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Proscription's Futures

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ABSTRACT

Proscription of individuals and groups potentially linked to terrorism in the form of targeted sanctions have become increasingly controversial in recent years, especially in Europe. Initially considered the less violent alternative when countering terrorism, individual proscriptions have become contested for their impact on due process rights and democratic space. This paper focuses on a key aspect of proscription measures that goes relatively unnoticed: its discourses and practices of time and temporality. It analyses in some depth the rationalities of time evoked, debated, accepted, and rejected in two court cases on individual sanctions. It focuses on two elements at work in these cases: first, the relation between the precautionary and the punitive; second, the politics of establishing and examining terrorist intention. In this manner, it contributes to broader literatures on proscription in two ways. First, it advances the debate on security temporalities in general and the discussion of future-oriented sanctions in particular, by focusing on recent cases and case-law. Second, the paper brings a focus on legal practice to proscription debates. The paper concludes that the juridical repertoire of establishing and assessing intentions is not just broadened but fundamentally altered in the current proscription regime.

KEYWORDS

Blacklisting; legal practice; precaution; proscription; terrorist intent

Introduction: Preemptive proscription

Proscription of individuals and groups potentially linked to terrorism in the form of targeted sanctions have become increasingly controversial in recent years, especially in Europe. Initially considered the less violent alternative when countering terrorism, or the “humanitarian face” of global economic sanctions regimes,¹ individual proscriptions have become contested for their impact on due process rights and democratic space. Numerous court cases before the European General Court challenge the legitimacy and procedures of targeted sanctions—cases involving both UN measures and independent EU measures. One such case is notable for the way in which it frames the rationale of individual proscriptions. Mohammed el Morabit, a Dutch citizen accused and initially convicted of belonging to a loose terrorist network known as the “Hofstadgroup,” challenged his blacklisting before the EU Court of First Instance in 2007. He did so on the grounds that his appeal was still pending, and that—in the absence of a definitive conviction—the blacklisting measure prejudiced his presumption of innocence. His case was hardly the most controversial of all cases that we have seen before the European courts: after all, El

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Morabit at the time of his blacklisting already had a court conviction in relation to terrorism.

However, his case is of interest because of the way in which the court phrased and affirmed the rationale underpinning individual EU-based proscription measures. According to the court, the blacklisting measure is not a penalty and “in no way prejudices the person’s innocence or guilt.” In addition, the measure does not entail “confiscation of the assets” but only effects a “freezing, as a precaution; they are not therefore a penalty, but have the sole aim of enabling the Council to take effective action against the financing of terrorism.”² In this rationale, it is the *temporary, precautionary* nature of the measure that underpins its exceptional effects on due process rights and political liberty. The court here draws a firm line between proscription as a precautionary measure, and criminal punishment, which would mobilise a set of due process rights. The El Morabit case resolved itself when he was cleared of all charges by the Court of Justice of The Hague in 2008, and subsequently delisted. However, the larger issues concerning the precautionary nature of the proscription measure, and its “urgent nature” in the context of what the court calls “fight against terrorism and ... the objective of combating threats to international peace and security” remain acute.

As a vibrant and growing literature has shown, proscription of organisations and individuals is an important but understudied aspect of the so-called “War on Terror.” Proscription refers to a broad set of measures that can be taken at state level or transnationally³ involving, amongst other things, asset freezing measures and a prohibition of (financial) support.⁴ This seemingly technical financial measure has substantial impact on individuals’ lives: without access to their resources, use of a bank account, opportunity to buy insurance or receive salaries, the measure fully disables a meaningful life in a modern society. A financial blacklisting measure is a mode of political and societal exclusion: it disables participation in the space of democratic engagement and functions as a form of “modern exile.”⁵

As the special issue editors have noted, proscription and blacklisting have a “symbolic, denunciatory function.”⁶ They work through discourses of “otherness” that performatively constitute the liberal, rational Self and its terrorist, violent Other.⁷ These measures place their targets outside the boundaries of society and the political order.⁸ As I have argued elsewhere, blacklisting is a form of modern “ban”: it seeks to render its targets politically mute, and places them beyond the boundaries of political participation.⁹ In this sense, proscription pushes against the limits of democracy, evoking the question: “how can a democratic system systematically exclude population groups from democratic participation, if the principle of democracy is precisely to include all sectors of society in a public debate?”¹⁰

This contribution to the special issue focuses on a key aspect of proscription measures that goes relatively unnoticed: its discourses and practices of time and temporality. Proscription and blacklisting decisions are taken in the name of an urgent but unspecified security threat, that is more like a generalized danger than a specified imminent attack. As worded in the European Council Regulation of 2001, these restrictive measures aim to

prevent and prohibit the financing of terrorist acts, i.e. intentional offences that by their nature or context may damage a country when committed with the intention of seriously intimidating the population, destabilising the country, etc.¹¹

In this context, courts have held that a freezing measure “must, by its very nature, be able to take advantage of a surprise effect.”¹² The present invocation of a potentially violent future supported or facilitated by the suspect organisation or individual, ultimately underpins all forms of proscription measures. In addition, it is the supposedly temporary nature of the measure that generates its exceptional effects. In this sense, mechanisms of time, temporality, and temporariness are core to the way in which proscription works as a unique and complex security measure.

This paper offers a close reading of two recent proscription cases, in order to examine how these debate, reject, and reconfigure mechanisms of time and temporality. It examines two sets of recent cases (Kadi and LTTE) where the precautionary, “forward-looking,” nature of the measure was challenged, and where the sanction acquired punitive effects, normally associated with “backward-looking” criminal proceedings. The temporal logics of proscription are among the main axes of contestation before the (European) courts. Courts have to grapple with the boundary between precaution and punishment, as well as the tipping point between a temporary and (semi-)permanent measure. Increasingly, the relatively neat separations between freezing and confiscating; prevention and punishment; forward-looking and backward-looking measures, are stretched and challenged. This article focuses specifically on two temporal elements: namely the relation between the precautionary and the punitive; and the establishment and assessment of terrorist intentions. It shows that the cases under consideration confound and stretch the distinction between present measures and potentially violent futures. They entail new ways in which potential violent futures are enacted in the present as a basis for punishment and sentencing.

In developing these claims, the paper seeks to contribute to broader literatures on proscription in two ways. First, it seeks to foster a dialogue between the literatures on blacklisting and targeted sanctions on the one hand, and critical security studies literatures on the other. Critical literatures on security preemption and counterterrorism have focused on the identity politics at work within proscription regimes, and the effects of such Us-versus-Them discourses on the space for democratic engagement.¹³ They have however been less attentive to the specific temporal dimensions of proscription policies or the ways in which proscriptions are challenged and contested in practice. Critical (legal) literatures on targeted sanctions and blacklisting, on the other hand, have placed these measures into the broader context of post-9/11 security preemption, and have offered detailed juridical analysis of ongoing cases.¹⁴ But they have done less to connect to the literatures on critical studies of terrorism, and to analyse ways in which identities and suspect communities are mobilised through proscription. This paper seeks to foster a debate across these literatures, *inter alia* by bringing the analysis of juridical temporalities in dialogue with critical literatures on proscription.

Secondly, it advances the debate on security temporalities in general and the discussion of future-oriented sanctions in particular, by focusing on recent cases and case-law. The paper brings a focus on legal *practice* to proscription debates. Beyond its logics as set out in policy documents and parliamentary debates, the legal terrain of proscription is messy and contested. The approach developed here—and inspired by the recent “practice turn” in international studies—suggests that it is at the *level of practice* that proscription measures are given meaning and made to act upon the world.¹⁵ The legal text is important because it is a privileged performative space, in which linguistic utterances have a direct

capacity to shape reality, establish facts, and mete out punishment.¹⁶ In the juridical case, the abstract norm or universal regulation is enacted and rendered meaningful. As Kim Lane Scheppelle has put it, “in law, cases arise out of particular problems, where local injuries ... require an application of general knowledge to determine causation, responsibility and blame. Law ... traffics between the universal and the specific.”¹⁷ My starting point, then, is that the meaning and effect of proscription measures is enacted in the frontline of legal practice, court contestations, and policing decisions. As further discussed below, this builds on the work of Andrew Neal and others, who have already drawn attention to the juridical practices that belie counterterrorism.¹⁸

In this context, the paper offers a reading of key aspects of two of the most important cases before the European General Court (formerly European Court of Justice), which has emerged as a major legal venue where UN and EU blacklisting measures are being contested. The “Kadi” and “LTTE” cases have both resulted in significant critiques and partial annulment of blacklisting measures by the courts. Briefly put, the Kadi case established that blacklisting entails a breach of human rights; especially the right to be heard, and the right to property. The (ongoing) LTTE case, by comparison, has found that blacklisting measures are based on superficial source material and an elusive process of decision-making. However, both cases also affirm, in principle, the value of blacklisting as a legitimate security measure in the face of an unspecified terrorist danger. This combination of affirmation and rejection of aspects of blacklisting leads to a fragmented juridical terrain.¹⁹ The complexity of this terrain is compounded when one further takes into account proceedings before the national courts, which the paper does by examining the criminal proceedings against LTTE fundraisers in The Netherlands in 2011.

The next section further develops the conceptual framework of this paper, that centers on security temporalities and legal practices. This is followed by two empirical sections, concerning the Kadi and LTTE cases consecutively. The conclusion returns to the configuration of present and future in criminal trials relating to proscribed organisations.

Security temporalities

The mobilization of the future, as Timothy Mitchell, amongst others, has shown, is an important political “mode of adjudicating and managing claims in the present.”²⁰ This is the case in many policy domains, but perhaps nowhere as much as in post-9/11 security policy. Contemporary security politics mobilises its own future-oriented temporality of “ticking bomb” scenarios and preemptive intervention.²¹ Here, the modernist future as an “open realm of potential” is readily read in terms of a broad, generalised danger, requiring urgent, exceptional measures.²² In this context, Sven Opitz and Ute Tellmann have encouraged a detailed attention to the “politics of time” as the “contingent and contestable making of the various temporal patterns and rhythms that define social order.”²³ They observe the emergence of a contemporary “emergency imaginary,” which invokes the future in specific ways. “The present future invoked in the emergency imaginary is not a pure potential,” Opitz and Tellmann write, “it does not stretch out before us like an open field, but it comes at us. It is a future not to be lived but to be survived.”²⁴

This emergency imaginary “disrupts and disfigures” our classic understandings of “legal temporality” as slow, reiterative, and backward-looking rhythm.²⁵ Proscription measures are situated precisely in this clash between future-oriented, urgent security measures, and

the slow, backward-looking juridical process. On the one hand, they offer a mode of urgent intervention and enable the immediate, surprising targeting of suspects who are imagined to be capable of causing catastrophic futures. On the other hand, proscription measures are increasingly inscribed in a juridical regime that applies a slow, hesitant rhythm of contestation and assessment.

The future-oriented nature of proscription and other preventive security measures has received substantial analytical attention—especially within juridical literatures. This literature critically examines the underlying *rationale* of proscription measures, often through a Foucauldian-inspired approach that unpacks the *dispositif* of security. A *dispositif* is attentive to the rationalities, technologies, and spaces of security, with a specific attention to the way in which power is exercised through the “uncertain and the aleatory.”²⁶ Thus, it has been noted how proscription and blacklisting entail a mode of security preemption, because these measures seek to target potential suspects in advance of, and often instead of, criminal trial. The future-oriented harm of terrorist violence and facilitation associated with the proscribed organisation is brought into the present as a basis for exceptional security action. In this sense, proscription operates through a logic of pre-crime, seeking to disrupt suspects who “have not yet committed a crime and may never do so.”²⁷ As security measure, proscription brings the potential catastrophic future into the present, and renders possible a present sanction in advance of violence.²⁸

However, in order to push existing debates further, it is important to ask how these discourses and rationalities are enacted and contested in (legal) practice. Foucault himself draws attention to the “effective, real, daily operations of the actual exercise of sovereignty” which, he argues, “point to a certain multiplicity.”²⁹ In the case of proscription, that multiplicity becomes evident when we examine actual court contestations—as the next section does in more detail. As Andrew Neal has argued, urgent and exceptional security measures are not always taken outside the space of law. On the contrary, counterterrorism is often driven by, and enacted through, the legislature. The aftermath of crisis and attacks is marked by “rushed, reactive” counterterrorist lawmaking.³⁰ In this context, Neal calls for detailed research attention to processes of counterterrorist lawmaking and its contestations. He advances an understanding of legislating “as practice,” which renders our focus on negotiation, “political manoeuvres, unequal access to information ... [and] bureaucratic procedures.”³¹

In this line, this article focuses on legal practice, and examines court judgements as sites of juridical contestation. Broadly speaking, the initial court decisions examining blacklisting measures infallibly reproduced the formal governmental and legal rationales underpinning this precautionary measure—as did for example the El Morabit decision discussed in the introduction to this paper. However, as the cases progressed through complex appeal procedures, the courts increasingly offered multiple and sometimes diverging understandings of the rationalities and temporalities of proscription.

In this sense, a focus on legal *practice* is able to move debates in a new direction, by rendering explicit the multiplicity of (temporal) logics that emerge as proscription is contested before the courts. As Grabham shows, legal decisions often entail a specific mode of temporality; they are ways of “doing things with time.”³² As techniques of governance, Grabham writes, “temporal constructs ... create particular types of embodied legal subject, with particular histories, trajectories and futures.”³³ Though Grabham does not examine security temporalities specifically, the question of how juridical decisions and

documents create the legal subject of “the proscribed organisation”—with its particular histories and projected futures—is pertinent. Rather than a coherent rationality of proscription, what is emerging can be understood as an “assembly of legal temporalities through a range of disjunctive moves and apparently unlikely actors.”³⁴

Building on existing analyses of the interconnections between law and time, this paper focuses specifically on two temporal elements as they have played out before the courts in proscription cases. First, it traces the relation and reconfiguration of the precautionary and the punitive. Proscription formally does not constitute evidence of criminal wrongdoing. Its precautionary and temporary nature renders it distinct from criminal punishment, such as confiscation. This is illustrated in the El Morabit case, where the court confirmed the distinction between, on the one hand, *confiscation* as a punitive measure that mobilises the full spectrum of due process rights, and *freezing*, on the other hand, as a temporary precautionary measure that supposedly does not affect or prejudice the presumption of innocence. In addition, the court affirmed that such measures have to be taken with speed and urgency—circumventing normal legal procedure—because “the delays inherent in any legal proceedings would be incompatible with the urgent nature of the fight against terrorism.”³⁵ However, this supposed separation between precaution and punishment has been challenged before the courts, and some cases (notably Kadi) have found it to be untenable.

A second key aspect of the future-making nature of proscription in general and black-listing measures in particular is the way in which it formulates *the politics of intention*. The supposed violent and anti-democratic intentions of organisations is often grounds for their proscription. For example, as Jarvis and Legrand have shown, within UK Parliamentary debates, such measures are discursively justified by appealing to a dystopian future purportedly desired and intended by the targeted organisations, such as the establishment of “the Islamic caliphate” or the instatement of sharia law.³⁶ But how can we know, assess, and verify such intentions and their propensity for violence, especially in a legal setting? In cases prosecuting the facilitation and financing of designated terrorist organisations, an important juridical conundrum is how to assess or prove the future intention of present money flows within a court of law. Once monies leave the jurisdiction of the court concerned, how can proceedings assess whether they support acts of violence or armed battle, or whether they are simply used for legitimate support of friends or family in conflict zones? This question exceeds the debate on proscription—for example, recent criminal cases of so-called “foreign fighters” in Europe have debated whether it is possible to remit money to IS-held territories *without* contributing to armed struggle, or whether such remittances always—directly or indirectly—serve to support violence.

Knowing and extracting intentions is an enduring politico-judicial puzzle long preceding the specific post-9/11 problematique. Foucault has analysed the Confession as a modern mode of power which seeks to constitute the subject around their inner thoughts and intentions. “To declare loud and intelligibly the truth about oneself— ... to confess—has in the Western world been considered for a long time ... as an essential item in the condemnation of the guilty.”³⁷ Confession in the Foucauldian sense exercises power through the continuous “verbalization” of the “depth of the thoughts” which constitutes the self and its truths.³⁸ However, this mode of power also requires “validation” through a juridical dialogue which tries, tests, rejects, and legitimates the statement of truth. “The legitimate truth is the one that is produced neither in the form of a prophecy nor in the

form of a deduction ... but in the form of an interrogation of witnesses ... who are ultimately forced to avow,” writes Foucault in his interpretation of the dialogue between Oedipus and the chorus.³⁹ *Avowal* as an orchestrated process of articulation and assessment is how intentions become real within legal procedure, according to Foucault’s reading.

Relevant to our argument here, is the socio-political history of the repertoire of juridical truth-telling, especially as it concerns criminal intent and future-oriented intentions. Establishing criminal intentions is historically enabled through strategies of confession and avowal—in particular, juridical rituals of truth telling and validation. Importantly, recent terrorism law across the European Union includes provisions for aggravated punishment of criminal acts (for example, theft and extortion) committed “*with a view to*” the perpetration of terrorist acts.⁴⁰ This brings the question of intention to the center of current counterterrorism legislation: relatively mundane acts of driving, reading, websurfing have now been held criminal if they are proven to be undertaken with “terrorist intent.”⁴¹ At the same time, however, we see new ways of realising the criminal act in the present, that do not necessarily require an extended ritualistic avowal of future intentions. One of the findings of this paper, as discussed below, is that in the case of the criminal trial concerning LTTE fundraising in The Netherlands, the question of whether the monies were collected for the purpose of supporting future violence was relatively absent.

The next sections “trace the temporal mechanisms at play” in selected key cases, with a focus on the construction of terrorist intentions, and the shifting relation between the precautionary and the punitive.⁴² Methodologically, my approach entails “taking case reports and policy documents at their word ... forcing into view the agency and form of these documents-as-things.”⁴³ Consequently, the analysis of the Kadi and LTTE cases in the next sections is conducted through an interpretative, inductive textual analysis, with a focus on temporal elements and mechanisms.⁴⁴

Kadi: the duration of precaution

The set of cases concerning the (de)listing of Mr. Kadi that were before the European Court of Justice and the European General Court between 2001 and 2013 comprise perhaps the most well-known contestation of the apparatus of blacklisting. Yassin Abdullah Kadi, a Saudi national, was placed on the UN Security Council list in 2001 on the suspicion that his bank al-Barakat had provided financial facilitation for Al Qaeda.⁴⁵ The UN listing was automatically transposed into EU law through successive EU Council Regulations. Kadi challenged his placement on the UN list in various jurisdictions, including the European Courts. The literature on the Kadi case by now is substantial, dealing mostly with questions concerning the disjuncture in UN and EU legal orders.⁴⁶

Temporal mechanisms played a key role when Courts considered the question of the alleged breach of Mr. Kadi’s human rights and right to property. In relation to the right to property, specifically, the Court had to consider the legitimacy of this restrictive measure that claims to be temporary without setting a limit on its duration. Initially, the Court affirmed the legitimacy of the contested blacklisting decision, precisely on the basis of its temporary nature. In its first judgement in 2005, the court described the sanction as a “precautionary measure which, unlike confiscation, does not affect the very substance of

the right of the persons concerned to their property in their financial assets but only the use thereof.”⁴⁷ The precautionary and temporary nature of the measure was seen to underpin the government’s right to refrain from informing the targets formally of the suspicions against them.⁴⁸ What is important to note for our discussion on temporalities, is that the 2005 judgement gives no indication of the reasonable *duration* of such a temporary measure. At the time, the parties contesting these sanctions had been listed for four years (having been placed on the blacklist shortly after 9/11). The Court does not comment on this length of time, but simply notes that the blacklisting measure does not have “an unlimited period of application” because it is supposedly reviewed by the Security Council after 12 or 18 months.⁴⁹

However, the Court’s reasoning on this issue did not hold during the appeal process, which found in 2008 that the freezing measure constituted an “unjustified restriction of [Mr Kadi’s] right to property.”⁵⁰ For the first time, the Court introduced the actual time horizon of Mr. Kadi’s experience into the equation, noting that the freezing measure had been applied since October 2001. The court reasoned that—though temporary—the freezing measure does “undeniably entail a restriction of the exercise of Mr Kadi’s right to property that must ... be classified as considerable.”⁵¹ In addition, the court called the restriction “significant” given “actual continuation of the freezing measures affecting him.”⁵² However, the court refrains from specifying at what point the temporary measure changes *from* being a temporary and justified one *to* being a considerable and significant restriction of property rights. In other words, the court does not specify the point at which the precautionary, temporary measure acquires a considerable, durable, and punitive effect. The court notes that the duration of the measure should be subject to a test of proportionality and viewed in light of the question of a “reasonable relationship ... between the means employed and the aim sought.”

However, the Kadi appeals judgement gives no further guidance concerning the assessment of proportionality in this context. It does not specify a “tipping point” or threshold at which a temporary precautionary measure acquires a significant, disproportionate, and punitive effect. The court annuls the regulation insofar as it concerns Mr. Kadi, but it upholds blacklisting as in principle a legitimate security measure compatible with the rule of law. Though the proportionality test sounds like a reasonable legal approach, it is difficult to carve out proportional restraints when the danger addressed by blacklisting measures is understood to be broad and unspecified, with the potential to cause a fundamental disruption of societies.

In this sense, the Kadi case presents us with a puzzle of temporality. The *duration* of the “temporariness” of blacklisting measures is rarely questioned or measured. In a much quoted passage, for example, former U.S. Treasury Secretary Paul O’Neill, who played a key role in the design of the post-9/11 targeted sanctions regime, wrote: “Because the funds would be frozen, not seized, the threshold of evidence could be lower and the net wider. Yet ‘freeze’ is something of a legal misnomer—funds of Communist Cuba have been frozen in various U.S. banks for 40 years.”⁵³ While finding serious human rights flaws in blacklisting regimes, the Kadi appeal judgement shirks away from abandoning the apparatus of blacklisting altogether. It upholds the legitimate nature of blacklisting *if* temporary and precautionary. In this sense, it offers new juridical patterns and rhythms, by suggesting that there is a threshold when the precautionary becomes punitive. However, the moment of that threshold remains always elusive, and the court refrains

from specifying this temporal threshold. The precautionary measure is formally considered to be a short-term, temporary, surprise effect, necessary so that targets do not quickly move their funds. However, this short-term surprise measure is stretched out beyond an unspecified temporal horizon, leading to significant, punitive restrictions in the present. In this sense, there is a fundamental temporal disjunction at the heart of proscription practices: the elusive juncture at which the precautionary becomes punitive can never be specified in law but is fundamentally political. The aporia underscores the political core of this juridical practice.

LTTE: proscription's present

A second set of cases relevant to our analysis of the relation between the precautionary and the punitive and the temporal logics of blacklisting, concerns the LTTE proceedings before the European General Court, as well as the national criminal courts (in this case in The Netherlands). The LTTE⁵⁴ (commonly known as the “Tamil Tigers”) were placed on the EU blacklist in 2006, underpinned by EU Regulation 2580.⁵⁵ The LTTE are not placed on the UN blacklist, and the organisation is not suspected of committing terrorist acts within the EU. The proscription at EU level was debated fiercely within the European Council, and is commonly thought to be a political decision: it has emerged that the listing was supported by the UK and India, and by a letter with a “list of attacks imputed” to LTTE.⁵⁶ The international designation of LTTE as “terrorist” entailed an important shift in the politics of ongoing peace negotiations. Labelling the LTTE as terrorist rendered the LTTE’s political voice mute and meant that negotiations were no longer “based on parity between the protagonists.”⁵⁷ As a consequence, Norway, which plays an important role in the Sri Lankan peace process, objected to the listing of LTTE and to the EU listing regime more generally.⁵⁸ The LTTE itself has vigorously contested its placement on the EU list, leading to a series of cases before the EU General Court.⁵⁹

This section focuses on the cases and contestations surrounding the LTTE proscription at both the EU and the national level. As outlined above, it offers a *practice-based* approach to understanding proscription law.⁶⁰ Proscription measures acquire meaning through the actual juridical contestations and court decisions that enact or contest it. This section analyses temporal disjunctions in the LTTE listing with a focus on the relation between the precautionary and the punitive. As in the Kadi case, there is an aporia surrounding the question when the precautionary measure becomes punitive. However—unlike Kadi—that aporia is exposed not through the question of duration, but through a play of different levels of jurisdiction. As Valverde has shown, jurisdiction is not strictly territorial, but is better understood as a “game” of space, time, and mood, whereby juridical authority is claimed, enacted, or refused.⁶¹ In this sense, seemingly technical questions of jurisdiction “actually involve ... much larger, extra legal issues of power and authority.”⁶² This section examines the complex interrelation and disjunction between legal processes within EU and the national jurisdictions in the LTTE cases. As we have seen, proscription at the EU level is formally not taken to prejudge questions of “innocence or guilt” in the national juridical context.⁶³ Nevertheless, the EU listing decision became of prime importance in the (Dutch) national criminal case, where suspects were tried for terrorism support and financing.

Secondly, the LTTE case pivots around questions of terrorist intent and how these materialise before the courts. I have argued that, traditionally, criminal intent is brought before the court through ritualistic performances of confession and avowal, as analysed by Foucault. In the national case concerning LTTE terrorist fundraising however, such ritualistic avowals were less important than the assumption of the terrorist identity of the organisation itself. To some extent, this moves legal intervention away from being anchored in individual criminal behaviour toward being based on organisational identity.⁶⁴

LTTE's contestations of its inclusion on the EU blacklist have focused on a number of grounds. These include, first, the argument that the LTTE is engaged in an armed battle with the government of Sri Lanka, and that, in such armed battle, it is not possible to designate one of the warring parties as "terrorist." Second, the LTTE argues that the decision underpinning its listing was taken by the UK and India on the basis of a disputed list of facts and allegations, that does not amount to a "decision by a competent authority" as required. In 2014, LTTE won an important victory when the European General Court found that the blacklisting of the LTTE had been "based not on acts examined and confirmed in decisions of competent authorities," but was rather based on "factual imputations derived from the press and the internet."⁶⁵ The LTTE contestation over its listing is ongoing, with Advocate General Sharpston recently affirming the EU's duty to examine the evidence presented by a competent authority underpinning a listing decision, and not simply relying on "facts and evidence found in press articles and information from the internet."⁶⁶

This contestation at the EU level interrelates in complex ways with criminal proceedings at the national level—in this case, The Netherlands. Paying attention to this national case shows how the listing at EU level—which, supposedly, does not in itself prejudice the presumption of innocence—helps shape a criminal conviction in a different juridical venue. Taking place in the same time period of the LTTE case contestation before the General Court, but in a different jurisdiction, was a criminal prosecution for the financing and facilitation of LTTE in The Netherlands, which commenced in 2011 and is ongoing with various appeals until the time of writing. The Dutch case revolved around the criminal culpability of facilitating and financing LTTE, and whether this constituted participation in a terrorist or criminal network. For the Dutch court, the contestations regarding the EU listing of LTTE was not a reason to delay the Dutch criminal trial (despite a request to this effect by the defense).⁶⁷

The key question in the Dutch LTTE case was whether the defendants participated in a terrorist or criminal organisation with a view to committing terrorist crimes. The defendants had facilitated LTTE-related meetings in The Netherlands and had collected money at these meetings to be remitted, allegedly for the purpose of supporting violent struggle in Sri Lanka. The defendants had organised political and cultural meetings of the Tamil community in The Netherlands, rented meeting halls, planned events, fabricated and sold DVDs, and collected support money for these activities. They kept an extensive financial administration of donations. A pre-trial report co-authored by Dutch police and prosecution, claims that the monies collected "had the objective of supporting the terrorist activities of the LTTE."⁶⁸ However, this claim does not figure very prominently in the criminal indictment. Instead, the indictment includes various accusations, of which the participation in a terrorist or criminal organisation was key; alongside the recruitment for

armed battle (in Sri Lanka), and the possession and distribution of material for the purpose of incitement to violence.⁶⁹ Most importantly, the defendants were accused of breaking national and EU sanctions law.

The case focused to a large extent on the nature and intentions of LTTE as an international organisation. The court found that the LTTE is a “global organisation ... with a structured and durable cooperation.”⁷⁰ The Dutch network (Tamil Coordinating Committee, or TCC) was assessed to be part of this global organisation, directly under control of the international secretariat.⁷¹ According to the court, the intention (“oogmerk”) of this criminal organisation was to break the (EU) sanctions law, to break national gambling law by organising improvised lotteries, and, subsequently, to hide the money flows to Sri Lanka, for example by using cash couriers.⁷² The money collected by the defendants was intended to support these criminal objectives. In this particular case, the court acquits the suspects of terrorist-related accusations—an aspect that would later be appealed by the Dutch prosecution.⁷³

Furthermore, the court examines the role of the accused in the international structure of the LTTE. The four accused had, variously, organised meetings, solicited donations, written a financial activities plan (retrieved on a USB stick), and kept a financial administration of gifts and donations for multiple years. In addition, the defendants were accused of coercing diaspora communities to contribute financially.⁷⁴ It is clear from court documents that the Sri Lankan government had provided the Dutch security services with intelligence concerning the activities of the Dutch defendants in the hierarchy of the LTTE. For the defense, this was reason to ask for the evidence to be dismissed, as such material might stem from investigations which used torture.⁷⁵ The Dutch court agreed that “it cannot be precluded” that torture took place in the local areas in Sri Lanka during the time period of evidence gathering. But it finds no evidence to suggest likelihood of the use of torture in this case, and does not see reason to preclude the material and documents presented by the security services (both Sri Lankan and Dutch). This material demonstrates, according to the court, the pivotal position of the accused in the LTTE financial network and the Dutch TCC.

Remarkably, in contrast to the pre-trial report, there was little to no assessment of the intended *purpose* of the monies in all the court’s discussions concerning the collection of financial support for LTTE, and of whether these were (proven to be) used for violent acts. The defense complained that the indictment was insufficiently specific in this regard, because it does not specify the criminal facts facilitated and committed “elsewhere in the world.”⁷⁶ However, what counted for the court were not the specific acts supported with the monies and whether these were intended to support armed conflict abroad. Instead, what mattered to the court was the evidence that the defendants were *aware* of the placement of the LTTE on the EU terrorism sanctions list. The court affirms the importance of national and EU Sanctions regulation because of its purpose in “maintaining or restoring international peace and security ... and the combating of terrorism.”⁷⁷ Despite being aware of LTTE’s proscription, defendants continued activities in support of the LTTE. This leads the court to conclude that defendants knowingly and purposefully contravened Dutch sanctions law. They did so not for personal gain, but to justify criminal behaviour through “ideological motivation.”⁷⁸ The defendants were convicted of prison sentences between 19 months and 6 years. Appeal procedures in The Netherlands are ongoing.

The Dutch LTTE case, I suggest, provides an example of the elastic way in which present crimes and future intentions are configured in proscription law. Despite the ongoing contestations before the General Court, the LTTE's placement on the EU sanctions list proved pivotal to the realisation of a conviction in the Dutch case, even if such placement is not evidence of criminal activity in itself. In this manner, the defendants were sentenced to six years imprisonment for breaching sanctions law *despite* being acquitted of belonging to a terrorist organisation. We have to recall here that a blacklisting measure is not evidence of criminal wrongdoing as was confirmed in the El Morabit case cited at the beginning of this paper. It supposedly does not prejudice the presumption of innocence. The temporary precautionary blacklisting measure does not entail a formal accusation of criminal wrongdoing (meaning that blacklisted individuals are not "suspects" in the criminal law sense). However, what we saw in the LTTE criminal trial in The Netherlands is a temporal elasticity in which a criminal conviction of financial support of LTTE was realised; *even if* the blacklisting of LTTE itself is not understood to be evidence of criminal acts. The listing at EU level was reconfigured to become part of the evidentiary basis at the national level, even if it is not supposed to prejudice the presumption of innocence.⁷⁹ In this case, the court considered the Dutch branch of LTTE to be a criminal organisation with the intent of breaking the sanctions law, despite the fact that this organisation existed long before the LTTE placement on the sanctions list, despite the continuing contestation of its proscription before the EU General Court, and after the violent defeat of the LTTE by the Sri Lankan army in 2009.

Moreover, the court's reasoning does not focus on the *intended use* of the collected monies in the context of the armed battle in Sri Lanka: there is little discussion of the question whether the monies did actually support violent action, or whether they were used primarily for charitable purposes including health and education. Because LTTE is judged to be a state-like organisation, this could have been a conundrum for the Court, as it has been so often in post-9/11 terrorism financing accusations.⁸⁰ By focusing purely on the breach of sanctions law, the court circumvents a) the thorny question of the intended *use* of money (violence versus charitable); and b) having to follow the money flows once they leave The Netherlands and prove a link to specific violent acts. Indeed, as the UK's independent review on Terrorism Legislation has noted in relation to proscription measures: "Prosecutors value [proscription] offences ... because it is easier to present a case to a jury when there is a link to a named, proscribed organisation than it is to prove a link to terrorism from first principles."⁸¹ Such cases, I suggest, display a temporal elasticity that reconfigures the precautionary and the punitive. Importantly, while proscription itself is not evidence of criminal wrong-doing, or even of formal suspicion in the criminal law sense, financially supporting a proscribed organisation is a crime and in the Dutch case led to a substantial criminal conviction. Put differently: collecting financial support for an organisation that is not accused of crime, can be reconfigured as a crime. This elasticity stretches and redefines the meaning of terrorist intentions, and loosens the relation between the present measure and the potential future.

Placed in the broader perspective of examining proscription as a political practice, the Dutch LTTE case shows the messy and multi-layered juridical process through which proscription takes effect and keeps hold. The 2006 listing decision by the EU forms the basis for a criminal conviction in The Netherlands, even if the proscription itself does not entail an allegation of crime. The General Court's finding that LTTE's listing was based on

unverified news and internet sources does not preclude the ongoing prosecution of LTTE members in The Netherlands.⁸² The offense under Dutch criminal law, moreover, is reconfigured from being a future support of terrorist violence, into a present breach of the sanctions law. This reconfiguration voids the need to prove, before a court of law, actual financial support of violent/terrorist acts.

Finally, it is relevant to note how proscription affects the space of democratic engagement and the public sphere in visceral ways. Key to the allegations was that defendants had organised cultural gatherings, rented meeting spaces, collected monies (in support of these activities), held speeches, and made DVDs with pro-LTTE messages. The criminal conviction for a breach of Sanctions Law leaves a grey area concerning the legitimacy of these political activities. At what point does such political engagement become a criminal offense? According to the defense, there was already a “chilling effect” among the Tamil community in The Netherlands: their offices have been approached by people asking whether it is allowed in The Netherlands “to rent a meeting space? To found an association? To organise a sports-day? And if so, are you allowed to ask participants a financial contribution to cover the costs of the meeting?”⁸³ In fact, the ongoing appeals procedures before the Dutch High Court focuses precisely on the question of the right of free speech of organisations that have been labelled as terrorist. In this appeals procedure, the Dutch prosecution office holds the position that terrorist organisations cannot appeal to the right of free speech when soliciting financial contributions.⁸⁴

More broadly, it is important to emphasise that future-oriented precautionary measures, of which proscription is an important example, produces novel forms of “precarious subjectivity.”⁸⁵ This pertains to new criminalisations within Europe for ideological and financial support to particular parties of international armed conflicts. And it pertains, also, to organisations and institutions inside conflict zones, who find their political voice in peace negotiations reduced,⁸⁶ and who increasingly struggle to receive legitimate charitable support.⁸⁷

Concluding: proscription’s futures

Proscription of organisations and blacklisting of individuals has received relatively little analytical attention—outside juridical scholarship—but it has important implications, both societally and juridically. These measures have major effects on the space of democratic engagement in contemporary societies. They raise questions about the relation between the precautionary and the punitive in contemporary counterterrorism. They involve a sliding boundary between theatres of war (to be governed by the laws of war) and understandings of terrorism (to be governed by counterterrorism legislation). We now have numerous court judgements—mainly from the European General Court—that find blacklisting to be in breach of human rights, especially the right to a fair trial and the right to property (Kadi). In addition, the court has found listings to be based on sketchy evidence and an elusive “decision” (LTTE). Nevertheless, the invocation of proscription measures by authorities has intensified rather than abated in recent years.

This paper has honed in on the temporalities of proscription as they have been articulated, enacted, and contested within legal practice. Articulations of temporality bring the alleged future terrorist/violent act into the present by appealing to a broad, generalised notion of danger that requires an immediate response with surprise effect. At

first glance, the cases of Kadi and LTTE are very different: while both contested their listing before the European Court on the grounds of human rights, the LTTE case was supplemented by criminal proceedings before a national court, that sought to convict defendants for participating in a terrorist network and the financing of terrorism. The cases resonate with each other, however, in the sense that they raise questions about the complex temporal and jurisdictional mechanisms at work within proscription practices. In the LTTE case, defendants were convicted to imprisonment for knowingly breaking Dutch sanctions law by collecting money for LTTE, while it was a proscribed organisation. In this case, we have seen how a discussion of the future act of violence is evaded altogether—so as to avoid having to prove the likelihood of the future use of particular money flows—in favour of the present crime of breach of sanctions law.

With proscription law and other pre-crime measures, then, it is possible to conclude that the juridical repertoire of establishing and assessing intentions is not just broadened but fundamentally altered. The nature of a proscription measure is that further criminal proceedings do not have to demonstrate (terrorist) intention in the juridical sense. The difficult question of the destiny and intent of the money flows (which plagued early post-9/11 criminal cases) is circumvented by establishing a present breach of sanctions law instead. Interestingly, we see similar reconfigurations in other areas of counterterrorism law at present. In the context of European prosecution of foreign fighters, there are proposals to criminalise physical *presence* in IS-controlled territory. This is a way of avoiding having to establish within a criminal prosecution, what a suspect actually did in Syria, and whether s/he engaged in violent acts or acts of combat.⁸⁸ In this manner, prosecutions sever the relation between the present punishment and the potential future. Taken together, these cases signify a sliding boundary between the forward-looking nature of proscription and the backward-looking nature of criminal punishment. They entail new ways in which potential violent futures are enacted in the present as a basis for punishment and sentencing. They show how the exceptional nature of security measures like proscription become interwoven with pre-existing legal systems.

Notes

1. Gavin Sullivan, “Transnational Legal Assemblages and Global Security Law: Topologies and Temporalities of the List,” *Transnational Legal Theory* 5, no. 1 (2014): 81–127.
2. European Commission Legal Service, “Press Release, Mohamed El Morabit V. Council,” September 2, 2009, http://ec.europa.eu/dgs/legal_service/arrets/07t037_en.pdf (accessed November 25, 2016). Also Hadassa Noorda, “Preventive Deprivations of Liberty: Asset Freezes and Travel Bans,” *Criminal Law and Philosophy* 9, no. 3 (2015): 521–35.
3. This paper focuses mainly on blacklisting in the form of “targeted sanctions,” as decided by the UN, EU, and national authorities. This can be understood as a particular form of proscription, because it similarly targets organizations and individuals on political grounds. Blacklisting operates transnationally, through EU and UN, and can be regarded as a *specific* proscription measure with transnational effects. Blacklisting entails an asset freeze and a travel ban of the affected persons. It also interdicts financial relations with the named individual or organisation. See for example: Council of the European Union, “EU Terrorist List,” <http://www.consilium.europa.eu/en/policies/fight-against-terrorism/terrorist-list/> (accessed November 29, 2016).

4. EU Council Common Position (2001/931/CFSP), December 28, 2001, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF> (accessed November 25, 2016).
5. Iain Cameron, "European Union Anti-Terrorist Blacklisting," *Human Rights Law Review* 3 (2003): 225–56; Marieke de Goede, "Blacklisting and the Ban: Contesting Targeted Sanctions in Europe," *Security Dialogue* 42, no. 6 (2011): 499–515; Timothy Legrand, "Banishing the Enemies of All Mankind: The Effectiveness of Proscribing Terrorist Organisations in Australia, Canada, the UK and US," in Lee Jarvis and Michael Lister, eds., *Critical Perspectives on Counter-Terrorism* (London: Routledge, 2014), 150–68.
6. Lee Jarvis and Tim Legrand, "Legislating for Otherness: Proscription Powers and Parliamentary Discourse," *Review of International Studies* 42, no. 3 (2015): 562; also Tim Legrand and Lee Jarvis, "Enemies of the State: Proscription Powers and their use in the United Kingdom," *British Politics* 9, no. 4 (2014): 450–71.
7. Jarvis and Legrand, "Legislating for Otherness" (see note 6); David Campbell, *Writing Security* (Minneapolis: University of Minnesota Press, 1992); Debbie Lisle, "Frontline Leisure: Securitizing Tourism in the War on Terror," *Security Dialogue* 44, no. 2 (2013): 127–46; Eva Herschinger, "A Battlefield of Meanings: The Struggle for Identity in the UN Debates on a Definition of International Terrorism," *Terrorism and Political Violence* 25, no. 2 (2013): 183–201.
8. Angela Bourne and Fernando Casals Bertoa, "Prescribing Democracy? Party Proscription and Party System Stability in Turkey, Germany and Spain," *European Journal of Political Research*, 56, no. 2 (2017): 440–65.
9. de Goede, "Blacklisting and the Ban" (see note 5).
10. Robert Kluijver, "Notes from the Curator and Chairman of the First Edition of the New World Summit," in Jonas Staal, ed., *New World Summit*, 13; <http://newworldsummit.org/wp-content/uploads/2013/04/New-World-Summit-Leiden-publication.pdf> (accessed November 25, 2016).
11. European Council, "Combating the Financing of Terrorism," <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l24402&from=NL> (accessed November 25, 2016); see also UN Security Council Resolution 1390 (2002).
12. Court of First Instance, *Judgement of the Court of First Instance in Case T-315/01*, Yassin Abdullah Kadi versus Council of the European Union and Commission of European Communities, September 21, 2005, §308.
13. For literature in the broad realm of critical terrorism studies, see for example: Raphael Bossong, "The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance," *Journal of Common Market Studies* 46, no. 1 (2009): 27–48; Christopher Baker-Beall, Charlotte Heath-Kelly, and Lee Jarvis, *Counter-Radicalisation: Critical Perspectives* (London: Routledge, 2014); Charlotte Heath-Kelly, "Reinventing Prevention or Exposing the Gap? False Positives in UK Terrorism Governance and the Quest for Pre-emption," *Critical Studies on Terrorism* 5, no. 1 (2012): 69–87; Christian Kaunert, Sarah Leonard, Patryk Pawlak, eds., *European Homeland Security: A European Strategy in the Making?* (London: Routledge, 2012); Francesco Ragazzi, "Suspect Community of Suspect Category: The Impact of Counter-Terrorism as Polices Multiculturalism," *Journal of Migration and Ethnic Studies* 42, no. 5 (2016): 724–41.
14. For a broader discussion on blacklisting see for example: Sullivan, "Transnational Legal Assemblages and Global Security Law" (see note 1); Francesca Galli, "The Freezing of Terrorists' Assets: Preventive Purposes with a Punitive Effect," in F. Galli and A. Weyembergh, eds., *Do Labels Still Matter? Blurring Boundaries between Administrative and Criminal Law* (Editions de l'Université de Bruxelles, 2014), 43–68; Elspeth Guild, "The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the Terrorist Lists," *Journal of Common Market Studies* 46, no. 1 (2008): 173–93; William Vlcek, "Acts to Combat the Financing of Terrorism: Common Foreign and Security Policy at the European Court of Justice," *European Foreign Affairs Review* 11, no. 4 (2006): 491–507.
15. Emmanuel Adler and Vincent Pouliot, eds., *International Practices* (Cambridge: Cambridge University Press, 2011); Rebecca Adler-Nissen, *Opting out of the European Union* (Cambridge:

- Cambridge University Press, 2014); Christian Bueger and Frank Gadinger, "The Play of International Practice," *International Studies Quarterly* 59, no. 3: 449–60; Christian Bueger, "Making Things Known: Epistemic Practices, the United Nations, and the Translation of Piracy," *International Political Sociology* 9, no. 1 (2015): 1–18; Iver B. Neumann, "Returning Practice to the Linguistic Turn," *Millennium* 31, no. 3 (2002): 627–51; Mark B. Salter, "Border Security as Practice: An Agenda for Research," *Security Dialogue* 45, no. 3 (2014): 195–208.
16. Marieke de Goede and Beatrice de Graaf, "Sentencing Risk: Temporality and Precaution in Terrorism Trials," *International Political Sociology* 7, no. 3 (2013): 313–31; also Beatrice de Graaf and Alex P. Schmid, eds., *Terrorists on Trial: A Performative Perspective* (Leiden: Leiden University Press, 2016).
 17. Kim Lane Scheppele, "Judges as Architects," *Yale Journal of Law & the Humanities* 24, no. 1 (2012): 360; also Wouter Werner, "The Use of Law in International Political Sociology," *International Political Sociology* 4, no. 3 (2010): 304–7.
 18. Andrew Neal, "Normalisation and Legislative Exceptionalism: Counter-Terrorist Lawmaking and the Changing Times of Security Emergencies," *International Political Sociology* 6, no. 3 (2012): 260–76.
 19. Gavin Sullivan and Marieke de Goede, "Between Law and the Exception: The UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise," *Leiden Journal of International Law* 26 (2013): 833–54.
 20. Timothy Mitchell, "How the Future Entered Government," *Critical Inquiry* 40, no. 4 (2014): 484.
 21. Ben Anderson, "Preemption, Precaution, Preparedness," *Progress in Human Geography* 34 (2010): 777–98; Louise Amoore, *The Politics of Possibility* (Durham, NC: Duke University Press, 2013); Claudia Aradau and Rens van Munster, *Politics of Catastrophe* (London: Routledge, 2011); Claudia Aradau and Rens van Munster, "Governing Terrorism through Risk: Taking Precautions, (Un)knowing the Future," *European Journal of International Relations* 13, no. 1 (2007): 89–115; Gabe Mythen and Sandra Walklate, "Terrorism, Risk and International Security: The Perils of Asking 'What If?'" *Security Dialogue* 39, no. 2–3 (2008): 221–42.
 22. Barbara Adam, "History of the Future: Paradoxes and Challenges," *Rethinking History* 14, no. 3 (2010): 366.
 23. Sven Opitz and Ute Tellmann, "Future Emergencies: Temporal Politics and Law and Economy," *Theory, Culture & Society* 32, no. 2 (2014): 108.
 24. *Ibid.*, 112.
 25. Opitz and Tellmann, "Future Emergencies" (see note 23), 108; also Bruno Latour, *The Making of Law*, translated by M. Brilman and A. Pottage (Cambridge: Polity, 2010); Michael J. Shapiro, *Politics and Time* (London: Polity, 2016).
 26. Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978*, ed. Michel Senellart, transl. Graham Burchell (Houndsmills, Basingstoke: Palgrave, 2007), 11; Michael Dillon, "Underwriting Security," *Security Dialogue* 39, no. 2–3 (2008): 309–32; Luis Lobo-Guerrero, *Insuring Life: Value, Security and Risk* (London: Routledge, 2016).
 27. Lucia Zedner, "Pre-Crime and Post-Criminology?," *Theoretical Criminology* 11, no. 2 (2007): 262; Jude McCulloch and Sharon Pickering, "Suppressing the Financing of Terrorism," *British Journal of Criminology* 45 (2005): 470–86; Jude McCulloch and Dean Wilson, *Pre-Crime: Preemption, Precaution and the Future* (London: Routledge, 2016); Fleur Johns and Wouter Werner, "The Risks of International Law," *Leiden Journal of International Law* 21, no. 4 (2008): 783–86.
 28. Clearly, there are a number of established juridical concepts within criminal law that enable a conviction or punishment for a future misdeed, including for example the charge of "conspiracy." As legal scholar Robert Chesney—amongst others—has shown, the juridical scope for prosecuting potential future crimes has been significantly widened in the context of post-9/11 security law. See for example Robert M. Chesney, "Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism," *Southern California Law Review* 80 (2007): 425–502.
 29. Foucault, *Security, Territory, Population* (see note 26), 11.

30. Andrew Neal, "Terrorism, Lawmaking, and Democratic Politics: Legislators as Security Actors," *Terrorism and Political Violence* 24, no. 3 (2012): 358; also Andrew Neal, "Normalisation and Legislative Exceptionalism: Counter-Terrorist Lawmaking and the Changing Times of Security Emergencies," *International Political Sociology* 6, no. 3 (2012): 260–76.
31. Neal, "Terrorism, Lawmaking and Democratic Politics" (see note 30), 358.
32. Emily Grabham, "Doing Things with Time: Flexibility, Adaptability and Elasticity in UK Equality Court Cases," *Canadian Journal of Law and Society* 26, no. 3 (2011): 485–508.
33. Emily Grabham, "Governing Permanence: Trans Subjects, Time and the Gender Recognition Act," *Social & Legal Studies* 19 (2010): 108; also Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (London, Routledge, 2015).
34. Emily Grabham, *Brewing Legal Times: Things, Form and the Enactment of Law* (Toronto: University of Toronto Press, 2016), 15.
35. European Commission Legal Service, Press Release (see note 2).
36. Jarvis and Legrand, "Legislating for Otherness" (see note 6), 568.
37. Michel Foucault, "About the Beginning of the Hermeneutics of the Self: Two Lectures at Dartmouth," *Political Theory* 21, no. 2 (1993): 201; also Andrea Teti, "Orientalism as a Form of Confession," *Foucault Studies* 17 (2014): 193–212.
38. Foucault, "Hermeneutics of the Self" (see note 37), 220.
39. Michel Foucault, *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice*, translated by Stephen W. Sawyer (Chicago: University of Chicago Press, 2014), 80.
40. Council Framework Decision on Combating Terrorism, June 13, 2002, Article 3, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0475&from=EN> (accessed November 25, 2016).
41. De Goede and de Graaf, "Sentencing Risk" (see note 16); Susanne Krasmann, "Law's Knowledge," *Theoretical Criminology* 16, no. 4 (2012): 379–94.
42. Grabham, "Governing Permanence" (see note 33), 108.
43. Grabham, "Doing Things with Time" (see note 32), 486.
44. Mark B. Salter and Can E. Mutlu, eds., *Research Methods in Critical Security Studies* (New York: Routledge, 2013), Part IV.
45. It is beyond the scope of this article to discuss the validity of this suspicion, and the complex case of al-Barakat. Here, it is relevant to note that the 9/11 Commission did not find support for the claim that al-Barakat financially supported Al Qaeda. See: Thomas H. Kean, Lee H. Hamilton et al., *The 9/11 Commission Report* (Washington, July 22, 2004), chapter 5; for more detail see, Marieke de Goede, "Hawala Discourses and the War on Terrorist Finance," *Environment and Planning D: Society and Space* 21, no. 5 (2003): 513–32.
46. Including for example: Christina Eckes, "Juridical Review of European Anti-Terrorism Measures—The Yusuf and Kadi Judgements of the Court of First Instance," *European Law Journal* 14, no. 1 (2008): 74–92; Christina Eckes, "The Case for the Resilience of the EU's Constitutional Foundations," *European Public Law* 15, no. 3 (2009): 351–78; Sara Poli and Maria Tzanou, "The Kadi Rulings: A Survey of the Literature," *Yearbook of European Law* 28, no. 1 (2009): 533–58; Katja S. Ziegler, "Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights," *Human Rights Law Review* 9, no. 2 (2009): 288–305; Larissa van den Herik, "The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual," *Leiden Journal of International Law* 20 (2007): 797–807; Takis Trimidas and Jose A. Gutierrez-Fons, "EU Law, International Law, and Economic Sanctions Against Terrorism: The Judiciary in Distress?," *Fordham International Law Journal* 32, no. 2 (2009): 901–71; Jan Klabbers, "Kadi Justice at the Security Council?," *International Organizations Law Review* 4, no. 1 (2007): 1–12.
47. Court of First Instance, *Judgement of the Court of First Instance in Case T-315/01*, §299 (see note 12).
48. *Ibid.*, §320.
49. *Ibid.*, §344. The Court does not specify the nature of this re-examination process. The question whether this constitutes a meaningful review became part of the appeal

- procedure, where the defense argued that “the re-examination procedure before the Sanctions Committee, based on diplomatic protection, does not afford protection of human rights equivalent to that guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms.” See: European Court of Justice, *Judgement of the Court In Joined Cases C-402/05 P and C-415/05 P*, Yassin Abdullah Kadi and Al Barakaat International Foundation versus Council of the European Union and Commission of European Communities, September 3, 2008, §256. <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62005CJ0402&from=EN> (accessed November 25, 2016).
50. European Court of Justice, *Judgement of the Court In Joined Cases C-402/05 P and C-415/05 P*, Yassin Abdullah Kadi and Al Barakaat International Foundation versus Council of the European Union and Commission of European Communities, September 3, 2008, §370. <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62005CJ0402&from=EN> (accessed November 25, 2016).
 51. *Ibid.*, §358.
 52. *Ibid.*, §369 .
 53. Quoted in Ron Suskind, *The Price of Loyalty* (New York: Simon & Schuster, 2004), 192.
 54. Liberation Tigers of Tamil Eelam.
 55. Council Decision of May 29, 2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:144:0021:0023:EN:PDF> (accessed November 25, 2016).
 56. Judgement of the General Court in Joined Cases T-208/11 and T-508/11, Liberation Tigers of Tamil Eelam (LTTE), v Council of the European Union, October 16, 2014, § 84. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011TJ0208&from=EN> (accessed November 25, 2016).
 57. S. Nadarajah and D. Sriskandarajah, “Liberation Struggle or Terrorism? The Politics of Naming the LTTE,” *Third World Quarterly* 26, no. 1 (2005): 95.
 58. L. Boon-kuo, B. Hayes, V. Sentas, and G. Sullivan, *Building Peace in Permanent War: Terrorist Listing and Conflict Transformation* (London: International State Crime Initiative, 2015), 36; also Sophie Haspeslagh, “Listing Terrorists: The Impact of Proscription on Third-Party Efforts to Engage Armed Groups in Peace Processes—A Practitioner’s Perspective,” *Critical Studies on Terrorism* 6, no. 1 (2013): 189–208.
 59. EU General Court, “Judgement of the General Court in Joined Cases T-208/11 and T-508/11,” October 16, 2014, <http://curia.europa.eu/juris/documents.jsf?num=T-208/11#> (last accessed May 17, 2017).
 60. Neal, “Terrorism, Lawmaking” (see note 30); Neal, ‘Normalisation and Legislative Exceptionalism’ (see note 30).
 61. Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (see note 33), chapter 3.
 62. Valverde, *Chronotopes* (see note 33), 82.
 63. European Commission Legal Service, “Press Release, Mohamed El Morabit V. Council,” September 2, 2009, http://ec.europa.eu/dgs/legal_service/arrets/07t037_en.pdf (accessed November 25, 2016).
 64. Also Jarvis and Legrand, “Legislating for Otherness” (see note 6).
 65. CASE para 207; General Court of the European Union, “Press Release No 138/14,” Luxembourg, October 16, 2014, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-10/cp140138en.pdf> (accessed November 25, 2016).
 66. Court of Justice of the European Union, Press Release No 108/16, Luxembourg, September 22, 2016, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-09/cp160108en.pdf> (accessed November 25, 2016).
 67. LJN: BT8829, *Verdict*, Rechtbank ’s Gravenhage (The Hague Court), October 21, 2011, p. 7. <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBSGR:2011:BT8829> (accessed November 28, 2016). All translations from Dutch are my own.
 68. Dutch National Police, “Report: Offering Subsidies and Permits to LTTE-related Organizations,” February 2011, 10. <https://vng.nl/files/vng/vng/Documenten/Extranet/>

[Veiligheid/2011/20110201_bestuurlijke_rapp_LTTE_in_Nederland.pdf](#) (accessed November 29, 2016).

69. LJN: BT8829, *Verdict*, 3–5.
70. *Ibid.*, 32.
71. LJN: BT8829, *Verdict*, 23.
72. *Ibid.*, 32.
73. At this time, the Dutch court acquits the suspects of the allegations of terrorism, because it classifies the conflict in Sri Lanka as a non-international armed conflict instead of an irregular (terrorist) insurgency. For this reason, as the defense argued, the laws of war are applicable to the conflict, which *precludes* a characterisation of one party to the conflict as terrorist. In rejecting the terrorist label, the Dutch Court produces a schism between the terrorist listing at EU level and the findings of the national Court. However, the LTTE case in The Netherlands has since been appealed to the Dutch High Court, which upheld the prosecutors' view that an international armed struggle does not preclude labelling one of the warring parties as terrorist (Dutch High Court 2017). In other words, terrorism proscriptions and prosecutions can also apply to situations of armed insurgency, as the EU General Court has also affirmed (*Judgement of the General Court in Joined Cases T-208/11 and T-508/11*), October 16, 2014, § 207; also Hadassa Noorda, "Thinking War in the 21st Century: Introducing Non-State Actors in Just War Theory" (PhD Dissertation, University of Amsterdam, 2016).
74. LJN: BT8829, *Verdict*, 23.
75. On intelligence, see also Richard Aldrich, "Beyond the Vigilant State: Globalisation and Intelligence," *Review of International Studies* 35, no. 4 (2009): 889–902; McCulloch and Wilson, *Pre-Crime* (see note 27), chapter 6; Kent Roach, "The Eroding Distinction between Intelligence and Evidence in Terrorism Investigations," in Andrew Lynch, Nicola McGarrity, and George Williams, eds., *Counter-Terrorism and Beyond* (London: Routledge, 2010).
76. *Ibid.*, 6.
77. *Ibid.*, 37.
78. *Ibid.*, 37.
79. Böhler Lawyers, Koppe, Buruma and Sluiter, *Pleitaantekeningen (Plea Notes)*, September 30, 2011, 32. [http://www.prakkendoliveira.nl/user/file/110930_-_pleitnota_tamils_\(anoniem\).pdf](http://www.prakkendoliveira.nl/user/file/110930_-_pleitnota_tamils_(anoniem).pdf) (accessed November 28, 2016).
80. For example, Jeroen Gunning, "Terrorism, Charities and Diasporas: Contrasting the Fundraising Practices of Hamas and Al Qaeda Among Muslims in Europe," in Thomas J. Biersteker and Sue E. Eckert, eds., *Countering the Financing of Terrorism* (London: Routledge, 2007).
81. David Anderson QC, UK Independent Reviewer of Terrorism Legislation, "The Terrorism Acts in 2015," December 2016, 29, <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2016/12/TERRORISM-ACTS-REPORT-1-Dec-2016-1.pdf> (accessed May 16, 2017).
82. Indeed, since the 2011 case discussed here, the EU General Court and subsequently the Dutch appeals court have found that an armed conflict does not preclude the designation of parties to the conflict as terrorist under the EU Regulation. As the General Court held in 2014: "the existence of an armed conflict within the meaning of international humanitarian law does not exclude the application of provisions of EU law concerning terrorism to any acts of terrorism committed in that context" (see: <http://eur-lex.europa.eu/legal-content/EN/TEXT/HTML/?uri=CELEX:62011TJ0208&from=EN>).
83. Böhler Lawyers, Koppe and Buruma, *Pleitaantekeningen (Plea Notes)*, April 14, 2011, 10. http://www.prakkendoliveira.nl/user/file/pleitnota_2e_regie-tamil.pdf (accessed November 28, 2016).
84. Office of the Public Prosecutor, "Cassation in Criminal Case Tamil Tigers," Press Release, September 10, 2015, <https://www.om.nl/actueel/nieuwsberichten/@90779/cassatie- Strafzaak/> (accessed November 28, 2016).
85. Liam P. D. Stockdale, "Imagined Futures and Exceptional Presents: A Conceptual Critique of Preemptive Security," *Global Change, Peace and Security* 25, no. 2 (2013): 155.

86. Boon-kuo et al., *Building Peace in Permanent War* (see note 58).
87. For example, Office of the United Nations, “Humanitarian Impact of Syria-Related Unilateral Restrictive Measures,” May 16, 2016, <http://www.charityandsecurity.org/node/1468> (accessed November 29, 2016).
88. “Dutch Minister of Security and Justice Wants to Criminalise Dwelling in IS-held Territory,” NRC, November 18, 2016, <https://www.nrc.nl/nieuws/2016/11/18/van-der-steur-wil-verblijf-in-is-gebied-straftbaar-stellen-5344532-a1532477> (accessed November 29, 2016).

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