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Politicisation, Law and Rights in the Transnational Counter-Terrorism Space: Indications from the Regulation of Foreign Terrorist Fighters

Fiona de Londras¹

Abstract

Since 2001 a transnational counter-terrorism space has emerged that is vast in its scale and ambition and which can be discerned at both ‘universal’ (i.e. United Nations) and regional (e.g. European Union) levels, as well as in other formal and informal international organisations (for example the G7 and the Global Counter-Terrorism Forum). This article explores the question of politicisation within that transnational counter-terrorism space, and the potential for meaningful politicisation in respect of initiatives and measures emanating from transnational processes. Taking the example of ‘foreign terrorist fighters’ it argues that a shift in arena to the transnational counter-terrorism space has fundamentally challenged the capacity for effective and meaningful politicisation; that the transnational counter-terrorism space can be depoliticised by design, that where this happens the domestic counter-terrorism space is depoliticised by implication, and that the *legal* benefits of politicisation may thus be lost to the detriment of rights, legality and accountability.

Keywords

Transnational counter-terrorism – foreign terrorist fighters – human rights – EU counter terrorism – UN Security Council

Introduction

Although “politicisation” is a term better known to political science and international relations than to law, what it captures—namely, “growing controversy, political

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activity, and [the involvement of] a range of actors”² in debating contentious issues—is of clear relevance to questions about how *law* relating to security and counter-terrorism is shaped, made, applied, and debated. Indeed, while the term may not be widely used in law, the kind of analysis that it prompts one to engage in is not unusual for lawyers. After all, it is in the fundamental nature of the legal and constitutional *milieu* that politics and law are difficult to separate and mutually reinforcing,³ and that processes of making law—and especially of who gets to be part of the process of law-making, and of how politics (formal and informal) determines those questions of in- and ex-clusion—are rightly questions to which we as lawyers ought to attend.

Furthermore, while politics and political will often pose clear challenges to law, they are also vital to ensuring lawfulness itself. Generally speaking, parliaments and executive branches recognise and take seriously their place and role in the constitutionalist ecosystem⁴ as the key entities engaged in identifying and remaining within the boundaries of lawfully permissible action. While the judicial role within that ecosystem receives plentiful scholarly attention, it is parliaments, executives and bureaucracies that are engaged in the everyday constitutional labour of contesting, determining, and maintaining constitutionalism.⁵

Conventional wisdom across both law and political science suggests that this critical political engagement with questions of law and legality loses a significant part of its effectiveness in the context of highly contentious, politically anxious issues such as security and counter-terrorism. In these contexts executive and specialist will may coalesce with popular concern to demand the expansion of the state’s reach and a dilution on its limitations,⁶ at least in the relatively short-term aftermath of a critical event such as a terrorist attack. For lawyers, and especially for constitutional and human rights lawyers, the decline in contestation and debate in those circumstances,

² Direct quote from introduction—please insert cross ref once title and page numbers are completed

³ See generally Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (2000; Hart Publishing).

⁴ Fiona de Londras, “In Defence of Judicial Innovation and Constitutional Evolution” in Laura Cahillane, James Gallen & Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (2016; Manchester University Press), defining constitutional interpretation as “a knowledge ecosystem in which dynamism and evolution are fostered by inter-entity interaction, which in turn improves decision-making and enhances collaboration”.

⁵ de Londras, above n 4; Mark Tushnet, *Why the Constitution Matters* (2010; Yale University Press).

⁶ For a full articulation of this argument see Fiona de Londras, *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (2011; Cambridge University Press), Chapter 1.

and the resultant decline in the quality of politicisation from a legal perspective, is a matter of grave concern. In particular, it raises questions about what happens to rights and the rights-based limitations on state power and security action when these spaces for repressive state action open up, commonly understood as a failure of ‘the political’ to ‘do its bit’ in maintaining ‘the legal’.⁷

In recent years there have been indications of a political willingness to step in and ‘de-exceptionalise’ some of areas of security,⁸ or at least to expose them to discussion and perhaps to *ex post facto* political or independent review.⁹ However, repressive consensus in the field of counter-terrorism persists; as our recent study of successive Conservative and Labour governments in the UK shows, for example, core commitments such as prevention and human rights exceptionalism are shared across these parties in spite of their apparent political disagreement on the role and nature of state power in a general sense.¹⁰ From a lawyer’s perspective this raises serious questions about the impact of apparent re-politicisation on the material question of the quality of the law. Similarly, courts have at least sometimes appeared to push back against repressive counter-terrorism laws and powers, albeit often modestly and sometimes ineffectively.¹¹

However, the story of de- and re-politicisation in security and counter-terrorism tends largely to focus on national contexts. This is understandable. Conventionally most counter-terrorism takes place at the national level; security is jealously guarded as a space of sovereign action, and even today international mechanisms have failed to

⁷ This is not an uncontested approach; for a survey of the key positions on this see Fiona de Londras & Fergal F Davis, “Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight” (2010) 30(1) *Oxford Journal of Legal Studies* 19.

⁸ See for example the discussion in XXXX, “Parliamentary Security Politics as Quantitative Politicization” in this issue.

⁹ See for example Jessie Blackbourn, “Independent Reviewers as Alternative; an Empirical Study from Australia and the UK” in Fergal F. Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (2014; Cambridge University Press).

¹⁰ Lydia Morgan & Fiona de Londras, “Is there a Conservative Counter-Terrorism?” (2018) 29(2) *King’s Law Journal* 1.

¹¹ de Londras, above n 6; Helen Duffy, *Strategic Human Rights Litigation* (2018; Bloomsbury Publishing).

reach a basic definitional consensus around ‘terrorism’ that is necessary before we can conclude any general, binding international legal instruments on terrorism.¹²

Over recent years, however, considerable parts of counter-terrorism law- and policy-making have moved out of the domestic sphere. A transnational counter-terrorism space has emerged that is vast in its scale and ambition and which can be discerned at both ‘universal’ (i.e. United Nations) and regional (e.g. European Union) levels, as well as in other formal and informal international organisations (for example the G7 and the Global Counter-Terrorism Forum). This article explores the question of politicisation within that transnational counter-terrorism space, and the potential for meaningful politicisation in respect of initiatives and measures emanating from transnational processes. Taking the example of ‘foreign terrorist fighters’ I will argue that the shift in arena to the transnational counter-terrorism space has fundamentally challenged the capacity for effective and meaningful politicisation; that the transnational counter-terrorism space can be depoliticised by design, that the domestic counter-terrorism space is depoliticised by implication, and that the *legal* benefits of politicisation may thus be lost, with detrimental impacts on rights, legality and accountability.

Importantly, my claim here is not that transnationalism in counter-terrorism will *always* or *inevitably* result in depoliticisation and a resultant negative impact on rights, legality and accountability. Certainly, one may be able to suggest areas where this was arguably not the case.¹³ However, what the example that I pursue here does

¹² See generally Ben Saul, *Defining Terrorism in International Law* (2008; Oxford University Press); Stella Margariti, *Defining International Terrorism: Between State Sovereignty and Cosmopolitanism* (2017; Springer).

¹³ One might, for example, suggest that data retention was politicized, at least within the European space, and that the fact that the Court of Justice of the European Union struck down the Data Retention Directive (Directive 2006/24/EC) suggests rights-based contestation pursued through litigation (*Digital Rights Ireland* Joined Cases C-293/12 and C-594/12). One might further argue that this was the case in respect of counter-terrorism financing, on which the Court of Justice also had important things to say in the *Kadi* litigation (*Kadi and Al Barakaat International Foundation v Council and Commission* (2008) C-402/05). However, both of these examples are actually ones in which perceived crisis resulted in depoliticisation at the time of transnational law-making—resistance to data retention melted away in the wake of terrorist attacks in Europe (see Chris Jones & Ben Hayes, “The Data Retention Directive: A Case study in the legitimacy and effectiveness of EU counter-terrorism policy” (2014; SECILE)); the terrorism financing laws that were ultimately considered in *Kadi* emanated from Security Council Resolution 1373 passed very quickly after the 9/11 attacks. Data retention laws continue to operate in many European countries now, but based on national rather than EU law (e.g. in the UK: Data Retention and Investigatory Powers Act 2014). Terrorist financing continues to be regulated by deeply problematic Security Council resolutions. In both cases discourses of rights continue to be

establish is that, through shifting counter-terrorism decision-, policy-, and law-making activities into the transnational space, states have created for themselves the capacity to depoliticise, to reduce contestation, to shut out rights-based perspectives, and to evade accountability. If this is so, then transnational counter-terrorism poses a serious and a clear challenge to the rule of law, not merely in substantive terms (*'what does the law originated at transnational level do to legally protected rights?'*) but more importantly in conceptual and institutional terms (*'is this law effectively limited by fundamental legal principles such as human rights, legality and proportionality?'*).

A manoeuvre that allows states to create and operate in a depoliticised zone of law-making activity and, thus, to decide for themselves when and to what extent they will limit their activities by reference to human rights law is a manoeuvre that severely challenges the rule of law. States cannot pick and choose when the law will limit their actions; to do so is to undermine the very idea of law itself. Transnational counter-terrorism has the tendency to do precisely that.

Sketching the Transnational Counter-Terrorism Space

The international legal regime could be said only to have been marginally concerned with countering terrorism prior to September 2001. There was no counter-terrorism law at European Union level,¹⁴ and while there were a number of specialist international law treaties on terrorism in particular contexts¹⁵ (e.g. hijacking of aircraft), no general international legal treaties or Chapter VII resolutions of the Security Council imposing legal duties on states to introduce domestic counter-terrorism laws states existed. Where states were confronted with terrorist violence it was largely dealt with through domestic laws and policies. International institutions such as the European Court of Human Rights occasionally found themselves dealing

marginalized, notwithstanding the fact that the Court of Justice intervened to mitigate some of the most egregious rights implications of both.

¹⁴ See generally Cian C Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (2012; Hart Publishing).

¹⁵ For example the Convention on Offences and Certain Other Acts Committed on Board Aircraft 1970; Convention for the Suppression of Unlawful Seizure of Aircraft 1971; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons 1973; International Convention Against the Taking of Hostages 1979; Convention on the Physical Protection of Nuclear Material 1979; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988.

with the international legal implications of counter-terrorism,¹⁶ but it was not a matter of general international *legal* concern.¹⁷

The attacks of 11 September 2001 changed this. Not only did the United Nations,¹⁸ European Union¹⁹ and North Atlantic Treaty Organization²⁰ take near-immediate and unprecedented legal steps in response, but a new institutional infrastructure of transnational counter-terrorism began rapidly to emerge.

At the United Nations, the Security Council almost immediately established the Counter-Terrorism Committee,²¹ which was then given heightened capacity through its dedicated Executive Directorate.²² A few years later the Secretary-General established the Counter-Terrorism Implementation Task Force²³ and the General Assembly endorsed the UN's Global Counter-Terrorism Strategy,²⁴ which is reviewed every two years. In 2017 the General Assembly established the UN Office of Counter-Terrorism.²⁵ Across all of these entities what Fionnuala ní Aoláin, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, calls an “under-appreciated” “scale of norm creation” has taken place.²⁶ Ní Aoláin argues (and I agree) that this poses specific challenges to “special and global compliance of wide-ranging counter-terrorism regulation across multiple and new spheres with human rights standards”.²⁷ The precise interactions of these norms and standards across the different parts of the

¹⁶ For a comprehensive account see Ana Salinas de Frias, *Counter-Terrorism and Human Rights in the Case Law of the European Court of Human Rights* (2013; Council of Europe).

¹⁷ For indications of the *status quo ante* in respect of terrorism and international law see, for example, Rosalyn Higgins & Maurice Flory (eds), *Terrorism and International Law* (1997; Routledge).

¹⁸ In particular through the passage, on 28 September 2001, of UN Security Council Resolution 1373, discussed further below.

¹⁹ In particular through the introduction, on 21 September 2001, of an EU Action Plan to Counter Terrorism discussed below (Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, SN 140/01).

²⁰ In particular, by invoking Article 5 of the Washington Treaty on 12 September 2001 (stipulating that an attack against one or several member states shall be considered as an attack against all member states).

²¹ UN Security Council Resolution 1373 (2001).

²² UN Security Council Resolution 1535 (2004).

²³ Established by the Secretary-General in 2005, and then institutionalised in the Department of Political Affairs by General Assembly Resolution A/RES/64/235 in 2009 (meaning it received a dedicated secretariat).

²⁴ This was adopted by means of a resolution and annexed Plan of Action: A/RES/60/288.

²⁵ A/RES/71/858.

²⁶ Fionnuala ní Aoláin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism 2017* (A/72/43280), para. 22.

²⁷ *Ibid.*

UN's counter-terrorism infrastructure is not always entirely clear, and even less clear—and largely under-considered—is their interaction with other legal regimes in both international and domestic law. Indeed, this is so under-considered that ní Aoláin has deemed clarifying these interactions to be a priority of her tenure as Special Rapporteur.²⁸ Within the United Nations context much counter-terrorism norm generation happens in what is effectively the Security Council, either through Chapter VII resolutions or through the Counter-Terrorism Committee. That Committee is itself a subsidiary body of the Security Council:²⁹ the Council established it, and its membership is the 15 members of the UN Security Council.³⁰ This is significant: not only is the Security Council's work largely determined by the priorities and veto-wielding of the five permanent members,³¹ but so too is it an institution with very limited membership and a capacity for speedy action that is unmatched across most of the rest of the international legal and organisational infrastructure. In this respect it is—as I have argued elsewhere—as close as one gets in international law in terms of structural capacity for reactive law- and policy-making to a domestic 'executive',³² while having the ability to make binding law on all member states of the United Nations under Chapter VII of the Charter.³³ In that respect, of course, it has a greater capacity for emergency norm generation than many domestic executive branches.³⁴

The transnational counter-terrorism space goes well beyond the United Nations, although, as will be demonstrated below, that is a key driver of activity across the space. It includes regional organisations as well. For our purposes I will focus here on two European regional organisations—the Council of Europe and the European

²⁸ Ibid, pp. 8-10.

²⁹ Lorraine Sievers & Sam Dawes, *The Procedure of the UN Security Council*, 4th Edition (2014; Oxford University Press), p. 538 *et seq.*

³⁰ UN Security Council Resolution 1373 (2001), operative paragraph 6.

³¹ David L Bosco, *Five to Rule Them All: The UN Security Council and the Making of the Modern World* (2009; Oxford University Press).

³² de Londras, above n 6, pp. 204-209.

³³ For a thorough account see Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004; Hart Publishing).

³⁴ The extent to which a domestic executive can 'make law' in an emergency depends on the constitutional structure of a given state, with some constitutions allowing their suspension or the suspension of legislative power during emergencies, or the imposition of martial law, for example. For a thematic account see Oren Gross & Fionnuala ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006; Cambridge University Press), Part I.

Union—although regional counter-terrorism law- and policy-making is certainly not unique to Europe.³⁵

The Council of Europe, with its 47 member states, is a significant regional organisation. Although it does not have equivalent constitutional and law-making capacities to the European Union (it cannot, for example, make directly effective law and its Court (the European Court of Human Rights) does not have constitutional supremacy in a manner analogous to the Court of Justice of the European Union), it has developed a counter-terrorism infrastructure that is noteworthy and impactful.

In 2003 the Committee of Experts on Terrorism (CODEXTER) was established with a number of thematic foci. In addition to developing policies across these areas of focus, the Committee was tasked with developing country profiles of member states' counter-terrorism laws and monitoring signature and ratification of core documents, especially the Council of Europe Convention on the Prevention of Terrorism, adopted in 2005. That Convention was added to with an Additional Protocol in 2015 (which in turn entered into force in 2017). The CODEXTER also acted as an important focal point for cooperation with other transnational counter-terrorism actors, especially the Counter Terrorism Committee Executive Directorate (in the United Nations) and the European Union. In 2018 CODEXTER was changed to the Council of Europe Counter-Terrorism Committee, which has as a priority the development of a Council of Europe Counter-Terrorism Strategy for 2018-2022, although interestingly its website does not indicate a cooperative role across the transnational counter-terrorism space³⁶ (in contrast to that of the CODEXTER³⁷).

Although it had no counter-terrorism laws on the morning of 11 September 2001, the European Union has since developed a very significant corpus of counter-terrorism law and policy.³⁸ A mere ten days after the attacks, on 21 September 2001, an

³⁵ See generally Giuseppe Nessi (ed), *International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight against Terrorism* (2006; Routledge); Larissa van den Herik & Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (2013; Cambridge University Press).

³⁶ <https://www.coe.int/en/web/counter-terrorism/cdct>

³⁷ <https://www.coe.int/en/web/counter-terrorism/codexter>

³⁸ See generally Ben Hayes & Chris Jones, "Taking Stock: The Evolution, Adoption, Implementation and Evaluation of EU Counter-Terrorism Policy" in Fiona de Londras & Josephine Doody, *The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism* (2015; Routledge), 13.

extraordinary meeting of the European Council was held, after which a European policy and action plan to counter terrorism was released,³⁹ emphasising everything from support for the development of international legal instruments and implementation of existing instruments, to the integration of counter-terrorism into the Common and Foreign Security Policy of the European Union. These first, core commitments were followed by an ‘Anti-Terrorism Road Map’, published on 26 September 2001.⁴⁰

The Road Map outlined the measures to be taken in the EU, which broadly map onto the commitments in the Action Plan, including ratification of relevant international agreements, the development of EU measures relating to counter-terrorism and communications data, and the enlargement of Europol activities in the counter-terrorism realm. In spite of the challenges posed by the scale of the Road Map’s ambition, much of this somewhat hectic⁴¹ programme has actually been implemented, and new elements added to it, through a process of hyperactive law and policy-making at EU level.⁴²

Following the Madrid attacks the European Union adopted its Counter-Terrorism Strategy,⁴³ which in turn led to the adoption of further strategies (such as EU Strategy for Combating Radicalisation and Recruitment⁴⁴), as well as measures focusing on border security,⁴⁵ the protection of critical infrastructure,⁴⁶ and enhancement of air

³⁹ Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, SN 140/01.

⁴⁰ SN 4019/01 (OR. Fr), 26 September 2001.

⁴¹ For an analysis see, for example, Raphael Bossong, “The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance” (2008) 46(1) *Journal of Common Market Studies* 27.

⁴² For an account of that hyperactivity and the measures introduced, see Ben Hayes & Chris Jones, above n. 38.

⁴³ Council of the European Union, *The European Union Counter-Terrorism Strategy* (2005) 14469/4/05 REV 4.

⁴⁴ European Union Strategy for Combating Radicalisation and Recruitment to Terrorism (2005) 14781/1/05; Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism (2014) 9956/14.

⁴⁵ Border policy is diffuse and controversial in the European Union, and has included the development of smart border packages and an EU border agency—FRONTEX—located in Warsaw, and the introduction of EU law regulating biometric data in passports: Council Regulation (EC) No 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States; Regulation (EC) No 444/2009 amending Council Regulation (EC) No 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States. For a critical analysis of its connection to and influence by counter-terrorism see, for example, Anneliese Baldaccini, “Counter-Terrorism and the EU Strategy for Border Security: Framing Suspects with Biometric Documents and Databases” (2008) 10(1) *European Journal of Migration and Law* 31.

transport security.⁴⁷ In and beyond that Strategy the focus at EU-level has largely been on coordination, the development of legal instruments, attending to borders, disrupting terrorist finances, and developing new European agencies and institutions.⁴⁸ However, it was not until 2017 that the EU adopted a ‘hard’ omnibus legal instrument on counter-terrorism: the Directive on Combating Terrorism.⁴⁹ It is to this, and more particularly to its provenance, that we will shortly turn.

Lawyerly concern with the development of this transnational counter-terrorism space is not merely doctrinal (although, as this space has led to what ní Aoláin calls “an explosion of legal norms at various levels of legal capacity...at global, regional, national, and sub-national levels”,⁵⁰ the doctrinal concern is significant). Returning to the observations about the relationship between politicisation, law and legality outlined in the introduction to this paper, a question emerges about the implications of arena shifting in counter-terrorism across geo-political scales to a bespoke and rapidly emerging transnational space.⁵¹ What are the implications of such a change in law- and policy-making location for politicisation and, resultantly, for the ability properly to ensure that implications for rights are accounted for and minimised in the making of counter-terrorism law and policy? To answer this question it is instructive to turn now to the question of ‘foreign terrorist fighters’ and to how recent legal manoeuvres in relation to tackling the security challenges they pose illustrate that the transnational counter-terrorism space operates in a manner that minimises politicisation. In short, I will argue that when legal obligations originate in that space there can be a reduction

⁴⁶ Critical Infrastructure Protection in the Fight against Terrorism COM (2004) 702 final; A European Programme for Critical Infrastructure Protection COM/2006/0786 final; Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection L 345/75.

⁴⁷ A key part of this is the governance of passenger name records (PNR), which is now done by means of Directive 2016/681 on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

⁴⁸ Furthermore, EU counter-terrorism takes place across a sprawling architecture that goes well beyond the specialized agencies. On this see Josephine Doody, “The Institutional Framework of EU Counter-Terrorism” in Fiona de Londras & Josephine Doody, *The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism* (2015; Routledge), 40.

⁴⁹ Directive 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.

⁵⁰ Above n. 26, para. 23.

⁵¹ This raises some issues particular to arena shifting when compared with arena shifting within national scales, for example from legislative to bureaucratic actors. It is, thus, not only about “[t]he institutional location of issues” (X-ref to introduction please—this is a direct quote from p8 of the draft introduction), but about the geopolitical location of those issues quite outside the national institutional infrastructure.

in the issue's salience and visibility to the public, and the range and diversity of actors involved can be (and is) limited, with necessary implications for politicisation.⁵² Far from shifting questions of counter-terrorism into more prominent public arenas,⁵³ the shift to a transnational counter-terrorism space re-constructs exclusivity, secrecy and executive dominance and thus undermines politicisation, rights, and the rule of law.

Foreign Terrorist Fighters: A Transnational Concern

In recent years the phenomenon of 'foreign terrorist fighters' has become a core concern in counter-terrorism. According to UN Security Council Resolution 2178 foreign terrorist fighters are "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict".⁵⁴ The precise scale of the phenomenon is (understandably) difficult to ascertain, but estimates indicate that it is significant. For example, the United Nations Office of Drugs and Crime estimates that between 2011 and 2017 something between 25,000-30,000 foreign terrorist fighters arrived in Syria and Iraq.⁵⁵ By its very nature, the challenge of foreign terrorist fighters is one that lends itself to multilateral and transnational responses: these individuals cross borders in order to undertake the prohibited behaviours, and in doing so they necessarily engage international law. Similarly, the adaptive capacities of terrorist organisations⁵⁶ suggest that unless there is at least some harmonisation of approaches across states, terrorist or putative terrorist actors might 'forum shop', focusing on states and borders that are relatively less regulated in respect of attempting to prevent the phenomenon than others.

⁵² These are said to be important elements of politicisation by, for example, Edgar Grande & Swen Hutter, "Introduction" in Edgar Grande & Swen Hutter, *Politicising Europe: Integration and Mass Politics* (2016: Cambridge University Press), 3, 8; Michael Zürn, "The Politicization of World Politics and its Effects: Eight Propositions" (2014) 6(1) *European Political Science Review* 47, 50.

⁵³ ED: X-ref to the introduction to this special issue please

⁵⁴ Security Council Resolution 2178 (2014), preamble para 9.

⁵⁵ UNODC, *Foreign Terrorist Fighters: Manual for Judicial Training Institutes South-Eastern Europe* (2017; Vienna), p. 1.

⁵⁶ On terrorist adaptation and hybridity see Fiona de Londras, "Hybrid (Counter-) Terrorism" in Nicolas Lemay-Hebert & Rosa Freedman (eds), *Hybridity: Law, Culture, and Development* (2017; Routledge), 58.

It is of little surprise, then, that the phenomenon has attracted the attention of international law.⁵⁷ In particular, in 2014, the Security Council passed Resolution 2178 to address foreign terrorist fighters, requiring all member states of the United Nations to “ensure that any person who participates in...terrorist acts or in supporting terrorist acts is brought to justice” and to “ensure that...domestic laws and regulations establish serious criminal offences sufficient to provide the ability to prosecute and to penalize”⁵⁸ such persons. In imposing that general obligation, Resolution 2178 was reinforcing the same injunction made very quickly after the 9/11 attacks in UN Security Council Resolution 1373, but Resolution 2178 then specifies the measures to be taken in respect of foreign terrorist fighters in order to fulfil this general obligation.

Resolution 2178 thus builds on and continues the pattern of legislative resolutions in the field of counter-terrorism that the Security Council began in 2001. Resolution 1373 required states to put in place national laws and measures to prevent, criminalise and prosecute terrorism.⁵⁹ That Resolution is highly controversial; it is the first time that the Security Council *obliged* states to pass particular criminal laws, and has been widely characterised as indicative of an inclination towards ‘legislation’ on the part of the Security Council.⁶⁰ It is notable, then, that the Security Council took an analogous approach to foreign terrorist fighters in 2014 and, by so doing, “reaffirmed [1373’s] innovative extension of the Council’s powers, with all the advantages (speed, uniformity) and disadvantages (decreased political legitimacy, lack of state consent) that Council legislative decisions entail”.⁶¹ If, as Balzacq argues, both the agent and the act matter to politicisation,⁶² then the selection of the Security Council as the arena within the transnational counter-terrorism space in which to act on FTFs, and the nature of the Resolution as a legislative one are both significant.

⁵⁷ For scholarly engagements see, for example, Andrea de Guttry, Francesca Capone, and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (2016, The Hague; TMC Asser Press); Letta Taylor, “Foreign Terrorist Fighter Laws: Human Rights Rollbacks Under UN Security Council Resolution 2178” (2016) 18(5) *International Community Law Review* 455.

⁵⁸ Security Council Resolution 2178 (2014), Operative Paragraph 6.

⁵⁹ See, for example, operative paragraph 1(b) and 1(d), UN Security Council Resolution 1373 (2001).

⁶⁰ See, for example, Paul C Szasz, “The Security Council Starts Legislating” (2002) 96(4) *American Journal of International Law* 901; José Alvarez, “The UN’s ‘War’ on Terrorism” (2003) 31 *International Journal of Legal Information* 238; Stefan Talmon, “The Security Council as World Legislature” (2005) 99(1) *American Journal of International Law* 175.

⁶¹ Jacob Katz Cogan, “Stabilization and the Expanding Scope of the Security Council’s Work” (2015) 109(2) *American Journal of International Law* 324, 333.

⁶² Thierry Balzacq, “The Three Faces of Securitization: Political Agency, Audience and Context” (2005) 11(2) *European Journal of International Relations* 177, 178.

The Security Council is not a *politicised* space (using that word as a term of art), even though of course it is a highly political one. As a general matter there is little contestation, especially where something is proposed in the wake of an attack on one of the five veto-holding permanent members. There is no effective civil society participation, and almost no human rights due diligence in respect of proposed new measures.⁶³ Speed rather than deliberation is the order of the day. This is all in evidence in respect of Resolution 2178. It was adopted unanimously, in a session chaired by President Barack Obama and addressed—in supportive terms—by the Secretary General, Ban Ki Moon. The Security Council meeting was convened at the urging of the United States of America and attended *and addressed* by representatives of states beyond the member states of the Council. At that time the non-permanent members of the Council were Chad, Nigeria, Rwanda, Jordan, South Korea, Chile, Argentina, Australia, Luxembourg and Lithuania, but representatives of Turkey, Qatar, Bulgaria, Kenya, FYR Macedonia, Canada, the Netherlands, Morocco, Norway, Trinidad and Tobago, Singapore, United Arab Emirates, India, Spain, Malaysia, Sri Lanka, Egypt, and Belgium all also addressed the Council. So too did representatives of the European Union and the Holy See. Serbia, Pakistan, Algeria, Senegal, Latvia, Denmark, Albania, Estonia, Kazakhstan all sent ministerial level representation. There was, quite simply, an astounding amount of consensus. No state spoke against the proposal.⁶⁴ No civil society consultation or participation was invited.

Resolution 2178 had a rapid impact in Europe, and particularly in the Council of Europe. As already mentioned above, the Council of Europe does have a Convention on the Prevention of Terrorism, which was adopted in 2005. Like Resolution 1373, that created offences that member states were to ensure were present in domestic law.⁶⁵ The European Union is a party to the Convention,⁶⁶ as well as all of the

⁶³ See Sievers and Daws, above n. 29. See also Fionnuala ní Aoláin, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism 2018, A/73/45453 (2018).

⁶⁴ UN Press Office, “Security Council Unanimously Adopts Resolution Condemning Violent Extremism, Underscoring Need to Prevent Travel, Support for Foreign Terrorist Fighters”, SC/11580, 24 September 2014.

⁶⁵ See generally Adrian Hunt, “The Council of Europe Convention on the Prevention of Terrorism” (2006) 12(4) *European Public Law* 603.

member states of the Council of Europe and the European Union themselves.⁶⁷ In 2014 the CODEXTER of the Council of Europe proposed the drafting of an Additional Protocol to the Convention in order to implement the criminal law provisions of Resolution 2178. A Committee on Foreign Terrorist Fighters and Related Issues was then established in January 2015, which in turn drafted and proposed the Additional Protocol, adding provisions on criminalising acts related to terrorist offences and on the exchange of information to the Convention itself. Significantly, travelling abroad for the purpose of terrorism,⁶⁸ funding travel abroad for the purpose of terrorism,⁶⁹ and organising or facilitating travel abroad for the purposes of terrorism⁷⁰ are all offences under the Additional Protocol. The Additional Protocol itself has been criticised by civil society for failing properly to take account of human rights or to engage effectively with civil society NGOs. As was the case with the EU's Directive on Combating Terrorism, discussed further below, the drafting process was expedited, with civil society participation largely limited to an opportunity to provide comments on a draft published by the Committee on Foreign Terrorist Fighters and Related Issues.⁷¹

It was in this context—following the adoption of Security Council Resolution 2178 and the conclusion of the Additional Protocol to a Convention to which the European Union was a party—that the inclusion of provisions on foreign terrorist fighters within a new EU directive on combating terrorism was undertaken.

The EU Directive on Combating Terrorism

⁶⁶ The European Union signed the Convention on 22 October 2015, and ratified the Convention on 26 June 2018.

⁶⁷ A full list of signatures and ratifications is available here https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/196/signatures?p_auth=dSYO132j

⁶⁸ Article 4, Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism.

⁶⁹ Article 5, Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism.

⁷⁰ Article 6, Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism.

⁷¹ See, for example, the remarks of the Open Society Justice Institute in its submission on the draft Additional Protocol, 24 March 2015, para 2. Available at <https://www.opensocietyfoundations.org/sites/default/files/comments-coe-terrorism-protocol-20160217.pdf>

The Directive on Combating Terrorism, proposed by the European Commission on 2 December 2015,⁷² is not merely a fresh piece of omnibus European counter-terrorism legislation. Rather, it amalgamates and adds to existing EU law (including the 2002 Framework Decision, as amended⁷³) drawing from other sources of transnational counter-terrorism—including Resolution 2178 and the Additional Protocol to the Convention on the Prevention of Terrorism—for those additions as they relate to foreign terrorist fighters.

There was, of course, an important European political provenance to the proposal for the Directive on Combating Terrorism, not least reactions to the attacks on Paris in November of 2015. In particular, there were three key ‘pre-proposal’ political events and accompanying documents that form a relevant part of the political provenance for the proposal of the Directive on Combating Terrorism: Council Conclusions of 13 October 2014,⁷⁴ the Joint Statement following the meeting between Justice and Home Affairs Ministers in Riga on 29-30 January 2015,⁷⁵ and the European Parliament’s Resolution of 11 February 2015.⁷⁶ These will now be discussed in greater detail.

In its Conclusions of 13 October 2014, the Council called upon the Commission to explore ways to overcome possible shortcomings of the existing Framework Decision in light of, in particular, the UN Security Council Resolution 2178 on foreign terrorist fighters. In the Joint Statement after the Riga Justice and Home Affairs Council, EU Ministers agreed on the importance of considering possible legislative measures to establish a common understanding of terrorism offences in light of Security Council Resolution 2178. The European Parliament’s Resolution of 11 February 2015 finally noted that “the EU is facing a severe and growing threat posed by the so-called ‘EU foreign fighters’”⁷⁷ and called for measures to be adopted “to disrupt the travel of

⁷² 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.

⁷³ Framework Decision on Combating Terrorism (2002/475/JHA) as amended by Framework Decision on Combating Terrorism (2008/919/JHA).

⁷⁴ Council Conclusions 14160/14.

⁷⁵ Riga joint statement following the informal meeting of Justice and Home Affairs Ministers in Riga on 29 and 30 January (5855/15).

⁷⁶ European Parliament Resolutions 2015/2560.

⁷⁷ *Ibid*, preambular paragraph G.

European and other foreign fighters and to deal with returnees”,⁷⁸ and noted “the need...to harmonise criminalisation of foreign fighter-related offences across the EU”.⁷⁹ In doing so, it referred expressly to Resolution 2178. At that time, then, there was consensus at a high political level in the European Union that European law needed better to address foreign terrorist fighters as envisioned in both Security Council and Council of Europe instruments.

In legal terms this was achieved by the inclusion in the Directive on Combating Terrorism of foreign terrorist fighter offences.⁸⁰ It is quite clear that the inclusion of these offences was a response to legal developments in the transnational counter-terrorism space. The Explanatory Memorandum to the proposed Directive explicitly notes that the EU’s counter-terrorism *acquis* needed to be reviewed in order to implement new international obligations under Resolution 2178.⁸¹ So too the Explanatory Memorandum referred explicitly to the Council of Europe’s Additional Protocol,⁸² which—as outlined above—was itself implementing the obligations outlined in Resolution 2178.

Thus, in order to give effective to both the EU’s obligations under the Additional Protocol and its member states’ obligations under UN Security Council Resolution 2178, the Commission proposed a Directive that would include offences relating to receiving training for terrorism,⁸³ travelling abroad for terrorism to any country, including a member state of the European Union,⁸⁴ organising or otherwise facilitating travelling abroad for terrorism,⁸⁵ and the financing of travelling abroad for terrorism.⁸⁶ The Commission also proposed criminalising a number of additional, inchoate actions relating to FTFs.⁸⁷

The Making of the Directive on Combating Terrorism

⁷⁸ Ibid, para 4.

⁷⁹ Ibid, para 26.

⁸⁰ Especially Articles 9 and 10, Directive on Combating Terrorism.

⁸¹ European Commission, above n. 72, Explanatory Memorandum, p. 4.

⁸² Ibid, p. 5.

⁸³ Proposed Article 8.

⁸⁴ Proposed Article 9.

⁸⁵ Proposed Article 10.

⁸⁶ Proposed Article 11.

⁸⁷ For example, Proposed Article 16.

Following ratification of the Lisbon Treaty, Directives are generally to be made according to the ordinary legislative procedure (OLP) of the Union, under which the Council and Parliament of the Union have the same legislative weight, and the majority of EU laws are jointly adopted.⁸⁸ The Directive on Combating Terrorism was purportedly passed under the OLP. Under the OLP the Commission submits a legislative proposal to the European Parliament, Council and national parliaments. The two co-legislators work in parallel, with the Parliament debating its agreed text and the Council its general approach more or less contemporaneously. During the examination of a proposal, the relevant parliamentary committee asks the Commission and the Council to keep it informed of the proposal's progress under Rule 43(2). The two institutional texts are published in the public domain and the Council and the Parliament adopt a legislative proposal either at the first reading or at the second reading (following a trilogue negotiation phase). If the two institutions do not reach an agreement after the second reading then a conciliation committee is convened. If the text agreed by the conciliation committee is acceptable to both institutions at the third reading, the legislative act is adopted.⁸⁹ In a number of interesting ways the passage of the Directive deviated from the usual progression of proposals under the OLP.

First, and as already intimated, while the Commission did propose the Directive (thus taking the legislative initiative), this proposal was clearly influenced by the political catalysts prioritising the tackling of foreign terrorist fighters as outlined above.

Secondly, the proposal was not preceded by the kind of consultation that is usually undertaken before the Commission initiates legislation. In the ordinary course of events such proposals result from extensive consultation including an *ex ante* impact assessment, reports by experts, consultation of national experts, international organisations and NGOs and consultation via Green and White Papers.⁹⁰ Moreover, an inter-service consultation process is launched among the different Commission

⁸⁸ Article 294, Treaty on the Functioning of the European Union.

⁸⁹ On the OLP generally Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials*, 6th Edition (Oxford; Oxford University Press), pp. 126-133.

⁹⁰ All of this is part of the approach to better regulation outlined by the European Commission in its Better Regulation Guideline (SWD (2015) 111) and resultant Better Regulation 'Toolbox', available at http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf

departments in order to ensure that all aspects under consideration are taken into account. The proposal is then adopted by the College of Commissioners and published in the Official Journal of the European Union. It is then submitted to Parliament, Council and all EU national parliaments where it is assessed on the basis of the principles of subsidiarity and proportionality.⁹¹ The purpose of this process, and its usually robust nature, is to ensure “the highest possible quality” in all legislation,⁹² with the various phases of consultation and preparation “provid[ing] a rigorous evidence base to inform decision-making and contribute to making Commission activities more effective, coherent, transparent and accountable”.⁹³

However, the Directive was not subjected to this ordinary scrutiny. In particular, there was no *ex ante* impact assessment at all; a development that causes particular rights-based concern. Ordinarily an impact assessment is required when there is likely to be a significant economic, environmental, or societal impact of the measure.⁹⁴ In EU parlance social impacts include impacts on legally protected rights. It is permissible to skip the impact assessment phase in limited circumstances, such as where the Commission is transposing an international agreement with no significant margin for variation.⁹⁵ While one might consider that the relationship between the Directive, Resolution 2178 and the Additional Protocol thus justified the lack of an impact assessment, the Explanatory Memorandum explained it otherwise, stating:

[T]he urgent need to improve the EU framework to increase security in the light of recent terrorist attacks including by incorporating international obligations and standards, [and therefore] this proposal is exceptionally presented without an impact assessment.⁹⁶

The recourse to urgency to justify the circumvention of ordinary law-making processes, of course, resonates across security and counter-terrorist contexts.

⁹¹ Protocol No 2 to the Treaty of the European Union.

⁹² *Better Regulation Toolbox*, above n. 90, p. 7.

⁹³ *Ibid*, 7.

⁹⁴ European Commission, Guidelines on Impact Assessment, available at <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-impact-assessment.pdf>, p. 15.

⁹⁵ *Better Regulation Toolbox*, above n. 90, p. 33.

⁹⁶ European Commission, above n. 72, p. 12.

Thirdly, and related to the fact that no impact assessment took place, the Directive was not subjected to the analysis of scientific experts, consultants and stakeholders—including civil society—as is usually the case. The Commission’s *Better Regulation Toolbox* recommends such engagement because “it helps to deliver higher quality and more credible proposals and gives greater transparency and legitimacy to the policy development process”.⁹⁷

In the absence of the impact assessment there was no such engagement with experts, or with civil society. Instead of being brought into the process through the legislative process and structure, civil society groups with concerns about the human rights implications of the Directive had to try to penetrate the process from the outside. In February 2016, Amnesty International, the International Commission of Jurists (ICJ), the Open Society Justice Initiative and the Open Society European Policy Institute published a joint statement detailing concerns arising from a close reading of the proposed Directive and recommending substantive changes to ensure better alignment with international human rights law.⁹⁸ The statement refers to concerns previously expressed with both the Council of Europe’s Additional Protocol and Security Council Resolution 2178,⁹⁹ both of which it was said had been passed following expedited and non-transparent policy processes with serious implications for public scrutiny, debate and input from relevant sectors of civil society. As a result, they cautioned against the transposition of Resolution 2178 and the Additional Protocol arguing that they both “contain flaws that give rise to the potential to result in

⁹⁷ Above n. 90, p. 59.

⁹⁸ Amnesty International, the International Commission of Jurists (ICJ), the Open Society Justice Initiative and the Open Society European Policy Institute Joint Submission Regarding the European Commission’s Proposed Draft Combatting Terrorism Directive, 19 February 2016, IOR 60/3470/2016.

⁹⁹ Amnesty International and the International Commission of Jurists, Preliminary public observations on the terms of reference to draft an Additional Protocol supplementing the Council of Europe Convention on the Prevention of Terrorism, 6 March 2015 <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/03/CouncilofEurope-Letter-ForeignFighters-Advocacy-Legal-Submission-2015-ENG.pdf>; Amnesty International and the International Commission of Jurists, Submission to the Committee on Foreign Fighters and Related Issues (COT-CTE) on the Draft Additional Protocol to the Convention on the Prevention of Terrorism, 19 March 2015, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/03/CouncilofEurope-Submission-ForeignFighters-Advocacy-Legal-Submission-2015-ENG.pdf>; Amnesty International and the International Commission of Jurists, Submission to the Council of Europe Committee of Experts on Terrorism (DODEXTER) on the Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, 7 April 2015. <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/CouncilofEurope-CODEXTER-DraftProtocolTerrorismConvention-ICJ-AISubmission-2015-ENG.pdf>; Open Society Justice Initiative, Comments on the Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, 24 March 2015, <https://www.opensocietyfoundations.org/publications/comments-draft-additional-protocol-council-europe-convention-prevention-terrorism>.

arbitrary, disproportionate and discriminatory interference with human rights, and to conflict with international humanitarian law and international criminal law, where applicable. These problems”, they argued, were “also reflected, and in some cases exacerbated in the text of the proposed Directive”.¹⁰⁰ In the absence of any structured engagement with civil society, however, this clear form of contestation—central to politicisation—was essentially excluded from the law-making process around the Directive.

Fourthly, the Council took a somewhat unusual approach to its engagement with the proposed Directive. Following formal adoption by the Council and European Parliament in December 2015, the proposed Directive was discussed by the Council’s Working Party on Substantive Criminal Law known as DROIPEN, which was to establish the Council’s general approach to the proposal for the basis of subsequent negotiation with the Parliament. On a number of occasions, DROIPEN met in a ‘Friends of the Presidency’ formation to consider the proposed Directive and prepare draft conclusions as a basis for further discussion among the Member States.¹⁰¹ This is an interesting and unusual step within a legislative process. Friends of the Presidency groups are *ad hoc*, subject-specific groups convened at the invitation of the Presidency and comprised of political advisors and legal experts from the Member States and the European institutions.¹⁰² It would appear that the draft Directive was discussed at least eight times at the Friends of the Presidency Group established to consider it¹⁰³ and, perhaps more interestingly, that this Group was in effect precisely the same in composition as the DROIPEN but reconstituted for the purpose of completing the Council’s business quickly as no interpretation is needed for such meetings.¹⁰⁴

¹⁰⁰ Above n. 98, pp. 2-3.

¹⁰¹ Council records show that the proposed Directive was an agenda item for the Friends of the Presidency Group on 8 January, 19 January, 20 January, 29 January; 18 February; 26 February and 2 March 2016. The EU Monitor website also reveals that the proposed Directive was discussed at a Friends of the Presidency meeting on 6 October 2016. However, no record of this can be found on the EU Council website.

¹⁰² The ‘Friends of the Presidency Group’ was improvised during Agenda 2000 negotiations. The Friends of the Presidency Group continues to convene on an *ad hoc* basis, at the invitation of the President to consider focused, well-defined questions or problems. See generally Jeffrey Lewis, “Informal integration and the supranational construction of the Council” (2003) 10(6) *Journal of European Public Policy* 996.

¹⁰³ Above n. 101.

¹⁰⁴ Responding to an email query on the composition of the Group Milena Petkova (Political Administrator of the General Secretariat of the DG Justice and Home Affairs) wrote: “This is the same

Neither was dissensus, disagreement or dissent much in evidence in the European Parliament's engagement with the proposed Directive. Under the OLP the President of the Parliament refers the proposal to the relevant parliamentary committee, which appoints a rapporteur from its membership who then guides the proposal through the various stages of the procedure, reporting progress to the responsible committee during the committee stage and then reporting to Parliament as a whole at the plenary stage of proceedings. Once a report is agreed in committee it is placed before the plenary Parliament for debate, and for simple majority votes on 1) amendments to the proposal, 2) the proposal and 3) amendments to the draft legislative resolution. Finally, Parliament votes on the draft legislative resolution as a whole. The Civil Liberties (LIBE) Committee was selected as the relevant committee to consider the proposed Directive, with Monika Hohlmeier having been appointed Rapporteur. LIBE's final report on the proposed Directive was published on 4 July 2016. Ahead of the publication, LIBE convened an extraordinary meeting on 4 July to adopt the final report. There was little dissent, with 41 members voting in favour, 4 against, and 10 abstentions.

Once the Council and Parliament had reached their respective positions on the proposed Directive the trilogue stage commenced. Trilogues are important in law-making processes. If agreement is reached on compromise amendments between Council and Parliament in the first reading trilogues then the amendments are formally passed by the respective parliamentary committee and passed to the plenary Parliament where a simple majority of MEPs in attendance can agree to the compromise. Although the process becomes more rigorous as the proposal moves through different readings (i.e. if early agreement is not reached), the reality is that the vast majority of measures are agreed at 1st reading and the rest at 2nd reading.¹⁰⁵ However, trilogues are extremely controversial within EU law. They are opaque by design, generally understood as "a trade-off in which speed is prioritized over

composition of capital based experts meeting in the Council Working Party on Substantive Criminal Law (DROIPEN), which is in charge of the negotiations of the Terrorism Directive. It involves mainly experts from the Ministries of Justice of the Member States. It appears that a Friends of Presidency formation of DROIPEN means in practice that interpretation is not available. For logistical reasons, this enables the Presidency to convene expert meetings in the Council as often, as needed" (email correspondence; 27 October 2016).

¹⁰⁵ <http://www.statewatch.org/analyses/no-205a-cleu.pdf>

inclusive decision making”,¹⁰⁶ and pose real challenges to attempts to interrogate the process of developing, ratifying and implementing EU Directives. In the case of the proposed Directive substantive issues relating to ‘travelling’ (and thus to foreign terrorist fighters) in Article 9 remained after the third trilogue,¹⁰⁷ and the Directive as a whole was not agreed until the seventh trilogue on 17 November 2016. However, given the nature of trilogues it is not clear whether it was substantive questions of the criminalisation of activities of foreign terrorist fighters, another substantive provision, or the vexed but technical question of the legal basis of the Directive that was the source of the disagreement reflected in the need for seven trilogues.

The Implications of Transnational Counter-Terrorism for Politicisation: Suggestions from the Regulation of Foreign Terrorist Fighters

The Directive is now part of European Union law, having been adopted in March 2017.¹⁰⁸ The nature of a Directive is that it is binding on the countries to which it is addressed.¹⁰⁹ In other words, member states must transpose it into domestic law, although they have some flexibility as to the form and means of the transposition. The Directive on Combating Terrorism requires “Member States [to] bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 8 September 2018”.¹¹⁰ This obligation is absolute: member states will be required to transpose the Directive and not even the (strong) resistance of civil society can get away from the fact that all member states are subject to this legal obligation, even if and where they went beyond what was considered necessary or desirable for the state in question. As a result, any politicisation that might be present at the domestic level could only be tepid and partially effective: no matter how much dissent or debate there is, the obligation on addressee member states to transpose the Directive remains, raising questions about whether committing resources to resisting

¹⁰⁶ Gijs Jan Brandsma, “Co-Decision after Lisbon: The Politics of Informal Trilogues in European Union Lawmaking” (2015) 16(2) *European Union Politics* 300.

¹⁰⁷ Council Communication 12736/16.

¹⁰⁸ 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.

¹⁰⁹ Article 288, Treaty on the Functioning of the European Union.

¹¹⁰ Article 28(1), 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.

this transposition at domestic level would be a worthwhile exercise on the part of civil society. If this is the case, what might the development of a transnational counter-terrorism space and the initiation within it of legal obligations of the kind illustrated here by the example of provisions relating to foreign terrorist fighters tell us about politicisation in the counter-terrorism context?

First, this should call our attention to a wider process when we are considering the extent and the impact of politicisation in the context of counter-terrorism. A purely domestic analysis—or indeed an analysis of only one arena (such as the European Union)—simply may not be enough. Many counter-terrorism laws now have complex and transnational provenances, and that complexity calls into question the conventional wisdom about the making of counter-terrorism law. It has long been widely observed that counter-terrorism laws and policies are often devised and implemented following a ‘shock’ to the system that is perceived to require a legal and/or political response. Hence, the Birmingham Bombings led to the Prevention of Terrorism Act 1974, the 9/11 attacks to the USA Patriot Act, and so on. However, following the growth of the transnational counter-terrorism space the narratives of contemporary counter-terrorism are far more complex than that, if indeed these relatively simplistic tellings of the growth of counter-terrorism law were ever accurate in the first place. While a shock may instigate a revision of, addition to, or extension of counter-terrorism law or policy, the law or policy that emerges may well be the product of a complex and non-linear set of events, policies, engagements, and activities, often led by actors that are not considered to be part of the ‘primary’ policy-making process within a particular (national or supranational) institutional setting. If we are properly to assess the extent and the quality of politicisation in counter-terrorism we must look to all of these layers—to all of these arenas of counter-terrorist activity—to assess how, why, and by whom the law is really being made.

In the context of foreign terrorist fighters, we have seen here that the actions of the United Nations Security Council in passing Resolution 2178 are clearly a material part of the policy-making process that led to the Council of Europe’s Additional Protocol, then the European Union Directive on Combating Terrorism and, eventually, to domestic law transposing that Directive across the member states of the

European Union. Assessing politicisation in the context of those transposing laws, for example, thus requires one to be at least attentive to wholly different processes and arenas: the making of Security Council Resolution 2178, the making of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, and the making of the EU Directive on Combating Terrorism. The national political arena is, in this context, inextricably linked with these transnational arenas, which—as already shown—were, by design, depoliticised. The very nature of the Security Council is such that politicisation of this kind is difficult to achieve, and procedural decisions taken at the Council of Europe and, especially, within the European Union—to use a Friends of the Presidency Group formation, to skip the *ex ante* impact assessment, to eschew structured consultation with experts and civil society—were such that politicisation was made almost impossible. If, as outlined in the introduction to this paper, politicisation and its introduction of debate, dissent, contestation, participation, and openness really are important to ensure that essential questions of legality, proportionality and rights protection are aired so that political bodies play their part in ensuring legality and constitutionalism, then this manifestation of the transnational counter-terrorism space is of real and serious concern.

The importance of recognising the complexity of the narrative leading to the Commission proposal of a Directive here cannot be overstated; this is not simply a matter of explaining *why* the process started, but also of understanding that *at the outset of that process* some elements of the policy were effectively pre-determined by what came before it.

Even if there had been dissent and disagreement about whether criminal offences relating to foreign terrorist fighters were needed or desirable, this criminalisation was quite simply required by Resolution 2178 and by the Additional Protocol. The decision to give effect to this requirement through an EU Directive, rather than by each member state individually through self-started domestic law, meant that an arena was chosen and constructed in which opacity could be ensured (through trilogues, for example), in which civil society could be structurally excluded (through deciding not to have an *ex ante* impact assessment for reasons of urgency), and in which public participation and attention were minimised because of the democratic distance between the EU institutions and the polity and the relative lack of concerted media

attention when compared to domestic counter-terrorism law making. Once the EU law had been passed in this depoliticised space, a legal obligation—enforceable by infringement actions taken by the Commission¹¹¹—arose so that the potential for meaningful politicisation in the domestic law making processes that inevitably follow the Directive’s passage was reduced.

This illustrates very well the extent to which counter-terrorism law- and policy-making is becoming increasingly international and transnational, and the impact of this on politicisation. This suggests that if politicisation is to happen in the process of passing laws with transnational provenance, then it must happen somewhere in the transnational counter-terrorism space; domestic politicisation will not be enough to undo any serious rights-infringements that result from the substantive provisions of the transnational law. But that space can be designed to minimise this, whether by focusing on Security Council activities or by structuring regional law-making processes to minimise it, as illustrated by this example. In such a context we become reliant to some extent on bureaucracy to provide the legal products we hope to achieve through politicisation: to ensure legality, to be attentive to rights, to assess proposals against constitutional tests such as the requirement that all interference with rights must be proportionate. However, notwithstanding the constitutional commitment to legality and proportionality within the European Union, the transnationalism of the provisions’ provenance impacts on this too. This is evident from the explanatory memorandum that accompanied the proposal for the Directive.¹¹²

In that memorandum the Commission engaged to some extent with how the proposed Directive might impact on rights and freedoms, concerning itself in particular with freedom of movement and freedom of association in respect of the foreign terrorist fighter provisions. Due mention is made of the rights, freedoms and principles set out in the Charter of Fundamental Rights (and reflected in Article 6(1) of the Treaty of the European Union), and it acknowledges the constitutional traditions and international obligations common to the Member States including the European Convention on Human Rights. The memorandum thus correctly notes that “all

¹¹¹ Article 226 Treaty of the European Union.

¹¹² European Commission, above n. 72.

measures intended to enhance security measures must comply with the principles of necessity, proportionality and legality, with appropriate safeguards to ensure accountability and judicial redress”.¹¹³ The Commission also states that any limitation on rights “is subject to the principle of proportionality with respect to the legitimate aim of genuinely meeting objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others, be provided for by law and respect the essence of those rights and freedoms”.¹¹⁴

However, with one exception, nowhere in the memorandum can one find any explanation or analysis of *how* these rights are to be protected by the terms of the Directive. The Commission acknowledges potential implications for one specific human right – freedom of movement – in reference to the new offence of travelling abroad for terrorist purposes. An attempt to establish proportionality is made in this case and a Directive governing freedom of movement and residence,¹¹⁵ including allowing for restrictions on those freedoms, is offered as some form of legislative precedent. But once again, there is no real engagement with counter-arguments. Criminalising travel for terrorism purposes, even between Member States and thus within the zone of freedom of movement of the European Union, is required to give effect to Resolution 2178 and the Additional Protocol; if proportionality and respect for rights is required, *and* criminalisation is required, then bureaucratic logic suggests—and the Explanatory Memorandum suggests—that criminalisation must be proportionate. Without rigorous processes that structure and enable dissent and disagreement, the lack of rigour that underpins such an analysis cannot easily be exposed. The outcome, in other words, is more or less predetermined, even though the original instrument—Resolution 2178—was concluded without effective regard for rights.

¹¹³ Ibid, p. 13.

¹¹⁴ Ibid.

¹¹⁵ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

Even if, as in the Directive, there is a provision for the impact on rights to be considered in an *ex post facto* reporting process,¹¹⁶ it is difficult to imagine what could be done if that later process concluded that the Directive did in fact lead to disproportionate impacts on rights in respect of the offences underpinned by Resolution 2178. Those criminal offences would still be required, and the Resolution itself would offer no pathway to resolving the inconsistency with fundamental rights protection. While it is true that Resolution 2178 includes some general statements of commitments to rights in its preambular provisions and requires states to comply with the Resolution in a manner “consistent with international human rights law”,¹¹⁷ Resolution 1373 on which it builds does not include an obligation to attend to rights, and generic statements of regard for rights do little to specify how rights are to be protected or to create a benchmark against which rights-based accountability can be assured.¹¹⁸ While such references to rights *perform* concern for rights, they do not effectively limit state actions that are justified or compelled by the obligations imposed in the Resolution.

Neither does the memorandum adequately compensate for the lack of civil society engagement in the development of the proposal. Instead of canvassing predictive objections of civil society and showing how they have been addressed, the Commission’s discussion of consultation is limited to noting the involvement of civil society organisations in negotiations within the Council of Europe on the Additional Protocol. Although the memorandum acknowledges civil society concerns that the Additional Protocol displays “flaws that give rise to the potential to result in arbitrary, disproportionate and discriminatory interference with human rights,” it fails to engage with the arguments, or with how they might impact on the proposed Directive. In other words, the memorandum reports, but does not rigorously rehearse (much less counter), the argument that the international instruments on which the Directive was based were flawed and, if so, that the European Union was obliged to find a means of implementing them that would resolve these rights-related flaws.¹¹⁹

¹¹⁶ Article 29(2), Directive 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.

¹¹⁷ Resolution 2178 (2014), operative paragraph 5.

¹¹⁸ See the comments and recommendations of the Special Rapporteur to this effect in her 2018 report: Fionnuala ní Aoláin, above n 63.

¹¹⁹ *Kadi and Al Barakaat International Foundation v Council and Commission* (2008) C-402/05.

Thus, the provisions designed in depoliticised transnational arenas (the UN Security Council and the Council of Europe) were treated as presumptively lawful and proportionate, notwithstanding the genuine questions that arise in relation to them. The lack of a participative and open process of progressing the Commission's proposal meant that there was no opportunity properly to test the ways in which the European Union might be able to address and perhaps resolve these questions.¹²⁰ The provisions were compelled by international law and thus treated as presumptively constitutional, legal, and proportionate. The Directive will most likely receive the same treatment in the domestic legal and political systems in which its transposing measures will be developed and passed. The original sins of Resolution 2178 will almost certainly find no confession in domestic parliaments, with the rights-based repercussions of a lack of politicisation in the Security Council in New York making their way into legislation passed in parliaments from Dublin to Dubrovnik.

Conclusions

It may well be, as other contributors to this special issue argue,¹²¹ that as a general field of activity security is becoming increasingly politicised. If that is the case, and provided politicisation is focused to at least some extent on rights and lawfulness, this will be welcome from a legal perspective. However, something interesting and concerning is happening with counter-terrorism that calls into question the usefulness of this politicisation. That is the rapid though fragmented emergence of a transnational counter-terrorism space in which, as I have shown here, serious and concerning domestic laws may find their ultimate provenance. Where that happens, the usefulness of politicisation in domestic systems—even if it does occur—may well be minimal, and the ability of the transnational space to structure out the potential for politicisation of real domestic legal and political import.

The speed of development, scale of law- and policy-making, and nature of operation of the transnational counter-terrorism space is difficult to map. Even the sketch

¹²⁰ On the importance of such processes see Fiona de Londras, "Accounting for Rights in EU Counter-Terrorism: Towards Effective Review" (2016) 22(2) *Columbia Journal of European Law* 237.

¹²¹ X-REFS AS REQUIRED PLEASE EDS

provided here is only partial. Not included, for example, are the bodies—the ‘counter-terrorism clubs’¹²²—that exist outside of the formal structures of international organisations but are clearly designed to be norm entrepreneurs and influencers of regional and national entities (such as the Global Counter Terrorism Forum), the counter-terrorism initiatives of informal inter-state groupings (such as the G7), and the activities of a global counter-terrorism industry that includes legal ‘experts’ writing and influencing domestic laws for countries around the world who are required (by instruments such as Resolution 2178) to implement such legislation, but which have little relevant domestic expertise because they do not have any empirical need for such laws based on the nature of the security risks they face.

Counter-terrorism law and policy is increasingly being made in complex, transnational venues and moving through transnational spaces to have serious legal impacts at domestic and regional levels. In this, it is increasingly beginning to resemble the transnational legal orders that lawyers, regulatory theorists, governance scholars and political scientists have long been concerned with;¹²³ orders that are multi-level, operate on a mix of formal and informal delegation, and pose challenges to our commitments to accountability within the contemporary state.¹²⁴ When it comes to counter-terrorism these challenges have a particular shape, not least because of the ways in which security laws impact on rights, and formal accountability mechanisms such as courts often struggle to resist strong security narratives advanced by states to justify these societal impacts. The analysis presented here suggests that within that transnational counter-terrorism space there is a lack of politicisation that, where it arises in one venue, can have serious implications in others. If that is right, then there is much for political scientists and for lawyers who care about law, rights, and the role of politics in securing legality and constitutionalism to be anxious about, and a clear need for us to attend to the connections, norm-movements, influences and

¹²² Fiona de Londras, “Transnational Counter-Terrorism: The Urgent Need for Constitutionalist Attention” (2019) *Current Legal Problems*, forthcoming.

¹²³ See in particular Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (2013, New York; Cambridge University Press); Terence Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (2015, New York; Cambridge University Press).

¹²⁴ See for example Giandomenico Majone, “From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance” (1997) 17(2) *Journal of Public Policy* 139; Giandomenico Majone, “Delegation of Regulatory Powers in a Mixed Polity” (2002) 8(3) *European Law Review* 319; Deirdre Curtin and Linda Senden, “Public Accountability or Transnational Private Regulation: Chimera or Reality?” (2011) 38(1) *Journal of Law and Society* 163.

depoliticising manoeuvres that occur within, and are enabled by, the growing transnational counter-terrorism space.

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