Contemporary Challenges

The Global Crime, Justice, and Security Journal

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Acknowledgements and Remarks from the Editor-in-Chief

Contemporary Challenges: The Global Crime, Justice, and Security Journal (CCJ) was borne of a realisation that problems of global crime, justice, and security are becoming ever more entangled and pose some of the most trying challenges to modern society. To provide a platform for novel ideas to add to the academic debate surrounding these issues, a select number of postgraduate students from the Edinburgh Law School organised and founded the CCJ.

In choosing the journal's name, the editorial board felt like it had found the most succinct description of its focus while also reflecting its thematic range. Issues of global crime, justice and security manifest in multiple aspects of political and social life which adds to their salience in academic debate.

Before presenting the research of this publication, we would like to dedicate a few lines to the people without whom the CCJ's conception would not have been possible.

First, we would like to express our gratitude to Dr. Andy Aydin-Aitchison, senior lecturer in criminology at the Edinburgh Law School and program director of the MSc in Global Crime, Justice and Security. His insightful classes built the foundation upon which the CCJ was able to flourish. Moreover, his constant encouragement and enthusiasm were motivating ever since the CCJ was just a faint idea in the heads of a handful of venturous students. His willingness to be the CCJ's academic patron is a testimony of his support. It is an honour to have Dr. Aydin-Aitchison co-write the foreword to this issue alongside Dr. Milena Tripkovic and Dr. Andrea Birdsall.

Secondly, we would like to thank Ms Rebecca Wojturska as well as the rest of the Library & University Collections department of the University of Edinburgh. Ms Wojturska helped us with the registration of the journal, website set-up and the overall establishment of the CCJ, and was

always available to answer any administrative queries – no matter how mundane they seemed. Her vigorous support paved the way for the current as well as future issues of the CCJ.

Our compliments further extend to the lecturers and staff of the Edinburgh Law School. It was their passion for academic progress that inspired our authors and editors to proactively partake in academic debate.

Furthermore, we would like to acknowledge our authors — the core of our publication — who submitted their excellent manuscripts despite the simultaneous pressure from the COVID-19 pandemic and their own academic commitments.

The journal is divided into two sections: Commentaries and Articles. Commentaries are small pieces in which authors are at the leniency to comment and give their opinion on a particular topic. They aim to provide thought-provoking perspectives rather than holistic analyses. Articles, on the other hand, are longer and more detailed accounts of a given topic. Their aim is to showcase the research done by postgraduate students in the field of global crime, justice and security.

The contemporary challenges that the world confronts should not be taken lightly. We hope that with this modest contribution, we can offer some perspectives to help shape ideas on how to overcome these challenges.

On behalf of the editorial board,

Frederik Florenz
Editor-in-Chief

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Introduction:

Inaugurating the *Contemporary Challenges Journal*

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This marks the inaugural issue of the *Contemporary Challenges Journal*, an independent initiative of postgraduate students on the MSc Global Crime, Justice and Security and associated MSc and LLM programmes at the University of Edinburgh. The journal is oriented around the core concerns of the degree programme, tackling problems of crime and (in)security that are international or transnational, and examining legal and political responses to these. It makes its way into the world at a time of challenges that are, if not unprecedented, certainly novel for contemporary generations in the particular combination of global reach, health impacts and impact on social and economic activity.

In future issues we might expect to see papers trying to make sense of COVID19 from the perspective of global crime, justice and security studies. For now, we might speculate, but it is too early to draw firm conclusions. State crime and zemiological frames could help address the questions of short term state negligence and the longer term failures to address social need underpinning the heavy costs borne by medical and care workers, members of the poorest sectors in society, and consistently marginalised and disadvantaged social groups. Implicit assumptions on patterns of policy learning and measures of state strength need revisiting in the wake of failures in states presiding over advanced economies to protect the lives and health of their citizenry and early signs of more successful strategies for containment and community

support in states often classed as weak. Meanwhile, national and international law enforcement agencies have responded to the pandemic by identifying and publicising related criminal activity, including the spread of misinformation, bogus investment opportunities and the use of COVID-19 to disguise money-laundering activity. Yet, when the call for papers for the current issue was finalised in mid-February, nearly a full month was still to pass before WHO declared COVID-19 a pandemic. It is a great credit to the editorial board, headed by Frederik Florenz and June Shuler, that they have managed the submission, peer review, and publication process while facing significant disruption: the physical closure of the University; sudden and unplanned international moves as border closures loomed; and shifts to remote patterns of working and meeting. In common with the authors of the papers in this issue, they faced all of this while managing the 'day job' of working on their own term papers.

The papers here reflect a diverse range of interests and approaches in line with the aspiration to be a broad church in terms of topics and disciplinary approaches that has characterised the MSc in Global Crime, Justice and Security since its launch in September 2009. Now in its 11th year, the programme has seen 160 students graduate. They arrived at Old College with groundings in various disciplines and professional experience; an eye to different aspects of what we try to cover with the catch all term 'global' – the transnational, the international, comparisons, and overlooked spaces; and interests in all stages, from the definition of problems in terms of crime, justice and security, through explanatory frameworks, to exploring legal, social and political problems. Favouring a lively pluralism over the quest for coherence, the MSc programme, in conversation with other programmes in the Schools of Law and Social and Political Science, draws strength from this diversity. We see them leave with a renewed, if critical, appreciation of what they brought; an extended awareness of the field of study; and an openness to the productive disruptions of encounters in a multi-disciplinary space. The editorial board called for papers under six broad headings:

- Comparative, International or Transnational Criminology, Security or Justice studies
- International Crime and its implications for international security
- Genocide, human rights violations and atrocity crimes
- Reconciliatory politics
- Interaction between Criminology, Law and Security
- Global Crime and Security

In this first issue 3 commentaries and 6 longer articles are presented. Three of these handle issues of weaponry as a threat to security at different levels. Putseys argues that while

state maintained nuclear weaponry may represent a threat to global security, the jinn is out of the box and the impossibility of 'uninvention' means that a nuclear free world is an unrealistic goal. Le Moal explores the less formal sources of threats from nuclear weaponry in the form of nuclear trafficking, using Social Network Analysis and the concept of Human Capital to locate state and non-state actors in a directed network. Piccini focuses on small arms and light weapons, perhaps less impactful on an individual level, but massively harmful in total given their prevalence. His paper highlights the need to focus attention at upstream actors more than the far more diffuse downstream distribution networks. Two of the papers handle questions of terrorism and counter terrorism. Baumer-Schuppli argues that the proliferation of legal definitions of terrorism in international law relativises violence and erodes the principle of nullum crimen sine lege certa (principle of criminal foreseeability). In tackling terrorism, Summers argues for the importance of the local, and with it a form of community policing focused on building community intelligence through relationships based on openness and transparency on the part of police. Two contributions draw particular insights from comparative frames. Bartels' commentary on David Garland's account of American exceptionalism extends the analysis beyond ideology, political economy to juxtapose prison officer training regimes in Norway and the United States. Using examples from Bahrain and Lebanon, Al-Hindi is able to draw inferences on the role of law in creating and sustaining lethal vulnerabilities among significant populations of migrant domestic workers, and in doing so adds to the growing understanding of femicide and its diverse manifestations. Lazzarotto revisits some of criminology's sociological origins in looking to place Durkheim in the current century, while in one further commentary Fiennes draws on more recent challenges to the domain of criminology, showing how the harms-based lens of Zemiology enriches our understanding of the diversion of oil supplies through 'bunkering' and illicit trade. In a short commentary she manages to address both outcomes and explanatory frames overlooked by a narrower focus on crime.

Each of these papers stems from the individual scholar's work as they master the field of global crime, justice and security. Students on the MSc and LLM programmes come from across the globe and come together in an environment, which allows and encourages open reflection on their prior knowledge and experiences. Sharing ideas with a global peer group enriches their perspectives and tests the ideas that have been shaped into the papers you see here. In a sense, the peer review process did not start with the editorial board, rather it kicked in the moment the authors opened their mouths to say something in the first seminar of the

year. In many instances, the papers rise to the challenge identified by Ian Loader and Sarah Percy of bringing the 'outside' in and the 'inside' out that characterises the field of studies (2012). The cautionary 'bracketing off' of those terms recognises that while there may be a spatial separation between the domestic and the international, that is rendered decreasingly pertinent by interpersonal, community, economic and other ties that bind each locality into the wider global frame. How best to capture the complexity of that set of ties? The answers inevitably emerge from a plurality of voices and perspectives – the inaugural issue the *Contemporary Challenges Journal* adds some more voices to the conversation, and we look forward to hearing from more emerging scholars in the years to come.

References

Loader, Ian and Percy, Sarah 2012 'Bringing the "outside" in and the "inside" out: Crossing the criminology/IR divide'. *Global Crime* 13(4) pp. 213-218. DOI 10/1080/17440572.2012.715402

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Oil Bunkering in the Niger Delta:

A Social Harm Perspective

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Nigerian crude oil is said to be 'stolen' on an industrial scale (Katsouris & Sayne 2013, iii). United Nations' estimates have suggested that Nigeria's shadow oil industry has a turnover of US$2 billion per year (Burgis 2015, p. 177). Oil theft — known as 'bunkering' — involves tapping into existing infrastructure and extracting oil, either for sale or for local consumption in the oil-rich Niger Delta region (Katsouris & Sayne 2013). Within Nigeria, oil bunkering is theft and can be prosecuted under the 1975 Anti-Sabotage Act or the Petroleum Act, although in practice little successful prosecution has taken place (Naanen 2019).

The perspectives of social harm and received criminological literature both offer useful insight into the practice of bunkering. These are complementary approaches: the lens of social harm supplements and nuances the tools of traditional criminological theory. Together they provide a wider field of view, which not only encompasses individual culpability and state definitions of crime, but also emphasises the role of global social and economic structures that obstruct 'the fulfilment of fundamental needs' (Tifft & Sullivan 2001, p. 191) — and thus produce harm. These structures include entrenched corruption and inadequate public service provision (Koos & Pierskalla 2016). A social harm perspective also highlights the tunnel vision inherent in the 'language of crime' (Copson 2018, p. 49). Discourse around oil bunkering often adopts the terminology of theft. This language distracts from and disavows the claims of ownership that many Delta Nigerians lay to the land's natural resources.

Proponents of a social harm perspective criticise criminology as bound to state-sanctioned notions of crime. For Pemberton (2004), criminal law is underpinned by the idea of individual culpability. Hillyard and Tombs (2017) similarly argue that, even where critical criminology scrutinises state definitions of crime, its framework still rests on an extant body of criminal law. Specifically, a preoccupation with the 'guilty mind', *mens rea*, shapes the individualistic basis of bourgeois law, hindering the attribution of criminal liability to collective entities or corporations (ibid., p. 289, 287). More broadly, individualistic theories are limited in their capacity to apportion responsibility. Robert Agnew's General Strain Theory (GST) is one such individualistic criminological approach. GST describes entrapment in aversive conditions and resultant 'goal blockage' (that is, the non-fulfilment of positively valued objectives). Goal blockage is, in turn, a driver for criminal activity (Agnew 2012, p. 33). Applied to oil bunkering, GST is illuminating in some respects — but ultimately it offers an incomplete picture.

Naanen (2019, p. 702, 705), who conducted a year-long qualitative field investigation in the Niger Delta, argues that approximately 20% of bunkerers are young, unemployed, impoverished Niger Delta residents, who cannot afford school fees or hospital bills. GST, in calling attention to harsh socio-economic conditions, can contextualise oil bunkering as the logical exploitation of market opportunity (ibid): bunkered oil can be refined as fuel for local use (even with basic equipment) and then peddled on the street, thus generating income (Katsouris & Sayne 2013). Crucially, GST is not tied to social class and so embraces the range of socio-economic backgrounds that characterise oil bunkerers. Naanen estimates that the remaining 80% of bunkerers are affluent and well-connected oil barons, who use their wealth and social capital to vanish shiploads of oil into international waters (Naanen 2019, p. 702, 705). Ultimately, however, Agnew's (2012) emphasis is on life history of the individual. Whilst GST can elucidate certain individual drivers like goal blockage, it also isolates oil bunkering from an important causative context of entrenched socio-economic norms.

Elsewhere, critical criminology *has* sought to incorporate the structural into its analysis of crime. Green and Ward's (2017, p. 446) concept of corruption — 'the illegitimate use of state agencies' powers over the allocation of resources' — as a kind of 'vicious circle' is a useful analogy for affluent and well-connected oil bunkerers. Where corruption is already the norm, offering a bribe holds a promising chance of success with a low risk of punishment (ibid.). Illegal

bunkering of Nigerian crude oil likely began in the late 1970s or early 1980s. Nigeria was under military rule and high-ranking officers began misappropriating oil both to cultivate political stability and to enrich themselves (Katsouris & Sayne 2013). The state-run Nigerian National Petroleum Company (NNPC) is now seen as 'one of the most politicized and compromised institutions of any oil-producing nation.' (ibid., p. 1). Crucially, the complicity of high-ranking state officials enables illegally extracted Nigerian oil to be absorbed into various countries in Latin America, Asia, and Eastern Europe (Baumüller et al. 2011; Katsouris & Sayne 2013). Foreign banks store and launder the earnings of illicit oil networks: banks in the United States, the United Kingdom, Switzerland, Dubai, India and Singapore serve as hotspots for potential money laundering (Katsouris & Sayne 2013). Legitimate refiners may also unwittingly purchase and process stolen crude (ibid.). In essence, bunkered oil is a player in the global market. By 'fencing' both the illicit funds and the bunkered commodity through global, state and interstate institutions, the corruption process successfully raises itself to the global stage (and suborns both witting and unwitting accomplices).

Green and Ward's (2017) 'vicious circle' concept does identify the recurrent and self-perpetuating nature of state-level corruption — but it locates such corruption within a wider context of state crime as '*organisational deviance*, by *state agencies* […], which *violates human rights*' (p. 439; emphasis original). That is to say, Green and Ward's (2017) analogy posits a singular, direct connection between perpetrator (state) and victim (state subject), and so fails to capture the self-renewing, circular and symbiotic link between the normalised behaviour of Nigeria's Government and the suffering of its people. By contrast, a social harm perspective captures harm — specifically, interference with 'the fulfilment of fundamental needs' (Tifft & Sullivan 2001, p. 191) — more widely, as an *ongoing process*, rather than as a pattern of discrete events. Tombs and Hillyard (2017) concur: such denial of need fulfilment is a form of structural violence, propagated through economic and social organisation.

In this regard, Nigeria's weak institutions and oil infrastructure are important (Koos & Pierskalla 2016). Oil revenue vastly outstrips the revenue generated by income tax, so that Nigeria has a political economy that is defined not by the needs of the Nigerian people, but by oil rents (ibid.). Moreover, the benefits of oil production are unequally distributed; a culture of corruption to the highest level is connected to rampant poverty and unemployment (ibid.). Le Billon (2005,

p. 12, 24) links such corruption to discretionary control over substantial oil rents and describes a 'resource curse': although Nigeria has produced more than US$350 billion-worth of oil over the past thirty years, the proportion of Nigerians who survive on less than US$1 per day has increased from 36% to 70%. Meanwhile, during his four-year rule of Nigeria, General Sani Abacha reportedly embezzled roughly US$2.2 billion (ibid., p. 12). In essence, the economic conditions that may entice Delta inhabitants to oil bunkering are rooted in government activity within and around the oil industry. Behind the high oil rents that feed government corruption lies the reliance of developed and developing countries all over the world on oil as a source of energy. This reliance, in turn, hands enormous heft to the corporate oil sector (Allen 2012), including companies like Eni and Shell — power that has not been exercised to the advantage of the Nigerian people.

Together, government corruption and indifference to the needs of its people have produced weak public services, leaving whole populations vulnerable to further harm (Green & Ward 2017). Fuel shortages and blackouts occur frequently in Nigeria (Koos & Pierskalla 2016). Inadequate management of oil spills (which are caused by both the legal oil industry and illicit bunkering) has seen depletion of biodiversity — and so the destruction of traditional livelihoods based on fishing and agriculture (Allen 2013; UNEP 2011). In their study of corporate social responsibility initiatives in Nigeria, Uduji, Okolo-Obasi, and Asongu (2019) link such decline in traditional livelihoods (and the resulting high rates of unemployment) to the prevalence of human trafficking in the Niger Delta region. Unemployment and poverty leave individuals vulnerable to trafficking both within and beyond Nigeria, with the incidence in Nigeria's oil producing regions among the highest in the country (ibid.). Organised, transnational networks traffic Nigerian children and young people primarily for prostitution, pornography, domestic servitude, street trading, armed conflict, and ritual killings (ibid.; Ogunniran 2017). This toxic knock-on effect of oil bunkering extends tentacles far into the wider world: the principal trafficking destinations include Gabon, Niger, Cameroon, Benin, Italy, Spain, and Saudi Arabia (Uduji, Okolo-Obasi & Asongu 2019; Ogunniran 2017).

There are also direct toxic effects at home. Exposure to crude, through oil spills, is carcinogenic, causes respiratory and other illnesses, and has resulted in a reduction in household food security of 60% – as assessed using the Cornell-Radimer scale (Ordinioha & Brisibe 2013, pp. 12-13). Under Nigeria's Oil Pipeline Act (1990), oil spills not attributable to the legal industry

do not attract compensation (including 'material relief' and medical care) for suffering populations in areas affected by bunkering (ibid., p. 14). This speaks to the kind of 'moral indifference' that, according to Pemberton (2004, p. 82), underpins the political elite's perpetuation of its subjects' suffering. Unlike the tools of traditional criminology, therefore, a social harm perspective can capture the denial of the fulfilment of human needs as a multidirectional web of interactions that are continuously made, remade, and reinforced.

Finally, a social harm perspective can help understand how 'the language of crime' operates (Copson 2018, p. 49). Authors, including Katsouris and Sayne (2013, iii, iv), use the vocabulary of '"theft" and "steal[ing]"' to refer to oil bunkering. This discourse draws on the Nigerian state's categorisation of bunkering as illegal. Whilst its illicit status is a fact, that discourse of illegality eclipses — and even disavows — alternative narratives: Delta Nigerians may see oil bunkering and artisanal refining as a legitimate economic activity for self-betterment (Naanen 2019). Equally, they may view themselves as marginalised and excluded from the prosperity bestowed by the legitimate oil economy (ibid.). Indeed, the Land Use Decree (1978) stripped local communities of any ownership rights to oil (Allen 2013). Bunkering may therefore be experienced as an act of reclamation, by the community, of the natural resources in its land (Naanen 2019). As Pemberton (2004) suggests, the language of crime can constrict the societal imaginary, so that only those harms delimited by the official criminal justice system are conceivable. Such language, in turn, reaffirms that system's 'moral hierarchy', whereby intentional acts are punished over moral 'indifference' (ibid., p. 82). Effectively, the language of crime is only a reliable source of information about itself. In this case, the validity of the language of theft both relies on and reinforces interpretations of ownership as resting with the Nigerian Government, as well as with the interests to whom that Government grants extraction rights.

Further research might consider, in depth, the network of international actors that enables bunkered oil to travel overseas; environmental degradation in the Delta; insurgent violence; and the relationship between licit multi-national oil corporations, operating in Nigeria, and illicit oil bunkering. Overall, a social harm perspective can enrich traditional criminological approaches by capturing the role of social and economic structures in the perpetuation of suffering and harm, an ongoing process that may be legitimated by 'the language of crime' (Copson 2018, p. 49). In the case of Nigeria, this conceptual alignment may be a necessary key in any attempts to unlock and

resolve a deep malaise, so institutionalised that it has produced a vicious symbiosis between harmer and harmed.

References

Agnew, R 2012, 'Reflection on "A Revised Strain Theory of Delinquency"', *Social Forces,* vol. 91, no. 1, pp. 33-38, DOI 10.1093/sf/sos117.

Allen, F 2012, 'The Enemy Within: Oil in the Niger Delta', *World Policy Journal,* vol. 29, no. 4, pp. 46-53, DOI 10.1177/0740277512470928.

Baumüller, H, Donnelly, E, Vines, A & Weimer, M 2011, 'The Effects of Oil Companies' Activities on the Environment, Health and Development in Sub-Saharan Africa', European Parliament Policy Department, viewed 15 October 2019, <www.chathamhouse.org/sites/default/files/0811ep_report_0.pdf>.

Burgis, T 2015, *The Looting Machine: Warlords, Tycoons, Smugglers and the Systematic Theft of Africa's Wealth*, William Collins, London.

Copson, L 2018, 'Beyond "Criminology vs. Zemiology": Reconciling Crime with Social Harm' in A Boukli & J Kotzé (eds.) *Zemiology: Reconnecting Crime and Social Harm.* Springer International Publishing, Cham, pp. 33-56.

Hillyard, P & Tombs, S 2017, 'Social Harm and Zemiology' in A Liebling & S Maruna (eds.) *The Oxford Handbook of Criminology.* Oxford University Press, Oxford, pp. 284-305.

Katsouris, C & Sayne, A 2013, 'Nigeria's Criminal Crude: International Options to Combat the Export of Stolen Oil', *Chatham House*, viewed 22 October 2019, <www.chathamhouse.org/sites/default/files/public/Research/Africa/0913pr_nigeriaoil.pdf>.

Koos, C & Pierskalla, J 2016, 'The Effects of Oil Production and Ethnic Representation on Violent Conflict in Nigeria: A Mixed-Methods Approach', *Terrorism and Political Violence,* vol. 28, no. 5, pp. 888-911, DOI 10.1080/09546553.2014.962021.

Le Billon, P 2005, 'The Resource Curse', *The Adelphi Papers*, vol. 45, no. 373, pp. 11-27, DOI 10.1080/05679320500129037.

Naanen, B 2019, 'When Extractive Governance Fails: Oil Theft as Resistance in Nigeria', *Extractive Industries & Society,* vol. 6, no. 3, pp. 702-710, DOI 10.1016/j.exis.2019.03.019.

Ogguniran, I 2017, 'Forward Looking or Backward Stepping: Evaluating Child Protection from Sexual Exploitation in Nigeria', *Journal of Human Trafficking*, vol. 3, no. 3, pp. 167-181, DOI 10.1080/23322705.2016.1146519.

Ordinioha, B & Brisibe, S 2013, 'The Human Health Implications of Crude Oil Spills in the Niger Delta, Nigeria: An Interpretation of Published Studies', *Nigerian Medical Journal*, vol. 54, no. 1, pp. 334-354, DOI 10.4103/0300-1652.108887.

Pemberton, S 2004, 'A Theory of Moral Indifference: Understanding the Production of Harm by Capitalist Society' in P Hillyard, C Pantazis, S Tombs & D Gordon (eds.) *Beyond Criminology: Taking Harm Seriously.* Pluto Press, London/Ann Arbor, pp. 67-83.

Tifft, L & Sullivan, D 2001, 'A Needs Based Social Harm Definition of Crime' in S Henry & M Lanier (eds.) *What is Crime? Controversies Over the Nature of Crime and What to do About it.* Rowman & Littlefield, Oxford.

Uduji, J, Okolo-Obasi, E & Asongu, S 2019, 'Corporate Social Responsibility in Nigeria and Multinational Corporations in the Fight Against Human Trafficking in Oil-producing Communities', *Local Environment*, vol. 24, no. 12, pp. 1097-1118, DOI 10.2139/ssrn.3470614.

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Can and should nuclear weapons be fully abolished?

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Nuclear weapons are weapons of mass destruction, and as such differ from regular weapons in the magnitude of their destructive power and reach. Nuclear explosions may unleash a thousand (potentially million) times more destructive power than conventional weapons (Siracusa 2008, p. 21). This is estimated based on the sheer magnitude of their impact, the expanse of their destructive power as well as their long-term effects. Nuclear weapons have the potential to destroy entire cities and yet, our preconceived idea about them is that they are a key feature of national and international security. This seems rather counterintuitive. In this commentary, I will establish the rationale behind our moral responsibility to abolish nuclear weapons, whilst arguing that the transition to a nuclear-weapons free world is not a realistic outcome. I will highlight how nuclear weapons are inefficient in guaranteeing security, especially given the possibility of human and technical errors occurring. Under a realist lens of human nature, presupposed conflict is a likely scenario. As such, nuclear weapons would serve as a deterrent to prevent said conflicts. Nuclear weapons cannot be un-invented', and with the possibility that civilians might misuse nuclear energy, abolishing these weapons becomes unfeasible (Bourne 2016). It is up to states to make the decision of whether the world can become non-nuclear, which does not seem currently likely.

First, we must look at the question of whether nuclear weapons should be fully abolished or not. The term ‘should’ implies a sense of morality and practicality, as opposed to a question of

possibility. It does not ask us if we can eliminate nuclear weapons, rather it asks if it is the right thing to do. A key argument against the abolishment of nuclear weapons is that of nuclear deterrence and its benefits. Deterrence, as defined by George and Smoke (1974), is 'simply the persuasion of one's opponent that the costs and/or risks of a given course of action […] outweigh its benefits' (cited in Wilson 2008, p. 422). The main assumption here is that nuclear deterrence works, since any incoming/imminent attack on a nuclear state would result in nuclear retaliation. The resulting tit-for-tat moves lead to nuclear warfare and fundamental devastation. This would imply not only damage to architecture, cities or countries, but also great environmental repercussions (Doyle 2013). The most poignant example of the deterrent capability of nuclear weapons is the Cold War. Due to the fear of Mutually Assured Destruction (MAD) between the United States (US) and the Soviet Union (USSR), the two countries were disincentivised to attack each other despite frequent provocations. MAD was a doctrine of international security, in which the use of nuclear weapons by one nation against another could result in the complete annihilation of all parties involved. The shadow of nuclear retaliation and subsequent nuclear war deterred the two superpowers from attacking one another. Interestingly though, when we look at the Anti-Ballistic Missile Treaty, we can observe that MAD was not necessarily a naturally occurring phenomenon. The treaty was born out of a discrepancy between the US and USSR anti-ballistic missile (ABM) capabilities. In essence, the USSR developed ABM systems which allowed them to intercept potential US nuclear missiles and therefore fend off an attack; much to the dismay of the US which was lacking behind in ABM development (Grynaviski 2010). Amid Soviet uncertainty regarding the potency of US ABM systems, US and Soviet representatives negotiated a limit on these defensive capabilities. With limited defence, destruction was truly mutually assured. The history of the ABM treaty shows that MAD is not inherent to nuclear proliferation and required an institutionalised legal framework (Yoo 2001). In other words, MAD needed to be constructed as opposed to being a natural consequence of nuclear weapons proliferation.

Even if nuclear weapons had an intrinsic deterrent capacity, deterrence is not necessarily as effective as initially perceived. Deterrence is assumed to be effective because of the prevalent notion that the safety of civilians influences military campaigns (Wilson 2008). However, if we look at the bombings on civilians during the Second World War (WWII), we can observe that neither Germany nor Britain were ever inclined to surrender to protect their people. Bombing campaigns shifted their targets from soldiers and military infrastructure to civilian infrastructure

(ibid.). The assumption that military decisions are invariably influenced by civilian casualties is therefore flawed. Of course, it is difficult to compare conventional deterrence such as the WWII example with nuclear deterrence. Conventional weapons during WWII were significantly less destructive than nuclear weapons during the Cold War. As such, it could be argued that given the much larger scale of the damage potentially caused by a nuclear weapon, they would be more likely to facilitate deterrence. However, upon examining the case of Japan, it is unclear as to whether it was the nuclear bombs (which were the climax of an already long-lasting bombing campaign on Japanese cities) or the declaration of war from the Soviet Union that incited surrender (ibid.). Tying Japan's decision to surrender to the destruction of Hiroshima and Nagasaki is therefore a weak link. Instead, Japan's surrender is more likely related to an array of factors such as the improbability of meaningful military gains considering the surrender of Japan's allies. All of this suggests that nuclear attacks on civilians do not necessarily affect military morale nor do they seem to matter much to heads of state. If this is the case, it is safe to assume that deterrence is not guaranteed to be successful, therefore the primary purpose of nuclear weapons is eliminated. If nuclear weapons no longer have a purpose, then they should be abolished as they become futile tools.

I will now examine the role of human and technical error, in the argument for nuclear weapon abolishment this factor supports the argument for abolishment. In their work, Lewis et al. (1995) examine 13 cases of 'near misses,' in which nuclear weapons were almost launched as a result of misunderstandings, miscommunications, and technical failures. Notable examples include the 1962 Operation Anadyr failure, the 1980 NORAD faulty computer chip case, and the 1991 Kargil Crisis. A detailed account of these events can be found in Lewis et al.'s (ibid.) study. These cases have a crucial commonality: they attest to how nuclear catastrophes can still occur due to factors outside of political control or military strategy. A weapon can be detonated either accidentally or deliberately, due to miscommunication. Although there are many safeguards in place to reduce this risk, it is impossible to eliminate the factor of human and technical error. Therefore, it is impossible to totally eradicate the risk of accidental nuclear launches which may be misinterpreted as attacks. This is another moral justification for abolishment. The consequences that result from human and technical error would arguably be more catastrophic than any other conventional weapon.

I would like to point out that, even if nuclear weapons are assured by states to be used solely for the purpose of deterrence, there is no guarantee that they will not be used when faced with an emergency (Doyle 2013). The realist school of political thought has been the most influential when informing nuclear doctrine, and as such it is important to examine where it stands regarding nuclear weapons (Bull 1968). The realist perspective considers the state to be the principal actor in international relations. Furthermore, the main focus of international politics is state power through which states achieve security. Realist thought also suggests that it is within human nature to be prone to conflict (Morgenthau 1948, p. 17). If this is the case, one could assume that it is perfectly within the realm of human nature to utilise weapons of mass destruction in order to gain power or security, especially if the state is perceived to be threatened. As alluded to earlier, proponents of nuclear weapons have suggested that rational states would be deterred from utilising these weapons in fear of retaliation. This could be misleading, as we have seen in numerous occasions how nuclear states have continued to use their military might against other nuclear states, which could potentially have led to large-scale conflict (Doyle 2013). Doyle (ibid.) highlights how nuclear weapons did not prevent the North Atlantic Treaty Organization (NATO) from using military force in Kosovo for example, or Egypt and Syria from attacking Israel. In other words, what starts as a conventional war may escalate into nuclear warfare. Taking this into account, one must conclude that nuclear weapons pose too great a danger in a realist world and as such must be abolished.

I will now tackle the second half of the question, 'can nuclear weapons be fully abolished?' This is a question of possibility.

The possibility of nuclear disarmament is easily countered by the idea that nuclear weapons cannot cease to exist, as they cannot be 'un-invented' (Bourne 2016). This is an intuitive assumption which implies invention is irreversible (ibid.). Invention is 'the building of a pathway, assembling a unity of action from disparate elements' (ibid., p. 14). Therefore, un-invention must be the reversal and elimination of this process. Due to the scope of this essay, I will only focus on tacit knowledge with reference to un-invention and the counter argument for it.

It is likely that if disarmament were to take place, the knowledge of how to build nuclear weapons would prevail. This implies that said knowledge is tacit as opposed to explicit. Explicit knowledge can be recorded and stored in the form of symbols and words, whereas tacit knowledge

is gained from practice and experience (MacKenzie & Spinardi 1995). Tacit knowledge is an important part of invention, especially in the case of nuclear weapons, as seen in MacKenzie and Spinardi's work (1995). It could be then argued that if experimentation was halted and no one continued to participate in these investigations, this practical knowledge would be lost over time. However, this assumption is inaccurate. Although tacit knowledge is important, it would merely take longer to obtain this knowledge through repetition of practice. It would still be achievable as it was the first time, meaning that un-invention cannot have taken place. In fact, the idea of un-invention seems largely counter-intuitive. Once an idea, process, or creation has come to be, the process of invention cannot be reversed. In simple terms, even if nuclear weapons were to be eliminated and the knowledge on how to create them had ceased to exist, the fact remains that these weapons had once been invented and therefore existed. Re-invention is thus a more likely scenario, whereby nuclear weapons technology could perhaps gain a new and more peaceful purpose (Bourne 2016).

Nuclear disarmament promises to come with iron-clad verification processes, to ensure no state is utilising or building nuclear weapons. This should in theory placate fears of states producing these weapons illegally. However, taking into consideration the case of Iran and the ambiguity of their nuclear programme, we can understand how verification becomes complicated. Iran – along with other states – utilises nuclear reactors to produce energy. This in itself is not a problem, however the materials used in nuclear reactors and the materials produced by them have the capability to power nuclear bombs (Barzashka & Oelrich 2012). While the Non-Proliferation Treaty (NPT) prescribes a monitoring system to ensure nuclear material is used for energy purposes exclusively, it does not provide any method of actively stopping or preventing these materials being used as weapons (ibid.). Therefore, there is always the possibility for nuclear energy producing states to accrue nuclear material, and subsequently create a nuclear weapon illegally before the monitoring system detects it. This is because work on nuclear weapons can occur in computers or small-scale laboratories which are capable of evading national surveillance (ibid.). This situation is not unique to Iran, and so we must conclude that for as long as nuclear materials are used for energy, there will always be the possibility of a nuclear bomb being built. This danger makes it highly unlikely that nuclear abolishment can occur, as states will not be incentivised to give up their own nuclear weapons as long as nuclear energy producing states may have weapons on their own.

Finally, there has been an increase in the number of non-governmental initiatives and appeals made to the abolishment of nuclear weapons and states themselves have begun to show a willingness to partake in this. As seen in Granoff's work (2009), Germany's Foreign Minister Guido Westerwelle, appealed for the removal of all NATO nuclear weapons from German soil. He suggested that these weapons were outdated relics of the Cold War and that by eliminating them, they would set a precedent for Europe to follow suit (ibid.). It is also implied that a US led nuclear disarmament initiative would be enthusiastically followed by other states. This is also the case in Japan, suggesting there is widespread agreement on the importance of nuclear disarmament. In 2017, a majority of United Nations member states voted for a proposed treaty agreeing to ban nuclear weapons. This would imply a growing awareness of the detrimental effects that the possession of nuclear weapons entails, and in an ideal world leading to the eventual abolishment thereof. However, the current political situation regarding nuclear weapons suggests otherwise. Three states; namely the United States, the United Kingdom, and France have refused to sign this treaty and have published whitepapers stating that they refuse to agree to these terms, in order to ensure national and public safety (United States Mission to the United Nations 2017). This would suggest that although some states are keen on the idea of nuclear disarmament, certain key, powerful nuclear states are not since nuclear weapons are viewed as essential to their national security. It is impossible to ban nuclear weapons if there is no consensus among states, particularly powerful states such as those mentioned.

To conclude, this paper has demonstrated that nuclear weapons should be abolished as their deterrent capability is put into question by the evidence provided. Furthermore, they pose much too high a risk when human and technical errors are acknowledged If their primary purpose of deterrence does not work, if they are susceptible to the aforementioned errors, and human nature cannot be trusted, then they pose more of a risk than a safeguard. However, there is little evidence to suggest that abolishing nuclear weapons is likely in practical terms due to; the impossibility to un-invent these weapons, the issue of certain verification in states utilising nuclear energy, and importantly the unwillingness of powerful states to give up their nuclear weapons. In short, although there is a strong rationale for nuclear weapons to be abolished, in practice it is a highly unlikely scenario. Therefore, through a realist lens this will not happen, certainly not in the foreseeable future.

References

Barzashka, I & Oelrich, I 2012, 'Iran and Nuclear Ambiguity', *Cambridge Review of International Affairs,* vol. 25, no. 1, pp. 1-26, DOI 10.1080/09557571.2012.656457.

Bourne, M 2016, 'Invention and Uninvention in Nuclear Weapons Politics', *Critical Studies on Security,* vol. 4, no.1, pp. 6-23, DOI 10.1080/21624887.2015.1106427.

Bull, H 1968, 'Strategic Studies and Its Critics', *World Politics,* vol. 20, no. 4, pp. 593–605, DOI 10.2307/2009685.

Doyle, JE 2013, 'Why Eliminate Nuclear Weapons?', *Survival: Global Politics and Strategy,* vol. 4, no. 1, pp. 7-34, DOI 10.1080/00396338.2013.767402.

Granoff, J 2009, 'The Process of Zero', *World Policy Journal,* vol. 26, no. 4, pp. 85-93, DOI 10.1162/wopj.2010.26.4.85.

Grynaviski, E 2010, 'Necessary Illusions: Misperception, Cooperation, and the Anti-Ballistic Missile Treaty', *Security Studies*, vol. 19, no. 3, pp. 376-406, DOI 10.1080/09636412.2010.503512.

Lewis, P, Williams, H, Pelopidas, B & Aghlani, S 2014, *Too Close for Comfort, Cases of Nuclear Use and Options for Policy*, Chatham House, London.

MacKenzie, D & Spinardi, G 1995, 'Tacit Knowledge, Weapons Design, and the Uninvention of Nuclear Weapons', *American Journal of Sociology,* vol. 101, no. 1, pp. 44-99, DOI 10.1086/230699.

Morgenthau, HJ 1948, *Politics Among Nations: The Struggle for Power and Peace*, Alfred A. Knopf, New York.

Siracusa, JM 2008, *Nuclear Weapons: A very short Introduction*, Oxford University Press, Oxford.

United States Mission to the United States 2017, 'Joint Press Statement from the Permanent Representatives to the United Nations of the United States, United Kingdom, and France Following the Adoption', accessed 17 August 2020, <https://usun.usmission.gov/joint-press-statement-from-the-permanent-representatives-to-the-united-nations-of-the-united-states-united-kingdom-and-france-following-the-adoption/>.

Wilson, W 2008, 'The Myth of Nuclear Deterrence', *The Non-Proliferation Review,* vol. 15, no. 3, pp. 421-439, DOI 10.1080/10736700802407101.

Yoo, J 2001, 'Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation', *California Law Review,* vol. 89, no. 3, pp. 851-916, DOI 10.2307/3481184.

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Competing Exceptionalisms:

A Commentary on Garland's Characterisation of American Criminal Justice

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In 2020, David Garland's article *Penal controls and social controls: Toward a theory of American penal exceptionalism* proposed a framework to categorise and explain American penal exceptionalism within the sociology of punishment. The following commentary will firstly situate Garland's work in the United States (US), then show its applicability by relating it to Norwegian penal exceptionalism. Finally, an extension of Garland's framework will be proposed: integrating the role of correctional officers (commonly referred to as prison guards) and correctional officer training as a proxy through which exceptionalism can be observed.

American penal exceptionalism is usually framed in an outcome-based way, taking imprisonment rates as a measurement to conclude that the 'rate of imprisonment and size of [the] prison population […] is markedly above the historical and comparative norm for societies of this type' (ed. Garland 2001, p. 2). However, it is important to note that 'American authorities do not just impose more punishment: they also punish in a distinctive way' (Garland 2020, p. 4). Garland convincingly claims American penality is exceptional in that it relies overwhelmingly on one mode of penal action: penal control. Drawing from Foucault's (1977) notion of penal 'tactics', Garland establishes a sociological analysis of the overlooked 'action dimension' by identifying four penal action modes: penal afflictions ('punishments that wound offenders' bodies'), penal levies ('punishments that appropriate offenders' resources'), penal controls ('punishments that impose restraints on offenders'), and penal assistance ('punishments that provide resources to offenders') (ibid., p. 6). A variety of these are typically

used together. In Western Europe, it is common for penal levies, control, and assistance to be used conjunctively (ibid.). Different penological *aims* (such as retribution and rehabilitation) can also fall within the same type of penal action. Overreliance on penal control is exemplified by extreme sentencing practices (such as life without parole), severe austerity in prisons (including practices of solitary confinement), and restrictive impositions on supervisee behaviors (ibid.).

After this sociological analysis, Garland works backwards to establish which distinctiveness in US systems allows for this exceptional overuse of penal controls. He uncovers two causal links between US penal controls and US political economy. Firstly, Garland establishes an indirect one, whereby processes of social control — present in every society and mediated through social structures such as labor markets, schools, and families — are said to be weakened, leading to heightened social disorder (ibid.). Garland notes that 'interpersonal violence is a product of social and economic structures, mediated by patterns of social control, and enacted in specific social situations by particular individuals': increased violence is therefore attributable to a breakdown of social control patterns (ibid., p. 12). This weakening is explained by the failure of American institutions to contend with de-industrialisation (the decline in urban manufacturing jobs and subsequent urban exodus of middle-income families), allowing for an exorbitant rise in crime compared to Western European counterparts. Crucially, Garland argues that social controls are 'extended by market exchanges and social networks; reinforced by the social protections and services of the welfare state; and backed up, in the last resort, by the remedial controls of criminal law' (ibid., p. 13). Hyper-liberal, *laissez-faire* American political economy ensures that risks are shouldered by individuals exposed to pure market forces. As a result, it is far less likely that communities (where people are systemically forced to work several jobs, vulnerable to unemployment, and exposed to a lack of social mobility, addiction, and homelessness, along with a plethora of other social problems), faced with an unresponsive state, will be able to raise well-socialised children (ibid.). American political economy therefore leads to a particularly criminogenic society, reactively remediated by penal control.

Secondly, Garland establishes a direct causal link between penal controls and US political economy: 'the limited capacities of a minimalist welfare state' (ibid., p. 3). American federal and state governments respond to social instability and disorder with penal control measures instead of attempting to use long-term social policy. This, Garland argues, is due to relatively small state capacity (ibid., p. 11). Various American afflictions are to blame: aversion

to taxation, Republican resistance to state spending, the extensive division of power that allows for 'vetoing controversial legislation', and widespread mistrust of welfare and ex-criminals, all contribute to a systematic rejection of *New Deal* and *Great Society* 'flirtations' with social democracy (ibid., p. 16). Garland maintains that 'America's ultra-liberal political economy has produced a welfare state that is much less expansive and much less enabling' (ibid., p.17). Therefore, there is simply less space for responses outside that of penal control. In other words, response is chronically *post-facto* (ibid., p. 16); resorting to 'soft power', like penal assistance (i.e. social workers, treatment programs, community initiatives), is not possible due to the lack of access to and creation of soft power infrastructure and institutions.

This is an attractive theoretical framework. As Garland suggests (ibid., p. 19), it could be applied comparatively to Norway, whose prison conditions, low rates of incarceration, and low recidivism contribute to the term 'Scandinavian [penal] exceptionalism' (Pratt 2008). The 'exceptional conditions in most Scandinavian prisons, while not eliminating the pains of imprisonment, must surely ease them' (ibid., p. 124).

It can be said that Norway favours penal assistance over penal control, even when the two are used together. Norwegian prisons are chiefly ruled by two principles: the 'principle of normality' and the 'progression towards reintegration' (Kriminalomsorgen [Norwegian Correctional Service] 2020). Prison sentences are also far shorter in Norway; '[t]he longest prison sentence […] is 21 years[1] [and] the average sentence is around 8 months. More than 60% of unconditional prison sentences are up to 3 months, and almost 90% [are] less than a year' (ibid.). Norway is also comparatively less restrictive of prisoner movement than the US, going as far as having 'open prisons', housing prisoners with lesser offenses — like drunk driving — and those coming from closed prisons who are at the end of their sentence as a means to prepare them for release (Pratt 2008).

Following Garland's framework, this different penal exceptionalism in Norway, researched by John Pratt among others, can be explained by its political economy indirectly and directly due to the specificities of its welfare state. Pratt (2008) highlights that social control is highly developed in Norway. The structures of family, school, and labour markets enable social control to be highly active and effective. Humanistic values are intrinsic to Scandinavian identity. There is an 'emphasis on collective interest'; 'trust, self-regulation and cooperation' ensure that this societally enforced norm is created and respected (ibid., p. 123, 125). Strict cultural egalitarianism 'seeks to bring about rule compliance through inclusiveness

and solidarity, giving emphasis to everything that visitors [to collective spaces] are *allowed to do*, instead of the punishments that will follow for rule breaking' (ibid.): there can be 'no dangerous "other"' (ibid., p. 130). Class divisions are negligible. Whilst capital punishments such as the death penalty have historically been said to represent a desire by the ruling class to exert its supreme authority, minimal class distinctions in Norway mean 'the spectacle of punishment could serve no such function' (ibid., p. 129). Norway's social democratic political economy enables the strengthening of this social control, with emphasis placed on Keynesian orthodox economic policies which used increased state spending to create jobs and guarantee their protection (ibid.). This ensures the structures preserving social control remain in place, with minimal disruptions to family, school and labour markets; it also ensures the presence of a responsive state to contend with any emerging social disruption. Therefore, crime itself is low as Norwegian society self-regulates, and little resort to penal control is necessary for public security.

Following Garland, Norway's reliance on penal assistance can also be directly causally linked to the development of the Scandinavian welfare state, which led to the institutionalisation of this characteristic egalitarianism. Security is instead ensured through the workings of the welfare state. Pratt emphasises that Norway's political structure is conducive to this. Due to 'unicameral parliaments', legislation is unlikely to be delayed or 'watered down'; 'proportional representation necessitated a politics of consensus'; there is a strong preference for deepening welfare and increased taxation; and prisoners are largely viewed as welfare recipients, the stigma for which is non-existent (ibid., p. 128). As a result, Norway has an exceptionally large state capacity unburdened by its unicameral parliamentary system; it is believed that 'welfare reforms can bring relief from crime', and it is ensured that tax funds exist for this purpose (ibid., p. 130). Norway's expansive, robust welfare state ensures there is firstly the drive and funds for penal assistance, and secondly that there are alternatives to penal control that address the roots of social problems. Applying Garland's framework helps explain the nature and reason behind Norway's penal exceptionalism.

I will now propose a possible extension of Garland's research by integrating the correctional officer as an archetype of penal exceptionalism. Correctional officers have significant influence over prison cultures (Johnsen, Granheim & Helgesen 2011). Garland's structure can be shown clearly at a micro-level through an analysis of the role of correctional officer. He mentions that 'probation and parole officers in the US are routinely armed and, unlike their European counterparts, bear little resemblance to social workers' as an example of

the extreme focus on violent penal control that constructs America's exceptional penality (Garland 2020, p. 4). This establishes a link between modes of penal control and the importance of correctional officers as actors, an important facet of modes of penal action that I believe Garland neglects to fully delve into.

Garland frames his typology 'within a "social control" perspective that highlights the collective processes through which social order is routinely reproduced and views them as the context in which state policy operates' (ibid., p. 2). Penal control, however, is ultimately reproduced through and by the figure of the correctional officer. Modes of penal action are 'the concrete practices by which penal actors operationalize punishments and contrive to produce their intended effects': correctional officers, more than just (re)producing penal control, are archetypes of this control (ibid., p. 6). This is because correctional officers are the transmission of forms of penal action that are most hyper-present for prisoners and how they experience punishment in the penal system. This highlights the importance of correctional officer training. The workings of state mechanisms, through which penal control is enforced, is shown in the concept of setting out to shape the 'ideal' correctional officer -- 'the right to punish for violations of law is within the core of a state's perpetuous monopoly of force, and to achieve compliance with the criminal justice system, the state uses or threatens force against inmates. Most visibly, [US] prisons have watch towers where armed guards literally threaten inmates with death if they try to escape' (Leider 2018, p. 988). It is therefore plausible that correctional officer training can show modes of penal action, both in the training's conception, and in the symbolic importance of the correctional officer as keeper of penal order. Exceptionalism is too abstract to usefully measure, but correctional officer training is a valid proxy for modes of penal action: it reflects a society's conceptualisation of punishment.

A concise example of the usefulness of integrating the concept of the correctional officer more closely with Garland's framework is a comparison of correctional officer training in the US and Norway. In the US, length of training varies from state to state, but is measured on average in terms of weeks, not years (New York State Department of Civil Service 2020). Training requirements largely focus on the 'Physical Abilities Test [which includes] the ability to "see a human figure at a distance of one quarter mile or a target at 250 yards"' (Federal Bureau of Prisons 2020), the assumption being that prisoners will attempt to escape and must be brought under harsh physical control. This is a translation of *laissez-faire* policies into the micro-level of prisons: mindsets of competition are encouraged as prisoners are painted as inherently self-interested, wishing only to cause disruption and, ultimately, harm. US

correctional officers, trained in the 'use [of] firearms; [ability to] perform self-defense movements, lift, drag, and carry objects' (ibid.), inevitably use force to exert control over this constant, perceived unsafety, as the use of force is the only avenue of suppression available within the penal system and the neoliberal state. Empathy and forming connections with inmates are not central in training. This shows the workings of penal control through its ideal perceived arbiter, the most direct form of penal control experienced by prisoners in the US. In contrast, Norway's training program for correctional officers is two years long and more holistic, entailing 'practical […] immersion in complex problem-solving scenarios and time spent in training prisons' as well as 'purely theoretical' training (Høidal 2018, p. 65; Strandberg 2010, p. 76). Crucial fields of training are 'security and safety [...] and social work and reintegration' (Bruhn, Nylander & Johnsen 2017, p. 73). Creating a high-trust prison environment is prioritised, and 'security, safety, control and order, as well as rehabilitative work, are achieved most successfully through positive officer–prisoner relationships' (Johnsen, Granheim & Helgesen 2011, p. 517). Norway's guard training reflects the country's reliance on penal assistance, and the socially embedded role of the correctional officer as a figure that translates policy into direct impact.

To conclude, Garland's analysis is a timely one. Following the Minneapolis Police Department's murder of George Floyd on 25 May 2020 igniting nationwide protests and riots in the US, an organised push towards defunding police departments and funding a more diverse welfare structure comprising social workers and community policing schemes is underway. Due to the connectivity between policing and correctional systems and their operationalisation of control, this shift in thinking away from penal control could make its way from concept to application in policing and then the prison system. Only the creation of an American welfare state could reform the mentality of punishment embedded in American society.

Notes

1. There is one exception to this general rule. Norway's '[…] Penal Code provides for a 30-year maximum sentence for crimes related to genocide, crimes against humanity or some other war crimes' (Kriminalomsorgen, 2020)

References

Bruhn, A, Nylander, PÅ & Johnsen, B 2017, 'From prison guards to... what? Occupational development of prison officers in Sweden and Norway', J*ournal of Scandinavian Studies in Criminology and Crime Prevention,* vol. 18, no. 1, pp. 68-83, viewed 16 July 2020, DOI 10.1080/14043858.2016.1260331.

Federal Bureau of Prisons 2020, *Hiring Process,* viewed 10 June 2020, <https://www.bop.gov/jobs/hiring_process.jsp>.

Garland, D (ed.) 2001, *Mass Imprisonment: Social Causes and Consequences,* Sage Publications, London.

Garland, D 2020, 'Penal controls and social controls: Toward a theory of American penal exceptionalism', *Punishment & Society*, vol. 22, no. 3, pp. 1-32, DOI 10.1177/1462474519881992.

Høidal, A 2018, 'Normality behind the Walls', *Federal Sentencing Reporter*, vol. 31, no. 1, pp. 58-66, DOI 10.1525/fsr.2018.31.1.58.

Johnsen, B, Granheim, PK & Helgesen, J 2011, 'Exceptional prison conditions and the quality of prison life: Prison size and prison culture in Norwegian closed prisons', *European Journal of Criminology*, vol. 8, no. 6, pp. 515-529, DOI 10.1177/1477370811413819.

Kriminalomsorgen [Norwegian Correctional Service] 2020, *About the Norwegian Correctional Service*, viewed 10 June 2020, <https://www.kriminalomsorgen.no/index.php?cat=265199>.

Leider, R 2018, 'Taming Self-Defense: Using Deadly Force to Prevent Escapes', *Florida Law Review*, vol. 70, no. 5, pp. 971-1018, viewed 16 July 2020, <http://www.floridalawreview.com/wp-content/uploads/Leider.pdf>.

New York State Department of Civil Service 2020, *Correction Officer Trainee*, viewed 24 July 2020, <https://doccs.ny.gov/employment/correction-officer-trainee>.

Pratt, J 2008, 'Scandinavian Exceptionalism in an Era of Penal Excess: Part I: The Nature and Roots of Scandinavian Exceptionalism', *The British Journal of Criminology*, vol. 48, no. 1, pp. 119-137, DOI 10.1093/bjc/azm072.

Strandberg, K 2010, 'The Norway Prison System: A look from the inside', *Corrections Forum*, vol. 19, no. 5, pp. 73-77, viewed 22 July 2020, <http://search.ebscohost.com.ezproxy.is.ed.ac.uk/login.aspx?direct=true&db=sxi&AN=56933197&site=ehost-live>.

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The Proliferation of Definitions of Terrorism in International Law:

A Story of Failed Symbolism and Premature Universal Jurisdiction

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Abstract

This paper analyses the proliferation of definitions of terrorism in international law and across national jurisdictions. On the one hand, this paper argues that terrorism legislation mainly pursues a symbolic function in international and criminal law by constructing the common enemy to the community of states. However, the fundamental disagreement on the nature of terrorism undermines this core function of terrorism legislation because violence becomes relativized by competing definitions of terrorism. On the other hand, this paper highlights how, in the presence of competing legal definitions of terrorism across states, the duty to prosecute or extradite (*aut dedere aut iudicare*) threatens the fundamental principle of foreseeability of criminal accountability (*nullum crimen sine lege certa*). As individuals are held accountable to multiple overlapping jurisdictions, self-determination struggles and legitimate acts in armed conflicts become increasingly criminalised. Therefore, the proliferation of definitions of terrorism in international law and across domestic jurisdictions has the effect of weakening collective action in international law and at the same time strengthening unilateral prosecution of terrorism.

Keywords: Definition of Terrorism; Symbolism; *Aut Dedere Aut Iudicare*; Universal Jurisdiction.

1. Introduction

Hardly any other topic of criminal law is as emotionally loaded as terrorism. Consequently, domestic and international law have both embraced the concept, introducing countermeasures against terrorism. While almost everyone seems to agree that terrorism is 'bad', there is little agreement on what terrorism is. This is exemplified by a statement by the French scholar Begorre-Bret (2006, p. 1987) who claims that 'we must first seek an efficient response, not a precise definition'.

However, the lack of international agreement on a uniform definition of terrorism and the resulting proliferation of competing definitions on the regional and domestic level have adverse consequences for various areas of law and policy. A comprehensive overview of all consequences of the proliferation of the definitions of terrorism is beyond the scope of this paper. Instead, this paper will focus on two consequences of the proliferation of definitions of terrorism in law that have largely been neglected within academic literature.

Firstly, the proliferation of definitions of terrorism in international law has almost unanimously been portrayed as beneficial for states as it allows for flexibility in introducing counterterrorism measures while, at the same time, minimising legal constraints in the enforcement thereof (Acharya 2009, pp. 668-669; Grozdanova 2014, p. 316). Conversely, this paper argues that the proliferation of definitions of terrorism fractures the community of states and erodes the normative foundation of terrorism legislation as the community is unable to construct a common enemy.

Secondly, the delicate interplay between the proliferation of definitions of terrorism across domestic jurisdictions and the principle of *aut dedere aut iudicare* (to extradite or to prosecute) has remained underexplored. This paper emphasizes that the interplay between the different definitions might damage the fundamental principle of *nullum crimen sine lege certa* (no crime without well-defined law).

In this essay, I will first elaborate on the nature of the proliferation of definitions of terrorism in international law and across national jurisdictions. I will then highlight the importance of symbolism in terrorism legislation and explain how the competing definitions of terrorism fracture the international community. Afterwards, I will explain the principle of *aut dedere aut iudicare* and how the interplay between the principle and the proliferation of definitions of

terrorism erodes fundamental principles of criminal law. Consequently, the findings will highlight how states compensate a lack of collective agreement on a definition of terrorism with the unilateral expansion of their criminal jurisdiction, to the detriment of fundamental principles of criminal law.

2. Symbolism and the Power to Define

For a better understanding, I will shortly outline the nature of the proliferation of definitions of terrorism in international law. While there are multiple treaties[1] which enumerate specific terrorist acts on a global level, none of these treaties contain an abstract definition of terrorism. Thus, definitions of terrorism on the global level resemble a sectoral approach that can be freely adjusted to new situations and contexts (Greene 2017, pp. 415-416). With the drafting of the United Nations Draft Comprehensive Convention 2000, there have been efforts to reach an agreement on an abstract definition of terrorism (Saul 2006, pp. 184-185). However, the drafting process ultimately suffered from a stalemate when fundamentally different conceptions of terrorism became apparent among the member-states. On the one hand, certain members wanted to introduce an exclusionary clause for self-determination movements which would have prevented struggles of peoples against colonial and racist regimes and foreign occupiers from falling within the ambit of terrorism (Saul 2005a, p. 78). On the other hand, other members disagreed on the question of whether terrorism can be committed not only by non-state actors but also by armed forces belonging to a state party (ibid., p. 80).

Along with the lack of an abstract definition on the global level, there is a proliferation of different abstract definitions on the regional level. The differences among these regional treaties[2] are striking and go far beyond mere semantics. Finally, the proliferation of international and regional definitions is intensified at the national level with virtually every jurisdiction having its own definition (Di Filippo 2014, p. 10). The extreme proliferation of definitions of terrorism across domestic jurisdictions accelerated with Security Council Resolution 1373 which obliged states to criminalise terrorist conduct but failed to define the concept of terrorism (United Nations Security Council 2001, art. 2(e); Saul 2005b, p. 161). Furthermore, regional conventions add to the proliferation, as states often simply have to 'approximate' the delicts described in the conventions ('Council and European Parliament Directive (EU) 2017/541' 2017, para. 6).

However, some authors claim that the proliferation of definitions of terrorism is largely overstated and that there is in fact a definition of terrorism in customary international law (Cassese 2006, p. 957; Gal-Or 2015, pp. 698-699). Those scholars who accept the existence of a customary definition of terrorism usually point to shared elements that are common to various international and domestic definitions of terrorism (Cassese 2006, p. 957; Gal-Or 2015, pp. 686-687). The Special Tribunal for Lebanon accepted the existence of a customary law definition of terrorism based on shared elements found in various international and domestic definitions (Gillett & Schuster 2011, p. 1007), but some scholars have dismissed the verdict of the tribunal as incomplete and motivated by judicial activism (Verdebout 2014, pp. 725-726). Indeed, an enumerative approach conceals how many definitions form a coherent whole and cannot be dissected. For example, the exclusion of self-determination struggles constitutes a fundamental component of the definition of terrorism for the signatories to the *Convention of the Organisation of the Islamic Conference on Combating International Terrorism* (1999, art. 2). Moreover, in light of the continued failure to reach common ground on the definition of terrorism at the global level (Braber 2016, pp. 41-43), it is hard to see how a customary definition of terrorism could have emerged (Aksenova 2015, pp. 283-284; Ambos 2011, p. 671; Saul 2011, p. 699).

The lack of harmony between the definitions of terrorism at the national and regional levels, and the absence of an abstract definition on the global level has widely been regarded as a failure of international law, as the power to define terrorism is left to states (United Nations Security Council 2001, Resolution 1373, art. 2(e); Grozdanova 2014, p. 308; Margariti 2017, p. 8; Saul 2005b, p. 160; Zeidan 2004, p. 492). Interestingly, no scholars have actually explained why it is unusual for states to have such power to define terrorism, since the power to define criminal conduct is one of the core characteristics of state-sovereignty (Baragwanath 2018, p. 27; Young 2006, p. 100) and a proliferation of definitions across countries is certainly not surprising. However, it might be that terrorism is a unique crime and a proliferation of definitions may have uniquely harmful effects. There are multiple arguments one could intuitively raise to highlight the harmful effects of a proliferation of definitions of terrorism. For example, one could ascertain that it hampers a coordinated response to terrorism (Richards 2014, p. 214; Van den Herik & Schrijver 2013, p. 4) or that it opens the opportunity for states to frame terrorism in terms of war (Martin 2013, p. 647) with the detrimental consequence of establishing a parallel system to criminal law which lacks its procedural safeguards (Wade 2010, p. 416). However, these issues are not unique

to terrorism but are also common for other transnational crimes such as drug trafficking (Orlova & Moore 2005, p. 269). I argue that it is not necessarily terrorism that differs from other crimes, but it is terrorism *legislation* that differs from other criminal legislation. Thus, this section focuses on an entirely different argument that has not received adequate attention: the proliferation of the definitions of terrorism undermines one of the foundational purposes of terrorism legislation, namely its symbolic function.

Terrorism legislation differs from other criminal legislation insofar as it usually does not focus on criminalizing specific harmful acts, since most conduct that is deemed terroristic in nature is already criminalized under domestic law around the world (Fletcher 2006, pp. 895-896; Weigend 2006, pp. 912-913). Saul (2006, p. 25) argues that terrorism is distinct from other crimes because of its intent to instil fear and its political motive. Yet, there is even fundamental disagreement with respect to these two characteristics (Braber 2016, p. 46). Therefore, there is a substantive overlap between terrorism and other crimes such as murder which begs the question: what is the purpose of criminalising terrorism?

One potential answer is that the criminalisation of terrorism serves primarily a symbolic function. The term 'symbolic' as it is used in this paper is neither meant in a derogatory way nor is it intended to imply that such legislation is ineffective or useless. Rather, the term emphasises that the primary purpose of the criminalisation of terrorism is labelling 'the other' or 'the public enemy' (Begorre-Bret 2006, p. 1991; Friedrichs 2006, pp. 87-90; Schmitt 1933, p. 8). While proponents of labelling theory might point out that this is no different from other crimes (Becker 2018, pp. 11-12), it is hardly disputable that the crime of terrorism takes labelling to the extreme (Bryan, Kelly & Templer 2011, pp. 85-86). By criminalising terrorism, the state wants to demonstrate that terrorism constitutes some form of 'other' violence that is more severe than 'normal' violence (Dexter 2012, p. 132). The severity that is ascribed to acts deemed 'terrorist' is also exemplified by the expansive use of surveillance, extraordinary administrative and police powers, as well as the multiplication of precursor offences (Hamilton 2019, pp. 110-117). Therefore, states may expand their powers by defining threats and determining appropriate countermeasures (Wæver 1995, p. 54).

This holds true for both the domestic and the international level. In Resolution 1373, the United Nations Security Council (2001, preamble para. 3) labelled any form of terrorism as a threat

to peace, irrespective of the context it is committed in or its actual impact on international security (Subedi 2002, p. 160; Saul 2005b, pp. 158-159). While domestic terrorism legislation attempts to define a threat to the community within a state, international terrorism legislation aspires to construct a threat to the community of states. Therefore, defining terrorism as a collective threat on the international level attempts to achieve an effect comparable to the goal of domestic terrorism legislation: determining and shaping a common 'enemy'.

A similar logic is exemplified by international criminal laws, where symbolic reasons are regularly invoked as justification for their existence (Aksenova 2017, p. 486; Damaska 2008, pp. 345-347). As Damaska (2008, pp. 345-347) argues, international criminal justice is most persuasive where it seeks to stigmatise inhumane acts and to build a common moral understanding. The label of an international crime such as genocide comes with enormous moral weight attached (Mayroz 2017, pp. 87-88) and arguably justifies humanitarian intervention and the use of force (Simon 2016, p. 164; William & Stewart 2008, p. 110). Therefore, international crimes ultimately serve a discursive function of labelling the 'enemy' to the community of states, and where a common understanding emerges, collective action becomes possible. Likewise, as the main purpose of terrorism legislation rests on symbolism, the effectiveness of labelling the common 'enemy' depends on a shared understanding of what constitutes terrorism.

However, as aforementioned, international law on terrorism lacks a common understanding of what the concept of terrorism entails. Instead, terrorism law is marked by diverging definitions across states and regions. Multiple authors have asserted that the lack of a uniform definition in international law has placed states in a comfortable position of defining terrorism at will (Acharya 2009, pp. 668-669; Grozdanova 2014, p. 316; Richards 2014, pp. 214-215). However, those who claim that the power to define is solely beneficial for states fail to grasp the consequences of the proliferation of definitions on the international level. While the power to define might increase cohesion on the national level (Richards 2014, p. 214), terrorism legislation fails to define the common 'enemy' on the international level and instead relativises violence. If each state defines his enemies as terrorists and these enemies likewise define the condemning state's conduct as terrorism, then violence becomes only a matter of perspective (Begorre-Bret 2006, p. 1994; LeVin 1995, pp. 49-50; Walzer 2001, p. 17). One might very well even ask whether terrorism really exists if there can be no shared understanding of it. However, an even more drastic consequence flowing from the proliferation of definitions of terrorism is the way in which it disbands any hope of a

world without terrorism (Herschinger 2013, p. 195). To develop a common vision of a world without terrorism presupposes a shared understanding of terrorism (ibid., pp. 194-195). The proliferation of definitions reveals that terrorism is a relative concept which in turn prevents the community of states to differentiate themselves from the 'terrorists' (ibid., p. 195). Instead, the community fractures into regional groups where a certain common understanding of terrorism can be found. However, this fragmentation imposes legitimacy costs on states because their counterterrorism measures become driven by competing and contradicting regional political agendas. Thus, the proliferation of definitions of terrorism undermines one of the core purposes of terrorism legislation: to develop a common 'enemy' and a common vision of the international community of eradicating terrorism.

3. Universal Jurisdiction and the Proliferation of Definitions

The conclusion drawn in the previous section has profound consequences for other areas of law. As the proliferation of definitions of terrorism undermines the normative foundation of international terrorism legislation, options for international cooperation become limited. Instead, states opt for an expansion of their unilateral powers. This can best be seen in the progressive inclusion of the principle of *aut dedere aut iudicare* (to extradite or to prosecute) in international (Caligiuri 2018, p. 248), regional,[2] and domestic (Thalmann 2018, pp. 186-199) terrorism legislation. Multiple states apply the principle based on general clauses that give precedence to treaty obligations (ibid., pp. 161-164), even when the domestic terrorism legislation does not explicitly provide for it. *Aut dedere aut iudicare* overlaps with the principle of universal jurisdiction with the difference that universal jurisdiction is permissive and *aut dedere aut iudicare* mandatory (Kolb 2004, p. 253; Thalmann 2018, p. 74). States must amend their legislation to enable prosecution or extradition of alleged terrorists (Kolb 2004, p. 256). While traditional criminal jurisdiction is based on the principles of territoriality and nationality (Lee 2007, p. 203), universal jurisdiction allows the prosecution of a crime by any state (Thalmann 2018, pp. 67-69). By maximising the number of jurisdictions where the alleged terrorist can be prosecuted, universal jurisdiction mainly aims at preventing impunity (Lee 2007, p. 209). Interestingly, in the light of a growing consensus that the duty to prosecute precedes over the duty to extradite (Kolb 2004, p. 258; Thalmann 2018, pp. 83-84), Lee (2007 pp. 212-213) has asserted that universal jurisdiction might also facilitate a fair trial where the territorial state may be politically motivated in its judgement.

However, there are multiple reasons why universal jurisdiction as such is a controversial concept. On the one hand, universal jurisdiction interferes with state sovereignty (Lee 2007, p. 208). On the other hand, if national jurisdictions are seen as communities that share common norms and values, fairness requires that a perpetrator is also judged by the community he or she belongs to or has committed the crime against (ibid., pp. 208-209; Perkins 1971, pp. 1155-1156). For these reasons, universal jurisdiction can in principle only be justified to prosecute the most heinous crimes, where an act does not just offend the community it has been committed against but 'shock[s] the conscience of humanity' (*Rome Statute of the International Criminal Court* 1998, preamble; Nagle 2011, pp. 356-357). Moreover, universal jurisdiction presupposes that there is international agreement on a precise definition of the crime (Nagle 2011, p. 357).

Some scholars dispute that terrorism fulfils these criteria and thus question whether there is a legitimate interest in universal jurisdiction over terrorism (ibid., p. 356). The various definitions of terrorism are so broad that the claim that *any terrorist act* is of concern to the international community is hardly defensible (ibid., p. 353). Moreover, the lack of a uniform definition of terrorism seems to violate the legal mandate that a crime must be well-defined. One might argue that certain acts of terrorism as defined by the sectoral treaties fulfil this requirement, but the multiple conflicting abstract definitions found in regional treaties cast doubt on the legitimacy to exercise universal jurisdiction over terrorism in abstract terms. Nevertheless, various authors passionately defend universal jurisdiction over terrorist crimes (Lawless 2007, p. 146; Lee 2007, p. 212; Newton 2013, pp. 84-85).

In any case, states are free to establish universal jurisdiction through treaties, as they have done with terrorism. In fact, both the United Nations Security Council and the General Assembly have contributed in a fundamental way to the current situation. The General Assembly has consistently emphasised the principle of *aut dedere aut iudicare* in its pre 9/11 terrorism-resolutions (Lawless 2007, pp. 144-145) and the Security Council implicitly affirmed the principle in Resolution 1373 without ever defining terrorism (United Nations Security Council 2001, art. 2(c); Saul 2005b, p. 142). It was only three years later, after many states had already enacted their own terrorism legislations, that the Security Council provided an abstract definition of terrorism with Resolution 1566 (United Nations Security Council 2004, article 3)[5]. Notwithstanding, Resolution 1566 is non-binding and there is neither a duty to incorporate the definition of the Security Council nor to amend existing laws (Saul 2006, p. 248). Thus, nothing prevents states

from exercising universal jurisdiction unilaterally over acts that fall within their domestic definition of terrorism.

Consequently, the proliferation of definitions of terrorism results in an incongruence. States may only approximate the abstract definition of terrorism found in one of the treaties. Many of these treaties even explicitly hold that nothing prevents the parties from incorporating a broader definition of terrorism in their domestic legislation (*Convention of the Shanghai Cooperation Organization against Terrorism* 2009, art. 2(2)). In that case, their duty of *aut dedere aut iudicare* only concerns those acts falling within the treaty-definition (Kolb 2004, pp. 270-271). However, states still *may* prosecute acts that fall outside of the treaty-definition. Thus, in that case, any individual is potentially subject to the broadest domestic definition of terrorism.

Problems regarding congruence may even arise when states do not depart from the treaty-definitions. The duty to prosecute and extradite also applies *vis-à-vis* third parties who are not signatories to the agreement (Mitchell 2009, ch. 2 para. 27; Scharf 2001, p. 367). Thus, states are obliged to prosecute or extradite even in cases where the terrorist act, as defined in the treaty, was committed outside of the territories of the parties to the treaty or when it is not committed by one of their nationals.[6] Therefore, an alleged terrorist might be prosecuted for conduct which was not criminal in the territory he has committed the alleged act of terrorism because the exercise of universal jurisdiction usually does not require dual criminality (Thalmann 2018, p. 362). Moreover, states are not required to apply the criminal law of the state where the crime was committed (ibid., p. 365). In fact, applying foreign law in the context of universal jurisdiction is extremely rare (ibid.).

This raises fundamental questions with respect to the principle of *nullum crimen sine lege certa* (no crime without well-defined law). According to this principle, an individual can only be held criminally liable for his acts if it was foreseeable that his or her conduct was punishable, and the respective legal norms were accessible (Reuter 2017, p. 20; Scharf 2001, pp. 375- 376; Van der Wilt 2015, p. 530). The question of whether the exercise of universal jurisdiction violates the principle was raised in relation to torture before the European Court of Human Rights (ECtHR). In *Ould Dah v. France* (2009, p. 422) the complainant was convicted by the French authorities for the crime of torture he had committed in Mauritania. The ECtHR dismissed the complainant's claim that his conviction was not foreseeable and violated the principle of *nullum crimen sine lege*

certa (*Ould Dah v. France* (dec.) 2009, p. 439). Surprisingly, the ECtHR solely focused on the precision of French law and not on the foreseeability of the application of French law to the complainant's case (Thalmann 2018, p. 233). Thalmann (ibid., p. 234) rightly points out that the judgement is unsatisfactory and the foreseeability of the application of French law was by no means self-evident as the ECtHR seemed to see it. However, what might have swayed the ECtHR was the fact that torture was not only precisely defined in French law but also in international law (*Ould Dah v. France* (dec.) 2009, p. 439; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984, art. 1(1)).

However, the situation is quite different for terrorism. As established above, there is no coherent approach to terrorism in international law. Instead, there are the sectorial crimes in international law and multiple competing abstract definitions in regional treaties. To complicate matters further, some of the regional definitions encompass behaviour that is clearly legitimate in wartime. For example, the *Convention of the Shanghai Cooperation Organisation against Terrorism* (2009, art. 2(1)(3)) *inter alia* views acts that intend to 'intimidate the population and … cause substantial damage to property … in order to achieve political, religious, ideological and other aims by influencing the decisions of authorities' as acts of terrorism. Many legitimate acts in armed conflicts and self-determination struggles fall within this definition. The United Kingdom (*R. v. Gul* (2013) UKSC 64, paras. 52-58) and Canada (*R. v. Khawaja* (2012) SCC 69, paras. 95-103) have convicted individuals based on terrorism offences for acts that arguably should have been governed by international humanitarian law (Roach 2014, p. 823). Whether there is a violation of *nullum crimen sine lege certa* must be determined on a case by case basis but under these current premises, there is an increased potential for violation. At the very least, one would need to concede that there are heavy legitimacy-costs involved and the integrity of criminal law suffers if the principle of *nullum crimen sine lege certa* is watered down by exercising universal jurisdiction in the absence of international agreement on a definition of terrorism.

There are, of course, multiple practical limitations on the materialisation of the aforementioned issues. First, the alleged terrorist must be present in the territory of the prosecuting state in order to trigger the *aut dedere aut iudicare* principle (Kolb 2004, pp. 268-269). Second, a state might not fully implement the principle despite the treaty obligation (Martin 2013, p. 664) or simply forfeit prosecution for political reasons (Kolb 2004, pp. 261-262). However, it is unsatisfactory to trust in the underenforcement of criminal law. In my view, the premature

introduction of the *aut dedere aut iudicare* principle in terrorism legislation in the absence of a universal consensus on the definition of terrorism erodes the fundamental principle of *nullum crimen sine lege certa* in criminal law.

4. Conclusion

As I have shown in this paper, the proliferation of definitions of terrorism in international law and across national jurisdictions carries unintended consequences. The competition of different definitions of terrorism on the international level has fractured the international community, preventing the construction of a common 'enemy' and a common vision. Some might celebrate the fact that legislative incoherence limits state power on the international plane, while others might see it as a missed chance to challenge indiscriminate violence in a coherent way.

In any case, the proliferation of definitions of terrorism does not just undermine the sense of a shared understanding on the international level but threatens to erode fundamental and shared principles of criminal law. The introduction of the *aut dedere aut iudicare* principle in the absence of a shared understanding of terrorism has led to a complex system of overlapping and contradictory criminal jurisdictions which hampers the foreseeability of being held criminally liable. Thus, there is a serious danger that the application of the *aut dedere aut iudicare* principle undermines the fundamental principle of *nullum crimen sine lege certa*. The primary beneficiaries of the overlapping jurisdictions are the major international powers as it allows them to criminalize behaviour abroad that threatens cohesion at home. This is accompanied by a legislative shift to criminalize even broader concepts than terrorism such as 'extremism' (Greene 2017, p. 439).

Thus, the consequences of the proliferation of definitions of terrorism on the international level and across national jurisdictions are multi-layered with contradictory effects for legal systems, states, and individuals. States might balance the adverse consequences the proliferation of definitions has on collective actions against terrorism with more extensive unilateral competences to prosecute conduct abroad, to the detriment of fundamental legal principles.

Notes

1. Convention on Offences and certain Other Acts Committed on Board Aircraft 1963; Convention for the Suppression of Unlawful Seizure of Aircraft 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973; International Convention against the Taking of Hostages 1979; Convention on the Physical Protection of Nuclear Material 1980; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988; Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991; International Convention for the Suppression of Terrorist Bombings 1997; International Convention for the Suppression of the Financing of Terrorism 1999; International Convention for the Suppression of Acts of Nuclear Terrorism 2005.

2. See, e.g., Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance 1971, art. 2; Convention of the Organisation of the Islamic Conference on Combating International Terrorism 1999, art. 1(2); OAU Convention on the Prevention and Combating of Terrorism 1999, art. 1(3); Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism 1999, art. 1; 'Council and European Parliament Directive (EU) 2017/541' 2017, art. 3; Convention of the Shanghai Cooperation Organization against Terrorism 2009, art. 2(1)(3).

3. Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance 1971, art. 5; Convention of the Organisation of the Islamic Conference on Combating International Terrorism 1999, art. 3(B)(1); OAU Convention on the Prevention and Combating of Terrorism, 1999 art. 6(4); 'Council and European Parliament Directive (EU) 2017/541'

2017, art. 19(4); Convention of the Shanghai Cooperation Organization against Terrorism 2009, art. 5(3).

4. See, for example, 'Council and European Parliament Directive (EU) 2017/541' 2017, art. 19(4).

5. The definition provided by Article 3 of Resolution 1566 is '[...] criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature [...]' (United Nations Security Council 2004, article 3).

6. See, for example, 'Council and European Parliament Directive (EU) 2017/541' 2017, art. 19(4).

References

Acharya, UD 2009, 'War on Terror or Terror Wars: The Problem in Defining Terrorism', *Denver Journal of International Law and Policy,* vol. 37, no. 4, pp. 653-679, viewed 6 August 2020 <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1253&context=djilp>.

Aksenova, M 2015, 'Conceptualizing Terrorism: International Offence or Domestic Governance Tool', *Journal of Conflict and Security Law,* vol. 20, no. 2, pp. 277-299, DOI 10.1093/jcsl/krv002.

Aksenova, M 2017, 'Symbolism as a Constraint on International Criminal Law', *Leiden Journal of International Law,* vol. 30, no. 2, pp. 475-499, DOI 10.1017/S0922156516000741.

Ambos, K 2011, 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?', *Leiden Journal of International Law,* vol. 24, no. 3, DOI 10.1017/S0922156511000215.

Baragwanath, D 2018, 'Responding to Terrorism: Definition and Other Actions', in C Eboe-Osuji & E Emeseh (eds.), *Nigerian Yearbook of International Law 2017*. Springer International Publishing, Cham, pp. 17-49.

Becker, HS 2018, *Outsider: Studies in the Sociology of Deviance*, Free Press, New York.

Begorre-Bret, C 2006, 'The Definition of Terrorism and the Challenge of Relativism', *Cardozo Law Review,* vol. 27, no. 5, pp. 1987-2004, viewed 6 August 2020 <https://eurasiaprospective.files.wordpress.com/2015/09/definition-of-terrorism.pdf>.

Braber, I 2015, 'The Thorny Nature of a Terrorism Definition in International Law', *IUP Journal of International Relations,* vol. 10, no. 1, pp. 40-55, viewed 6 August 2020 <iupindia.in/1601/International%20Relations/The_Thorny_Nature_of_a_Terrorism.html >.

Bryan, D, Kelly, L & Templer, S 2011, 'The Failed Paradigm of 'Terrorism'', *Behavioral Sciences of Terrorism and Political Aggression,* vol. 3, no. 2, pp. 80-96, DOI 10.1080/19434472.2010.512151.

Caligiuri, A 2018, 'Governing International Cooperation in Criminal Matters: The Role of the Aut Dedere Aut Judicare Principle', *International Criminal Law Review,* vol. 18, no. 2, pp. 244-274, DOI 10.1163/15718123-01802005.

Cassese, A 2006, 'The Multifaceted Criminal Notion of Terrorism in International Law' *Journal of International Criminal Justice,* vol. 4, no. 5, pp. 933-958, DOI 10.1093/jicj/mql074.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Treaty no. 24841, *United Nations Treaty Series*, 1465, pp. 85-210, viewed 16 February 2020, <https://treaties.un.org/doc/Publication/UNTS/Volume%201465/v1465.pdf>.

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, Treaty No. 14118, *United Nations Treaty Series,* 974, pp. 177-248, viewed 16 February 2020, <https://treaties.un.org/doc/Publication/UNTS/Volume%20974/v974.pdf>.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988, Treaty no. 29004, *United Nations Treaty Series,* 1678, pp. 201-348, viewed 16 February 2020, <https://treaties.un.org/doc/Publication/UNTS/Volume%201678/v1678.pdf>.

Convention for the Suppression of Unlawful Seizure of Aircraft 1970, Treaty no. 12325, *United Nations Treaty Series,* 860, pp. 105-159, viewed 16 February 2020, <https://treaties.un.org/doc/Publication/UNTS/Volume%20860/v860.pdf>.

Convention of the Organisation of the Islamic Conference on Combating International Terrorism 1999, viewed 16 February 2020, <http://ww1.oic-oci.org/english/convenion/terrorism_convention.htm>.

Convention of the Shanghai Cooperation Organization against Terrorism 2009, Treaty no. 49374, *United Nations Treaty Series*, 2815, pp. 69-142, viewed 16 February 2020, <https://treaties.un.org/doc/Publication/UNTS/Volume%202815/v2815.pdf>.

Convention on Offences and certain Other Acts Committed on Board Aircraft 1963, Treaty no. 10106, *United Nations Treaty Series,* 704, pp. 219-254, viewed 16 February 2020, <https://treaties.un.org/doc/Publication/UNTS/Volume%20704/v704.pdf>.

Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991, Treaty no. 36984, *United Nations Treaty Series,* 2122, pp. 359-420, viewed 16 February 2020, <https://treaties.un.org/doc/Publication/UNTS/Volume%202122/v2122.pdf>.

Convention on the Physical Protection of Nuclear Material 1980, Treaty no. 24631, *United Nations Treaty Series*, 1456, pp. 101-188, viewed 16 February 2020, <https://treaties.un.org/doc/Publication/UNTS/Volume%201456/v1456.pdf>.

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973, Treaty no. 15410, *United Nations Treaty Series,* 1035, pp. 167-248, viewed 16 February 2020, <https://treaties.un.org/doc/Publication/UNTS/Volume%201035/v1035.pdf>.

Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance 1971, Treaty no. 24381, *United Nations Treaty Series,* 1438, pp. 191-209, viewed 16 February 2020, <https://treaties.un.org/doc/Publication/UNTS/Volume%201438/volume-1438-I-24381-English.pdf>.

'Council and European Parliament Directive (EU) 2017/541 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA' 2017, *Official Journal* L88, p. 6, viewed 6 August 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L0541>.

Damaska, M 2008, 'What is the Point of International Criminal Justice', *Chicago-Kent Law Review,* vol. 83, no. 1, pp. 329-365, viewed 7 August 2020, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2599&context=fss_papers>.

Dexter, H 2012, 'Terrorism and Violence: Another Violence is Possible?', *Critical Studies on Terrorism,* vol. 5, no. 1, pp. 121-137, DOI 10.1080/17539153.2012.659920.

Di Filippo, M 2014, 'The Definition(s) of Terrorism in International Law' in B Saul (ed.) *Research Handbook on International Law and Terrorism*. Edward Elgar, Cheltenham, pp. 3-19.

Fletcher, GP 2006, 'Indefinable Concept of Terrorism', *Journal of International Criminal Justice,* vol. 4, no. 5, pp. 894-911, DOI 10.1177/1477370819828934.

Friedrichs, J 2006, 'Defining the International Public Enemy: The Political Struggle Behind the Legal Debate on International Terrorism', *Leiden Journal of International Law,* vol. 19, no. 1, pp. 69-91, DOI 10.1017/S0922156505003183.

Gal-Or, N 2015, 'The Formation of a Customary International Crime: Global Terrorism Human (In)Security', *International Criminal Law Review,* vol. 15, no. 4, pp. 665-699, DOI 10.1163/15718123-01504006.

Gillett, M & Schuster, M 2011, 'Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism', *Journal of International Criminal Justice,* vol. 9, no. 5, pp. 989-1020, DOI 10.1093/jicj/mqr036.

Greene, A 2017, 'Defining Terrorism: One Size Fits All?', *International and Comparative Law Quarterly,* vol. 66, no. 2, pp. 411-440, DOI 10.1017/S0020589317000070.

Grozdanova, R 2014, ''Terrorism' – too Elusive a Term for an International Legal Definition?', *Netherlands International Law Review,* vol. 61, no. 3, pp. 305-334, DOI 10.1017/S0165070X14001351.

Hamilton, C 2019, *Contagion, Counter-terrorism and Criminology*, Springer International Publishing, Cham.

Herschinger, E 2013, 'A Battlefield of Meanings: The Struggle for Identity in the UN Debates on a Definition of International Terrorism', *Terrorism and Political Violence,* vol. 25, no. 2, pp. 183-201, DOI 10.1080/09546553.2011.652318.

International Convention against the Taking of Hostages 1979, Treaty no. 21931, *United Nations Treaty Series,* 1316, pp. 205-280, viewed 16 February 2020 <https://treaties.un.org/doc/Publication/UNTS/Volume%201316/v1316.pdf>.

International Convention for the Suppression of Acts of Nuclear Terrorism 2005, Treaty no. 44004, *United Nations Treaty Series,* 2445, pp. 89-198, viewed 16 February 2020 <https://treaties.un.org/doc/Publication/UNTS/Volume%202445/v2445.pdf>.

International Convention for the Suppression of Terrorist Bombings 1997, Treaty no. 37517, *United Nations Treaty Series,* 2149, pp. 256-336, viewed 16 February 2020 <https://treaties.un.org/doc/Publication/UNTS/Volume%202149/v2149.pdf>.

International Convention for the Suppression of the Financing of Terrorism 1999, Treaty no. 38349, *United Nations Treaty Series,* 2178, pp. 197-292, viewed 16 February 2020 <https://treaties.un.org/doc/Publication/UNTS/Volume%202178/v2178.pdf>.

Kolb, R 2004, 'The Exercise of Criminal Jurisdiction over International Terrorists' in A Bianchi (ed.) *Enforcing International Law Norms against Terrorism*. Hart, Oxford, pp. 227-282.

Lawless, M 2007, 'Terrorism: An International Crime', *International Journal*, vol. 63, no. 1, pp. 139-159, DOI 10.1177/002070200806300112.

Lee, W 2007, 'Terrorism and Universal Jurisdiction' in S P Lee (ed.) *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory*. Springer, Dordrecht, pp. 203-217.

LeVin, VT 1995, 'The Logomachy of Terrorism: On the Political Uses and Abuses of Definition', *Terrorism and Political Violence,* vol. 7, no. 4, pp. 45-59, DOI 10.1080/09546559508427317.

Margariti, S 2017, *Defining International Terrorism: Between State Sovereignty and Cosmopolitanism*, T.M.C. Asser Press, The Hague.

Martin, C 2013, 'Terrorism as a Crime in International Domestic Law: Open Issues' in L Van den Herik & N Schrijver (eds.) *Counter-terrorism Strategies in a Fragmented International Legal Order.* Cambridge University Press, Cambridge, pp. 639-666.

Mayroz, E 2017, 'Genocide: To Prevent and Punish 'Radical Evil'' in P Kastner (eds.) *International Criminal Law in Context*. Taylor and Francis, Milton, pp. 71-90.

Mitchell, C 2009, *Aut Dedere, Aut Judicare: The Extradite or Prosecute Clause in International Law*, Graduate Institute Publications, Geneva.

Nagle, LE 2011, 'Terrorism and Universal Jurisdiction: Opening a Pandora's Box', *Georgia State University Law Review,* vol. 27, no. 2, pp. 339-378, DOI 10.2139/ssrn.1582432.

Newton, MA 2013, 'Terrorist Crimes and *Aut Dedere Aut Judicare* Obligation' in L Van den Herik & N Schrijver (eds.) *Counter-terrorism Strategies in a Fragmented International Legal Order*. Cambridge University Press, Cambridge, pp. 68-92.

OAU Convention on the Prevention and Combating of Terrorism 1999, Treaty no. 39464, *United Nations Treaty Series,* 2219, pp. 179-256, viewed 16 February 2020 <https://treaties.un.org/doc/Publication/UNTS/Volume%202219/v2219.pdf>.

Orlova, A V & Moore, J W 2005, '"Umbrellas" or "Building Blocks"?: Defining International Terrorism and Transnational Organized Crime in International Law', *Houston Journal of International Law,* vol. 27, no. 2, pp. 267-310, viewed 7 August 2020 <http://www.hjil.org/articles/hjil-27-2-orlova-moore.pdf>.

Perkins, R 1971, 'The Territorial Principle in Criminal Law', *Hastings Law Journal,* vol. 22, no. 5, pp. 1155-1172, viewed 6 August 2020 <repository.uchastings.edu/cgi/viewcontent.cgi?article=2186&context=hastings_law_journal>.

Reuter, T 2017, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, Springer International Publishing, Cham.

Richards, A 2014, 'Conceptualizing Terrorism', *Studies in Conflict & Terrorism,* vol. 37, no. 3, pp. 213-236, DOI 10.1080/1057610X.2014.872023.

Roach, K 2014, 'Terrorism' in MD Dubber & T Hörnle (eds.) *The Oxford Handbook of Criminal Law*. Oxford University Press, Oxford, pp. 812-837.

Rome Statute of the International Criminal Court 1998, Treaty no. 38544, *United Nations Treaty Series*, 2187, pp. 3-633, viewed 16 February 2020 <https://treaties.un.org/doc/Publication/UNTS/Volume%202187/v2187.pdf>.

Saul, B 2005a, 'Attempts to Define 'Terrorism' in International Law', *Netherlands International Law Review,* vol. 52, no. 1, pp. 57-84, DOI 10.1017/S0165070X05000574.

Saul, B 2005b, 'Definition of Terrorism in the UN Security Council: 1985-2004', *Chinese Journal of International Law,* vol. 4, no. 1, pp. 141-166, DOI 10.1093/chinesejil/jmi005.

Saul, B 2006, *Defining Terrorism in International Law*, Oxford University Press, Oxford.

Saul, B 2011, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism', *Leiden Journal of International Law,* vol. 24, no. 3, pp. 677-700, DOI 10.1017/S0922156511000203.

Scharf, MP 2001, 'Application of Treaty-based Universal Jurisdiction on Nationals of Non-party States', *New England Law Review,* vol. 35, no. 2, pp. 363-382, viewed 7 August 2020 <heinonline.org/HOL/LandingPage?handle=hein.journals/newlr35&div=24&id=&page=>.

Schmitt, C 1933, *Der Begriff des Politischen* [The Concept of the Political], Hanseatische Verlagsanstalt, Hamburg.

Simon, TW 2016, *Genocide, Torture, and Terrorism*, Palgrave Macmillan US, New York.

Subedi, SP 2002, 'The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law', *International Law FORUM du Droit International,* vol. 4, no. 3, pp. 159-169, DOI 10.1163/157180402400497800.

Thalmann, V 2018, *Reasonable and Effective Universality: Conditions to the Exercise by National Courts of Universal Jurisdiction over International Crimes*, Schulthess, Geneva.

Treaty on Cooperation Among the States Members of the Commonwealth of Independent States in Combating Terrorism 1999, Treaty no. 50095, *United Nations Treaty Series,* 2867, pp. 41-74, viewed 16 February 2020 <https://treaties.un.org/doc/Publication/UNTS/Volume%202867/v2867.pdf>.

United Nations Security Council 2001, *Resolution 1373*, Resolution S/RES/1373, viewed 16 February 2020 <https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf>.

United Nations Security Council 2004, *Resolution 1566*, Resolution S/RES/1566, viewed 16 February 2020 <https://www.un.org/ruleoflaw/files/n0454282.pdf>.

Van den Herik, L & Schrijver, N 2013, 'The Fragmented International Legal Response to Terrorism' in L Van den Herik & N Schrijver (eds.) *Counter-terrorism strategies in a fragmented international legal order*. Cambridge University Press, Cambridge, pp. 1-26.

Van der Wilt, H 2015, 'Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test', *Nordic Journal of International Law,* vol. 84, no. 3, pp. 515-531, DOI 10.1163/15718107-08403007.

Verdebout, A 2014, 'La Definition Coutumière Du Terrorisme d'Antonio Cassese: De la Doctrine au Tribunal Special pour le Liban [The Customary Definition of Terrorism of Antonio Cassese: Of the Doctrine of the Special Tribunal for Lebanon]', *Droit et Société,* vol. 88, no. 3, pp. 709-728, DOI 10.3917/drs.088.0709.

Wæver, O 1995, 'Securitization and Desecuritization' in RD Lipschutz (eds.) *On Security.* Colombia University Press, New York, pp. 46-86.

Wade, M 2010, 'Fighting Terrorism – The Unprincipled Approach: The UK, the War on Terror and Criminal Law' in M Wade & A Maljevic (eds.) *A War on Terror: The European Stance on a New Threat, Changing Laws and Human Rights Implications*. Springer, New York, pp. 401-427.

Walzer, M 2001, 'Excusing Terror: The Politics of Ideological Apology', *The American Prospect,* vol. 12, no. 18, pp. 16-17, viewed 6 August 2020 <https://prospect.org/features/excusing-terror/>.

Weigend, T 2006, 'The Universal Terrorist: The International Community Grappling with a Definition', *Journal of International Criminal Justice,* vol. 4, no. 5, pp. 912-932, DOI 10.1093/jicj/mql063.

William, PR & Stewart, ME 2008, 'Humanitarian Intervention: The New Missing Link in the Fight to Prevent Crimes against Humanity and Genocide?', *Case Western Reserve Journal of International Law,* vol. 40, no. 1-2, pp. 97-110, viewed 6 August 2020 < https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1276&context=jil>.

Young, R 2006, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation', *Boston College International and Comparative Law Review,* vol 29, no. 1, pp. 23-106, viewed 6 August 2020 <https://lawdigitalcommons.bc.edu/iclr/vol29/iss1/3>.

Zeidan, S 2004, 'Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism', *Cornell International Law Journal,* vol. 36, no. 3, pp. 491-496, viewed 6 August 2020 <https://scholarship.law.cornell.edu/cilj/vol36/iss3/5/>.

Case Law

Ould Dah v. France (dec.), ECHR 2009-I, pp. 415-466

R. v. Gul (2013) UKSC 64

R. v. Khawaja (2012) SCC 69

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The Architecture of Illicit Nuclear Trafficking:

An Instrumental Approach to Network Analysis

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Abstract

Since the collapse of the Soviet Union, nuclear trafficking in Russia and the former Soviet Republics has become an ever-prevalent threat for international security. This essay provides an assessment of the organisational structure of this transnational organised crime (TOC). Using the instrumental approach to network analysis and Bourdieu's concept of social and human capital as a methodological framework, this essay investigates the nature of connections maintained among criminals during the various stages of the nuclear trafficking process – acquisition, transportation, sale – and contends that nuclear trafficking displays characteristics both of a stable hierarchy and a fluid network. Thus, it reaches the conclusion that TOC groups involved in this illicit activity present a hybrid form of organisational structure which is best described as a directed network – that is, a criminal entity with a stable group of organisers located at its core, and fluid nodes of individuals in charge of executing the different phases of the trafficking process at its periphery.

Keywords: Transnational Organised Crime, Nuclear Trafficking, Social Network Analysis, Social Capital.

1. Introduction

While criminologists have often argued that nuclear theft in Russia and the former Soviet Republic is perpetuated by solitary amateurs, the evidence suggests the presence of a broader trafficking organisation, displaying the involvement of transnational organised crime (TOC) groups. This paper focuses on the organisational structure of nuclear trafficking and assesses whether it can be framed as a stable hierarchy or a fluid network. For this purpose, the first section of this paper reviews the scholarship on the topic of nuclear theft and trafficking and justifies the framing of nuclear trafficking as a TOC. It then continues to provide definitions for 'network' and 'hierarchy', as well as introduce instrumental network analysis combined with Bourdieu's concept of social and human capital as this paper's selected analytical framework. The second section of this paper investigates the organisational characteristics visible at the three different stages of the nuclear trafficking process – acquisition, transportation, sale – through the lens of an instrumental approach to network analysis. It finds that this illicit trade displays features both of a stable hierarchy and a fluid network. Drawing on these findings and using organised crime typologies, it is argued that nuclear trafficking has a hybrid organisational structure, which can be framed as a directed network.

Nonetheless, this essay's conclusion is to be interpreted as a plausible rather than a definitive answer. The academic literature on nuclear trafficking, which is investigated in this paper, largely relies on the data collected by the Database on Nuclear Smuggling, Theft and Orphan Radiation Sources (DTSO). This database comprises only cases of nuclear thefts and smuggling incidents which have been intercepted, offering incomplete information on the subject matter as the phenomenon is likely to be much more frequent than the DTSO suggests.

2. Nuclear Trafficking as Transnational Organised Crime

2.1. *The Emerging Issue of Nuclear Trafficking*

Since the collapse of the Soviet Union, a growing phenomenon of nuclear thefts and attempted smuggling has been witnessed in Russia and the former soviet republics. Considering the risk of nuclear terrorism, the stealing of nuclear material – roughly defined as 'substances containing uranium, plutonium, or thorium' (Morrissey 2005, p. 30) – has been regarded by scholars, policy-makers and organisations such as the International Atomic Energy Agency (IAEA) as a significant international security threat (Mueller 2009). As a matter of fact, allegations of Al-Qaida's interest in the nuclear bomb, as well as previous usage of amateurly fabricated bombs by Chechen rebel groups have led nuclear theft to be placed at the top of the international community's policing agenda (Mueller 2009; Schmid & Wesley 2006). Nonetheless, an examination of the scholarly literature highlights that the inner workings of nuclear trafficking activities have remained largely unknown both in the political spheres and academia.

Indeed, while conventional wisdom assumes that nuclear thefts occurs mostly in military bases (Zaitseva & Hand 2003), this criminal activity has largely taken place in the closed nuclear cities of the former Soviet Union (Carpintero-Santamaría 2012; Ouagrham-Gormley 2007). Nuclear cities are guarded facilities devoted to 'the research, development and production [of nuclear materials]', and the maintenance of a nuclear power plant (Carpintero- Santamaría 2012, p. 101). Specifically, the DTSO establishes that nuclear thefts in nuclear cities have mostly been carried out by individuals working within the nuclear complex (Zaitzeva & Hand 2003). Accordingly, most scholars have framed the issue of nuclear theft in nuclear cities implicitly along the lines of mainstream criminology's economic deprivation theory (Messner & South 1986), arguing that it results from the 'financial hardships' which nuclear workers have experienced after the collapse of the Soviet Union (Zaitseva & Hand 2003, p. 824). Essentially, the scholarship has established that economic difficulties have provided them with a rationale for stealing and reselling nuclear materials. Nonetheless, this observation is the point of departure for diverging accounts

among criminologists on this specific type of criminal activity. Indeed, many of these scholars have deduced that the black nuclear market is driven by desperate nuclear employees who act as solitary amateurs, rather than professional criminal groups (Kupatadze 2010; Oaugrham-Gormley 2007).

Nonetheless, this account is short-sighted and offers 'a poor and incomplete representation of a more sophisticated "invisible" nuclear black market' (Potter & Sokova 2002, p. 113). While this essay does not negate the assumption that some nuclear thieves are amateurs operating alone, it argues that some others supply nuclear materials to criminal groups, thereby being the first link in a broader trafficking chain. Accordingly, the data of DTSO suggests that nuclear trafficking by criminal groups is an established phenomenon. Between 1991 and 2012, over 630 nuclear *smuggling* incidents were intercepted in the Black Sea region during their illicit transportation (Zaitseva & Steinhäusler 2014). Specifically, this essay contends that this criminal activity displays the characteristics of a TOC. The work of Zaitseva (2007) is insightful in this regard, as it argues that between 2001 and 2005, over forty intercepted cases of nuclear trafficking meet the criteria to be framed as the doings of criminal groups. It includes cases where multiple individuals are caught in the process, or when one or more individuals are arrested in possession of this illicit commodity when attempting to cross a border. Arguably, these elements reflect a degree of organisation and premeditation symptomatic of a TOC (Wright 2013). This data also displays the transnational character of this criminal phenomenon, an indispensable criterion for framing a criminal activity as a TOC (Miraglia, Ochoa & Briscoe 2012). Considering these elements, this paper aims to provide an assessment of the organisational structure and *modus operandi* of the TOC groups involved in nuclear trafficking. To do so, it uses an instrumental approach to network analysis and Bourdieu's human and social capital concepts as analytical tools, as introduced in the following section.

2.2. Definitions and Analytical Framework

Criminologists have provided the scholarship with a plethora of assessments on the organisational structure of TOC groups, displaying a salient lack of scholarly consensus. This is largely due to the ever-prevalent assumption that TOC groups have moved beyond the mafia-associated 'hierarchical and pyramidal' *type* of organisational structure to form looser networks of criminals (Williams 2001, p. 62). Nonetheless, there has been a consistent scholarly debate on what is to be defined as a criminal *network* (Varese 2010). The concept of network isn't monolithic; it can encompass various forms of organisational structures with features and nuances of their own (Campana 2016). Its holistic character is illustrated in the work of scholars, who use it either as a substantive or instrumental term in their research (ibid.). Implicitly taking a substantive stance, some authors, such as Albini (1971, p. 288) use the word 'network' to describe a specific form of organisational structure and frame criminal networks as 'system[s] of loosely structured relationships functioning primarily because each participant is interested in furthering his own welfare'. Conversely, for scholars following an instrumental approach, the term 'network' is not attached to a specific form of organisation (Campana 2016, p. 3). For instance, using the concept of 'loosely-coupled' and 'tightly-coupled' units, Williams (2001, p. 66) provides a more nuanced definition, simply defining the term 'network' as 'a series of nodes' socially connected. Accordingly, even a hierarchical organisation of roles could be framed as a 'network' formed with tightly-coupled-units, as it displays strong social bonds among participants (Campana 2016; Williams 2001).

Along the lines of Williams' (2001) analysis, this essay uses an instrumental approach and defines 'hierarchy' and 'network' as follows. A fluid TOC network is horizontally-shaped and made of loosely-coupled units (e.g. individuals, solitary cells etc.). In contrast, a stable hierarchical organisation is formed of tightly-coupled units which are vertically organised (e.g. American mafia families in the 1960s). Accordingly, it investigates whether nuclear trafficking is vertically or horizontally organised, composed with tight or loose units of criminals. Hence, this essay identifies the actors involved at each stage of the nuclear trafficking process – acquisition, transport, sale –

and investigates the nature of the relationships which connect participators at each stage. Specifically, in order to assess the quality of nuclear trafficking participants' social relations, this essay utilizes Bourdieu's (1980) concept of social and human capital. Human capital refers to the specific qualities, technical knowledge and resources possessed by participants involved in the trafficking network, while social capital relates to 'the connections or ties' which exist between them (Bright et al. 2017, p. 425). In turn, this method allows to identify which actors are at the centre or the periphery of the structural organisation of nuclear trafficking. As such, it is assumed that 'high-degree centrality actors possess higher social capital' as they connect the nodes together and organise the network activities. Actors lacking social capital but possessing human capital (i.e. specific and technical knowledge), on the other hand, are framed as operational nodes located at the periphery (ibid.).

The next section uses this framework to categorise nuclear trafficking, showing that the activity is multi-layered and diverse in its organisation.

3. The Organisational Structure of nuclear trafficking

3.1. The Theft of Nuclear Material

The trafficking of nuclear material shares similar constraints with that of antiquities in that both these illicit commodities are finite resources (Campbell 2013). Contrary to drugs and arms, nuclear materials cannot be illicitly manufactured and can only be accessed in nuclear sites. This specific constraint makes criminal groups involved in nuclear trafficking dependent on access to nuclear sites in order to obtain nuclear material. Furthermore, rather than infiltrating their own members into nuclear facilities, these groups have to establish connections with individuals who are not only able to access this resource, but who also possess the adequate knowledge to identify the nuclear materials to be stolen and to take the necessary precautions for the safe delivery of this radioactive commodity to the next link in the chain. Hence, along the lines of social network analysis (SNA), the actor responsible for the acquisition of these illicit materials is required to have the adequate human capital for this task. This is illustrated in the data collected by the DTSO,

which demonstrates that most thefts are perpetuated by nuclear workers. In turn, this suggests that bribery is the means through which the connection between nuclear thieves and criminal groups is established[1].

Specifically, this essay contends that this connection through bribery is enabled by the social capital possessed by criminal groups – that is, their ability to interact socially with individuals outside of their group. Two forms of social capital have been identified as facilitating the supply of nuclear material to criminal groups. The first one is uncovered when examining the work of Shelley (2006), who emphasizes that closed nuclear cities display a significant drug problem. Nuclear trafficking groups assumedly have contacts with local drug dealers, who can connect them with the nuclear workers among their regular clients, so that nuclear traffickers can bribe them to steal nuclear materials. The second form of social capital are the connections that some criminal groups maintain with high-level officials (Lee 2003; Gerber 2000). Corruption in the upperworld indirectly facilitates nuclear theft, as outlined in the case of Yevgeny Adamov, a former Russian minister of Atomic Energy who has been tried for diverting funds allocated to the safeguarding of nuclear facilities to achieve his own private benefit (Schelley 2006). In turn, the lack of security measures in nuclear facilities 'creates an atmosphere in which low-level workers and insiders will be in a position to steal nuclear material' (ibid., p. 554).

It is argued that the role of corrupted high-level officials and nuclear thieves is better understood along the lines of SNA. Indeed, these actors can be described as 'nonredundant contacts' operating in a 'different sphere' from the rest of the criminal group (Williams 2001, p. 85). While these contacts are indispensable for facilitating nuclear trafficking, they are easily replaceable in that they are valuable for their human capital only. This is particularly relevant in the case of nuclear thieves. With drug addictions and economic hardship devastating nuclear cities, criminal groups are provided with a range of nuclear workers possibly willing to help them towards the acquisition of nuclear materials. Similarly, TOC groups can partner with various officials depending on their needs. For instance, the DSTO includes cases of nuclear thefts involving the

complicity of directors of power plants to that of politicians (Shelley 2006; Zaitseva & Hand 2003). Hence, these nodes dealing with the supply of nuclear materials to the black market can be framed as fluid and loose ties in the organisational structure of nuclear trafficking criminal groups. Nevertheless, the social capital which is displayed in these groups' capacity to establish connections with the upperworld implies that some of their members have the power to reach and influence these high-level officials; in turn suggesting the presence of high-level criminals and leaders in the nuclear trafficking process.

3.2. The Transportation of Nuclear Material

The information collected by the DTSO has enabled scholars to trace an alleged 'nuclear silk road' used by criminal groups (Stone 2001, p. 1632). Accordingly, this illicit commodity is usually transported outside of Russian territory. Most intercepted cases of nuclear smuggling have taken place in the Caucasus region (especially Georgia) and the disputed territories of South Ossetia and Abkhazia (Kupatadze 2007), arguably explained by the fact that many Russian nuclear cities are located along the Russo-Georgian border (Shelley & Orttung 2006). The DTSO includes many intercepted cases of nuclear material shipping attempts have occurred in Georgian seaports (Zaitseva & Steinhäusler 2014). It also records numerous arrests of nuclear sellers in Turkey (Schmid & Spencer-Smith 2012). Hence, the available data suggests that Georgia and Turkey are respectively significant transit and destination countries (Nelson, Roslycky & Ouagrham-Gormley 2007). Accordingly, the tracing of this cross-border smuggling route suggests 'levels of sophistication in cross-border smuggling operations' (Lee 2006, p. 28), as it requires that groups involved in nuclear trafficking have 'experience in avoiding detection, knowledge of safe routes, protection by corrupt authorities' (Zaitseva & Hand 2003, p. 830).

Examining the work of Lee (2006), who conducted interviews with Western customs officials, suggests that the social capital of these TOC groups is a decisive factor for the successful transportation of this illicit commodity. This scholar finds that different groups involved in nuclear trafficking are able to cooperate and communicate together; they 'collect and share information on

which Russian customs posts are equipped with radiation monitors' and choose their routes accordingly (ibid., p. 28). Additionally, their social capital is visible in their ability to bribe high-level officials and directors of border and maritime customs posts in Georgia (Kupadtaze 2007; Shelley & Orttung 2006). In contrast, most individuals who have been caught in the transportation process are not professional criminals. Rather, cases reported in the DTSO suggest that transporters of nuclear materials are 'unaware couriers' individuals paid by criminal groups to transport illicit materials without necessarily knowing what they are trafficking (Kupatadze 2007, p. 47; Shelley & Orttung 2006; Williams & Woessner 2000). As for nuclear thieves, couriers are likely 'individuals desperate to support their families' recruited along the Russo-Georgian border, an area suffering from 'extreme poverty' levels (Shelley & Orttung 2006, p. 22).

Hence, the organisational structure of the transportation stage is rather complex. While it exposes the participation of unaware and amateurish couriers, it also shows the use of sophisticated means to enable the successful transportation of nuclear materials to its destination – cooperation among criminal groups, bribery of officials. This paper argues that the couriers are a loosely-connected node in the organisational structure of nuclear trafficking. Indeed, transporters share similarities with nuclear thieves. Not only are couriers motivated by economic deprivation, but they also do not possess valuable social capital. This is reflected in the lack of information that they are given about the merchandise that they transport, which also implies that they have limited social connections with the criminal groups that employ them. Additionally, the multiple arrests of couriers in the Caucasian region suggests that criminal groups must change transporters regularly, which makes this node significantly fluid. Nonetheless, the transportation phase also displays characteristics of a stable and vertically-organised structure. The ability of nuclear trafficking groups to cooperate or bribe high-level officials implies that specific members possess significant social capital, which arguably makes them more important and stable than others. Additionally, the delegation of the task of transportation in itself as well as the pre-selection of the smuggling route on strategic grounds suggests the existence of a higher chain of command.

3.3. The Sale of Nuclear Material

While the data of the DTSO suggests that Turkey is a 'preferred destination' for trafficked nuclear material (Lawlor 2011, p. 75), it provides limited information on potential buyers (Schmid & Spencer-Smith 2012). Most intercepted transaction cases involve nuclear sellers who were either unable to reach for the alleged buyer or were arrested during sting operations conducted by Turkish policemen pretending to be potential buyers (ibid.). Nonetheless, the DTSO provides broad insights on the nature of some arrangements between criminal groups and these buyers. For instance, the database includes a case which occurred in the nuclear city of Chelyabinsk, Russia, in 1998, where a large quantity of uranium had been stolen, 'almost enough for a nuclear bomb' (Lee 2006, p. 27). While no suspect was apprehended, the scale of this operation suggests that nuclear trafficking groups had established arrangements with potential buyers prior to the acquisition of this nuclear material. When examining the transaction phase specifically, intercepted cases in Turkey provide insights on the actors involved in this stage. They suggest that the use of intermediaries is the means through which transactions are operated. For instance, a case involved an individual who was arrested after attempting to sell uranium in Ankara, Turkey. There, he was supposed to meet the buyer, as he had been instructed to by a contact (Zatiseva & Steinhäusler 2014). Another case displaying the role of intermediaries occurred in 2006, when police officers conducted a sting operation. While the sellers were supposed to attend, they sent instead an intermediary with a sample of the nuclear material (Lawlor 2011).

The transaction phase displays a similar level of complexity as that of the previous stages. These intercepted cases demonstrate that – as for nuclear thieves and transporters – intermediaries possess minimal social capital, maintain limited contacts with actors involved in the trafficking process other than to receive instructions, and are not involved in the arrangements made with potential buyers prior to the transaction meeting. Specifically, the 'sting ring' case suggests that the use of intermediaries is a method for protecting members of the nuclear trafficking group who had previously established contact with the buyer. In the event of a sting operation, it is the courier who is apprehended. The use of intermediaries as covers also suggests that they are easily

replaceable actors. Overall, these elements enable the categorization of middlemen as loose and fluid nodes in the organisational structure of nuclear trafficking. Conversely, the transaction stage also displays hierarchical characteristics. The fact that some members are protected using intermediaries implies that they hold important positions in the organisational structure of nuclear trafficking operations. The sting operation case described above suggests that these specific individuals are indispensable due to their social capital for finding and establishing connections with potential buyers. Additionally, their role in enhancing and directing the nuclear trafficking process is further displayed in their ability to make arrangements with buyers before they acquire the nuclear material. Hence, these are stable actors located within the organisational core of the criminal group. As a matter of fact, the characteristics of the organisational structure for the transaction phase are consistent with that of the acquisition and transportation phases. It includes organisational elements both of a fluid network and a stable hierarchy.

Nuclear trafficking displays a hybrid form of organisational structure. Along the lines of these findings and after examination of Williams (2001, p. 69) and Le's (2012, p. 127) organised crime typologies, this essay argues that nuclear trafficking's organisational structure can be framed as a 'directed network'. A directed network is composed of a core group of organisers and a peripheral network of associates and contacts acting under the direction and supervision of the organisers. Each phase of the nuclear trafficking process displays these characteristics. They involve loose and fluid nodes of 'field workers', actors who oversee the execution of the trafficking process, such as nuclear thieves, couriers and intermediaries. They are recruited and receive instructions from a core and stable group of individuals in charge of enabling and directing the illicit operation as a whole. Specifically, organisers use their social capital to establish connections with local drug dealers, other trafficking groups, high-level officials, and potential buyers to plan and enable the successful operation of the trafficking process.

Building on this insight, this essay argues that these findings have implications for the criminologist scholarship as well as for the policing of nuclear trafficking. Firstly, the instrumental

approach to network analysis and Bourdieu's human and social capital concepts provide valuable tools for investigating the organisational structure of TOC groups. As it does not assume 'any structure a priori' (Campana 2016, p. 1), this method enables scholars to uncover complex structures that cannot be categorized as definite stable hierarchies and fluid networks. Additionally, while the downstream use of a typology was possible in the case of nuclear trafficking, typologies might not consistently grasp the complexity of other organised crime structure. Hence, while the substantial interpretation of the term 'network' has become an ever-prevalent paradigm in the criminologist literature (Borgatti & Foster 2003), this essay suggests that criminologists should seek a more neutral approach to investigate organised crime structures through the use of instrumental network analysis as their preferred method. Secondly, as outlined in Le's (2012) work, identifying the organisational structure of a criminal group is indispensable to effectively disrupt its activities. As such, it can be derived from this assumption that the policing of nuclear trafficking should be adapted to tackle the hybrid structure of nuclear trafficking organisations and should, accordingly, focus on targeting the actors at their core to effectively eliminate the threat they pose to international security.

4. Conclusion

This essay has analysed the organisational structure of nuclear trafficking through the lens of an instrumental network analysis and Bourdieu's concept of social and human capital. Through investigating the various stages of this mode of TOC, this essay has found that groups engaged in nuclear trafficking organise differently across multiple stages of activity. While some nodes of actors are rather fluid and loose, others are stable, and located at the core of the nuclear trafficking process, planning and directing of its operations. This core group of actors possess extensive social capital, which enables them to recruit a network of replaceable participators to establish connections with outsiders such as; local drug dealers, high-level officials, other trafficking groups, and to find buyers for trafficking nuclear material. In turn, this essay concludes that the organisational structure of nuclear trafficking can be framed as a directed network. This conclusion

challenges the dominant network paradigm and suggests that an instrumental network analysis is a more appropriate framework when investigating organised crime structures.

Notes

1. As outlined in the introduction, this paper's findings are to be understood as a plausible rather than a definite answer. As such, while it hasn't been discussed in academic research, it remains possible that TOC groups involved in nuclear trafficking also threaten or blackmail nuclear workers in order to obtain nuclear materials.

References

Albini, JL 1971, *The American Mafia: Genesis of a Legend*, Appleton Century Crofts, New York.

Borgatti, SP & Foster, PC 2003, 'The network paradigm in organizational research: A review and typology', *Journal of management* vol. 29, no. 6, pp. 991-1013, DOI 10.1016/S0149-2063_03_00087-4.

Bourdieu, P 1980, 'Le capital social: Notes Provisoires' [Social Capital: Preliminary Notes], *Actes de la Recherche en Sciences Sociales*, vol. 31, no. 1, pp. 2-3, viewed 16 August 2020, <https://www.persee.fr/doc/arss_0335-5322_1980_num_31_1_2069>.

Bright, D, Greenhill, C, Britz, T, Ritter, A & Morselli, C 2017, 'Criminal network vulnerabilities and adaptations', *Global Crime*, vol. 18, no. 4, pp. 424-441, DOI 10.1080/17440572.2017.1377614.

Campana, P 2016, 'Explaining criminal networks: Strategies and potential pitfalls' *Methodological Innovations,* vol. 9, pp. 1-10, DOI 10.1177/2059799115622748.

Campbell, PB 2013, 'The illicit antiquities trade as a transnational criminal network: Characterizing and anticipating trafficking of cultural heritage', *International Journal of Cultural Property*, vol. 20, no. 2, pp. 113-154, DOI 10.1017/S0940739113000015.

Carpintero-Santamaría, N 2012, 'The incidence of illegal nuclear trafficking in proliferation and international security', *Behavioral Sciences of Terrorism and Political Aggression*, vol. 4, no. 2, pp. 99-109, DOI 10.1080/19434472.2010.512156.

Gerber, J 2000, 'On the Relationship between Organized and White-Collar Crime: Government, Business, and Criminal Enterprise in Post-Communist Russia', *European Journal of Crime Criminal Law and Criminal Justice*, vol. 8, no. 4, pp. 327-342, DOI 10.1163/15718170020519229.

Kupatadze, A 2010, 'Organized Crime and the trafficking of radiological materials: The case of Georgia', *The Nonproliferation Review*, vol. 17, no. 2, pp. 219-234, DOI 10.1080/10736700.2010.485425.

Kupatadze, A 2007, 'Radiological Smuggling and Uncontrolled Territories: The Case Of Georgia', *Global Crime*, vol. 8, no. 1, pp. 40-57, DOI 10.1080/17440570601121852.

Lawlor, Maj. Gen. B 2011, 'The Black Sea: Center of the nuclear black market', *Bulletin of the Atomic Scientists*, vol. 67, no. 6, pp. 73-80, DOI 10.1177/0096340211426506.

Le, V 2012, 'Organised crime typologies: structure, activities and conditions', *International Journal of Criminology and Sociology*, vol. 1, pp. 121-131, viewed 16 August 2020, <http://www.ncjrs.gov/App/publications/abstract.aspx?ID=267256>.

Lee, R 2003, 'Nuclear smuggling: patterns and responses', *Parameters: Unted States Army War College Quarterly*, vol. 33, no. 1, pp. 95-111, viewed 16 August 2020, <https://www.hsdl.org/?view&did=1868>.

Lee, R 2006, 'Nuclear smuggling, rogue states and terrorists', *China and Eurasia Forum Quarterly*, vol. 4, no. 2, pp. 25-32, viewed 16 August 2020, <https://isdp.eu/content/uploads/images/stories/isdp-main-pdf/2006_lee_nuclear-smuggling-rogue-states-and-terrorists.pdf>.

Messner, SF & South SJ 1986, 'Economic deprivation, opportunity structure, and robbery victimization: Intra- and interracial patterns', *Social Forces*, vol. 64, no. 4, pp. 975-991, DOI 10.1093/sf/64.4.975.

Miraglia, P, Ochoa, R & Briscoe, I 2012, 'Transnational Organised Crime and Fragile States', *OECD Development Co-operation Working Papers* 5, pp. 4-29, viewed 16 August 2020, <https://gsdrc.org/document-library/transnational-organised-crime-and-fragile-states/>.

Morrissey, S 2005, 'IAEA Reports Increase in Nuclear Trafficking', *Arms Control Today*, vol. 35, no. 9, p. 30, viewed 16 August 2020, <https://link-gale-com.ezproxy.is.ed.ac.uk/apps/doc/A139587007/ITOF?u=ed_itw&sid=ITOF&xid=9b0cf6c4>.

Mueller, J 2009, *Atomic obsession: nuclear alarmism from Hiroshima to al-Qaeda*, Oxford University Press, Oxford.

Nelson, DN, Roslycky, LL, & Ouagrham-Gormley, SB 2007 'Terrorists, Trafficking, and WMD Still the Greatest Danger/Sonia Ben Ouagrham-Gormley Responds', *Arms Control Today*, vol. 37, no. 8, p. 55, viewed 16 August 2020, <https://www-jstor-org.ezproxy.is.ed.ac.uk/stable/23628259>.

Ouagrham-Gormley, SB 2007, 'An Unrealized Nexus? WMD-related Trafficking, Terrorism, and Organized Crime in the Former Soviet Union', *Arms Control Today*, vol. 37, no. 6, pp. 6-13, viewed 16 August 2020, <https://www-jstor-org.ezproxy.is.ed.ac.uk/stable/23628165>.

Potter, WC & Sokova, E 2002, 'Illicit nuclear trafficking in the NIS: What's new? What's true?', *The Nonproliferation Review*, vol. 9, no. 2, pp. 112-120, DOI 10.1080/10736700208436896.

Schmid, A & Wesley, R 2006, 'Possible Causes and Motives of Nuclear and Radiological Terrorism in the Light of Empirical Data on Smuggling Incidents of Nuclear Materials' in J Victoroff (ed.) *Tangled Roots: Social and Psychological Factors in the Genesis of Terrorism.* IOS Press, Amsterdam, pp. 357-398.

Schmid, A & Spencer-Smith, C 2012, 'lllicit Radiological and Nuclear Trafficking, Smuggling and Security Incidents in the Black Sea Region since the Fall of the Iron Curtain–an Open Source Inventory', *Perspectives on Terrorism*, vol. 6, no. 2, pp. 117-157, viewed 16 August 2020, <https://www.universiteitleiden.nl/binaries/content/assets/governance-and-global-affairs/isga/perspectives-on-terrorism/2012-2.pdf>.

Shelley, LI 2006, 'Trafficking in Nuclear Materials: Criminals and Terrorists', *Global Crime*, vol. 7, no. 3-4, pp. 544-560, DOI 10.1080/17440570601073335.

Shelley, LI & Orttung, R 2006, 'Criminal acts: How organized crime is a nuclear smuggler's new best friend', *Bulletin of the Atomic Scientists*, vol. 62, no. 5, pp. 22-23, DOI 10.2968/062005007.

Stone, R 2001, 'Nuclear trafficking: 'A real and dangerous threat'', *Science*, vol. 292, no. 5522, pp. 1632-1636, DOI 10.1126/science.292.5522.1632.

Varese, F 2010, 'What is organised crime?' in F Varese (ed.) *Organized Crime: Critical Concepts in Criminology*. Routledge, London, pp. 1-33.

Williams, P 2001, 'Transnational criminal networks' in J Arquilla & D Ronfeldt. (eds) *Networks and netwars: the future of terror, crime, and militancy*. RAND Corporation, Santa Monica, Arlington, Pittsburgh, pp. 61-99.

Williams, P & Woessner, PN 2000, 'Gangs go nuclear', *World Today*, vol. 56, no. 12, pp. 7-9, viewed 16 August 2020, <https://www-jstor-org.ezproxy.is.ed.ac.uk/stable/40476456>.

Wright, A 2013, 'Mapping rough terrain: the contested concept of organised crime' in A Wright (ed.) *Organised Crime*. Routledge, London, New York, pp. 1-21.

Zaitseva, L 2007, 'Organized Crime, Terrorism and Nuclear Trafficking', *Strategic Insights*, vol. 6, no. 5, pp. 1-18, viewed 16 August 2020, <http://hdl.handle.net/10945/11473>.

Zaitseva, L & Steinhäusler, F 2014, 'Nuclear Trafficking Issues in the Black Sea Region', *EU Non-Proliferation Papers*, no. 39, pp. 1-24, viewed 16 August 2020, <https://www.files.ethz.ch/isn/187240/April_2014_39.pdf>.

Zaitseva, L & Hand, K 2003, 'Nuclear smuggling chains: Suppliers, intermediaries, and end-users', *American Behavioral Scientist*, vol. 46, no. 6, pp. 822-844, DOI 10.1177/0002764202239177.

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A Comparative Analysis of the Femicide of Migrant Domestic Workers in Bahrain and Lebanon:

The Systemic Abuse of Foreign Female Labourers

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Abstract

Gender-based violence (GBV) is becoming a major topic of criminological concern. This article examines the factors contributing to the abuse of female Migrant Domestic Workers (MDWs) by their employers in two Middle Eastern countries, Lebanon and Bahrain. It pinpoints the law as the structure that maintains the slavery-like conditions that facilitate the systematic violence towards MDWs in Bahrain and Lebanon. It also looks at how processes of criminalisation cement MDWs in their precarious positions, subject to un-investigated femicide. Therefore, this article proposes to view femicide as a state of existence resulting from a wider societal structure as opposed to a single act condensed in time and space. The article adopts an intersectional approach to GBV, which draws attention to the states' role in facilitating the exploitation of MDWs. It also calls for the inclusion of MDWs in the Lebanese and Bahraini labour laws. By acknowledging the multi-dimensional abuse which ultimately results in the death of MDWs, the article concludes that the governments of the receiving and sending countries must do more to protect their most marginalised subjects. Moreover, criminologists should include MDWs as a criminalised group in more of their academic endeavours.

Keywords: Femicide, Gender-based Violence, Migrant Workers, Middle East, Kafala System

1. Introduction

Stories of gender-based violence frequently shock communities around the world. Women situated at the fringes of their respective societies due to their ethnicity, socio-economic status, sexual orientation or the intersection of these identities, are particularly vulnerable targets of gender-based violence and the macro-societal structures that perpetuate it. The form of gender-based violence which will be analysed in this article is the femicide of Migrant Domestic Workers (MDWs). This analysis will compare the structural factors which 'produce' a continuous state of femicide in Lebanon and Bahrain. The reasons for the focus on femicide are twofold: firstly, it draws attention to the systematic abuse of (predominantly female) MDWs in the host countries and secondly, it is the endpoint of a larger system of exploitation starting at the country of origin.

The article will explore the framework to be used, by discussing the criminological literature on femicide as well as sketching the contours of the 'Kafala system' which positions MDWs in a perpetual state of abuse. In both Lebanon and Bahrain, the law is the institution through which traditional gender categories are maintained. In order to reach this conclusion, this article will firstly show the criminalisation of migration, specifically of poor, black, female migrants, combined with the excessive policing of women in both Middle Eastern countries leaves MDWs subject to unchecked abuse and violence. Secondly, by delegating responsibility for them to their individual employers, the state relegates MDWs to their specific roles as domestic workers, deeming their abuse as a private matter beyond the remit of the state. The sense of ownership that employers have over MDWs is facilitated by the state's neglect of the marginalized group, cementing their precarious position as commodities, and making them vulnerable to unlimited forms of exploitation. The article will conclude that the law itself maintains the subjugation and abuse of MDWs.

A comparative criminology approach will be used in this article. According to Giddens (1979, p. 3), social scientific inquiry should always investigate and challenge the spatio-temporal assumptions surrounding a given phenomenon. Such an approach processes and critiques a *status quo*, analyses what can be improved, and challenges what has been accepted as 'truth'. The aim of the article is not to establish universal truths, but to discover 'how particular factors can make some women more vulnerable than others' (Mirza 2016, p. 595). This essay uses two Arab countries because of their geographical, cultural, and historical similarities (Gorman 2007, p. 100).

The subsequent similarity in criminal justice systems between the two allows for the attainment of solid conclusions (Hundle 2019). Despite being the two Kafala practicing countries with the most information available, there is relatively limited information on the topic due to underreporting, government cover-ups, and facilitation of this exploitation by the law. Subsequently, the aim of this essay is not to provide an exhaustive account, but to provide a starting point to prompt further research.

2. Theoretical Framework and Context

2.1 Femicide: A Definitional Conundrum

The definition of femicide has been a focal point of academic debate. Its most rudimentary account defines femicide as 'the misogynous killing of women by men' (Radford & Russel 1992, p. 3). However, this cannot account for the woman-on-woman violence which many MDWs face. This is not to neglect the exploitative conditions set by men, or that other women abuse MDWs; this form of abuse occurs mainly in the domestic sphere where the 'Madame' has control over the MDWs' living situation (Hamill 2012, p. 16). The criminological approach to GBV often interprets femicide as a part of homicide (Corradi et al. 2016, p. 981), which neglects the factors cementing certain gender roles and abstracts the conditions in which patriarchy is 'crossed through and interacts with other power structures like race, class, age and disability status' (Hester, Kelly & Radford 1996, p. 65). Corradi et al. (2016, p. 985) defined femicide as 'the result of a violent interaction whereby a woman or a girl dies i.e. an extreme and direct form of violence as part of an interpersonal process within a larger social context'. This definition is also limited, however, because defining femicide as an interpersonal process 'fails to cover the arduous process leading up to her death' (Shalhoub-Kevorkian 2003, p. 581).

Instead, this article attempts to address the problematic social context that MDWs find themselves in, by viewing femicide as encompassing a global social structure that 'recreates, maintains, and justifies a pervasive, inhumane social abuse' (Shalhoub-Kevorkian 2003, p. 582). Shalhoub-Kevorkian's (ibid.) definition of femicide extends the concept of death in femicide to more than the mere 'inability to breathe' (ibid., p. 581); instead, it is also an abusive mode of existence imposed on women by global and macrolevel structures while they are still alive. In this view, victims of femicide exist in a mode of 'death-in-life' (ibid.). Looking at this abuse as 'a cause and a consequence of inequality in patriarchal societies, serving to control women as a sex class'

(Radford & Russel 1992, p. 3) allows us to incorporate the structural violence into the investigation.

Ultimately, Shalhoub-Kevorkian's (2003) definition is the most relevant to the ends of this article, because it encompasses the global system which makes a woman's life as a domestic worker unconducive to normal standards of living. This definition allows for a link from individual-level crime and violence against MDWs to macro-level power structures that facilitate it.

According to Cook (2016, p. 342), criminologists should appreciate that the discipline is a 'product of White, economically privileged' male experience. By contrast, an intersectional approach gives voice to 'those who have historically been silenced [and] is concerned with socially structured systems of inequality' (Sokoloff & Burgess-Proctor 2011, p. 237). There is an 'absence in the cross racial feminist analysis' (Hundle 2019, p.48) connected to histories of the Global South, and drawing attention to their particular situations 'sheds light on new universals of feminist practice […] [challenging] us to see feminism in new ways' (ibid., p. 49).

Using an intersectional approach which doesn't see communities as 'objects of intervention […] [but] subjects in their own rights' (Wade 2011, p. 32), I chose two Middle Eastern countries as the subjects of inquiry. This emphasises that the aim is not to colonise the experiences of the women discussed in this article, but to situate it in the larger context of femicide. When writing about the Middle East, avoiding orientalist forms of writing is key, such as constructions of the 'abusive "Madam" [*sic*.] and (the male Arab employer as a sexual predator)' which contribute to the narrative of 'abusive Arabs' (Pande 2013, p. 435); the exploitation of women is a global phenomenon.

2.2 Contours of the Kafala System

As of 2016, there were 250,000 female MDWs in Lebanon (Insan Association 2016, p. 8; Jureidini 2002), and 76,249 female MDWs in Bahrain (Migrant Rights 2018); the women originate mainly from Ethiopia, Sri Lanka, and the Philippines (Insan Association 2016). Femicide of MDWs has been increasing rapidly in Lebanon with 'the bodies of 138 migrant domestic workers […] repatriated between January 2016 and April 2017' (Su 2017). The rate at which MDWs are

being killed in Lebanon has also doubled in recent years (Amnesty International 2018). This worrying phenomenon will be explained in this article through an exploration of the Kafala system.

The Kafala (or sponsorship) system is particular to the Middle East and has been likened to 'modern day slavery' (Jureidini 2010, p. 156; Hall 2019). According to Article 7 of The Lebanese Labour Law, domestic workers are excluded from the protections given to ordinary employees (Hamill 2012, p. 25), and are instead governed by the Kafala system which delegates legal and economic responsibility over an individual MDW to an individual employer (Pande 2013, p. 418). Private agencies 'contract' with other groups in the sending countries to bring female migrant domestic workers into Lebanon (Jureidini 2010). MDWs sign contracts with particular employers (ibid., p. 143), which bind them to the employer for a period of two years — a fixed time increment universal to all countries using the Kafala system. The individual hiring MDWs becomes the sponsor or 'Kafeel', and the contract signed is often in a language that MDWs do not read, nor understand (Hamill 2012, p. 12). In addition, MDWs are often charged a large starting fee, which makes them indebted to the agency which brought them to the country (Insan Association 2016).

Politically, Bahrain seems to have taken steps to improve the situation of MDWs, being the first country in the Middle East to have abolished the Kafala system controlling MDWs (Harmassi 2009). Bahrain was also labelled the 'most-committed' of the labour-receiving Gulf countries to 'improving migrant labour practices' (Human Rights Watch 2019, p. 2). Despite this, MDWs in Bahrain have reported 'working up to 19-hour days, with minimal breaks and no days off […] [and being] prevented from leaving their employer's homes, and [not] provided with adequate food' (Human Rights Watch 2015). These reports imply that despite the Kafala system having been repealed in Bahrain, its exploitative features prevail.

Therefore, Lebanon and Bahrain maintain similar systems — the only difference is that Bahrain supposedly repealed Kafala in 2009 (Harmassi 2009). Nonetheless, Bahrain was selected as a subject of enquiry for this study because as the only Middle Eastern country that has tried to review the system, it will allow us to investigate whether the Kafala system is 'merely' a legal institution or a more pervasive social structure. Lebanon, on the other hand, still maintains the legal frameworks of the Kafala system and thus seemingly serves as a counterpoint to Bahrain. In

reality however, as this essay will show, the two countries are very similar in their exploitation of MDWs.

Despite Bahrain's abolishment of the system in 2009, Human Rights Watch (2015) found that the implemented reforms are not exhaustive in key issues of MDWs and even those areas that are covered lack adequate implementation. For example, MDWs still do not have codified 'maximum daily and weekly work hours' (Human Rights Watch 2019, p. 6) and do not enjoy mandated days off. Furthermore, MDWs are still subject to physical and sexual abuse in the home and their cases often only proceed timidly through the criminal justice system (ibid., p.98). In both countries, MDWs' entry visa as well as residence and work permits include the sponsor's name; the sponsor assumes financial and legal responsibility for the MDW while she is in the country (Hamill 2012, p. 11). In this way, the Kafala system represents an 'outsourcing of management of migrant labour from the state to the citizen' (Hamadah 2020). Both countries tolerate the physical and sexual abuse of MDWs, them 'not receiving the promised wage (on time)', the 'unstructured nature of work', them working 'long hours without time off', and restrictions on their mobility (Pande 2013, p. 426). Often, one MDW will be burdened with multiple roles in multiple locations (ibid., p. 427).

The complicity of the sending and host countries in the abusive state which MDWs find themselves in as well as the atomisation of power over the MDW's migration and circumstances in the 'Kafeel', fits with the above definition of femicide as a perpetual state of abuse facilitated by macro-societal structures. Economic interests of the sending and receiving countries propel women into a 'death-in-life' (Shalhoub-Kevorkian 2003) state whereby they are subject to abuse and femicide.

3. Claim One: MDWs are Criminalised Through the Kafala System

The criminalisation of MDWs facilitated through the Kafala system is a way of policing and maintaining gender boundaries. Criminalisation of persons can be defined as the process of 'turning a section of the population into criminals' (Gordon 1983, p. 138). Strobl (2008, p. 166) describes the forces that contribute to criminalisation as 'a process involving the decentring and diffusion of legal forms and practices across agencies and jurisdictions'. Criminalisation places people outside the protections of the law, leaving their freedom severely restricted. Lebanon, for example, has a long history of discriminating against foreigners, and in the COVID-19 pandemic,

has created new laws restricting the ability of MDWs to be tested (Azhari 2020). Subjecting certain groups to differential treatment under the law is a process of criminalising migrants (Global Detention Project 2018). This section proceeds to analyse both Lebanon's and Bahrain's approaches to the abuse of MDWs at the hands of their employers. The section ultimately concludes that both countries perpetuate the maintenance of gender boundaries, and continue to criminalise MDWs as both foreigners and women.

The criminalisation of migrants results in their marginalisation within society, leaving MDWs to face the triangular jeopardy of being 'foreign', women and 'criminal'. This issue is not limited to the Middle East. Since the turn of the millennium, the illegal migrant workers have become a 'useful and profitable category, that […] serves to create and sustain a legally vulnerable and tractable and cheap reserve of labour' (Pande 2013, p. 438). Factors such as 'poverty, lack of economic opportunity at home and demand abroad allows traffickers to exploit persons in need of income' — further cementing their criminal status (Beydoun 2006, p. 1013).

The 'feminization of poverty' and the 'proliferation of organized crime, increases the number of women who are victim to prostitution and trafficking' (ibid.). The feminisation of poverty is defined by the European Institute for Gender Equality (EIGE) as the 'increasing incidence and prevalence of poverty among women compared to men, as a result of structural discrimination that affects women's lives' (European Institute for Gender Equality 2000). The fact that many of the women living in poverty are 'uneducated and have no formal training', in addition to the reluctance of society to accept new forms of gender roles, means that the cyclical nature of their poverty will continue as they are forced into domestic and other kinds of servitude (Beydoun 2006, p. 1014). Global hierarchies are evident in this social context as the consensus imagines these women as a disposable workforce and public discourse depicts them as 'deviant and therefore undeserving of state protection' (Pickering 2007, p. 48). In globalizing times, MDWs basically become 'a commodity for sale and apt servitude or other forms of exploitation' (Beydoun 2006, p. 1010). This shows the salience of an abusive global economic system, dependent on female labour, in criminalising MDWs (Strobl 2008). Subsequently, MDWs are situated at the margins of their host society, making them 'fitting' targets of violence and abuse.

The particularity of the Arab world is the excess policing of women, especially in conservative Muslim countries, where 'patriarchal community structures [like] religious

communities and elite community leaders often fail women survivors' (Hundle 2019, p. 49). There is a racialized gender discourse of femininity which dehumanizes women, especially those pertaining to ethnic minorities (Garcia-Del Moral 2018, p. 929). The systematic deaths of MDWs in the Arab world is reflective of the intersection of societal and institutional misogyny and racism in the region (Perry 2006; Mahdavi & Sargent 2011). Garcia-Del Moral (2018, p. 932) notes that 'racialised gender discourses of femininity mark[s] […] women as [immoral and] disposable'. This intersection of gender and race leads to MDWs being considered 'black, female, foreign and illegal' (Beydoun 2006, p. 1018). The context of 'restrictions like limits on right to leave employers house outside work hours, confiscation of passports, forced confinement, and restrictions on their ability to reside independently' (Insan Association 2016, p. 8) means that MDWs are deemed criminals if they attempt to escape violence. The criminalisation of MDWs as illegally trafficked, as well as the excessive control over women in society, leaves their freedom severely restricted. In the context of COVID-19, families are confined to homes, and MDWs 'have been forced into more intensive and dangerous work' (Chulov 2020); they are not allowed to speak to their families, are not given a day off, and are not paid (Massena 2020).

The lack of protection of MDWs under the countries' labour laws means that both countries render MDWs vulnerable to being criminalised as both 'women' and 'foreign', either obligated to endure abusive conditions in their employers' homes, or forced into illegality by running away. MDWs are constrained by the dyadic dependency on their employer for their immigration status as well as Lebanon's and Bahrain's dependency on foreign workers. Thus, the MDW cannot enter or leave the country, nor transfer employment without written permission from the Kafeel (International Labour Organisation 2012, p. 1). If the sponsor withdraws at any time, the MDW no longer has legal immigration status (Strobl 2008, p. 169). Additionally, if they protest their terms of employment, the Kafeel can unilaterally lower their wages, abuse them, refuse to renew their contract or petition for their deportation, which results in a loss of their legal residency and possible criminal charges (International Labour Organization 2012, p. 4). If an MDW attempts to leave to flee their abuser, their employer may use tactics which would release themselves from legal obligations owed to the MDW and report them missing or accuse them of stealing. When MDWs have been successful in fleeing abuse, they are likely forced into illegal work, or as Pande (2013, p. 415) states, become part of the 'new population of readily exploitable workers ("illegal workers")' who are cheap, flexible and vulnerable. Due to lack of legal recourse, they are often

caught and deported for overstaying their residency visa (Strobl 2008, pp. 173-174). This means that the two options for MDWs are to either endure abuse at the hands of their employer or flee and risk living in the country illegally. Mirza (2016, p. 600) looks at the lack of 'immigration status as a prominent feature of […] abuse', since it becomes a 'source of control and intimidation'. This reinforces the idea of femicide as a perpetual mode of existence as opposed to an event condensed in time and space (Shalhoub-Kevorkian 2003). The status of MDWs as foreign in conjunction with the legal centralisation of migration management in the Kafeel provides the Kafeel with a plethora of abusive tactics such as the threatening of deportation. MDWs' immigration status is completely in the hands of their Kafeel. For abused MDWs, their presence in the country is conditional on enduring different forms of abuse.

Bahrain has formally abolished the Kafala system, meaning that there are less legally mandated restrictions on MDWs' freedom, but the 'use of local police stations to handle labour-related disputes represents a criminalisation of housemaids even when their behaviour is not criminal' (Strobl 2008, p. 165). Police are unable to deal with the larger socio-political, economic and legal issues surrounding the problem, so housemaids tend to be criminalised and incarcerated even when it is inappropriate (ibid., p. 179). These two Middle Eastern countries are heavily dependent on foreign labour yet remain societally and institutionally racist (Perry 2006). Being 'black, female, foreign and illegal' (Beydoun 2006, p. 1018), even in a country which has abolished the Kafala system, is still societally criminalising. In the same process as above, the limited protections that MDWs have under Bahraini labour law, means that they are subject to a similar choice, either living under abusive conditions in their employers' homes, or fleeing and taking up illegal work in the country. Both situations result in MDWs possibly being tried in the criminal justice system, which cements the idea that they are criminals. Bahrain has taken steps in the right direction but the policewomen that 'play [a] central role in handling [MDWs]' are still a symptom of the larger problem of the criminalisation of MDWs (Strobl 2008, p. 180). Ultimately, until MDWs are adequately protected under the labour law, they are vulnerable to being criminalised as 'women', as well as 'foreign': as a result, their femicide will continue.

The justification for continued employment of MDWs is the countries' dependence on foreign female labour (ibid., p. 166), and the possibility of Lebanese and Bahraini women to join the workforce (International Labour Organisation 2012, p. 7). This justification aligns with the

definition of femicide discussed above, as it points to the economic structures that facilitate micro-level violence dispersed across time and space. In order to upend this state of death-in-life, both countries must include MDWs in their labour law (to give them the common standard of living that they deserve) and review their anti-trafficking legislation. Treating MDWs as criminals is a human rights violation to be remedied by abolishing the Kafala system.

4. Claim Two: How Legal Frameworks Maintain Traditional Gender Roles

The previous section detailed systemic reasons why MDWs have become a criminalised commodity in Lebanon and Bahrain through Kafala. This section addresses how the law is the institution through which traditional gender categories are maintained. By abandoning their responsibility to limit the exploitation of foreign labourers, the governments relegate these women to their homes, deeming them beyond the protections of the law. The issue of MDWs in both countries is deemed as one that should be dealt with either in the individual contractual relationship between the Kafeel and the MDW, or through the criminal justice system. This section outlines how the government neglects its responsibility to protect these marginalised women, and the way this perpetuates their vulnerability to subjugation at the hands of their employers. The state's neglect of MDWs leaves them as their employers' possessions, contributing to the way that traditional gender categories are maintained.

The role of the government is to 'facilitate a context within which women can reduce their vulnerabilities and respond to their conditions in a manner that reflects their constraints and needs' (Mirza 2016, p. 606). Despite the state's responsibility to protect vulnerable women, host governments have not developed 'effective measures to address the failure of the police and the justice system to prevent, investigate and punish' any crimes committed against MDWs by their sponsor. In effect, this means that 'the perpetrators enjoy impunity for their actions' (Garcia-Del Moral 2018, p. 943). In the context of international flows of labour, this directs attention to the state, as a site that 'reproduces the mutual construction of race and gender' (ibid., p. 931) by facilitating the entry and exploitation of these women as a result of economic interests in cheap labour.

By making the sponsor legally responsible for the migrant, the 'state responsibility for "alien surveillance" is passed onto the "Madame" who becomes the mediator between the state and domestic workers' (Pande 2013, p. 17). This absolves the government from providing labour

protection (Mahdavi & Sargent 2011, p. 10) and allows the country to 'abdicate responsibility to protect the rights of migrant workers by delegating to sponsors the subjective power to determine a workers immigration status' (International Labour Organisation 2012, p. 5). Subsequently, 'victims exist in a political vacuum where governmental assistance and protection was never extended' (Beydoun 2006, p. 1038). In trapping MDWs in this vacuum, governments facilitate femicide as a state of existence. The privacy of the home is a sphere that the government is reluctant to get involved in, further marginalizing the women who the government is meant to protect (Corradi et al. 2016, p. 983; Jureidini 2010, p. 155). Compounded by the costs of exit, which include 'economic destitution, fear of family and community ostracism' (Mirza 2016, p. 597), some women fear returning home because of the shame of returning without enough money to pay off the initial debt they incurred to the agencies or traffickers (Pande 2013, p. 422). Ultimately, the delegation of responsibility to the employers means that the government can overlook their human rights responsibilities, while justifying the continued exploitation of these women through notions of economic benefit to the country and a lack of jurisdiction over the domestic sphere.

Related to the notion of femicide, the government's neglect of these vulnerable women needs to be situated 'in the context of the role of family, society [and] structural conditions' (Barberet 2014, p. 84). Maureen Cain (1990, p. 3) argues that women are seen as 'Others', who are to be 'owned, given away, disciplined, coerced and marked with good or bad intentions'. The dehumanizing tendency to regard MDWs as deserving of different standards of rights, constructs and validates the larger societal and official discourse of their 'ownership' by employers (Insan Association 2016, p. 12). Because the sponsors paid a purchase fee, the idea that MDWs are objects to be owned perpetuates the paternalistic narrative, and further marginalises MDWs (Pande 2013, p. 428). The disposable nature of domestic work is reflected in the government's lack of protection for MDWs, as well as in societal perceptions that women's 'labo[u]r that is not valued and is sometimes invisible' (Barberet 2014, p. 83). MDWs are often uneducated and have no formal training, since societies are hesitant to accept new forms of gender roles other than housekeeper and childminder, the cyclical nature of feminization of poverty continues (Beydoun 2006, p. 1014). MDWs in the Kafala system are not viewed as women but rather as private property in a larger neoliberal economic structure.

Despite the abolishment of the Kafala system in Bahrain, MDWs are still relegated to an area where their situation warrants certain treatment (or lack of treatment) by the law, leaving them virtually helpless and 'owned' by their sponsor. Instead of being a protector of MDWs, the law is the institution that maintains them as possessions of those in power, trapping them in a state of femicide. MDWs in Lebanon have *de facto* no recourse to police services, and often have to depend on Non-Governmental Organisations (NGOs) and social workers when faced with abuse or situations unconducive to their survival (International Labour Organization 2012, p. 4). There is no motivation by the government to alter this system nor its understanding that these women are disposable because of the economic benefits this system provides.

Despite Bahrain's abolishment of the Kafala System, the government still has not included domestic workers under the labour law, leaving any disputes between the MDW and her employer to be handled by the police. Strobl (2008, p. 180) notes that Bahraini policewomen in this field are 'empowered to be authorities but only to keep men and women's roles in society delineated'. In other words, they are placed in situations of power, but only to the extent that they deal with disputes regarding the home, which the government has neglected. Strobl (ibid.) further claims that these policewomen are simultaneously 'symbols of progressive female roles in Bahrain, […] [and] re-enforcing [*sic.*] social customs that perceived women as suitable for opposite roles within private domestic spheres'. By abandoning their responsibility to protect MDWs, the state plays the minimised role ascribed to it by neoclassical economics thereby perpetuating their image as 'property' of their employers. The Lebanese state maintains the economic benefit, relegating MDWs to their status as possessions to be owned by the employer and trapped in their domestic servitude. The Bahraini system has increased protections for MDWs, yet by being dealt with by an all-woman police force, MDWs are simultaneously criminalised as well as trapped again in their role as domestic servants. In both countries, the absence of meaningful jurisdictions on MDWs' rights traps MDWs in a state of femicide, as discussed above.

Ultimately, the legal system is one of the institutions through which traditional gender categories are maintained. By neglecting the responsibility to protect trafficked and non-trafficked MDWs, the state delegates responsibility to employers, who enforce unsupervised patriarchal control over these women. This sets off a discourse of the 'abusive madame', distracting attention from the shortcomings of state provision of protection. It can be reliably claimed in both Bahrain

and Lebanon that keeping migrant domestic workers trapped in the home, and subject to complete supervision with no recourse to public aid, reinforces the idea that women are meant to be limited to the domestic sphere. The fact that MDWs are not included in the labour law and instead 'owned' by their sponsors provides room for perpetrators of violence to oppress the women with little-to-no consequences (Garcia-Del Moral 2018, p. 943). Finally, the legal systems in both countries perpetuate notions of the weak, domicile women who are meant to only do domestic work, maintaining gender categories.

5. Conclusion

The aim of this article was to draw attention to the systemic factors which lead to the femicide of Migrant Domestic Workers in two Middle Eastern countries: Bahrain and Lebanon. Processes of criminalisation leave MDWs labelled with stereotypes of illegality and inferiority; in the social context of excessive control of women, this means that MDWs are confined to the home and forced to perpetuate their gender's 'role'. The law is one of the factors that contributes to the subjugation of these women, as the government avoids its responsibility to protect, instead delegating exclusive control over women to individual employers. This leaves MDWs vulnerable to unchecked exploitation and abuse, with no access to legal protection. By criminalising MDWs and providing a legal framework that perpetuates traditional gender roles, the Kafala system traps MDWs in a perpetual state of femicide. These processes are facilitated by wider global economic structures and both countries' dependencies on cheap labour.

Further research may look at the techniques of rationalisation which occur when these women are systematically abused (Sykes & Matza 1957), or 'immigration detention centres' (Lee, Johnson & McCahill 2018, p. 20) in which MDWs are detained. Many questions remain: Should Bahrain be lauded as a progressive example or has it merely implemented a Kafala 2.0? Under what conditions could Lebanon ever abolish the Kafala system and include MDWs in the Labour Law? How has the COVID-19 pandemic affected the femicide of MDWs in the Gulf? This article is especially important in a context where the numbers of MDWs entering the countries have been steadily increasing, and rampant poverty in the home countries is allowing smugglers to capitalise on destitute populations. More comparative research is necessary to fill the gap surrounding the relationship between host and sending countries, as well as the trafficking rings which make this exploitation possible.

References

Amnesty International 2018*, End Kafala: Justice for Migrant Domestic Workers in Lebanon,* viewed 11 September 2020, <www.amnesty.org/en/latest/campaigns/2019/04/lebanon-migrant-domestic-workers-their-house-is-our-prison/>.

Azhari, T 2020, 'Undocumented in Lebanon: No Papers, No Coronavirus Test', *Al Jazeera News*, viewed 28 March 2020, <https://www.aljazeera.com/news/2020/03/undocumented-struggle-access- coronavirus-tests-lebanon-200328114859620.html>.

Barberet, R 2014, *Women, Crime and Criminal Justice: A Global Enquiry,* Routledge, London.

Beydoun, KA 2006, 'The Trafficking of Ethiopian Domestic Workers into Lebanon: Navigating Through a Novel Passage of the International Maid Trade'*, Berkeley Journal of International Law*, vol. 24, pp. 1009-1045, DOI 10.15779/Z38WD3S.

Cain, M 1990, 'Towards Transgression: New Directions in Feminist Criminology', *International Journal of Sociology of Laws*, vol. 18, no. 1, pp. 252-273, viewed 11 September 2020, <http://www.ncjrs.gov/App/publications/abstract.aspx?ID=122722>.

Chulov, M 2020, 'Pandemic Raises Fears Over Welfare of Domestic Workers in Lebanon', *The Guardian*, viewed 16 April 2020, <https://www.theguardian.com/global-development/2020/apr/16/pandemic-raises-fears-over-welfare-of-domestic-workers-in-lebanon?fbclid=IwAR3347ulQv4mVnUKYTUYns3hy-PoRFPKTM-zbI5CdgJXDvRwDuxLY1bc8wM>

Cook KJ 2016, 'Has Criminology Awakened from its "Androcentric Slumber"?', *Feminist Criminology,* vol. 11, no. 4, pp. 334-353, DOI 10.1177/1557085116660437.

Corradi, C, Marcuello-Servós, C, Boira, S & Weil, S 2016, 'Theories of Femicide and their Significance for Social Research', *Current Sociology,* vol. 64, no. 7, pp. 975-995, DOI 10.1177/0011392115622256.

European Institute for Gender Equality (EIGE) 2000, *Feminisation of Poverty*, viewed 11 September 2020, <eige.europa.eu/thesaurus/terms/1133>.

Garcia-Del Moral, P 2018, 'The Murders of Indigenous Women in Canada as Feminicides: Towards a Decolonial Intersectional Reconceptualization of Femicide', *Signs: Journal of Women in Culture and Society,* vol. 43, no. 4, pp. 929-954, DOI 10.1086/696692.

Giddens, A 1979, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis,* Palgrave MacMillan, London.

Global Detention Project 2018, *Immigration Detention in Lebanon: Deprivation of Liberty at the Frontiers of Global Conflict,* viewed 11 September 2020,

<https://www.globaldetentionproject.org/immigration-detention-in-lebanon-deprivation-of-liberty-at-the-frontiers-of-global-conflict>.

Gordon, P 1983, *White Law: Racism in the Police, Courts and Prisons,* Pluto Press, London.

Gorman, A 2007 'Regulation, Reform and Resistance in the Middle Eastern Prison' in F Dikötter & I Brown (eds.) *Cultures of Confinement: A History of the Prison in Africa, Asia and Latin America.* Cornell University Press, Ithaca, New York, pp. 95-146.

Hall, R 2019, 'Lebanon's Labour Minister Likens Kafala System to "Modern Day Slavery" and Vows Reform', *The Independent,* viewed 11 September 2020, <www.independent.co.uk/news/world/middle-east/lebanon-kafala-migrant-workers-labour-minister-camille-abousleiman-a8894056.html>.

Hamadah, F 2020, 'COVID and Kafala', *MR Online,* viewed 11 September 2020, <https://mronline.org/2020/08/17/covid-and-kafala/>.

Hamill, K 2012, 'Policy Paper on Reforming the "Sponsorship system" for Migrant Domestic Workers: Towards an Alternative Governance Scheme in Lebanon', *KAFA (Enough) Violence & Exploitation*, viewed 11 September 2020, <www.kafa.org.lb/sites/default/files/2019-02/Reforming_JKafalaSystemLeb_0.pdf>.

Harmassi, M 2009, 'Bahrain to End 'Slavery' System', *BBC News,* viewed 11 September 2020, <http://news.bbc.co.uk/1/hi/world/middle_east/8035972.stm>.

Hester, M, Kelly, L & Radford, J 1996, *Women, Violence and Male Power: Feminist Activism, Research and Practice,* Open University Press, Buckingham.

Human Rights Watch 2015, 'Bahrain: Abuse of Migrant Workers Despite Reforms', viewed 11 September 2020, <https://www.hrw.org/news/2012/09/30/bahrain-abuse-migrant-workers-despite-reforms>.

Human Rights Watch 2019, 'For a Better Life: Migrant Worker Abuse in Bahrain and the Government Reform Agenda', viewed 11 September 2020, <www.hrw.org/report/2012/09/30/better-life/migrant-worker-abuse-bahrain-and-government-reform-agenda>.

Hundle, AK 2019, 'Postcolonial Patriarchal Nativism, Domestic Violence and Transnational Feminist Research in Contemporary Uganda', *Feminist Review,* vol. 121, no. 1, pp. 37-52, DOI 10.1177/0141778918818835.

Insan Association 2016, 'Trapped: Migrant Domestic Workers in Lebanon', viewed 11 September 2020, <https://www.insanassociation.org/en/images/Trapped.Compressed.pdf>.

International Labour Organization 2012, 'Responding to Emerging and Critical Issues', *Reform of the Kafala (Sponsorship) System*, Policy Brief No. 2, viewed 11 September 2020, <https://www.ilo.org/dyn/migpractice/docs/132/PB2.pdf>.

Jureidini, R 2002, 'Women Migrant Domestic Workers in Lebanon', *International Migration Papers,* no. 48, The International Labour Organization, viewed 11 September 2020, <http://www.fudepa.org/Biblioteca/recursos/ficheros/BMI20060000461/imp48e.pdf>.

Jureidini, R 2010, 'Trafficking and Contract Migrant Workers in the Middle East', *International Migration,* vol. 48, no. 4, pp. 142-163, DOI 10.1111/j.1468-2435.2010.00614.x.

Lee, M, Johnson, M, & McCahill, M 2018, 'Race, Gender and Surveillance of Migrant Domestic Workers in Asia' in M Bosworth, Y Vázquez & A Parmar (eds.) *Race, Criminal Justice and Migration Control: Enforcing the Boundaries of Belonging.* Oxford University Press, Oxford, pp. 13-28.

Mahdavi, P & Sargent, C 2011, 'Questioning the Discursive Construction of Trafficking and Forced Labour in the United Arab Emirates', *Journal of Middle East Women's Studies,* vol. 7, no. 3, pp. 6-35, DOI 10.2979/jmiddeastwomstud.7.3.6.

Massena, F 2020, 'Trapped in Lebanon: Fears of Abuse for Migrant Domestic Workers Amid Covid-19 Lockdown', *The New Arab*, viewed 11 September 2020, <https://english.alaraby.co.uk/english/indepth/2020/4/10/for-domestic-workers-lebanon-lockdown-a-recipe-for-abuse?fbclid=IwAR0TixWFLKVMNmH9T9tOpEByOkY0hQsh83pLzW06hLGlAtZ0rS3GldJRPMo>.

Migrant Rights 2018, 'Assessing Bahrain's New Standard Contract for Domestic Workers', viewed 11 September 2020, <www.migrant-rights.org/2018/03/assessing-bahrains-new-standard-contract-for-domestic-workers/>.

Mirza, N 2016, 'The UK Government's Conflicting Agendas and "Harmful" Immigration Policies: Shaping South Asian Women's Experiences of Abuse and "Exit"', *Critical Social Policy,* vol. 36, no. 4, pp. 592-609, DOI 10.1177/0261018316641239.

Pande, A 2013, 'The Paper that you Have in your Hand is my Freedom: Migrant Domestic Work and the Sponsorship (Kafala) System in Lebanon', *International Migration Review*, vol. 47, no. 2, pp. 414-441, DOI 10.1111/imre.12025.

Perry, M 2006, 'Perceptions of Race in the Arab World', viewed 11 September 2020, <https://inhouse.lau.edu.lb/bima/papers/Perry.pdf>.

Pickering, S 2007, 'Transnational Crime and Refugee Protection', *Social Justice*, vol. 34, no. 2, pp. 47-61, viewed 11 September 2020, <https://www.jstor.org/stable/29768434>.

Radford, J & Russell, DEH 1992, *Femicide: The Politics of Woman Killing*. Open University Press, Buckingham.

Shalhoub-Kevorkian, N 2003 'Re-examining Femicide: Breaking the Silence and Crossing "Scientific" Borders', *Signs: Journal of Women in Culture and Society*, vol. 28, no. 2, pp. 581-608, DOI 10.1086/342590.

Shalhoub-Kevorkian, N & Daher-Nashif, S 2013, 'Femicide and Colonization: Between the Politics of Exclusion and the Culture of Control', *Violence against Women,* vol. 19, no. 3, pp. 295-315, DOI 10.1177/1077801213485548.

Sokoloff, NJ & Burgess-Proctor, A 2011, 'Remembering Criminology's "Forgotten Theme": Seeking Justice in US Crime Policy Using an Intersectional Approach' in M Bosworth & C Hoyle (eds.) *What is Criminology?.* Oxford University Press*,* Oxford, pp. 236-248

Strobl, S 2008, 'Policing Housemaids: The Criminalisation of Domestic Workers in Bahrain', *British Journal of Criminology*, vol. 49, no. 2, pp. 165-183, DOI 10.1093/bjc/azn071.

Su, A 2017, 'Slave Labour? Death Rate Doubles for Migrant Domestic Workers in Lebanon', *The New Humanitarian*, viewed 11 September 2020, <https://www.thenewhumanitarian.org/feature/2017/05/15/slave-labour-death-rate-doubles-migrant-domestic-workers-lebanon>.

Sykes, GM & Matza, D 1957, 'Techniques of Neutralization: A Theory of Delinquency', *American Sociological Review,* vol. 22, no. 6, pp. 664-667, DOI 10.2307/2089195.

Wade, L 2011, 'Learning from "Female Genital Mutilation": Lessons from 30 Years of Academic Discourse', *Ethnicities,* pp. 24-49, DOI 10.1177/1468796811419603.

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The Application of Durkheimian Theories in the 21st Century

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Abstract

Classical sociological theorists have been criticised for being too vague, incomplete, and ever too conservative and notwithstanding all the efforts and consideration that has been dedicated to linking different parts of Durkheimian thought to the law itself, contemporary sociology and criminology frequently disregard its potential within the current study of law and criminology. This paper, however, will strive to explore and prove, through a Durkheimian lens, how classical sociological frameworks can provide us with a series of diverse aspects to analyse modern values and circumstances.

Keywords: Emile Durkheim, Theoretical Criminology, Sociology

1. Introduction

19th century criminological discourse primarily focused on crime and criminality, which gave rise to the first fields of study for sociology. With the appearance of sociology as an autonomous discipline at the start of the 20th century, a turning point in the consideration of deviance emerged. While remaining on deterministic bases, in contemporary discourse sociology's emphasis is placed on the influence of society as a whole (the 'social body') rather than on the intrinsic characteristics of people. Emile Durkheim, one of the most distinguishable sociologists and often hailed as the 'father of sociology', argued that the origin of deviance lies in anomie, which he describes as the disease of a society deprived of moral and legal rules leading to the disintegration of solidarity. Changes in the model of society, economic crises or the disruption of the family structure would be characteristic of anomie (Carrabine et al. 2009).

In the Rules of the Sociological Method (1895), he presented the foundations for what would later become the sociology of crime. In his work, he rejected the plausibility of making an a priori distinction between 'real' crimes and other types of deviant behaviour. He argued that a behaviour which can cause harm, does not necessarily have to be labelled as 'pathological'. Durkheim stipulated that crime is not a pathological phenomenon but a normal one because there are no societies in which criminal behaviour does not exist — regardless of whether the society is archaic, traditional, or contemporary. It is of crucial importance to highlight that he was the first sociologist to consider crime as a simple transgression of a norm: 'an act is criminal when it offends the strong, well-defined states of the collective consciousness' (Durkheim 1984, p. 39). Consequently, he shifts the prospect of criminal anthropology and sociology by affirming: 'We do not condemn it because it is a crime, but it is a crime because we condemn it' (Durkheim 1984, p. 40). The sociologist further explains that the act of punishment is not intended to correct or intimidate the offender but rather to reactivate the 'common conscience', the sense of their collective belonging which manifests itself through the agreement on shared rules (Carrabine et al. 2009).

The development of the sociology of crime at the dawn of the 20th century has thus made it possible to shift the sources of determinism from a moralist and essentialist point of view to a reformist and functionalist position attentive to the links between individuals and the means that are put at their disposal inside the social body (ibid.).

Despite warranted criticism of classic sociological and criminological theories, the latter can still contribute by providing some valuable devices for amending orthodox beliefs about the sociological field's potentials for advising both moral and legal assessment. Cotterrell (2011) argues that it is Important to note that even though Emile Durkheim's extensive school of thought on the sociology of morality presents us with the most sources, it has not yet been thoroughly examined. Contemporary sociology and criminology frequently disregard its potential within the current study of law, notwithstanding all the efforts and consideration that has been dedicated to linking different parts of Durkheimian thought to the law itself. The classical sociologist undeniably gives us a compelling and notable template that assists us in analysing and studying some constitutional values, striving to prove how they achieve such depth as they have from their coherence with conditions needed to ensure both the adherence and unification of the society (ibid., p. 4).

Therefore, this paper will present how some classical and fundamental sociological concepts that revolve around a composition of certain values, can still contribute to contemporary criminological research and to the legal studies. It will first analyse the notions of moral individualism, the sacred, and human dignity, followed by the role of punishment in society and will end with the application of some of the theories in more contemporary settings.

2. Durkheim on Moral Individualism, the Sacred, and Human Dignity

According to Cotterrell (2011), the process of understanding the concept and role of punishment by following Durkheimian thought requires us to register Durkheim's insights and beliefs on morality, the sacred, and that of human dignity. For Durkheim, 'morality is an infinity of special rules' (Durkheim 1961, p. 25), which are linked to a series of distinct social conditions and historical stipulations, where actions — such as decisions and practices — obtain their own moral significance in particular circumstances. However, in order to properly comprehend the concept of morality and its role in society, it is crucial to evaluate social behaviour empirically. According to Durkheimian thought, sociology's role is not to unveil any moral facts, but to illustrate how 'any criteria governing what is morally appropriate will relate to the sociological character of the particular type of society concerned' (Cotterrell 2011, p. 4).

The purpose of Durkheim's work is thus to show that a moral fact is a social fact. For this, he relies on the idea that an act, which never has as its object the interest of the individual or of other individuals, is never called moral. Morality can only have the objective of the group formed by a plurality of associated individuals. That is to say, society constitutes a personality qualitatively different from the individual personalities that compose it. Moral thought, therefore, begins where attachment to any group also occurs (ibid., p. 5). Cotterrell then further explains that sociology can, nonetheless, examine socialisation objectively as a 'social fact', and only then can it recognise the moral beliefs and traditions that are consistent with substantial social connections in specific societies. Sociology can, thus, be considered as a guide to morality, as it can present some standards in the evaluation and criticism of people's moral beliefs and choices. It could, therefore, be argued that sociology is fit to provide assistance and guidance on what laws and regulations should be implemented. Nevertheless, it is when the sociological field exposes some significant weight of some moral value within some social circumstances, that the issue of whether they should be displayed and supported by the law will then need to be confronted. The aforementioned socio-legal perspective is foreign to the majority of research orientations in the sociological field of law, as law mainly portrays itself as an establishment of power, rather than an illustration of morality (ibid.). It is increasingly common for the public to require the law to consider the moral dimensions of a situation (Van Der Burg & Taekema 2004). Sociology can, therefore, assist in providing some legal and moral values that are worth examining and indeed be taken into consideration.

Durkheim was concerned throughout his intellectual career with moral facts as he created this expression precisely to delimit normative behaviour from a sociological point of view. Reforms of criminal law and practice, as well as the emergence of the idea of human rights in the late eighteenth century (Garland 1990b), are an expression of a more profound cultural transformation, through which the human person himself becomes a sacred object. The presence of a sacred moral system supports the expansion of personal sentiments and ardent responses, which also manifest the permanence and strength of 'the sacred moral order' (ibid.). Garland further argues that Durkheim intends to demonstrate the sacredness of the individual in modernity, highlighting the profound ambiguity of the term 'individualism'. He explains that we now find ourselves in a position where individuals lack a goal beyond maximising selfish pleasure or economic utility. Rules are perceived as a series of principles which require certain conducts to be

followed. Within this general class of rules, moral facts constitute a subset, because not all rules of conduct are moral (ibid.).

For Durkheim, the opposition between the sacred and the profane is constitutive of all religion and, in a certain sense, of all normative order. It creates a division of reality between two radically different domains, which can only communicate with each other by means of exceptional ceremonies and people. Practical life itself is divided according to this order, which separates ordinary actions from material social reproduction, ritual, and sacred actions. The sacred is what we owe some particular and absolute respect. It must not be violated in any way, because his own character is precisely a superior dignity, which subjects him to all other realities. Beyond everything, common convictions stress the significance and the sacredness of the personal and 'correlative virtues', such as autonomy, reason, compassion, diversity, and human dignity. Being part of the very basis of social life, the aforementioned principles are bestowed an innate status and are profoundly nurtured in people's consciences (ibid., pp. 48-50). The sacred moral order, in the form of the Church, represented a moral community whose purpose was to protect the same sacred interests (e.g. unity) rather than the profane ones (individual concerns) that were perceived as direct attacks to the sacred. In the contemporary world, however, the role of the protector of these sacred values was replaced by some global legal orders, such as the European Union, the United Nations, and associated human rights protections.

For Durkheim one of the most essential and correlative virtues was human dignity, which even though it has been labelled as an ineffective and fatally vague in more traditional legal frameworks (Macklin 2003, p. 1420), which is sought in the modern field of law. Some writers, such as Mauntner (2008), believe that human dignity is the foundation of human rights. According to Schachter (1983, p. 851), it incorporates the perception of personal individualism, which indicates a personal 'autonomy and responsibility', which in its turn is part of a more significant social group (Cotterrell 2011, p. 8).

Several scholars (Lee & George 2008, p. 174) have argued in their works that a subjective perception of dignity differs from an objective one. More specifically, even if someone's dignity might have been objectively harmed, that does not mean it has been harmed from a subjective perspective, and the same applies vice-versa. Society can, therefore, determine whether someone's dignity is violated, notwithstanding what the individual thinks (Dworkin 1994, pp. 167–168).

Thus, examining human dignity from a legal aspect does not suggest freedom from all restraints, but to 'individual's right to personality and the flourishing not the deterioration of the personality' (Cotterrell 2011, p.9).

According to Cotterell (2011), Durkheim believed that for an individual's complete participation in society, one must believe in having complete control of their life conditions, and in being free from society's oppression in matters of personal choices, external powers, and from the exploitation that would threaten their identity — for instance, the violation of privacy by publicising personal information about an individual without asking for their permission. It could, therefore, be argued, that the loss of one's dignity and autonomy results in the 'loss of personal control over one's conditions of existence' (ibid., p.10). The objective perspective of both dignity and sovereignty is, particularly though the law, connected to the control of these conditions, as it represents human value as perpetual and 'human dignity as non-alienable by the individual' (ibid.).

The reason behind the lasting significance and relevance of theories such as moral individualism is that their importance grows as societies become more complex and differentiated. Therefore, these notions of general humanity, are both sociologically, and consequently also in the criminological field, essential in contemporary societies. They are required to support 'society-wide' interpersonal and social interactions, financial assurance and planning, social incorporation and commitment, as well as tolerance towards diversity. These are some sociological values that encourage the state to thrive, and they could never cross the 'necessarily extensive state regulation of ever more complex social and economic life' (ibid., p. 11).

3. Sociology of Punishment

Sociology of punishment represents the collection of thoughts that examines the relationship between punishment and society, by trying to comprehend penal punishment as a sociological event and therefore tries to track its purpose in social life. It is of crucial importance to highlight that sociology of punishment has not always been in the centre of attention within the sociological realm. Consequently, up until recently, there were only a few works that tackled the issue of punishment, and Durkheim was the only one to make an impactful contribution to the field. Despite the weight of punishment as a subject of analysis, contemporary sociology has not tried to include penal systems as a centre of their researches or as the foundation of sociological observations (Garland 1990a). The field of punitive justice has not attracted specialist from various

fields, such as philosophers, literary scholars, and criminologists, as they try to explore the insights that this realm can contribute to our 'social world'. Consequently, this area of study has finally been able to prove its potential as both an intellectual and inspiring sphere of thought that tackles issues not only on punitive strategies but also the operation of society as a whole (ibid.)

Contrary to common thought, the concept of punishment in sociology is not only restricted to the discipline of criminals and delinquents, nor can it be reduced to a specialised tool whose aim is to reduce the crime index. Classical approaches in the field of the sociology of crime and punishment, such as Hobbes, Foucault, and Durkheim, although from different perspectives, try to grasp punishment's true meaning and role in society, by going beyond places of confinement or the courtrooms, but recognise it as a social institution, which consists of whole political, historical, and even symbolic processes that shape societies from their core (Garland 1990b).

The prevalent era of punishment until the Enlightenment was characterised and portrayed in Thomas Hobbes's *Leviathan* (1651), where he argued that the sovereign has the right to punish its people for their crimes. According to Hobbes, the state of nature of societies is a state of war, and in order to avoid this state, people enter a social contract and accept a sovereign monarch. This monarch gains its normative powers and legitimacy not through religion or ideology, but through the theoretical conception of the social contract. In this contract, the public is expected to follow certain rules and make some sacrifices for the state, so that the state in return can ensure their rights, which incorporates the punishment of the deviants 'with corporal or pecuniary punishment, or with ignominy, every subject according to the law he hath formerly made' (Hobbes 1997, p. 111). In such societies, the criminal is perceived as an enemy of the state, as his crime is an act against the society and sovereignty itself. More specifically, the crime insults the people who are following the social rules, and in the process, it also demeans the sovereign's power and authority (ibid.).

Michel Foucault (1975), however, argued that under absolute monarchy, 'judicial torture' must be interpreted as a political ritual. The law represents the conscious power of the sovereign, and crimes are perceived as assaults to the monarchy itself. The right to punish the offenders, therefore, falls into its hands. Harmed sovereignty is restored by public punitive rituals that symbolise its power. Hence the importance of this liturgy of torture testifies the triumph of the law. More specifically, he argues that an essential element of sustaining social order as a monarch

is that of securing the present power dynamics and structure (Foucault 1995, pp. 47-48). It could be argued that the purpose of punishment, in these societies, was not that of bringing justice, but that of demonstrating sovereign power in public for the purpose of securing social order.

Foucault (ibid.) reports that throughout the 18th and 19th centuries, the punitive system underwent some radical changes. He witnessed two significant changes in the punitive system. Firstly, the public display of punishment lost its ceremonial function and gradually faded, and 'it survived only as a new legal or administrative practice' (ibid., p. 8). Instead, criminals were detained in prisons, and in certain countries, such as Switzerland and Austria, community service and probation was the primary imposition. The purpose of punishment shifted, and rather than targeting and harming the criminal's body, it started aiming for their souls and minds through discipline (Garland 1986, p. 850). This new era of penal punishment indicated the closure of 'monarchical sovereignty', which up until then, had demonstrated its supreme power and authority through classified 'inquisitorial trials, torture of defendants, and the political ritual of public execution' (Gibson 2011, p. 1042).

Even though this transformation of punishment had been already discussed by some scholars and historians, Foucault scrutinises them for characterising the advocates of this enlightened transformation as 'philanthropists nobly seeking less cruelty, less pain, more kindness, more respect, more humanity' for the underprivileged and feeble offenders (Gibson 2011, p. 1042). However, the French philosopher claims that that was not the real rationale for advocacy and that the legal theories of punishment that are supposedly derived from classical liberal thoughts are but constitutional fiction (Paternek, 1987). It is suggested that it was the upper class who were interested in reform not because of some philanthropic dignity, but because of the desire to redirect penal law towards categories of crimes - like theft - that damages their class interests, and to overthrow absolute monarchy (Gibson 2011, p. 1042). Consequently, as state and punitive power did not come from a pivotal jurisdiction, as it did in absolute monarchies, it got scattered amidst numerous institutions whose role became to control the working class through observation and discipline. Prisoners were under severe disciplinary measures that did not derive from corporal punishment but from the gaze of the unceasing observance by the prison warders. It is further argued that Foucault reprimanded the disciplinary system of modern punitive institutions, as he

claimed that not only were they not less oppressive than the premodern measures, but their purpose of physical punishment for disciplining the mind, was even more deceptive (ibid.).

The criterion of disciplinary measures, from Foucault's perspective, is Bentham's Panopticon, which constitutes the prototype of modern prisons (Paternek 1987, p. 107). A concept that derives from the idea of focal surveillance and observation, which situates a tower in the middle of the prison grounds. In that way, the guards have a constant and holistic view of the penitentiary and its prisoners. The convicts, however, don't know when and whether they are, in fact, being monitored (ibid.). Foucault characterises Bentham's system as 'a marvellous machine which, whatever use one may wish to put it to, produces homogenous effects of power' (Foucault 1972, p. 202). As Gibson (2011) discusses, the French philosopher claims that this power of surveillance, is both restrictive and creative, as it provides an insight on the subdued people. More specifically, the power (*pouvoir*) and knowledge (*savoir*) portray modernity as an integral idea, and they are perceived as two entities and authorities that restrain and discipline the criminals. Thenceforth, all the knowledge acquired from the insight from the penitentiaries, are used in the advancement of some scientific fields, such as 'criminology, medicine, and psychiatry', which evaluate all the data, and in their turn contribute in the development of new approaches that strive to make these institutions more productive and effective, in their process of constructing 'docile bodies' (ibid., p. 1043)

Emile Durkheim's remarkable contribution in the field of the sociology of punishment, which differs from Foucault's, is important in two regards. First, through his work, *The Divison of Labour in Society* (1984) and in *Moral Education* (1961), he made the concept of punishment a primary objective of analysis in sociology. Second, he argued that the essential component of criminality and criminal activity is neither the criminal nor the control of violence, but society as a whole (Garland 1990b). Despite revealing the importance of the question of the social meanings constituting the penal institution, the sociology of punishment reduces the latter to the meaning it obtains for a theoretical, economic or political system and suggests the simplicity of the scheme functionalist where the same forces acting on the same objects must produce the same sequences of effects (ibid.). To what extent, however, can a theoretical concept or system predetermine the meaning of punishment?

Following Durkheim's ideas, the fundamental symbolic representation of penal punishment is immediately reduced to a precise function: that of guaranteeing a definite cohesion, balance, or social adjustment at the level of manners and sensibilities. In other words, punishment expresses both a ritualistic and expressive dimension (Smith 2008, p. 339). In *The Divison of Labour in Society*, Durkheim explains that '[t]he totality of beliefs and sentiments common to the average members of a society forms a determinate system with a life of its own. It can be termed the collective or common consciousness' (Durkheim 1984, p. 38). Garland (1990b) further explains, that all these beliefs and sentiments merge and form a system that represents a 'proper life', more specifically, it is an 'objectified', which is an existence that reflects socialisation thanks to the very authority that this system gives its sacredness to. A society would, therefore, only exist by the image it creates of itself and this very image is that of a consistent 'collective consciousness' whose only purpose is to maintain and sustain social institutions. Within this frame of reference, the penal institution is thus interpreted as a means of communication that transcends the twofold relationship between the court and the punishment of the criminal. Durkheim (1984, p. 176) further argues that the punishment is the sole tangible symbol from 'which an inner state is represented; it is a notation, a language through which either the general social conscience or that of the teacher expresses the feeling inspired by the disapproved behaviour'. It, hence, aims to demonstrate the authority of an order made real by putting into practice its image of sanctity (Garland 1990b).

One of Durkheim's most remarkable arguments regarding the penal system is that of constraining the brutality of punishments and substituting them with moral education.

He argued that there is a prominent contradiction in avenging the victim's harmed human dignity by stripping away that of the offender. His theory of moral individualism supports that the act of punishment should not be imposed upon someone's body. Even when dealing with serious offences, Durkheim maintained punishment should be limited to imprisonment. Physical forms of discipline should be rejected as they directly harm human dignity (Cotterrell 2011, p. 11). The value order of the aforementioned theory is verified in sociology as it supports the integration and participation in society (ibid.).

Durkheim sees punishment as a compromise which can present itself to be uneasy as it is a procedure that hurts the criminal's human dignity and autonomy but in a rigidly restrained and calculated way. It follows the assumption that the damage done to these values is not irreparable.

As previously discussed, human dignity is one of the main principles that one must hold onto for his or her complete integration in society (ibid., p. 12).

Following the same chain of thought, in his work *Moral Education* (1961), he presents a developed and precise theory on the significance of moral education within the penal system. In the same way that contemporary education must generate a secular and objective morality and use it to attain the best means of promoting the 'collective conscience', the punitive measures should also exploit moral education within places of confinement as a means of promoting social morality.

It is of critical importance to highlight that not only is punishment incapable of imposing moral jurisdiction by itself, but it suggests that the authority has already been put in place. The establishment of that jurisdiction and function of the sacred is, in other words, a sort of moral instruction and influence that initiates from home continues to school and then stretches out throughout the whole society (Garland 1990b, pp. 55-56). 'Punishment does not give [moral] discipline its authority, but it prevents discipline from losing its authority, which infractions if they went unpunished, would progressively erode' (Durkheim 1961, p. 167). We, therefore, ought to renounce the idea of punishment being a practical tool, but recognise its pure form: that of an 'expressive form of moral action'. In reality, punishment is a method of conveying a moral message, and of indicating the strength of expression which lies within it, for proper integration in society once the offender is released (Garland 1990b, p. 58). However, in the contemporary world, the power structure between the *punisher* and the *punished* changed. The sender of the moral message is no longer purely the sovereign. Instead the new sacred moral order and human rights protect and promote global human values, such as dignity (*Universal Declaration of Human Rights* 1948, art. 1).

Durkheim's theory on penal punishment provided a series of very innovative thoughts into the field of sociology and criminology that still remain relevant today. In comparison to primitive societies, contemporary ones have become a lot more lenient towards their punishment methods, so ruthless practices of punishments, such as torture, gradually become less common (Garland 1990b). Nevertheless, penal institutions and places of confinement are far from perfect. Several countries such as the United States (U.S. Department of Justice 2017) and the United Kingdom that are facing grave problems of mass incarceration. In 2017, the American National Institute of Justice announced that over three-quarters of released convicts are 're-incarcerated within five

years of discharge from prison'. The significant number of re-offending rates is owed to the fact that most prisons in the U.S are focusing their penal institutions on punishing the inmates instead of centering their attention on their rehabilitation for a successful integration in society (Reich 2017). Despite there being some individuals that have claimed that prison rehabilitation does not lessen re-incarnation (Taylor 2019), numerous studies have proven the contrary (Millard 2019; U.S. Department of Justice 2017). But this trend is not uniquely American. Prison population in the UK has seen a remarkable increase in the last decades (Sturge 2019). This is even more problematic when overcrowding and poor considerations on dignity and human rights is a global phenomenon (World Prison Brief 2018).

Hence, it could be argued that Durkheim's theories regarding punishment and correctional methods, do provide us with a very solid framework that could be applied in contemporary punitive and correctional establishments.

4. Conclusion

In conclusion, Durkheim's sociological framework provides us with a series of diverse aspects to analyse modern values and circumstances. His theories have justly been criticised for being too vague, incomplete, and ever too conservative (Garland 1990b). Even his notion of social solidarity could reasonably be criticised as it mainly centres its ideas on the functional regulation and reliance, while it lacks consideration of other groundworks of solidarity within emotional connections and engagements. Notwithstanding the shortcomings in his findings and works, his discussion on the sociological frameworks of values within the legal realm, merit some earnest attention and reflection, primarily due to their unmistakable sophistication, extensive reach, and compelling relevance to both modern sociology and criminology. He undeniably raises myriad questions and arguments worth investigating, that very often circumvent the frame of the philosophy of law and morality. One of Durkheim's most significant discussions is that the justification and rationalisation of constitutional values, by addressing the singular nature of the justice system as an interpretation of conditions for robust social interactions. (Cotterrell 2011, p. 17).

After examining several theories and their application in contemporary settings, it is safe to assume that twenty-first century criminologists should still be paying attention to 'classical' theories. Notions and values of human dignity, authority, and their implication in modern life, remain undeniably relevant. It could, therefore, be argued, that by underrating and by-passing classical theorists such as Durkheim, and by turning his insights and theories as second nature (Smith 2008), the legal field of sociology has unmistakably missed on some opportunities of extension (Garland 1990b).

References

Broson, J & Carson, EA 2019, 'Prisoners in 2017, NCJ 252156', US Department of Justice, Office of Justice Programs, Bureau of Justice Statistic, pp. 1-44, viewed 2 January 2020, <https://www.bjs.gov/content/pub/pdf/p17.pdf>.

Carrabine, E, Cox, P, Lee, M, Plummer, K & South, N 2009, *Criminology: A Sociological Introduction*. 2nd ed. Routledge, Abington.

Cotterrell, R 2011, 'Justice, Dignity, Torture, Headscarves: Can Durkheim's Sociology Clarify Legal Values?', *Social & Legal Studies*, vol. 20, no. 1, pp. 3-20, DOI 10.1177/0964663910378433.

Durkheim, E 1961, *Moral Education: A Study in the Theory and Application of the Sociology of Education*, Free Press, New York City.

Durkheim, E 1984, *The Divison of Labour in Society*, Macmillan, London.

Durkheim, E 1979 'A Discussion on Sex Education' in WSF Pickering (ed.) & HL Sutcliffe (tr.) *Durkheim: Essays on Morals and Education*. James Clarke & Co Ltd, Cambridge.

Dworkin, R 1994, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom*, Vintage Books, New York.

Foucault, M 1995, *Discipline and Punish: The Birth of The Prison*. 2nd ed. Vintage Books, New York City.

Garland, D 1986, 'Foucault's Discipline and Punish an Exposition and Critique', *American Bar Foundation Research Journal*, vol. 11, no. 4, pp. 847-880, DOI 10.1111/j.1747-4469.1986.tb00270.x

Garland, D 1990a, 'Frameworks of Inquiry in the Sociology of Punishment', *The British Journal of Sociology*, vol. 41, no. 1, pp. 1-15, DOI 10.2307/591014.

Garland, D 1990b, *Punishment and Modern Society*, University of Oxford, Oxford.

Gibson, M 2011, 'Global Perspectives on the Birth of the Prison', *The American Historical Review*, vol. 116, no. 4, pp. 1040-1063, DOI 10.1086/ahr.116.4.1040.

Hobbes, T 1997, *Leviathan: Or the Matter, Forme and Power of a Commonwealth*, Ecclesiastical and Civil, Touchstone, London.

Lee, P & George, R 2008, 'The Nature and Basis of Human Dignity', *Ratio Juris*, vol. 21, no. 2, pp. 173-193, DOI 10.1111/j.1467-9337.2008.00386.x.

Macklin, R 2003, 'Dignity is a Useless Concept', *BMJ*, vol. 327, no. 7429, pp.1419-1420, viewed 2 January 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC300789/>.

Mautner, M 2008, 'From "Honor" to "Dignity": How Should a Liberal State Treat Non-Liberal Cultural Groups?', *Theoretical Inquiries in Law*, vol. 9, no. 2, pp. 609-642, DOI 10.2202/1565-3404.1199.

Millard, O 2019, 'Prison Should be a Place of Rehabilitation, Not Reprimand', Varsity, viewed on 2 January 2020, <https://www.varsity.co.uk/opinion/18019>.

Paternek, M 1987, 'Norms and Normalization: Michel Foucault's Overextended Panoptic Machine', Human Studies, vol. 10, no. 1, pp. 97-121, DOI 10.1007/BF00142988.

Reich, J 2017, 'The Economic Impact of Prison Rehabilitation Programs', Warton University of Pensylvania, viewed 2 January 2020, <https://publicpolicy.wharton.upenn.edu/live/news/2059-the-economic-impact-of-prison-rehabilitation/for-students/blog/news.php>.

Schachter, O 1983, 'Human Dignity as a Normative Concept', *The American Journal of International Law*, vol. 77, no. 4, pp. 848-854, DOI 10.2307/2202536.

Smith, P 2008 'Durkheim and Criminology: Reconstructing the Legacy', *The Australian and New Zealand Journal of Criminology*, vol. 41, no. 3, pp.333-344, DOI 10.1375/acri.41.3.333.

Sturge, G 2019, 'UK Prison Population Statistics', House of Commons Library, viewed 9 May 2020, <https://commonslibrary.parliament.uk/research-briefings/sn04334/>.

Taylor, D 2019, 'Prisoner Rehabilitation Does Not Work, Says Former Prisons Boss', *The Guardian*, viewed 2 January 2020, <https://www.theguardian.com/society/2019/oct/29/prisoner-rehabilitation-does-not-work-says-former-prisons-boss>.

Travis, A 2017, 'England and Wales Have Highest Imprisonment Rate in Western Europe', *The Guardian*, viewed 2 January, <https://www.theguardian.com/society/2017/mar/14/england-and-wales-has-highest-imprisonment-rate-in-western-europe>.

Universal Declaration of Human Rights 1948, resolution 217 A (III), viewed 2 January 2020, <https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf>.

Van Der Burg, W & Taekema, S (eds.) 2004, *The Importance of Ideals: Debating Their Relevance in Law, Morality, and Politics*, P.I.E. - Peter Lang, Brussels.

Westley, F 1978, '"The Cult of Man": Durkheim's Predictions and New Religious Movements', *Sociological Analysis*, vol. 39, no. 2, pp. 135-145, DOI 10.2307/3710213.

World Prison Brief 2018, 'Highest to Lowest - Occupancy Level (Based on Official Capacity)', viewed 10 May 2020, <https://www.prisonstudies.org/highest-tolowest/occupancy-level?field_region_taxonomy_tid=All>.

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The Legality of Small Arms Production:

An Obstacle to Effective Trade Regulations?

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Abstract

Officially, international control of small arms and light weapons (SALW) has made considerable advancements in recent years, most notably in the form of the 2014 Arms Trade Treaty (ATT). Nonetheless, important systemic and structural deficiencies seem to persist, which prevent these control mechanisms from achieving their intended purpose. In an attempt to find an explanation for these shortcomings, this article traces back previous attempts aimed at combatting the illicit proliferation of SALW, by emphasising both their unbowed demand and the trade's continuous commercial viability. The example of Bulgarian-made AK-47 machineguns underlines the picture of a system intentionally failing to prevent the weapons' profitable export. It concludes that following the rise of globalisation, the privatisation of SALW manufacturing industries appears to have become the biggest impediment to effective control. Subsequently, it is argued that most anti-proliferation treaties are deliberately limited to *a priori* insufficient trade restrictions, as they lack any pre-emptive measures that target these weapons' mass production in the first place. Once produced, SALW will find a buyer – no matter the existence of trade restrictions.

Keywords: Small Arms Trade, Trade Regulation, SALW

1. Introduction

The past thirty years have witnessed increased attention brought to the global proliferation of small arms and light weapons (SALW) due to their recognition as the primary cause of death in conflict situations since the end of the Cold War, with women and children being disproportionally affected (Lustgarten 2015; Bolton, Sakamoto & Griffiths 2012; Killicoat 2006). Notwithstanding numerous attempts to combat their illicit distribution and misuse (Bolton, Sakamoto & Griffiths 2012; Greene 2000), including the arguably most extensive multinational agreement to this day, the 2014 Arms Trade Treaty (ATT) (Lustgarten 2015), these deadly weapons still regularly find their way into in the hands of child soldiers, insurgents, and terrorists around the globe (Hanson 2011; Marsh 2002).

Confronted with the question as to why these efforts frequently do not seem to achieve their aspired goals, this essay shifts the attention away from the focus on trade regulations towards a more fundamental issue: the widespread legality of semi-private and mass-market production of SALW (Small Arms Survey 2014; Bolton, Sakamoto & Griffiths 2012).

First, an initial account of the global distribution of small arms, their humanitarian impact and market value will be followed by a scrutiny of past trade-focused initiatives aimed at combatting illicit proliferation. Highlighting the fact that the geographic fulcrum of SALW production lies in the Global North, the essay then proceeds to analyse the key impact of increased privatisation and globalisation on Western small arms manufacturing industries in the post-Cold War era (Bolton, Sakamoto & Griffiths 2012; Marsh 2002). The developments in this period have since proved seminal for the efficacy of trade-focused arms treaties.

The findings are exemplified by the semi-private Bulgarian production of AK-47 type assault rifles, which in spite of existing treaties and embargos were found to have been provided to questionable clients in conflict zones all over the globe (Lustgarten 2015; Hanson 2011; Killicoat 2006; Kiss 2004; Greene 2000). In conclusion, the evidence provided reveals how the scrutiny of the mass-market production of small arms can offer an explanation for the

shortcomings and resulting ineffectiveness of the current mechanisms aimed at combatting the illicit proliferation and misuse of SALW. These mechanisms are usually limited to arms trade and fall short of having any pre-emptive effects.

2. The impact of SALW

This segment analyses five aspects pertinent to SALW trade definitional range, their availability, potential for harm, and the lucrative business related to both their production and trade. Given the existence of diverging definitions of SALW (Lustgarten 2015; Bolton, Sakamoto & Griffiths 2012; Efrat 2010), Greene's (2000, p. 154) comparatively wide interpretation will serve as a base line for the following analysis:

> *[…] the term "small arms" refers to conventional weapons produced (if not used) for military purposes that can be carried by an individual, including pistols, rifles, sub-machine guns, assault rifles and grenades. Light weapons can be carried on a light vehicle, and operated by a small crew. They include heavy machine guns, light mortars, and shoulder-fired anti-tank or anti-aircraft missiles.*

However, this definition is not sufficient in that it does not encapsulate military grade training and ammunition. Despite ammunition and training technically not falling under the umbrella term of SALW, they should be considered an important part of any discussion on SALW; a detail obscured by Greene's (2000) definition. In this way this essay views SALW not as solely manufactured objects but an institutionalised regime consisting which holds substantial symbolic and social values. This paper borrows Krassner's (1982) definition of regime as a social construct consisting of 'principles, values, norms, rules and decision-making procedures around which actors' expectations converge in a given issue area'. These factors all work towards the proliferation and use of SALWs to cause harm. Because the problem of SALW extends the mere material manifestations of weapons, trade-regulations are inherently flawed. Instead, an upstream approach focussing on the legality of the SALW regime is in order. SALW are present in the

majority of countries worldwide, with their legitimate possession being 'intimately connected to' a state's 'inherent right of self-defence' (Lustgarten 2015, p. 570).

Consequently, approximately 'eight million new small arms and up to 15 billion rounds of ammunition' (Amnesty International 2017) find their way into the global markets each year, both the licit and illicit (Boutwell & Klare 1998), adding to an estimated total of 875 million units in circulation today (Small Arms Survey 2018b; Amnesty International 2017). Yet even the Small Arms Survey, in its function of keeping track of global SALW sales and conflict-related developments, has repeatedly stated that despite best attempts to deliver accurate numbers, the actual trade is likely to be considerably higher (Small Arms Survey 2014).

While not suggesting a simplified causal relationship between gun ownership and violence, this extensive distribution has been known to facilitate conflict (Lustgarten 2015). Boutwell and Klare (1998) found that global armed conflicts in the past 30 years were not dominated by heavy military equipment but by SALW defined by Greene (2000). SALW not only caused the majority of casualties, but their usage has been tied to the displacement of millions of refugees in politically unstable regions, predominantly in the Global South (Krause 2001, cited in Bolton, Sakamoto & Griffiths 2012; Boutwell & Klar 1998). As a result, these cumbersome milestones earned them the title of 'the real weapons of mass destruction' (Annan 2000, cited in Lustgarten 2015 p. 571; Bolton, Sakamoto & Griffiths 2012).

Yet despite their destructive potential, small arms also mean lucrative business for those involved in their production and distribution, which has been found to represent a key obstacle to the efficacy of any type of agreement aimed at curbing their proliferation. In 2018, the authorized trade in SALW alone was estimated at approximately US$8.5 billion (Small Arms Survey 2018b; Amnesty International 2017), representing a drastic increase compared to 2002, where Marsh's (2002) research, based on the Small Arms Survey's most recent data at the time, allocated the number to lie between US$4-6 billion (2002). Given the inherent complexity and the secrecy veiling the black markets' intricate workings (Marsh 2002; Greene 2000), the profits generated by

the illicit trade were estimated to range ‘from 10-20’ to ‘55 percent of the legal trade’ in 2002 and most likely do not reflect the current reality (Dyer & O'Callaghan 1998, cited in Marsh 2002, p. 220).

Shifting attention to the production of SALW, it is important to understand who benefits the most from their global trade. While disregarding ‘craft production’ at this point, done ‘largely by hand’ and ‘in relatively small quantities’ (Small Arms Survey 2018a), the industrial production of small arms in particular has expanded drastically since 1990, both quantitatively and geographically. Throughout most of the 20th century small arms manufacturing used to be the specialty of a handful of powerful state-affiliated producers, disproportionally located in the US, Russia and China (Marsh 2002). The standoff between the former two countries spurred state production of various types of firearms in during the Cold War, including SALW. Yet as will be addressed further below, the end of this Arms Race had a landslide effect for the weapons producing industry around the globe.

Today, ‘nearly 1,250 companies’, both private and semi-private, operate in more than 90 countries (Stevenson, n.d., cited in Bolton, Sakamoto & Griffiths 2012, p. 304), with the world’s top ten producers of SALW all surpassing annual revenues of US$100 million, and predominantly residing in North America, Europe, Asia and Russia (Small Arms Survey 2014).

SALW therefore contribute substantially to harm and conflicts around the world and represent a challenge that needs to be addressed accordingly. Because SALW should rather be seen as an institutionalised regime as opposed purely material objects, existing arms control regimes fall short of having an impact. This will be shown in the next section.

3. The (insufficient) focus on trade regulations

This section comprises a short summary of noteworthy attempts to combat the illicit proliferation of SALW. After a recollection of past efforts, the Arms Trade Treaty of 2014 will be

scrutinised in more depth, in order to set the stage for a range of potential issues inherent to their collective approaches.

In the 1990s the uncontrolled diffusion of small arms became recognised as morally objectionable and as posing a potential threat to international security and regional stability (Bolton, Sakamoto & Griffiths 2012; Efrat 2010; Greene 2000). This spurred the UN and various international humanitarian organizations to generate support for collective control measures focused on SALW traffic and transfer (Spapens 2007, p. 359). This stemmed from the growing awareness of some leading political individuals - like former UN General Secretaries Boutros Boutros-Ghali and Kofi Annan - that most of the weapons used and responsible for disastrous human agony worldwide (especially in many African countries) predominantly originated form the Global North (Lustgarten 2015). Yet due to their inability to meaningfully affect the production of said weapons, attention was focused on restricting their use and controlling their trade instead.

Besides the UN, other groups and organizations became active in creating new regulative initiatives as well, such as: [..] the European Union (EU), Organisation of American States (OAS), Mercosur, Organisation of African Unity (OAU), Southern African Development Community (SADC), [or] the Economic Community of West African States (ECOWAS) (Greene 2000, p. 151).

Some of the more 'substantial regional initiatives' made good progress and achieved partial success (Greene 2000, p. 187), like the 'curbing [of] gun violence' by African governments (Efrat 2010, p. 128) through treaties like the ECOWAS SALW trade moratorium in 1998 (Greene 2000). Yet others such as the EU's Code of Conduct for Arms Exports (Bolton, Sakamoto & Griffiths 2012), as well as numerous international embargoes (Marsh 2002) were repeatedly criticised for being 'weak and ineffective' (Efrat 2010, p. 98), or 'well-intentioned' but feeble (Jones 1988 cited in Marsh 2002, p. 220).

These critiques frequently centred on a repeated lack of 'binding financial or legal obligations' (Greene 2002, p. 172) and crucial 'enforcement mechanisms' (Greene 2002, p. 173), resulting at times in a display of plain disregard for the restrictions agreed on. The handling of foreign arms licensing by the UK serves as a good example. Amongst other prominent international infringements, the British government was found to have circumvented a UN arms embargo imposed on Sierra Leone in 1998 (Marsh 2002) and to have supported 'purported' sales of British weapons to 'Jordan in the late 1980s that were actually to Saddam Hussein's Iraq' (Lustgarten 2015, p. 573).

4. The Arms Trade Treaty

In an attempt to finally create a legally binding, international agreement that would prevent state-to-state transfers of conventional weapons when known that they might 'be used to commit or facilitate genocide, crimes against humanity, or war crimes' (Amnesty International 2017; Small Arms Survey 2013, p. 1), 154 states accepted and approved the 'text of an Arms Trade Treaty' (ATT) in 2013 (Lustgarten 2015, p. 569). The US then voted against it and other leading arms manufacturing nations like Russia, China and India abstained (Lustgarten 2015, p. 576).

Even with these key producing countries abstaining, the ATT arguably represents an unprecedented achievement in the realm of SALW control, but its actual wording conceals major barriers to its applicability. In fact, upon a closer look, considerable inconsistencies and weaknesses regarding the ATT's scope and the obligations become quickly apparent (Small Arms Survey 2013).

Whereas seemingly covering a broad range of conventional types of weapons, including SALW, missiles and missile launchers, the exclusion of categories like military grade training and transport as well as surveillance equipment all represent serious defects (Lustgarten 2015). This is particularly problematic, given that the latter frequently form part of repressive regimes' arsenals and are thus 'likely to be used in ways and for purposes that the Treaty supposedly sought to prevent (Lustgarten 2015, p. 587).

Yet the potentially most unsettling point besides these missing items, as well as a generally narrow focus on 'export, import, transit or transhipment' regulations (Small Arms Survey 2013, p. 2), is its lacking rigor where of absolute necessity for it to make a significant difference. Despite the inclusion of arguably stern requirements that need to be fulfilled before a private arms-exporting deal can be authorized by its respective government (Small Arms Survey 2013), the ATT's (UNGA 2013) Article VI and VII's ambiguous language continues to leave loopholes for deviations. For example, article VII(1) stipulates that signatories should:

> *'[…] in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State in accordance with Article 8 (1), assess the potential that the conventional arms or items:*
>
> *(a) would contribute to or undermine peace and security;*
>
> *(b) could be used to:*
>
> *(i) commit or facilitate a serious violation of international humanitarian law;*
>
> *(ii) commit or facilitate a serious violation of international human rights law;*
>
> *(iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or*
>
> *(iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.'*

Therefore, the ATT enables countries to base their decision on whether a trade agreement fits the ATT's standards on a number of subjective 'factors that are irrelevant, and may well be contrary, to the objects and purposes of the Treaty' (Lustgarten 2015, p. 591). Arms-manufacturing

and exporting countries' governments are practically allowed to assess for themselves, based on their nationally gathered intelligence, whether or not their weaponry could 'contribute to or undermine international peace and security', which only then would represent a relevant transfer obstacle (Lustgarten 2015, p. 591).

The resulting liability to individual interpretation in borderline cases and sheer narrowness of scope, as well as the repeated non-incorporation of an effective enforcement apparatus (Lustgarten 2015) might be reasonably seen as self-supporting problems, but as it will now be argued, they actually represent but extensions of a more fundamental issue.

Costly international agreements that aim to combat the negative humanitarian effects of SALW's uncontrolled proliferation do not address their root issue of the legality of their, often private, mass-market origin (Efrat 2010). No matter how despicably firearms are used, how many regulations are broken, and embargoes ignored, the chances for them to have been produced absolutely legally in the first place are disproportionally high (Spapens 2007; Stohl 2005; Marsh 2002). Most guns trafficked and/or misused originate from either legally manufacturing industrial companies, private gun holders, or government arsenals and their disposal of 'surplus' arms (Greene 2000, p. 153).

And even if one was to focus on trade restrictions alone, as exemplified by the earlier mentioned treaties, and despite wide criticism arguing for the inefficiency of such myopic approaches (Bolton, Sakamoto & Griffiths 2012; Greene 2000), 'licit and illicit trade cannot so easily be disaggregated' (Krause 2002, cited in Bolton, Sakamoto & Griffiths 2012, p. 306). It is an 'open secret that many governments are deeply implicated in much of the illicit arms trade, either by facilitating covert supply to proxies and allies or by turning a "blind eye" to the diversion into the black market' (Stohl 2005; Greene 2000, p. 151).

The next chapter thus takes a step back and tries to scrutinize how private SALW manufacturing evolved after the end of the Cold War and how global arms manufacturing companies arguably managed to reach a position outside the reach of effective control.

5. Impact of privatisation and globalisation on SALW production

With the end of the Cold War the aforementioned system of a limited number of 'state monopolies of violence', responsible for the lion share of global weapons production, opened up to a more market-based, liberal 'political economy of arms trafficking' (Bolton, Sakamoto & Griffiths 2012, p. 305; Kiss 2004).

While 'private arms manufacture and brokerage' (Thayer 1969, cited in Bolton, Sakamoto & Griffiths 2012, p. 305) had existed well before the fall of the Iron Curtain in 1989, the following waves of privatisation of formerly state-owned industries, and increased 'economic liberalization and improvements in communication and transportation' (Efrat 2010, p. 126) had a decisive impact. Paired with 'dramatic socio-economic transitions' (Kiss 2004, p. 1), the sudden drop in states' military demand for small arms led to an 'increased pressure on arms companies to export' (Bolton, Sakamoto & Griffiths 2012, p. 305). Luckily for them, the 21st century woke up to a changing political landscape and the global rise of 'low- to medium-intensity modern civil' conflicts (Small Arms Survey 2007, p. 269) and as a result the mass-market production of SALW rose anew.

After having overcome the initial fears of losing their 'markets, subsidies, and privileges' due to the 1990s' 'major economic recession, fundamental political changes' and 'redefined national military and security interests' (Kiss 2004, p. 1), the businesses involved benefitted from an opening of the market. Weapons became increasingly treated like regular commodities, to be traded and sold on global markets according to the guiding principles of demand and supply (Killicoat 2006). With indiscriminate sales predominantly based on profit-driven calculus (ibid.), the growing demand frequently led to disregard for 'the negative effects of their business' (Efrat 2010, p. 127), despite some of it originating from 'rebel groups, [or] organized crime networks in

armed' conflict zones (Boutwell, Klare & Reed 1995, cited in Bolton, Sakamoto & Griffiths 2012, p. 305; Sköns & Weidacher 2000).

Yet focusing on private arms companies alone only explains half of the dynamic, as they are frequently co-owned by their host states, who at times have been known to encourage even less than popular or ethical sales to promote their own agenda (Lustgarten 2015, p. 570).

In their respective works Bolton, Sakamoto and Griffiths (2012) and Stohl (2005) describe how easily the lines between legal and illegal trade can blur. 'Clandestine deals' between illicit arms traders and legal manufacturers can 'open up untapped supply' for questionable clients while providing lucrative opportunities for the producers (Griffiths & Wilkinson 2007, cited in Bolton, Sakamoto & Griffiths 2012, p. 305; Greene 2000). By facilitating such illicit transactions, the producing states' governments are able to trade with the 'underworld with limited political backlash, shielded by opaque supply chains' (Griffiths & Wilkinson 2007, cited in Bolton, Sakamoto & Griffiths 2012, p. 305). Using private companies as middlemen removes their 'own large fingerprints on the arm sales' (Hanson 2011, p. 144). In his research, Greene found that governments often deliberately facilitate 'excessive and destabilising flows and accumulations' of SALW because of their own economic or political motivations abroad (2000, p. 182; Marsh 2002). A look at the production and impact of Bulgaria's AK-47 rifle exports illustrates this complex interplay of state and private interests and its impact on the feasibility of restrictive international trade regulations (Killicoat 2006).

6. The AK-47 Kalashnikov and its European reproduction

The AK-47 Kalashnikov assault rifle, named after its inventor Mikhail Kalashnikov (1919-2013) and initially produced exclusively in the former Soviet Union, has long defended its reputation as the most popular and deadly fire arm ever created (Freeman 2019; Blair 2015; Hanson 2011). With estimates ranging from 50 to 100 million units related to this category in circulation today, since its release in 1947 (Small Arms Survey 2007), it represents the most 'ubiquitous weapon in the history of firearms' (Blair 2015; Hanson 2011, p. 144).

Large parts of its unbroken success are owed to its simplicity, cheap price, longevity and reliability; regardless of the operating conditions (Hanson 2011; Small Arms Survey 2007). And despite some albeit contested (Hanson 2011) critique regarding its comparatively lesser accuracy, user safety and limited range (Killicoat 2006), it has been the 'weapon of choice for armed forces' in about 80 countries as well as of 'non-state actors alike' (Jane's Information Group 2003, cited in Small Arms Survey 2007, p. 258).

Besides having played a key role in a majority of insurgencies and guerrilla combats 'in Asia, Latin America, and […] Africa' in the last 30 years (Hanson 2011, p. 145; Small Arms Survey 2007), roughly '250,000 people per year' are estimated to fall victim to its use (Freeman 2019). A development which led Chivers (2010) to the 'dispassionate' conclusion that rarely an invention had 'done so much to kill so many through "war, terror, atrocity, and crime"' like the AK-47 (cited in Hanson 2011, p. 145).

Yet due to it not being patented (Killicoat 2006, p. 3), others besides the Soviet Union soon sought to produce the weapon themselves motivated by its reliability in battle (Hanson 2011). These states include the US, China and many Eastern European countries (Freeman 2019; Kiss 2004). Today Poland, Hungary, Romania and Bulgaria all situate companies, both private and at least partly state-owned, which produce and export rifles of the AK type (Freeman 2019; Small Arms Survey 2007). For illustrative purposes however, a closer look at the partly state-owned Bulgarian company of *Arsenal Co* will reveal the gravity and implications of the discussed issue. As of 2019 the country has become Europe's number one exporter of Kalashnikovs (Freeman 2019).

During the transitory years of the 1990s and driven by the mentioned need to find new clients, 'save the industry and provide the country with indispensable hard currency earnings', the Bulgarian state initiated a rigorous 'arms export policy' which led to large-scale exports (Freeman 2019; Small Arms Survey 2007, p. 17). Despite its acceptance into NATO in 2004 led to a

tightening of its export controls, many of its prior foreign sales were found to have had dire humanitarian consequences (Small Arms Survey 2017). In a way, the damage was already done.

While only portraying a short and by no means all-encompassing list, thorough investigations into *Arsenal Co's* past trades conducted by The Telegraph and The New York Times revealed numerous infringements of international trade agreements. Shipments of '35 tons of weapons' were exported to 'a group of rebels in Sierra Leone' (Freeman 2019) in 1998, despite documents claiming Nigeria as the original destination. AKs sold to the Saudi government were allegedly channelled into 'the killing fields of Syria and Yemen' (Freeman 2019). Even the Islamic State in Iraq and Syria (ISIS) ended up getting access to relinquished *Arsenal* weapons in Mosul in 2014 and purportedly legal exports to Uganda were quickly resold illegally to supply the 'blood-curdling civil war' in South Sudan (Freeman 2019; Small Arms Survey 2007).

Finally, it is vital to consider that roughly '90 per cent' of *Arsenal's* massive and mostly 'military-related' production is sold abroad to 'Asia, Africa, and the Middle East' (Kiss 2004, p. 35). Virtually no European armed force nor NATO currently employs and thus requires AK-47s for their own defense purposes (Military Factory 2019; Hanson 2011), partly and arguably because of pride and 'national chauvinism' barring European SALW manufacturing bastions like Germany, the UK or Italy to accept and accredit their former competitor's prime product's proficiency (Hanson 2011, p. 145).

7. Conclusion

The paper's main line of argument has been of a simple nature: Once a product of a particular popularity is produced, it will inevitably reach its wider customer base unleashing a process which is hard enough to control if the main actors involved actually willed it, yet impossible if they do not. Therefore, framing SALW as an international regime could provide a more holistic account of the problem.

Here, the evidence collected suggests a lack of wholeheartedness of SALW-producing countries in their attempts to effectively restrict potentially dangerous individuals from getting access to weaponry. In order to find a plausible answer for the resulting feebleness of, and lacking commitment to the various trade-based agreements many producing states ostensibly adhere to, I scrutinized the impact of both globalisation and privatisation on SALW manufacturing industries after the Cold War.

While the causal link between the political and/or profit-driven interests of state-owned and private industries, and the ineffectiveness of current trade-focused treaties might have been presented as too simplistic as to do justice to the actual complexity of illicit SALW proliferation, I argue that the findings do hint in this direction.

To this day, most trade-based initiatives aimed at preventing illicit access and misuse of firearms, including the ATT, have effectively failed to achieve their aspired goals to a satisfying degree. Not only have some of them been found to be ill equipped on a technical side but none of them address the elephant in the room, namely the legal origin of most small arms traded, whether legally or illegally. The complexity and implications of this issue were underlined by the example of Bulgarian AK-47 type rifles, produced not for the host country's or its allies' self-defense, but sold and exported mainly for profit, regardless of allegedly questionable final destinations.

Finally, both the current shape of international arms trade treaties and a glimpse at some of their members' ulterior motivations and practices do paint a worrisome picture regarding the prior's likelihood and ability to prevent the society's weakest members from the illicit proliferation and misuse of SALW.

References

Amnesty International 2017, *Killer Facts: The Scale of the Global Arms Trade*, viewed 3 December 2019, <https://www.amnesty.org/en/latest/campaigns/2017/09/killer-facts-the-scale-of-the-global-arms-trade/>.

Annan, K 2000, 'Freedom from Fear: Small Arms', Report of the Secretary-General to the Millenium Assembly of the United Nations, UNGA, New York viewed 3 December 2019, <https://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf>.

Blair, D 2015, *AK-47 Kalashnikov: The firearm which has killed more people than any other*, viewed 3 December 2019, <https:// www.telegraph.co.uk / news/ worldnews/ northamerica/ usa/ 11714558/ AK-47-Kalashnikov-The-firearm-which-has-killed-more-people-than-any-other.html>.

Bolton, M, Sakamoto, EE & Griffiths, H 2012, 'Globalization and the Kalashnikov: Public-Private Networks in the Trafficking and Control of Small Arms', *Global Policy*, vol. 3, no.3, pp. 303–313, DOI 10.1111/j.1758-5899.2011.00118.x.

Boutwell, J & Klare, M 1998, 'Small Arms and Light Weapons: Controlling the Real Instruments of War', *Arms Control Today*, vol. 28, no. 6, pp. 15–23, viewed 15 August 2020, < https://search.proquest.com/docview/211216338?accountid=10673>.

Boutwell, J, Klare, M & Reed, LW (eds.) 1995, *Lethal Commerce: The Global Trade in Small Arms and Light Weapons,* American Academy of Arts and Sciences, Cambridge.

Chivers, CJ 2011, *The gun*, Simon and Schuster, New York.

Dyer, S & O'Callaghan, G 1998, Combating Illicit Light Weapons Trafficking: Developments And Opportunities. London: British American Security Information Council, London, no. 3, viewed 15 August 2020, <https://www.files.ethz.ch/isn/57319/1998combatingillicit.pdf>.

Efrat, A 2010, 'Toward Internationally Regulated Goods: Controlling the Trade in Small Arms and Light Weapons', *International Organization*, vol. 64, no. 1, pp. 97–131, DOI 10.1017/S0020818309990257.

Freeman, C 2019, 'Licensed to kill: The Kalashnikov centre of Europe', viewed 3 December 2019, <https:// www.telegraph.co.uk / news/ licensed-to-kill/ >.

Greene, O 2000, 'Examining international responses to illicit arms trafficking', *Crime, Law and Social Change*, vol. 33, no. 1, pp. 151–190, DOI 10.1023/A:1008398420612.

Griffiths, H & Wilkinson, A 2007, *Guns, Planes and Ships: Identification and Disruption of Clandestine Arms Transfers*, SEESAC, Belgrade.

Hanson, VD 2011, 'The World's Most Popular Gun: The Long Road to the AK-47', *The New Atlantis*, no. 32, pp. 140–147, viewed 15 August 2020, < www.jstor.org/stable/43152665>.

Jane's Information Group 2003, *Jane's Infantry Weapons: Yearbook 2002–2003*, Jane's Information Group, Coulsdon.

Jones, S 1988, 'EU and U.S. Codes of Conduct on Arms Transfers: Status and Review', *The Monitor Nonproliferation, Demilitarization, and Arms Control*, vol. 4, no. 4, pp. 23-31.

Killicoat, P 2006, 'Weaponomics: The Economics of Small Arms', *IDEAS Working Paper Series from RePEc*, pp. 1–28, viewed 15 August 2020, <https://www.csae.ox.ac.uk/materials/papers/2006-13text.pdf>.

Kiss, Y 2004, 'Small Arms and Light Weapons Production in Eastern, Central, and Southeast Europe', *Small Arms Survey Occasional Papers,* no. 13, pp. 1–54, viewed 3 December 2019, <http:// www.smallarmssurvey.org / weapons-and-markets/ producers/ industrial-production.html>.

Krasner, S 1982, 'Structural causes and regime consequences: regimes as intervening variables', *International organization*, vol. 36, no. 2, pp.185–205, DOI 10.1017/S0020818300018920.

Krause, K 2001, 'Norm-Building in Security Spaces: The Emergence of the Light Weapons Problematic', GERSI/REGIS Working Papers 11, viewed 21 May 2012, <https://depot.erudit.org/bitstream/000854dd/1/000257pp.pdf>.

Lustgarten, L 2015, 'The Arms Trade Treaty: Achievements, Failings, Future'*, International & Comparative Law Quarterly*, vol. 64, no. 3, pp. 569–600, DOI 10.1017/S0020589315000202.

Marsh, N 2002, 'Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms', *The Brown Journal of World Affairs*, vol. 9, no. 1, pp. 217–228, viewed 15 August 2020, <https://www.jstor.org/stable/24590286>.

Military Factory 2019, *Modern Small Arms by Army*, viewed 3 December 2019, <https:// www.militaryfactory.com / modern-guns/ index.asp>.

Sköns, E & Weidacher, R 2000, 'Arms production' Stockholm International Peace Research Institute (SIPRI) Yearbook, viewed 15 August 2020, <https://www.sipri.org/yearbook/2000/06>.

Small Arms Survey (ed.) 2007, 'What Price the Kalashnikov?: The Economics of Small Arms', in *Small Arms Survey 2007: Guns and the city, Small Arms Survey*, pp. 256–287, viewed 15 August 2020, <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2007/en/Small-Arms-Survey-2007-Prelims-Intro-EN.pdf>.

Small Arms Survey 2013,'The Arms Trade Treaty: A Step Forward in Small Arms Control?', *Small Arms Survey Research Notes*, no. 30, pp. 1–4, viewed 15 August 2020, <http://www.smallarmssurvey.org/fileadmin/docs/H-Research_Notes/SAS-Research-Note-30.pdf>.

Small Arms Survey 2014, 'Producers of Small Arms, Light Weapons, and Their Ammunition', *Small Arms Survey Research Notes*, no. 43, pp. 1–4, viewed 15 August 2020, <https://www.files.ethz.ch/isn/182840/SAS-Research-Note-43.pdf>.

Small Arms Survey 2018a, *Producers,* viewed 7 December 2019, <http:// www.smallarmssurvey.org / weapons-and-markets/ producers.html.>.

Small Arms Survey 2018b, *Weapons and Markets*, viewed 3 December 2019, <http:// www.smallarmssurvey.org / weapons-and-markets.html>.

Spapens, T 2007, 'Trafficking in Illicit Firearms for Criminal Purposes within the European Union', *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 15, no. 3-4, pp. 359–381, DOI: 10.1163/092895607X231206.

Stevenson, J (n.d.) 'The Flow of Small Arms and Explosives to Terrorist Groups: EU Challenges and Remedies', UNIDIR EU Background Paper no. 15.

Stohl, RJ 2005, 'Fighting the Illicit Trafficking of Small Arms', *SAIS Review of International Affairs*, vol. 25, no. 1, pp. 59–68, DOI 10.1353/sais.2005.0018.

Thayer, G 1969, *The War Business: The International Trade in Armaments*, Simon & Schuster, New York.

The Arms Trade Treaty 2013, Treaty no. 52373, United Nations Treaty Series, 3013, viewed 3 December 2019, < https://treaties.un.org/doc/Publication/UNTS/No%20Volume/52373/Part/I-52373-08000002803628c4.pdf>.

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Trust Through Intelligence?

Exploring the Nexus between Community and Counter-Terrorism Policing

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Abstract

It would be understandable to view community policing and counter-terrorism policing as two distinct concepts which are intrinsically situated at opposites poles in the world of policing. While one invokes cultures such as transparency, public engagement and visibility, the other is traditionally considered as a series of clandestine operations more akin to the intelligence-led policing model. This paper will argue that the two policing strategies are in fact compatible. With a shift in the nature of terrorism itself apparent, the contemporary lone wolf attacker is not only a deadly threat, but one which is incredibly difficult to detect using methods such as background checks and covert investigation. This is due to a lack of communication and/or physical ties between attackers, a high level of isolation stemming from affinity to extremist ideologies, combined with self-struggle and anger. In order to combat prospective attacks, effective preventative measures must be implemented in both geographical and social spaces. Such measures warrant the implementation of community policing philosophies which can help establish trust and promote co-operation, leading to accurate, reliable community intelligence, as well as reassurance and security for the members of the community itself.

Keywords: Community Policing, Terrorism, Intelligence, Security

1. Introduction

In the field of modern policing, there are many strategies inherently diverse in philosophy and operational detail. Two such strategies, which have conceptually existed for a long period of time and have been thrust into the spotlight in a global, interconnected world, will be analysed in this paper. The first is community policing — a highly visible form of policing guided by public relations and familiarity (Tilley 2008). The second, counter-terrorism policing, is often associated with secrecy and covert operations (Innes & Thiel 2008). Community policing has been widely researched (Alderson 1979; Banton 1964; Mackenzie & Henry 2009; Skogan & Hartnett 1999), and is very much considered a highly visible, domestic, public facing and 'on the ground' policing strategy. Counter-terrorism policing on the other hand has traditionally been seen as a form of high policing (a policing style based on gathering of information or intelligence) exclusive to security-related, investigative or even military organisations.

The problem of international terrorism in particular brings a global perspective to the strategy, and emphasises the importance of transnational co-operation between states as well as the utilisation of agencies such as the International Criminal Police Organization (INTERPOL), United Nations Police (UNPOL) and the North Atlantic Treaty Organization (NATO) (Masse 2003; O'Reilly 2015). This considered, since the turn of the century counter-terrorism operations have branched out to include a lower form of policing with multi agency co-operation, such as community intelligence and local contact units. Perhaps this is due in part to the recognition of a shift in the tides of terrorism, namely a proliferation of lone-wolf style planning and attacking. It is this extension of counter-terrorism operations that can draw from the community policing philosophy and adopt strategies that will promote cohesion, trust and positive relations between the police and the public (Ramirez 2008), with the goal of preventing potential attacks at the root as opposed to relying on often disproportionate reactive measures. In turn, this relationship can greatly aid the police with vital intelligence, whilst simultaneously supporting communities which may be burdened with individuals who are predisposed to adopting radical views, or even violent behaviour (Thomas 2016). These two policing strategies can work in unison and are not wholly incompatible. However, it is important to consider that there is no one formula which can be applied to all communities, agencies or groups, as well as certain caveats and potential difficulties that arise concurrently with the amalgamation of the two concepts.

In this paper, I will profile the two concepts of community policing and counter-terrorism policing, briefly outlining the constitution and contemporary context of both, and allude to converging themes such as empathy, visibility and legitimacy. The changing terrorist threat

will be explored and how the added difficulty of identifying and investigating radical individuals is relevant to the argument for unison. I will then go on to discuss the common elements that are key to the compatibility of the two concepts. These include public engagement, partnership working, trust, and transparency. In addition, the importance of procedural justice, models of co-operation, and empathy towards Muslim communities in particular will be discussed in light of growing concerns of international terrorism perpetuated by Islamic extremism. However, the rise of far-right extremism will also be acknowledged. The concept of community intelligence and its importance to counter terrorism as well as local policing will be emphasised.

It should be noted that the majority of academic literature reviewed in this area is Anglo-American, with a small contribution from European authors. I cannot account for how this argument travels in the Global South, therefore it is crucial that further research on the matter is done by authors from here, particularly Middle-Eastern countries where terrorist attacks are more frequent (Ward 2018). Regarding local communities themselves, much of the analysis and discussion places an emphasis on Muslim communities. The majority of studies produced in the 21st century are relevant to the current 'wave' of terrorism (Rapoport 2003), which places a strong emphasis on religion at its core— specifically Islamic extremism.

2. Community Policing

Defining community policing has been a notoriously contested debate amongst scholars, due to the highly specific nature of the strategy as well as the ethnic and socio-economic diversity of the modern day 'community'. There is no universal 'one size fits all' definition that can be applied (van der Giessen, Brein & Jacobs 2017). However, there are widely established philosophies which constitute the community policing concept, and characterise the approaches' overarching theme of effective police-public relations (Bennett 1994). A review of community policing literature by Mackenzie and Henry (2009) put forward key components of effective practice, which have appeared (in some degree) consistently in a number of other academic sources (Bennett 1994; Hamilton-Smith et al. 2013; Skogan & Hartnett 1999; Skogan & Williamson 2008).

The first key principle is *public engagement,* emphasising the importance of allowing communities a voice to raise issues or concerns which are specific to local needs, therefore giving police an idea of what to prioritise. It is best achieved through decentralisation and a sense of familiarity between officers and the public (Murray 2005). This component also relates to community empowerment, allowing greater autonomy, recognition of the public as a police partner, and is epitomised by the phrase 'policing by consent'.

Another tool - that is not exclusive to community policing - is *effective agency partnerships*. While community policing is, often critically, associated with a 'widening' of the police role (Bittner 2001; Millie 2013), collaboration with local organisations such as schools, places of worship, housing associations, trusts/groups and local councils can create a productive division of labour. This complements the work of the police and allows action to be taken even if demands cannot be met with direct police action (Mackenzie & Henry 2009).

Proactive problem solving combines the two previously mentioned components for police to explore specific and creative solutions to concerns raised by members of the community. The community officer can act as a direct agent of change, or as a conduit for another agency (Thomas 2016).

It is imperative for a community policing team to be sincere, trustworthy empathetic and accountable in their work. The perceived right to exercise power should be gained from these attributes, as opposed to an obligation due to fear of repercussions (Tankebe 2013). This concept is referred to as *police legitimacy* and is vital for the maintenance of a positive relationship between the police and the community.

Finally, it is important to acknowledge that successful community policing is a shift away from reactive, 'fire-brigade' policing to a more *preventative approach,* aiming to stop crime at the root through community initiatives, police visibility and diversionary tactics (van der Giessen, Brein & Jacobs 2017). This preventative component is particularly relevant in relation to the application of counter terrorism policing in the community.

In order to implement the philosophies described, there are several operational strategies which tend to be associated with community policing. Police-public consultation forums are an excellent way of maintaining a consistent level of public engagement, communication and police accountability. Harkin (2014) recognises that such forums contribute to 'civilising policing', and aid police legitimacy. In addition to this strategy, community police officers increase their community contact time by spending more time on the beat, hosting 'drop-in' sessions, being present at community events and giving talks at local schools. This increases their visibility to the public, with the aim of instilling feelings of confidence and security (Bennett 1994). However, it is important to note that in practice this is often difficult due to an inherent association between the police and oppression, as well as practical challenges of encouraging community members to attend sessions or events. The installation of a community policing is certainly not a quick-fix and must be handled care and tact in order to build the trust and rapport that is integral to its success.

The highlighted philosophies and operational strategies relevant to counter-terrorism efforts will be explored later in this paper. Some scholars have made a case for intelligence-led

policing to offer a more effective partnership with counter-terrorism operations (Carter & Carter 2009; Carter & Carter 2012). This is mainly due to the similarities which stem from the systematic, 'invisible' elements of both policing styles, as well as the desire for the removal of serious or prolific offenders from society (Tilley 2008). While these elements may be favourable in a retrospective, investigative context, they are limiting to the prevention of a terrorist incident. An intelligence-led policing approach hinders some of the crucial strategies mentioned previously, and while there is certainly a place for it in relation to counter-terrorism, it would be unfavourable to use this model exclusively, in a community setting.

3. Modern Terrorism And Counter-Terrorism Policing

Similar to community policing, there is a debate over the definition of terrorism. What constitutes a 'terrorist act' is subjective, though there are common elements as stated by Innes and Thiel (2008). Terrorist acts are committed by individuals or groups who are politically, religiously or ideologically motivated. They utilise violence, target civilians and to a larger extent their civil liberties, in an attempt to bring about socio-political change. This is largely in accordance with both the United Kingdom (UK) and United States (US) Governments which use very similar terms in their definition of terrorism (HM Government 2000; 18 USC Ch. 113B). The events in the US on 11th September 2001 represented the beginning of an association between terrorist acts and Islam, through the creation of a near-global scale moral panic stemming from generalisations carried by media sensationalism (Powell 2011). However, despite limited academic research up until the 21st century, terrorism is categorically not a new concept. Islamic extremism was thrust into the spotlight due to a number of unprecedented attacks and proliferation of factions, particularly in the Levant. Historically, terrorism by Irish Republican groups such as the Irish Republican Army (IRA) and its variants was seen as the most prominent terrorist threat to the UK. In more modern times, there has been a proliferation of far-right movements likely perpetuated by populist politics and the use of social media outlets as a means of promotion of hate speech and extremist ideas (Alvares & Dahlgren 2016)

Innes (2006) frames terrorism as communicative action and an attempt at social control. Attackers attempt to alter the social norms of a more powerful group i.e. a state and bring about a societal or political shift. Although resilience is considered a mainstay of the British and American people, it *is* apparent that terrorists can succeed in this goal. These shifts could be a nation-wide change to legislation, such as changes to airport security or national gun control, or more 'minute' societal changes which can still have a symbolic impact on a population. For example, the Crusaders® – New Zealand's most successful rugby team – were rebranded due

to negative connotations with the oppressive crusades, which were cited by the Christchurch mosque attacker (The Guardian 2019).

While the community policing philosophy has remained relatively consistent since its inception, the concept of terrorism has shown an element of fluidity, exhibiting temporal and geographical shifts. Depending on time and place, terrorism is associated with different radical organisations or societal groups. This relates to Rapoport's (2003) 'Four waves of modern terrorism' states that over the past century terrorism can be grouped into four distinct periods or 'waves'. The current, 'distinctly international' religious wave is expected to diminish in 6-7 years (ibid.). In western societies, Islamic extremism is specifically identified as the prominent actor in this wave, but therein exists further branches or 'sub-waves'. Gallagher (2016) suggests that this fourth wave may end before Rapoport's estimation, citing the decreasing religiosity of attacks. He cites that now it may well be the time of actors motivated not only by religion but by an extreme social agenda. This accounts for the increase in attacks by far-right attackers and white supremacists in recent years. Gallagher (2016) interestingly remarks that the dissipation of religiosity could mark the resurgence of Rapoport's first wave, rooted in anarchical ideology. Examples of these acts include the murder of Member of Parliament (MP) Jo Cox prior to the EU referendum by an individual with a far-right ideology, described by then prime minster David Cameron as an 'attack on democracy' (BBC 2016). Another poignant example is the aforementioned mass shooting at two mosques in Christchurch, New Zealand by a white supremacist motivated by neofascist goals (Martin & Smee 2019).

Crucially, counter-terrorism policing has also undergone change. As the war on terror continues, there has been a shift – arguably an *extension* – of counter-terrorism operations from largely global to include a more local orientation, intertwining the 'invisible' and 'visible'. Counter-terrorism has seen a division of labour across the high and low policing spectrum. I maintain that the high policing element – such as covert surveillance and investigation from the security services and counter-terrorism branch – are largely incompatible and inherently dissimilar to community policing philosophies. More recently however there has been a widening of the police role in terms of policing terrorism 'on the ground'. This extension of policing responsibility necessitates the inclusion of community policing philosophies and operational strategy, in order to effectively achieve the critical goal of preventing future attacks.

In addition to framing terrorism in a 21st century context, Innes (2006, p. 227) creates a classification of police counter-terrorism work in order to 'map the division of labour in terms of how key agencies perform their specific roles as part of the overall counter-terrorism effort'. The second strand – the 'community protection function' – is associated with the work that

domestic or local police forces do (ibid.). Prospectively it includes creating a hostile environment for attackers, both socially and physically, through information sharing, procedural justice and 'target hardening' techniques. Retrospectively, it places emphasis on mitigating the effects of an attack, providing reassurance, monitoring inter/intra-community relations or even tensions (ibid.).

Community policing is an advantageous strategy for the implementation of a large portion of the classification's components, especially on a prospective level. While target hardening and crime prevention through environmental design (CPTED) is favourable for securing densely populated areas with a heavy flow of people on a physical level, a community policing approach can help promote and develop ideas to change cultures and mindsets which are not restricted to only bustling city centres. Concepts such as co-operation, police-public relations, reassurance through trust and confidence, de-radicalisation, identification and intelligence can all be actuated – in some capacity – by the community policing strategy.

4. The Changing Terrorist Threat

As briefly discussed earlier, Gallagher (2016) notes there has been a shift in the motivations of terrorists from a heavily religious rationale toward a radical social agenda outlook. He suggests that this could bring about the end of Rapoport's 'religious wave' and formulate a new 'fifth', more akin to the first 'anarchist' wave (ibid., p. 74). The momentum gathered by the Islamic State (IS) represents a sub-wave, somewhere between the fading fourth and the emerging fifth. While Al-Qaeda are a strict hierarchical, tiered organisation whose strategy is perhaps more specific, IS represents a state - or a state of mind - with a lot less restriction. Rather than reaching out and appealing to 'members' of the organisation, they target conflicted, marginalised individuals who may not have immediate ties - rather 'leanings' - to the state's ideology (Cronin 2015). These global shifts in the very nature of terrorism itself have created a new phenomenon known as the 'lone wolf'.

The emergence of this new sub-wave of terrorism over the past decade has questioned counter-terrorism units and security agencies policing strategies. There has been an apparent shift from 'quality to quantity' (ibid.; Innes & Thiel 2008). A decline in hierarchical organisations with a skilled, structured inner core driving operations, means there is less of a focus on them from counter-terrorism agencies, yet this does not translate to a decline in dangerousness. Previously these agencies were concerned with targeting high profile individuals who were high ranking or skilled members of whichever organisation they belonged to. Recently, however, there has been a recognition from both academics and practitioners that radicalisation is occurring locally, and these individuals are not being driven exclusively with the support of

'global' terrorist organisations. Due to the individualised nature of lone wolf terrorism, the characteristics and motivations that these attackers exhibit are difficult to pinpoint but have been documented. Spaaj (2010, p. 866) comments on the significance of self-struggle and anger: 'lone wolf terrorists tend to create their own ideologies that combine personal frustrations and aversion with broader political, social, or religious aims'. Their radical thoughts are often exacerbated by an enabler, followed by a triggering event, which can occur sharply or over time (Hamm & Spaaj 2015).

Lone wolves are a problem for high policing agencies. They are difficult to identify and investigate due to the lack of ties to terrorist groups, and can easily fall under the radar, often not having criminal history (Bakker & de Graaf 2010). Therefore, the 'traditional' counter-terrorism strategy is largely ineffective in preventing attacks; instead, building rapport with communities on the ground could help to provide intelligence that otherwise would not be acquired through 'higher' means. There is now an awareness of the potential for unison of the two concepts. This shift in what constitutes a radicalised individual and their pre-disposition for violence in today's society – as well as an extension of counter-terrorism policing to the local setting – warrants the prioritisation of resources on community policing strategies, particularly in communities which are likely to feel marginalised or oppressed.

5. Relationship Between The Two Policing Models

5.1. A Community Policing Approach

This section will explore how the community policing philosophies and practices highlighted earlier can be applied with the goal of combatting terrorism at the 'glocal' level. While considered incompatible in the past, there has been a spate of literature as well as recognition from practitioners with regard to the two disciplines working in unison: 'good community policing, as well as good counter-terrorism policing, demands that real efforts are made to work within and with local communities' (Hill 2018, p. 47). Scholars have suggested that the role of community policing in the fight against modern terrorism should prioritise the prevention of attacks rather than the pursuit or investigation of individuals following one (Clarke & Newman 2007; Lyons 2002; Murray 2005). This is best achieved through the practice of Innes' community protection function (Innes 2006, p. 227). Through this class of counter-terrorism police work via community policing principles, constabularies have the potential to achieve the goals of an effective local policing strategy (while also opening the gate for vital intelligence) stemming from the following components.

Spalek (2010) highlights the importance of trust between the police and members of the Muslim community. It is common for Muslim communities to be labelled as 'suspect' and

be placed under surveillance and control, which then raises the danger of over-policing and the subsequent erosion of trust (Bowling & Phillips 2007; Spalek & McDonald 2010). In the heavily politicised context of modern Islamic terrorism, many have criticised the Blair government for publicly announcing that 'Islam isn't the problem' before denouncing it and allowing negative connotations to breed within the populace (Klausen 2009, p. 417). Scholars such as Klausen have degraded aspects of community policing such as partnership working, arguing that they are not effective on a day-to-day basis, therefore cannot find success when applied in a counter-terrorism context (ibid.). Spalek (2010, p. 794) instead suggests that trust 'goes beyond responding to people's everyday concerns about crime'. A breakdown of trust severely inhibits the community policing function, and in a counter-terrorism context can halt information sharing as well as restrict intelligence (Hillyard 2005; Innes et al. 2007). In addition to this, the breakdown of legitimate trust will pave the way for 'harder' policing strategies such as raids, stop and search and covert surveillance (Pantazis & Pemberton 2009), which will only break down relations further. Despite potential underlying feelings of islamophobia, trusting relationships can still be established not only between individual officers and communities but also crucially at an institutional level. This must be on a broader level than simply information sharing, with genuine empathy and care expressed toward the community and issues that are present within. The key here is the utilisation and appreciation of community members as partners, instead of resources or informants. In addition, Spalek (2010) suggests that a crucial prerequisite to the maintenance of trusting relationship is openness, honesty and transparency. She found that officers in the Muslim Contact Unit (MCU) – a specialist community focused policing unit – and the Muslim community had a more trusting relationship when officers openly explained their role and what they would be doing (ibid., pp. 801-803). Activities such as supporting community interests or initiatives and offering advice through consultation forums, thereby empowering community members, were found to be effective in building contingent or 'short-term' trust (ibid., pp. 803-804). However, establishing implicit trust involves a long-standing relationship. Therefore, the key here is police legitimacy stemming from the contingent trust building activities and officer familiarity, which good community policing necessitates.

Lyons (2002) notes implicit trust can also be created by improving co-operation and two-way channels of communication. Partnership working between the police and the community in general can help with this as well as partnerships with local organisations or agencies. However, these partnerships must be reciprocal and help must be offered by police, even in matters that do not appear to have any relevance in terms of counter-terrorism (ibid., pp. 532-533). Tyler, Schulhofer and Huq (2010) distinguish co-operation as either *instrumental* (co-

operating due to fear of repercussions or the benefit outweigh the risk), or *normative* (co-operating due to perceived legitimacy). Procedural justice – the fairness by which the police apply the law – has been cited as crucial to effective police-public co-operation and perceived legitimacy. In their study of a Muslim-American community, they found that procedural justice and police practice heavily shapes co-operation (ibid.). This provides evidence in favour of the effectiveness of normative cooperation as opposed to instrumental. Community policing at its core aims to combat crime through precisely these means — policing by consent as opposed to coercive policing by fear. Clarke and Newman (2007) put forward the caveat of finding a balance between coercive policing and over-leniency, which can skew perceptions of right-leaning members of the community. As seen in previous examples, the scales can tip in the other direction, and perceived 'terrorist sympathising' could well be the enabler or trigger event for far right radicalisation or violent behaviour. A balance must be reached by police, and consistently reviewed or consolidated (ibid., pp. 14-15).

In 2009, Alejandro J. Beutel (p. 5) produced 'Building Bridges to Strengthen America', written on behalf of the Muslim Public Affairs Council which proposes 'fresh and constructive' ideas from a Muslim standpoint. It offers an alternative model for terrorism by framing terrorism as a business firm, which creates 'grievance themed advertisements to tap into and/or create a market for people experiencing identity crises' (ibid., p. 12). These individuals fit the lone wolf taxonomy and form the 'market for martyrs' which terrorist groups such as IS attempt to reach out to. Even without recruitment, ideas and propaganda can be disseminated. In return, community policing style counter-terrorism measures must offer a 'product extension merger' between the Muslim community and law enforcement (ibid.). The two 'partners' each have particular strengths that can help each other when brought together, thus competing against the terrorists in the 'market for martyrs' (ibid., p. 15). Crucial to this model is division of labour. Beutel (ibid.) suggests that community policing teams must focus their efforts on initiatives to maintain inclusivity with the Muslim community whilst acting on intelligence gained from them and following leads. They would clamp down on the terrorists' ability to 'operate within the market', while the Muslim community reciprocates these efforts by 'drying up the market itself' - attempting to inoculate vulnerable individuals from radicalisation through religious education, creating strong social networks through programs and initiatives, and investing in long-term groups or societies (ibid., p. 16). On the policing side, principles involve respecting communities' civil rights and liberties, aiding in a number of social services, and basing decisions on credible information. However familiar with the community, officers should try to avoid engaging in theological discourse as they are largely ill-equipped compared to commu-

nity or religious leaders, who have linguistic and cultural tact (ibid., pp. 17-19). This considered, perhaps the gap between counter-terrorism and de-radicalisation activities can be bridged with the role of Muslim police officers. Spalek (2010) comments that Muslim officers with experience in community policing who also live in and identify with the community being served is a hugely favourable addition to a community policing team. This could be a boost in terms of religious credibility, cultural understanding, empathy, enhanced familiarity and respect (ibid.).

5.2. Community Intelligence

A recurring theme which is continually put forward by advocates of a community-based counter-terrorism strategy is community intelligence. Firstly, it is worth noting that this concept is not new or unique to counter-terrorism. Community intelligence cannot not fall under the intelligence-led policing philosophy, as it relies on the effectiveness of visible, local, consensual policing in order for it to be of value, as opposed to 'high' intelligence of a clandestine, covert nature (Innes & Sheptycki 2004). It is generated when information supplied by members of a community supports police decision making with regard to operational strategy (Thomas 2016). Information can relate to a several issues such as risk, vulnerability, tension and harm within a community, or indeed between communities (National Policing Improvement Agency 2010, p. 56). This allows police to 'build up a picture of the contextual risks that a particular community group feels concerned about. Community intelligence applied to counter-terrorism is precisely the type of data that might help police circumvent intelligence gaps and blind spots that seemingly inhere in their established methods' (Innes 2006, p. 230). Even if in the main objective in some cases is to allow a better understanding of how different communities function, as well as tensions, gathered information serves an important purpose. Strategic contacts are of an overt nature and are heavily reliant on a good rapport built on trust, which was highlighted earlier as a crucial component to the community-based counter-terrorism principle. The caveat that exists with this strategy includes the authenticity of sources, and if the 'contact' truly represents a community's views (ibid., p. 234). A resolution to this problem could lie with the inclusion of Muslim officers that can themselves contribute and offer better judgement with regard to community issues (Spalek 2010). In addition, there is a danger of the police presenting themselves as insincere, which can be perceived as a ruse for gathering intelligence, thus resulting in 'identity groups' or even entire communities shutting themselves off and become reluctant to co-operate (Hanniman 2008). Therefore, sincerity and a genuine will to serve the community must be shown through community-based initiatives and trust building activities discussed earlier.

It is important to consider that within a 'community', there are a number of diverse social groups — each with their own identity. Consequently, there is an increase in potential victims or perpetrators (Innes 2006, p. 231). This presents the need for police to expand their network of contacts, or ties. The strategic contact methodology tends to rely on certain key contacts, such as community leaders or those in the position of acquiring information. This is perhaps an advantageous approach for hierarchical terrorist organisations of the past, where there existed individuals that community or religious leaders were aware of. However, in today's lone wolf sub-wave, I suggest Granovetter's (1982) 'strength of weak ties' theory is favourable. Information on these individuals is harder to acquire and certainly more diffuse, therefore having a larger number of contacts increases the likelihood of something being seen or heard in the community. This method can effectively compliment key strategic contacts whilst incorporating a lower, 'on the ground' approach. One methodology developed by Innes and Roberts (2007) was 'conversation with a purpose' or CWAP. If police happen to interact with a member of the public who is not a witness, victim or suspect, they are encouraged to check up on any general concerns that individual has, collecting overt intelligence through transparency and empathy. It serves as useful tool and requires little training. The methodology was then developed into the 'intelligence-based Neighbourhood Security Interview' (i-NSI) (ibid., p. 6). This is a more systematic, sophisticated approach which involves software that identifies a 'gap' or a need for intelligence, based on information from CWAP. Contacts are then selected for a structured interview (ibid.). This strategy has been shown to be effective in a study by Lowe and Innes (2012). However, it is noticeable that there were very few interviews/ conversations conducted with black and minority ethnic (BAME) individuals in the results. Perhaps this was a representative sample of the community in the study. It, however, raises the following question: are the interviews being conducted proportionately and with relevance to each specific community? A recurring theme from this section is the danger of the police-public interaction appearing superficial, or 'in bad taste'. Being 'formally' interviewed by a police officer heightens anxiety, therefore the officer conducting these information gathering operations *must* be empathetic, fair, and demonstrate procedural justice.

6. Policy Implications

Many of the principles and strategies explored in this section are already being put into practice in some regard. The UK Government's CONTEST strategy was re-evaluated and updated in 2018, and shows positive signs relating to the issues and concepts discussed in this paper, particularly with regards to the *Prevent* strand (HM Government 2018). It acknowledges

the individualism of the modern terrorist and considers religiosity, background factors, personal factors, and radicalisation vulnerability (ibid., p. 33). The importance of partnership working with communities as well as local agencies and civil society organisations is highlighted, some of which can help to combat radicalisation, as recommended by Beutel (2009). In addition to this, the role of education in schools and community centres is imperative, as young people are increasingly vulnerable to identity crises, and have access to numerous internet sources (HM Government 2018; Beutel 2009). This is certainly a step in the right direction, but it remains to be seen if the outlined strategies acknowledged are implemented with efficiency, empathy and tact.

7. Conclusion

This paper has outlined the two distinct policing concepts of community and counter-terrorism policing in a modern context, as well as identifying key philosophies and strategies that intersect and can be utilised in the amalgamation of the two. The exploration of Rapoport's wave theory (2003) and recognition of the shift in the current terrorist wave has brought to light the individualistic nature of the modern-day terrorist threat, and therefore the importance of an 'on the ground' approach to countering said threat. From there, the application of community policing components in a counter-terrorism context were explored and, and it has been shown – with supporting academic literature as evidence – that many elements of community policing *can* and *are* being used in order to combat radicalisation and violent tendencies in communities across the UK and the US. While acknowledging the spotlight on the Muslim community, the importance of principles such as trust, co-operation and procedural justice have been examined. Finally, the importance of community intelligence as well as the caveats that present alongside it have been discussed, as well as the UK Governments' recognition of the importance of a local, integrative approach. This paper has displayed the application of community policing to combat modern day terrorism is not only favourable, but is being recognised and implemented in the Anglo-American setting.

References

Alderson, J 1979, *Policing Freedom*, Macdonald & Evans, Plymouth.

Alvares, C & Dahlgren, P 2016, 'Populism, Extremism and Media: Mapping an Uncertain Terrain', *European Journal of Communication*, vol. 31, no. 1, pp. 46-57, DOI 10.1177/0267323115614485.

Bakker, E & de Graaf, BA 2010, 'Lone Wolves: How to Prevent This Phenomenon?' *International Centre for Counter-Terrorism (ICCT) - The Hague*, no. 2, viewed 17 March 2019, <http://www.icct.nl/download/file/ICCT-Bakker-deGraaf-EM-Paper-Lone-Wolves.pdf>.

Banton, M 1964, *The Policeman in the Community,* Tavistock Publications, London.

BBC News 2016, 'Jo Cox MP Death: Police Probe Right Wing Links to MP's Killing', viewed 10 April 2019, <https://www.bbc.co.uk/news/uk-england-36560895>.

Bennett, T 1994, 'Community Policing on the Ground: Developments in Britain' in DP Rosenbaum (ed.) *The Challenge of Community Policing: Testing the Promises.* SAGE Publications, Inc., Thousand Oaks, pp. 224-246.

Beutel, AJ 2009, 'Building Bridges to Strengthen America: Forging an Effective Counterterrorism Enterprise Between Muslim Americans and Law Enforcement', *Muslim Public Affairs Council,* viewed 19 March 2019, <https://www.mpac.org/publications/policy-papers/building-bridges.php>.

Bittner, E 2001, 'Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police', *Deviance et Societe*, vol. 25, no. 3, pp. 285-305, DOI 10.3917/ds.253.0285.

Bowling, B & Phillips, C 2007, 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search', *The Modern Law Review*, vol. 70, no. 6, pp. 936-961, DOI 10.1111/j.1468-2230.2007.00671.x.

Carter, DL & Carter, JG 2009, 'Intelligence-led Policing: Conceptual and Functional Considerations for Public Policy', *Criminal Justice Policy Review*, vol. 20, no. 3, pp. 310-325, DOI 10.1177/0887403408327381.

Carter, JG & Carter, DL 2012, 'Law Enforcement Intelligence: Implications for Self-radicalized Terrorism', *Police Practice & Research*, vol. 13, no. 2, pp. 138-154, DOI 10.1080/15614263.2011.596685.

Clarke, RV & Newman, GR 2007, 'Police and the Prevention of Terrorism', *Policing: A Journal of Policy & Practice*, vol. 1, no. 1, pp. 9-20, DOI 10.1093/policing/pam003.

Cronin, AK 2015, 'ISIS is Not a Terrorist Group: Why Counterterrorism Won't Stop the Latest Jihadist Threat', *Foreign Affairs*, vol. 94, no. 2, pp. 87-98, viewed 15 March 2019, <https://search-proquest-com.ezproxy.is.ed.ac.uk/docview/1658669066?accountid=10673>.

Featherstone, M, Holohan, S & Poole, E 2010, 'Discourses of the War on Terror: Constructions of the Islamic Other After 7/7', *International Journal of Media & Cultural Politics*, vol. 6, no. 2, pp. 169-186, DOI 10.1386/mcp.6.2.169_1.

Gallagher, MJ 2016, 'The 2016 'Lone Wolf' Tsunami - Is Rapoport's 'Religious Wave' Ending?', *Journal of Strategic Security*, vol. 10, no. 2, pp. 60-76, DOI 10.5038/1944-0472.10.2.1584.

Granovetter, M 1983, 'The Strength of Weak Ties: A Network Theory Revisited', *Sociological Theory*, vol. 1, pp. 201-233, DOI 10.2307/202051.

Hamilton-Smith, N, Mackenzie, S, Henry, A & Davidones, C 2013, 'Community Policing and Reassurance: Three Studies, One Narrative', *Criminology & Criminal Justice*, vol. 14, no. 2, pp. 160-178, DOI 10.1177/1748895813483762.

Hamm, M & Spaaj, R 2015, 'Lone Wolf Terrorism in America: Using Knowledge of Radicalization Pathways to Forge Prevention Strategies', *National Criminal Justice Reference Service Report*, viewed 21 March 2019, <https://www.ncjrs.gov/pdffiles1/nij/grants/248691.pdf>.

Hanniman, W 2008, 'Canadian Muslims, Islamophobia and National Security', *International Journal of Law, Crime & Justice*, vol. 36, no. 4, pp. 271-285, DOI 10.1016/j.ijlcj.2008.08.003.

Harkin, D 2014, '*Civilizing Policing'? What Can Police-public Consultation Forums Achieve for Police Reform, 'Democratic Policing', and Police Legitimacy?*, PhD thesis, The University of Edinburgh, Edinburgh.

Hill, M 2018, 'The Terrorism Acts in 2017: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006, the Terrorism Prevention and Investigation Measures Act 2011, and the Terrorist Asset Freezing ETC Act 2010', viewed 9 April 2019, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/747009/The_Terrorism_Acts_in_2017.pdf>.

Hillyard, P 1993, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain,* Pluto Press, London.

Hillyard, P 2005, 'The "War on Terror": Lessons from Ireland', *European Civil Liberties Network,* viewed 10 April 2019, <https://www.ecln.org/essays/essay-1.pdf>.

HM Government 2000, Terrorism Act 2000 c. 11(1) Introductory, viewed 12 April 2019, <https://www.legislation.gov.uk/ukpga/2000/11/contents>.

HM Government 2018, 'CONTEST: The United Kingdom's Strategy for Countering Terrorism', viewed 10 April 2019, <https://assets.publishing.service.gov.uk/government/up-

loads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf>.

Innes, M 2006, 'Policing Uncertainty: Countering Terror Through Community Intelligence and Democratic Policing', *The Annals of the American Academy of Political & Social Science*, vol. 605, no. 1, pp. 222-241, DOI 10.1177/0002716206287118.

Innes, M & Thiel, D 2008, 'Policing Terror' in T Newburn (ed.) *Handbook of Policing.* Willan Publishing, Milton, pp. 553-580.

Innes, M & Sheptycki, J 2004, 'From Detection to Disruption: Some Consequences of Intelligence Led Crime Control in the UK', *International Criminal Justice Review*, vol. 14, no. 1, pp. 1-14, DOI 10.1177/105756770401400101.

Innes, M & Roberts, C 2007, 'Community Intelligence in the Policing of Community Safety', *Community Safety: Innovation & Evaluation*, vol. 89, no. 1, pp. 183-206, DOI 10.1177/0032258X16630489.

Innes, M, Abbott, L, Lowe, T & Roberts, C 2007, 'Hearts and Minds and Eyes and Ears: Reducing Radicalisation Risks Through Reassurance Oriented Policing', viewed 15 March 2019, <https://www.researchgate.net/publication/265756123_Hearts_and_Minds_and_Eyes_and_Ears_Reducing_Radicalisation_Risks_through_Reassurance-Oriented_Policing>.

Klausen, J 2009, 'British Counter-terrorism After 7/7: Adapting Community Policing to the Fight Against Domestic Terrorism', *Journal of Ethnic & Migration Studies*, vol. 35*,* no*.* 3, pp. 403-420, DOI 10.1080/13691830802704566.

Lowe, T & Innes, M 2012, 'Can We Speak in Confidence? Community Intelligence and Neighbourhood Policing v2.0', *Policing & Society*, vol. 22, no. 3, pp. 295-316, DOI 10.1080/10439463.2012.671823.

Lyons, W 2002, 'Partnerships, Information and Public Safety: Community Policing in a Time of Terror', *Policing: An International Journal of Police Strategies & Management*, vol. 25, no*.* 3, pp. 530-542, DOI 10.1108/13639510210437023.

Mackenzie, S & Henry, A 2009, 'Community Policing: A Review of the Evidence', Scottish Government, viewed 23 April 2019, <https://www-publicinformationonline-com.ezproxy.is.ed.ac.uk/download/15923>.

Martin, L & Smee, B 2019, 'What Do We Know About the Christchurch Atack Suspect?', *The Guardian,* viewed 11 April 2019, <https://www.theguardian.com/world/2019/mar/15/rightwing-extremist-wrote-manifesto-before-livestreaming-christchurch-shooting>.

Masse, T 2003, 'Domestic Intelligence in the United Kingdom: Applicability of the MI-5 Model to the United States', *Library of Congress,* viewed 10 April 2019*,* <https://apps.dtic.mil/dtic/tr/fulltext/u2/a455815.pdf>.

Millie, A 2013, 'The Policing Task and the Expansion (and Contraction) of British Policing', *Criminology & Criminal Justice*, vol. 13, no. 2, pp. 143-160, DOI 10.1177/1748895812466393.

Murray, J 2005, 'Policing Terrorism: A Threat to Community Policing or Just a Shift in Priorities?', *Police Practice & Research*, vol. 6, no. 4, pp. 347-361, DOI 10.1080/15614260500293986.

National Criminal Intelligence Service 2000, *The National Intelligence Model,* London, <https://netpol.org/wp-content/uploads/2014/06/National-Intelligence-Model.pdf>.

National Policing Improvement Agency (NPIA) 2010, *Local Policing & Confidence*, viewed 20 March 2019, <http://library.college.police.uk/docs/npia/localpolicingandconfidence.pdf>.

O'Reilly, C 2015, 'The Pluralization of High Policing: Convergence and Divergence at the Public–private interface', *British Journal of Criminology*, vol. 55, no. 4, pp. 688-710, DOI 10.1093/bjc/azu114.

Pantazis, C & Pemberton, S 2009, 'From the 'Old' to the 'New' Suspect Community Examining the Impacts of Recent UK Counter-Terrorist Legislation', *The British Journal of Criminology*, vol. 49, no. 5, pp. 646-666, DOI 10.1093/bjc/azp031.

Powell, KA 2011, 'Framing Islam: An Analysis of US Media Coverage of Terrorism Since 9/11', *Communication Studies*, vol. 62, no. 1, pp. 90-112, DOI 10.1080/10510974.2011.533599.

Ramirez, D 2008, *Partnering for Prevention,* viewed 3 April 2019, <http://www.cps.neu.edu/pfp/projects/case_ studies.php>.

Rapoport, DC 2003, 'The Four Waves of Rebel Terror and September 11' in CW Kegley (ed.) *The New Global Terrorism, Characteristics, Causes, Controls.* Upper Saddle River, New Jersey, pp. 52-56.

Reese, SD & Lewis, SC 2009, 'Framing the War on Terror: The Internalization of Policy in the US Press', *Journalism*, vol. 10, no. 6, pp. 777-797, DOI 10.1177/1464884909344480.

Skogan, WG & Hartnett, SM 1999, *Community Policing, Chicago Style,* Oxford University Press, Oxford.

Skogan, WG & Williamson, T 2008, 'An Overview of Community Policing: Origins, Concepts and Implementation' in T Williamson (ed.) *The Handbook of Knowledge-based Policing: Current Conceptions and Future Directions.* Wiley, Hoboken, pp. 43-58.

Spaaj, R 2010, 'The Enigma of Lone Wolf Terrorism: An Assessment', *Studies in Conflict & Terrorism*, vol. 33, no. 9, pp. 854-870, DOI 10.1080/1057610X.2010.501426.

Spalek, B 2010, 'Community Policing, Trust, and Muslim Communities in Relation to "New Terrorism"', *Politics & Policy*, vol. 38, no. 4, pp. 789-815, DOI 10.1111/j.1747-1346.2010.00258.x.

Spalek, B & McDonald, LZ 2010, 'Terror Crime Prevention: Constructing Muslim Practices and Beliefs as 'Anti-Social' and 'Extreme' Through CONTEST 2', *Social Policy and Society,* vol. 9, no. 1, pp. 123-132, DOI 10.1017/S147474640999025X.

Tankebe, J 2013, 'Viewing Things Differently: The Dimensions of Public Perceptions of Police Legitimacy', *Criminology*, vol. 51, no. 1, pp. 103-135, DOI 10.1111/j.1745-9125.2012.00291.x.

Tilley, N 2008, 'Modern Approaches to Policing: Community, Problem-oriented and Intelligence Led' in T. Newburn (ed.) *The Handbook of Policing.* 2nd ed. Taylor and Francis, Abingdon, pp. 373-403.

The Guardian 2019, 'Crusaders Weigh Up Name Change After Christchurch Attack', viewed 21 March 2019, <https://www.theguardian.com/sport/2019/mar/21/crusaders-weigh-up-name-change-after-christchurch-attack>.

Thomas, G 2016, 'A Case for Local Neighbourhood Policing and Community Intelligence in Counter Terrorism', *The Police Journal*, vol. 89, no. 1, pp. 31-54, DOI 10.1177/0032258X16630489.

Tyler, TR, Schulhofer, S & Huq, AZ 2010, 'Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans', *Law & Society Review*, vol. 44, no. 2, pp. 365-402, DOI 10.1111/j.1540-5893.2010.00405.x.

van der Giessen, M, Brein, E & Jacobs, G 2017, 'Community Policing: The Relevance of Social Contexts', *Community Policing - A European Perspective,* Springer, Cham, pp. 35-50, DOI 10.1007/978-3-319-53396-4_4.

Ward, A 2018, *Why We Should Measure the Economic Impact of Terrorism in the Middle East*, viewed 6 April 2019, <https://www.rand.org/blog/2018/09/why-we-should-measure-the-economic-impact-of-terrorism.html>.