



## Counterterrorism and the rule of law in an evolving European Union: *Plus Ça Change?*

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### Abstract

By taking the European Union (EU) as a principal focal point, this chapter will evaluate critically the rule of law challenges arising from the production and operation of counterterrorism norms. The article will focus on four case studies, two involving the rule of law *ex ante* (at the stage of adoption of EU law) and two involving the rule of law *ex post* (looking at its impact). In terms of *ex ante* rule of law challenges, the chapter will analyse the production of binding standards by the global executive and the trickle-down effect of these standards at the regional, EU and national level and the limits of scrutiny and justification of counterterrorism legislation on emergency grounds. In terms of rule of law *ex post*, the chapter will examine challenges of counterterrorism law to the principle of legality via over-criminalisation and the adoption of vague and broad definitions of terrorism, as well as challenges to the right to a fair trial and principle of effective judicial protection resulting from state arbitrariness in the mechanism of producing terrorist sanctions. The contribution will question whether the entry into force of the Lisbon Treaty, and the process of constitutionalisation of criminal law it entailed, has made a difference regarding the compliance of EU counterterrorism law with the rule of law.

### Keywords

Rule of law, terrorism, foreign fighters, UNSC, FATF, listing

### Introduction

Counterterrorism norms have been produced in a complex, multilevel and multi-source framework, involving a number of actors at the global, regional and national level. These norms have been adopted as a matter of urgency, with the post-9/11 legal landscape has been characterised by the introduction of a series of exceptions to fundamental legal principles underpinning liberal

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democracies and by the gradual normalisation by legislators of the state of emergency.<sup>1</sup> The European Union (EU) has responded in a similar vein, backed largely by the intergovernmental framework for the adoption of criminal law under the third pillar.<sup>2</sup> This contribution will examine critically the challenge that the production of EU counterterrorism norms under an emergency framing has on the rule of law. The concept of the rule of law has both substantive and procedural dimensions. In a leading analysis of the concept in a domestic context, Craig has distinguished between formal and substantive meanings of the rule of law, with formal meanings addressing the manner in which the law was promulgated, the clarity of the ensuing norm and the temporal dimension of the enacted norm while substantive meanings focusing on substantive rights deriving from the rule of law.<sup>3</sup> A similar rule of law taxonomy has been put forward by Tamanaha, who also distinguishes between formal and substantive versions of the rule of law<sup>4</sup>: moving from thinner to thicker categories, formal rule of law versions start with rule-by-law (law as instrument of government action), moving to formal legality (law is general, prospective, clear, certain) and then to rule of law as democracy and legality (consent determines content of law). Substantive versions of the rule of law focus on the protection of individual rights, moving to the right of dignity and to justice, and ultimately to social welfare.<sup>5</sup> Tamanaha eloquently stresses the importance of ‘rule of law, not man’, as man is arbitrary.<sup>6</sup> Key elements in Tamanaha’s typology are reflected in the theorisation of the rule of law by the late Lord Bingham, former President of the UK Supreme Court. According to Bingham, the core of the rule of law principle is that ‘all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts’.<sup>7</sup> Bingham’s understanding of the rule of law is based primarily on procedural aspects, including the accessibility of the law, the requirement for law and not discretion,<sup>8</sup> limits to the exercise of public power, the provision of means enabling dispute resolution without prohibitive cost or inordinate delay<sup>9</sup> and compliance by the state with its obligations in international law as in national law. However, rule of law also includes substantive aspects including equality before the law and the protection of human rights including the right to a fair trial.<sup>10</sup>

A similar conceptualisation of the rule of law has been put forward in the context of the law of the EU, where the rule of law is recognised as a key value of the Union,<sup>11</sup> by the European Commission.<sup>12</sup> According to the Commission, the rule of law is based on a non-exhaustive list of principles including legality, which implies a transparent, accountable, democratic and

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1. On responses in the United States, see among others Bruce Ackerman, *Before the Next Attack* (Yale University Press, London 2007); Jeremy Waldron, *Torture, Terror and Trade-Offs – Philosophy for the White House* (OUP, Oxford 2010); Kent Roach, *The 9/11 Effect* (CUP, Cambridge 2011).

2. See among other Cian Murphy, *EU Counter-Terrorism Law: Pre-emption and the Rule of Law* (Hart, Oxford 2012).

3. Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) 16 PL 467.

4. Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP, Cambridge 2004).

5. *Ibid*, 91.

6. *Ibid*, 122.

7. Tom Bingham, *The Rule of Law* (Allen Lane, London 2010) 8.

8. *Ibid*, ch 4.

9. *Ibid*, ch 8.

10. *Ibid*, ch 7.

11. Article 2 TEU.

12. European Commission, ‘A New EU Framework to Strengthen the Rule of Law’ (Communication) COM (2014) 158 final.

pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.<sup>13</sup> The Commission perceives the rule of law as a constitutional principle with both formal and substantive components, meaning that respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights.<sup>14</sup> From these different theorisations of the rule of law, a further categorisation emerges: *rule of law ex ante*, which relates to principles which are applicable in the lawmaking process (including legality, transparency and democracy); and *rule of law ex post*, which includes principles which are applicable after the enactment of legislation (including legal certainty, prohibition of arbitrariness and effective judicial protection including the protection of human rights).<sup>15</sup> By taking the EU as a principal focal point, this chapter will evaluate critically both the *ex ante* and the *ex post* rule of law challenges arising from the production and operation of counterterrorism norms. The article will focus on four case studies, two involving the rule of law *ex ante* and two involving the rule of law *ex post*. In terms of *ex ante* rule of law challenges, the chapter will analyse the production of binding standards by the global executive and the trickle-down effect of these standards at the regional, EU and national level and the limits of scrutiny and justification of counterterrorism legislation on emergency grounds. In terms of rule of law *ex post*, the chapter will examine the challenges of counterterrorism law to the principle of legality via over-criminalisation and the adoption of vague and broad definitions of terrorism, as well as challenges to the right to a fair trial and principle of effective judicial protection resulting from state arbitrariness in the mechanism of producing terrorist sanctions. The contribution will question whether the entry into force of the Lisbon Treaty, and the process of constitutionalisation of criminal law it entailed,<sup>16</sup> has made a difference regarding the compliance of EU counterterrorism law with the rule of law.

### The ‘trickle-down effect’ of global executive standards

A key feature of the emergence of a global counterterrorism regime since 9/11 has been the adoption of key elements of this regime not by multilateral legislative instruments reflecting a global consensus but by executive action of organisations with specific – and at times single – agendas and with very limited transparency, scrutiny and democratic accountability. This tendency has had a significant adverse impact on the transparency and deliberative and democratic scrutiny requirements of the rule of law, as standards adopted by executive and ad hoc bodies have then tricked down and adopted in a legally binding form at the regional, supranational and national levels. Two instances of executive production of global norms are key in this context. The first one is the emergence of the United Nations (UN) Security Council (UNSC) as the main global actor introducing terrorist sanctions regimes post-9/11 –sanctions regimes which have been copied by the EU and its Member States.<sup>17</sup> A number of scholars have noted that in this manner an executive

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13. Ibid, 4.

14. Ibid.

15. On this distinction, see Valsamis Mitsilegas, ‘Rule of Law: Theorising EU Internal Security Cooperation From a Legal Perspective’ in Raphael Bossong and Mark Rhinard (eds), *Theorising Internal Security Cooperation in the European Union* (OUP, Oxford 2016) 109.

16. On the constitutionalisation of EU criminal law, see Valsamis Mitsilegas, *EU Criminal Law After Lisbon* (Hart, Oxford 2016) ch 2.

17. For details, see Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights* (OUP, Oxford 2009).

body such as the UNSC has assumed a legislative role.<sup>18</sup> The imposition of sanctions via a listing process by the UNSC can be theorised under the prism of ‘global administrative law’.<sup>19</sup> Kingsbury and Krisch note that underlying the emergence of global administrative law is the vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalised interdependence in such fields as security, with much in the detail and implementation of such regulation is determined by transnational administrative bodies – including international organisations and informal groups of officials that perform administrative functions but are not directly subject to control by national governments or domestic legal systems or, in the case of treaty-based regimes, the state parties to the treaty.<sup>20</sup> Both the manner of the adoption of these standards and their content have significant human rights implications – but it is executive, and not legislative, action which has framed the global response in this field.

The second key instance of production of counterterrorism norms under the ‘global administrative law’ paradigm involves the adoption of a series of Recommendations on terrorist finance by the Financial Action Task Force (FATF). The rapid evolution and expansion in the FATF mandate, standards and membership can be attributed to its informal nature<sup>21</sup> and network structure which aims at flexibility and adaptability.<sup>22</sup> Although the membership of the FATF is limited and its output takes the form of Recommendations which could be characterised as ‘soft law’,<sup>23</sup> or informal law,<sup>24</sup> their impact at the regional, EU and national level is considerable. Each time the EU adopts or revises its legislation against money laundering and terrorist finance, it justifies this step on the basis of the need to take into account the revised FATF Recommendations.<sup>25</sup> However, the production of norms by the FATF raises significant challenges of democratic participation, transparency and accountability. Particular challenges arise in this context by the fact that norms

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18. See in particular, Stefan Talmon, ‘The Security Council as World Legislature’ (2005) 99 AJIL 175; JE Alvarez, ‘Hegemonic International Law Revisited’ (2003) 97 AJIL 873.
  19. Benedict Kingsbury, Nico Krisch and Richard B Stewart, ‘The Emergence of Global Administrative Law’ (2004–2005) 68 L Contemp Probl 15.
  20. *Ibid.*, 16.
  21. On the concept of informal international lawmaking, see Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (OUP, Oxford 2012); Informal lawmaking is defined as dispensing with certain formalities traditionally linked to international law having to do with output, process or the actors involved. See Joost Pauwelyn, ‘Informal International Lawmaking: Framing the Concept and Research Questions’ in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (OUP, Oxford 2012) 13 and 15.
  22. On the network nature of the Financial Action Task Force, see Anne-Marie Slaughter, *A New World Order* (Princeton University Press, Princeton, NJ 2004). Slaughter highlights the advantages of what she calls ‘government networks’, marrying hard and soft power and using information, persuasion and socialisation (p 168).
  23. In the context of the Financial Action Task Force, it can be argued that the regular revision of both mandate and standards has been easier than a more formal international organisation. See in this context Alan Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’ (1999) 48 Intl Comp LQ 901, noting that soft law instruments are easier to amend or replace than treaties. See Boyle, ‘Some Reflections on the Relationship’, 903.
  24. See Pauwelyn, Wessel and Wouters, *Informal International Lawmaking* (n 21).
  25. On the impact of Financial Action Task Force Recommendations on EU law over time, see Valsamis Mitsilegas, *Money Laundering Counter-Measures in the European Union: A New Paradigm of Security Governance Versus Fundamental Legal Principles* (Kluwer Law International, Alphen aan den Rijn 2003); Valsamis Mitsilegas and Bill Gilmore, ‘The EU Legislative Framework Against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards’ (2007) Intl Comp LQ 119; Valsamis Mitsilegas and Niovi Vavoula, ‘The Evolving EU Anti-Money Laundering Regime. Challenges for Fundamental Rights and the Rule of Law’ (2016) Maastrich J Eur Comp L 261.

are produced by a club with selective membership (it is worth noting here that while not all EU Member States are FATF members, the European Commission is a member) and then imposed by a sophisticated and invasive system of multilevel implementation monitoring across the globe; and by the fact that norms are produced behind closed doors, mainly by experts representing national executives.<sup>26</sup> While the use of networks of experts has been seen as a positive development in ensuring the efficiency of anti-money laundering standards, which are the outcome of professional socialisation among the experts producing them,<sup>27</sup> the uncritical emphasis and reliance on expertise creates an ‘expert consensus’<sup>28</sup> serving to depoliticise the issues and shield them from political debate.<sup>29</sup>

The production of counterterrorism norms at the level of the global executive and the infiltration of these norms into multiple legal orders at the regional, supranational and national level has been ongoing. A key recent instance of such norm production involving a multilevel interaction of legal orders concerns the definition of terrorism via the criminalisation of conduct by ‘foreign fighters’. The initial response has come again by the UNSC, which has adopted a Resolution calling for the adoption of a wide range of measures on ‘foreign fighters’.<sup>30</sup> The adoption of the Resolution was a US-led initiative, aiming to address via the UNSC the lack of global consensus in the field and pushing for measures notwithstanding the scarcity of data on the phenomenon of foreign fighters.<sup>31</sup> The UNSC standards have since formed the basis of the adoption by the Council of Europe of its Additional Protocol to the Convention on the Prevention of Terrorism adopted by the Council of Europe,<sup>32</sup> which has amplified the provisions of the UNSC Resolution and given them legally binding force via a multilateral regional treaty. As a third step, the Additional Protocol has now been ratified by the EU,<sup>33</sup> which has also revised its internal legislation on the criminalisation of terrorism by adopting a new Directive to align EU law with UNSC and Council of Europe standards.<sup>34</sup> According to the Commission’s Explanatory Memorandum to the proposal, existing EU law needs to be reviewed ‘to implement new international standards and obligations taken by

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26. Valsamis Mitsilegas, ‘Transnational Criminal Law and the Global Rule of Law’ in Giuliana Ziccardi Capaldo (ed.), *Global Community Yearbook of International Law and Jurisprudence* (OUP, Oxford 2016) 47.

27. Slaughter, *A New World Order* (n 22) 54.

28. David Kennedy, ‘Challenging Expert Rule: The Politics of Global Governance’ (2005) 27(1) *Sydney L Rev* 5.

29. On various aspects of ‘depoliticisation’, see Somek who notes that ‘where “problem-solving” serves as the preferred descriptor of an activity, ideological conflict does not enter the picture. Problem-solving is the antithesis of political struggle’. Alexander Somek, *Administration Without Sovereignty* (University of Iowa Legal Studies Research Paper 09-04, January 2009, 17). Also see Klabbers who that ‘the facility of doing business without being side-tracked or controlled, dovetails neatly with our late-modern (or postmodern) infatuation for management and technocracy as viable substitutes for politics’. See Jan Klabbbers, ‘Institutional Ambivalence by Design: Soft Organizations in International Law’ (2001) 70 *Nord J Intl L* 403, 417.

30. UN Security Council Resolution 2178 (2014).

31. Lisa Ginsborg, ‘One Step Forward Two Steps Back: The Security Council, “Foreign Terrorist Fighters”, and Human Rights’ in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar, Cheltenham UK/Northampton MA USA 2018) 195–99.

32. For a background to the Protocol, see Nicola Piacente, ‘The Contribution of the Council of Europe to the Fight against Foreign Terrorist Fighters’ (2015) 1 *Eucrim* 12–15.

33. Council Decision (EU) 2018/890 of 4 June 2018 on the conclusion, on behalf of the European Union, of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism [2018] OJ L159/15.

34. Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6, recitals 5 and 6.

the EU and to tackle the evolving terrorist threat in a more effective way<sup>35</sup> – with express reference being made not only to the Council of Europe Convention and the UNSC Resolution in the field but also to relevant FATF standards.<sup>36</sup> It is worth noting here that the Commission refers to the revision of an Interpretative Note by a non-legislative body (the FATF) to take into account the standards set out by another non-legislative body (the UNSC) to shape the EU legislative response on the criminalisation of ‘foreign fighters’.<sup>37</sup> In this manner, global executive standards adopted with limited scrutiny and transparency have exerted significant influence to the significant extension of the criminalisation of terrorism in the EU and its Member States via a four-step process: the adoption of standards by the global executive (UNSC); their influence on the output of other global executive actors (the FATF); the transformation of global executive standards into legally binding standards in a regional multilateral treaty (in the Council of Europe); and the subsequent mirroring of these standards in supranational EU law via the revision of the EU counterterrorism Directive. Although we still do not have a global, international treaty on the criminalisation of terrorism at UN level, the criminalisation of terrorism is being extended by other means.

### **The re-emergence of emergency – limits to transparency, scrutiny and justification**

A common feature of the enactment of counterterrorism legislation has been its framing as emergency legislation which has been designed to respond to a terrorist attack speedily. This emergency approach has led to legislation with a far-reaching effect on human rights being adopted under very tight deadlines leaving very limited scope for meaningful scrutiny and justification. The rule of law is challenged here as legislation is being treated as emergency legislation and adopted speedily under minimal democratic scrutiny and justification. At the EU level, this emergency framing was evident post-9/11, where there has been swift political agreement on a raft of unprecedented EU legislation, deemed necessary to respond to terrorism (including the European Arrest Warrant Framework Decision, the first Framework Decision on Terrorism and the Decision establishing Eurojust).<sup>38</sup> Throughout the third pillar years, agreements on transatlantic counterterrorism cooperation have been subject to minimal scrutiny.<sup>39</sup> The EU-US agreements on extradition and mutual legal assistance remained classified until the very last weeks before signature, notwithstanding repeated requests for their publication for the purposes of scrutiny.<sup>40</sup> The Europol-US and Eurojust-US Agreements have not even published in the *Official Journal of the European Union*. The first version of the PNR Agreement (between the Community and the United States) was transmitted to the European Parliament for examination under deadlines which, according to

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35. Commission, ‘Proposal for a Directive on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA on Combating Terrorism’ COM (2015) 625 final, 4.

36. *Ibid.*, 5–6.

37. *Ibid.*, 6.

38. Valsamis Mitsilegas, Jörg Monar and Wyn Rees, *The European Union and Internal Security* (Palgrave, Houndmills, Basingstoke/New York 2003).

39. Valsamis Mitsilegas, ‘Transatlantic Counter-Terrorism Cooperation and European Values – The Elusive Quest for Coherence’ in Deirdre Curtin and Elaine Fahey (eds), *A Transatlantic Community of Law* (CUP, Cambridge 2014) 289.

40. House of Lords European Union Committee, ‘EU-US Agreements on Extradition and Mutual Legal Assistance’ (38th Report, session 2002-03, HL Paper 135).

Parliament, did not enable it to conduct meaningful scrutiny – with the handling of scrutiny leading to Parliament challenging the agreement in the ECJ.<sup>41</sup> Similar scrutiny concerns have arisen with regard to the choice of dealing with the Decision confirming the adequacy of the US data protection framework for the purposes of the PNR agreement via comitology.<sup>42</sup> The first EU-US TFTP Agreement, signed a day before the entry into force of the Lisbon Treaty – in an attempt to conclude this under the intergovernmental process of the ‘old’ third pillar and thus pre-empt the Community elements brought about by Lisbon and effectively sideline the European Parliament.<sup>43</sup> Moreover, significant limits have been placed by the Council to transparency and scrutiny of documents related to the negotiations by members of the European Parliament.<sup>44</sup> The conclusion of these agreements, negotiated with minimal transparency on the face of sustained and growing fundamental rights concerns expressed by parliaments, EU expert bodies and civil society,<sup>45</sup> was presented as a *fait accompli*, with signature dates set out in advance and leaving limited time for debate and scrutiny.

The entry into force of the Lisbon Treaty created more space for scrutiny of counterterrorism proposals via the abolition of the third pillar and thus granting the European Parliament co-legislator powers. A post-Lisbon Inter-institutional agreement has also introduced extensive justification requirements on the European Commission.<sup>46</sup> A number of counterterrorism measures (including the post-Lisbon EU-US Agreements on PNR and TFTP and the new terrorism Directive) were adopted on the basis of the new powers of the European Parliament. However, rule of law challenges regarding scrutiny, transparency and justification have not been entirely eliminated post-Lisbon. One factor contributing to the persistence of these challenges has been, as will be seen below, the use of questionable legal bases under CFSP to adopt counterterrorism measures bearing significant human rights consequences against individuals. Another factor has been what can be called the ‘re-emergence of emergency’: the tendency by the Commission, in the name of political calls for swift action under an emergency framing in response to terrorist attacks, to table proposals for legislation with insufficient justification and without submitting a full impact assessment.

A key example in this context has been the Commission proposal for a new Directive on the criminalisation of terrorism, where the Commission relied on ex post evaluations of previous

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41. Valsamis Mitsilegas, ‘Border Security in the European Union. Towards Centralised Controls and Maximum Surveillance’ in Elspeth Guild, Helen Toner and Anneliese Baldaccini (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart, Oxford 2007) 359. The Court’s ruling resulted in the agreements being negotiated under the third pillar with the Parliament having a much more limited scrutiny role.

42. Valsamis Mitsilegas, ‘Contrôle des Étrangers, des Passagers, des Citoyens: Surveillance et Anti-Terrorisme’ (2005) *Cult Confl* 155.

43. Council Decision 2010/16/CFSP/JHA of 30 November 2009 on the signing, on behalf of the European Union, of the Agreement between the European Union and the United States on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program [2010] OJ L8/9. For the background, see Anthony Amicelle, ‘The EU’s Paradoxical Efforts at Tracking the Financing of Terrorism. From Criticism to Imitation of Dataveillance’ (CEPS Paper in Liberty and Security in Europe, No 56, August 2013).

44. Deirdre Curtin, ‘Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?’ (2013) 50(2) *CML Rev* 423.

45. Mitsilegas, ‘Transatlantic Counter-Terrorism Cooperation’ (n 39).

46. Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making [2016] OJ L123/1.

Framework Decisions on terrorism and on stakeholder consultations in the context of negotiations of Council of Europe Additional Protocol but did not submit an impact assessment justifying the specific assessment.<sup>47</sup> The Commission stated that this choice was exceptional justified ‘given the urgent need to improve the EU framework to increase security in the light of recent terrorist attacks including by incorporating international obligations and standards’.<sup>48</sup> This approach is problematic, as it introduces a state of emergency approach in the post-Lisbon EU legal order and contributes towards limiting scrutiny and accountability on measures which, as will be seen below, have substantial human rights and rule of law consequences. In a case, concerning the absence of an impact assessment during the adoption of Directive 2017/853 regulating the control, acquisition and possession of weapons,<sup>49</sup> AG Sharpston took the view that the Interinstitutional Agreement introduces a binding obligation to conduct an impact assessment in each and every case<sup>50</sup> and that always requiring an impact assessment would make it impossible to take legislative action even where the circumstances clearly demonstrate the need for urgent action.<sup>51</sup> The Court of Justice has concurred with the main findings of the Advocate General, arguing that the absence of an impact assessment was compensated by the reliance by the Commission on a variety of information including an evaluation of the firearms Directive, a public consultation, consultations with the European Parliament and Member States and a series of studies related to the use, deactivation and trafficking of firearms.<sup>52</sup> However, these sources of information lack the specific framing and objectives of an Impact Assessment, where the Commission must examine in detail and justify concrete proposals and options for EU legislative action. The transparency and justification aspect of the exercise have been lost in an emergency framing.

## Legality and over-criminalisation

A key challenge of counterterrorism norms to the rule of law *ex post* centres on the threat that these norms pose to the principle of legality in criminal offences and penalties. Here, the principle of legality emerges as a reflection of the rule of law, with the law being required to meet certain standards of certainty and foreseeability in the eyes of the citizen so arbitrariness by the state authorities is avoided. The principle of legality, which is enshrined in the ECHR and Article 49 the Charter, includes the requirement of legal certainty to avoid arbitrary action by the state and is threatened by norms which are too broad, vague or overextended.<sup>53</sup> A key challenge to the legality principle in this context is the vagueness and overreach in defining and criminalising terrorism. The recent ‘trickle-down’ measures on the criminalisation of terrorism trying to address the phenomenon of ‘foreign fighters’ are a pertinent example of vague and broad criminal law challenging the principle of legality. As seen above, the production of these norms has been the outcome of a process of multilevel decision-making starting from the global executive (UNSC)

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47. Commission, ‘Proposal for a Directive’ (n 35), 11–12.

48. *Ibid.*, 12.

49. Case C-482/17 *Czech Republic v Parliament and Council*, Opinion of AG Sharpston delivered on 11 April 2019.

50. Para 93.

51. Para 97.

52. Paras 87–92.

53. Valsamis Mitsilegas, ‘Article 49 – Principles of Legality and Proportionality of Criminal Offences and Penalties’ in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart/Beck, Oxford and Portland OR 2014) 1351.



and then through regional multilateral treaties (Council of Europe) and supranational EU law to filter through to national systems in Europe. Each of these instances has produced vague and broad definitions of terrorism, developed and amplified over time. In Resolution 2178 (2014), the UNSC called upon states to ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalise in a manner duly reflecting the seriousness of the offence: (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; (b) the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, to finance the travel of 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; and (c) the wilful organisation, 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, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training.<sup>54</sup>

Resolution 2178 introduces a new dimension to the global regime of preventive justice.<sup>55</sup> In addition to preparatory offences such as terrorist recruitment and funding, which raise fundamental challenges to freedom of expression, non-discrimination and the respect of political rights,<sup>56</sup> the focus is placed here primarily on the criminalisation of mobility and travel. As demonstrated in the case of *Nada* before the European Court of Human Rights dealing with travel bans as terrorist sanctions,<sup>57</sup> restrictions on mobility are likely to contravene European human rights norms, including the right to leave. A broad criminalisation of mobility also challenges the principle of legality in criminal offences and sanctions, as it is not clear exactly what is criminalised and why. More broadly, the criminalisation of the mobility of the so-called ‘foreign fighters’ poses fundamental challenges to the relationship of trust between citizens and the state and blurs the distinction between citizens and foreigners on the one hand and immigration and criminal law on the other. Here, immigration-type measures (albeit in a more serious, criminal law form) are used to regulate

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54. In addition, states are called upon to prevent the entry into or transit through their territories of any individual about whom that State has credible information that provides reasonable grounds to believe that he or she is seeking entry into or transit through their territory for the purpose of participating in the acts described in para 6, including any acts or activities indicating that an individual, group, undertaking or entity is associated with Al-Qaida, as set out in para 2 of Resolution 2161 (2014), provided that nothing in this paragraph shall oblige any State to deny entry or require the departure from its territories of its own nationals or permanent residents. See paras 5–8.

55. On the supranational and global dimensions of preventive justice, see Valsamis Mitsilegas, “‘Security Law’ and Preventive Justice in the Legal Architecture of the European Union” in Ulrich Sieber, Valsamis Mitsilegas, Christos Mylonopoulos, Manos Billis and Nandor Knust (eds), *Alternative Systems of Crime Control – National Transnational and International Dimensions* (Duncker and Humblot, Berlin 2018) 203.

56. Scheinin has argued that para 6 of the Resolution will provide a handy tool for oppressive regimes that choose to stigmatise as ‘terrorism’ what they do not like, including political opposition, trade unions, religious movements and minority and indigenous groups/see Martin Scheinin, *Back to Post-9/11 Panic? Security Council Resolution on Foreign Terrorist Fighters (2014)* <<https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/>> accessed 10 October 2020.

57. *Nada v Switzerland*, App No 10593/08, [2012] ECHR 1691.

the conduct of citizens; and, conversely, criminal law measures are used to regulate mobility, a conduct which has been traditionally the domain of immigration law.<sup>58</sup>

The UNSC approach has been adopted and standards have been developed further in the Additional Protocol to the Convention on the Prevention of Terrorism adopted by the Council of Europe.<sup>59</sup> In addition to widening the categories preparatory offences,<sup>60</sup> the Protocol introduces a series of provisions expressly criminalising mobility and travel. States are called to adopt such measures as may be necessary to establish 'travelling abroad for the purpose of terrorism' *from its territory or by its nationals*, when committed unlawfully and intentionally, as a criminal offence under its domestic law.<sup>61</sup> Attempt is also criminalised.<sup>62</sup> Travelling abroad for the purpose of terrorism is defined 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>63</sup> The Protocol also criminalises funding travelling abroad for the purpose of terrorism<sup>64</sup> and organising or otherwise facilitating travelling abroad for the purpose of terrorism.<sup>65</sup>

As seen above, the UNSC and Council of Europe standards have been influential in the adoption of the new EU Directive on terrorism.<sup>66</sup> The text of the Directive introduces a number of offences leading to extensive criminalisation. These include providing and receiving training for terrorism<sup>67</sup> and, importantly, travelling for the purpose of terrorism and organising or otherwise facilitating travelling for the purpose of terrorism.<sup>68</sup> Terrorist travel is criminalised regardless of whether the destination country is located inside or outside the EU or the Schengen area. Member States are called to criminalise one of the following conducts when committed intentionally: travelling to a Member State for the purpose of committing, or contributing to the commission of, a terrorist offence, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group, or for the purpose of the providing or receiving of training for terrorism, or preparatory acts undertaken by a person entering that Member State with the intention to commit, or contribute to the commission

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58. On the blurring of boundaries between counter-terrorism and immigration policy in the context of the surveillance of mobility at the global level, see Mitsilegas, 'Security Law' (n 55).

59. See Piacente, 'The Contribution of the Council' (n 32) 12–15.

60. See the provisions on criminalising the participation in an association or group for the purpose of terrorism (Article 2) and receiving training for terrorism (Article 3).

61. Article 4(2).

62. Article 4(3).

63. Article 4(1).

64. Funding travelling abroad for the purpose of terrorism means providing or collecting, by any means, directly or indirectly, funds fully or partially enabling any person to travel abroad for the purpose of terrorism, as defined in Article 4, para 1 of the Protocol, knowing that the funds are fully or partially intended to be used for this purpose (Article 5(1)).

65. Organising or otherwise facilitating travelling abroad for the purpose of terrorism means any act of organisation or facilitation that assists any person in travelling abroad for the purpose of terrorism, as defined in Article 4, para 1, of the Protocol, knowing that the assistance thus rendered is for the purpose of terrorism (Article 6(1)).

66. See Directive (EU) 2017/541 of the European Parliament (n 34).

67. Articles 7 and 8.

68. Articles 9 and 10, respectively. According to Article 9(1), each Member State must take the necessary measures to ensure that travelling to a country other than that Member State for the purpose of committing, or contributing to the commission of, a terrorist offence, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group, or for the purpose of the providing or receiving of training for terrorism is punishable as a criminal offence when committed intentionally.

of, a terrorist offence as defined in the Directive.<sup>69</sup> Attempt at terrorist travel is also criminalised.<sup>70</sup> Importantly, for the offences prescribed in the Directive to occur, it is not necessary that a terrorist offence is actually committed, nor is it necessary, for the majority of these offences (including the training, travel and organisation of travel offences, but also for the offences of directing or participating in a terrorist organisation), to establish a link to another specific offence laid down in the Directive.<sup>71</sup>

The criminalisation of terrorist travel in these terms is extremely problematic. Following the UNSC and the Council of Europe approaches, the Directive introduces extremely broad and hard to define criminal offences, including attempt, and not requiring a link to the commission of concrete terrorist offences – leading thus to overcriminalisation; it is a challenge for such criminalisation to meet the threshold of what is required to uphold the principle of legality in criminal offences, as the offences are defined in a very broad manner; criminalisation is not in compliance with a number of fundamental rights, including the right to leave; and it undermines the relationship of trust between the citizen and the state by effectively creating different classes and categories of citizens – with citizens here becoming foreigners, or rather ‘foreign fighters’.<sup>72</sup> Further challenges regarding the use of criminalisation as a basis for an even broader definition of terrorism for enforcement purposes.<sup>73</sup> These challenges become more acute at the level of the EU constitutional order, which is based upon the fundamental principle of free movement. Criminalisation in such broad terms – without the requirement for a terrorist offence to actually be committed and thus treating terrorist travel offences essentially as self-standing offences – pushes further the boundaries of the preventive justice paradigm. Here, the logic of prevention extends beyond criminalising conduct which may lead to the commission of a further specific criminal offence – as it is not clear whether criminalisation will actually lead to a specific harm or will increase the risk of harm.<sup>74</sup> Rather, criminalisation takes place here on the basis of dangerousness: The further punishment is removed from a concrete terrorist act, the closer we get to a criminal law system aimed at punishing the dangerous individual.<sup>75</sup> Criminalisation on these terms is reminiscent of Jakobs’ construction of *Feindstrafrecht*, or enemy criminal law, reflecting a tendency towards subjective criminalisation on the basis of the character and culpability of the actor rather than on her externally visible conduct – with the actor becoming a threat and thus treated as an enemy and not a citizen.<sup>76</sup>

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69. Article 9(2).

70. Article 14(3).

71. Article 13.

72. Valsamis Mitsilegas, ‘European Criminal Law and the Dangerous Citizen’ (2018) 25(6) *Maastrich J Eur Comp L* 733.

73. A key example of this trend is the Commission proposal on the prevention of dissemination of terrorist content online (COM (2018) 640 final). The proposal imposes obligations to providers on the basis of terrorism whose subjective element is defined even more broadly than the 2017 Directive – with the requirement of intention being removed. For criticism of such an approach, see Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the right to privacy and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 7 December 2018, 3.

74. Peter Asp, ‘Preventionism and Criminalization of Nonconsummate Offences’ in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of Criminal Law* (OUP, Oxford 2014) 23, 33.

75. Mitsilegas, ‘European Criminal Law and the Dangerous Citizen’ (n 72).

76. Günther Jakobs, ‘Kriminalisierung im Vorfeld einer Rechtsgutsverletzung’ (1985) 97 *ZStW* 751, commented in Daniel Ohana, ‘Gunther Jakob’s *Feindstrafrecht*: A Dispassionate Account’ in Markus Dubber (ed.), *Foundational Texts in Modern Criminal Law* (OUP, Oxford 2014) 354.

## Listing and the limits of procedural justice

The emergence of a global regime on terrorist sanctions post-9/11 constitutes another instance of challenges to the rule of law, which involves the existence of an effective remedy and the ability of the citizen to challenge state decisions. This vision of the rule of law is further linked with requirements of transparency and justification from the part of the state in its decision-making. As seen above, the establishment of a sanctions regime by the UNSC has challenged rule of law *ex ante*, through the adoption of binding standards having an effect on human rights not by the legislature but by the executive. The *way in which* the sanctions system is designed and operates poses further, significant, *ex post* rule of law challenges, in creating a system where preventive sanctions based on listing individuals deemed to be dangerous.<sup>77</sup> Listing is a performative technology that helps constitute the objects and categories it targets or complies.<sup>78</sup> Listing linked to individuals has appeared prominently in this context to address the perceived terrorist threat: Instead of (or in addition to) investigating and prosecuting specific terrorist offences, the focus has also been on imposing sanctions (in particular freezing orders and travel bans) on individuals suspected of being associated with terrorism. This process of listing as ‘guilt by association’ is underpinned by a clear preventive logic.<sup>79</sup> The terrorist listing system established by the UNSC entails severe human rights consequences through executive decisions taken with no scrutiny and with very few opportunities for the affected individuals to challenge the measures imposed on them. With the UNSC terrorist sanctions system having a direct impact globally, including in EU law,<sup>80</sup> these *ex post* rule of law challenges have been exposed before the Court of Justice. The implications of this system of sanctions for the rule of law have been highlighted by Scott Crosby who highlighted the shift towards greater governmental discretion on national security grounds at the expense of judicial scrutiny, emphasised the sidelining of the criminal justice system and the weakening of the judiciary in its scrutiny role against abuses of power and noted that

Terrorist and other blacklisting regimes have thus created structural mechanisms for the production of both increasing executive/legislative (and effectively unaccountable) powers over individuals and novel means of bypassing domestic fundamental rights protection mechanisms.<sup>81</sup>

These issues were addressed by the Court of Justice in the well-known and analysed *Kadi* litigation, the CJEU found that terrorist listings under EU law must comply with the principle of effective judicial protection. Much of the commentary to the final outcome of the first part of the *Kadi* litigation (or *Kadi I*<sup>82</sup>) has focused on the implications of the CJEU approach for the principle of effective judicial protection as a rule of law expression in relation to the autonomy of EU law

77. Mitsilegas, ‘European Criminal Law and the Dangerous Citizen’ (n 72).

78. Marieke de Goede, Anna Leander and Gavin Sullivan, ‘Introduction: The Politics of the List’ (2016) 34 *Environ Plan D: Soc Space* 3, 6.

79. See also Marieke de Goede and Gavin Sullivan, ‘The Politics of Security Lists’ (2016) 34 *Environ Plan D: Soc Space* 67, 71 and 76.

80. For details, see Eckes, *EU Counter-terrorist Policies* (n 17).

81. Scott Crosby, Francesca Galli and Saskia Hufnagel, ‘The Penal Elements of Targeted Sanctions’ (2015) *New J Eur Crim L* 300, 301.

82. Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649; Case T-306/01 *Ahmed Ali Yussuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533; Joined Cases C-402/05P and C-415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

vis-à-vis the authority of the UNSC.<sup>83</sup> The CJEU was called to revisit its rulings in a second set of cases concerning Mr Kadi (*Kadi II*). During the *Kadi II* litigation, a number of key developments have taken place since the Court's ruling in *Kadi I*, most notably a series of revisions to the UNSC system of listing individuals whose assets should be frozen under Resolution 1267 including the appointment of an Ombudsperson and a de-listing process.<sup>84</sup> In deciding on *Kadi II* at first instance, the General Court applied, albeit reluctantly, the reasoning of the Court of Justice in *Kadi I* and advocated the full review of not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in that measure are based.<sup>85</sup> In its subsequent ruling in *Kadi II*, the Court of Justice<sup>86</sup> made express reference to the need for the European judiciary to ensure the in principle full review of the lawfulness of all Union acts in the light of fundamental rights<sup>87</sup> and mentioned in particular the respect for the rights of the defence and the right to effective judicial protection as enshrined in Articles 41(2) and 47 of the Charter, respectively.<sup>88</sup>

Respect for these rights entails a number of obligations related to the provision of reasons for the EU listing authority.<sup>89</sup> As regards the extent of judicial review, the Court found that the EU judiciary must determine whether the competent EU authority has complied with the procedural safeguards the obligation to state reasons mentioned above.<sup>90</sup> Judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.<sup>91</sup> To that end, it is for the Courts of the EU to carry out that examination, to request the competent EU authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination.<sup>92</sup> The Court thus advocated a standard of evidence-based, detailed, substantive judicial review *in concreto* and not *in abstracto*.<sup>93</sup> While attempting to accommodate to some extent security considerations, by accepting *in camera*

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83. See among others Takis Tridimas, 'Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order' (2009) 34 EL Rev 103; Daniel Halberstam and Eric Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order' (2009) 46 Common Mark L Rev 13; Piet Eeckhout, 'Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit' (2007) 3 Eur Const L Rev 183; Grainne de Burca, 'The European Court of Justice and the International Legal Order after *Kadi*' (NYU School of Law Jean Monnet Working Paper 01/2009) <[www.jeanmonnetprogram.org/papers/09/090101.html](http://www.jeanmonnetprogram.org/papers/09/090101.html)> accessed 10 October 2020; Elspeth Guild, 'The Uses and Abuses of Counter-Terrorism Policies in Europe. The Case of the "Terrorist Lists"' (2008) 46 J Common Mark Stud 173.

84. For an overview and a critique of these developments, see Gavin Sullivan and Marieke de Goede, 'Between Law and the Exception: The UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise' (2013) 26 Leiden J Intl L 833; Gavin Sullivan, 'Transnational Legal Assemblages and Global Security Law: Topologies and Temporalities of the List' (2014) 5 Transnatl Leg Theory 81.

85. Case T-85/09 *Kadi v Commission* ECLI:EU:T:2010:418. For a commentary, see Christina Eckes, 'Controlling the Most Dangerous Branch From Afar: Multilayered Counter-Terrorist Policies and the European Judiciary' (Amsterdam Law School Legal Studies Research Paper No 2011-08) 12-13.

86. Joined Cases C 584/10 P, C 593/10 P and C 595/10 P *European Commission v Kadi* ECLI:EU:C:2013:518.

87. Para 97.

88. Paras 98–100.

89. Paras 111–16.

90. Para 118.

91. Para 119.

92. Para 120.

93. Paras 121–24.

examination of security-sensitive documents,<sup>94</sup> the Court of Justice has adopted in *Kadi II* a rigorous, substantive test of judicial review of listing decisions by the European judiciary which may serve as a human rights benchmark for global listing regimes. The Court reiterated that such a judicial review is indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned, those being shared values of the UN and the EU.<sup>95</sup>

The Court of Justice thus confirmed again, as in *Kadi I*, the autonomy of the EU legal order based on the respect for the rule of law and human rights. Giving substance to the essence of effective judicial protection is tantamount to upholding the rule of law at EU level. While the Court's ruling in *Kadi I* has had a noticeable impact in improving listing procedures at UN level, the Court of Justice in *Kadi II* sent a clear message that such improvements can by no means equate to effective judicial protection. The Court of Justice continued to remind the international community that it is the individual who should be the focus of authorities in the invasive process of the imposition of restrictive sanctions. At the same time, the Court of Justice in *Kadi II* sent a clear message with regard to the relationship between the executive and the judiciary: The executive cannot use secrecy and confidentiality to evade judicial scrutiny, especially when the protection of fundamental rights is at stake. However, the Court of Justice did not appear to be as protective with regard to substantive rights, including the right to property. While the Court emphasised the far-reaching and adverse impact that restrictive measures have on the affected individuals, it went short from endorsing the General Court's strongly worded statement that restrictive measures can be considered to be in essence criminal sanctions. As the General Court noted,

It might even be asked whether – given that now nearly 10 years have passed since the applicant's funds were originally frozen – it is not now time to call into question the finding of this Court, at paragraph 248 of its judgment in *Kadi*, and reiterated in substance by the Court of Justice at paragraph 358 of its own judgment in *Kadi*, according to which the freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof. The same is true of the statement of the Security Council, repeated on a number of occasions, in particular in Resolution 1822 (2008), that the measures in question “are preventative in nature and are not reliant upon criminal standards set out under national law”. In the scale of a human life, 10 years in fact represent a substantial period of time and the question of the classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal seems now to be an open one (emphasis original).<sup>96</sup>

*Kadi II* was a missed opportunity for the Court of Justice to address the serious human rights consequences of preventive law. The Court of Justice seems to accept the legitimacy preventive nature of sanctions and did not engage with the argument of the General Court that procedural defects lead to a disproportionate impact of the affected individuals' right to property – with the

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94. The Court has developed a similar benchmark with regard to the scrutiny of classified documents on 'internal' EU sanctions schemes. See Case C-27/09 *P. France v OMPI/PMOI* ECLI:EU:C:2011:853 and the analysis in Deirdre Curtin, 'Second Order Secrecy and Europe's Legality Mosaics' (2018) 41(4) *West Eur Politics* 846.

95. Para 131.

96. Para 150.

logic and essence of restrictive measures remaining largely unquestioned. In this light, *Kadi II* should be viewed as a triumph of procedural but not substantive justice.<sup>97</sup>

## Conclusion

This article has demonstrated that, almost two decades after 9/11, significant rule of law challenges to the production and implementation of counterterrorism measures remain. In the EU legal order, these challenges remain even after the entry into force of the Lisbon Treaty. Although the uncritical introduction of states of emergency after 9/11 has been challenged by the judiciary and to some extent by European legislators (in particular by the European Parliament), shortcuts to the rule of law persist and reappear, pushed by governments after each new terrorist attacks. This chapter has demonstrated the perseverance of challenges to both the rule of law *ex ante* (through the development of counterterrorism standards with significant human rights implications by the global executive and their uncritical acceptance by and ‘trickle-down’ effect on regional, supranational and national legal systems; through the reintroduction of limited scrutiny of new counterterrorism measures) and the rule of law *ex post* (through challenges to the principle of legality as regards the definition and criminalisation of terrorism; the consolidation of extensive preventive sanctions against individuals deemed to be dangerous). Reacting to these rule of law challenges takes time, and while there have been improvements in terms of strengthening the rule of law in counterterrorism (most notably by the intervention of the European judiciary), recent reactions to terrorist attacks and the relaunch of an EU agenda on security demonstrate that any rule of law gains may be precarious in a renewed political framing of a state of emergency. The rule of law challenges at European level are further compounded in view of the growing globalisation of counterterrorism and the inevitable interaction between EU institutions and global players, including executive bodies such as the UNSC and the FATF, and agenda-setting actors such as the United States. EU law provides strong rule of law benchmarks, and the challenge is to be vigilant and uphold these benchmarks both in the Union’s internal action and, most importantly, in the Union’s external action. In the field of counterterrorism, the danger is that rule of law deficient standards and practices produced externally may enter the jurisdiction of the Union and its Member States through the back door.

## Author’s note

In memoriam Scott Crosby, who always fought for justice and the rule of law.

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97. Valsamis Mitsilegas, ‘The European Union and the Global Governance of Crime’ in Valsamis Mitsilegas, Peter Alldridge and Leonidas Cheliotis (eds), *Globalisation, Criminal Law and Criminal Justice – Theoretical, Comparative and Transnational Perspectives* (Hart, Oxford 2015) 153.

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