EU Counter-terrorist Policies: Security vs. Human Rights?

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The recent Madrid and London attacks "imported" the phenomenon of mass global terrorism into Europe, underlying the need for an increased security and anti-terrorist legal framework within the EU. The Western Balkan ise in the core of this discussion if we consider that Slovenia is already an EU member, Croatia is a candidate country and therefore will have to implement most of the EU legislative framework, and Bosnia is effectively controlled by the EU in terms of security. Prior to those events, and even before 9/11, the EU had already adopted specific measures to address aspects of terrorism, many of which have a prima facie impact upon the fundamental rights of European citizens. The two central questions arising are 1) is it acceptable to "trade" human rights with security and 2) do these measures really provide adequate security against global terrorism? The presentation will address these issues, attempt to provide the answers and stimulate a constructive discussion.

I. Introduction

The 2005 terrorist attacks in London displayed, in the most tragic way, the vulnerability of Western societies in general and Europe in particular to the activity of groups or individuals willing to perform suicide bombings or other forms of terrorist activity.

We have already witnessed an even larger scale event in Madrid in 2004, which resulted in about 200 civilians getting killed. However, assimilating the two incidents would be a huge mistake for the following reasons: (1) the Madrid bombings were better organized and much more sophisticated in the manner of execution,[2] (2) the profile of the terrorists in Madrid fitted perfectly the American and British oriented model of Moslem fundamentalists of Arabic origin. On the other hand, according to the information that was released by the British police and press, the four identified suicide terrorists were British citizens, raised in Britain, properly incorporated within the local society, while three of

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[2] In the terrorist attack in the railway station of Madrid on 11th March 2004 the terrorists used remote controlled devices and the plan was very professionally organized and executed, calculated to cause the maximum amount of deaths.

them were also born in Britain.[3] This crucial difference seems to bring Europe against a new type of terrorist threat, not anticipated before: the "next door" terrorist which, moreover, does not fit the typical model of a religious fanatic Arab.

This presentation will discuss the main legal and political issues of the EU anti-terrorist measures and policies, as well as their effects upon the fundamental rights and freedoms of European citizens.

One could wonder about the relation between the EU policies and the Western Balkan. However, this region is indeed very close to the EU, not merely geographically, but also in many other aspects.

Our host country, Slovenia, is already a part of the European family, while Croatia and FYROM have applied for membership to the EU, which necessarily means the adoption of the EU legislative and normative framework prior to their accession. As for Bosnia–Herzegovina, the involvement of the EU is substantial, since EUFOR has assumed the military control of Bosnia from NATO in 2004,[4] while the EU has been appointing the Special Representative to BiH since 2002.[5] Moreover, the Union has declared in numerous occasions that it is looking forward to enhanced cooperation with Serbia, Montenegro and Albania.

Moreover, we should not forget that since 1st January 2007, with the accession of Bulgaria and Rumania, the Western Balkan region will be "enclosed" between EU countries. Therefore, if we assume that the EU countries constitute a secure area, it is in the best interests of the Union to secure its immediate European neighbourhood. Thus, the Western Balkan region becomes a crucial part of the equation.

II. Legal Responses to Terrorism by the EU

A. *Initial Action against Terrorism*

The EU countries did not discover terrorism after the Madrid and London bombings. In fact, Western Europe was the main theatre of terrorist activity from the 70s to the 90s, both of European or Arabic origin. One may remember the bloody 1972 Munich Olympics, when the Black September group captured and eventually killed several Israeli athletes, and the Carlos operation in Vienna against the petroleum Ministers of the OPEC. In the European field, we could refer to the activities of Brigate Rosse in Italy, Action Direct in France, November 17, ELA (Revolutionary Popular Struggle) etc. in Greece, RAF and Baader Meinhoff in West Germany, all of which have been dissolved or suspended

[3] See the BBC website with the profiles of the four suicide bombers. BBC, *Suicide Bombers' 'Ordinary' Lives*, 18 July 2005. Available online at: http://news.bbc.co.uk/1/hi/uk/4678837.stm (All websites used in this paper were last checked in January 2007).

[4] EUFOR was constituted by the Council Joint Action 2004/570/CFSP of 12 July 2004 and its presence and role in Bosnia was approved by the UN Security Council Resolution S/RES/1575 (2004) of 22 November 2004, *EU Military Operation in Bosnia and Herzegovina (EUFOR - Althea)*. Due to the fact that it was created to substitute the SFOR, its strength (7.000) and mandate remain the same. For more detailed information on EUFOR see: http://www.euforbih.org/mission/mission.htm.

[5] This post, which is provided by the Dayton agreement, entails large powers of "colonial nature", that amounts even to the removal of the elected leaderships of the constituting federal entities of Bosnia. This power was used by the former Special Representative Paddy Ashdown who decided to remove the leaders of the Republika Srpska, while the new Special Representative has already threatened that if the new government of the Republika Srpska that was elected on October 1st holds a referendum on independence from the Federation he will do the same. On the powers of the EU Special Representative see his website: http://www.eusrbih.org. Javier Solana has set the specific political tasks of the EU that the Special Representative is to achieve in a press statement (EU Doc. S033/06 of 31.1.2006).

their activities, as well as to various radical branches of the IRA and unionist groups in Northern Ireland, and ETA in Spain, which remains the most active terrorist group in Europe nowadays.[6]

Even before 2001, the EU had adopted certain measures – of a specific character – with a view to combat terrorism and organized crime, more important of which were the Council Joint Action 96/610/JHA of 15 October 1996 concerning the creation of a directory of counter-terrorism competences and expertise, in order to enable relevant cooperation between member states,[7] Council Joint Action 98/428/JHA of 29 June 1998 on the creation of a European Judicial Network with responsibilities in terrorist offences,[8] and Council Joint Action 98/733/JHA of 21 December 1998 which makes participation in a criminal organization a criminal offence in the EU member states.[9] Reference should also be made to the Council Common Position 2001/154/CFSP of 26 February 2001, which provides, *inter alia*, for the freezing of funds belonging to Osama Bin Laden and persons or entities associated with him.[10]

A general remark that could be made over the aforementioned documents is that the primary aim of the measures is to create mechanisms of cooperation and coordination between the competent authorities of the various states concerned. The only significant legal decision made was making participation in a criminal organization (including terrorist groups) an individual offence, common to all EU countries, which would apparently facilitate extradition proceedings and enhance interstate cooperation.[11]

This lack of a consistent policy towards terrorism may be justified on two grounds: (a) during the late 90s the actual problem of terrorism within the EU was minimized with the exception of Spain (ETA), UK (IRA groups) and Greece (17 November etc.) and there was no apparent reason for an overall EU antiterrorist policy and (b) the relevant areas of jurisdiction remain part of the core of state authority and states – especially the ones with terrorism problems - did not wish EU interference with their antiterrorist activities, including political considerations with regard to the labelling of terrorists.

B. The Situation after September 11, 2001

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[6] Since 2001, the EU Council maintains a list of persons and groups against which the anti-terrorist meaures introduced in 2001 would apply. See: Council of the European Union, *Council Common Position 2005/220/CFSP of 14 March 2005 updating Common Position 2001/931/CFSP on the application of Specific Measures to Combat Terrorism and Repealing Common Position 2004/500/CFSP*, in: Official Journal of the European Union (Volume 48, L 69), 16 March 2005, at p. 59. Available also online at: http://europa.eu.int/eur-lex/lex/JOHtml.do?uri=OJ:L:2005:069:SOM:en:HTML.
This list comprises persons and groups from around the world and is not confined to "European Terrorism". However, the criteria for inclusion in this list, remain rather unclear and Art. 1 §§ 4-6 of Common Position 2001/931/CFSP places responsibility for the inclusion of a person or group in the terrorist list to the competent judicial or other authorities of each individual member state. Although Art. 1 § 4 refers to prosecution for a terrorist act "*…based on serious and credible evidence or clues…*" or condemnation for such acts a prerequisite for inclusion in the list, at the same time it provides that persons or entities identified by the UNSC as related to terrorism may be included in the list, thus allowing for a purely political organ, such as the SC, to designate terrorists without any of the judicial guarantees stated above.

[7] OJ L 273, 25 October 1996, at p. 1. (All documents of the *Official Journal of the European Union* can be found online at: http://eur-lex.europa.eu/en).

[8] OJ L 191, 7 July1998, at p. 4.

[9] OJ L 351, 29 December 1998, at p. 1.

[10] OJ L 57, 27 February 2001, at p. 1. This position was adopted pursuant to UN Security Council Resolution 1333 (2000).

[11] This was evidenced by the close cooperation of the French and Spanish authorities in the arrest of several ETA members or other Basque activists in France and their surrender to the Spanish authorities.

Undoubtedly, the benchmark to the attitude of all Western states towards terrorism was September 11, 2001. Although the strikes were directed against the US, Europe was directly involved by providing troops for the operations in Afghanistan,[12] but also by taking political and legal action with a view to combating terrorism as a phenomenon. The random and isolated actions taken before 2001 gave their way to a more comprehensive approach towards terrorism as a global threat.

To this end, the EU introduced several legislative documents in an effort to take an effective stand against international terrorism. In order to review and evaluate the measures in detail, we have to identify the various issues and examine them separately.

1. The Definition of Terrorism

Although there is a global action against international terrorism, especially after the September 11 attacks, the international community did not succeed, so far, in adopting a generally accepted definition of terrorism and terrorists. This presents a very serious obstacle in the fight against terrorism, since the uncertainty about who is a terrorist has a negative impact on the attitude of many states towards the various "terrorist" groups. The often-quoted statement by Yasir Arafat that "*One man's terrorist is another man's freedom fighter"* is very characteristic as to the confusion and the political considerations behind labelling a person or a group as terrorist.

In the aftermath of the September 11 attacks, during the UN debate on measures to eliminate international terrorism,[13] although there was a unanimous condemnation of the attacks and many states emphasized the need for a definition of terrorism, there was disagreement as to who would be included in such a definition.[14] In the context of the EU, the most important documents up to now have been the Common Position 2001/931/CFSP of 27 December 2001[15] and the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.[16] These documents set out a series of measures but, more importantly, they are the first documents of Western origin that touch upon the issue of the definition of terrorism and provide solid criteria for the definition of terrorists and terrorist groups. According to these definitions there are three basic criteria to be employed in order to characterize a group or an act as terrorist:

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[12] The relevant decisions were not taken within the institutional framework of the EU, but under Article 5 of the NATO Treaty, which, nevertheless, involved almost all EU members. See Lord Robertson, Statement by NATO Secretary General Lord Robertson of 2 October 2001. Available also online at: http://www.nato.int/docu/speech/2001/s011002a.htm.
However, the actual involvement of EU member states in the military operations in Afghanistan was undertaken pursuant to UN Security Council, Resolution 1373 (2001), S/RES/1373 (2001). Available online at: http://www.un.org/docs/scres/2001/sc2001.htm.

[13] The debate took place between 1-5 October 2001 in the UN headquarters (See: http://www.un.org/terrorism/list011001.html).

[14] *Ibid.* See, *inter alia,* the statements of Malaysia, Zimbabwe, Saudi Arabia, Qatar, Oman, Namibia, Morocco, Libya (speaking on behalf of the Arab Group as well), Iraq, Iran, Yemen, India, Russia, but see ***contra*** the categorical statement by Sir Jeremy Greenstock on behalf of the UK who emphasized that *"… Increasingly, questions are being raised about the problem of the definition of terrorism … For the most part terrorism is terrorism. It uses violence to kill and damage indiscriminately to make a political or cultural point and to influence legitimate governments … There is common ground amongst us on what constitutes terrorism … But there are also wars and armed struggles where actions can be characterized, for metaphorical and rhetorical force, as terrorist. This is a highly controversial and subjective area on which … we will never reach full consensus … At the edges [of war], dishonourable actions may share some of the characteristics of terrorism. Let the corpus of international humanitarian law deal with that"* Available online at: http://www.un.org/terroris/statements/ukE.html.

[15] OJ L 344, 28 December 2001, at p. 93.

[16] OJ L 164, 22 June 2002, at p. 3 et seq.

a) ***The acts:*** Both the Common Position and the Council Decision refer to a series of criminal acts that will be deemed as terrorist offences.[17]

b) ***The aim:*** According to both the Common position and the Council Decision, the above acts, in order to constitute terrorist offences, must be committed with the intention of (i) seriously intimidating a population, (ii) compelling a government or international organization to perform or abstain from performing any act or (iii) seriously destabilizing or destroying the fundamental political, constitutional or social structures of a state or international organization.

c) ***Participation in a terrorist organization:*** The 2001 Common Position lists offences relating to the participation in a terrorist group among the acts considered as terrorist. On the contrary, the 2002 Council Decision creates a separate category of offences for direction of or participation in a terrorist group or financing such activities and obliges member states to introduce separate legislation for the punishment of such activity.

Whereas the 2001 Common Position does not make any kind of distinction between the groups that would perform terrorist acts, the 2002 Framework Decision, in para. 11 of its preamble specifically states *"… actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision"*, thus following the typical Western oriented view that the notion of terrorism should be confined to the activities of private groups and cannot, under any circumstances, include actions by state organs or official state policies, even if they match the abovementioned criteria.[18]

A possible justification of this exclusion might be that EU member states – or some of them with actual terrorism problems like Spain and the UK - did not want these provisions to be applied against their own military or police in exercising their antiterrorist policies. However, this provision automatically rules out possible application of these measures to official state policies (eg. by Israel against the Palestinians or Turkey against the Kurds) that would otherwise fit the criteria listed above.[19]

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[17] The list includes all crimes typically associated with terrorist activity, namely, attacks upon a person's life likely to cause death, kidnapping or hostage taking, destruction of state facilities or infrastructure, seizure of aircraft or other means of transportation, manufacture of explosives, nuclear or biological & chemical weapons and their use and disruption of water or electricity power.

[18] It is interesting to note that the United States Code, Title 22, Section 2656f (d), uses a more general definition of terrorism stating that *"The term "terrorism" means premeditated, politically motivated violence perpetrated against noncombatant (including military personnel which is unarmed or off-duty) targets by sub national groups or clandestine agents, usually intended to influence an audience"*. This definition was also used by the US Department of State, in its 1996 Patterns of Global Terrorism Report and has been repeated in every annual report since. The NATO, in its *Military Concept for Defence against Terrorism*, defines in its Annex A terrorism broadly as *"The unlawful use or threatened use of force or violence against individuals or property in an attempt to coerce or intimidate governments or societies to achieve political, religious or ideological objective"*. Available online at: http://www.nato.int/ims/docu/terrorism-annex.htm.

[19] Although it is not the purpose of this presentation to discuss in detail the conceptual differences between states on the definition of terrorism, it is deemed necessary to present the two basic points of departure in defining terrorism. The opposite position may be found in documents of Arab origin, namely the 1998 League of Arab States Convention for the Suppression of Terrorism which defines terrorism in Art. 1 § 2 as "*Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize natural resources"*, while at the same time it states in Art. 2 (a) that "*All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of International Law, shall not be regarded as an offence"*. Essentially the same definitions are repeated in the Organization of Islamic Conference Convention on Combating International Terrorism. Support for the Arab position can be found in UN General Assembly Resesolution 40/61 of 9 December 1985, where, in paragraph 6,

Nevertheless, despite the problems discussed above, the introduction of this definition is very important since it clarifies the individuals or groups to whom it refers and thus, making the various measures more practical and effective. More importantly, it creates a common definition, which enables member states to act in a uniform way and will minimize the potential conceptual and political considerations on the issue of terrorism within the EU for the purposes of domestic antiterrorist measures.

2. Legal Measures to Confront Terrorism

The above documents, especially the 2002 Framework Decision, do not only provide the definition of terrorism, but also introduce specific measures to effectively deal with this phenomenon. The basic legal framework of the above documents is supplemented by a series of more specialized instruments in the various fields of EU competence that regulate certain aspects relating to terrorism. These measures were taken gradually, after the September 11 attacks in the US, and they do not constitute a reaction to the recent London bombings.

The most significant achievement is the European Arrest Warrant (EAW), which was introduced by the Council Framework Decision 2002/584/JHA of 13 June 2002.[20] Its basic aim is to abolish extradition procedures between member states and replace them by a system of surrender between judicial authorities. As the EU fact sheet on the fight against terrorism emphasizes, the EAW reduces the ability of terrorists and other criminals "*… to evade justice by exploiting differences in national legal systems*".[22] The 25 member states have already enacted national legislation to implement the Framework Decision on the EAW.[23]

Although the Decision is comprehensive (35 Articles, 18 pages), it deals primarily with administrative or bureaucratic issues surrounding the relevant procedures and very few provisions are devoted to the rights of the individuals concerned. There should also be noted a complete lack of judicial guarantees and possibilities of reviewing the requests by the competent judicial authorities which raise a lot of questions on the impact of the EAW on the fundamental human rights of the suspects and on the ability of the domestic judicial systems to effectively protect these rights.

Another practical step was taken by the Framework Decision 2002/465/JHA of 13 June 2002 on Joint Investigation Teams[24] which aims to institutionalize the bilateral police cooperation in cases of criminal investigation for terrorism, drugs and human trafficking. This should be seen in combination with the Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific

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it is stated that "*Calls upon all States to fulfill their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts"*, a statement which can be interpreted both ways. On the efforts for a universally accepted definition of terrorism, especially after September 11, 2001, and the various problems created with the different perceptions of states see Subedi, S.R., *The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law*, in: International Law FORUM du Droit International (Volume 4, Number 3), March 2002, pp. 162-167.

[20] OJ L 190, 18 July 2002, at p. 1 et seq.

[22] European Union, *Factsheet: The Fight against Terrorism*,

[23] See the Annex to the *EU Plan of Action on Combating Terrorism* where the implementation status for the various instruments listed in the Declaration on terrorism is displayed for each Member State. Avaiable online at: http://ue.eu.int/uedocs/cmsUpload/WEBad02.en05.pdf.

[24] OJ L 162, 20.6.2002, at p. 1 et seq.

measures for police and judicial cooperation to combat terrorism.[25] The latter document introduces specific measures to facilitate and speed up cooperation between the judicial and police authorities of the member states, providing *inter alia*, for the designation of special units or persons within the police and judiciary of the member states to deal with issues of terrorism, the exchange of information and evidence relating to terrorist offences etc.

A document considered very important by the EU is the Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust, an agency entrusted with the general task of improving co-ordination between EU judges and prosecutors covering a wide range of criminal activities, including terrorism. The cooperation extends to a large number of issues, including exchange between the competent authorities of the member states personal data of persons that are convicted or accused of criminal activity specified in the decision and even some personal data of victims or witnesses to crimes which may be kept in the database of Eurojust as long as it may be necessary for it to perform its tasks (Art. 21 § 1 but with certain limitations set forth in the following paras). These data can also be exchanged with relevant authorities of third states (Art. 27 § 1 (c)) and even conclude agreements to this end.

The extensive powers with regard to the acquisition and administration of personal data of EU citizens will be monitored by a supervisory body consisting of three members and ad hoc judges of the states concerned who will have full access to all files. Every person whose data is acquired by Eurojust will, in principle, have access to the files, which may be denied if (a) it would jeopardize Eurojust's activities or any national investigation assisted by it, (b) such access may jeopardize the rights and freedoms of third parties (Art. 19 § 4). This Decision is not yet in force, since Spain, Greece and Cyprus have not introduced national legislation to implement it.[26]

Reference should also be made to the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution of orders freezing property or evidence.[27] The objective of this document is to establish the rules under which a member state shall recognize and execute a freezing order issued by a judicial authority of another member state in the course of criminal proceedings. It refers to a wide range of offences (including terrorism) and its most problematic aspect is that it bypasses the double criminality rule (i.e. the rule that demands the act to be a criminal offence both at the requesting and the executing State and it is a principle of criminal law). Although only four of the 25 EU members have enacted the necessary legislation so far, its future application would create very serious problems, especially with regard to behaviours that are included but do not constitute an individual crime in all EU members. For example, racism and xenophobia, which are listed in the Decision, are not crimes *per se* in many EU countries and therefore, freezing the assets of a person accused of a behaviour which does not constitute a crime in the state of execution would amount to a violation of the fundamental principle of criminal law *nullum crimen, nulla poena sine lege* (there is no crime or penalty without a law providing for them).

A measure that is also pictured as a priority in the fight against terrorism is Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by member states.[28] Although the basic purpose of this document is to increase passport security and make them impossible to counterfeit, we should not disregard the inclusion of personal data into a storage medium incorporated in the passport (fingerprints and other biometric identifiers), which raise questions with regard to their usage as security features.

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[25] OJ L 16, 22.1.2003, at p. 68 et seq.
[26] As of 1 August 2005.
[27] OJ L 196, 2 August 2003, at p. 45 et seq. This document should be associated with the 1999 *International Convention for the Suppression of the Financing of Terrorism*, which has been ratified by all EU Member States, except Ireland, which is in the process of ratification.
[28] OJ L 385, 29 December 2004, at pp.1-6.

Finally, the drafters of the *EU Fact Sheet on the Fight against Terrorism*,[29] expressing the official EU position, proudly refer to the "massively increased" cooperation between the EU and the US on terrorism. Among the measures that have been taken we should mention the following:

a) The conclusion of an agreement on the transfer of Personal Name Records (PNR) data held by airlines to the US Customs and Border Protection (CBP).[30]
b) The signing of two agreements between Europol and the US law enforcement agencies, including the sharing of intelligence and personal data.
c) The establishment of contacts between Eurojust and the US Justice Department.

A similar agreement was subsequently signed between the EU and Canada. In the relevant press release it was explained that "… *Under the agreement, airlines flying from the EU to Canada will transfer selected passenger data to the Canadian authorities to help identify passengers who could be a security, and in particular a terrorist threat*".[32]

In addition to the already mentioned documents there are a number of other instruments to supplement the basic measures against terrorism, as described above, which are either too specialized or of a non legal character.[33]

It is not difficult to detect a significant impact of these measures to the individual rights of EU citizens, without any form of protection or guarantees thereof. A characteristic example is that in the PNR data agreement, data protection is safeguarded by a Commission Decision, which regards the US Customs and Border Protection Bureau, as providing an adequate level of protection for PNR data transferred to the US.[34]

3. Developments after the London Bombings

The impact of the recent bombings may already be seen in the efforts of the British presidency of the EU to speed up the implementation of certain measures that were either delayed or member states were reluctant to proceed,[35] possibly due to the negative effect these measures would have on the civil rights of their citizens. In the Council's Declaration on the EU Response to the London Bombings[36] of July 13th 2005, EU member states undertook to proceed, within a fixed time limit, with a series of legal and political steps, the most important of which are the following:

- A Framework Decision on the Retention of Telecommunications Data (by October 2005);

[29] European Union, *Factsheet: The Fight against Terrorism*.
[30] For the text of the 2004 agreement see OJ L 183, 20 May 2004, at p. 84. This agreement provides unilateral access to PNR on behalf of the US authorities, since the EU does not have a similar system (but even if it acquires one, the US Department of Homeland Security will have the obligation to actively promote cooperation of its airlines, if it is practicable (clause 6). The initial agreement was signed in 2004, but it was annulled by the Court in 2006 (Joined Cases C-317/04 & C-318/04). The new agreement was reached on 11 October 2006 (Council Doc. 13226/06 of 11 October 2006) and its substantive provisions were not significantly altered.
[32] EU Commission Press Release IP/05/965 of 18 July 2005.
[33] For a list of such documents see Council of the EU, Doc. 14894/04 (Presse 332).
[34] EU Commission Decision C (2004) 1799 of 17 May 2004, taken pursuant to Article 25 (6) of Directive 95/46/EC.
[35] See the *Declaration on Combating Terrorism*, which was adopted by EU leaders in the aftermath of the 2004 Madrid bombings. Available online at: http://ue.eu.int/uedocs/cmsUpload/79635.pdf. The big majority of the measures contained in the Declaration on the London bombings, refers to actions already decided after the Madrid bombings.
[36] Council of the EU, Doc. 11116/05 (Presse 187).

- A Framework Decision on the Exchange of Information between Law Enforcement Authorities (by December 2005);
- Adoption of the Framework Decision on the Exchange of Information and Cooperation Concerning Terrorist Offences (by September 2005);
- Council Regulations on Wire Transfers (by December 2005) and cash control (by September 2005);
- Code of Conduct to Prevent the Misuse of Charities by Terrorists (by December 2005);
- EU Strategy on preventing people turning to terrorism (by December 2005).

The core new aspect introduced by this declaration is the will of European leaders to proceed with the monitoring (to use a polite word) of telecommunications within the EU, although the actual implementation of this Framework Decision – if and when it is agreed upon - might be delayed, since it has to go through the domestic legal systems of the EU member states, in most of which this contravenes fundamental provisions of their constitutions.

III. Is there an EU Policy on Terrorism?

A. Efforts after the Madrid and London Bombings

After the terrorist attacks in Madrid, the European Council adopted a comprehensive Declaration on Combating Terrorism where it puts forward certain "*high level strategic objectives*", part of a revised EU Plan of Action to Combat Terrorism. In brief, these objectives amount to the following:

- Deepen the international consensus and enhance international efforts to combat terrorism;
- Reduce the access of terrorists to financial and other economic resources;
- Maximize capacity within EU bodies and member states to detect, investigate and prosecute terrorists and prevent terrorist attacks;
- Protect the security of international transport and ensure effective systems of border control;
- Enhance the capability of member states to deal with the consequences of a terrorist attack;
- Address the factors, which contribute to support for, and recruitment into terrorism;[37]
- Target actions under EU external relations towards priority third countries where counter-terrorist capacity or commitment to combating terrorism needs to be enhanced.[38]

Moreover, in the same document, the European leaders adopted a Draft Declaration on Solidarity against Terrorism, based on the solidarity clause laid down in Art. 42 of the EU Constitutional Treaty

[37] As the EU Counter Terrorist Coordinator said, while addressing the UN Committees charged with combating terrorism, "*the EU Member States have pledged to increase their international aid with € 20 billion by 2010 to … help developing countries combat poverty, manage conflicts and improve governance, reducing the potential for radicalization and recruitment into terrorism"*. De Vries, Gijs, *Press release: World Must Keep Focus on Fight against Terrorism*, 23-24 June 2005. Available online at: http://ue.eu.int/uedocs/cmsUpload/FocusOnFightag_terr.pdf.

[38] These objectives are specified in detail in Annex I of the Declaration. The very same objectives and even the same wording in the document can also be found in the *EU – US Declaration on Combating Terrorism* of June 26th, 2004 (Council Doc.10760/04 (Presse 205)).

where they undertake to act jointly if one of them is the victim of a terrorist attack and to mobilize all available resources, including military ones if a member or acceding state so requests.[39]

The question that emerges is whether these objectives constitute an EU antiterrorist policy. If we review the equivalent declaration that was adopted after this year's London bombings, which refers more or less to the same things one could easily answer to the negative. Apart from the technical issues related to assistance and cooperation between member states, the more politicised aspects were not addressed, or they were not dealt with effectively.

Moreover, some of the focus points of the 2004 Declaration are rather vague, and they do not produce any practical result, for example, the decision to deepen international consensus. In the Annex, it is explained that this amounts to supporting the role of the various UN organs dealing with terrorism (this is anyway an obligation imposed on all states by UN Security Council Resolution 1373 (2001)) and ensuring full implementation of the UN Conventions on Terrorism, as well as to agree a Comprehensive UN Convention against Terrorism (however, this seems to imply that all EU members already agree on the contents of such a Convention, which is hardly the case).

A neglected point of the Declaration is the attempt to address the factors, which contribute to support for and recruitment into terrorism. Another version of this provision can be found in the 2005 Declaration where the Council underlines the importance of preventing people form turning to terrorism by addressing the factors that contribute to radicalisation and recruitment to terrorist groups. If the basic elements of this strategy were agreed upon, it would either mean that all EU members have reached a consensus on the factors that contribute to the growth of terrorism internationally.

Furthermore, the Madrid and London attacks did not put forward possible different approaches by member states, as they constituted "typical" terrorist attacks against civilians. For example, it would be very interesting to see the reactions by the various member states if Iraqis planted a bomb in a British military installation inside Great Britain.

B. Problems with Creating a Common Antiterrorist Policy

The question on whether the EU can have an antiterrorist policy touches upon the major issues of disagreement between EU members in the various fields of foreign policy (which refer to the roots of terrorism), as well as in internal problems, the most important of which can be summarized to the following:

a) The war in Iraq: It had already divided Europe in two parts when it happened and, although the intensity has been reduced, the differences still exist. The difference of opinions is not limited to whether the war should take place or not, but also to more fundamental issues relating to international law.

b) The Palestinian issue: Although the problem does not have a direct impact on the EU, since it is not a part of it and its political role with regard to this issue is minimized, it should not be underestimated. The fact that a large part of the Arab– oriented terrorism exists because of the Palestinian struggle against Israel, and the pro-Israeli or neutral position of most EU members make this issue central for the EU.

c) The amount and subjects of cooperation with the US: The American Minister of Defence, Mr. Donald Rumsfeld has already classified EU countries into old and new Europe (new Europe being the pro-American EU countries and old Europe the rest). This statement, more or less, reflects the general debate within the EU on the EU – US

[39] The Draft Declaration leaves the choice of the appropriate means to comply with this solidarity clause towards an affected state to the discretion of each member or acceding state and does not go as far as to introduce certain patterns of behaviour.

relations, not only about terrorism, but on a whole range of financial and political issues. In addition to that, we should also record the anti-American sentiments of the public opinion in most EU countries that certainly has or will have an impact on the policies of the respective governments.

d) Not all EU members are part to the Schengen Agreement[40]: Two EU members, namely Britain and Ireland are not part to the Schengen *acquis* –which was incorporated as EU treaty law by the Treaty of Amsterdam - and the subsequent legislative measures. They have chosen to participate only into the law enforcement and judicial aspects of the Schengen agreement but not to the core issues regulated by Schengen, i.e. dismantling internal frontier controls, common rules on visas and external border control. [42]

It is somewhat ironical that, while the UK is currently advocating strict measures on the exchange of information, monitoring the Internet, phone calls etc. as methods of combating terrorism, at the same time it does not participate into the already established system that has the capability of accomplishing such measures, the Schengen Information System. Moreover, the position of the UK (and Ireland too) with regard to their non-participation to the Schengen system seems to imply that the rest of the EU states cannot perform effective and thorough border or passport controls.

It is difficult to see how this position can accommodate the collective will of EU leaders to proceed with the strict measures described above (3.1.) and the denial of the UK and Ireland to be part of the system enabling them to proceed.

It seems quite clear that the above factors will prevent the EU from adopting a common, overall policy against terrorism. The emotionally loaded reactions that were recorded after the Madrid and London bombings – and will probably be repeated after a similar terrorist strike - are not enough to drive EU member states to overcome their fundamental political, legal and conceptual differences.

Additionally, all decisions taken in the fields of CFSP and JHA require unanimity, as any international treaty between independent states. Even when a framework decision is reached it still has to go through internal legislative measures in the member states in order to be enforced and failure to do so is not subject to judicial action on behalf of the EU organs. The negative referenda in France and the Netherlands have blocked the implementation of the EU Constitution, which would facilitate decision-making processes through the adoption of European laws.

C. What Kind of Approach?

[40] Apart from the old and new EU countries (minus UK and Ireland) in 2001 the Schengen system was further enlarged by the agreement on the accession of the Nordic Passport Union, comprising Denmark, Finland, Sweden (they were not participating until then), Norway and Iceland. See Council Decision 12741/1/00 Rev. 1 of 20 November 2000. The Schengen System also comprises the Schengen Information System (SIS II), which allows for the exchange of information on certain categories of persons and [stolen] goods between participating States, as well as the Visa Information System (VIS).

[42] The British Foreign Office explains that *"Maintaining the UK's frontier controls is the most effective way for us to control immigration and combat international and organised crime … The UK has the right to check all nationals on arrival to check their credibility and the credibility of their documents"*. Available online at: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029392367.

Another question central to the issue of an EU antiterrorist policy is which direction this policy should take. Since the September 11 attacks, the world had to associate with one of two opposite positions: (1) The American oriented view that terrorism is a form of war and measures against it must be basically of military nature in self-defence. This view was shared by most European and other Western states and all decisions within the framework of NATO were taken under this perspective. (2) The other view, mostly advocated by non-Western states, human rights organizations and NGOs is that the most effective way of combating terrorism is to eradicate the roots and causes of terrorism, namely the various international problems like the Palestinian issue, the Iraq war, poverty and unequal distribution of global wealth etc.
However, the acceptance of both views is problematic in many aspects. Initially, if we accept that action against terrorism constitutes a war, then the applicable set of rules is not criminal law (as terrorist offences are regarded until now) but the laws of armed conflict. This would mean that terrorists are combatants and, if captured, are entitled to prisoner-of-war treatment. Moreover, the application of the laws of war would significantly increase the number of permissible targets and most of the "political" targets would become legitimate. The advocates of this view refer to a kind of war where only one side has rights and is entitled to make the rules.[43] This became evident through the treatment of Taliban and pro-Taliban fighters captured in Afghanistan and transferred to Guantanamo military base in Cuba. They were denied the status of war prisoners and were characterized as "illegal fighters" with virtually no rights either as Prisoners of War (POW) or as criminal defendants.[44]

The opposite view, i.e. eradicating the causes of terrorism in order to stop it, sounds very sensible and probably the only permanent solution to the issue of international terrorism. However, the practical application of this very logical proposal is rather difficult to achieve. First of all, the determination of the actual causes of terrorism is purely subjective and differs largely according to the political, religious and social background of the parties concerned. In addition, when we are referring to states, their international relations are not always formed based on what might be right or just, but are the outcome of complicated processes, alliances, international obligations, vital interests etc., which cannot be altered easily, or states might not wish to alter their international policies. When terrorist activities are involved, even if a state intended to act the way the terrorists wished, it would not do so after a terrorist attack because this would seem like a concession to terrorist demands, therefore making that State vulnerable and subject to further terrorist activity.

So far, the EU has managed to refrain from associating itself with one of these views, even though individual EU member states have taken very clear positions in favour of the "war theory", on their own or through NATO. The approach of the EU, as it derives from the various documents of either political or legal nature, considers terrorism as a very serious form of criminal activity and introduces measures that will effectively counter terrorism and minimize the operational capability of terrorists by denying them access to funding and other aspects essential for their operations. In addition, the EU proceeds with a series of general precautionary measures (eg. Passport and Visas) that will ensure better policing of the EU borders and monitoring of persons that enter the EU. Another set of measures tries to counter terrorist activity by regulating and monitoring aspects of everyday life of EU residents in general and, finally, it gives great importance to the prevention of terrorism through international cooperation, mainly with the US, but also with other states that share the same ideas or wish to strengthen their counter-terrorist capabilities. Certain political declarations also address the issue of

[43] See also Warbrick, Colin, *The European Response to Terrorism in an Age of Human Rights*, in: European Journal of International Law (Volume 15, Number 5) 2004, pp. 989 – 1018, at p. 1017.
[44] A US District Court of Columbia ruling of 1 February 2005 found that the decisions of the Combatant Status Review Tribunal, established by an order of the undersecretary of Defence Paul Wolfowitz were unconstitutional and that the detainees had valid claims under the 3rd Geneva Convention. On the treatment of detainees in Guantanamo, see also Schlager, Erika B., *Counter-Terrorism, Human Rights and the United States*, in Helsinki Monitor (Volume 16, Number 1), Brill Academic Publishers, March 2005, pp.78-87, pp. 83-86.

the causes of terrorism, but – until now - the EU has not elaborated on this aspect through more precise wording and positive action.

IV. The Impact of Anti-Terrorist Measures on the Rights of EU Citizens

It was not contested that many of the already existing or the newly introduced measures undertaken by the EU to combat terrorism will certainly have an impact on the civil rights of the European citizens. The basic aspects of this discussion are whether these measures touch the core of the protected rights and what Europeans gain "in exchange" for these alleged violations.

A. The Framework of Protective Provisions

There are three basic sets of rules protecting the fundamental rights of European citizens. Initially, there is the European Convention for the Protection of Human Rights and Fundamental Freedoms,[45] to which all EU members, as well as the other European states are parties. Article 6 § 2 of the Treaty on the European Union (TEU) incorporates the fundamental rights guaranteed by the HRC into the EU legal framework *"as general principles of community law"*. The European Court of Justice (ECJ) has always upheld its primary position within the EU legal system and given great importance to the observation of its provisions by the EU organs.

All constitutions of the EU member states have protective clauses for the fundamental civil and political rights of their citizens. Although these provisions are part of the domestic legislations of the respective states, they acquire significant importance when it comes to the adoption of EU oriented instruments (eg. Council Framework Decisions, Directives etc.), since they have to go through the relevant procedures of domestic legislation and to be filtered through the applicable constitutional guarantees.

We can also identify references to the protection of human rights and fundamental freedoms in many provisions of the primary and secondary EU legislation as for example Article 11 § 1 of the TEU which provides that *"… The Union shall define and implement a CFSP … the objectives of which shall be … to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms"*. Reference to the respect for human rights and fundamental freedoms is also made in many Council Decisions related to terrorism (eg. Council Framework Decision 2002/475/JHA).

Finally, the EU Charter of Fundamental Rights, which was adopted during the Nice Summit in 2000, is the first EU document to introduce directly applicable fundamental rights for EU citizens towards states and EU organs. Unfortunately, this instrument does not yet have legal validity, since it was not incorporated in the Nice Treaty, but was adopted as a declaration of principles bearing significant political, but not actual legal value. The incorporation of the Charter into the Constitutional Treaty as Articles II-61 to II-114 would have given it the proper legal status, but the negative outcome of some of the referenda renders the fate of the current version of the Constitutional Treaty rather uncertain, if not doomed and, unless the EU proceeds with the adoption of the Charter as a separate legal instrument, it will not be directly applicable.[46] It has to be noted though that the ECJ has already started to invoke the Charter in some of its recent decisions, giving it full legal effect.[47]

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[45] ETS No. 5, Rome, 4-11-1950 (Text: http://conventions.coe.int/Treaty/en/Treaties/Html/177.htm).

[46] The future human rights agenda of the European Commission includes immediate implementation of the Charter, waiting for the EU Constitution to enter into force.

[47] In the Judgment of the Court of First Instance of 13 June 2005 in the case *The Sunrider Corp v. Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (T-242/02), the Court at para. 51 held that

B. Problematic Issues from the Application of Antiterrorist Measures

Many of the provisions that were already presented above touch upon certain fundamental rights of EU residents. Additionally, the policies that the EU has followed or is about to follow on combating terrorism have problematic aspects with regard to the possible violations of those rights, the most important of which may be summarize to the following:

1. Circulation of Personal Data of EU Citizens

The demand that was made by the US authorities after September 11, 2001 that all foreign airlines flying to the US should disclose the PNR of all their passengers caused a lot of scepticism as to the scope of the measure, and its initial application resulted in several planes being denied landing in US territory.[48] The dispute ended with the adoption of an Agreement between the EU and the US on the Transfer of PNR by European Airlines to the US authorities,[49] providing for the transfer of PNR to the US authorities on a unilateral basis, since the EU does not have a similar electronic system to acquire and process such data (probably it is not necessary as well).

In a similar agreement between the EU and Canada, the Commission acknowledged that *"… the Agreement with Canada gives further enhanced data protection compared to the deal concluded with the US last year, and a smaller number of data elements are involved"*,[50] thus recognizing the highly problematic character of the EU – US initial agreement.

However, this particular EU – US agreement was annulled by the Court (in its decisions in Joined Cases 317/04 & 318/04).[51] Unfortunately, the decision did not touch upon the core of the agreement, but merely declared the done on the wrong legal basis.

"The principle that decisions must be adopted within a reasonable time, set out, as a component of the principle of good administration, in Article 41(1) of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000, is mandatory in any Community administrative proceedings". The judgment is available online at: http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-242/02&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100.
See also the Judgment in the Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 [2004] *JFE Engineering & others v. Commission*, at para. 178.

[48] This demand was made pursuant to the relevant US legislation on air transportation that was adopted after September 11, 2001, namely the Aviation and Transportation Security Act of 9 November 2001, which was followed by two regulations, the most important of which is the *Passenger Name Record Information Required for Passengers on Flights in Foreign Air Transportation to or from the US* (published on 25 June 2002). The PNR, apart from the "typical" data such as names, reservation number and dates, travel agency, form of payment, seating, also includes the PNR history (previous travels), food preference, special services, who pays for the ticket and even the internal account of the organization (eg. University) that paid for the ticket. It becomes evident that many of the above are data of a highly sensitive nature and may lead to conclusions as to the religious etc. orientation of the passenger. For a more detailed analysis of the PNR data see Pérez Asinari, María Veronica and Yves Poullet, *The Airline Passeger Data Disclosure Case and the EU-US Debate*, in: Computer Law & Security Report (Volume 20, Number 2), Elsevier, 2004, pp. 98 – 116, pp. 99-100.

[49] OJ L 183, 20 May 2004, at p. 84.

[50] EU Commission Press Release, *EU and Canada sign Agreement on the Transfer of Air Passenger Data* (P/05/965), 18 July 2005. Available online at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1216&format=HTML&aged=1&language=EN&guiLanguage=en.

[51] OJ C 178, 29.7.2006, pp. 1-2.

The new, renegotiated, agreement does not alter the substantive provisions, except from a few, minor alterations.[52] In the Press Release issued by the Council, it is stated that the new agreement will ensure "*an equivalent level of protection of passengers' personal data in line with European standards on fundamental rights and privacy*".[53] The amount of compatibility with fundamental rights standards is better explained by the Letter of the US Department of Homeland Security (DHS) to the Council regarding certain undertakings of the US Government towards the initial agreement of 2004. The letter states very clearly that in view of a 2005 Presidential Order, the DHS will share PNR with any other US agency dealing with terrorism and the obligations towards the EU will not impede this sharing of information.[54] In other words, agencies such as the CIA, NSA, FBI and numerous others will have free access to PNR data of European citizens, with the apparent consent of the Council.

The current situation regarding the personal data of EU citizens is that they literally "fly around" the world in an uncontrolled manner, without a possibility of judicial review (since the relevant agreements are part of the CFSP) and without the person being able to have access to those data (since there is no relevant provision in the EU – US agreement). The capability of personal data processing and exchange already exists in the context of the Schengen system but it refers to certain categories of persons (convicted criminals, wanted or accused persons) and under quite strict procedures of data gathering and monitoring the overall system by independent national authorities. On the contrary, the American system aims at finding potential terrorists by processing PNR data of persons flying to the US, thus making everyone a suspect, being able to deny access to anyone who, e.g. might have travelled a lot to Arab countries, or would otherwise fit the criteria that US authorities apply for the identification of potential terrorists.

It is doubtful whether this system can actually be effective in minimizing the potential of terrorists entering the US[55] while, on the other hand, the EU, by allowing for the transfer of these data, violates *prima facie* Article 8 §§ 1, 2 of the HRC,[56] and –more explicitly- Article 8 of the EU Charter of Fundamental Rights which provides that:

> "*1. Everyone has the right to the protection of personal data concerning him or her.*
> 2. *Such data must be processed fairy for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*"

[52] See Council Docs. 13216/06 (Agreement) and 13226/06 (Decision) of 11 October 2006. The agreement is *ad interim* and will automatically expire on 31 July 2006.
[53] Council Doc. 14006/06 (Presse 288) of 16 October 2006.
[54] Council Doc. 13738/06 of 11 October 2006, paras. 2-5. In particular, para. 5 states that "*DHS will therefore facilitate the disclosure of PNR data to US government authorities exercising a counterterrorist function that need PNR for the purpose of preventing or combating terrorism and related crimes …*".
[55] For some very interesting statistics concerning the possibility of apprehending terrorists through the screening methods in the US see Hardin, Russel, *Civil Liberties in an Era of Mass Terrorism*, in: The Journal of Ethics (Volume 8, Number 1), Springer, 2004, pp-77-95, at pp. 79-81, where the author calculates that for every terrorist who will certainly be found and caught through this system in the US, there will be at least 5.000 non-terrorists that will be monitored and investigated, rendering the whole system impractical.
[56] Article 8 § 1 refers to the right of respect for the private and family life of every person, as well as to the correspondence, while § 2 sets the limits for lawful interference with this right by the State. It is widely argued that the right to privacy is extended to cover data protection as well. See *inter alia*, Bygrave, Lee, *Data Protection Pursuant to the Right to Privacy in Human Rights Treaties*, in International Journal of Law and Information Technology (Vol. 6, Issue 3), Oxford University Press, 1998, pp. 247-284.

Moreover, the legal basis that the EU used in order to conclude the initial PNR agreement with the US was Directive 95/46/EC,[57] which was passed with the objective of protecting "*… the fundamental rights and freedoms of natural persons and in particular their right to privacy with respect to the processing of personal data"* (Art. 1 § 1) while at the same time preventing member states from restricting or prohibiting the free flow of data between them for reasons connected with the protection afforded under para. 1 (Art. 1 § 2). Although the Directive is applicable to the processing of personal data carried out by the airline companies, the scope of the directive cannot be extended in order to cover the transatlantic transfer of the PNR. However, the Commission used Article 25 of the above Directive to assess that the US CBP provides an adequate level of protection for the data transferred from the EU and the EU Council went on to conclude the agreement, without any legal basis for giving away the PNR of EU passengers.[58]

Similar concerns are also raised with regard to the exchange of personal data of suspects under the Europol and Eurojust institutions with the relevant US authorities.[59]

2. Extradition Procedures within the EU and to Third Countries

The idea of harmonizing the existing extradition systems within the EU and creating a single system for the apprehension of wanted persons within the Union, thus facilitating police and judicial cooperation is, in theory, a very good development towards the achievement of an area of freedom, security and justice. However, it is essential that the fundamental human rights and principles of criminal law are upheld in order for such a procedure to work.

In the case of the EAW, it has to be noted that its provisions are subject to the observation of fundamental human rights and cannot be applied contrary to the HRC and other applicable human rights instruments. To this effect, Article 1 § 3 of the EAW states that *"This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and the fundamental legal principles as enshrined in Article 6 of the Treaty on European Union"*. Therefore, the simplification of the rules on surrender brought in by the EAW should not have the effect of minimizing human rights standards.[60] The abolition of the double criminality requirement may be seen as being contrary to Art. 7 § 1 of the HRC on the part of the extraditing state (no punishment without law), while the absence of judicial review of the EAW, once it is issued, is also problematic since it could be in violation of Art. 6 of the HRC (right to a fair trial).

Even before the actual entry into force of the EAW, in a very important recent decision of 18/07/2005, the German Constitutional Court declared the German law incorporating the EU Arrest Warrant into the German legislative system void on grounds of violation of freedom from extradition and of the right to resource to a court as provided by Articles 16 § 2 and 19 § 2 of the German Constitution (Grundgesetz) respectively.[61] Although all EU countries have enacted legislation to implement the

[57] Directive 95/46/EC of the European Parliament and of the Council of 24th October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ C 316, 23.11.95, pp. 31-50. It is mentioned in para. 3 of the preamble of the PNR agreement.
[58] Commission Decision C (2004) 1799 of 17 May 2004. The Council Decision 2004/496/EC of 17 May 2004, that approved the agreement, does not provide any legal basis for its decision, regarding the transfer of the PNR (OJ L 183, 20.05.2004, p. 83).
[59] See Section 2.2.2.
[60] See also the paper prepared by Amnesty International EU Office entitled: *Human Rights at the Borders? Counter Terrorism and EU Criminal Law*, AI Index: IOR 61/013/2005, 31 May 2005, pp. 17-18.
[61] German Constitutional Court Decision of 18 July 2005, Press Release 64/2005. Available online at: http://www.bverfg.de/pressemitteilungen/bvg05-064en.html. The full text of the decision is available in German at: http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604. In response to the Decision, the Commission issued a statement in which it *"regrets that for the time being, Germany will have no implementing legislation in*

Framework Decision on the EAW, it is expected that other national courts will also address similar questions with regard to fundamental rights protected by the respective Constitutions and seem to be in contrast with the provisions of the EAW.

Another related issue refers to the extradition to third countries. In 2003 the EU concluded an extradition agreement with the US.[62] As Amnesty International observes *"The negotiations … were widely criticized for their lack of transparency and the absence of any democratic scrutiny on the process"*.[63] The most problematic aspect of this agreement is the provision of Art. 13 where it is stated that any EU member is entitled to require as a precondition for extradition to the US that the death penalty shall not be imposed or carried out. However, the wording of the provision that states *may* set a condition or *may* refuse extradition is at least unfortunate, since it does not exclude the possibility of extradition to the US even though the extradited person might be executed.[64] This constitutes an unacceptable derogation from the obligations of the member states deriving from Protocol No. 6 to the HRC on the Abolition of the Death Penalty. In addition, Art. 19 § 2 of the EU Charter of Fundamental Rights stipulates that *«no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty …"*, a very clear provision which also seems to be in contrast with Art. 13 of the EU-US extradition agreement.[66]

i. Retention of Telecommunications Data

This prospect seems to be the most scaring of the proposals made by the British Presidency and endorsed in principle by the other EU member states, leading to the practical abolition of the privacy of correspondence and communications, also touching upon issues of data protection. This proposal did not come as a response to the London bombings, since it was already part of the UK Presidency priorities.[67]

The Directive 2006/24/EC of the European Parliament and the Council on Data Retention of 15 March 2006[68] provides *inter alia* for the retention of any data

a) necessary to trace and identify the source of communication,
b) necessary to identify the destination, date, time and duration of a communication, the type of communication and the equipment used and
c) necessary to identify the location of mobile communication equipment used.

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place at national level that guarantees that the system of mutual recognition established by the EU Framework Decision of 13 June 2002 on the EU Arrest Warrant also applies in Germany". It will depend now on the German legislator when the system of the EU arrest warrant, agreed in 2002, can also apply effectively in Germany (http://europa.eu.int/comm/justice_home/news/intro/ news_intro_en.htm).

[62] OJ L 181, 19 July 2003, at p. 27 *et seq*.

[63] Amnesty International Report, *Human Rights at the Borders? Counter Terrorism and EU Criminal Law,* at p. 26.

[64] See: Amnesty International, *EU-US Extradition Agreement still Flawed on Human Rights – Recommendations to the JHA Council of 5-6 June 2003*, AI Index EUR, 4 June 2003.

[66] The agreement has not yet entered into force because almost half EU member states have not gone through with the required legislative measures and the bilateral agreements with the US, while the US government has only submitted the agreement to the US Senate on 29 September 2006. For the course of the ratification processes see Council Doc. 10959/2/06, Rev. 2 of 26 October 2006.

[67] Secretary of State for Foreign and Commonwealth Affaires, *Prospects for the EU in 2005*, at para. 62 (counter-terrorism). Available at: http://www.fco.gov.uk/Files/kfile/Prospects in the EU 2005_CM 6611,0.pdf.

[68] OJ L 105, 13 April 2006, pp. 54-63.

The directive also states that no data concerning the content of the communication should be retained (Art. 5 § 2).

The obligation of governments according to the directive is to retain the abovementioned data for a period between six months and two years (Art. 6), but any member state may invoke unspecified "particular circumstances" and extend the maximum period (Art. 12 § 1).

The questions that could be asked on the scope and necessity of this Directive are limitless. Although the last paragraph of the Preamble of this Directive refers to respect for fundamental rights according to Art. 8 of the ECHR and the common constitutional traditions of the member states, the operative clauses do not seem to take into account any of the above. Moreover, the retention appears to be pointless, unless the content of the communication is also retained, in order to provide adequate proof of a criminal transaction. But in this case we would encounter even more severe violations of the fundamental rights of EU citizens.[69]

ii. The Use of Biometric Identifiers in Passports

Although increased passport security as a measure against counterfeit and other related criminal activities is perfectly understandable, the question is to what extent should this security concept go and whether the personal data stored in passports may also be used for other purposes that identification of the person (eg. by insurance companies).

The compatibility of passport security measures containing biometric identifiers with fundamental human rights provisions will also depend on the specific guarantees that will ensure security and transparency for the whole system. The experience of police and customs authorities in the EU by the application of the Schengen system can certainly help this effort succeed. However, the nature of the biometric data that will be used is much more sensitive than the data for certain categories of persons in the Schengen system and there must be additional guarantees with regard to the circulation of such data to third countries.

V. Conclusions

As described above, many measures that were adopted or are about to be adopted by the EU have a very serious impact on fundamental human rights.

Although the present author considers that human rights cannot be traded or exchanged under any circumstances because they constitute the very essence of democracy, let us accept, for the sake of argument, that EU leaders are ready to sacrifice certain human rights of their citizens, in order to achieve more security and enhanced protection against international terrorism. The main issue here is whether such measures actually add to security and if they can effectively protect Europe from international terrorism. To this point, I would like to make some observations relating to the effectiveness of the existing or proposed counter-terrorist policies.

[69] The deadline for member states to enact national legislation incorporating the content of the Directive is set to be 15 September 2007, but according to Art. 15 § 3 each member may postpone the actual application of the Directive until 15 March 2009. 16 member states have made use of this provision. This could be viewed as an indication that they are either unwilling to enforce such measures or not ready to present them to their peoples and parliaments for adoption.

The Americans have already used the Echelon surveillance system[70] long before September 11, 2001. This system is designed to intercept every form of communication and identify words or phrases that the user of the system considers indicative of terrorist or other activity he wishes to monitor. The system proved to be totally useless with regard to the terrorist attacks of September 11 and there has not been any indication that it actually helped in preventing a terrorist attack. It is rather unclear whether the retention of telecommunication data in the EU, which is essentially of the same nature as Echelon, would add something to an antiterrorist policy and how it would do so.

Not long ago, the British authorities discovered an alleged plot of terrorist attacks on aircrafts and introduced a series of measures that caused a complete chaos throughout British and other European airports. The seriousness of these allegations is yet to be confirmed, although the long lasting silence on behalf of the British authorities may be seen as a clear indication of their inability to formulate concrete accusations against the arrested persons.[71] What really happened was the creation of an unprecedented chaos over European airports, which disrupted air traffic for many days and caused significant losses of property of passengers. No terrorist attack could have accomplished this chaos …

Moreover, the overall concept of antiterrorist measures taken either by the EU or – even more – by the US, seem to consider that terrorists are stupid or naive. They are supposed to use easily readable e-mails describing their plans, talk about Osama Bin Laden on the phone, leave their fingerprints all over the crime scenes and they certainly have to be of Arabic origin wearing traditional clothes, so that everyone can spot them from miles away. Reality has shown that this is hardly the case and that any security measure, no matter how sophisticated it may be, is very difficult to prevent someone who is determined to get killed while inflicting the maximum possible amount of casualties. Terrorists are not stupid either. They will not plant a bomb in an army facility or government building, because this is very well guarded. They will choose a soft target, virtually impossible to guard, such as the subway, trains, buses.[72] The impossible task of eliminating terrorism can be seen in the context of the long lasting Arab – Israeli conflict were the Israelis are faced with everyday suicide bombings in public places, without being able to prevent most of them.
As far as passports and PNR data are concerned, a good, dedicated terrorist is probably expected to carry a false passport, travel with his/her real name and access a country s/he would face prosecution through its official entrances. Even Hollywood movies are providing more plausible and sophisticated scenarios as to the ability of terrorists to infiltrate within their target state.

Additionally, the "American" style of antiterrorist thought seems to neglect the very simple psychological factor that once someone has decided to sacrifice their life to perform a terrorist attack - which is a far more difficult decision to make - they will definitely find ways to avoid the various security measures or will select a target easily accessible.

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[70] The Echelon surveillance system is based on a network of satellites and ground stations located in the US, UK, Australia, New Zealand and Canada. It should also be noted that in 2001 the European Parliament adopted a resolution on the existence of a global system for the interception of private and commercial communications (ECHELON interception system). Doc. PE 305.391 of 5 September 2001, adopted with a majority of 359 - 159 with 39 abstentions. This Resolution criticized the ECHELON system as violating the fundamental right to privacy.

[71] Out of 25 suspects initially arrested, only 8 were charged with accusations related to the alleged bomb plot and it is very doubtful whether these accusations will lead to court convictions, due to the nature of the alleged evidence against them. A new measure that is discussed is tagging passengers in airports through the EU-funded Optag system for purposes of locating people inside airports.

[72] A survey that was made in the US with regard to screening procedures in public transportation means displayed fears of the general public of inefficiency in apprehending terrorists, extremely high costs and the potential of even more destructive terrorist attacks. Viscusi W.Kip and Richard J. Zeckhauser, *Sacrificing Civil Liberties to Reduce Terrorist Risks*, in: Journal of Risk and Uncertainty (Volume 26, Number 2-3), Springer, 2003, pp. 99-120.

Another aspect that must be taken into account regarding the effectiveness of antiterrorist policies is the changing nature of terrorism. September 11, 2001 confirmed that terrorism has acquired a new face, following the globalization process. The Madrid and London bombings have simply imported this global, mass terrorism phenomenon into Europe. Therefore, traditional antiterrorist policies should also adjust so as to confront terrorism as a global beyond-the-state phenomenon.[73] The adoption of UN Security Council Resolution 1373/2001 was an initial response to this kind of terrorism on behalf of the international community.[74]

However, even this approach fails to take into account the new type of terrorists that emerged out of the London bombings: peaceful, loyal British citizens, properly incorporated within the local society that were transformed (?) into suicide bombers. Is there a security system that can prevent this kind of terrorism? Unless one decides to expel or detain any group of persons that might be a pool for the creation of terrorists, for example Moslems, Pakistanis, Arabs living in the UK, the answer is negative. This method has already been described by the Genocide Convention as a crime against humanity, or in more familiar terms "ethnic cleansing". Are Western governments – in particular European ones – prepared to undertake similar steps as a method of combating terrorism? Apparently not.

It would seem to me that the above thoughts display that the more negative impact a certain measure has on human rights, the less effective it is as a counter-terrorist measure. So far, this type of approach to international terrorism has merely violated the rights of EU citizens.

A very logical question that could be asked is whether we should stop combating terrorism altogether, since the suggested measures are ineffective to this end. As with all criminal activities, any state – in our case the EU as a whole – has an obligation to fight terrorism and provide the maximum possible security for its citizens. However, there cannot be a trade-off between human rights and counter-terrorism.[75] If the state becomes a terrorist itself in order to fight terrorism, then I would prefer my chances with the possibility of suicide bombings while living in a democratic state, respecting the human rights of its citizens.

Hopefully, the future EU antiterrorist policies will correspond to the democratic and human rights traditions in this continent, providing effective responses to international terrorism, not only at the police, legal and technical levels, but also addressing the causes of terrorism and applying the proper political solutions.

The HUMSEC project is supported by the European Commission under the Sixth Framework Programme "Integrating and Strengthening the European Research Area".

[73] See also the article by Adam Roberts *The Changing Faces of Terrorism* which describes the various forms terrorism has acquired throughout the ages. The article is available online at: http://www.bbc.co.uk/history/recent/sept_11/changing_faces_01.shtml.

[74] On the impact of the measures introduced by UN Security Council Resolution 1373 see Olivier, Clementine, *Human Rights Law and the International Fight Against Terrorism: How do Security Council Resolutions Impact on States' Obligations Under International Human Rights Law? (Revisiting Security Council Resolution 1373)*, in: Nordic Journal of International Law (Volume 73, Number 4), Martinus Nijhoff Publishers, 2004, pp. 399-419.

[75] According to Hardin *"The first concern with terrorism is likely to be the trade-off between controlling terrorism and enabling government to intrude massively into citizens' lives. Most moral theorists are adverse to such trade-offs"* in Hardin, *Civil Liberties in an Era of Mass Terrorism*, at p. 92.