Human Rights, Counter-terrorism and Criminology: The Siren Call of Security

Claire Hamilton

Professor of Criminology, Maynooth University

ABSTRACT

In light of recent departures from human rights standards in the name of 'security', this paper argues that the application of governmentality-informed criminological concepts may help to illuminate the process and context in which such departures are made and the 'rationalities' and 'knowledges' that facilitate them. By forcing us to pay attention to the power-knowledge networks inherent in the bureaucratic, political and juridical apparatus through which rights are negotiated, the governmentality analytic opens up important possibilities for a politically richer, more self-reflexive and ultimately less disingenuous rights discourse.

INTRODUCTION

If the human rights era is currently in its twilight, as some commentators contend, then the Al-Qaeda attacks of 11 September 2001 mark an important staging post in its demise. As Conor Gearty remarks in his insightful aetiology of the current crisis, the response to the events of 11 September dealt a 'hammer blow' to human rights globally, providing a new and convenient 'means for the assertion by states all around the world of their national power over international scrutiny, especially in the field of human rights'.[1] While the range of illegal conduct engaged in by the American executive in the period post-11 September elevated the United States to international notoriety, less appreciated perhaps is the impact of counter-terrorism law and policy on the penal trajectory of the European Union. Despite a stronger, more embedded commitment to human rights,[2] counter-terrorism measures imposed on EU member states have been described as a 'turbo' to the penalisation engine, resulting in a significant escalation

[1]Conor Gearty, 'Is the human rights era drawing to a close?', *European Human Rights Law Review* 5 (2017), 425–31: 428.

[2]See, for example, Sonja Snacken and Els Dumortier, *Resisting punitiveness in Europe?* (Abingdon, Oxon; New York, 2012); Tom Daems, Dirk van Zyl Smit and Sonja Snacken (eds), *European penology?* (Oxford, 2013); Barry Vaughan and Shane Kilcommins, 'The Europeanisation of human rights and the limits of authoritarian policing in Ireland', *European Journal of Criminology* 4 (4) (2007), 437–59.

Author's e-mail: claire.hamilton@mu.ie

Irish Studies in International Affairs, Vol. 29 (2018), 205–216

doi: https://doi.org/10.3318/ISIA.2018.29.02

in penal measures and a punitive climate in Europe.[3] State- and EU-level responses that have followed the recent spate of terror attacks have only served to compound fears. Surveying the national security landscape in European countries since 2014, Amnesty International stated the problem bluntly: 'Brick by brick, the edifice of rights protection that was so carefully constructed after the Second World War, is being dismantled.'[4]

Taking this literature as its point of departure, this paper seeks, first of all, to map the human rights impacts of some of the flagship counter-terrorism measures adopted by the European Union since 2001. What may be termed the 'siren call of security' in Europe remains a pressing issue given the 'increasing dosages'[5] of security measures that meet each new attack. In an effort to counteract this, the paper argues that the application of governmentality-informed criminological concepts may help to illuminate the process and context in which such departures from human rights standards are made and the 'rationalities' and 'knowledges' which facilitate them. By forcing us to pay attention to the power-knowledge networks inherent in the bureaucratic, political and juridical apparatus through which rights are negotiated, the governmentality analytic[6] opens up important possibilities for a politically richer, more self-reflexive and ultimately less disingenuous rights discourse. The paper proceeds as follows. Part 1 examines the recent history of counter-terrorism law and policy in the European Union, where the enactment of a significant body of counter-terrorism legislation since 11 September has driven radical and permanent change in at least some areas of mainstream criminal law and procedure, with significant implications for human rights. Following on from this, Part 2 discusses some of the limitations of human rights as identified in the criminological literature and contemplates the role of governmental criminology, as inspired by the work of French philosopher and historian, Michel Foucault, in identifying potential sites for progressive intervention.

PART 1: EUROPE AND THE SIREN CALL OF SECURITY

It is axiomatic that the events of 11 September threw up new and unprecedented challenges for defenders of human rights. In the wake of this apparently new brand of terrorism, a new brand of counter-terrorism measures emerged, incorporating, as is now well known, various illegalities in the form of Guantanamo, Abu Ghraib, torture black sites, wholesale executive surveillance and much else. While European leaders showed more restraint in terms of their commitment to the rule of law, in Europe various examples of 'counter law' or 'law against law'[7], precautionary logic[8] and securitising measures abound.[9] Perhaps of most

[3]Els Dumortier *et al*., 'The rise of the penal state: what can human rights do about it?' in Snacken and Dumortier, *Resisting punitiveness in Europe?* 107–32.

[4]Amnesty International, *Dangerously disproportionate: the ever-expanding national security state in Europe* (London, 2017).

[5]Oren Gross, 'Chaos and rules: should responses to violent crises always be constitutional?' *The Yale Law Journal* 112 (5) (2003), 1011–34.

[6]Studying social relations from the point of view of governmentality means focussing on governance as a mentality or rationality of rule. Governmentality is an influential, but somewhat varied approach. Governmental criminology has been described as a 'variable approach to criminology influenced by Foucault' (Pat O'Malley, 'Governmental criminology', in Eugene McLaughlin and Tim Newburn (eds), *The SAGE handbook of criminological theory* (London, 2009), 319–36: 319).

[7]Richard V. Ericson, *Crime in an insecure world* (London, 2007).

[8]Liora Lazarus, Benjamin Goold and Caitlin Goss, 'Control without punishment: understanding coercion', in Jonathon Simon and Richard Sparks (eds), *The SAGE handbook of punishment and society* (London, 2013), 463–92.

[9]Estella Baker, 'Governing through crime? The case of the European Union', *European Journal of Criminology* 7 (3) (2010), 187–213.

concern is the fact that in Europe the post-11 September drive towards securitisation effected radical and *permanent* change in some critical areas of mainstream criminal law and procedure, in contradistinction to the more conservative approach to domestic law reform adopted by the US state in the post-11 September period.[10] While not gainsaying in any way the highly punitive executive measures taken by the US in the period immediately following the Twin Tower attacks, such measures have at least permitted a certain retrenchment in the face of political and legal opposition.[11] In Europe, on the other hand, while procedural protections may 'balance out' some of the existing counter-terrorism measures, it is highly unlikely that we will see any such measures reversed.[12]

Much of the explanation for this process of securitisation relates to timing. The 11 September terrorism emergency occurred precisely at the moment when the EU was beginning to assert itself in the criminal justice field (the EU had created an 'area of security, justice and freedom' in 1999), resulting in counter-terrorism becoming the focal point for the development of the EU's role in this area.[13] The sheer volume of counter-terrorism measures adopted by the EU bears testament to this with a recent report by SECILE identifying 239 such measures for the period 2001–13.[14] While implementation of some of these measures has been patchy,[15] many of the most significant (and controversial) instruments in terms of their impact on domestic criminal justice have now been successfully transposed and implemented by member states.[16]

Following the attacks, the European Council hastily arranged an extraordinary (emergency) meeting of the *chefs de cabinet* in Brussels on 21 September. The meeting sought to address perceived deficiencies in EU action in this area, namely, the lack of a common legal definition of terrorism, the absence of a harmonised system of penalties and a basis for accelerated extradition, and set itself the deadline of December 2001 to reach agreement on several legal acts.[17]

[10]Kent Roach, *The 9/11 effect: comparative counter-terrorism* (Cambridge, 2011); Claire Hamilton, 'The European Union: sword or shield? Comparing counter-terrorism law in the EU and USA after 9/11', *Theoretical Criminology* 22 (2) (2018), 206–25.

[11]David Cole, 'Military commissions and the paradigm of prevention', in Fionnuala Ní Aoláin and Oren Goss (eds), *Guantanamo and beyond: exceptional courts and military commissions in comparative perspective* (Cambridge, 2013), 95–116; Hamilton, 'The European Union: sword or shield?'

[12]Mariana Chaves, 'EU's harmonization of national criminal law: between punitiveness and moderation', *European Public Law* 21 (3) (2015), 527–53; Cian Murphy, 'Counter-terrorism law and policy: operationalisation and normalisation of exceptional law after the "War on Terror"', in Diego Acosta Arcarazo and Cian Murphy (eds), *EU security and justice law: after Lisbon and Stockholm* (Oxford, 2013).

[13]Cian Murphy, 'EU Counter-terrorism and the rule of law in a post-"War on Terror" world', in Martin Scheinin (ed), *European and United States counter-terrorism policies, the rule of law and human rights*, RSCAS Policy Paper 2011/03, available at: http://www.cesruc.org/uploads/soft/130221/1-130221192106.pdf (8 August 2018).

[14]SECILE, *Catalogue of EU Counter-Terrorism Measures Adopted since 11 September 2011*. Available at: http://www.statewatch.org/news/2013/dec/secile-catalogue-of-EU-counter-terrorism-measures.pdf (8 August 2018).

[15]Monica Den Boer, 'Fusing the fragments: challenges for the EU International security governance on terrorism' in Dieter Mahncke and Joerg Monar (eds), International terrorism: a European response to a global threat? *(*Brussels, 2006). European Commission, *Report from the Commission based on Article 11 of the Council Framework Decision on combatting terrorism of 13 June 2002*. COM/2007/681.

[16]European Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism*. COM/2014/0554.

[17]Jorg Monar, 'Anti-terrorism law and policy: the case of the European Union', in Victor V. Ramraj, Michael Hor and Kent Roach (eds), *Global anti-terrorism law and policy* (Cambridge, 2005), 425–52.

While the European Commission had been working on proposals in these areas for many months it is difficult to overstate the transformative effect of the 11 September attacks in this area: as Monica den Boer has written, 'All of a sudden decisions were possible on dormant dossiers'.[18] By 27 December 2001, the EU had constructed the two main pillars of its counter-terrorism strategy: a common definition of terrorism (the first such definition by an international body) and a Framework Decision on Combating Terrorism (FDCT), overhauling the law on extradition between member states.[19]

As the trigger for a wide range of coercive powers the definition of terrorism is obviously critical,[20] however, in an EU context this issue assumed particular importance as so few member states had any specific legislation criminalising terrorism prior to the adoption of the Framework Decision in 2002.[21] Indeed, the number of member states with legislation that criminalised terrorist acts autonomously went from 6 prior to 11 September to 22 by 2007.[22] Roach describes this as 'an explosive growth' or 'viral propagation of anti-terrorism laws in Europe' whose impact should not be underestimated.[23] In terms of reforms at member state level, the definition of terrorist offences inevitably led to the adoption of new criminal offences in those states without anti-terrorism legislation. Moreover, legislation was also required in those states that already had counter-terrorism legislation in place given that they all had definitions of terrorism that were narrower than the EU's. In the 2002 Framework Decision on Combating Terrorism these new offences took the form of directing, creating, supporting or participating in a terrorist group and this was extended in 2008 to include offences of public provocation to commit a terrorist offence, recruitment, and training for terrorism (including via the Internet). These offences have been criticised for the threat they pose to fundamental legal principles as well as the preventative or pre-emptive direction in which they take the criminal law.[24] Indeed, such was the concern of the European Parliament about the 2008 amendments that it sought to introduce human rights safeguards into the legislation, amendments which were rejected by the Council, save for a declaratory (and arguably superfluous) statement regarding the general requirement to respect fundamental rights.[25] It is worth noting that all of these offences are subject to enhanced sentencing as the Decision also provided for minimum maximum sentences (15 years for directing and eight for participatory or preparatory acts). This is the case even if group offences are not applicable to an individual,

[18]Monica den Boer, 'Fusing the fragments: challenges for EU internal security governance on terrorism', in Dieter Mahncke and Jorg Monar (eds), *International terrorism: a European response to a global threat?* (Brussels, 2006), 83–111: 90.

[19]Council of the European Union, *Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States.* 2002/584/JHA; Council of the European Union, *Council Framework Decision of 13 June 2002 on Combating Terrorism*. 2002/475/JHA.

[20]Amnesty International, *Human rights dissolving at the borders? Counter-terrorism and EU criminal law* (Brussels, 2005); Cian Murphy, *EU Counter-terrorism law: pre-emption and the rule of law* (Oxford, 2012).

[21]Javier Argomaniz, 'Post-9/11 institutionalisation of European counter-terrorism: emergence, acceleration and inertia', *European Security* 18 (2) (2009), 151–72; Amnesty International, *Human rights dissolving at the borders?*

[22]Chaves, 'EU's harmonization of national criminal law: between punitiveness and moderation'.

[23]Kent Roach, 'Introduction: comparative counter-terrorism law comes of age', in Kent Roach (ed.), *Comparative counter-terrorism law* (Cambridge, 2015), 1–48: 29.

[24]Murphy, *EU counter-terrorism law*; Francesca Galli, *The law on terrorism: the UK, France and Italy compared* (Brussels, 2015).

[25]European Parliament, *Report on the proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism*. COM/2007/0650.

given the requirement for member states to enact 'effective, proportionate and dissuasive'[26] criminal penalties for all offences linked to terrorism.[27]

In Europe, moreover, the problems associated with these associative and preparatory offences are compounded by the EU definition of terrorism itself. This definition is also expansive, defining terrorist acts as those committed with the aim of:

> seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.[28]

The list of offences goes beyond violence to include serious property damage 'likely to result in major economic loss',[29] a move that has been criticised, particularly when interpreted in the context of the broadly drafted 'unduly compelling' a government.[30] While drafted more tightly than the UK provisions, it does appear broader than the definitions adopted by most of the UN conventions on terrorism and indeed the US Patriot Act.[31]

The European Arrest Warrant (EAW)—'the jewel in the crown of the EU's response to the terrorist attacks'[32]—probably represents one of the most prominent yet possibly also the most controversial of the EU counter-terrorism measures.[33] While proposals for the EAW predated the events of 11 September, negotiations between member states on this sensitive area were so protracted that it really only became 'politically palatable'[34] in the period after the attacks. Indeed, while the proposal had already been under preparation by officials for a period of two years, national views on the most basic features of the instrument were 'very, very far apart'[35] until the events of 11 September. The measure, adopted in a Framework Decision of 13 June 2002, revolutionised laws relating to extradition in the EU, effectively transforming what was once a detailed judicial procedure with strict legal requirements, such as the dual criminality rule, into an administrative 'box-ticking exercise'.[36] The procedure is now a summary one whereby the merits of the request are taken on trust and the receiving member state is obliged to execute an EAW unless one of the very limited grounds of objection is applicable. The considerable efficiencies gained by the measure (particularly the reduction in delays) have been noted by the European

[26]Article 5, FDCT.

[27]Murphy, *EU counterterrorism law*.

[28]Article 1(1), Council of the European Union, *Council Framework Decision of 13 June 2002 on Combating Terrorism*. 2002/475/JHA.

[29]Article 1(1)(d), Council of the European Union, *Council Framework Decision of 13 June 2002 on Combating Terrorism*. 2002/475/JHA.

[30]Sionaidh Douglas-Scott, 'The rule of law in the European Union: putting the security into the area of freedom, security and justice', *European Law Review* 29 (2) (2004), 219–42.

[31]Lucia Zedner, 'Review of 9/11 effect', *University of Toronto Law Journal* 63 (4) (2013), 161–65; Roach, *Comparative counter-terrorism law*.

[32]Douglas Scott, 'The rule of law in the European Union', 223.

[33]Elias Van Sliedregt, 'European approaches to fighting terrorism'. *Duke Journal of Comparative and International Law* 20 (2010), 222–35.

[34]Cian Murphy 'The Constitution of EU Counterterrorism Law', 16 July 2012, available at: http://www.ejiltalk.org/the-constitution-of-eu-counter-terrorism-law/ (8 August 2018).

[35]Christian Kaunert, 'Without the power of purse or sword: the European arrest warrant and the role of the commission', *Journal of European Integration* 29 (4) (2007), 387–404: 396.

[36]James MacGuill, 'European arrest warrant in Ireland: an uneven playing field', Paper presented at *European Arrest Warrant and EU-US Extradition Conference*, Irish Centre for European Law, Trinity College Dublin, 19 June 2004.

Commission,[37] something which, given that justice delayed is often justice denied, may well work in ease of requested persons. Yet the benefits in terms of expeditious hearings must also be considered against strong concerns voiced about disproportionality, violations of procedural rights, poor detention conditions and the imprisonment of innocent persons.[38] While space constraints do not permit a full examination of the concerns voiced, two observations relevant to the current argument can be made. First, as with the FDCT discussed above, it is surprising given the ostensible respect for human rights principles proclaimed in various EU legal instruments that the prospect of serious breaches of human rights was not expressly stated as a ground on which extradition could be refused, an omission that has led to highly variable protection of rights across member states.[39] Another significant concern is with net-widening or 'function creep'[40] which was evident from the legislation's inception: while it was presented to member states and to the public as a key counter-terrorist measure it included within its scope a long list of 32 offences, many of which, such as road traffic offences, are not even offences of specific intent. Unsurprisingly, this has resulted in the majority of requests being issued for ordinary rather than terrorist offences as well as the systematic use of the EAW procedure for minor offences.[41] This is unfortunate given the severely damaging effect which the disproportionate use of the EAW can have on individuals sought by requesting states; not only can they be taken away from their homes, families and employment for a lengthy period, perhaps for years, but they will in all likelihood be denied bail by virtue of the very fact of being a resident of another country.[42]

While the EU has been active in the counter-terrorism area in its own right, as a supranational legal framework, it has also played an important role in the implementation of UN Security Council Resolutions. EC Regulation 2580/2001 implemented UNSC Resolution 1373 (2001) and also instituted the EU's own autonomous counter-terrorist restrictive measures regime.[43] Initially, the EU adopted a highly secretive and legally complex approach to the blacklisting process which, alarmingly, appeared to preclude judicial review.[44] This approach,

[37]European Commission, *Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States*. COM/2011/0175.

[38]Thomas Hammarberg, 'Overuse of the European arrest warrant—a threat to human rights'. *The Council of Europe Commissioner's Human Rights Comment*. Available at: https://www.coe.int/en/web/commissioner/-/overuse-of-the-european-arrest-warrant-a-threat-to-human-rights?inheritRedirect=true (8 August); European Parliament, *Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant*. A7–0039/2014.

[39]Gabor Magyar, 'The European arrest warrant: a current evaluation'. Paper presented at seminar on the pre-Lisbon instruments: Special Focus on the European Arrest Warrant, European Centre for Judges and Lawyers (European Institute of Public Administration), Cracow, 16 February 2012; Ilias Anagnostopoulos, 'Criminal justice cooperation in the European Union after the first few "steps": a defence view', *ERA Forum* 15 (1) (2014), 9–24.

[40]Javier Argomaniz, Oliver Bures and Christian Kaunert, 'A decade of EU counter-terrorism and intelligence: a critical assessment', *Intelligence and national security* 30 (2–3) (2015), 191–206.

[41]European Parliament, *Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant*.

[42]Niall Fennelly, 'European arrest warrant: recent developments'. Address to the Academy of European Law Conference, EU Courts in the area of freedom and justice: recent developments, Trier, 14/15 June 2007.

[43]Julia Hoffmann, 'Terrorism blacklisting: putting European human rights guarantees to the test', *Constellations* 15 (2008), 543–60.

[44]Amnesty International, *Human rights dissolving at the borders?*

described by Murphy as 'counter-law' or 'law against law',[45] was subsequently amended in response to a series of judgments from the European Court of Justice, resulting in procedural amendments to ensure both access to effective judicial review and the provisions of reasons for a suspect's initial listing.[46] The most recent Directive from the EU has also incorporated the measures contained in UN Security Council Resolution 2178 in relation to foreign terrorist fighters, with largely negative consequences for human rights standards in European countries.[47] In January 2017, for example, Amnesty International expressed its concern that counter-terrorism measures adopted in the aftermath of UNSC Resolution 2178 'have been steadily dismantling [the European human rights system], putting hard won rights at risk',[48] citing concerns about abuse of the definition of terrorism, the use of secret evidence and the criminalisation of various forms of expression.

PART 2: CRIMINOLOGY, GOVERNMENTALITY AND THE LIMITS OF HUMAN RIGHTS

In EU criminal justice, therefore, as elsewhere, the logic of security, with its 'unknown unknowns',[49] has regularly trumped concerns about human rights, taking not only the 'exceptional' but also the 'ordinary' criminal justice sphere in a decidedly pre-emptive direction.[50] While the human rights credentials of the European Union are little in doubt, their failure to act as a bulwark against excessive securitisation recalls earlier arguments made by Lucia Zedner[51] and others such as Suzanne Krasmann[52] regarding the limits of the human rights idiom as a means of resisting the siren call of security and the emerging paradigm of preventive justice. Zedner identifies several difficulties with the traditional approach to human rights, among them: (i) the heavy emphasis on the judiciary at the expense of other institutions/decision-makers; (ii) the neglect of the information supplied by 'expert' non-judicial decision-makers such as the intelligence services; (iii) the manner in which human rights set up binaries concerning compliance or non-compliance, giving rise to (iv) the need for 'thicker' normative basis for critique. This latter point has been echoed by Ian Loader and Richard Sparks[53] in their quest for a public criminology that is actively engaged with the democratic process. How, they wonder, can criminology contribute to the search for a better politics of criminal justice in a manner that goes beyond the human rights idiom, which they perceive as too narrow and legalistic?

[45]Murphy, *EU counterterrorism law*.

[46]Elizabeth Guild, 'The uses and abuses of counter-terrorism policies in Europe: the case of the "Terrorist Lists."' *Journal of Common Market Studies* 46 (2008), 173–193; Jennifer Lang, 'EU counter-terrorism: security, justice, democracy and opportunity for all?' 14 August 2011. Available at: http://www.e-ir.info/2011/08/14/eu-counter-terrorism-security-justice-democracy-and-opportunity-for-all/ (8 August 2018).

[47]Council of the European Union, *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.*

[48]Amnesty International, *Dangerously disproportionate: the ever-expanding national security state in Europe* (London, 2017), 7.

[49]To use a now famous Rumsfeldian phrase. See Donald Rumsfeld, 'Defense Department Briefing' C-SPAN, 12 February 2002. Available at: https://www.c-span.org/video/?168646-1/defense-department-briefing (8 August 2018).

[50]Murphy, 'The constitution of EU counter-terrorism law'.

[51]Lucia Zedner, 'Pre-crime and post-criminology?' *Theoretical Criminology* 11 (2) (2007), 261–75.

[52]Suzanne Krasmann 'Law's knowledge: on the susceptibility and resistance of legal practices to security matters', *Theoretical Criminology* 16 (4) (2012), 373–94.

[53]Ian Loader and Richard Sparks, *Public Criminology?* (London, 2010).

This returns us to the first point made by Zedner and the question of the 'political'. In all criminal justice policymaking, but *a fortiori* in matters of the security of the state, the success of human rights claims is highly dependent upon their political or strategic viability. As Fiona de Londras *et al.* observe in research conducted with European policymakers working in the security field,

> ultimately what determines the outcome of any process relating to counter-terrorism is *political will*: in the absence of a definitive legal decision as to 'legitimacy' (i.e. a court case), political judgement determines proportionality, necessity and ultimately legitimacy.[54]

Such deceptively simple findings invite a view of human rights less as an unproblematic vector of normative aspirations, and more as a 'battleground'[55] that is highly susceptible to security claims in a given moment. In this light, proposed 'solutions' to excessive securitisation such as a 'culture of justification'[56]—which places the onus of justification for any restrictive measures on the political body proposing the measure, to show that any putative laws meet fundamental requirements of legality and respect for human rights—appear to somewhat miss the point. Krasmann identifies this weakness in current human rights discourse as the assumption of a common concern about rights in this field. As she argues, the fatal flaw in the argument is that 'it presupposes what has yet to arise, namely a common concern about governmental encroachment in the name of security and a willingness of all parties to join in that discourse'.[57] When combined with pressure from international organisations such as the UN Security Council—and what Cathleen Powell[58] terms the 'culture of authority' flowing therefrom—it is not difficult to see how the sheer 'instrumentality and hegemonic'[59] force of executive and legislative action finds human-rights abusing measures rapidly outpacing judicial proceedings (witness the findings by the European Court of Human Rights on CIA black sites some 12 years after the event[60]).

Yet, as the critical criminologist Stan Cohen has argued, 'intellectual scepticism [about human rights] cannot become an excuse for political non-engagement'[61]. Taking up this mantle, Krasmann has proposed a radical break with the liberal conception of law (and therefore rights) as an isolated, ideal body, and towards a Foucauldian reconception of law 'as a practice', discernible only in the manner of its realisation. As an illustration of law's limits in the security field and its willingness to bend to what is considered 'necessary', she cites the example of torture and the manner in which it has been inscribed into law, both in the infamous US 'torture memos' and in scholarly debate

[54]Fiona De Londras *et al.*, *SECILE: The impact, legitimacy and effectiveness of EU counter-terrorism legislation* (SECILE, 2015). Available at: https://fdelondras.files.wordpress.com/2016/01/secile-d5-3.pdf, 24 (8 August 2018). (Emphasis added.)

[55]Panu Minkkinen, *Sovereignty, knowledge, law* (London, 2009).

[56]David Dyzenhaus, 'Deference, security and human rights', in Benjamin Goold and Liona Lazarus (eds), *Security and Human Rights* (Portland, 2007), 125–56.

[57]Krasmann, 'Law's knowledge', 381–2.

[58]Cathleen Powell, 'The legal authority of the United Nations security council', in Goold and Lazarus, *Security and Human Rights*.

[59]Leanne Weber, Elaine Fishwick and Marinella Marmo, *Crime, justice and human rights* (London, 2014), 99.

[60]*Al-Nashiri v. Poland*; *Abu-Zubaydah v. Poland*. Application no. 28761/11, 24 July 2014.

[61]Cited in Ruth Jamieson and Kieran McEvoy, 'Conflict, suffering and the promise of human rights', in C. Chinkin *et al.*, *Crime, social control and human rights: from moral panics to states of denial: essays in honour of Stanley Cohen* (Willan, 2007).

(eg Dershowitz[62]). Reconceptualised thus, law and rights appear highly contingent, political and relational. Unlike conventional approaches to rights, the focus is firmly on modes of thinking (of all decision-makers, not only the judiciary); forms of knowledge informing such decision-making; and the mechanisms by which these are translated into reality. More concretely, this would involve the application of a Foucault-inspired governmentality analytic to identify: the process and context in which departures from human rights standards are made; the 'rationalities' and 'knowledges' that facilitate them; the practices and devices ('technologies') that translate political reasoning into programmes of government;[63] and the policy lessons we can learn from these observations.[64]

Foucault's conception of law and rights has historically been associated with the postmodern school of thought, suggesting he would have no truck with the universalist concept of human rights at all.[65] Foucault was an elusive thinker, however, whose thought was constantly evolving. More recently, scholars such as Ben Golder have detected in his later work a 'critical affirmation' of rights discourse, according to which he neither rejects nor embraces rights but rather engages 'critically within and against existing rights discourse'.[66] On this view, rights are neither apolitical ideals, nor 'an anti-politics—a pure defense of the innocent and powerless against power',[67] but rather political tools which may be implicated in relations of power as much as a means of criticising them.[68] Foucault, then, forces us to pay attention to the power-knowledge networks inherent in the bureaucratic, political and juridical apparatus through which rights are negotiated. In so doing, his work opens up important possibilities for a politically richer, more self-reflexive and ultimately less disingenuous rights discourse.[69]

Foucault's aim was always to understand the limits of ways of thinking in order to find possibilities for thinking differently, thereby enhancing our capacity for change. For a fully-developed analysis of governance in this area, however, various dimensions of the bigger picture are required which criminology can do much to provide. First of all, securitising discourses in the counter-terrorism field are best understood against the backdrop of a broader 'punitive turn',[70] one

[62]Alan Dershowitz, 'Tortured reasoning', in Sanford Levinson (ed.), *Torture: a collection* (Oxford and New York, 2004), 257–80.

[63]Alan Hunt, 'Encounters with juridical assemblages: reflections on Foucault, law and the juridical', in Ben Golder (ed.), *Re-reading Foucault: on law, power and rights* (London, 2012), 64–84; Nikolas Rose, Pat O'Malley and Mariana Valverde, 'Governmentality', *Annual Review of Law and Social Science*, Vol. 2 (2006), 83–104.

[64]Randy K. Lippert, 'Governmentality analytics and human rights in criminology', in Weber *et al*. (eds), *The Routledge International Handbook of Criminology and Human Rights* (London, 2016), 80–90.

[65]Weber *et al*., *Crime, justice and human rights.* The modern, universalistic notion of human rights can of course be said to conflict with the postmodernist privileging of relativism and contingency.

[66]Ben Golder, **'**Foucault's critical (yet ambivalent) affirmation: three figures of rights', *Social & Legal Studies* 20 (3) (2011), 283–12.

[67]W. Brown, 'The most we can hope for…: human rights and the politics of fatalism', *South Atlantic Quarterly* 103 (2004), 451–63: 453.

[68]Duncan Ivison, *Rights* (Stocksfield, 2008).

[69]Golder, 'Foucault's critical (yet ambivalent) affirmation: three figures of rights'.

[70]See, for example, Claire Hamilton, 'Reconceptualising penality: towards a multidimensional test for punitiveness', *British Journal of Criminology* 52 (4) (2014), 321–43; Claire Hamilton, *Reconceptualising penality: a comparative perspective on punitiveness in Ireland, Scotland and New Zealand* (Farnham, UK, 2014).

that is frequently linked to the 'free market turn' or advent of neoliberalism.[71] In proposing a broader 'sociology of security', Ian Loader[72] correctly points to the need for connections to be forged between contemporary discourses on security and rights and the various political and penological transformations that have gone before them. As Loader argues, it is the 'logic of populist reason'[73] or, in David Garland's words, 'culture of control'[74] (*viz*. risk management and reaction politics) that have created the conditions in which popular appeals to security can be made so successfully. Indeed, for some criminologists the 'war on terror' simply forms 'more of the same' in terms of the mass violent incarceration we have seen emerge in certain neoliberal democratic states in recent decades.[75] Certainly, it would be foolish in any analysis of counter-terrorism to ignore the fact that the pursuit of security of a more anodyne kind has been high on the political agenda since many decades before the emergence of 'super-terrorism', in 2001.[76]

Within criminology, the governmentality analytic has played an important role in understanding and conceptualising important features of the 'punitive turn' and the growing centrality of 'law and order' as a political and public concern.[77] Perhaps most significantly, the two key themes of 'responsibilisation' and 'governing through [crime]' have been used extensively in the criminological literature in order to render intelligible significant changes in the penal and crime control field.[78] The former concept, elaborated by Garland,[79] is a neoliberal rationality that devolves responsibility for governance of crime from the state to local authorities, private security agencies or individuals. The latter, developed by Jonathan Simon, refers to the use of crime as a mode of governance in order to justify 'interventions that have other motivations'.[80] Together with the work of other criminologists writing in a governmentality vein, such as O'Malley,[81] Garland and Simon's work has been adept at linking newly ascendant technologies (e.g., risk assessments) in the crime field with political rationalities hostile to the welfare state, namely, neoliberalism. Through the identification of key governmental rationalities of control (for instance, an economic style of reasoning), governmentality analysis has also heavily influenced what is probably the

[71]David Downes, 'Comparative criminology, globalization and the "punitive turn"', in David Nelken (ed.), *Comparative criminal justice and globalization* (Farnham, Surrey, 2011), 27–48.

[72]Ian Loader, 'The cultural lives of security and rights', in Goold and Lazarus, *Security and Human Rights* (Oxford, 2007).

[73]Ernesto Laclau, *On populist reason* (London, New York, 2005).

[74]David Garland, *The culture of control* (Oxford, 2001).

[75]Phil Scraton and Jude McCulloch, *The violence of incarceration* (New York, 2009).

[76]Zedner, 'Pre-crime and post-criminology?'; Claire Hamilton and Giulia Berlusconi, 'Counter-terrorism, contagion and criminology: the case of France', *Criminology & Criminal Justice*. Article first published online, 3 January 2018, available at: https://doi.org/10.1177/1748895817751829 (8 August 2018).

[77]Randy K. Lippert and Kevin Stenson, 'Advancing governmentality studies: lessons from social constructionism', *Theoretical Criminology* 14 (4) (2010), 473–94.

[78]Randy K. Lippert, 'Governmentality', in Avi Brismann, Eamon Carrabine and Nigel South (eds), *The Routledge Companion to Criminological Theory and Concepts* (London, 2016), 451–54.

[79]David Garland, 'Governmentality and the problem of crime', *Theoretical Criminology* 1 (1997), 173–214; Garland, *The culture of control.*

[80]Jonathon Simon, *Governing through crime: how the war on crime transformed American democracy and created a culture of fear* (New York, 2007), 4.

[81]Pat O'Malley, 'Risk, power and crime prevention', *Economy and Society* 21 (3) (1992), 252–75; Pat O'Malley, 'Volatile and contradictory punishment', *Theoretical Criminology* 3 (1999), 175–96.

seminal work in the field of the sociology of punishment, Garland's *Culture of Control,*[82] including its central organising concept ('culture of control').[83]

Deploying these and other conceptual tools, therefore, governmentality-informed criminology may help provide answers to the elusive question of how we currently govern the terrorism problem and, no less significant, how we are *to be* governed.[84] The 'added value' of the governmentality literature within the security/rights area, however, is not confined to the provision of historical perspectives on counter-terrorism and its relation to the complex and contradictory field of neoliberal politics. On the contrary, very real benefits may be derived from a 'horizontal' analysis that can situate contemporary counter-terrorism policies alongside crime governance strategies more broadly. Within the legal and international relations literature, terrorism is often treated as a distinct governmental problem because of the existential threat it poses to the state, and therefore one that invites analysis of the nature of exceptional sovereign power or 'exceptionalism' (see for example, Giorgio Agamben[85]). Recent research on the impact of counter-terrorism law and policy, however, suggests that power permeates at different levels so that the various governmental strategies developed to control serious crime in recent years have much in common with those applied to terrorism.[86] Indeed, in some jurisdictions at least (we take the case of France, see Claire Hamilton and Giuilia Berlusconi[87]) the reciprocal nature of policies directed at terrorism and at organised crime and drug trafficking renders highly problematic the neat division between these two areas. Security measures in the counter-terrorism sphere, like those applied to crime more generally, are, in Foucauldian terms, disciplinary measures and, as Neal[88] has argued strongly in the context of the international relations literature, should not be sealed off from (security) politics more generally.

CONCLUSIONS

Viewed in this light, there are strong reasons for analysing counter-terrorism measures, with their serious implications for human rights, through the lens of governmentality-informed criminology. While human rights have a long history, connections between existing criminological scholarship and human rights frameworks are of relatively recent origin.[89] Perhaps unsurprisingly, given Foucault's supposed rejection of human rights, the governmentality 'toolbox' as developed within criminology has not been applied at all to human rights. As Randy Lippert argues, however, the fresh, and radical, perspective it affords, has much to offer

[82]Garland, *The culture of control.*

[83]Pat O'Malley, 'Governmental criminology', in Eugene McLaughlin and Tim Newburn (eds), *The SAGE handbook of criminological theory* (London, 2009), 319–36.

[84]Lippert, 'Governmentality analytics and human rights in criminology'.

[85]Giorgio Agamben, *State of exception* (Chicago, Il., 2005).

[86]John Lea, 'From the criminalisation of war to the militarisation of crime control', in Sandra Walklate and Ross McGarry (eds), *Criminology and war: transgressing the borders* (Abingdon, 2015), 198–211.

[87]Hamilton and Berlusconi, 'Counter-terrorism, contagion and criminology: the case of France'.

[88]Andrew Neal, '"Events dear boy, events": terrorism and security from the perspective of politics', *Critical Studies on Terrorism* 5 (1) (2012), 107–20.

[89]Therese Murphy and Noel Whitty, 'Making history: academic criminology and human rights', *British Journal of Criminology* 53 (4) (2013), 568–87; Leanne Weber, Elaine Fishwick, Marinella Marmo (eds), *The Routledge International Handbook of Criminology and Human Rights* (London, 2016).

critically-orientated criminologists working in the field, not least a better understanding of how discourses can become 'amenable to progressive intervention and reform…while avoiding ill-conceived totalizing endeavours doomed to fail'.[90] Indeed, it is perhaps only through careful empirical examination of European governmental discourse in the security field that the detailed workings of human rights claims and decision-making will be revealed, enabling advocates of rights to move beyond the current impasse whereby rights are frequently deprioritised.

[90]Lippert, 'Governmentality analytics and human rights in criminology', 88.