

Counter-terrorism and human rights

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1. Importance of safeguarding human rights while fighting terrorism

Effective counter-terrorism measures and the protection of human rights are not conflicting but complementary and mutually reinforcing goals. We must be sure that in combating terrorism we do not ourselves damage our democratic and legal institutions. This is important not only for moral reasons, but also to prevail in the long term: Terrorists want to destroy who we are, our values of rule of law, freedom, human rights which our societies are built on. We must not allow the terrorists to prevail.

The importance of respecting human rights, international law and the rule of law in the fight against terrorism is set out in the EU Counter-terrorism Strategy which was adopted in 2005 by the European Council. The EU's "strategic commitment" as set out in the strategy is "To combat terrorism globally while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice." The EU Security Strategy states: "The development of a stronger international society, well functioning international institutions and a rule-based international order is our objective. We are committed to upholding and developing international law."¹

The Council has stressed the importance of the respect of human rights in the fight against terrorism on numerous occasions, for example: "The Council reiterates that human rights, refugee law and international humanitarian law have to be respected and maintained when combating terrorism. The Council will continue to follow closely developments with regard to human rights in combating terrorism and take adequate measures for their protection."² We are committed to combating terrorism effectively, using all legal means and instruments available. Terrorism is itself a threat to our system of values based on the rule of law."³

The importance of respect of human rights in the fight against terrorism has also been recognized in the EU Strategy for Combating Radicalization and Recruitment to Terrorism identifies the respect of human rights as one of the cornerstones of PREVENT: "Democratic societies can only overcome the scourge of terrorism in the long term if they remain committed to their own values. The EU's fight against terrorism is solidly anchored in a legal framework that ensures respect for human rights and fundamental freedoms....Respect for human rights creates a climate of tolerance, diversity and acceptance conducive to successful integration. The protection of human rights of all people is an important aspect of the EU's non-discrimination and integration policies....All people in Europe have the means to obtain redress for violations of human rights as defined by the European Convention for the Protection of Human Rights and Fundamental Freedoms, through national courts and the European Court of Human Rights and the Court of Justice of the European Communities⁴."

¹ European Security Strategy

² Council Conclusions, 11 December 2006

³ EU Foreign Ministers 15.09.2006

⁴ EU Media Communication Strategy; European Union strategy for combating radicalisation and recruitment through effective communication of EU values and policies (doc 10862/1/06 REV 1 EXT 1)

A wide array of factors are, to varying degrees in various parts of the world, conducive to radicalisation. Sustainable development, democracy and good governance, and respect for human rights and the rule of law, make people less likely to embrace the ideologies of terrorists groups⁵.

There might be a temptation to over-react and argue that the normal rules and human rights do not apply when fighting terrorism. However, this is short-sighted: measures that are perceived as unfair or violating human rights can serve as recruitment tools for terrorists and create more terrorists than they disable. I agree with US President Obama that " ... in the long run we also cannot keep this country safe unless we enlist the power of our most fundamental values. We uphold our most cherished values not only because doing so is right, but because it strengthens our country and keeps us safe. Time and again, our values have been our best national security asset - in war and peace; in times of ease and in eras of upheaval. Instead of serving as a tool to counter-terrorism, Guantanamo became a symbol that helped al Qaeda recruit terrorists to its cause. ...Indeed, the existence of Guantanamo likely created more terrorists around the world than it ever detained. So the record is clear: rather than keep us safer, the prison at Guantanamo has weakened American national security. It is a rallying cry for our enemies. It sets back the willingness of our allies to work with us in fighting an enemy that operates in scores of countries. By any measure, the costs of keeping it open far exceed the complications involved in closing it."⁶

Judicial review of counter-terrorism measures both nationally and at EU level is an important part of the rule of law and ensures human rights compliance. The EU has strengthened its own human rights protections in the Lisbon Treaty: The Charter of fundamental rights was adopted, EU accession to the European Convention of Human Rights is foreseen in the Lisbon Treaty, which will eventually lead to the jurisdiction of the European Court of Human Rights regarding EU measures. All EU Member States are already bound by the ECHR and have to comply with the rulings of the European Court of Human Rights. The Court has delivered many rulings in the counter-terrorism context, for example on the limits of allowed interrogation techniques, transfers or now a pending case on diplomatic assurances. Similarly, the European Court of Justice has been active reviewing EU counter-terrorism measures, in particular sanctions. For example, the EU autonomous sanctions regime has been reformed and made human rights compliant after it had been struck down initially by the European Court of Justice. Since Lisbon, the ECJ has full jurisdiction for justice and home affairs. In this domain, transitional rules with previous treaties are governed by Article 10 of Protocol No 36 to the Treaties. Active judicial review is taking place also in the Member States. Since Lisbon, the role of the European Parliament in counter-terrorism has been increased, it now acts as co-legislator. For example, the EU-US Terrorist Financing Transfer Programme (TFTP/Swift) Agreement had to be re-negotiated with US after the initial no vote in the European Parliament, in order to comply to EP's vision on data protection for the citizens.

All this shows that judicial review is key in assuring human rights compliance of counter-terrorism measures in Europe.

2. Data protection and data sharing

One very controversial issue, which is at the core of the balance between human rights and security, is data protection and data sharing.

⁵ EU Strategy for Combating Radicalisation etc

⁶ President Obama, Protecting Our Security and Our Values, National Archives Museum, Washington, D.C. May 21, 2009

Reinforcing data collection and data protection: Because of the changing nature of the threat ("lone actors", "clean skins") we have to collect and share more relevant data such as police (DNA, fingerprints) and justice data (criminal records) but also information held by the private sector (passenger name records, mobile phone data). Anders Breivik, the author of the most recent drama in Norway, claims to have planned his attacks over nine years. Who was he in touch with during that time? Where did he go? At the same time, it is equally important to design robust data protection regimes. It is indispensable in Europe to get support in Parliaments and public opinion for data sharing measures, given the fear of a surveillance society. This means: More data protection allows for more sharing because there is more trust and a level playing field. Programmes such as the EU-US PNR Agreement and the EU-US TFTP Agreement are vital in the fight against terrorism and have allowed to disrupt a number of plots. At the same time, these agreements contain strong data protection provisions. The EU is considering creating its own PNR and TFTS systems (so far it relies on US analysis only). Research is important and can increase both security and freedom ("privacy by design"). Concepts such as privacy by design have to be supported, as they allow for more sharing while increasing data protection.

More public-private partnerships are needed, especially between the intelligence community and private industry. This is relevant for example with regard to terrorist financing and cargo security. The Yemen parcel bomb plot of October 2010 led to many surprises: Very different rules existed for screening of passengers and their luggage compared to cargo. Customs and counter terrorism should better cooperate and security aspects be better integrated into the customs process. We need fora to better inform private carriers and providers on the threat and to receive information for the security agencies. There was no mutual recognition in the EU of cargo screening and no common methodology to determine high risk cargo, although in the meantime, these issues have been improved by new EU air cargo policies.

3. EU-US context : Counter-terrorism and international law

The EU and the US agree: "Efforts to combat terrorism should be conducted in a manner that comports with the rule of law, respects our common values, and complies with our respective obligations under international law, in particular international human rights law, refugee law, and humanitarian law. We consider that efforts to combat terrorism conducted in this manner make us stronger and more secure."

In 2006, an in-depth dialogue of EU legal advisers with the US State Department's Legal Adviser John Bellinger was started to discuss the various complex legal questions related to the fight against terrorism. This very fruitful dialogue allowed to understand better each others interpretation of the international law framework applicable to the fight against terrorism and each others policies. Both sides were able to identify areas of agreement, areas of disagreement and areas for further discussion. The importance of the dialogue has been recognized in the EU-US Joint Statement on Guantanamo closure: "Taking into account that the action against international terrorism raises important legal questions, we recognize the importance of deepening our dialogue on international legal principles relevant to combating terrorism. In particular, we will continue working together in semi-annual meetings involving the Legal Advisers to the Foreign Ministries of the European Union member states (COJUR), representatives of the General Secretariat of the Council of the European Union and the European Commission, and the U.S. Department of State Legal Adviser, with the objective of furthering an improved mutual understanding of our respective legal frameworks, and developing common ground from which we can work more effectively in combating terrorism."⁷

⁷ Joint Statement of the European Union and its Member States and the United States of America on the Closure of the

Terrorism is a crime. Terrorists have to be investigated, prosecuted and convicted according to the normal rules of criminal law. The EU has challenged the global war against Al Qaeda paradigm. And there are several good reasons for that: By treating terrorists as the mean criminals they are, we are able to confront the threat on our own terms, based on the rule of law. This helps take the false glamour out of terrorism. I have never heard Al Qaeda referring to the Madrid bombers as martyrs as they do when talking about Guantanamo inmates, for instance. Why? Because they stood a trial and were convicted for their criminal acts. They are no good for propaganda recruitment purposes. I want to stress that criminal investigations and trials in Europe and in the US have an impressive track record and have provided a treasure-trove of information in the fight against terrorism. And last, but not least, bringing terrorists to justice is paramount for the victims and their families, because it allows their voices also to be heard. 10 years after 9/11 and after the death of Bin Laden, it is time for our societies to find closure and look forward. Emergency measures and responses must not be made permanent. We strongly support President Obama's attempt to return the US response to terrorism closer to the traditional law enforcement and criminal justice paradigm which we share. There is no global armed conflict in the legal sense against Al Qaeda.

The EU welcomed the steps President Obama took after taking office regarding detainee policies and in June 2009 created a framework to support the US Administration in the attempt to close Guantanamo⁸. Since then, about two dozen detainees have been accepted by EU Member States. The EU-US Joint Statement on Guantanamo closure states: "We note the positive actions taken by the President of the United States of America when he ordered the closure of the Guantanamo Bay detention facility by January 22, 2010. We welcome the determination of the United States of America to close the facility together with other steps taken, including the intensive review of its detention, transfer, trial and interrogation policies in the fight against terrorism and increased transparency about past practices in regard to these policies, as well as the elimination of secret detention facilities... We take note of the commitment of the United States to develop a new and more sustainable approach to security-related issues and of the thorough review of US policies initiated by President Obama's Executive Orders of January 22, 2009. Against this background and in the expectation that underlying policy issues will be addressed, the EU and its Member States wish to help the US turn the page. In this context, certain Member States of the European Union have expressed their readiness to assist with the reception of certain former Guantanamo detainees, on a case-by-case basis."

The EU has continued its very useful dialogue with the State Department Legal Adviser Harold Koh. The US Administration has banned "enhanced interrogation techniques" and secret detention. However, Military Commissions continue for alien terrorist suspects, where the first death penalty trial has started. Political pressure against regular criminal trials of alien AQ related terrorist suspects is increasing. Legislation currently pending in Congress, which the Administration has threatened to veto, would not only make Guantanamo closure impossible, it would also prohibit criminal trials in regular courts. This is attracting adverse attention in Europe and is making it more difficult, for example to persuade the European Parliament to back cooperation agreements essential to Europe's security such as on PNR or TFTP. It would be in the EU's interest to engage Congress, as the US Administration has been engaging the European Parliament, to explain how Europe has

Guantanamo Bay Detention Facility and Future Counterterrorism Cooperation, based on Shared Values, International Law, and Respect for the Rule of Law and Human Rights

⁸ The framework consisted of the Conclusions of the Council and of the representatives of the Governments of the Member States on the closure of the Guantanamo Bay Detention Centre; the Joint Statement of the European Union and its Member States and the United States of America on the Closure of the Guantanamo Bay Detention Facility and Future Counterterrorism Cooperation, based on Shared Values, International Law, and Respect for the Rule of Law and Human Rights and an EU submission to the Detention Policy Task Force

been able to implement effective counter terrorism supported by effective guarantees of human rights and fundamental freedoms.

4. Law enforcement and criminal justice approach: Focus on prevention

From a CT point of view, the criminal justice system has been a vital and very effective tool. The track record is excellent. Criminal investigations have provided a lot of information on terrorist networks and plots. Experienced prosecutors and law enforcement officials have obtained a lot of information from defendants. Many plots have been disrupted in Europe over the past years and the perpetrators convicted in the courts.

As a key part of its commitment to the international rule of law and human rights, the EU has been promoting globally a criminal justice and law enforcement approach to the fight against terrorism, based on the rule of law and human rights. Over the past decade, the EU has also developed what is internationally the most comprehensive model of cooperation in criminal justice and law enforcement.

As the criminal justice system is one of the most important tools in the fight against terrorism in the EU, it has to be effective. We cannot wait for the criminal justice system to kick in only after an attack has been committed. Instead, we have to use the criminal justice system also as a preventive tool. This means that we need to have offenses on the books which cover the preparatory stages, such as membership in a terrorist organization. Within the EU, an additional challenge is Schengen, the area of free movement of people in most EU countries without border controls. Terrorist networks operate in more than one country and travel within the EU is easy and without controls. Therefore, in the EU we had to develop tools that create a level playing field in terms of substantive offenses. Certain minimum standards of terrorism related behaviour have to criminal offenses in all EU Member States in order to avoid that terrorists commit an offense in one EU MS and then travel to another, where what they have done is not criminalized. The EU did this with two so-called Framework Decisions on Counter-terrorism.

However, the same minimum level of substantive offenses is not enough to have an effective criminal justice system in place on a European level. Given the great number of cross border cases and the ease of travel, we had to develop other tools in addition to the offenses themselves to be able to achieve convictions across Europe. Traditional mutual legal assistance and extradition instruments have been complemented with real time cooperation in EUROPOL and EUROJUST, as well as the mutual recognition principle in criminal procedure (e.g. European Arrest Warrant, European Evidence Warrant, Joint Investigation Teams, European Investigation Order under preparation). EU Mutual Legal Assistance and Extradition Agreements with third countries such as the US and Japan have created a modern framework for cooperation in criminal justice.

The most important opportunity to advance the rule of law, human rights and a criminal justice approach to the fight against terrorism is the Arab Spring. The Minister of Interior of Tunisia has already approached the EU for assistance in Security Sector Reform. The EU, given its huge experience in transforming totalitarian security systems after 1989, should respond to the Tunisian request for assistance as a priority, designing, together with the Tunisian government a comprehensive strategy for assistance in Security Sector Reform (SSR) reform, which would be fully in line with the “deep democracy” principle endorsed by the European Council. SSR needs a broad and comprehensive approach, starting with the legal framework, re-drafting of the Constitution and the laws to ensure independence of the judiciary, democratic control of the armed forces, limits to the authority of security agencies and oversight mechanisms.

In order to be effective this kind of reform should not consist of a series of piecemeal projects which do not address the core of the issue, which is transformation of the security sector. There must be a broad strategy if reform is to achieve the depth and sustainability needed for long term success. This applies not only in Tunisia but also to opportunities in Morocco, Libya and Egypt. Above all, it applies to the EU's most challenging Counter Terrorism relationship, with Pakistan. Recent events have shown the limits of the military approach to Counter Terrorism in Pakistan. The EU is already active in supporting the criminal justice approach, but this has been difficult because of the sheer scale of the problems facing Pakistan and the losses it has been incurring, and because of the wider need to improve the capacity and effectiveness of all aspects of the justice system. A holistic programme to develop the rule of law is needed not only for Counter Terrorism but also for economic development. Given the scale and depth of the problems, this will have to be a long term endeavour but needs to start now.

5. Listing

An area where human rights are discussed in the context of the fight against terrorism is the freezing of assets in the contexts of targeted sanctions.

TARGETED SANCTIONS ("UN LIST")

Council Regulation (EC) No 881/2002 and Council Regulation (EU) No 1286/2009

Following the judgment of the Court of Justice of the European Communities of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P Kadi & Al Barakaat v. Council and Commission, the Commission made a proposal for an amendment of Regulation (EC) No 881/2002 [COM(2009)187] on 22 April 2009 and the Council adopted Regulation (EU) No 1286/2009⁹ on 22 December 2009.

The revised procedure now provides that the listed person, entity, body or group should be provided with the reasons for listing as notified by the UN Sanctions Committee, so as to give the listed person, entity, body or group an opportunity to express his, her or its views on those reasons while at the same time allowing for the funds and economic resources of persons, entities, bodies and groups included in the Al-Qaida and Taliban list drawn up by the UN to be frozen 'without delay' as provided for by the relevant UN Security Council Resolutions.¹⁰

Meanwhile, clarification by the Court of Justice of the consequences of the 2008 judgment is awaited. On 30 September 2010, the General Court handed down its judgment in Case T-85/09, which concerns Mr Kadi's appeal against Commission Regulation (EC) No 1190/2008 which re-listed Mr Kadi after the judgment of 3 September 2008. The Council, the Commission and the UK

⁹ OJ L 346, 23.12.2009, p. 42

¹⁰ United Nations Security Council Resolutions (S/RES) relating to the prevention and suppression of terrorism and terrorist financing require jurisdictions to freeze without delay the funds or other assets of, and to ensure that no funds or other assets are made available, directly or indirectly, to or for the benefit of any person or entity either: a.) designated by, or under the authority of, the United Nations Security Council under Chapter VII of the Charter of the United Nations, including in accordance with S/RES/1267(1999) and its successor resolutions (see S/RES/1267(1999), S/RES/1333(2000), S/RES/1363(2001), S/RES/1390(2002), S/RES/1452(2002), S/RES/1455(2003), S/RES/1526(2004), S/RES/1617(2005), S/RES/1730(2006), S/RES/1735(2006), S/RES/1822(2008), S/RES/1904(2009)); or b.) designated by that jurisdiction pursuant to S/RES/1373(2001).

have lodged appeals against the General Court's judgment (Joined Cases C-584/10 P, C-593/10 P and C-595/10 P).

The adoption of **Security Council Resolution 1904 (2009)** on 17 December 2009 has introduced significant improvements to the sanctions regime against Al-Qaida and the Taliban and associated individuals and entities, including new elements relating to the procedures for the listing and delisting of individuals and entities, most notably the introduction of an independent and impartial ombudsperson to look into requests for delisting of such individuals and entities. The EU declaration on the adoption of Security Council Resolution 1904(2009) welcomed it as a significant step forward in the continued efforts of the Security Council to ensure that fair and clear procedures exist for placing individuals and entities on the list created pursuant to Security Council Resolution 1267(1999) and for removing them as only procedural guarantees for the individual and entities involved will strengthen the effectiveness and contribute to the credibility of this and other sanctions regimes.

On 17 June 2011, the Security Council of the United Nations adopted **Resolution 1988 (2011) and Resolution 1989 (2011)** which divides the sanctions regime against Al-Qaida and the Taliban into two separate regimes. In particular, the Ombudsperson's mandate has been extended, and the rules governing her office have been further improved and elaborated in Security Council Resolution 1989 (2011).

Implications of the Lisbon Treaty

The Lisbon Treaty changed the legal situation by introducing two separate legal bases for measures regarding the freezing of assets related to terrorism:

- Article 75 of TFEU¹¹ under the Title "Area of Freedom, Justice and Security", which provides a specific legal basis for defining a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds of natural, legal persons or non-State entities in order to prevent terrorism, and

¹¹ **Art. 75 TFEU** reads as follows:

- (1) Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.
- (2) The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.
- (3) The acts referred to in this Article shall include necessary provisions on legal safeguards.

- Article 215 of the TFEU¹², which provides a legal basis for restrictive measures in the framework of the Common Foreign and Security Policy, including the freezing of funds and economic resources of natural or legal persons and groups of non-State entities with a view to preventing international terrorism.

While the framework referred to in Article 75(1) of the TFEU is to be adopted following the ordinary legislative procedure (Commission proposal, co-decision European Parliament and Council), measures under Article 215 of TFEU are adopted by the Council on a joint proposal from the High Representative and the Commission, and the European Parliament is only informed thereof.

In adopting Council Regulation (EU) 1286/2009¹³ on the basis of Article 215 of TFEU, the Council has taken the view that action against international terrorism pertains to the CFSP. Conversely, Article 75 TFEU relates only to EU internal persons or groups.

The European Parliament has filed an application to have Council Regulation (EU) 1286/2009 annulled because it argues that the legal basis should have been Article 75 TFEU rather than Article 215 TFEU (Case C-130/10). The case is still pending.

In its EU Internal Security Strategy of 22 November 2010¹⁴, the Commission stated that in 2011 it would consider devising a framework for administrative measures based on Art. 75 TFEU as regards freezing of assets to prevent and combat terrorism and related activity.

The Commission Services (DG HOME) organised three expert meetings to discuss with MS, the Council Secretariat and the Counter Terrorism Coordinator the scope and application of Art. 75 of TFEU. The last meeting took place in Brussels on 17 March 2011.

TARGETED SANCTIONS ("AUTONOMOUS LIST")

Council Common Position 2001/931/CFSP and Council Regulation (EC) No 2580/2001

On 9 September 2010, the General Court annulled a Council decision confirming the listing of Stichting Al Aqsa (Case T-348/07, Stichting Al Aqsa v. Council). The General Court held that, if the Council confirms a listing decision following a review based on Article 1(6) of Common Position 2001/931/CFSP, the decision of a competent authority referred to in Article 1(4) of Common Position 2001/931/CFSP on which the original listing decision was based, must still be valid. In the present case, the decision by the competent authority had been repealed. Two appeals against this judgment are pending (Joined Cases C-539/10 P and C-550/10 P).

¹² **Art. 215 TFEU** reads as follows:

- (1) Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.
- (2) Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.
- (3) The acts referred to in this Article shall include necessary provisions on legal safeguards.

¹³ OJ L 346, 23.12.2009, p. 42

¹⁴ COM(2010) 673 final

On 7 December 2010, the General Court dismissed the action submitted by Mr. Sofiane Fahas (Case T-49/07) against his listing by the Council. The Court stated that the Council had respected its obligation to state reasons; that by sending the contested decision and a Statement of Reasons to the applicant, the Council had respected his rights of defence and his right to effective judicial protection. The Court also concluded that none of the Applicant's other fundamental rights has been violated.

Some of the litigation related to the autonomous list continues. Key issues under consideration by the Court include also the interpretation of “decision taken by a competent authority” (C-27/09 P Advocate General's Opinion delivered on 14.07.2011), transmission of sensitive information to the Union judicature (C-27/09 P - *ibid*) and compensation for damage caused by the Union (T-341/07 - awaiting judgment).

The last application was submitted to the General Court on 11 April 2011 (Case T-208/11) by the LTTE, the Council submitted its Defence on 19 September 2011.