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## THE AGE OF PREVENTION

### *Crime and Crime Prevention in the Global Era*\*

«Fear is the extreme expression of narrow-minded and stupid seriousness, which is defeated by laughter (...). Complete liberty is possible only in the completely fearless world.»

Michael Bakhtin, *Rabelais and His World* (1965)

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### 1. The global era and its negatives

In the last decades, States have been dramatically increasing their commitment in crime prevention in what has been defined a «major shift» from the paradigm of traditional retrospective criminal justice to that of crime prevention<sup>1</sup>. From «post-crime society» to «pre-crime society»<sup>2</sup>, from the «punitive state» to the «preventive state»<sup>3</sup>.

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<sup>1</sup> Cf. M. TUCK, *Crime Prevention: a Shift in Concept*, in “Home Office Research and Planning Research Bulletin”, 24, 1987, p. 5 ff.

<sup>2</sup> L. ZEDNER, *Pre-crime and post-criminology?*, in “Theoretical Criminology”, 11, 2007, p. 262, quoting P.K. DICK, *The Minority Report* (1956), London, Gollancz, 2002.

<sup>3</sup> C.S. STEIKER, *The Limits of the Preventive State*, in “Journal of Criminal Law and Criminology”, 81, 1998, pp. 773-774; cf. also E.S. JANUS, *The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence*, in “Crim. L. Bull.”, 40, 2004, p. 576 ff. and S. KRASMANN, *The enemy on the border: Critique of a programme in favour of a preventive state*, in “Punishment society”, 9, 2007, p. 301 ff.

This «preventive turn»<sup>4</sup>, is rooted in the longstanding process of «*insécurisation*»<sup>5</sup> (or «uncertainization»)<sup>6</sup> that has been affecting Western societies since the last century. The post-war individual, overwhelmed by the experience of the atrocities of war and totalitarianism and fulfilled with feelings of alienation, anxiety, «nothingness» and absurd, was invested by an existential crisis – widely investigated by philosophy<sup>7</sup> and psychology<sup>8</sup> and expressed by literature<sup>9</sup> and arts<sup>10</sup> – that makes our age the «age of anxiety»<sup>11</sup>. A growing sense of insecurity, rather than an effective deterioration of the security conditions in our societies (as Castel and Bauman observe, developed countries are *objectively* the most secure societies in the history of humanity)<sup>12</sup>, induced (and facilitated

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<sup>4</sup> A. CRAWFORD, *Introduction. The preventive turn in Europe*, in ID. (ed.), *Crime Prevention Policies in Comparative Perspective*, Cullompton, Willan Publishing, 2009, p. xv. Recently, see also H. RANDAU DA COSTA CARVALHO, *The Preventive Turn in Criminal Law*, Oxford, Oxford University Press, forthcoming.

<sup>5</sup> The word was coined by J.-L. MATHIEU, *L'insécurité*, Paris, Presses Universitaires de France, 1995.

<sup>6</sup> Z. BAUMAN, *Postmodernity and its discontents*, Cambridge, Polity Press, 1997, p. 203 [Italian ed. ID., *La società dell'incertezza*, transl. by R. Marchisio and S. Neirotti, Bologna, Il Mulino, 1999, p. 17]

<sup>7</sup> For instance, amongst many, M. HEIDEGGER, *Sein und Zeit*, in “Jahrbuch für Philosophie und phänomenologische Forschung”, VIII, 1927, p.1 ff. (but see also ID., *Brief über den Humanismus*, Klostermann, Frankfurt a.M. 1946, where the philosopher seems to dissociate his thought from that of existentialism); J.-P. SARTRE, *L'être et le néant*, Paris, Gallimard, 1943; S. DE BOUVOIR, *Pyrrhus et Cinéas*, Paris, Gallimard, 1944; ID., *Pour une morale de l'ambiguïté*, 1947; ID., *L'Existentialisme et la Sagesse des nations*, Paris, Nagel, 1948; M. MERLEAU-PONTY, *Phénoménologie de la perception*, Paris, Gallimard, 1945; ID., *Humanisme et terreur, essai sur le problème communiste*, Paris, Gallimard, 1947; ID., *Sens et non-sens*, Paris, Nagel, 1948. But, of course, see also the works of Edmund Husserl, Søren Kierkegaard and Friedrich Nietzsche.

<sup>8</sup> Other than the works of Sigmund Freud see, amongst others, O. RANK, *Das Trauma der Geburt*, Wien-Leipzig-Zürich, Internationaler Psychoanalytischer Verlag, 1924; ID., S. FERENCZI, *Entwicklungsziele der Psychoanalyse. Zur Wechselwirkung von Theorie und Praxis*, Wien-Leipzig-Zürich, Internationaler Psychoanalytischer Verlag, 1924; L. BINSWANGER, *Grundformen und Erkenntnis menschlichen Daseins*, Zürich, Max Niehans Verlag, 1942; ID., *Henrik Ibsen und das Problem der Selbstrealisation in der Kunst*, Heidelberg, L. Schneider, 1949; C. ROGERS, *On Becoming a Person: A Therapist's View of Psychotherapy*, London, Constable, 1961; ID., *A Way of Being*, Boston, Houghton Mifflin, 1980; ID., B. STEVENS, *Person to Person: The Problem of Being Human*, Lafayette (CA), Real People Press, 1967.

<sup>9</sup> Again, just for example: F. KAFKA, *Die Verwandlung*, München, K. Wolff, 1915; ID., *Der Prozess*, Berlin, Die Schmiede, 1925; ID., *Das Schloß. Roman*, München, K. Wolff, 1926; J.-P. SARTRE, *La Nausée*, Paris, Gallimard, 1938; A. CAMUS, *L'Étranger*, Paris, Gallimard, 1942; ID., *La Peste*, Paris, Gallimard, 1947; ID., *L'État de Siège*, Paris, Gallimard, 1948.

<sup>10</sup> From Samuel Beckett to Jean-Luc Godard, from Alberto Giacometti to Jackson Pollock, from Ingmar Bergman to Woody Allen, just to name some.

<sup>11</sup> The expression, introduced by the homonymous Pulitzer-winning poem by Wystan Hugh Auden [W.H. AUDEN, *The age of anxiety: a baroque eclogue* (1947), Princeton-Oxford, Princeton University Press, 2011], which inspired Leonard Bernstein's Second Symphony [L. BERNSTEIN, *The Age of Anxiety, Symphony No. 2 for Piano and Orchestra (after W. H. Auden)*, New York Philharmonic conducted by Leonard Bernstein, Sony Music 88697880862, compact disc (n. 3), 2011], has been later used by many to describe the many uncertainties (many of which caused by globalization) that affect our times: cf. S. DUNANT, R. PORTER (eds.), *The age of anxiety*, Virago, London 1996 and, more recently, H. JOHNSON, *The age of anxiety: McCarthyism to terrorism*, Harcourt, Orlando-London 2005 (incidentally, Johnson's father – Malcom Johnson – was the Author of the New York Sun series *Crime on the Waterfront*, which inspired the Academy Award-winning film *On the Waterfront*, featuring the famous original soundtrack composed by Leonard Bernstein himself).

<sup>12</sup> R. CASTEL, *L'insécurité sociale: qu'est-ce qu'être protégé?*, Seuil, Paris 2003, p. 5; Z. BAUMAN, *Liquid Fear*, Polity Press, Cambridge 2006, p. 129 [Italian ed. ID., *Paura liquida*, transl. by M. Cupellaro, Laterza, Roma-Bari 2006, p. 161].

the generalised acquiescence to) a widespread «preventionism»<sup>13</sup>, covering all sectors of life and, especially, the areas of law concerned with the fight against crime.

Of course, as an end, prevention is, in itself, «a positive»<sup>14</sup>, as preventing crime from occurring means precisely protecting the interests and values of the human person (either as an individual or as a member of organised societies), from some of the most serious harms possible – which is without any doubt a duty-responsibility of every legal order.

As a set of means, though, crime prevention can entail also «negative» consequences for the human being. This happens when the models of crime prevention include measures aimed at averting the danger (or even the risk or the mere fear) of the perpetration of criminal offences through the coercive restriction or deprivation of (also fundamental) rights and liberties of dangerous individuals (e.g. preventive detention, asset freeze, bans, curfews, control or preventive orders etc.). We call these measures *negative measures*, as opposed to *positive measures*, which, instead, are based on the consent of the individual and encourage legal behaviour through the promotion and the development of the person (e.g. psychological or social support, information campaigns, educational programmes, etc.)<sup>15</sup>.

Alas, especially in the recent years, the preventive turn has become an all-*negative* turn, for the following reasons.

Other than the age of anxiety – which mainly recalls a subjective development – our age is the age of globalisation (the «global era») – which entails also serious objective developments of contemporary societies (which, of course, in turn affect subjectivity). Societies have never been so «open» to each other<sup>16</sup>. The mobility of persons, the transfer of money, the exchange of experiences, information and economic models are getting easier and faster thanks to the ever-accelerating technological progress. The unstoppable multiplication of connections and reciprocal interdependences between States and international organisations are increasingly eroding the old Nation-State, with its territorial sovereignty<sup>17</sup> (although this does not mean that Nation-States are not powerful any more: in fact, national political leaders still have a large role to play in the world, as we will see)<sup>18</sup>. Global elites are becoming ever more independent from territorially confined units of political and cultural power<sup>19</sup>. Corporations, courted by politicians, gain incredible power and control beyond the political system, as they have a key role in shaping not only the economy, but society as whole<sup>20</sup>. The reasons and the

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<sup>13</sup> P. ASP, *Preventionism and Criminalization of Nonconsummate Offences*, in A. ASHWORTH, L. ZEDNER, P. TOMLIN (eds.), *Prevention and the Limits of the Criminal Law*, Oxford University Press, Oxford 2013, p. 24-25 (and *passim*).

<sup>14</sup> E.S. JANUS, *The Preventive State*, cit., p. 576.

<sup>15</sup> Cf. our previous analysis in L. PASCULLI, *Le misure di prevenzione del terrorismo e dei traffici criminali internazionali*, Padova University Press, Padova 2012.

<sup>16</sup> Z. BAUMAN, *Liquid Fear*, cit., p. 96 [Italian ed., p. 120-121]. See also ID., *Modus vivendi. Inferno e utopia del mondo liquido*, transl. by S. D'Amico, Laterza, Roma-Bari 2008, pp. 1-7.

<sup>17</sup> Z. BAUMAN, *Globalization. The Human Consequences*, Polity Press-Blackwell, Cambridge-Oxford 1998, ch. 3 [Italian ed. ID., *Dentro la globalizzazione. Le conseguenze sulle persone*, transl. by O. Pesce, Laterza, Roma-Bari 2001]; U. BECK, *What is globalization?*, Polity Press, Cambridge 2000, esp. p. 4 [German ed. ID., *Was ist Globalisierung*, Frankfurt a. M., Suhrkamp, 1997].

<sup>18</sup> A. GIDDENS, *Runaway World: How Globalisation is Reshaping Our Lives*, Profile Books, London 2002, p. 7 ff. But see also U. BECK, *What is globalization?*, cit., p. 3 ff.

<sup>19</sup> Z. BAUMAN, *Globalization*, cit., p. 3.

<sup>20</sup> U. BECK, *What is globalization?*, cit., pp. 2-4.

techniques of economics and of the market overlap with (and take control of) the reasons and techniques of politics and law<sup>21</sup>.

### 1.1. *The globalisation of crime*

Many are the negative effects of globalisation, also with regard to the developments of crime. On the one hand, the breaking of State boundaries that makes possible the global circulation of persons, goods and information also makes possible the widespread circulation of criminals, victims, unlawful assets, instrumentalities of crime and even criminal knowledge and ideologies. Think about the many transnational traffics of human beings, drugs, weapons or the online publication of bomb-making instructions. Moreover, globalisation facilitates the intersection of means and goals of different areas of criminality (so-called «*transversality*» of crime)<sup>22</sup>. As it has been correctly pointed out, groups or individual involved in terrorist activities can easily use smuggling routes that have been long established by criminal syndicates for weapons, drugs or persons<sup>23</sup>. And, as the infrastructures of criminality get increasingly interconnected and interdependent, the mutual self-interest of different offenders and criminal groups in cooperate with each other gets stronger and stronger: the transversality of means becomes a transversality of purposes<sup>24</sup>. On the other hand – and on a deeper level –, the high selectiveness of the globalisation of trade and capitals in the deregulated markets engenders poverty, inequality and injustice, which in turn originate violence and conflict<sup>25</sup>. Much of such violence and conflict results into unprecedented criminal aggressions to the most important values of the human being (either as an individual or as a member of organised societies) exploiting the means and the technologies typical of globalisation. Other than the plague of international terrorism, one clear example of such aggressions is offered by the violent actions and riots of militant groups (such as the *Black bloc*) precisely as a reaction and protest against market globalism and its claims<sup>26</sup>. But the developments of globalisation do not further only violent criminality: if it is true that globalisation has helped to expose the extent to which corruption (in its broadest meaning) is embedded

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<sup>21</sup> Cf., amongst others, M. DONINI, *Un nuovo medioevo penale? Vecchio e nuovo nell'espansione del diritto penale economico*, in "Cass. pen.", 2003, p. 1808.

<sup>22</sup> On the *transversality* of global crime see our L. PASCULLI, *Le misure di prevenzione*, cit., p. 178 for further notes and references.

<sup>23</sup> B. YANKIE, *Criminalità Globale e terrorismo transnazionale: una crescente alleanza*, in *Il terrorismo internazionale e la sicurezza globale. Seminario Internazionale di Studi* (Trieste, 15 Novembre 2002), a cura di P. Martucci e P. Granata, Venezia, Centro Studi Criminologici, 2005, p. 26 ff. On the connections between terrorism and organised crime see also M.C. BASSIOUNI, *Effective National and International Action against Organized Crime and Terrorist Criminal Activities*, in "Emory Int'l L. Rev.", 1990, 4, p. 9 ff. and L. HOLMES (ed.), *Terrorism, Organized Crime and Corruption. Networks and Linkages*, Cheltenham-Northampton, Edward Elgar, 2007.

<sup>24</sup> K. ANNAN, *In Larger Freedom. Towards Development, Security and Human Rights for All*, New York, United Nations, 2005, par. 76 ff. and SECRETARY GENERAL'S HIGH LEVEL PANEL ON THREATS, *Challenges and Changes, A more secure world: our shared responsibility*, New York, United Nations, 2004, VII.

<sup>25</sup> Cf. Z. BAUMAN, *Liquid Fear*, loc. cit. See also ID., *Modus vivendi*, loc. cit. From an economic perspective see also the works of Joseph Stiglitz, especially J. STIGLITZ, *The Price of Inequality*, New York, Norton, 2012; ID., *Globalization and Its Discontents*, New York, Norton, 2002.

<sup>26</sup> These (debatable) claims, as summed up by Manfred B. Steger, are: 1) globalisation is about the liberalization and global integration of markets; 2) globalisation is inevitable and irreversible; 3) nobody is in charge of globalisation; 4) globalisation benefits everyone; 5) globalisation furthers the spread of democracy in the world (M.B. STEGER, *Globalization. A very short introduction*, Oxford, Oxford University Press, 2013, p. 108).

in international economic exchanges and to improve the efforts to contrast it<sup>27</sup>, it is also true that it creates incentives (especially where the logics of power and profit prevail over ethics)<sup>28</sup> and new means for corruption<sup>29</sup>, broadly considered as any «abuse of power for private gain»<sup>30</sup>, thus leading to what has been defined a «corruption eruption»<sup>31</sup>. Another example is that of tax frauds: many are the cases of private enterprises eluding national tax regulations through complicated schemes of transnational circulation of goods and (also simulated) international transactions<sup>32</sup> (such as those of the so-called «missing trader frauds» or «carousel frauds»)<sup>33</sup>.

In short: crime gets global in its causes, means and effects. And as crime gets global, national criminal justice systems get ever more incapable of fulfilling their traditional preventive and retributive functions. The territorial scope of application of internal criminal law together with the difficulties in collecting evidence in other countries preclude national criminal justice systems to effectively prosecute many global criminals acting from abroad or in many different territories. Other than retribution, this frustrates also the deterrent effect of the threat of punishment, already weakened with regard to those forms of criminality which are particularly rooted into vicious social circuits, such as organised crime or corruption, or determined by ideological reasons that subvert any cost-benefit logic, such as terrorism<sup>34</sup>. At the same time, a universal system of criminal justice capable to remedy the inevitable shortcomings of internal criminal justice, although invoked by many<sup>35</sup>, is still far from being established, as several States are still reluctant to accept an international criminal jurisdiction. The closest system to such a

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<sup>27</sup> See, for instance, H.-E. SUNG, D. CHU, *Does participation in the global economy reduce political corruption? An empirical enquiry*, in J. WINTERDYK, P. REICHEL, H. DAMMER (eds.), *A Guided Reader to Research in Comparative Criminology/Criminal Justice*, Bochum, Universitätsverlag Dr. N. Brockmeyer, p. 235 ff.

<sup>28</sup> On this specific topic see S. ROSE-ACKERMAN, «Grand» *Corruption and the Ethics of Global Business*, in “J. Banking & Finance”, 2002, 26, p. 1889 ff. and G.I. ZEKOS, *Ethics versus corruption in globalization*, in “J. Management Development”, 2004, 23, 7, p. 631 ff.

<sup>29</sup> C. WARNER, *Globalization and Corruption*, in G. RITZER (ed.), *The Blackwell Companion to Globalization*, Oxford, Blackwell, 2007, p. 593 ff., also drawing upon J. GERRING, S.C. THACKER, *Do Neoliberal Policies Deter Political Corruption?*, in “Int’l Organization”, 2005, 59, p. 233 ff. See, also for further references, P. GLYNN, S.J. KOBRIN, M. NAÍM, *The Globalization of Corruption*, in K.A. ELLIOTT (ed.), *Corruption and the Global Economy*, Washington, Peter G. Peterson Institute for International Economics, 1997, p. 7 ff.; F. SCHNEIDER, *Shadow Economies and Corruption all over the World: Empirical Results for 1999 to 2003*, in “International Journal of Social Economics (IJSE)”, special issue, 1, 35, 9, 2008; and A. REHREN, *The Ethical Challenges of Political Corruption in a Globalized Political Economy*, in R.G. PATMAN, D.B. MACDONALD, B. MASON-PALMER (eds.), *The Ethics of Foreign Policy*, London, Ashgate, 2007, p. 169. With specific regard to some of the possible causal relations between global economy devices and corruption see, for instance, P.M. PINTO, B. ZHU, *Fortune or Evil? The Effect of Inward Foreign Direct Investment on Corruption*, paper presented at the annual meeting of the MPSA Annual National Conference (Palmer House Hotel, Hilton, Chicago, IL, April, 3<sup>rd</sup> 2008) or B. ZHU, *Economic Integration and Corruption: The Case of China*, paper prepared for the annual conference of International Political Economy Society (College Station, TX, November 13<sup>th</sup>-14<sup>th</sup>, 2009).

<sup>30</sup> Cf. *EU Anti-Corruption Report*, 2014, p. 2 and 37.

<sup>31</sup> M. NAÍM, *The Corruption Eruption*, in “Brown J. World Affairs”, 1995, 2, 2, p. 245 ff.

<sup>32</sup> See, also in a broader perspective, F. SCHNEIDER, *The Financial Flows of Transnational Crime and Tax Fraud in OECD Countries: What Do We (Not) Know?*, in “Public Finance Review”, 2013.

<sup>33</sup> On such frauds see, for all, A. GIOVANARDI, *Le frodi IVA. Profili ricostruttivi*, Torino, Giappichelli, 2013.

<sup>34</sup> Cf. P.B. HEYMANN, *Terrorism and America. A Commonsense Strategy for a Democratic Society*, Cambridge (MA)-London, MIT Press, 1998, p. 79.

<sup>35</sup> One for all, M. DELMAS-MARTY, *Global Crime Calls for Global Justice*, in “Eur. J. Crime Crim. L. & Crim Just.”, 10, 2002, p. 286 ff.

jurisdiction, that of the International Criminal Court, still appears to be too weak and ineffective and gives rise to too many criticisms<sup>36</sup>.

All the developments mentioned above cannot but influence, once again, also the subjectivity of the post-modern (or late modern<sup>37</sup>, or reflexive modern<sup>38</sup> or *surmoderne*<sup>39</sup>) man in crisis. In this «new world disorder»<sup>40</sup>, where justice and security seem impossible to achieve, fears and feelings of insecurity are unavoidably bound to grow and spread<sup>41</sup>. As Bauman writes, the «openness» of societies becomes «the terrifying experience of heteronomous, vulnerable populations overwhelmed by forces they neither control nor truly understand»<sup>42</sup>. Besides, the global circulation of news and information constantly reminds us, in the most explicit and sensationalistic ways, not only the threats and dangers posed by newborn (global) crimes (such as cyber-crime or international terrorism), but also the emergence of old crimes that in the past remained unnoticed (such as many sexual abuses and human trafficking)<sup>43</sup>. Moreover, private sellers of securitarian panaceas keep warning loudly possible buyers against risks and dangers of all sorts<sup>44</sup> (which – of course – their products can perfectly prevent!). Thus, other than delivering actual risks, dangers and crimes old and new, globalisation boosts the perception of (more or less real) risks, dangers and crimes and feeds (more or less

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<sup>36</sup> From different points of view cf., amongst others, E. POSNER, *The Absurd International Criminal Court. After 10 years and hundreds of millions of dollars, it has completed precisely one trial*, in “The Wall Street Journal”, June 10<sup>th</sup>, 2012; N. RONZITTI, *Decimo anniversario. Il triste bilancio della Corte penale internazionale*, in *www.affarinternazionali.it*, July 17<sup>th</sup>, 2012 [<http://www.affarinternazionali.it/articolo.asp?ID=2086>] (February 8<sup>th</sup>, 2015); D. ZOLO, *Luci e ombre della corte penale internazionale*, in *il manifesto*, 3 luglio 2002 e ID., *Giustizia internazionale, la lunga mano di Washington. Tre domande a Danilo Zolo*, in “Italian Institute for International Political Studies”, [<http://www.ispionline.it/en/node/1030>] (February 10<sup>th</sup>, 2015). From a more technical perspective see, for instance, C. MELONI, *L'impasse della Corte Penale Internazionale sulla Libia. La Libia rifiuta di ottemperare all'obbligo di consegnare Saif Al-Gheddafi all'Aia e presenta istanza di inammissibilità del caso*, in “Diritto penale contemporaneo”, June 1<sup>st</sup>, 2012.

<sup>37</sup> A. GIDDENS, *The Consequences of Modernity*, Cambridge, Polity, 1990; ID., *Modernity and Self-Identity. Self and Society in the Late Modern Age*, Cambridge, Polity, 1991.

<sup>38</sup> U. BECK, A. GIDDENS, S. LASH, *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order*, Polity Press, Cambridge 1994; U. BECK, *The Reinvention of Politics. Rethinking Modernity in the Global Social Order*, Cambridge, Polity, 1996.

<sup>39</sup> G. BALANDIER, *Communication et image: une lecture de la surmodernité*, in A. CARÉNINI, J.-P. JARDEL, *De la tradition à la post-modernité: hommage à Jean Poirier*, Paris, Presses universitaires de France, 1996 p. 41; ID., *Civilisations et puissance*, La Tour d'Aigues, l'Aube, 2005; M. AUGÉ, *Non-lieux, introduction à une anthropologie de la surmodernité*, Paris, Seuil, 1992.

<sup>40</sup> K. JOWITT, *New World Disorder: the Leninist Extinction*, Berkeley-Los Angeles, University of California Press, 1993. Cf. also Z. BAUMAN, *Postmodernity and its discontents*, cit., p. 22 ff. [Italian ed. ID., *La società dell'incertezza*, cit., p. 62] and ID., *Globalization*, cit., p. 55 ff.

<sup>41</sup> On fear (also in the globalized world) see D. ZOLO, *Sulla paura. Fragilità, aggressività, potere*, Milano, Feltrinelli, 2011.

<sup>42</sup> Z. BAUMAN, *Liquid Fear*, cit., p. 96.

<sup>43</sup> Cf. our reflections in *Le misure di prevenzione del terrorismo*, cit., pp. 77-78 (also drawing on F. MANTOVANI, *Diritto penale. Parte speciale*, vol. I, *I delitti contro la libertà e l'intangibilità sessuale*, Padova, CEDAM, 2005, p. 332).

<sup>44</sup> Z. BAUMAN, *Liquid Fear*, cit., p. 6 ff. [Italian ed., ID., *Paura liquida*, cit., p. 10 ff.].

founded) feelings of insecurity. The age of globalisation is, therefore, the age of risk<sup>45</sup>, the age of uncertainty, insecurity and unsafety – or, in one word, *Unsicherheit*<sup>46</sup>.

### 1.2. The “negativisation” of crime prevention

Facing such negative involutions of globalisation, one would expect from national political powers (also gathered in inter-national or supra-national organisations) common efforts towards a full understanding of the impersonal and indefinable forces that drive globalisation, as well as the global adoption of revolutionary measures to counter the revolutionary<sup>47</sup> (also criminogenic and criminotropic) outcomes of «negative globalisation»<sup>48</sup>. In other words, one would expect a *positive turn* to reverse the processes (of inequality, discrimination, violation of the human person etc.) that are causing the waves of hate, crime and violence that are currently shaking the foundations of the Western world as well as undermining the very existence of many (not only Western) social formations (such as many ancient tribal societies)<sup>49</sup> – if not of the entire human race. The only way to effectively prevent the worrisome criminal aggressions and circuits engendered or facilitated by globalisation is a thorough reflection and a comprehensive intervention – orchestrated on a global level – on the deepest (political, social, cultural, economic) systemic roots of such aggressions through education, formation, information, ethics, political dialogue and any sort of positive measure capable to remove the ultimate and multiform causes of global crime and promote those values that are common to every human being by creating a culture of equality, mutual respect, understanding and reciprocal trust. This would include, of course, a serious commitment in dissipating groundless fears and feelings of insecurity and increasing social trust and confidence through the global promotion of awareness, education, acknowledgement of mutual differences and customs between different peoples as well as through the promotion of truly universal values, shared by every human being, and their protection through an effective global system of criminal justice.

Regrettably, a defined actor governing the global scene and capable to offer such a «positive counterpart» to the negative effects of globalisation is missing<sup>50</sup>. While single States are physiologically incapable to manage phenomena that go far beyond the field of their territorial sovereignty, inter-*national* and supra-*national* organisations, as the words themselves reveal, are still depending too much on (also imperialistic) national policies and models to provide innovative and truly global solutions to the criminal implications of globalisation. Even when they are not an immediate reflection of the political will of

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<sup>45</sup> See, above all and amongst others, the writings of Ulrich Beck, such as U. BECK, *Risikogesellschaft: Auf dem Weg in eine andere Moderne*, Frankfurt am Main, Suhrkamp, 1986 [Italian ed. ID., *La società del rischio. Verso una seconda modernità*, Roma, Carocci, 2000]; ID., *World Risk Society*, Cambridge, Polity Press, 1999; ID., *Weltrisikogesellschaft. Auf der Suche nach der verlorenen Sicherheit*, Frankfurt am Main, Suhrkamp, 2007 [Italian ed. ID., *Conditio humana. Il rischio nell'età globale*, transl. by C. Sandrelli, Roma-Bari, Laterza, 2011].

<sup>46</sup> Z. BAUMAN, *In search of politics*, Stanford, Stanford University Press, 1999, p. 5 [orig. publ. Cambridge, Polity Press, 1999] [Italian ed. ID., *La solitudine del cittadino globale*, transl. by G. Bettini, Milano, Feltrinelli, 2011<sup>4</sup>, p. 13].

<sup>47</sup> On the «revolutionary» character of globalisation see A. GIDDENS, *Runaway World*, cit.

<sup>48</sup> Z. BAUMAN, *Liquid fear*, cit., p. 96.

<sup>49</sup> On this specific risk cf. A. AHMED, *The Thistle and the Drone. How America's War on Terror Became a Global War on Tribal Islam*, Washington, Brookings Institution Press, 2013.

<sup>50</sup> Cf. Z. BAUMAN, *Liquid Fear*, loc. cit. and M. DONINI, loc. cit.

the most influential of such States (such as that of the United States of America within the Security Council of the United Nations)<sup>51</sup>, the measures devised by international or supranational bodies are still the result of the political decisions taken by representatives of member States or are, however, inspired to internal measures (a quick look to the most important international conventions against the most disparate forms of criminality will reveal the systematic borrowing of the most typical national measures of prevention or repression – such as criminalisation, confiscation, travel bans, etc.). Moreover, every international and supranational measure needs to be implemented by States (harmonisation implies by definition national legislation), which means that, in order to work, any initiative on a supranational level requires the honest and effective cooperation of States. Yet, many are the examples of appreciable steps towards some concrete and democratic solutions that are hindered or contrasted (if not sabotaged) by single States. Think about the reluctance of the United States to join the International Criminal Court<sup>52</sup>, the conditioning of international criminal tribunals by certain world powers<sup>53</sup> or the negative reaction of some States – also as members of the UN Security Council – to the famous Kadi decision by the Court of Justice of the European Union (see par. 4). So that, in the end, old Nation-States – the same Nation-States that are ever more controlled and eroded by non-political global powers<sup>54</sup> – however remain the ultimate and only political forces capable of some effective action<sup>55</sup>.

As we said, though, it is clear that as the systemic roots of many areas of criminality are getting increasingly global States alone are congenitally incapable of any decisive intervention on such roots. Thus, in the attempt of temporarily reassuring their own citizens and, especially, in the effort of reaffirming their own legitimacy, States – alone or through the international organisations in which they are gathered – resort to the only device that globalisation left untouched (if not strengthened with new dreadful technologies): coercion. The use of force to repress any human prerogative deemed to be dangerous, risky or just fearsome, even *before* it might outburst in a criminal behaviour becomes the *leit motiv* of national models of crime prevention, increasingly enriched with negative contents entailing the most disparate sacrifices of human rights and liberties. Of course, the diffusion of negative measures is also forwarded by the circulation of information and practices typical of globalisation, which favours the introduction of negative measures in jurisdictions where they had been previously unknown, other than the enrichment of existing negative preventive apparatuses with new measures imported from other jurisdictions.

This is how «negative globalisation» impressed an all-negative direction to the above mentioned «preventive turn».

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<sup>51</sup> Cf. A. BERNARDINI, *Il terrorismo, quale terrorismo?*, cit., p. 14 ff., *passim* and, with specific regard to the introduction by the Security Council of individual measures wanted by certain States, p. 17. *Amplius*, D. ZOLO, *Cosmopolis. La prospettiva del governo mondiale*, Milano, Feltrinelli, 2004<sup>3</sup> and again D. ZOLO, *Luci e ombre*, cit.

<sup>52</sup> See, for instance, A. CASSESE, *Il processo a Saddam e i nobili fini della giustizia*, in “la Repubblica”, 19 ottobre 2005, p. 23; E. CARETTO, *Corte penale dell’Aja, immunità per un anno ai caschi blu Usa. Salva la missione di pace in Bosnia*, in “Corriere della Sera”, 13 luglio 2002, p. 13 and D. ZOLO, *Giustizia internazionale*, cit.

<sup>53</sup> Cf. A. BERNARDINI, *Il terrorismo, quale terrorismo?*, e *il Consiglio di Sicurezza delle Nazioni Unite*, in F. SALERNO (ed.), *Sanzioni «individuali» del Consiglio di Sicurezza e garanzie processuali fondamentali*, Padova, CEDAM, 2012, 11 ff.

<sup>54</sup> Cf. U. BECK, *What is globalization?*, cit.

<sup>55</sup> Z. BAUMAN, *Liquid Fear*, cit.,

## 2. The three ways of negative prevention

In their substance, the ways of negative prevention are the same all over the world, although framed in different national legal frameworks and categories<sup>56</sup>.

In every jurisdiction such ways consist in direct or indirect deployments of State force entailing a more or less radical subversion of the traditional liberal principles governing criminal law and, more generally, several constitutional and international safeguards of human rights. Such subversion is usually conveyed by the (often deliberate) lack of a clear and punctual legal definition – linked to a minimum and concrete threshold of harmfulness or dangerousness – of the individual «threats» to be neutralised. This gives State authorities excessive margins of discretion in the application of negative preventive measures, so that, other than harmful or dangerous exercises of individual material liberty concretised in harmful or dangerous acts, negative measures end up with striking mere subjective statuses or attitudes, that is, expressions of mere moral liberty (the «essence of liberty», to say it with Berlin)<sup>57</sup>, which, as such, are always harmless and, therefore, can never be legitimately compressed by the State<sup>58</sup>.

### 2.1. The criminalisation of dangerousness (and more)

The very first instrument of negative prevention is criminal law<sup>59</sup> – one of the most typical expressions of the State's monopoly of force. Facing the shortcomings of traditional criminal justice in providing an adequate protection against the global developments of crime States are reshaping criminal law, in order to rendering it more preventive («*Präventionsstrafrechts*», according to Wohlers' expression)<sup>60</sup>. This «pre-emptive turn in criminal law»<sup>61</sup> includes the much-debated technique of criminalising harmless behaviours that the legislators assume to be dangerous on the basis of purely abstract presumptions<sup>62</sup>. Needless to say, such a technique may easily lead to the criminalisation of mere subjective attitudes or statuses in spite of the harm principle (and of the principle of materiality, known to continental traditions).

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<sup>56</sup> Cf. L. PASCULLI, *Le misure di prevenzione*, cit.

<sup>57</sup> I. BERLIN, *Freedom and its Betrayal: Six Enemies of Human Liberty*, ed. by H. HARDY, Princeton, Princeton University Press, 2002, p. 103-104.

<sup>58</sup> On such issues cf. M. RONCO, *Il significato retributivo-rieducativo della pena*, in «Dir. pen e proc.», 2005, p. 137.

<sup>59</sup> T.N. MÜLLER, *Prävention durch Strafrecht? Terrorismusabwehr und Vorfeldtatbestände*, in F. YENISEY, U. SIEBER (eds.), *Criminal Law in the Global Risk Society. German-Turkish Colloquium in Honour of Prof. Dr. Dr. h.c. mult. Hans-Heinrich Jescheck*, Bahçeşehir Üniversitesi Yayınları, Istanbul 2011, p. 463 ff.

<sup>60</sup> W. WOHLERS, *Deliktstypen des Präventionsstrafrechts. Zur Dogmatik «moderner» Gefährdungsdelikte*, Dunker & Humblot, Berlin 2000.

<sup>61</sup> L. ZEDNER, *Fixing the Future? The Pre-emptive Turn in Criminal Justice*, in B. MCSHERRY, A. NORRIE, S. BRONITT (eds.), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law*, Hart Publishing, Oxford-Portland 2008, p. 35 and, generally, all the contributions in such volume.

<sup>62</sup> For a first overview, cf. A. ASHWORTH, L. ZEDNER, *Prevention and Criminalization: Justifications and Limits*, in «New Crim. L. Rev.», 15, 2012, p. 542 ff.

## 2.2. Pre-crime and post-crime negative measures

Another trend, closely confining with the techniques of preventive criminal law, is the introduction of *individual measures of negative prevention*. These are measures aimed at incapacitating dangerous, suspicious, anti-social individuals (or those who «fail to reassure others about their security»)<sup>63</sup> through the restriction or deprivation of personal rights and liberties either before (and notwithstanding) the instant commission of a crime (pre-crime or *praeter delictum* measures: e.g. preventive forfeiture and confiscation, asset freeze, «civil preventative orders»<sup>64</sup> etc.) or after conviction and also beyond the duration of the inflicted sentence (post-crime, *post delictum* or post-conviction measures: e.g. the so-called «security measures» of some European legal orders, such as Italy or Germany, or the mechanisms for the post-sentence preventive detention of sex offenders adopted by some Australian states)<sup>65</sup>.

Despite their contents analogous if not identical to those of proper punishment, in many jurisdictions such measures are not subjected to the guarantees and principles of criminal law – within which, mark well, the modern liberal thought meant to constrain not only punishment strictly considered, but every «act of authority of one man over another»<sup>66</sup>. This is particularly true for pre-crime measures, which are even structurally inconsistent with most of the fundamental principles of criminal law and procedure. As for criminal law principles, amongst others: a) the *harm principle* of the common law tradition and especially the «*principio di offensività*» of the continental tradition are violated whenever negative measures are applied also to subjects that have not committed any harmful or dangerous behaviour yet; b) the *principle of culpability* is violated whenever negative measures are applied to harmless subjects only by virtue of the most fortuitous and involuntary connections with third persons (e.g. freezing of assets belonging to relatives of terrorists or to the heirs of dangerous subjects or suspects<sup>67</sup>) or goods (e.g. confiscation of “dangerous” assets owned by harmless persons); c) *strict legality (nullum crimen sine lege)* is violated whenever negative measures are applied on the basis of individual statuses of dangerousness or anti-sociality that are not typified with clarity and precision by statutory law (if not totally abandoned to the discretion of administrative and police authorities). As for criminal procedure principles, amongst others: d) the *presumption of innocence* is violated whenever such measures are applied before or regardless a judicial finding of responsibility for any offence (or for any dangerous fact whatsoever); e) the *principle of jurisdiction (nulla culpa sine iudicio)* is violated whenever negative measures are directly applied by administrative authorities; f) the *right to effective judicial remedies* is violated whenever no means of judicial review are established or whenever, although existing, they are not able to eliminate or correct the illegitimate application of the challenged measure; g) the *regime and standards of criminal*

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<sup>63</sup> P. RAMSEY, *The Theory of Vulnerable Autonomy and the Legitimacy of Civil Preventative Orders*, in B. MCSHERRY, A. NORRIE, S. BRONITT (eds.), *Regulating Deviance*, cit., p. 109 ff. and, *amplius*, ID., *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law*, Oxford University Press, Oxford 2012.

<sup>64</sup> S. SHUTE, *The Sexual Offences Act 2003 (4): New Civil Preventative Orders*, in “Crim. L. Rev.”, 2004, p. 417 ff.

<sup>65</sup> See M. BROWN, *Preventive detention and the control of sex crime. Receding visions of justice in Australian case law*, in “Alt. L.J.”, 36, 1, 2011, p. 10 ff.

<sup>66</sup> C. BECCARIA, *Dei delitti e delle pene*, (1764), Feltrinelli, Milano, 2007<sup>13</sup>, § II.

<sup>67</sup> Such is the case of the confiscation of the assets owned by the heirs of a dead person (deemed to be dangerous) consented by art. 18 of the Italian Code of anti-mafia laws and of the measures of prevention.

*evidence* are violated whenever negative measures rely on mere clues or suspicions or even rumours and sometimes entail criticisable inversions of the burden of proof to the detriment of the concerned individual.

Besides, many States and supranational bodies (such as the Security Council<sup>68</sup>, but also the European Court of Justice<sup>69</sup>) expressly deny the «penal» nature of such measures, which would rather be «preventive» in nature, due to their purely preventive function: this would exempt them from respecting criminal law standards, to the extent that they are often qualified as «administrative» or «civil» measures (especially in common law systems). States and international organisations use this labelling game, to say it with Dershowitz<sup>70</sup>, or labelling fraud, to say it with Fiandaca and Puglisi<sup>71</sup>, precisely in order to exercise their repressive force when the constraining boundaries of traditional criminal law would not allow it. On the one hand, negative (especially pre-crime) measures might be employed to punish presumed (or suspected) offenders who cannot be prosecuted due to the most disparate reasons (lack of evidence, lack of jurisdiction) or, worse, to satisfy the public need for retribution for a crime committed by offenders that cannot be found or apprehended (such as the promoters of some hideous terrorist acts) by punishing, in their place, innocent persons that happens to be accidentally related to them. On the other hand, more generally, such measures can be used as a powerful device of social exclusion (or even physical elimination) of harmless people who would be considered dangerous, anti-social or, worse, undesirable by State powers often based on mere assumptions or rumours. In both cases the original preventive purpose is totally perverted, since in the former case negative measures serve punitive purposes and in the second case they serve purposes of marginalisation, in a devious phenomenon we have defined as «*preventive repression*»<sup>72</sup>.

This practice should find, however, a conspicuous limitation in the safeguards typical of the rule of law and proclaimed also by international human rights law – such as the principles of *strict necessity* (*last resort or ultima ratio*) and *proportionality*, the right to *habeas corpus*, the *due process of law*. Albeit less tight than those of criminal law and procedure, these safeguards, shared by practically every so-called “democratic” Western legal order and consecrated both in national Constitutions and international human rights legal instruments, would certainly suffice to prevent illegitimate compressions of a minimum sphere of human rights, liberties and prerogatives directly emanating from human dignity, such as, for instance, the compression of moral liberty (as such always unjustified, as the moral liberty cannot be of any harm), the invasion of the individual legal sphere based on mere traits of personality or on mere suspicions, rumours or presumptions, rather than dangerous facts.

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<sup>68</sup> See, with particular clarity, the Preambles of the UN Security Council resolutions n. 1822 (2008) of June, 30<sup>th</sup> 2008, n. 1904 (2009) of December, 17<sup>th</sup> 2009, and n. 1989 (2011) of June, 17<sup>th</sup> 2011.

<sup>69</sup> Court of Justice of the EU (CJEU), November 15<sup>th</sup>, 2012, C-539/10 P and C-550/10 P, Stichting Al-Aqsa and Kingdom of the Netherlands, in “ECR”, 2013.

<sup>70</sup> A.M. DERSHOWITZ, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, in “Tex. L. Rev.”, 51, 1972-1973, p. 1295 ff.

<sup>71</sup> G. FIANDACA, G. PUGLISI, *Le misure di prevenzione cambiano trucco (ma non volto)*, in *Legge penale*, 1989, p. 24. See also G. CASAROLI, *Le misure di prevenzione patrimoniali tra accertamento del fatto e valutazione degli indizi*, in E. DOLCINI, C.E. PALIERO (eds.), *Studi in onore di Giorgio Marinucci*, I, Milano, Giuffrè, 2006, p. 2225.

<sup>72</sup> Cf. L. PASCULLI, *Le misure di prevenzione*, cit., p. 33 ff.

### 2.3. Emergency measures

Here is where the third way of negative prevention comes to play. In order to circumvent the constraining boundaries of the rule of law principles, States (and international organisations) resort to emergency law (or martial law) and emergency powers (or war powers) derogating even the minimum principles set in protection of fundamental rights and freedoms to neutralise the supposed “enemies” of the State (which in most cases are but common, if transnational, criminals), who could allegedly endanger the existence of State itself or, however, the security of the whole Nation through the commission of so “exceptional” crimes to be assimilated to acts of war. This leads the way to depriving certain individuals of the basic legal statute to which they are entitled by virtue of their human dignity – essential and insuppressible attribute of the human nature. Human beings end up in being qualified and treated as non-humans (as the theorists of «enemy criminal law» explicitly admit)<sup>73</sup>. The door, thus, opens to any sort of legalised violence, including torture and targeted killings<sup>74</sup>.

Moreover, far from remaining relegated in the field of mere exception, extraordinary measures, once adopted, get easily «normalised» as ordinary measures for fighting against any kind of criminality<sup>75</sup>. This happens first of all because they are often introduced to prevent crimes that, although harmful and unprecedented, lack the constitutive characters of emergency – namely, *extra-ordinariness* and *temporariness*<sup>76</sup> – and, instead, more seemingly represent the ordinary manifestations of criminality in the global era. In other words, rather than resigning to recognise the emerging global criminal offences (which as we said include both new crimes and old crimes that previously stayed uncovered) as the normal crime forms which we have to deal with in our times and committing into the effort to conceive seriously innovative, mainly positive ways to cope with them, States and international organisations keep insisting (often to their own financial and political benefit and purposes, instead of the good of society and the human beings who form it) in “fighting” crimes as wars and criminals as enemies. The new and the (re-)emerging are, thus, (also maliciously) confused with the exceptional. Furthermore, the normalisation can be driven by the declared intention (also provoked by the sharp criticisms coming from legal scholarship, human rights associations and the

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<sup>73</sup> See G. JAKOBS, *Zur Theorie des Feindstrafrechts*, in H. ROSENAU, S. KIM (eds.), *Straftheorie und Strafgerechtigkeit*, Frankfurt a.M., Peter Lang, 2010, p. 167 ff.; G. JAKOBS, *Derecho penal del ciudadano y derecho penal del enemigo*, in ID., M. CANCIO MELIÁ, *Derecho penal del enemigo*, Madrid, Civitas, 2003, p. 26 ff. [Italian transl. by F. Resta in G. JAKOBS, *Diritto penale del nemico*, in M. DONINI, M. PAPA, *Diritto penale del nemico. Un dibattito internazionale*, Milano, Giuffrè, 2007, p. 5 ff.]; G. JAKOBS, *Diritto penale del nemico? Una analisi sulle condizioni della giuridicità*, in A. GAMBERINI, ORLANDI R. (eds.), *Delitto politico e delitto penale del nemico. Nuovo revisionismo penale*, Bologna, Monduzzi, 2007, p. 116 ff.; G. JAKOBS, *Bürgerstrafrecht und Feindstrafrecht*, in “Höchstrichterliche Rechtsprechung Strafrecht (HRRS)”, 2004, p. 88 ff.; ID., *Selbstverständnis der Strafrechtswissenschaft vor den Herausforderungen der Gegenwart (Kommentar)*, in A. ESER, W. HASSEMER, B. BURKHARDT (eds.), *Die Deutsche Strafrechtswissenschaft vor der Jahrtausendwende*, Munich, Beck, 2000, p. 47 ff.

<sup>74</sup> We already sketched a picture of such developments in our *Le misure di prevenzione*, cit., p. 83 ff.

<sup>75</sup> On this, see our recent work, *La normalizzazione della prevenzione eccezionale del crimine globale. Improvvisazione «con una mano legata» in quattro tempi sull'emerso diritto della prevenzione criminale negativa*, in *L'eccezione nel diritto*, Trento, Università degli Studi di Trento, 2014.

<sup>76</sup> For a first short overview on the, so to say, «requirements» of emergency situations see, for now, L. ZEDNER, *Terrorism, the ticking bomb and criminal justice values*, in “Crim. Just. Matters”, 2008, 73:1, pp.18-19 and, in Italy, G.M. FLICK, *I diritti fondamentali della persona alla prova dell'emergenza*, in *Giur. It.*, 2008, p. 3 ff.

courts) to reshape exceptional measures in order to render them more compliant with the principles of the rule of law. In most cases, though, the operation turns out to be but a superficial make up or an hypocritical refurbishment that does not change the derogatory nature and substance of such measures and, instead, is the first step to lowering the general levels of protection of human rights and liberties and make the public accustomed to such derogations, as ever more “normal”. Thus, emergency measures tend to become accepted and «percolate» down into the fabric of everyday law as ordinary measures for the prevention of even the most traditional criminal offences<sup>77</sup>.

#### 2.4. *The negative effects of negative prevention*

The three ways of negative crime prevention depicted above are to be considered “negative” not only due to the afflictive nature of their contents, but also, on the one hand, because of their retrogressive ethical and legal implications and, on the other hand, because of their harmful effects, to the extent that we would not hesitate to assimilate certain preventive measures to global crimes properly considered.

First, negative prevention, as described above, represents a remarkable deterioration of the state of legal civilization and of the ethical standards in politics (at least) in Western societies. The many imaginative devices deployed by States and international organisations to circumvent the principles of criminal law and the safeguards of the rule of law are but an overt (and sometimes declared) repudiation of the accomplishments of liberal legal thought in centring law and especially criminal law on the universal value of the human person – which also meant the humanisation of punishment and criminal law, as well as the international proclamation of fundamental human rights and liberties. They are also a clear regression in crime prevention policies, compared with the «positive» evolutions impressed to many national models of crime prevention at least until the Eighties by the rehabilitative ideal and, more generally, the achievements of criminology<sup>78</sup>.

Second, negative prevention tends to conceal, rather than solve, the growing ineptitude of States to administer the instrument of punishment properly. The excessive length of criminal trials, selective (if not discriminating) legislative criminal policies that end up with reserving the certainty and severity of punishment only to the most marginalised sectors of society, as well as the distorted exploitation of measures originally intended to rehabilitate the offender for different purposes (such as deflating the workload of criminal courts, or emptying overcrowded prisons), have definitely contributed to the erosion of the deterrent efficacy of punishment traditionally considered and literally put the penal systems of some Countries, such as Italy, on the «verge of collapse»<sup>79</sup>. Rather than re-thinking national and supranational or international criminal justice systems so to restore or, for the latter, implement their preventive

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<sup>77</sup> Cf. L. ZEDNER, *Security, the State and the Citizen: the Changing Architecture of Crime Control*, in “New Crim. L. Rev.”, 13, 2010, p. 394, also drawing upon D. COLE, *Enemy aliens: double standards and constitutional freedoms in the war on terrorism*, The New Press, New York-London 2003, p. 7.

<sup>78</sup> On the decline of the rehabilitative ideal cf. F. ALLEN, *The Decline of the Rehabilitative Ideal. Penal Policy and Social Purpose*, New Haven, Yale University Press, 1981 and, of course, D. GARLAND, *The Culture of Control. Crime and Social Order in Contemporary Society*, Oxford University Press, Oxford 2001.

<sup>79</sup> G. MARINUCCI, *Il sistema sanzionatorio tra collasso e prospettive di riforma*, in “Riv. it. dir. proc. pen.”, 2000, p. 164.

effectiveness, States (also through international organisations), seem to find more convenient to expand their repressive arsenals so to include new forms of coercion outside the boundaries of the traditional principles that the rule of law impressed to criminal justice, so to compensate (and mask) the incapability of inflicting prompt, certain and just punishments with the display of ever more pervasive employments of State force against those who are rumoured, suspected or simply believed to be «at risk» of crime (most frequently due to their social status or for purely subjective – and generally inculpable – attributes). Thus, national negative prevention policies become amoral, if not immoral, as they pretend to be based on a misunderstood (or, rather, brutalised) political realism and a distorted sense of utilitarianism. The *evil* they imply (the sacrifice of human rights) is not *necessary* nor, as we will see immediately, *useful* and therefore is not just nor justifiable, but simply wrong. In most cases such policies are not the outcome of a hard choice in a real moral dilemma<sup>80</sup>, such as that of the used (and abused) «ticking bomb» scenario<sup>81</sup>, but they merely reveal the lack of political will to commit in a serious endeavour to elaborate new, revolutionary solutions. Even worse, such policies obtain the necessary public consensus by largely exploiting the ignorance and fears of the masses – sometimes even deliberately encouraging them (also through convenient manipulations of public information).

Third, negative measures are ineffective. They are not capable of averting the danger of crime, reducing the risk of crime and dissipating fear and sense of insecurity, especially in a global perspective. On the contrary, they have counterproductive effects<sup>82</sup>. As they tend to incapacitate the dangerous subject or exclude him from social life, negative measures always act on the means, rather than the causes of crime. Of course, by disabling their means of actions – be they their body (preventive detention), their liberties (bans, curfews and preventive orders) or their assets (confiscation) – in the short term and on an individual scale, they «prevent» the targeted persons from committing any crime<sup>83</sup>. In a long term and in a wider scale, though, they provide very little help in reducing the risk of crime, especially when it comes to prevent criminal aggressions coming from other States (terrorism, cyber-crimes, human trafficking) or forms of criminality that are rooted in the social fabric (corruption, mafia-style organisations). In

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<sup>80</sup> On these issues see M. WALZER, *The Problem of Dirty Hands*, in “Phil. & Pub. Affairs”, 2, 2, 1973, p. 160 ff., who also refers to two eminent existentialists J.-P. SARTRE, *Dirty Hands*, in ID., *No Exit and Three Other Plays*, English transl. by Lionel Abel, Vintage Books, New York 1955 [orig. ed. ID., *Les Mains Sales*, Gallimard, Paris 1948] and A. CAMUS, in ID., *Caligula and Three Other Plays*, English transl. by J. O’Brian and S. Gilbert, Vintage Books, New York 1958 [orig. ed. ID., *Les Justes* (1949), Paris, Gallimard, 1950].

<sup>81</sup> The «ticking bomb» scenario, firstly introduced by Bentham and then used also by Luhmann (cf. M. DONINI, *Il diritto penale di fronte al «nemico»*, in “Cass. pen.”, 2006, p. 735 ff., n. 129), recently has been widely employed by Alan Dershowitz to assess the possible legitimacy of a “legalised” torture (A.M. DERSHOWITZ, *It Is Necessary to Apply «Physical Pressure» to Terrorists – And to Lie about It?*, in “Isr. L. Rev.”, 23, 1989, p. 192 ff.; ID., *Why Terrorism Works*, Ch. 4, *Should the Ticking Bomb Terrorist Be Tortured? A Case Study in How a Democracy Should Make Tragic Choices*, New Haven-London, Yale University Press, 2002, p. 131 ff.) and of preventive detention (A.M. DERSHOWITZ, *Preemption: a knife that cuts both ways*, London-New York, Norton, 2006). See, also in a critical and constructive perspective, L. ZEDNER, *Terrorism, the ticking bomb, and criminal justice values*, in “Criminal Justice Matters”, 73, 1, 2008, pp. 18-19.

<sup>82</sup> From different perspectives, cf.: Z. BAUMAN, *Liquid fear*, cit., p. 96 ff.; ID., *Modus vivendi*, p. 20 ff.; D. COLE, *Enemy aliens: double standards and constitutional freedoms in the war on terrorism*, New York-London, The New Press, 2003, p. 9 ff.; ID., *The Priority of Morality: The Emergency Constitution’s Blind Spot*, in “Yale Law Journal”, 113, 2004, p. 1753 ff.; L. ZEDNER, *Security, the State and the Citizen: the Changing Architecture of Crime Control*, in “New Crim. L. Rev.”, 13, 2 2010, p. 393; EAD., *Preventive Justice or Pre-Punishment? The Case of Control Orders*, in “Current Legal Problems”, 60, 2007, p. 174. ff.

<sup>83</sup> Cf. N. TILLEY, *Crime Prevention*, Cullompton, Willan Publishing, 2009, p. 27.

fact, the exclusion, degradation, disqualification, segregation and stigmatisation produced by negative measures generally against minorities or marginalised individuals (the new «*classes dangereuses*»)<sup>84</sup> cannot but aggravate the social and psychological conditions that are at the origins of many criminal behaviours and, on a global level, they trigger or nurture ideologies and elevate socio-cultural barriers that, in turn, generate more crime and violence in different parts of the world. Nor such measures are capable of reducing fear and the sense of insecurity, since their enforcement is usually boasted together with spectacular exaltations of the threats they are supposed to annihilate. Indeed, as they turn out to be not necessary, nor truly useful, the public legitimisation of such measures relies precisely and solely on such fears.

More than that, the lenient resort to emergency governance and the normalised subversion of the main bulwarks of the rule of law undermine the certainty (other than the justness) of law, leaving the individual unsafe before a State which is practically *legibus solutus*, whereas the “right to security” (if any)<sup>85</sup> proclaimed by international charters, which many politicians invoke as a possible foundation of negative measures, is first of all the individual right to security against any arbitrary exercise of State power<sup>86</sup>. In fact, such are the abuses perpetrated through negative prevention, that we would not hesitate to say that some negative measures are criminal themselves. How should we qualify, if not as criminal acts, measures that are intentionally (and sometimes even explicitly) adopted beyond the limits, if not against the provisions of law (be it national law or international law, be it criminal law or the laws of war, be it human rights law or humanitarian law) and result in an unjust harm for fundamental human values? Think for instance, of some exceptional measures, such as the preventive detention of merely suspected (and not even accused) subjects, or of the so-called “targeted” or “smart sanctions” introduced, on the basis of debatable normative foundations<sup>87</sup>, by the UN Security Council resolutions, which in many cases turned into unjustifiable restrictions of fundamental individual rights. Not to mention the unacceptable episodes of torture («enhanced interrogation techniques»: *sic!*) practiced by US officers on detainees to the alleged purpose of contrasting terrorism, which have recently been confirmed as a fact by a compendious by a US Senate Report on the CIA detention and interrogation program<sup>88</sup>. Indeed, especially when driven by final purposes different than the mere “protection of security” (which is often a mere excuse to perpetrate the worst violations of other peoples’ rights in favour of the shadowy forces manoeuvring globalisation), measures as such are but unlawful and unjustifiable (and thus criminal) exercises of violence, whose effects, moreover, transcend the mere harm to (fundamental rights and liberties of) its immediate victims and are able to affect, often irremediably, whole societies as well as delicate global socio-political balances no less than other global crimes.

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<sup>84</sup> Cf. R. CASTEL, *L'insecurité sociale*, p. 6 e Z. BAUMAN, *Modus vivendi*, p. 77-78.

<sup>85</sup> On the debatable existence of a “right to security” see, for all,

<sup>86</sup> On the right to security in criminal law theory cf. P. RAMSEY, *The Theory of Vulnerable Autonomy*, cit., ch. 3 and 4 and, in Italy, D. PULITANÒ, *Sicurezza e diritto penale*, in *Riv. it. dir. proc. pen.*, 2009, p. 547 ff.

<sup>87</sup> We already discussed this in our *Le misure di prevenzione*, cit., p. 203 ff. For other criticisms see A. BERNARDINI, *Il terrorismo, quale terrorismo?*, cit., *passim*.

<sup>88</sup> US Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, approved December 13, 2012, Updated for Release April 3, 2014, Declassification Revisions December 3, 2014, available in <<http://www.intelligence.senate.gov/study2014.html>> (January 5<sup>th</sup>, 2015).

Alas, at the present moment there are very few ways to prevent these peculiar sort of (State) global crimes and prosecute those who are responsible for them, due to several reasons, amongst which: a) the lack of an appropriate international criminal justice system to ensure a just punishment of the individuals who are materially responsible for such offences, b) the many deficiencies of the international system of State responsibility, once again too dependent on State policies and interests which generally end up with favouring Western powers in detriment to different cultures and societies, c) the many ways of «othering» State responsibilities on other subjects<sup>89</sup>, d) (last but not least) the still scarce awareness of the general public and especially of the citizens of the States responsible for some of the most aberrant negative measures of the criminal nature of such offenses, which of course is clearly perceivable only from a global perspective that allow «us» to conceive the other and especially the diverse («them») also as possible victims of our own actions (or however, at worst, as criminals), rather than enemies or non-persons. Presently, the promotion of such an awareness is hindered by the above-mentioned political and media campaigns so committed in increasing fears instead of dissipating them, which tend to make appear such forms of global criminality as «necessary evil» (as such, perfectly justifiable) to fight other forms of global criminality (or rather the forms of global criminality committed by «others») according to a distorted sense of utilitarianism and of the *Raison d'Etat* in which the human person disappear in the dark of ever more unrestrained States powers. When it comes to crime prevention, then, the problem is how to prevent (and repress) that particular kind of global criminality in which many negative measures consist.

Thus, negative prevention becomes the image of the de-responsibilisation of the State for its actions. If every exercise of State power shall be founded, as many constitutions and international conventions expressly state<sup>90</sup>, on the State's duty-responsibility to protect the human person, then most exercises of power in which negative measures consist represent an overt violation of such duty-responsibility. Not only because, for the above reasons, negative prevention tends to aggravate the causes of global crime and insecurity, but also because, more subtly, it proves the State's unwillingness to acknowledge (and to respond for) its own responsibilities in the causation of global crime and its incapability of preventing and repressing it (the State «acts without thinking», to say it with Bauman)<sup>91</sup> or, worse, the willingness to conceal the irrationalities and immoralities of national policies and blame it on other subjects, easily depicted as «enemies» or «threats» (here, we would say, the State thinks much too well, but only according to its own interests). The fact that most negative measures are applied directly by executive or political bodies, rather than judicial bodies, on grounds and through procedures, also induced by international law, that lack the level of accountability and publicity typical of criminal trials (as it happens for many administrative and emergency measures) cannot but facilitate the escape of the State from its duty-responsibility, as it subtracts a most serious part of political discretion (that governing the intrusions into individual liberty) from the ordinary democratic forms of control on State authority.

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<sup>89</sup> R. JAMESON, K. MCEVOY, *State Crime by Proxy and Judicial Othering*, in «Brit. J. Crim.», 45, 2005, p. 504 ff.

<sup>90</sup> See for instance arts. 1, par. 3, 2 and 3 of the ICCPR, art.1 of the ECHR, arts. 1 and 2 of the American Convention on Human Rights (ACHR); art. 51 of the EU Charter of fundamental rights (EUCFR); art. 1 of the African Charter on Human and People's Rights (ACHPR).

<sup>91</sup> Z. BAUMAN, *Modus vivendi*, cit., p. 21.

In other words, if, as Bakhtin suggests, human power derives from an «official fear» which replaces the «cosmic fear» (the uncertainty and vulnerability of man before the inhuman power of the universe)<sup>92</sup>, then it is clear that in the global context two human powers are in strong contention: that of Nation-States and their international organisations and that of global criminals (especially terrorists and organised criminal groups using violent methods). Each of them tries to maintain his supremacy on the other by manipulating and increasing human fears. While terrorists and global criminals try to replace the «official fear» with a new form of «cosmic» (or however unofficial) terror (religious terrorists even consider themselves as instruments of the power of God), States and international organisation try to restore the «official fear» against such a new form of terror, by deploying ever more unpredictable and uncontrollable «terrorizing» exercises of power<sup>93</sup> founded on the exaltation of the same fears they are allegedly meant to eradicate.

### 3. For a positive turn

It is time to change direction. It is time to give (globalisation and) global crime prevention a positive turn.

#### 3.1. *Towards a global society and a global system of criminal justice*

The problem of (negative) globalisation is not mere domain of law, but it involves the most disparate disciplinary areas (philosophy, political sciences, economics, sociology, anthropology, psychology, history etc.), so that, as criminal lawyers, we cannot hope to be able to offer any comprehensive and satisfying solution on our own, except for promoting further inter-disciplinary research. Nonetheless, we can at least point at a certain direction, already prospected by many in several fashions<sup>94</sup>, which is that of a complete revision of the current structures and organisation of political power into a world society. As the Nation-States, together with their articulations in too Western-fashioned international organisations, unmistakably proved to be incapable of effectively control the negatives of globalisation, it is clear that we need to re-think *ex novo* the configuration and the distribution of power in the world, as well as its moral foundations and limits, in order to establish a globally and democratically legitimised (not necessarily

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<sup>92</sup> M. BAKHTIN, *Rabelais and His World* (1965), Bloomington, Indiana University Press, 1984. See also Z. BAUMAN, *Living (Occasionally Dying) Together in an Urban World*, in S. GRAHAM (ed.), *Cities, War, and Terrorism: Towards an Urban Geopolitics*, Oxford, Blackwell, 2004, p. 117.

<sup>93</sup> On the «terrorization» of criminal law cf. L. ZEDNER, *Terrorizing Criminal Law*, in “Crim. Law and Philos.”, 8, 2014, p. 99 ff.

<sup>94</sup> See, for instance, M.C. NUSSBAUM, *For Love of Country?*, Boston, Beacon Press, 1996; C. BEITZ, *Political Theory and International Relations*, rev. ed., Princeton, Princeton University Press, 1999; M. WELLER, *The reality of the emerging universal constitutional order: Putting the pieces of the puzzle together*, in “Cambridge Rev. Int'l Affairs”, 10, 2, 1997, p. 40 ff.; A. KUPER, *Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons*, in “Political Theory”, 28, 5, 2000, p. 640 ff.; P. SINGER, *One World: The Ethics of Globalization*, New Haven, Yale University Press, 2002. For a useful overview cf. K.I. KERSCH, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law*, Cambridge (UK), Cambridge University Press, 2004, p. 341 ff.

centralised) system of political power capable of controlling the forces driving globalisation and directing them in a positive direction, which is not only that of the protection of global values, but also, and especially, that of their factual promotion<sup>95</sup>.

Within such a framework, a serious revision of the grounds for justifying the use of force should take place. Coercion should be reduced to an exception, as such constrained by as many principles and individual safeguards as possible, also in inter-State relations. The current tendency to conceive many aggressions to fundamental human values as acts of war should be reversed, in favour of a conception that tends to embrace in the notion of crime as many harmful acts as possible. War should gradually fade in crime. It is evident that such an ambitious goal is not attainable without the establishment of a global system of criminal justice<sup>96</sup>, relying on its own legal institutions (police, prosecutors, judges etc.) entitled with the necessary jurisdiction to exercise the necessary (but constrained) coercive powers in every territory and against any human person for crimes that harm or endanger globally acknowledged human values.

This would certainly reduce the ongoing preventionism, as it would satisfy most of the security needs and dissolve most of the fears that currently nurture it. In the first place, the restoration, through an effective criminal justice system, of a retributive sense of the use of institutional force, with its corollaries of humanity and proportionality, would be far more reassuring than its preventive (or preemptive) employment. The prompt infliction of a proportionate and deserved sentence to global offenders, according to equal and certain legal provisions and processes, would fulfil the individual sense of justice and appease the instincts of fear and revenge arising from the global uncertainty of punishment and impunity, which presently bring to the neutralisation of also innocent persons who are merely connected to the real offenders or however suspected to be dangerous. At the same time, the certainty of the laws regulating such punishment and its processes would reassure the individual against any unpredictable or unlawful use of power by the authority (such as, for instance, the abuses of emergency or war powers). Moreover, the legal threat, on a global level, of afflictive criminal sanctions, along with the certainty of their concrete application, would have a deterrent effect on global offenders (*general prevention*), while, whenever this effect should not be enough, the material infliction of punishment would have at least the effect of preventing re-offending (*special-prevention*) through the (proportionate) deprivation or limitation of individual liberty (*incapacitation*) and the offer of (voluntary) re-socialising measures (*re-education*).

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<sup>95</sup> Cf. N. BOBBIO, *Sulla funzione promozionale del diritto*, in "Riv. trim. dir. proc. civ.", 23, 1969, p. 1312, now as ID., *La funzione promozionale del diritto*, in ID., *Dalla struttura alla funzione. Nuovi studi di teoria del diritto*, Milano, Edizioni di Comunità, 1977, p. 13.

<sup>96</sup> In these terms P. SINGER, *One World*, cit., p. 4, but see also M. DELMAS-MARTY, *Global Crime Calls for Global Justice*, cit., as well as the elaboration and debate on universal jurisdiction (regulated by the principles of subsidiarity and complementarity). In this regard, amongst others, see M.C. BASSIOUNI, *Universal Jurisdiction for International Crimes. Historical Perspectives and Contemporary Practice*, in "Va. J. Int'l L.", 42, 2001-2002, p. 81 ff.; S. MACEDO, *Universal Jurisdiction: International Courts and the Prosecution of Serious Crimes Under International Law*, Philadelphia, University of Pennsylvania Press, 2004 and the *Princeton Principles on Universal Jurisdiction*, Princeton, Princeton University, 2001; A. ESER, *Harmonisierte Universalität nationaler Strafgewalt: ein Desiderat internationaler Komplementarität bei Verfolgung von Völkerrechtsverbrechen*, in A. DONATSCH (Hrsg.), *Strafrecht, Strafprozessrecht und Menschenrechte: Festschrift für Stefan Trechsel zum 65. Geburtstag*, Zürich, Schulthess, 2002; ID., *For Universal Jurisdiction: Against Fletcher's Antagonism*, "Tulsa L. Rev.", 39, 2003, p. 955 ff. (responding to G. FLETCHER, *Against Universal Jurisdiction*, in "J. Int'l Crim. Justice", 1, 3, 2003, p. 580 ff.).

### 3.2. Deconstructing and reconstructing frameworks

Hindered as it is by the evident lack of a political will on part of national governments to give up their own privileges and acknowledge the inadequacy of their powers to manage globalisation<sup>97</sup>, the formation of a global society with its own system of global criminal justice at the present moment is far from being realised (although some believe that an emerging universal constitutional order is a reality already)<sup>98</sup>. Such an achievement requires, instead, a still long and likely slow process. A process aimed, first of all, at promoting the awareness of the inadequacy of the existing framework of powers and then at dismantling and replacing, when necessary, the paradigms, categories and mindsets of the political, philosophical, legal elaborations of modernity that have become inadequate to face the challenges posed by negative globalisation – such as, for instance, the «axiom» of State sovereignty in the international system<sup>99</sup> – or at rediscovering the substance of those achievements of modern legal thought that, deprived by their original meaning and purposes, are currently manipulated by State powers as mere slogans or empty formulas to make the most aberrant abuses acceptable – such as, for instance, the framework of emergency or war powers or the categories of civil, administrative and criminal law, which, originally conceived in the rule of law or the *Rechtsstaat* as instruments to protect the individual from the State, are now conveniently exploited as legitimate labels for illegitimate exercises of power.

The need for a revolutionary and deconstructing mentality also in law and politics should not be surprising, since during the last century, as a result of a widespread social collapse, we witnessed the collapse of longstanding structures and categories in so many fields of human life. Such a collapse may well be regarded as worrisome, inasmuch as expressive of critical social changes, but it does not necessarily prelude to negative outcomes, provided that we have the readiness and the courage to acknowledge it and to guide it towards positive evolutions. One fitting example is that of music (but the same goes with figurative painting, syntactical poetry etc.). The Twentieth Century crisis marked the definitive rejection of the reassuring framework of tonal music and even of the support of a written score to move towards atonalism, dissonance and improvisation<sup>100</sup>. This did not bring to the end of music, though. The extraordinary creativity and resourcefulness of the human being made it possible to conceive new forms of musical expression capable not only of developing the new deconstructive trends, often base on the rediscovery and the synthesis of ethnic moods (jazz and fusion are marvellous examples), but also and especially to incorporate them within the more traditional and formal schemes of classical music (the works by George Gershwin or Dmitri Shostakovich are but a few instances of such trend). Deconstruction was turned in re-construction. The same should go with law and politics. As the crisis of post-modernity and negative globalisation marked the departure from the modern conception

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<sup>97</sup> P. SINGER, *One World*, cit., p. 198-199.

<sup>98</sup> M. WELLER, *The reality of the emerging universal constitutional order*, cit.

<sup>99</sup> L. HENKIN, *Human Rights and State "Sovereignty"*, in "Ga. J. Int'l & Comp. L.", 25, 1995-1996, p. 31. Cf. also ID., *The Mythology of Sovereignty*, in R. St. JOHN MACDONALD (ed.), *Essays in Honour of Wang Tieya*, Martinus Nijhoff, Dordrecht, 1994, p. 351 ff. and ID., *That "S" Word: Sovereignty, and Globalization, and Human Rights Et Cetera*, in "Fordham L. Rev.", 68, 1999, p. 1 ff.

<sup>100</sup> L. BERNSTEIN, *The Unanswered Question. Six Talks at Harvard* (1976), Cambridge (MA), Harvard University Press, 1997, Ch. 5, *The Twentieth Century Crisis*, p. 263 ff.

of law to a more «liquid» law<sup>101</sup> – perhaps more flexible, but much more uncertain and ineffective – we should be brave and inventive enough to take advantage of this moment of deconstruction to (re-)construct a globalised law adaptable enough to the most disparate needs of our times, but at the same time capable of effectively constraining public powers. Incidentally, as we will see shortly, we believe that also in such a socio-legal-political revolution the rediscovery and the reciprocal integration of the most diverse local socio-cultural and ethnical roots represent a valuable asset.

With specific regard to negative crime prevention, this need for reconstruction and renovation has become most urgent, as, so far, the case law and literature<sup>102</sup> on the most disparate national or supranational negative measures, while «casting a first stone»<sup>103</sup>, has failed in providing effective constraints on State powers and, most of all, a systematic framework of the possible models of negative prevention. The main flaws of this jurisprudence are: a) *extemporariness*, which affects especially judicial decisions, inasmuch as they tend to focus only on single cases and on certain problematic aspects; b) *particularism*, as scholars and courts often consider only particular legal systems, measures (or set of measures), or crime areas, without adopting a more comprehensive view; c) *fragmentariness*, as the consequence of an elaboration lacking a systematic view and made of extemporary solutions and particular reflections; d) *conservatism*, as the existing jurisprudence around negative preventive practices is generally «constrained by the weight of expectations that new measures should fit the pre-existing structures of the criminal and civil process»<sup>104</sup>; e) *municipalism*, as when it comes to negative crime prevention, probably due to the (relative) novelty of the phenomenon for many jurisdiction (especially those in which negative prevention has been imported by virtue of international obligations), there is a surprising lack of dialogue between different legal traditions, with a consequent loss of the possible benefits of comparative legal analysis. The situation is even worse on a global level, as in its global dimension the problem of negative prevention involves the most disparate forms of criminality and the whole mankind and, thus, cannot stand any conservatism, particularism or municipalism, but requires an «entirely new conceptual and procedural framework»<sup>105</sup>, capable of give the appropriate recognition to the systematic connections between the existing negative measures, as a part of a whole rather than isolated items<sup>106</sup>.

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<sup>101</sup> Cf. R. BORSARI, *Diritto penale, creatività e co-disciplinarietà. Banche di prova dell'esperienza giudiziale*, Padova, Padova University Press, 2013; J. PŘIBÁŇ (ed.), *Liquid Society and Its Law*, London, Ashgate, 2013; M.A. QUIROZ VITALE, *Il diritto liquido. Decisioni giuridiche tra regole e discrezionalità*, Milano, Giuffrè, 2012; G. MESSINA, *Diritto liquido? La governance come nuovo paradigma della politica e del diritto*, Milano, Giuffrè, 2012.

<sup>102</sup> For two notable attempts at theorising a jurisprudence of preventive intervention see A.M. DERSHOWITZ, *Preemption: a knife that cuts both ways*, cit. (who reprises the work sketched previously in ID., *The Origins of Preventive Confinement in Anglo-american Law*, in "U. Cin. L. Rev.", 43, 1974, *Part I: The English Experience*, p.1 ss., *Part II: The American Experience*, p. 781 ss. and ID., *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, in "Tex. L. Rev.", 51, 1972-1973, p. 1277 ff.) and, with particular reference to preventive and preemptive war, M.W. DOYLE, *Striking first. Preemption and prevention in international conflict*, Princeton, Princeton University Press, 2008. For a systematic view of supranational punitive law see R. BORSARI, *Diritto punitivo sovranazionale come sistema*, Padova, CEDAM, 2007.

<sup>103</sup> M.W. DOYLE, *Casting the First Stone*, in "Washington Post", July 16<sup>th</sup>, 2006, referring to Dershowitz's *Preemption*, cit.

<sup>104</sup> L. ZEDNER, *Preventive Justice or Pre-Punishment? The Case of Control Orders*, in "Current Legal Problems", 60, 2007, p. 187.

<sup>105</sup> L. ZEDNER, *ibid.*

<sup>106</sup> C.S. STEIKER, *The Limits of the Preventive State*, cit., p. 778.

### 3.3. For a general theory of negative prevention

In short, we need a global general theory of negative prevention. We need to frame the many fragmented and often improvised national and inter- or supranational models of negative crime prevention in a system capable of fitting and being easily understood by any legal tradition, in order to highlight, in a comprehensive reading, the uniting features of the many measures and policies that form them, assess their foundations, criticise their shortcomings and eventually suggest new solutions. Besides, borrowing the words of Kay Ambos, the benefits of a system are many, namely:

- complete and “economic” solution of cases;
- rational and equal application of the law;
- simplification and better manageability of the law;
- guidance to further development of the law;
- better identification of value judgments built in the system<sup>107</sup>.

Moreover, the articulation of such a systematic framework for negative prevention could be an important contribution to the construction (or recognition?) of a “universal grammar” of crime prevention and criminal law<sup>108</sup> but also to the development of a global legal language at large, for the following reasons: 1) global crime affects «universally recognized values» (life, physical integrity, moral and physical liberty etc.) and the recognition of universal values is the fundamental basis for the construction of a legal system that aspires to be global; 2) the universal and fundamental nature of such values may facilitate the international consensus on the creation of such a global system; 3) as negative measures entail, by definition, the use or the threat of force their analysis provides us with the opportunity to (re-)consider in global terms the problem of coercion (or the relation between the individual and authority), which is the main concern of any legal system, included the possible future global legal order; 4) furthermore, as many internal negative measures are emergency or war measures typically enforced against aliens (thus, having an intrinsic transnational character), their critical analysis includes the assessment of the foundations and the individuation of the moral and legal limits of emergency or war coercive powers from a global point of view; 5) the critique of negative models of crime prevention brings to consider also positive models, which might offer interesting cues for fostering in a global perspective what Norberto

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<sup>107</sup> In this very terms, with regard to the system of crime and from a European Continental perspective, K. AMBOS, *Towards a Universal System of Crime: Comments on George Fletcher's Grammar of Criminal Law*, in “Cardozo L. Rev.”, 28, 6, p. 2648, also with reference to B. SCHÜNEMANN, *Einführung in das strafrechtliche Systemdenken*, in B. SCHÜNEMANN (ed.), *Grundfragen des modernen Strafrechtssystems*, Berlin-New York, de Gruyter, 1984, p. 1 ff.; C. ROXIN, *Strafrecht: Allgemeiner Teil*, München, Beck, 2006<sup>4</sup>, § 7; W. NAUCKE, *Einführung in das Strafrecht* 2002<sup>10</sup>, § 7; M. DONINI, *Verbrechenslehre. Eine Betrachtung aus der Sicht des italienischen Strafrechts*, Berlin, BWV Berliner-Wissenschaft Verlag, 2005, pp. 42-43 (original version: ID., *Teoria del reato: un'introduzione*, Padova, CEDAM, 1999) and E. GIMBERNAT, *Hat die Strafrechtsdogmatik eine Zukunft?*, in “ZStW”, 82, 1970, p. 405.

<sup>108</sup> Cf. G.P. FLETCHER, *Rethinking Criminal Law*, Boston, Little, Brown, 1978; ID., *Basic concepts of criminal law*, New York, Oxford University Press, 1998; G.P. FLETCHER, *Basic concepts of legal thought*, New York, Oxford University Press, 1996; ID., *The grammar of Criminal Law: American, comparative, and international*, Oxford-New York, Oxford University Press, 2007; ID., S. SHEPARD, *American law in a global context: the basics*, New York, Oxford University Press, 2005 (particularly, Part IV: *Criminal Law: The Adversary System and Its Alternatives*, p. 531 ss.). See also K. AMBOS, *Towards a Universal System of Crime*, cit., p. 2647 ff.

Bobbio called the «promotional function of law»<sup>109</sup>, which could provide great help in turning many negatives of globalisation into positives, starting from negative measures.

A word of warning is needed. The elaboration of a global theory of negative prevention shall not be conceived (nor read) as an instrument to legitimise *ex post* existing unlawful preventive measures or as a device of further normalisation of extraordinary measures, but rather as a critical apparatus aimed at constraining the use of such measures within the boundaries of strict necessity and within precise moral and legal limits and replacing them with positive measures whenever possible. Thus, the global theorisation on negative measures should prelude to a broader inter-disciplinary global theorisation on positive prevention, which necessarily requires the intersection of different competences (from sociology and criminology to economics, from psychology to pedagogy etc.), as it has the potential to intervene in many different ways on practically every aspect of human personality. Only this way, a global theoretical framework may become not only an instrument to search for the most effective and legitimate means to prevent crime, but also, and especially, a means itself to prevent the violations and the crimes committed for the sake of prevention and security. In other words, a general theory not only as a measure of prevention of «others'» crimes against «us», but first of all as a measure of prevention of «our own» crimes against «them»<sup>110</sup>.

This gives important indications on the right perspective to adopt when dealing with the problem of global crime prevention. We cannot forget that, however global in vocation, our perspective is that of Western lawyers or sociologists or criminologists etc. We need therefore to make our theoretical and practical proposition not only suitable to other jurisdictions, but also acceptable and legitimate for other peoples. Our perspective, therefore, should be focused, above all, on the serious responsibilities of Western systems, which we assume (often erroneously) to be more respectful of the individual, in the effort of acknowledging and remedying them. This is the fundamental moral premise on which any discourse on the (also criminal) responsibility of the others and, most of all, the legitimacy of whatever measure against them relies. Otherwise, any suggestion coming from the Western world would be perceived as an (another?) imperialist intrusion in other peoples' life and customs<sup>111</sup>. The lack of will of some States (or supranational organisations) to acknowledge and to respond for their own faults is the main obstacle in the pursuit of a global society both on a moral level and on a social level, as it is a clear manifestation of injustice and inequality and, thus, generates mistrust and suspect between peoples.

As for the methodology, it is quite evident that a theorisation on negative prevention aiming globally should rely first of all on the accomplishments of comparative research (applied both at the national and inter-/supranational level)<sup>112</sup>, which is one of

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<sup>109</sup> N. BOBBIO, *Sulla funzione promozionale del diritto*, cit.

<sup>110</sup> For the juxtaposition between «our» terrorism and «their» terrorism see N. CHOMSKY, *Chomsky: Paris attacks show hypocrisy of West's outrage*, in "CNN International", January 20<sup>th</sup>, 2015 (<<http://edition.cnn.com/2015/01/19/opinion/charlie-hebdo-noam-chomsky/>>) and ID., *Hopes and Prospects*, London, Haymarket Books, 2010, *passim*.

<sup>111</sup> «Why do you notice the splinter in your brother's eye, but do not perceive the wooden beam in your own eye? How can you say to your brother, "Let me remove that splinter from your eye", while the wooden beam is in your eye? You hypocrite, remove the wooden beam from your eye first; then you will see clearly to remove the splinter from your brother's eye» (Matthew, 7:3).

<sup>112</sup> See G. ZUCCALÀ, *L'unitario diritto penale europeo come meta del diritto penale comparato?*, in "Riv. trim. dir. pen. econ.", 2002, p. 603 ff.; M. DELMAS-MARTY, *The Contribution of Comparative Law to a Pluralist Perception of International Criminal Law*, in "J. Int'l Crim. Just.", 1, 2003, p. 13 ff.; G. FORNASARI, *Aspectos problematicos de la relacion entre comparacion penal y derecho penal internacional*, in "Revista del Ministerio

the greatest “positives” of our century<sup>113</sup> and can (and should) be facilitated and expanded by globalisation as a key for a common legal language<sup>114</sup>. Indeed, comparative research is one of the best ways to discover a first universal value of globalisation: *diversity*. As an intrinsic attribute of the human nature, diversity is the only quality characterising both every human being and every human society that cannot be suppressed by any human device, not even coercive measures. Even those who would like to deny certain persons their dignity could not possibly deny their diversity (in fact, they often explicitly assume it as a reason for discrimination). Thus, interestingly enough, diversity becomes an expression of equality as a universal (inasmuch as human) quality: to say it with Montaigne: «*Leur plus universelle qualité, c'est la diversité*»<sup>115</sup>. The comparative study of different legal and social systems is a fundamental step towards the unification of peoples into a global society, as it allows to identify common features, common problems, but especially common values to protect and promote<sup>116</sup>.

Interestingly enough, precisely in the field of negative prevention, systems that are so distant from each other, both geographically and culturally, seem to share similar preventive models. The mechanisms of preventive detention are similar in the most different jurisdictions<sup>117</sup>. While the United States of America keeps detaining innocent people in Guantanamo, Malaysia has recently enacted the new Security Offence (Security Measures) Act 2012 (SOSMA), which, while finally repealing the much

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Público”, 2006, p. 168 ff.; E. FRONZA, *Riflessioni sulla nascita di un sistema penale internazionale: il ruolo della comparazione*, in L. FOFFANI (a cura di), *Diritto penale comparato, europeo e internazionale: prospettive per il XXI secolo. Omaggio a Hans-Heinrich Jescheck per il 92° compleanno*, Giuffrè, Milano 2006, p. 171. See also I. EDGE (ed.), *Comparative Law in Global Perspective*, Ardsley, Transnational Publishers, 2000.

<sup>113</sup> For some studies on the comparative legal method see R. DAVID, *Traité élémentaire de droit civil compare*, Paris, Librairie Générale de Droit, 1950; ID., *Les grands systèmes de droit contemporains*, Paris, Dalloz, 1964 (now ID., C. JAUFFRET-SPINOSI, M. GORÉ, *Les grands systèmes de droit contemporains*, Paris, Dalloz, 2015<sup>12</sup>); M. ROTONDI, *Dogmatica e diritto comparato. Il diritto come oggetto di conoscenza* (1930), Padova, CEDAM, 1972; ID., *Dogmatic and comparative law* in “Tulane Law Rev.”, 8, 1933, p. 83 ff.; ID., *Il diritto comparato in Italia nell'ultimo secolo*, Padova, CEDAM, 1972; ID., *Buts et méthodes du droit comparé*, Padova, CEDAM/New York, Oceana, 1973; M. SCHMITTHOFF, *The Science of Comparative Law*, in “Cambridge Law J.”, 7, 1, 1939, p. 94 ff.; H.C. GUTTERIDGE, *Comparative law: an introduction to the comparative method of legal study and research*, Cambridge (UK), Cambridge University Press, 1949; M.S. MACDOUGAL, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, in “Yale Law Journal”, 61, 1952, 915; R. SACCO, *Comparazione giuridica e conoscenza del dato giuridico positivo*, in Id., *L'apporto della comparazione alla scienza giuridica*, Milano, Giuffrè, 1980, p. 247; ID., *Introduzione al diritto comparato*, Torino, Giappichelli, 1980; ID., A. GAMBARO, *Diritto comparato*, Torino, UTET, 1981; R. SACCO, *L'enseignement du droit comparé en Italie*, in “Revue internationale de Droit Comparé”, 4, 1988. More recently, with regards to criminal justice, amongst others: D. NELKEN (ed.), *Contrasting Criminal Justice: Getting from Here to There*, Aldershot, Ashgate/Dartmouth, 2000; F.C. PALAZZO, M. PAPA, *Lezioni di diritto penale comparato*, Torino, Giappichelli, 2005, Ch. I, *La comparazione nel diritto penale*, pp. 2-41.

<sup>114</sup> Cf. P.J.A. FEUERBACH, *Kleine Schriften vermischten Inhalts*, Nürnberg, Verlag von Theodor Otto, 1833, p. 163.

<sup>115</sup> M. DE MONTAIGNE, *Essais*, Bordeaux 1588, II, Ch. 37, p. 786.

<sup>116</sup> We have already performed such a comparative (both national and supranational) analysis in our previous study on the measures of prevention of international terrorism and criminal trafficking, precisely in view of a future more global elaboration (L. PASCULLI, *Le misure di prevenzione*, cit., p. 21), so that the results of that research can be now employed as a basis for the present work.

<sup>117</sup> Cf. A. HARDING, J. HATCHARD (eds.), *Preventive Detention and Security Law. A Comparative Survey*, Dordrecht-Boston-London, Martinus Nijhoff Publishers, 1993.

criticised Internal Security Act 1960<sup>118</sup>, keeps granting the police the power to detain any person they «believe to be involved» in security offences for up to 28 days without warrant and without charge (Sec. 4). Pre-charge detention without warrant up to 28 days was allowed also in the United Kingdom according to the provisions of the *Terrorism Act 2000* (Sec. 41 and Schedule 8), as amended by the *Criminal Justice Act 2003* and the *Terrorism Act 2006*, until *Protection of Freedoms Act 2012* reduced the pre-trial detention period to a maximum 14 days (still one of the longest in Europe). In Singapore any person that the President should consider dangerous for the security or the public order of Singapore can still be detained, upon order of the Minister charged with the responsibility for internal security, for up to two years (which may be extended for a further periods of two years at a time), according to the same Malayan Internal Security Act, extended to Singapore when it joined the Federation of Malaya in 1963 and still in force since its separation from Malaysia in 1965<sup>119</sup>.

Shifting from a positive to a judicial and theoretical level, it should be acknowledge that often the various elaborations of courts and scholars coming from the most different social, cultural and political contexts on the issues negative prevention (and of preventive criminal law at large) are often surprisingly similar, at least in the individuation of common problems, although in most cases their respective authors are totally unaware of such a convergence, also due to objective language obstacles. Moreover, comparative research is useful to uncover theoretical frameworks and paradigms that, while elaborated in a particular jurisdiction, can be profitably applied to other legal systems or however contribute to accelerate and improve the research for innovative solutions.

### 3.4. *Lessons from the Italian experience*

The need to abandon any particularism and municipalism is well represented by the Italian experience with negative prevention, which stimulated scholars and courts to find some innovative frameworks that have also been able to affect (although not always satisfactorily) legislative policies. Sadly, since few foreign scholars working on crime prevention can understand Italian, while, on the other hand, few Italian scholars wrote on such topics in more diffused languages, such as English<sup>120</sup>, the knowledge, the methodologies and the solutions accumulated by Italy with regard to negative prevention, which in many cases could enrich (also through negative examples) the national and international elaboration, risk to get totally forgotten and wasted in a global perspective.

Italy has a longstanding (albeit not necessarily commendable) tradition of negative crime prevention dating back to the legislation of the Nineteenth century which has been

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<sup>118</sup> N. FRITZ, M. FLAHERTY, *Unjust Order. Malaysia's Internal Security Act*, Joseph R. Crowley Program in International Human Rights, Fordham Law School, New York 2003, also in "Fordham Int'l L.J.", 26, 2002-2003, p. 1345 ff.

<sup>119</sup> J.T.T. LEE, *The Past, Present and Future of the Internal Security Act*, in "Singapore Management University School of Law Opinion Series", n. JL3, 2012; M. HOR, *Law and Terror: Singapore Stories and Malaysian Dilemmas* in V.V. RAMRAJ, M. HOR, K. ROACH, *Global Anti-terrorism Law and Policy*, Cambridge (UK), Cambridge University Press, 2005, p. 273 ff.

<sup>120</sup> Amongst the few, although a little outdated, A. MANNA, *The Measures of Prevention: Dogmatic-Exegetic Aspects and Prospects of Reform*, in "Eur. J. Crime Crim. L. & Crim. Just.", 5, 1997, p. 248.

evolving and expanding across the last century in ways that, in so many aspects, anticipated the most recent negative evolutions of global crime prevention<sup>121</sup>.

First of all, since 1930 Italy has one of the most structured systems of so-called «security measures» (« *misure di sicurezza*»), that is post-crime measures of various restrictive contents (also amounting to deprivation of liberty) applicable by criminal courts to (imputable and non-imputable) offenders as a consequence of their dangerousness and after the commission of a crime (Italian penal code, arts. 190-240). Such measures were originally conceived by the scholars and criminologists belonging to the so-called Positive School («*Scuola positiva*»), who purported a vision of criminal offenders as conditioned or determined to crime by the most disparate (biological, anthropological, social) factors rather than by their own free will and suggested to replace the traditional criminal sanctions based on individual responsibility – strenuously defended by their opponents belonging to the so-called Classical School («*Scuola Classica*») – with preventive measures (also called penal substitutes, «*sostitutivi penali*») aimed at neutralising individual dangerousness by removing the criminogenic factors<sup>122</sup>. The penal code of 1930, in a sort of compromise between the opposite Schools, chose to provide for two different kinds of possible sanctions for criminal offenses (so-called «double track» system, later admitted also by the Constitution of 1948 and known to other European Continental jurisdictions), that is, on the one hand, the traditional retrospective punishment and, on the other hand, the security measures. The problem is that the two sanctions are not mutually exclusive, as they can be applied also cumulatively. Moreover, rather than having merely re-socialising contents, in practice security measures have the same afflictive character of proper punishment, inasmuch as they consist in mere restrictions of individual rights and liberties (while, on the contrary, the traditional contents of punishment has been enriched with re-socialising contents due to the principle of re-education set forth by art. 27 of the Italian Constitution)<sup>123</sup>. In short, in Italy the «double track» has turned into a mere duplication of the punitive system<sup>124</sup>.

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<sup>121</sup> For instance, a predecessor of modern blacklists can be found in the Italian law n. 1339 of 1852, which prescribed to the local police authorities to enlist those suspected of minor crimes into a special record, to be reviewed and modified by the Municipal Council. Interestingly enough, though, such blacklists were legally bound to respect standards of individual safeguards that are often higher than their most recent successors. Thus, according to law of 1852 the «blacklists» of suspects should contain the express indication of clues and circumstances upon which the suspicions were founded, the list should be sent to the local judge and enlisted subjects were to appear and be heard before the judge, unlike UN Security Council blacklists.

<sup>122</sup> On the influence of the debate between Classical and Positive School cf. J. SIMON, *Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-First*, in “Tex. L. Rev.”, 84, 2005-2006, p. 2135 ff. and C. PETIT, *Lombroso en Chicago. Presencias europeas en la Modern Criminal Science Americana*, in “Quad. fior. storia pens. giur. mod.”, 36, 2007, p. 801 ff. In a wider perspective, M. GIBSON, *Born to Crime: Cesare Lombroso and the Origins of Biological Criminology*, Westport, Praeger, 2002 and P. BECKER, R.F. WETZEL (eds.), *Criminals and Their Scientists: The History of Criminology in International Perspective*, Cambridge (UK), Cambridge University Press, 2006.

<sup>123</sup> On which see G. BETTIOL, *Sulla rieducazione del condannato*, in “Riv. it. dir. e proc. pen.”, 1958, p. 643 ff.; ID., *Il mito della rieducazione*, in ID. et al., *Sul problema della rieducazione del condannato*, Atti del secondo convegno di diritto penale (Bressanone, 1963), Padova, CEDAM, 1964, p. 14, also in “Riv. it. dir. proc. pen.”, 1963, p. 701; ID., *La rieducazione del condannato*, in “Minerva Medica”, 1968 now in ID., *Scritti giuridici, 1966-1980*, Padova, CEDAM, 1980, p. 76

<sup>124</sup> L. FERRAJOLI, *Diritto e ragione. Teoria del garantismo penale* (1989), Laterza, Roma-Bari 2004<sup>8</sup>, p. 796.

As if it were not enough, there is a «third track»<sup>125</sup> originating in fascist legislation and refurbished, after the enforcement of the Constitution, by law 1423 of 1956<sup>126</sup>. Such track is represented by measures consisting in disparate forms of restrictions of liberty (never amounting to a deprivation) applicable to dangerous subjects even before the commission of a crime whatsoever and very similar in substance to the former Control Orders, introduced in the United Kingdom almost fifty years later by the *Prevention of Terrorism Act 2005 (PTA)*, now replaced by the terrorism prevention and investigations measures later introduced by *Terrorism Prevention and Investigation Measures Act 2011 (TPIMA)*, which repealed *PTA*. Thus, the mechanism of «pre-punishment» – one of the most serious reason for concern of today’s negative measures<sup>127</sup> – is, sadly, well known in Italy since at least a century. Finally, Italy resorted also to two of the most common expedients employed by contemporary jurisdictions to circumvent the basic principles of criminal law. The first is the resort to emergency powers to fight the most disparate “criminal emergencies”, as many pre-crime measure have been expanded or introduced by the Italian Government through urgent law-decrees, later converted (or rather, «normalised») in acts of the Parliament (such as, for instance, the ban from sport events established by law-decree n. 122/1993 converted in law n. 204/1993, or the recent anti-stalking measures established by law-decree n. 11/2009, converted in law n. 38/2009). The second is the employment of «labelling frauds», especially through the express legal qualification of (both pre-crime and post-crime) preventive measures sharing the same substance of proper punishment as «administrative measures» in the attempt to exclude individual safeguards (such is the case of security measures), not very differently from what happens at the UN level, as the UN Security Council keeps denying the «penal» nature of smart sanctions.

During the last century Italian, and especially after World War II, so many eminent Italian scholars committed themselves in the construction of a compendious jurisprudence aimed at denying the legitimacy of negative measures or at least at ensuring their compliance with the democratic principles of the Rule of law and the central value of the human person as an end in itself consecrated by the Republican Constitution, which served as the common basis and as a point of convergence of the opinions of scholars also of different political-ideological extraction, significantly united in the rationalisation of negative measures<sup>128</sup>. Such jurisprudence provided the Italian model of

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<sup>125</sup> S. RIONDATO, *Le misure di prevenzione e il degrado delle garanzie annunciato da Giuseppe Bettiol*, in ID. (ed), *Dallo Stato Costituzionale Democratico di Diritto allo Stato di Polizia? Attualità del “Problema penale” Nel trentesimo dall’Ultima Lezione di Giuseppe Bettiol*, Atti del Convegno (Padova, 28 maggio 2012), Padova University Press, Padova 2012, p. 122.

<sup>126</sup> For an interesting historical overview D. PETRINI, *La prevenzione inutile. Illegittimità delle misure praeter delictum*, Napoli, Jovene, 1996.

<sup>127</sup> L. ZEDNER, *Preventive Justice or Pre-Punishment?*, cit.; ID., *Pre-crime and pre-punishment: a health warning*, in “Criminal Justice Matters”, 81, 1, 2010, p. 24 ff.

<sup>128</sup> The moderate Catholic and liberal-democratic right-wing was represented especially by Giuseppe Bettiol, one of the Authors that most dedicated himself to fight the possible authoritarian drifts of negative measures (and criminal law), which was amongst the Framers of the Italian Constitution. See, *ex multis*: G. BETTIOL et al., *Stato di diritto e misure di sicurezza*, Atti del I Convegno di diritto penale (Bressanone, 1961), Padova, CEDAM, 1962; G. BETTIOL, *Sulla «nuova difesa sociale» considerata da un punto di vista cattolico* (1964), in ID., *Scritti giuridici*, t. II, Padova, CEDAM, 1966, p. 1005 ff.; ID., *Aspetti etico-politici della misura di sicurezza*, in ID., *Scritti giuridici*, t. I, cit., p. 504 ff.; ID., *I problemi di fondo delle misure di sicurezza*, in ID., *Scritti giuridici*, t. II, cit., 1966, p. 974 ff. Of Catholic-democratic extraction also Pietro Nuvolone: P. NUVOLONE, *Le misure di prevenzione nel sistema delle garanzie sostanziali e processuali della libertà del cittadino*, in G. BETTIOL et al., *Stato di diritto e misure di sicurezza*, cit., p. 163 ff., now in *Trent’anni di diritto e procedura penale*, Padova, CEDAM,

negative prevention with its own conceptual and procedural framework, autonomous from the systems of civil and criminal law (though closely related to the latter), that so many other national negative preventive models are still lacking<sup>129</sup>. Such was the influence and the insistence of Italian scholars (and sometimes also of Italian courts) on the rationalisation of the Italian apparatus of pre-crime negative measures of prevention, that recently it has been re-organised within a dedicated and comprehensive piece of legislation: the new code of anti-mafia laws and of the measures of prevention («*Codice delle leggi antimafia e delle misure di prevenzione*»)<sup>130</sup>, a real *unicum* in the world legal landscape. While still very criticisable under many aspects, the code has at least the merit of having recognised the systematic connections between various negative measures and of having regulated them as a uniform system.

We are not suggesting that the legislative codification of negative model can represent a solution on the global level. On the contrary, we firmly believe that such pieces of legislations are a dangerous step towards the unwelcome normalisation and diffusion of negative prevention. Nor we are suggesting that the Italian experience with negative prevention should be taken as a model with regard to global crime prevention: we are sure that there are many other systems we still have not had the time to explore that could provide even more valid and exportable solutions. What we want to highlight, instead, is that the municipalism has to be banned as soon and as much as possible, as the experience matured by any single jurisdiction may offer precious instruments to be exported abroad or to be adopted at a global level – which, in our example, is also true with regard to the precious lessons that Italy could learn from common law or North European jurisdictions about positive prevention, which in Italy is decidedly deficient.

Another interesting suggestion we get from our short excursus on the Italian system is that there are some values (in the Italian case, those expressed by the personalism of the Constitution) around which the consensus of the most disparate ideologies is solid. This makes us questioning whether a compact agreement such as that which united Italian scholars around some “constitutional” values, could be found also within an international and possibly global context around some possibly global values. In case of an affirmative answer, it is clear that such values would represent the foundations of the building of a global society.

It is, therefore, from such values that we should start our theorisation.

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1969, p. 367 ff.; ID., *L'accertamento della pericolosità nel processo ordinario di cognizione*, in CENTRO NAZIONALE DI PREVENZIONE E DIFESA SOCIALE, *Pene e misure di sicurezza: modificabilità e suoi limiti*, Atti del Convegno «Enrico De Nicola» (Como-Bellagio, April 29<sup>th</sup>-May 1<sup>st</sup>, 1961), Milano, Giuffrè, 1962, p. 27 ff.; ID., *Legalità e prevenzione*, in “Giur. cost.”, 1964, p. 197 ff.; ID., *Relazione introduttiva*, in CENTRO NAZIONALE DI PREVENZIONE E DIFESA SOCIALE, *Le misure di prevenzione*, Atti del Convegno «Enrico De Nicola» (Alghero, 26-28 aprile 1974), Giuffrè, Milano 1975, p. 15 ff.; ID., entry *Misure di prevenzione e misure di sicurezza*, in “Enc. dir.”, vol. XXVI, Milano, Giuffrè, 1976, p. 632 ff.. For more secular and progressive, but equally liberal positions see F. BRICOLA, *Forme di tutela «ante-delictum» e profili costituzionali della prevenzione*, in CENTRO NAZIONALE DI PREVENZIONE E DIFESA SOCIALE, *Le misure di prevenzione*, cit., p. 37; G. FIANDACA, entry *Misure di prevenzione*, in “Dig. disc. pen.”, vol. VIII, Torino, UTET, 1994, p. 108 ff.; ID., *Diritto penale del nemico. Una teorizzazione da evitare, una realtà da non rimuovere*, in A. GAMBERINI, R. ORLANDI (eds.), *Delitto politico e delitto penale del nemico*, cit.; G. FIANDACA, G. PUGLISI, *Le misure di prevenzione cambiano trucco*, cit., p. 24 ff.

<sup>129</sup> L. ZEDNER, *Preventive Justice or Pre-Punishment?*, cit., p. 187.

<sup>130</sup> Legislative decree n. 159 of September 6<sup>th</sup>, 2011.

#### 4. Conclusive remarks: Positive values and the value of positives

To search global values around which building our system of global crime prevention we do not necessarily need to reason in philosophical terms, as the international community has already expressed its agreement on the fundamental nature of a series of values, all of which revolving around one ultimate universal value: the human person. Such fundamental human values are the fundamental human rights and liberties enshrined in national constitutions and in international charters<sup>131</sup>. The proclamation of such rights, as well as the establishment of national and supranational legal instruments to protect them, is no less revolutionary than globalisation<sup>132</sup>.

The «positivisation» of the common ideal of a universal nucleus of human rights and liberties overcame the problem of the individuation and foundation of a truly global set of values springing from human dignity and deserving universal legal protection, which should be the foundations for the future construction of a global legal system. Such an achievement reflects a global consensus on a conception of State and society centred on the human person, inasmuch as it imposes obligations upon the State towards the individual<sup>133</sup>. It is the acknowledgement of the universal traits that unite all the individuals by virtue of their human nature, despite any diversity. It is also a call for morality in laws and politics, as the idea of human rights implies entitlement on the part of the holder in a «moral order under a moral law, to be translated into and be confirmed as legal entitlement in the legal order of a political society»<sup>134</sup>.

As a matter of fact, human rights are far from being respected and protected all over the world<sup>135</sup>, due to different conceptions of the same rights and liberties according to different socio-cultural contexts (women's rights are not certainly conceived in the same way in every Country) and to the political ineptitude or lack of will to adopt effective means of protection and promotion of human rights (many are the regimes committing systematic human rights violations, most of which are proper global criminal offences). Worst than that, human rights can be exploited by political powers to pursue imperialist politics: thus, in the name of «Western human rights» many violations of «others' human rights» are perpetrated<sup>136</sup> (many negative preventive measures are a clear example of this)<sup>137</sup>. Nevertheless, however difficult to define, human dignity is not a negotiable value: there is a clearly recognisable universal and minimum dimension of human dignity that leaves no room for mystification or misinterpretation – at least with regard to a set

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<sup>131</sup> Such as the American Declaration of the Rights and Duties of Man (ADRDM, Bogotá, 1948), the Universal Declaration of Human Rights (UDHR, Paris, 1948), the European Convention on Human Rights (ECHR, Rome, 1950), the International Covenant on Civil and Political Rights (ICCPR, New York, 1966), the International Covenant on Economic, Social and Cultural Rights (ICESCR, New York, 1966), the American Convention on Human Rights (ACHR, San José, 1969), the African Charter on Human and Peoples' Rights (ACHPR, Banjul, 1981), the Charter of Fundamental Rights of the European Union (EUCFR, Nice, 2000), the Arab Charter on Human Rights (ArCHR, Tunis, 2004).

<sup>132</sup> Cf. N. BOBBIO, *Il primato dei diritti sui doveri*, in ID., *Teoria generale della politica*, a cura di M. Bovero, Torino, Einaudi, 1999, p. 432. See also L. BACCELLI, *Una rivoluzione copernicana: Norberto Bobbio e i diritti*, in «Jura Gentium», VI, 1, 2009, p. 7 ff.

<sup>133</sup> N. BOBBIO, *Il primato dei diritti sui doveri*, cit., p. 436 and L. HENKIN, *The Age of Rights*, cit., p. 3.

<sup>134</sup> L. HENKIN, *ibid.*

<sup>135</sup> Cf. N. BOBBIO, *Sul fondamento dei diritti dell'uomo*, in ID., *L'età dei diritti*, cit., p. 16.

<sup>136</sup> See, for instance, R.M. HAYDEN, *Biased Justice: Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia*, in «Clev. St. L. Rev.», 47, 1999, p. 549 ff. More generally, on the abuses of human rights see S. MOYN, *Human Rights and the Uses of History*, New York-London, Verso, 2014.

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of individual prerogatives which, according to international human rights law, cannot be derogated even in times of war or emergency (namely, the right to be recognised as a person before the law, the right to life and to physical integrity against any violence, torture, slavery, forced labour, medical or scientific experimentation and other inhuman, cruel, degrading and humiliating treatments, the freedom of thought, conscience and religion, the principles of *nullum crimen nulla poena sine lege* and of *favor rei*)<sup>138</sup>. There is certainly room for balancing opposite interests and values, also in the fight against crime, as there is certainly room for opposite visions of the same rights, provided that such balancing and visions do not cross the boundaries of precise safeguards, principles and limitations stemming from that dimension of human dignity. Thus, massacring innocent civilians, such as the personnel of *Charlie Hebdo* in Paris, for mere ideological reasons, as well as torturing other human beings, such as the Guantanamo detainees, is an unjustifiable violation of human dignity in every social, cultural and even religious milieu, to the extent that both practices have been condemned by representatives of the same socio-cultural backgrounds of the respective perpetrators (namely, the Arab League and other Arab leaders<sup>139</sup>, on the one hand, and the US Senate Select Committee on Intelligence<sup>140</sup>, on the other).

This dimension of human dignity is well summarised in the maxim «do unto others as you would have them do unto you» (the so-called «Golden Rule»), which is older than its evangelic version and is common to the most diverse societies of the most diverse eras, to the extent that it has been considered «the essence of a universal morality»<sup>141</sup>. Indeed, it is precisely when applied across various cultures that such maxim becomes a truly revolutionary message<sup>142</sup>, as it imposes to abandon our own perspective to adopt the other's, also in spite of the principle of reciprocity, when necessary, as expressly stated also by international customary law<sup>143</sup> and sometimes also by national (case) law<sup>144</sup>,

<sup>138</sup> Cf. art. 4 ICCPR, art. 27 ACHR, art. 15 ECHR, arts. 3 Geneva Conventions.

<sup>139</sup> See *Arab League, Al-Azhar condemn Paris shooting attack*, in "Al Arabyia", January 7<sup>th</sup>, 2015, on <<http://english.alarabiya.net/en/News/world/2015/01/07/World-leaders-condemn-Paris-shooting-attack.html>> (February 21<sup>st</sup>, 2015); C. KURUVILLA, A. BLUMBERG, *Muslims Around The World Condemn Charlie Hebdo Attack*, in "The Huffington Post", January 7<sup>th</sup>, 2015, on <[http://www.huffingtonpost.com/2015/01/07/muslims-respond-charlie-hebdo\\_n\\_6429710.html](http://www.huffingtonpost.com/2015/01/07/muslims-respond-charlie-hebdo_n_6429710.html)> (February 21<sup>st</sup>, 2015).

<sup>140</sup> US Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, cit.

<sup>141</sup> W.T. STACE, *The Concept of Morals* (1937), New York, Peter Smith, 1990, p. 136.

<sup>142</sup> B. PUKA, entry *The Golden Rule*, in *Internet Encyclopedia of Philosophy*, ISSN 2161-0002, <<http://www.iep.utm.edu/>> (February 19<sup>th</sup>, 2015), also for further references.

<sup>143</sup> Cf. Rule 140 of customary international humanitarian law (*Principle of Reciprocity*), as reported by International Committee of the Red Cross (in J.-M. HENCKAERTS, L. DOSWALD-BECK, *Customary International Humanitarian Law*, vol. I, *Rules*, Cambridge, Cambridge University Press, 2009): «the obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity». See, amongst others, J. DE PREUX, *The Geneva Conventions and Reciprocity*, in "International Review of the Red Cross", 25, 1985, p. 25 ff.; R.O. KEOHANE, *Reciprocity in International Relations*, in "International Organization", 40, 1, 1986, p. 1 ff.; B. NASCIMBENE, *La capacità dello straniero: diritti fondamentali e condizione di reciprocità*, in "Riv. dir. int. priv. proc.", 2011, p. 307 ff.

<sup>144</sup> See the interesting decision of the Italian Supreme Court stating that when it comes to fundamental rights, reciprocity does not apply (Cass. civ., Sec. III, ord. February 2<sup>nd</sup>, 2012, n. 1493, in "Resp. civ. prev.", 2012, p. 1178, with a comment by M. WINKLER, *Il principio di reciprocità nell'era dei diritti fondamentali, ibid.*, p. 1179 ff.; *contra* Cass. civ., January 11<sup>th</sup>, 2011, n. 450, in "Guida dir.", 5, 2011, p. 88 ff.). From a different perspective, compare *Zschernig v. Miller*, 389 U.S. 429 (1968), where the U.S. Supreme Court found unconstitutional an Oregon statute which conditioned the right of non-resident aliens to inherit property from an Oregon

according to which the respect of fundamental rights cannot be conditioned to reciprocity.

Once they are construed around such a moral dimension of human dignity, human rights become more than a necessary, but insufficient, «compliance-seeking» «mimumum»<sup>145</sup> and acquire a vital critical function with regard to the existing models of crime prevention and a constructive function with regard to a future global system of crime prevention. The very same enunciation of rights and liberties, in fact, implies the elaboration of principles (as Gustavo Zagrebelsky writes, stating that “personal liberty is inviolable” is a principle). Principles, unlike rules, have a constitutional role, as they are «constitutive» of the legal order<sup>146</sup>. They are the new face of law, after the emergence of modern constitutionalism. Some of these principles are principles of liberty, exalting individual rights in function of freedom, some of them are principles of justice, exalting social and State duties-responsibilities in function of justice<sup>147</sup>. Of course, as articulated both in national constitutions and in international human rights instruments, such principles may well be fruit of the compromise between different and even contrasting conceptions of liberty and of justice, which may not be easy to reconcile in the practice of law as well as in political action. Nevertheless, they are uniform enough express an *ethos* and an order resulting from precise options of value and of legal civilisation, which allow not only to set some minimum standards of compliance of negative measures with a core number of human rights, but also to find the direction towards the individuation of higher moral and legal limits to be placed upon negative preventive action. Besides, the openness of (also global) constitutional principles to different conceptions of liberty and justice and, more generally, to different political and ideological views should not be conceived necessarily as a fault of an (also global) constitutional order, but rather an expression of pluralism and democracy and, therefore, of respect for diversity.

The critical and constitutive functions of human rights are not necessarily bound to remain relegated within the abstract academic analysis and critique, as at least since World War II a huge number of bodies and institutions have been entrusted with the task of giving effective protection to fundamental rights both on a national and supranational level<sup>148</sup>. It is true that many relevant intergovernmental bodies in charge

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decendent to the respect by the alien's government of the principle of reciprocity, because of «intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress».

<sup>145</sup> L. ZEDNER, *Preventive Justice or Pre-Punishment?*, cit., 187 and *passim*.

<sup>146</sup> G. ZAGREBELSKY, *Il diritto mite*, Torino, Einaudi, 1992, p. 148.

<sup>147</sup> Cf. ID., *ibid.*, Ch. 4 and 5.

<sup>148</sup> Think, amongst others, about the UN Human Rights Council (which replaced the Commission on Human Rights), the Office of the High Commissioner for Human Rights, the UN Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee against Torture, the Subcommittee on Prevention of Torture, the Committee on the Rights of the Child, the Council of Europe Commissioner for Human Rights, the European Court of Human Rights, the European Court of Justice, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, the League of Arab States inter-governmental Permanent Arab Commission on Human Rights, the Arab Human Rights Committee, National Human Rights Commission of India, but also the International Criminal Court. Not to mention the countless non-governmental agencies and independent movements actively committed into the promotion and protection of human rights, such as Amnesty International, Human Rights Watch, the International Human Rights Council, the American Civil Liberties Union (ACLU), the Arab Commission for Human Rights, the Arab Organization for Human Rights, the Asian Human Rights Commission, the Asian Centre for Human Rights, Human Rights in China, *Ligue des droits de l'homme*, just to mention a few.

with the protection of human rights are still not working as they should, as they often appear to be still too deferential to national political powers and often get easily exploited, misused or even abused by such powers in order to pursue their own policies of negative globalisation (think, for instance, to the controversial institution and employment of the International Criminal Tribunal for the former Yugoslavia by NATO powers)<sup>149</sup>. It is also true that non-governmental agencies are often too weak to decisively influence and reshape national and international policies and sometimes they can be more or less inadvertently supportive of municipal morals and local human rights conceptions that can be no less dangerous than the violations they are allegedly aimed at preventing, as they once again end up in justifying imperialist actions or however conveying wide deployments of violence against the most disparate “enemy aliens” (to stick to our example, some have criticised the one-sided position taken by Human Rights Watch on the human rights violations committed by NATO in the situation of the former Yugoslavia)<sup>150</sup>. We have to acknowledge, though, that the recent years have provided us with many factual demonstrations that these institutions can positively affect both political action and, consequently, legal regulations, to the concrete benefit of human rights.

One of the clearest examples is that of the famous Kadi case, in which, through several decisions<sup>151</sup>, the General Court and the Court of Justice of the European Union has proved to be willing to afford the highest protection possible to individual rights (such as the right to an effective judicial remedy, the rights of defence, the right of property in the light of the principle of proportionality) against the imposition at the European level of preventive measures devised by UN resolutions, hardly consistent with the human rights safeguards as conceived by European Union law. Though Kadi was delisted – on October 5<sup>th</sup>, 2012 – only eleven years after his enlisting – on October 17<sup>th</sup>, 2001 –, the importance of the European courts’ decisions cannot be underestimated. First, they had the force to resist the (also political) pressures coming from an international organisation such as the United Nations (and from the world powers represented in its Security Council) in the name of the particular *ethos* (of liberty and justice) embodied by the general principles of the European Union, which include the fundamental human rights and liberties protected by the ECHR. Secondly, such decisions concretely contributed to reshaping the procedures of enlisting and delisting so to allow the interested person a more effective participation and influence first through the institution of a focal point and then through the institution of the Office of the Ombudsman competent for submitting the requests of delisting to the Security Council<sup>152</sup> (it was upon such a request that Kadi was finally delisted).

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<sup>149</sup> Cf. A. BERNARDINI, *La Jugoslavia assassinata*, Napoli, Editoriale Scientifica, 2005 and again R.M. HAYDEN, *Biased Justice*, cit.

<sup>150</sup> R.M. HAYDEN, *ibid.*

<sup>151</sup> General Court of the EU (GCEU), September 21<sup>st</sup>, 2005, T-315/01, Yassin Abdullah Kadi v. Council and Commission, in “European Court Reports”, 2005, p. II-3649 ff.; GCEU, September 21<sup>st</sup>, 2005, T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission, *ibid.*, p. II-3533 ff.; CJEU, September 3<sup>rd</sup>, 2008, joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission, *ibid.*, 2008, p. I-6351 ff.; GCEU, September 30<sup>th</sup>, 2010, T-85/09, Yassin Abdullah Kadi v. Commission, *ibid.*, 2010, p. II-5177 ff. and Court of Justice of the EU (CJEU), 18 July 2013, joined cases C-584/10 P, C-593/10 P, C-595/10 P, Commission v. Yassin Abdullah Kadi, *ibid.*, 2013.

<sup>152</sup> L. PASCULLI, *Le misure di prevenzione*, cit., 231-237.

Also the European Court of Human Rights played a relevant, although probably less decisive, role in contrasting violations of fundamental human rights and liberties in negative prevention. Particularly, the Court repeatedly unmasked the most disparate «labelling games» and other expedients enacted by States to expediently circumvent human rights safeguards<sup>153</sup>.

But the principles springing from that universal dimension of human dignity are not known only to supranational courts. The progressive penetration of the principles of international law protecting a non-derogable nucleus of individual rights within national jurisdictions brought to what has been defined a change of the rules of the game<sup>154</sup>, as national courts are less inclined to give up their prerogatives of control over the other State powers also in times of war and emergency, thus leading the way to a rebalancing between the three State powers, in compliance with the principle of separation of powers also in exceptional circumstances. Moreover, a comparative reading of the decisions of the courts of different jurisdictions on negative measures allows to detect a common thread of principles elaborated by such courts, in the light of the respective constitutional traditions but also of international human rights law, in the attempt to effectively reduce the possibility of abuses<sup>155</sup>.

More than that, an important evolution deserves to be mentioned: *judicial globalisation*, that is, the judicial borrowing of international and comparative legal materials in a most appreciable comparative perspective<sup>156</sup>. Such practice, particularly developed in common law jurisdictions (amongst which Canada, United Kingdom, Ireland, India, Zimbabwe, Hong Kong, South Korea, Botswana) and even prescribed by certain Constitutions (such as, for instance, that of South Africa, art. 39, par. b e c), today is facilitated by the increase of occasions of meeting, cultural exchange and collaboration that globalisation offers to the magistrates of different nationality<sup>157</sup>. Moreover, judicial globalisation seems destined to receive further impulse also in the civil law jurisdictions of ECHR and EU States members, thanks to the influence of the decisions of the European Court of Justice and the European Court of Human Rights on such jurisdictions (which, in turn, make large use of national decisions in order to interpret also supranational law).

Judicial globalisation may represent a decisive device for diffusing and fostering the adhesion to the principles protecting fundamental rights and liberties, as well as for encouraging the circulation of best practices in crime prevention (and especially of positive measures), in view of ever higher and more uniform standards of efficacy and of individual safeguards. On a deeper level, judicial globalisation may also contribute to strengthen the role of judges in contrasting the risk of abuses by the executives and in

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<sup>153</sup> Cf., for instance, European Court of Human Rights (ECtHR), *Guzzardi v. Italia*, November 6<sup>th</sup>, 1980, n. 7367/76.

<sup>154</sup> D. BONNER, *Executive Measures, Terrorism and National Security. Have the Rules of Game Changed?*, Ashgate, Aldershot, 2007, IX-X, 3-4 and *passim*.

<sup>155</sup> See our previous analysis in L. PASCULLI, *Le misure di prevenzione*, cit., 159 ff.

<sup>156</sup> A.M. SLAUGHTER, *A New World Order*, Princeton, Princeton University Press, 2004, p. 66; M.S. FLAHERTY, *Judicial Globalization in the Service of Self-Government*, in "Ethics & Int'l Affairs", 2006, 20, p. 477 ff.; ID., *More Real Than Apparent: Separation of Powers, The Rule of Law, and Comparative Executive «Creativity» in Hamdan v. Rumsfeld*, in "Cato Supr. Court Rev.", 2005-2006, p. 51 ff.; ID., *Aim Globally*, in "Constitutional Commentary", 2000, 17, 205, p. ff.; ID., *Judicial Foreign Relations Authority After 9/11*, in M.B. MUKASEY, P.M. SHANE et al., *Civil Liberties 10 Years After 9/11*, in "N.Y.L. Sch. Rev.", 2011/12, 56, p. 119 ff. (with particular reference to U.S. anti-terrorism law).

<sup>157</sup> A.M. SLAUGHTER, *A New World Order*, cit., 65-103; M.S. FLAHERTY, *Judicial Globalization*, cit., 477 and footnote 1.

compensating to the lack of international judicial control over certain international measures<sup>158</sup> and the currently imperfect (inasmuch as too unbalanced in favour of executive powers) global separation of powers<sup>159</sup>.

We may, therefore, conclude this analysis with some positive note.

The global era is not only an age of negatives. It is also an age of positives. To say it with Norberto Bobbio and Louis Henkin, our age is, first of all, the «age of rights»<sup>160</sup>, but it is also the age of diversity, the age of principles, the age of judicial globalisation.

Against the temptation to resign to the fact that any intervention to reduce or eliminate the negative effects of globalisation – amongst which, above all, global crime – ultimately depends on the political will of those who govern our societies, we just have to discover the positive instruments that globalisation itself offers to contrast its negatives (amongst which the globalisation of crime and its negative prevention) and to build revolutionary frameworks, in order to criticise, influence and eventually reorganise political power towards a global society more just and free... especially from fear.

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<sup>158</sup> E. CANNIZZARO, A Machiavellian Moment? The UN Security Council and the Rule of Law, in *Int'l Organizations L. Rev.*, 3, 2006, p. 189 ss.

<sup>159</sup> Cf. M. FLAHERTY, *Judicial Globalization*, cit., p. 485 ff.

<sup>160</sup> Curiously enough, both Authors unknowingly used the same expressions in their two respective works both published in 1990: N. BOBBIO, *L'età dei diritti*, Torino, Einaudi, 1990 [English edition: ID., *The Age of Rights*, Cambridge, Polity Press, 1996] and L. HENKIN, *The Age of Rights*, New York, Columbia University Press, 1990.