Switzerland* (App. no. 10593/08), Judgment of 12 September 2012.

which assists the traveller in reaching his or her destination. As an example, the act of assisting the traveller in unlawfully crossing a border could be mentioned.<sup>39</sup> This broad criminalization challenges the principle of legality in criminal offences and sanctions and jeopardizes the relationship of trust between citizens and the state by effectively downgrading, in terms of risk, citizens to ‘foreign’ fighters.<sup>40</sup> This overcriminalization is also exemplified by the extraterritorial application of the rules by covering travelling to a country other than that Member State by citizens who may not be located in their state of nationality. The criminalization of inbound travel also is at odds with other initiatives on de-radicalization and integration of potential foreign fighters and returnees. In particular, the Commission has stated in that regard that prosecution can have adverse repercussions such as discouraging individuals who could otherwise be valuable sources of information from returning home or their relatives from alerting the authorities about signs of radicalization and preparation.<sup>41</sup> The inclusion of attempt of a criminal offence that is not clearly defined is also problematic in that it furthers the causal link to the commission of terrorist offences. Finally, given that the travel abroad must take place with the clear intention of terrorism, it may be extremely difficult to prove beyond any reasonable doubt that a person travelling to a conflict zone to join the fight there has the intention to commit acts of terrorism.<sup>42</sup> To that end, the European Parliament proposed that the intention of travelling for terrorist purposes should be proven ‘by inferring, as much as possible, from objective, factual circumstances’.<sup>43</sup> Nonetheless, that provision was watered down, with the final text dropping the need for factual circumstances.<sup>44</sup>

In any case, these rules are only minimum standards and Member States will have to implement them at the national level with possible discrepancies. Indeed, the Commission acknowledged the convoluted legal landscape in the aftermath of the adoption of the Directive by stressing that Member States require assistance in its implementation.<sup>45</sup> It remains to be seen to what extent Member States will interpret these acts broadly by finding that travelling to certain ‘suspect’ regions will be in principle sufficient to prove a terrorist purpose, thus reversing the burden of

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<sup>39</sup> European Commission (n. 20), p. 18.

<sup>40</sup> *Mitsilegas, V.*, op. cit. (n. 2).

<sup>41</sup> European Commission, Background document to the High-Level Ministerial Conference “Criminal justice response to radicalisation” 19.10.2015, p. 2.

<sup>42</sup> *Scheinin, M.*, op. cit. (n. 11).

<sup>43</sup> European Parliament (n. 29), p. 10.

<sup>44</sup> Recital 8.

<sup>45</sup> European Commission, Commission Staff Working Document – Comprehensive Assessment of EU Security Policy Accompanying the document Communication of the Commission to the European Parliament, the European Council and the Council – Ninth progress report towards an effective and genuine Security Union, SWD(2017) 278 final, p. 13.

proof.<sup>46</sup> The possibility of monitoring the movement of EU citizens to such regions is not mere rhetoric but the emerging reality for Member States, which are resorting to the increased capacities of highly sophisticated EU-wide information systems, particularly the SIS II.

### III. The reinvigoration of the SIS II as a response to the phenomenon of foreign fighters

The second strand of action on behalf of the EU to tackle the issue of ‘foreign fighters’ has been the strengthening of information exchange via centralized channels, particularly the SIS II. In a nutshell, the latter aims at preserving internal security at EU/Schengen level following the abolition of internal border controls<sup>47</sup> by containing ‘alerts’ on persons and objects falling under the following categories: a) persons wanted for arrest to be surrendered or extradited;<sup>48</sup> b) missing persons;<sup>49</sup> c) persons sought to assist with a judicial procedure;<sup>50</sup> d) persons and objects (such as vehicles, aircrafts, containers) to be subjected to discreet checks or specific checks;<sup>51</sup> e) objects for seizure or use as evidence in criminal proceedings;<sup>52</sup> and third-country nationals to be refused entry or stay in the Schengen area.<sup>53</sup> These alerts not only contain information about the particular person or object but also envisage clear instructions for concrete action to be taken by national officers when the person or object is found.

The EU approach to counter-terrorism involves the maximization of the SIS functionalities by opening up the database both in terms of what further infor-

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<sup>46</sup> Meijers Committee (n. 28), p. 7. In this context, it may well be the case that humanitarian organizations will face difficulties in their missions, as the overcriminalizing legal landscape in relation to human smuggling has led to prosecutions of NGOs.

<sup>47</sup> The SIS II legal framework currently comprises the following instruments: Regulation (EC) 1987/2006 of the European Parliament and of the Council on the development, operation and use of the second generation Schengen Information System (SIS II), [2006] OJ L381/4 (SIS II Regulation); Regulation (EC) 1986/2006 of the European Parliament and of the Council of 20 December 2006 regarding access to the Second Generation Schengen Information System (SIS II) by the services in the Member States responsible for issuing vehicle registration certificates [2006] OJ L381/1; Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) [2007] OJ L205/63 (SIS II Decision). For an analysis of the SIS II from a privacy perspective see *Vavoula, N.*, *Immigration and Privacy in the Law of the EU: The Case of Databases*, Brill Nijhoff, Nijmegen forthcoming 2018, Ch. 2.

<sup>48</sup> Arts. 26–31 of the SIS II Decision.

<sup>49</sup> Arts. 32–33 of the SIS II Decision.

<sup>50</sup> Arts. 34–35 of the SIS II Decision.

<sup>51</sup> Arts. 36–37 of the SIS II Decision.

<sup>52</sup> Arts. 38–39 of the SIS II Decision.

<sup>53</sup> Art. 24 of the SIS II Regulation.

mation can be obtained and in terms of who (else) will be able to handle this information. So far, the database has undergone significant changes as a response to 9/11 and the 2004 Madrid bombings.<sup>54</sup> The story repeats itself in relation to the FTF phenomenon with emphasis mainly on two issues of concern, the amount and content of alerts issued against suspected FTFs and the revision of the Schengen Borders Code<sup>55</sup> as regards the conduct of checks on persons at the external borders, particularly the SIS II, on EU nationals and other individuals enjoying free movement rights.<sup>56</sup>

### **A. Feeding the SIS II with alerts on discreet checks**

Effective tackling of the phenomenon of foreign fighters requires an increased exchange of information at EU level. As the most efficient countermeasure for the abolition of internal border controls, the SIS II has been a first class tool for enabling such information exchange through the possibility of registering alerts on persons or objects for discreet or specific checks.<sup>57</sup> Art. 36(2) of the SIS II Decision enables national authorities to register alerts pursuant to national law for the purposes of prosecuting criminal offences and for the prevention of threats to public security where there is a clear indication that a person intends to commit or is committing a serious criminal offence or where an overall assessment of a person gives reason to believe that that person will also commit serious criminal offences in the future. According to art. 36(3) of the SIS II Decision, authorities responsible for national security may also request the issuance of an alert for the prevention of threats including threats to internal or external national security. The alert contains information on the fact that the person of interest has been located and the modalities of that detection. Consequently, the Counter-Terrorism Coordinator has been calling as early as 2013 for the ‘increased and harmonised use of the SIS alert system’.<sup>58</sup> The calls for intensifying Member States’ efforts in populating the SIS II with FTF alerts multiplied, coupled with efforts to develop a list of criteria for in-

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<sup>54</sup> Council Regulation (EC) 871/2004 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism [2002] OJ L162/29; Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism [2005] OJ L68/44.

<sup>55</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1.

<sup>56</sup> Council of the European Union, Document 13416/14 (26.9.2014).

<sup>57</sup> Art. 37(4) prescribes: ‘During specific checks, persons, vehicles, boats, aircraft, containers and objects carried, may be searched in accordance with national law for the purposes referred to in Article 36. If specific checks are not authorised under the law of a Member State, they shall automatically be replaced, in that Member State, by discreet checks’.

<sup>58</sup> Council of the European Union, Document 9946/1/13 (28.5.2013).

serting such alerts into the system. In that respect, a list developed by the Ministers for Home Affairs coming from the EU countries ‘most concerned by the issue of foreign fighters’ emerged in July 2014.<sup>59</sup> These criteria included knowledge that the person has the intention to leave or has left the territory of a Member State to reach a jihadi area of conflict or knowledge that the person has the intention to leave or has left a jihadi area of conflict.<sup>60</sup> More contentiously, one of the criteria included the registration of alerts in cases where an individual facilitated such activities.

Following the Charlie Hebdo events, the EU Counter-Terrorism Coordinator underlined the need to develop common criteria to enter ‘foreign fighter’ information into the system.<sup>61</sup> Along the same lines, the Riga Joint Statement reaffirmed the need to reinforce information exchange and develop further cross-border cooperation on fighting the illegal trafficking of firearms by systematically inserting information into SIS II.<sup>62</sup> The first concrete measure adopted was Commission Implementing Decision 2015/219 of 29 January 2015 that allowed Member States to immediately report a hit on a discovered foreign fighter to the Member State(s) that introduced the alert into the system.<sup>63</sup> Essentially, a new category of alert emerged, that of an alert on discreet or specific checks requiring immediate reporting. However, due to the nature of an Implementing Decision, the adoption of the instrument lacked any democratic scrutiny on behalf of the Parliament.

In the Council meeting following the Paris events in November 2015, Member States were called to ensure that national authorities enter systematically data on suspected foreign terrorist fighters into the SIS II, in particular under art. 36(3) of the SIS II Decision regarding discreet checks.<sup>64</sup> The reason why this was a necessary step lies in a questionnaire circulated among Member States a few weeks before.<sup>65</sup> On the bright side, the national replies revealed that in absolute terms there had been a significant increase of alerts entered in SIS under art. 36(2) and (3) of the SIS II Decision in 2015 compared with 2014.<sup>66</sup> However, its use was still not

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<sup>59</sup> Council of the European Union, Document 12757/14 (4.9.2014).

<sup>60</sup> *Ibid.*, see Annex 1.

<sup>61</sup> Council of the European Union. Document DS 1035/15 (17.1.2015), p. 6.

<sup>62</sup> Council of the European Union, Document 5855/15 (2.2.2015).

<sup>63</sup> Commission Implementing Decision (EU) 2015/219 of 29 January 2015 replacing the Annex to Implementing Decision 2013/115/EU on the Sirene Manual and other implementing measures for the second generation Schengen Information System (SIS II) [2015] OJ L44/75.

<sup>64</sup> Council of the European Union, Document 14406/15 (20.11.2015).

<sup>65</sup> Council of the European Union, Document 13059/15 (14.10.2015).

<sup>66</sup> This increase must be viewed also in conjunction with the 30% increase of such alerts that was reported in 2014. See European Commission, Report from the Commission to the European Parliament and the Council – Fifth bi-annual report on the functioning of the Schengen area 1 November 2013 – 30 April 2014, COM(2014) 292 final.

adequate, as evidenced by heavy variations among Member States. This under-exploitation should be seen as a sign of reluctance on behalf of national authorities both in relation to the entry of alerts and in relation to the conduct of non-systematic checks on EU nationals at the external borders. In particular, there was disparity between the actual threat posed to some EU Member States and the amount of alerts entered. Alerts entered under art. 36(3) of the SIS II Decision remained generally very low and several Member States did not use this option at all. As for those who used the new tool of immediate reporting, practices varied. In addition, the new possibility as introduced by the Commission Implementing Decision was underused. Furthermore, the statistics did not clarify whether the number of alerts entered under art. 36(2) or (3) were related to 'foreign fighters'. Finally, the consultation of databases was also unsatisfactory: between 1,5 and 34% of persons enjoying the right to free movement were checked (Switzerland checks 100%).<sup>67</sup> Overall, despite the efforts to reinforce the use of the SIS II in the fight against terrorism and foreign fighters, the Council acknowledged that at that point these did not materialize in a comprehensive and consistent action on behalf of the Member States.

In the Communication on smarter and stronger borders, the Commission stressed – among other shortcomings – the need of storing hit information on discreet and specific check alerts in the SIS II Central System.<sup>68</sup> Then, in June 2016, the Council agreed on a Roadmap to enhance information exchange and information management including interoperability solutions in the Justice and Home Affairs area, which elaborated on the goals regarding the optimization of the SIS II in a threefold manner, namely by stressing the need to agree on indicative (thus non limitative or legally binding) criteria for inserting terrorism-related alerts, by ensuring that Member States insert alerts only when criteria are met, unless there are operational reasons not to, and by distinguishing those alerts involving terrorism-related activity with a marker.<sup>69</sup> The latter possibility seems to be already used by Member States. However, in the absence of binding criteria, national authorities retain full operational discretion to decide in which cases alerts shall be issued and under which category of alerts.<sup>70</sup>

The aforementioned changes in beefing up the SIS II with art. 36 alerts have been accompanied by a detailed refurbishment of the SIS II legal framework, which lightly touches upon the FTF issue as well. In December 2016, the Commission adopted a package of proposals one of which aims at improving and expand-

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<sup>67</sup> Council of the European Union, Document 14438/15 (23.11.2015).

<sup>68</sup> European Commission, Communication from the Commission to the European Parliament and the Council – Stronger and smarter information systems for borders and security, COM(2016) 205 final.

<sup>69</sup> Council of the European Union, Document 9368/1/16 (6.6.2016), pp. 31–33.

<sup>70</sup> Council of the European Union, Document 12286/16 (19.9.2016).



ing the use of the SIS in the field of police and judicial cooperation in criminal matters.<sup>71</sup> In a nutshell, the Commission proposal expands the use of biometrics and inserts the possibility of processing dactylographic data (palm prints) and DNA profiles, enlarges access for law enforcement authorities as well as Europol, and introduces new types of alerts.<sup>72</sup> In particular, in addition to discreet and specific checks, art. 37 of the proposal introduces a new form of check, the ‘inquiry check’, which will allow authorities to stop and question the person concerned. As a result, it is more in-depth than the existing discreet check but does not involve searching or arresting. It may, however, provide sufficient information to decide on further action to be taken. The aim of this new type of alert is to assist authorities to gather essential information for combating terrorism.

For the purposes of this chapter, two key challenges underpinning the registration of FTF alerts in the SIS II must be stressed. First, the effectiveness of these alerts in tackling the FTF phenomenon is based upon the existence of mutual trust among Member States which operates in a twofold manner. The issuing Member State must trust other states that they will effectively cooperate in locating the FTFs and thus contribute to the prevention of internal security threats. At the same time, Member States must trust each other on the quality of data, in other words that the data fed into the system have been entered in a proportionate and lawful manner. This latter dimension of mutual trust is safeguarded through art. 21 of the SIS II Decision which requires a proportionality assessment, according to which only proportionate, adequate, and relevant data must be stored in the system. In the absence of common criteria and with the concept of FTF gradually expanding, individuals may find themselves unlawfully registered in breach of the principle of proportionality. This danger has recently materialized with the example of France, illustrating the potential abuse of art. 36 alerts by storing alerts on individuals with only loose, if any, connections to terrorist activities. According to statistical data, France is responsible for around 60% of art. 36 alerts by registering more than 78,000 out of the 134,000 alerts.<sup>73</sup> The result of differentiated practices at the national level

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<sup>71</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending Regulation (EU) No. 515/2014 and repealing Regulation (EC) No. 1986/2006, Council Decision 2007/533/JHA and Commission Decision 2010/261/EU, COM(2017) 883 final. For the other proposals, see European Commission, Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, amending Regulation (EU) No. 515/2014 and repealing Regulation (EC) No. 1987/2006, COM(2016) 882 final; Proposal for a Regulation of the European Parliament and of the Council on the use of the Schengen Information System for the return of illegally staying third-country nationals, COM(2017) 881 final.

<sup>72</sup> For an appraisal of the proposals, see EDPS, Opinion 7/2017.

<sup>73</sup> Interestingly, the chart was released by the German Ministry of Interior and not EU-LISA, which is the EU agency responsible for the operational management of central-



reflects on the differentiated impact on individuals, who may find themselves affected depending on whether the issuing Member State follows overzealous practices in registering alerts, thus treating individuals as security threats. The en masse registration not only abuses the system and jeopardizes its effectiveness by potentially wasting resources on less significant cases but also runs counter to the explicit requirement of a proportionality assessment prior to the recording of an alert. Thus, this may lead to the secret surveillance of the movements of thousands of individuals and, potentially, the families or contacts of these individuals.

Second, building on the impact of alerts on individuals, the current and forthcoming legal framework prescribes a gradation of measures against the person concerned, whereby discreet checks are generally invisible, resulting in the mere monitoring of whereabouts and related circumstances, whereas specific checks may lead to searching the person or object pursuant to national laws. The forthcoming ‘inquiry check’ shall constitute an intermediate stage in terms of disturbance to the individual, allowing for questioning and gathering of further information. The addition of immediate reporting following a ‘hit’ has essentially resulted in police cooperation on the spot and the adoption of decisions on the fate of the individual concerned on the ground. However, the instructions for action in this context are vague, with limited information on the aftermath following a hit. The aforementioned consequences of an alert, however, should not rise up to the level of arrest and conversion of a ‘discreet or specific check’ alert to an art. 26 alert for the purposes of returning the person to the country of origin.<sup>74</sup> In terms of the consequences, such a possibility would transform individuals who may not have committed any terrorist offence at that point or individuals merely suspected of terrorism into convicted criminals. Coupled with the potential abuse, individuals may have their free movement rights limited in a disproportionate manner.

### **B. Reinforcement of checks on EU nationals: changes to the Schengen Borders Code**

Until recently, art. 8(2) of the Schengen Borders Code stipulated that ‘all persons shall undergo a minimum check in order to establish their identities on the basis of the production or presentation of their travel documents’. That minimum check was the rule for persons enjoying the right of free movement under Union law, meaning EU citizens, their family members, and citizens from Norway, Iceland, Liechtenstein, and Switzerland under bilateral agreements signed by those countries with

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ized databases, including the SIS II. See *Hunko, A.*, Secret alerts are increasing rapidly. Why? 21.2.2018, <https://andrej-hunko.de/presse/3990-secret-alerts-are-increasing-rapidly-why> (accessed April 2018). For an appraisal of this practice, see *Hinnant, L.*, France puts 78,000 security threats on vast police database, 4.4.2018, <https://apnews.com/a1690ac25cea4d5b8d2b622d3fd4e646> (accessed April 2018).

<sup>74</sup> Council of the European Union, Document 5635/18 (29.1.2018).

the EU. However, on a non-systematic basis, border guards could consult national and European databases to ensure that persons crossing the external border do not represent a risk to EU internal security. In relation to both checks, consultation of the SIS II is central.

In October 2014, the JHA Council decided that checks at external borders should be improved under the existing legal framework.<sup>75</sup> In response to these calls, the Commission, in December 2014, released a series of informal recommendations addressed to Member States as regards checks on travel documents against relevant databases, notably in relation to the SIS II.<sup>76</sup> In particular, it called for ‘intensified consultation’ of the relevant databases on the grounds of a risk-based approach rather than randomly. In the Commission’s own words, this approach entailed the conduct of analyses at the national level of ‘the risks for internal security’ and of ‘the threats that may affect the security of external borders’, on the basis of which border guards would be allowed to perform systematic checks on those persons falling under this risk assessment, whereas those not falling therein would generally not be checked against the databases. An example in this regard would be the systematic check on particular travel patterns, such as flights coming from the geographical areas in the vicinity of conflict zones. However, even in such cases, a certain category of persons would fall under the risk assessment, but no further indications were submitted. Other instructions to be considered at the national level involved technical improvements in the operation of both the database and the external border process in general (e.g. decrease in the response time of consultation, possibility to separately consult the system on travel documents and on persons, immediate seizure and notification to the SIRENE Bureau in cases when a forged document has been found).

The weeks following the Charlie Hebdo events in January 2015 witnessed the emergence of successive official responses both at the national and European level regarding counter-terrorism policies. The revision of the Schengen Borders Code gained support with the EU Counter-Terrorism Coordinator by calling for broader consultation of the SIS II ‘during the crossing of external borders by individuals enjoying the right to free movement’ being mindful of the need for technical solutions so that there is no impact on passenger waiting times at passport controls.

In addition, the non-binding Recommendations as set out above, including the emphasis on a risk-based approach, were incorporated in the revised Handbook for Border Guards released in June 2015.<sup>77</sup> In the latter, the Commission introduced an element of time in the risk-based approach by noting that

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<sup>75</sup> Council of the European Union, Document 14044/14 (9–10.10.2014).

<sup>76</sup> Council of the European Union, Document 16880/14 (18.12.2014).

<sup>77</sup> European Commission, Commission Recommendation of 15.6.2015 amending the Recommendation establishing a common “Practical Handbook for Border Guards

in any case, these checks shall remain proportional to the objective pursued, i.e. to the protection of internal security or security of external borders, but shall be adapted to the evolving threats identified by the Member States. They should be intensified in case the risk increases and should be carried out as long as the relevant risk assessment indicates the need for such intensified checks.

Unsurprisingly, immediately after the Paris terrorist attacks in November 2015, the Council invited the Commission to propose a targeted revision of the Schengen Borders Code to provide for systematic controls of EU nationals, including the verification of biometric information, against relevant databases at external borders of the Schengen area.<sup>78</sup> In other words, the risk-sensitive approach, exemplified by the informal recommendations on the basis of specific factors that needed to be taken into account by border guards, was replaced by a concrete proposal to intensify external border controls on EU citizens, thus effectively placing them and third-country nationals not subject to visa requirements under comparable mandatory checks at the external borders.

In the proposal that was tabled in December 2015,<sup>79</sup> the Commission regarded the reforms as a direct response to the increase in terrorist threats and substantiated the call for action found in the Council Conclusions of 9 and 20 November 2015. Interestingly, the latter focuses on measures to be adopted in the light of the refugee crisis, thus seemingly forming a rather disturbing link between two separate aspects, a link that was otherwise denied, at least at EU level. Following speedy negotiations, Regulation 2017/458<sup>80</sup> was adopted in March 2017, marking an era whereby EU nationals would be officially treated with generalized suspicion. The revised art. 8 of the Schengen Borders Code obliges national border guards to carry out systematic checks on persons enjoying the right of free movement under EU law, including EU citizens and members of their families who are not EU citizens, when they cross the external border both at entry and at exit against the SIS II, Interpol's Stolen and Lost Travel Documents (SLTD) database, and national databases containing information on stolen, misappropriated, lost, or invalidated travel documents, as well as in order to verify that the persons do not represent a threat to public order and internal security. The latter verification necessarily entails – but is not limited to – a check against alerts in the SIS II.

This obligation applies at all external borders, at air, sea, and land borders. However, where systematic checks may frustrate the traffic flow and lead to dispropor-

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(Schengen Handbook)” to be used by Member States’ competent authorities when carrying out the border control of persons (C(2006) 5186 final), C(2015) 3894 final.

<sup>78</sup> Council of the European Union, Document 14438/15 (23.11.2015).

<sup>79</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation No. 562/2006 (EC) as regards the reinforcement of checks against relevant databases at external borders, COM(2015) 670 final.

<sup>80</sup> Regulation (EU) 2017/458 of the European Parliament and of the Council of 15 March 2017 amending Regulation (EU) 2016/399 as regards the reinforcement of checks against relevant databases at external borders [2017] OJ L74/1.

tionate delays, targeted checks may take place at specified border crossing points, provided that a risk assessment conducted by the Member State concerned shows that this does not lead to risks related to the public policy, internal security, public health, or international relations of any of the Member States. The substitution of systematic checks with targeted ones may only be a temporary measure not exceeding what is strictly necessary and for specific reasons, by demonstrating the disproportionate impact on the flow of traffic and providing statistics on passengers and incidents related to cross-border crime.<sup>81</sup> The risk analysis should be communicated to Frontex and should be the subject of regular reporting to both the Commission and Frontex. As for the much more contentious issue of air borders, the derogation from checks has been applied only for a limited transitional period of six months,<sup>82</sup> prolonged to a maximum of 18 months in exceptional cases, where, at a particular airport, there are specific infrastructural difficulties. It is noteworthy that the final text reflects a restrictive approach, as the Commission proposal allowed the substitution of systematic checks not only in relation to specific crossing-points but generally within the national territory.<sup>83</sup>

The aforementioned changes to the Schengen Borders Code have brought the end to the abolition of minimum checks on EU nationals and other persons enjoying free movement rights when crossing the external borders both at entry and at exit and the growing elimination of differences in border controls between EU citizens and third-country nationals. This intensification of border controls signifies a negative turn in the relationship between a citizen and the State in that in principle all EU nationals travelling outside the Schengen area irrespective of the means of transportation, the destination, the purpose of travel, and the personal circumstances are considered as potential risks, are placed under suspicion, and therefore their movement needs to be regulated and monitored. Compared to the previous regime, the nature of risk assessment is reversed. Whereas earlier it was used to decide whether an individual should undergo a systematic check, wherefore it was primarily personalized, it is now used to support whether groups of individuals crossing the external borders should not be placed under scrutiny irrespective of their personal circumstances, wherefore it is depersonalized and generalized. In terms of the protection of fundamental rights, the mandatory consultation of the SIS II at the external borders for all beneficiaries of free movement rights entails an interference with the rights to privacy and data protection.

According to the Commission, however, in light of the operation of the SIS II on a hit/no hit basis coupled with the need to enhance EU security, such concerns are outweighed. The extent to which this statement holds true is debatable, and propor-

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<sup>81</sup> Council of the European Union, Document 6673/16 (3.3.2016).

<sup>82</sup> Council of the European Union, Document 5208/16 (15.1.2016).

<sup>83</sup> Council of the European Union, Documents 5753/16 (3.2.2016); 5808/16 (8.2.2016); 6181/16 (17.2.2016); 6310/1/16 (24.2.2016).

tionality concerns may arguably be raised especially if one considers the number of people on whom these checks will be performed in relation to the potential benefits the EU may gain from the changes. These benefits are particularly questionable given that the use of the system to enter alerts on persons to be placed under discreet or specified checks by national authorities is admittedly still inadequate. This means that EU nationals may have to undergo systematic checks in vain, if the database is not fed with information against which to check their data. However, more data will equally necessitate enhanced cross-border cooperation between national authorities, trust in the effectiveness of the system, and clear-cut criteria. The development of common risk denominators for inclusion of alerts may be just as problematic on non-discrimination grounds. If these conditions are not met, reliance on a proven non-efficient database at the expense of EU citizens' rights may not be an effective solution. At the same time, the performance of checks may generate in EU citizens' minds a so-called 'chilling effect', whereby a legitimate everyday activity such as travel may have negative implications for their private life.

#### **IV. Surveillance of mobility – the development of the EU PNR scheme**

##### **A. The origins of the EU PNR system: internalization of US standards**

The shift towards the generalized surveillance of mobility as a counter-terrorism tool has been central to the US response in the aftermath of 9/11. Due to the manner in which the attacks took place, emphasis was placed on 'border security' and in particular on preventing any movement that would place the United States under a similar terrorism risk.<sup>84</sup> A primary strand of US policy has been the adoption of domestic legislation requiring all airlines flying into the US to provide several of their national authorities with a wide range of everyday data on their passengers, forming the so-called Passenger Name Records (PNR) data. The imposition of this requirement on airlines flying from the EU has generated questions regarding the compliance of US PNR law with EU data protection and privacy law. Key in this context has been art. 25 of the Data Protection Directive 95/46,<sup>85</sup> soon to be replaced by art. 45 of the General Data Protection Regulation,<sup>86</sup> according to which

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<sup>84</sup> *Mitsilegas, V.*, Immigration Control in an Era of Globalisation: Deflecting Foreigners, Weakening Citizens, Strengthening the State, 19(1) *Indiana Journal of Global Legal Studies* (2011), 3–60.

<sup>85</sup> 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 [1995] OJ L281/31.

<sup>86</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC OJ L [2016] 119/1.

the transfer of data to a third country is only allowed if that country ensures an adequate level of personal data protection. In order to solve this matter, a number of – highly controversial – transatlantic PNR agreements have been concluded, verified by the Commission as follows: the first one of 2003<sup>87</sup> was replaced following an adverse ruling by the EU Court of Justice<sup>88</sup> in 2007<sup>89</sup> and finally ‘Lisbonised’ in 2012. The EU-US PNR Agreement is controversial by allowing the transfer of a wide range of personal data related to everyday legitimate activities, in bulk, to the United States. However, this is not an isolated case; similar agreements have been concluded between the EU and Canada and between the EU and Australia respectively, respectively, whereas a PNR agreement is currently being negotiated with Mexico. PNR data transfers are a trendy way of monitoring the movement of passengers; nevertheless, they blur the distinction between traditional immigration control at the border or extraterritorially and preventive justice and law enforcement. Furthermore, they establish a system of mass, generalized surveillance of all passengers, citizens and foreigners alike.<sup>90</sup> Importantly, these transfers pose significant challenges to EU data protection and privacy law with the Court of Justice of the EU (CJEU) in adopting Opinion 1/15 that ruled against the conclusion of the EU-Canada Agreement due to poor data protection safeguards.<sup>91</sup> Recognizing the PNR agreement as an ‘intelligence tool’,<sup>92</sup> the CJEU found that

taken as a whole, the data may, inter alia, reveal a complete travel itinerary, travel habits, relationships existing between air passengers and the financial situation of air passengers, their dietary habits or state of health, and may even provide sensitive information about those passengers.<sup>93</sup>

Whilst not dismissing the transfer and processing of PNR data for preventing and combating terrorism or other serious offences as a practice altogether,<sup>94</sup> the Grand Chamber called for increased safeguards by applying a strict proportionality test as regards the modalities of processing, including the precision of the categories of

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<sup>87</sup> For an analysis, see *Mitsilegas, V.*, *Contrôle des étrangers, des passagers, des citoyens. Surveillance et anti-terrorisme*, Cultures et Conflits, vol. 58, 2005, 155–182.

<sup>88</sup> Joined Cases C-317/04 *European Parliament v Council of the European Union* and C-318/04 *European Parliament v Commission of the European Communities*, Judgment of the Court (Grand Chamber) of 30 May 2006.

<sup>89</sup> For an analysis, see *Mitsilegas, V.*, *Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance in: E. Guild et al. (eds.), Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Hart, Oxford 2007, pp. 359–394.

<sup>90</sup> *Mitsilegas, V.*, *The Law of the Border and the Borders of Law. Rethinking Border Control from the Perspective of the Individual*, in: L. Weber (ed.), *Rethinking Border Control for a Globalizing World*, Routledge, Abington 2015, pp. 15–32.

<sup>91</sup> Opinion 1/15 of the Court (Grand Chamber) of 26 July 2017.

<sup>92</sup> *Ibid.*, para. 130.

<sup>93</sup> *Ibid.*, para. 128.

<sup>94</sup> *Ibid.*, paras. 186–189.

data transferred,<sup>95</sup> the manner in which processing must take place on the basis of predetermined models and criteria,<sup>96</sup> and the post-travelling retention period.<sup>97</sup>

Another brick in the surveillance wall [built] by processing PNR data has come from the EU legislature itself and concerns the development of a similar system to process its own air travel data, both in terms of intra-EU flights and flights to third countries. The setting up of a PNR system at EU level has been contemplated since 2004,<sup>98</sup> although only a handful of Member States, including the UK, operates domestic PNR systems. In this context, the first proposal for a Framework Decision dates back to 2007;<sup>99</sup> however, no agreement was reached until the entry into force of the Lisbon Treaty. A revised proposal was released in 2011,<sup>100</sup> essentially mimicking the EU-US PNR model, at least as regards the types of data to be processed and the focus on assessing the risks attached to passengers as a means of preventing terrorist attacks or other serious crimes. In April 2013, the European Parliament postponed the voting on fundamental rights grounds, but following the Charlie Hebdo events the EU PNR project was brought back to life. After speedy negotiations due to the urgency attached to the dossier, the EU PNR Directive was adopted in May 2016<sup>101</sup> and is due to be implemented by May 2018.

### **B. An appraisal of the EU PNR system**

The EU PNR Directive places a duty on airline carriers operating international flights between the EU and third countries to forward PNR data of all passengers to the Passenger Information Unit (PIU) established at domestic level for this purpose. Member States are given the discretion to extend the regime set out in the Directive to intra-EU flights, even to a selection of them.<sup>102</sup> Unsurprisingly, all participating States have declared their intention to make use of their discretion,

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<sup>95</sup> *Ibid.*, paras. 155–167.

<sup>96</sup> *Ibid.*, paras. 168–174.

<sup>97</sup> *Ibid.*, paras. 196–211.

<sup>98</sup> European Council, Declaration on Combating Terrorism (25.3.2004), <http://data.consilium.europa.eu/doc/document/ST-7906-2004-INIT/en/pdf> (accessed April 2018), p. 8. In any case, the EU-US PNR Agreements contain reciprocity clauses referring to the possibility of the EU developing such systems.

<sup>99</sup> European Commission, Proposal for a Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes, COM(2007) 654 final.

<sup>100</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, COM(2011) 32 final.

<sup>101</sup> 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 (EU PNR Directive).

<sup>102</sup> Art. 2 of the EU PNR Directive.

including Ireland and the UK, which have expressed their wish to participate in the instrument.<sup>103</sup> Once transmitted, the data will be stored and analysed by the national PIU. The purpose will be to identify persons who were previously unsuspected of involvement in terrorism or serious crime<sup>104</sup> and require further examination by competent authorities in relation to those offences listed in Annex II of the Directive. PNR data will be used in different ways – re-actively, pro-actively, and real-time – however, the focus on prevention is central.

In essence, the analysis by PIUs entails a risk assessment of all passengers prior to their travel on the basis of predetermined criteria to be decided by the respective PIU and possibly involving crosschecking with existing blacklists. Furthermore, the PIUs will respond to requests by national authorities to access the data on a case-by-case basis and subject to sufficient indication. Nevertheless, processing should not take place on the basis of sensitive data revealing on race, ethnic origin, religion or belief, political or any other opinion, trade union membership, health, or sexual life.<sup>105</sup> The initial retention period is six months, after which PNR data will be depersonalized, meaning that the PIU is entrusted with the task of masking out the names, address and contact information, payment information, frequent flyer information, general remarks, and all Advanced Passenger Information (API) data.<sup>106</sup> They may still be used for criminal law purposes under ‘very strict and limited conditions’<sup>107</sup> – that is, if so permitted by a judicial authority or another national authority competent to review whether the conditions have been met and subject to information and ex post review by the Data protection Office of the PIU.<sup>108</sup> Finally, at the behest of the European Parliament, a Data Protection Officer will be appointed in each PIU in order to monitor the processing of PNR data.<sup>109</sup>

The challenges that the development of the EU PNR system poses to the protection of privacy, data protection, and citizenship rights are acute. In essence, the Directive allows the systematic, blanket, and indiscriminate transfer, storage, and further processing of a wide range of personal data of all passengers travelling in the EU. The involvement of the private sector in the fight against terrorism and serious criminality intensifies, particularly if one takes into account that the duties of air carriers may be extended to non-carrier economic operators (e.g. travel agencies).<sup>110</sup> In addition, the inclusion of intra-EU flights within the scope of the Di-

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<sup>103</sup> Council of the European Union, Documents 8016/11 (28.3.2011) and 9103/11 (15.4.2011).

<sup>104</sup> EU PNR Directive, Recital 7.

<sup>105</sup> Art. 6(4) of the EU PNR Directive.

<sup>106</sup> Art. 12 of the EU PNR Directive.

<sup>107</sup> EU PNR Directive, Recital 25.

<sup>108</sup> Art. 12(3) of the EU PNR Directive.

<sup>109</sup> Art. 5 of the EU PNR Directive.

<sup>110</sup> EU PNR Directive, Recital 33. See also art. 19.



rective significantly expands the reach of surveillance. Indeed, back in 2011, it was noted that intra-EU flights represent the majority of EU flights (42%), followed by international flights (36%), and only 22% of flights operate within a single Member State.<sup>111</sup> In this framework, the movement of the vast majority of travellers, including EU citizens, is placed under constant monitoring irrespective of the fact that they are *a priori* innocent and unsuspected of any criminal offence. In fact, the operation of the PNR scheme signifies the reversal of the presumption of innocence whereby everyone is deemed as a potential security risk, thus necessitating their examination in order to confirm or rebut this presumption. Besides, there is no differentiation between risky flights and non-risky ones.

Furthermore, the risk assessment will take place in an unlimited and highly obscure manner; while it is explained that sensitive data must not be processed, the Directive fails to prescribe comprehensively and in detail how the data will be analysed. The underlying rationale is the profiling of all passengers and the identifying of behavioural patterns in a probabilistic logic, but nowhere in the Directive is it indicated that this is indeed the case. In Opinion 1/15 concerning the EU-Canada PNR Agreement, the CJEU marked the role of predetermined models and criteria in assessing ‘unverified personal data’ and highlighted the margin of error in such automated processing.<sup>112</sup> The Court further called for those criteria to be ‘specific and reliable’ so that it would be possible ‘to arrive at results targeting individuals who may be under a reasonable suspicion’.<sup>113</sup>

In that respect, the EU PNR Directive does not prescribe with precision the manner in which PIUs must process the travel data. It is merely stated that databases ‘relevant for the purposes of preventing, detecting, investigating and prosecuting terrorist offences and serious crime’ may be consulted, without further specification as to which these are.<sup>114</sup> For instance, a possible routine examination of the databases storing asylum seekers’ fingerprints or visa applicants’ data (through Eurodac and VIS respectively) will frustrate their legal framework resulting in a domino effect of multiple function creeps. As for the predetermined criteria, these ‘must be targeted, proportionate and specific’, but leeway is given to national PIUs to determine and review them in cooperation with national law enforcement authorities. With the exception of the role of the Data Protection Officer, no further guidelines have been prescribed in that respect, which raises serious proportionality concerns. In addition, this ambiguous *modus operandi* of PIUs may even call into question the extent to which the interference with privacy is ‘in accordance with law’ pursuant to art. 8(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) or, in EU terms, ‘provided for by law’, according

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<sup>111</sup> Council of the European Union, Document 8016/11 (n. 103).

<sup>112</sup> Opinion 1/15, para. 169.

<sup>113</sup> *Ibid.*, para. 172.

<sup>114</sup> Art. 6(3) of the EU PNR Directive.

to art. 52(1) of the EU Charter of Fundamental Rights. Based on settled case law of the European Court of Human Rights, every piece of legislation should meet the requirements of accessibility and foreseeability as to its effects.<sup>115</sup> The lack of clear rules as to how the processing of data will take place may suggest that travellers cannot foresee the full impact of the legislation on their lives.

Furthermore, the phrasing chosen with regard to the categories of data transferred from air carriers to PIUs for further processing raises proportionality concerns. In Opinion 1/15, the CJEU found that the term ‘general remarks’ provides

no indication as to the nature and scope of the information to be communicated and it may even encompass information entirely unrelated to the purpose of the transfer of PNR data. Furthermore, since the information referred to in that heading is listed only by way of example, as is shown by the use of the term ‘including’, heading 17 does not set any limitation on the nature and scope of the information that could be set out thereunder.<sup>116</sup>

This exact wording is also found in Point 12 of Annex 1 of the EU PNR Directive, thus, on the basis of the CJEU’s pronouncements in the present case, there is a lack of clarity and preciseness. Furthermore, as regards the offences covered by the scope of the Directive, although Annex II sets out a list in this regard, PNR data could still be used for other offences, including minor ones, when these are detected in the course of an enforcement action further to the initial processing.<sup>117</sup>

Moreover, in relation to the period for which the data will be retained, it appears that the EU institutions do not have a clear understanding of what constitutes a proportionate retention period. In particular, the 2007 proposal envisaged an extensive retention period of five years, after which the data would be depersonalized and kept for another eight years. The proposal of 2011 prescribed a significantly reduced initial retention period of 30 days, after which data would be anonymized and kept for a further period of five years. Although this option was supported by the Parliament, the Council called in its General Approach<sup>118</sup> for an extension of the initial retention period to two years, followed by another three years of storage of depersonalized data. A more privacy-friendly approach can be found in an Opinion of the Council Legal Service dated from 2011 according to which data of passengers in risky flights would be initially retained for 30 days and then be held for an overall period of six months.<sup>119</sup> Some Member States likewise supported a retention period of less than 30 days.<sup>120</sup> Overall, although it is welcomed that there are two sets of deadlines and, more importantly, re-personalization may take under

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<sup>115</sup> European Court of Human Rights, *Rotaru v Romania* (App. no. 28341/95), Judgment of 4 May 2000.

<sup>116</sup> Opinion 1/15, para. 160.

<sup>117</sup> Art. 7(5) of the EU PNR Directive.

<sup>118</sup> Council of the European Union, Document 8916/12 (23.4.2012).

<sup>119</sup> Council of the European Union, Document 8850/11 (12.4.2011).

<sup>120</sup> Council of the European Union, Document 11392/11 (14.6.2011).

limited circumstances, there is, however, no indication why the chosen retention periods are proportionate.

In Opinion 1/15, the CJEU approached this matter in a pragmatic way by distinguishing retention and use of PNR data before the arrival of air passengers, during their stay in Canada, and on their departure. Viewing the PNR system as one that ‘facilitates security checks and border control checks’, the Court found that the retention of data up to the departure from Canada is proportionate in relation to all air passengers.<sup>121</sup> However, during the stay of passengers who have been admitted entry in Canada, the use of their data must be based on new circumstances justifying that use, in particular ‘substantive and procedural conditions governing that use in order [...] to protect that data against the risk of abuse’.<sup>122</sup> In that respect, the threshold is particularly high, requiring objective evidence that the PNR data may have an effective contribution to the combating of terrorist offences and other serious crimes.<sup>123</sup> These conditions must be subject to prior review carried out either by a court or by an independent administrative body.<sup>124</sup> As for the retention after the departure of passengers from Canada, the CJEU opined that passengers subjected to entry and exit checks should be regarded as ‘not presenting, in principle, a risk’ for terrorism and serious crime,<sup>125</sup> therefore, there would not appear to be, once they have left, a connection – even a merely indirect connection – between their PNR data and the objective pursued by the envisaged agreement that would justify data retention.<sup>126</sup> As such, the continued storage of all air passenger data after departure is disproportionate and only ‘in specific cases, objective evidence is identified from which it may be inferred that certain air passengers may present a risk in terms of the fight against terrorism and serious transnational crime even after their departure from Canada, it seems permissible to store their PNR data beyond their stay in Canada’.<sup>127</sup> In such cases, a five-year retention period does not exceed the limits of what is strictly necessary.<sup>128</sup>

Such differentiated treatment is not foreseen in the case of the EU PNR Directive; during the first six months of retention the data are unmasked and there are no specific limitations as regards their use. Unmasking throughout the remainder of the retention period is possible provided that it is ‘reasonably believed that it is

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<sup>121</sup> Opinion 1/15, para. 197.

<sup>122</sup> Ibid., para. 200.

<sup>123</sup> Ibid., para. 201.

<sup>124</sup> Ibid., para. 202. See also Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen* (C-203/15) and *Secretary of State for the Home Department v Tom Watson, Peter Brice, Geoffrey Lewis* (C-698/15), Judgment of the Court (Grand Chamber) of 21 December 2016, para. 120.

<sup>125</sup> Opinion 1/15, para. 204.

<sup>126</sup> Ibid., para. 205.

<sup>127</sup> Opinion 1/15, para. 207.

<sup>128</sup> Ibid., para. 209.

necessary',<sup>129</sup> which points to a lower threshold than the one in Opinion 1/15 and may lead to generalized consultation by law enforcement authorities. Importantly, the CJEU has made clear that continued storage of all air passengers' data after departure is disproportionate in any case.

In addition to the privacy challenges as highlighted above, another point of concern is whether the processing of PNR data, including on intra-EU flights, could infringe [the right to] free movement enjoyed by EU citizens. This is an acute challenge that flows from Opinion 1/15 where the Court perceives the PNR system as a tool of quasi-border control in that it 'facilitates security checks and border controls'.<sup>130</sup> In this regard, the Commission Legal Service found that the EU PNR does not obstruct free movement.<sup>131</sup> Nonetheless the Parliament managed to include a reference in art. 4 that any assessments on the basis of PNR data shall not jeopardize the right of entry to the territory of the Member States concerned. This pronouncement is in strike contrast with Opinion 1/15 and the extent to which this reference is sufficient is doubtful. Furthermore, according to art. 21 of the Schengen Borders Code, police controls performed in the territory of a Member State are allowed insofar as they do not have the equivalent effect of border control. Such an effect is precluded when inter alia the checks are carried out on the basis of spot-checks. In *Melki*, the CJEU found that '*controls on board an international train or on a toll motorway*', limiting their application to the border region 'might [...] constitute evidence of the existence of such an equivalent effect'.<sup>132</sup> By analogy, the focus on controls at the border area in the systematic manner as the Directive sets out could have the equivalent effect of a border check. The lack of any differentiation between risky and non-risky flights and the fact that member States are left entirely free to determine the extent to which they monitor the flights to and from other Member States could enhance the risk. Besides, given the focus on preemption, it is hard to imagine that when a law enforcement authority considers that a person needs further monitoring, they would still allow them to travel.

## V. Conclusion

The terrorist events that have taken place in the past few years have accelerated and provided fresh impetus to the establishment of a multi-layered EU framework aimed at tackling the still elusive and obscure phenomenon of 'foreign terrorist fighters'. This emergency-driven response has been significantly influenced by global standards that legitimized and necessitated EU action. This approach,

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<sup>129</sup> Art. 12(3)(a) of the EU PNR Directive.

<sup>130</sup> Opinion 1/15, para. 197. See also para. 188.

<sup>131</sup> Council of the European Union. Document 8230/11 (28.3.2011).

<sup>132</sup> Joined cases C-188/10 *Aziz Melki* and C-189/10 *Sélim Abdeli*, Judgment of the Court (Grand Chamber) 22 June 2010, para. 72. Emphasis added.

whereby the EU would first negotiate and heavily lobby – also through its Member States – controversial policies outside the EU framework and then internalize regional and transnational law and practice is a form of ‘policy laundering’ first at the international level. As demonstrated in this contribution, digesting and mimicking external models of criminal justice raises numerous concerns regarding its compatibility with fundamental rights in the EU legal order, particularly in cases such as the deployment of PNR schemes which the CJEU has found to fall foul of EU law.

Furthermore, concepts of citizenship and trust seem to undergo a gradual transformation, whereby the difference between a citizen and a foreigner is steadily eliminated towards the uneasy direction of citizens becoming ‘foreigners’. As such, a number of fundamental constitutional guarantees are being weakened, while fundamental rule of law principles, including the principle of legality, are simultaneously being diluted. At the same time, the over-reliance on technological means as a method for identifying suspicious and risky citizens wrongly presupposes the existence of trust among EU Member States. In addition, it fosters and deepens the intertwining of criminality with mobility and further blurs the distinction between a citizen and a foreigner since immigration-type measures are increasingly favoured not only to regulate their movement but also for counter-terrorism purposes.<sup>133</sup> This blurring signifies a shift from securitization of migration to securitization of mobility where prevention is the key thread tangling these policies. Although the measures adopted build upon existing EU legislation broadly related to security and counter-terrorism (on the criminalization of terrorism, the setting up and operation of the SIS II, and the transfer of PNR data from the EU to third countries), this response has essentially led to EU law devolution in this context and the end of EU citizenship as we know it.

### List of abbreviations

API	Advanced Passenger Information
CJEU	Court of Justice of the EU
CoE	Council of Europe
DNA	deoxyribonucleic acid
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
EU	European Union
Eurodac	European Dactyloscopy

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<sup>133</sup> *Mitsilegas, V.*, op. cit. (n. 2).

FTF	Foreign Terrorist Fighter
JHA	Justice and Home Affairs
PIU	Passenger Information Unit
PNR	Passenger Name Records System
SIRENE	Supplementary Information Request at the National Entries
SIS	Schengen Information System
SLTD	Stolen and Lost Travel Documents
UK	United Kingdom
UN	United Nations
US	United States of America
VIS	Visa Information System

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Professor Dr. *Jacqueline Ross* is Prentice H. Marshall Professor of Law at the University of Illinois. She received her bachelor's degree with honors from the University of Chicago. She was an articles editor for the University of Chicago Law Review and graduated with honors from the University of Chicago Law School. Professor *Ross* served as law clerk to the Honorable Douglas H. Ginsburg, U.S. Court of Appeals for the District of Columbia Circuit. She then spent nine years as an assistant U.S. attorney in Chicago and Boston. A respected scholar in the fields of evidence and criminal law and procedure, *Ross* is the co-editor (with *Stephen Thaman*) of *Comparative Criminal Procedure* (Elgar Press, 2016) and co-editor (with *Thierry Delpuech*) of *Comparing the Democratic Governance of Police Intelligence New Models of Participation and Expertise in the United States and Europe* (Elgar Press, 2016) as well as co-author, with *Thierry Delpuech*, of the *Manuel d'Intelligence de Sécurité Publique pour la Police Nationale* (Ecole Normale Supérieure de Police, 2015). Professor *Ross* has published on undercover policing and local security partnerships in both American and European journals, including the University of Chicago Law Review, the American Journal of Comparative Law, the Oxford Journal of Legal Studies, the Annual Review of Law and the Social Sciences, and the Italian journals *Diritto e Giustizia* (Law and Justice) and *Giurisprudenza di Merito* (Jurisprudence of Note). Her article, *Impediments to Transnational Cooperation in Undercover Operations: A Comparative Study of the United*

States and Italy, 52 *American Journal of Comparative Law* 569 (2004), won the Edward Wise Senior Scholar Prize from the American Society of Comparative Law for best article in comparative criminal procedure. Her article, *The Place of Covert Policing in Democratic Societies: A Comparative Study of the United States and Germany*, 55 *American Journal of Comparative Law* 493 (2007), was also awarded the Ed Wise Senior Scholar Prize as well as the University of Illinois College of Law's Carroll P. Hurd Award for Excellence in Faculty Scholarship (2008). In the fall of 2008 Professor *Ross* was the Harry S. Carpentier Visiting Professor at Columbia Law School, and during the 2009–2010 academic year she was a Visiting Professor at New York University School of Law. She is also the co-director of the UCLA-Illinois-Princeton Comparative Law Work in Progress Workshop. Professor *Ross* is currently under contract with Cambridge University Press to complete *Undercover Under Scrutiny: A Comparative Look at Covert Policing in the United States, Italy, Germany, and France*.

Professor Dr. Dr. h.c. mult. *Ulrich Sieber*, director at the Max Planck Institute for Foreign and International Criminal Law and scientific member of the Max Planck Society for the Advancement of Science since 2003, is an Honorary Professor and faculty member at the law faculties of the University of Freiburg and the University of Munich and an Advisory Professor at the law departments of Renmin University, Beijing Normal University, and Wuhan University (all China). His main areas of interest encompass the changing face of crime, criminal law, and legal policy in today's 'global risk society'. His research focuses primarily on the territorial and functional limits of criminal law in the prosecution of new types of transnational and complex crime. Major project areas include organized crime, terrorism, economic crime, and cybercrime as well as comparative criminal law, European criminal law, and international criminal law. He is also the initiator and spokesperson of the International Max Planck Research School for Comparative Criminal Law (IMPRS-CC), a cooperative venture of the Max Planck Institute and the law faculty of the University of Freiburg. In addition to his academic work, Professor *Sieber* is active as an expert consultant and legal counsel, especially in the areas of computer law and international criminal law.

*James Stewart* was elected Deputy Prosecutor of the International Criminal Court (ICC) by the Assembly of States Parties on 16 November 2012. Prior to joining the Office of the Prosecutor (OTP) of the ICC, he worked as General Counsel in the Crown Law Office within the Ministry of the Attorney General in Toronto. Before this, he served as Senior Trial Attorney in the OTP at the International Criminal Tribunal for Rwanda (ICTR), as Chief of Prosecutions in the OTP at the International Criminal Tribunal for the former Yugoslavia (ICTY), and as Senior Appeals Counsel and then Chief of the Appeals and Legal Advisory Division in the OTP at the ICTR. *James Stewart* also served in the Office of the Ombudsman as a legal officer for two years. He joined the Downtown Toronto Crown Attorney's Office

as an Assistant Crown Attorney in 1979, handling criminal trials at all levels of court. Since 1985 he has served in the Crown Law Office – Criminal, where his practice expanded to include appeals before the Court of Appeal for Ontario and the Supreme Court of Canada. On leaves of absence from his office, he worked at the UN international criminal tribunals. *James Stewart* was educated at Bishop's College School in Lennoxville, Québec, he attended Queen's University in Kingston, Ontario (BA, 1967), and Université Laval in Sainte-Foy, Québec (M. ès A., 1971). In 1975, he graduated from the Faculty of Law at the University of Toronto, articulated for prominent criminal defence lawyer *Robert J. Carter*, Q.C. in 1975–1976, and was called to the Ontario Bar in 1977

Professor Dr. *Stephen Thaman* is Professor Emeritus at Saint Louis University School of Law. A recognized expert on comparative criminal law and procedure, he joined the SLU LAW faculty in 1995. He has consulted with Russia, Latvia, Georgia, Kyrgyzstan, Indonesia, and the Philippines on the reform of their codes of criminal procedure. He obtained his BA, MA, and JD from the University of California, Berkeley, and a Dr. iur. from the University of Freiburg in Germany. He has lectured in thirty-five countries on five continents on issues in US and comparative criminal law and procedures. After twelve years as an assistant public defender in Alameda County, Calif., Professor *Thaman* spent eight years in Europe, during which time he was a Fulbright Lecturer at the Free University of Berlin (1987–1988), Attorney Trainee at the European Commission of Human Rights in Strasbourg (1988), Associate at the International Institute for Higher Studies in the Criminal Sciences in Siracusa, Italy (1990–1991), and IREX fellow at the Institute of State and Law in Moscow (1992–1993). From 1993 to 1995 he worked with the American Bar Association CEELI Program in Moscow at which time he researched and wrote about the new Russian jury system. Professor *Thaman* was on the Scientific Advisory Board of the Max Planck Institute for Foreign and International Criminal Law in Freiburg from 2008 to 2014 and is currently on the Board of Directors of the International Association of Penal Law. His articles have appeared overseas in several languages and in several prominent US journals. In 2008 the second edition of his book *Comparative Criminal Procedure: A Casebook Approach* was published by Carolina Academic Press. He was editor of *World Plea Bargaining*, published by Carolina Academic Press in 2010, and of *Exclusionary Rules in Comparative Law*, published by Springer in 2013, and co-editor with *Jacqueline Ross* of *Comparative Criminal Procedure*, published by Elgar in 2016, and contributed chapters to all three books. *Stephen Thaman* has been a Visiting Professor at the universities of Orleans (France), Bologna, Buenos Aires, Bern, Trento (Fulbright Professor), Lisbon, Szeged (Hungary), as well as the National University of Singapore, Paris-Dauphine, and the Higher School of Economics (Moscow).

Dr. *Nikolaos Theodorakis* is a Lecturer and Associate Professor at the Oxford University Foreign Service Programme, a Junior Research Fellow at Pembroke College, and a Fellow at Stanford Law School. His interests include international trade law and finance, public international law, and EU law. Prior to joining Oxford, he taught and conducted research at the University of Cambridge, Harvard Law School, and Columbia Law School. He also gained professional experience at the US Committee on Capital Markets Regulation, the Kluge Center at the US Library of Congress, and the UK Ministry of Justice. Admitted in Brussels and Athens, *Nikolaos Theodorakis* is also a practising lawyer for an international law firm. His practice includes a wide range of international and EU law, with matters pertinent to privacy and data protection, international trade and customs, and corporate finance. He has served as a consultant for the OECD, UNICRI, and other international organizations. His expertise is often solicited in matters of regulatory and technical assistance, anti-corruption compliance and state reforms, and diplomatic affairs. Dr. *Theodorakis* has received awards from several bodies, including the State Council of the People's Republic of China, ESRC, British Academy, and Greek Parliament. He has been widely published and regularly receives invitations for public engagements, including guest lectures around the world, international symposia, and TEDx conferences.

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Professor Dr. *John Vervaele* is Professor at Utrecht Law School, Willem Pompe Institute for Criminal Law and Criminology, and Utrecht Centre for Regulation and Enforcement in Europe (Renforce), as well as Professor at College of Europe, Bruges. His research record includes thirty years of experience. The main research topics are: enforcement of Union law; standards of due law, procedural safeguards and human rights; criminal law and procedure and regional integration; compara-

tive economic and financial criminal law; terrorism and criminal procedure. His teaching record includes, besides the introductory courses on criminal law and criminal procedure, financial criminal law, international criminal law, European criminal law, and comparative criminal procedure at bachelor, master, and post-master levels. *John Vervaele* is a regular Visiting Professor in these areas at European and international universities (including the US, China, and Latin America). He is the President of the International Association of Penal Law (AIDP). He is also member of the steering committee of the European Criminal Law Academic Network (ECLAN) and elected member of the Counsel of the European Law Institute (ELI) in Vienna.

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The typical trial-oriented systems of criminal justice that are primarily based on the strict application of substantive criminal law have reached their functional and logistical limits in most parts of the modern legal world. As a result, new sanction models, less formal, administrative, and discretionary case disposals, plea bargaining arrangements, and other alternative procedural and transitional justice mechanisms have emerged at unprecedented levels in national and international legal orders affiliated both with the civil law and the common law tradition. These normative constructs and practices aim at abbreviating, simplifying, or circumventing the conventional criminal investigation and prosecution. They seek to enhance the effectiveness of conflict resolution proceedings and to shift the focus of crime control from repression to prevention.

The present volume explores these alternative, informal, preventive, and transitional types of criminal justice and the legitimacy of new sanction models in the global risk society from the perspective of national and international justice and by focusing on the special regimes of anti-terrorism measures and security law. The authors of the papers are experts and internationally acclaimed scholars in this field. Their research results were presented and discussed at an international conference held on 26–27 January 2018 at Middle Temple in London, UK, which was organized by the School of Law of the Queen Mary University of London, the Max Planck Institute for Foreign and International Criminal Law (Freiburg), and the European & International Criminal Law Institute (Athens).

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