

 EDITIONS DE L'UNIVERSITE DE BRUXELLES

# EU counter-terrorism offences

What impact on national legislation  
and case-law?

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# Foreword

This book is the result of the international conference “EU Counter-Terrorism Offences: What Impact on National Legislation and Case-law?” organised by ECLAN (European Criminal Law Academic Network) and the Institute for European Studies (Université Libre de Bruxelles) on 27-28 May 2011. This event took place in the framework of the project ECLAN II which has been carried out with the financial support of the European Commission (DG Justice), of the Ministry of Justice of the Grand Duchy of Luxembourg and of the Institute for European Studies (Université Libre de Bruxelles). The publication of this volume is funded by the Ministry of Justice of the Grand Duchy of Luxembourg.

The editors would like to express their gratitude to all those who were involved in the preparation of the conference, particularly Emanuela Politi and Serge de Biolley. Special thanks are also due to Julian Hale for his help in the language proofreading of some chapters of the book.



# The two Framework Decisions

## A critical approach<sup>1</sup>

Sabine GLESS

### 1. Introduction

Terrorism is a very serious challenge in many ways, not only for people, but also for the fundamental principles of democracies bound to the rule of law. When for instance, in spring 2011 special US agents finally tracked down Osama Bin Laden and killed him, the execution set off a heated debate among lawyers: was this a legal execution, a justified action of killing a combat in a war against terrorists? Or are terrorists vested with all the rights of a criminal suspect<sup>2</sup>, and thus certainly must be captured, out on trial and not killed?

Seven years before, Klaus Tolksdorf, the current president of the German Bundesgerichtshof declared: "The fight against terrorism cannot be a wild, unjust war" and ordered a retrial of Mounir el-Motassadeq, the only person successfully prosecuted for involvement in the September 11 attacks<sup>3</sup>. These attacks, as it is well known, have dramatically altered the context of discussions about fighting terrorism,

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<sup>1</sup> Parts of this contribution have been inspired by Cyrille Fijnaut's work; see S. GLESS, "Fighting Terrorism in a 'Rechtsstaat'", in T. SAPPES, M. GROENHUISEN and T. KOOLMANN (eds.), *Antwerpen/Cambridge, Intersentia*, 2011, p. 929-940. I wish to thank Dario Stagno and Claudine Abt, who have provided valuable help researching facts and editing the text.

<sup>2</sup> K. AMOS, "Terrorists Have Rights Too - What International Law Says about the Killing of Bin Laden", *Spiegel Online*, 2011, at <http://www.spiegel.de/international/world/0,1518,762417,00.html>; see also E. GUMB, "The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the 'Terrorist Lists'", *JCMS*, 2008, p. 173-193, at p. 184-188.

<sup>3</sup> *New York Times*, 5 March 2004, at <http://www.nytimes.com/2004/03/05/world/german-judges-order-a-retrial-for-a-9-11-figure.html>.

- FD from 2008 amending 2002 FD on combating terrorism<sup>13</sup>.
- Drafted and adopted in Brussels, published in the *EU Official Journal* some years ago, the two legal acts, hardly appear as documents of a wild unjust war.
- But in the legal profession critics are not so easily appeased, and thus I keep with my assignment for this publication and take a critical approach. I will discuss four objections against the Framework Decisions:
  - their definition of terrorism,
  - the duty to punish (on the ground of imprecise EU parameters),
  - the obligation to expand Member States' jurisdiction,
  - and the possible infringements on human rights.

## 2. EU-Framework in general

To combat terrorism is high on the EU agenda today<sup>14</sup>. Even before the terrorist attacks of 11 September 2001 the Commission had launched work on European legislation targeting terrorist crimes<sup>15</sup>. After the outrages in the US the initiatives for Framework Decisions defined terrorism and gave punishment parameters to the Member States as well as they established a more efficient cooperation, among other things, by introducing the European arrest warrant, which by now basically replaces traditional extradition procedures between the Member States. Several other legal acts followed<sup>16</sup>. The listing of terrorists, the freezing of their property without legal remedies or fair trial guarantees led to well-known and interesting case law establishing principles of due process<sup>17</sup>. Today legal instruments giving access to data exchange basis when pursuing terrorists are of high priority in practice<sup>18</sup>.

<sup>13</sup> Framework Decision 2008/919/JHA amending Framework Decision on combating terrorism, *OJ*, no. L 330, 9 December 2008, p. 21.

<sup>14</sup> See for instance V.V. RAMRAJ, M. HOR and K. ROACH (eds.), *Global Anti-Terrorism Law and Policy*, Cambridge, Cambridge University Press, 2005, p. 444-447.

<sup>15</sup> E.J. HUSABE and I. BRUCE, *Fighting Terrorism through Multilevel Criminal Legislation, Security Council Resolution 1373, the EU Framework Decision on Combating Terrorism and their Implementation in Nordic, Dutch and German Criminal Law*, Leiden/Boston, Martinus Nijhoff Publishers, 2009, p. 55-56.

<sup>16</sup> J. WOUTERS and F. NAERT, *op. cit.*, p. 911-915; V. MITSILEGAS, "The Third Wave of Third Pillar Law", *European Law Review*, 2009, p. 523-560, at p. 538-542.

<sup>17</sup> See e.g. ECJ, 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Commission and Council v. Kadi*; CFI, 11 June 2009, T-318/01, *Commission and Council v. Omar*; ECJ, 29 June 2010, Judgment C-550/09, *E. and F.*; see G. DE BŪRCA, "The European Court of Justice and the International Legal Order After Kadi", *Harvard International Law Journal*, 2010, p. 1-50; S. GLESS and D. SCHAFNER, "Judicial review of freezing orders due to a UN listing by European Courts", in S. BRAUN and A. WEYEMBERGH (eds.), *Le contrôle juridictionnel dans l'espace pénal européen/The judicial control in EU cooperation in criminal matters*, Bruxelles, 2009, p. 163-193; E. GULD, "The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the 'Terrorist Lists'", *op. cit.*, p. 173-193.

<sup>18</sup> V. MITSILEGAS, "Transatlantic Counter-Terrorism Cooperation", *op. cit.*; K.L. SCHEPPELE, "Other People's PATRIOT Acts: Europe's Response to September 11", *Loyola Law Review*, 2004, p. 89-148, at p. 89.

in the US as well as in Europe<sup>4</sup>. According to Amnesty International the goal of suppressing terrorism has been used as a justification "for laws and practices designed simply to stifle dissent and opposition"<sup>5</sup>. Tolksdorf thus is not alone with this view, but shares his opinion with many of his European colleagues<sup>6</sup>. His position as the presiding judge in the appeal against Mr Motassadeq's conviction provided him with a world-wide audience for the claim that even in a terrorist trial all evidence must be made available, including exonerating evidence. Some weeks before, the German Bundesgerichtshof had already acquitted Abdelghani Mzoudi, the second suspect to be tried for involvement in the 9/11 attacks, of accessory to murder and membership in Al Qaeda, namely because, as one of the judges put it, the evidence was not enough to convict him<sup>7</sup>.

In Europe, the prevailing view is that a justice system cannot bend to accommodate security concerns, not even those of international efforts to fight terrorism: "We cannot abandon the rule of law. That would be the beginning of a fatal development and ultimately a victory for terrorists"<sup>8</sup>. The reality of criminal justice systems, however, changed after 9/11<sup>9</sup>. Most countries introduced special laws against terrorists<sup>10</sup>. Traditional international cooperation was modified and new transnational frameworks were established<sup>11</sup> – all sharing a common goal: the fight against terrorism.

My assignment for this publication is a critical evaluation of the changes brought by two relevant EU Framework Decisions:

- FD from 2002 on combating terrorism<sup>12</sup>;

<sup>4</sup> R. BOSSONG, "The Action Plan on Combating Terrorism", *JCMS*, 2008, p. 27-48, at p. 30, 34 and 42; C. FINAUT, "The attacks on 11 September 2001, and the Immediate Response of the European Union and the United States", in J. WOUTERS and F. NAERT (eds.), *Legal instruments in the fight against international terrorism. A transatlantic dialogue*, Leiden/Boston, Nijhoff, 2004, p. 15-36, at p. 22-26; E. GULD, *op. cit.*, at p. 178-182; V. MITSILEGAS, "Transatlantic Counter-Terrorism Cooperation after Lisbon", *Eucrim*, 2010, p. 111-117, at p. 111-113; J. WOUTERS and F. NAERT, "Of Arrest Warrants, Terrorist Offences and Extradition Deals", *Common Market Law Review*, 2004, p. 909-935, at p. 909-911.

<sup>5</sup> REPORT OF AMNESTY INTERNATIONAL, "Human Rights Dissolving at the Borders? Counter-Terrorism and EU Criminal Law", *Amnesty International EU Office*, IOR 61/013/2005, p. 1-44, at p. 2, at <http://ejp.icj.org/IMG/AIreport.pdf>.

<sup>6</sup> See e.g. S. GLESS discussing C. FINAUT.

<sup>7</sup> *New York Times*, 6 February 2004, at <http://www.nytimes.com/2004/02/06/world/faulting-us-germany-frees-a-9-11-suspect.html?ref=abdelghanimzoudi>; for a more detailed discussion of the relevant German legal framework, see C. SAFFERLING, "Terror and Law – Is the German Legal System able to deal with terrorism?", *German Law Journal*, 2004, p. 515-524.

<sup>8</sup> *New York Times*, 5 March 2004.

<sup>9</sup> R. BOSSONG, *op. cit.*; C. FINAUT, "The attacks on 11 September 2001".

<sup>10</sup> See Martin Böse's and Robert Kert's country reports within this same publication.

<sup>11</sup> M. DEN BOER, S. HILLEBRAND and A. NOLKE, "Legitimacy under Pressure: The European Web of Counter-Terrorism Networks", *JCMS*, 2008, p. 101-124, at p. 109-115; J. WOUTERS and F. NAERT, *op. cit.*, p. 910-913.

<sup>12</sup> Framework Decision 2002/475/JHA on combating terrorism, *OJ*, no. L 164, 22 June 2002, p. 3.

In practice there have been cases in which prosecutions on terrorist charges were received by the public with disbelief or rather discontent.

In Austria law enforcement authorities brought charges against animal activists for being part of a criminal conspiracy, arguing that both mainstream and militant groups were part of a criminal conspiracy – not because of their actions, but because of their beliefs in support of animal rights – and that they should therefore be held responsible for a wide range of crimes committed in the name of animal rights. Although the activists were acquitted eventually, doubts about the feasibility and adequacy of such legislation prevail – and were recently fuelled after law enforcement authorities prosecuted a member of an association of fathers fighting for changes in family law.

This blurring distinction between terrorists and activists has also been the subject of discussion in Great Britain, where courts were faced with the question of whether terrorism against undemocratic and tyrannical regimes can be excused as a noble cause. In *R v F*, a Libyan national, whose family was allegedly murdered by or on behalf of Gaddafi's regime, was granted asylum in the UK in 2003. In 2006, he was arrested and charged under the UK Terrorism Act (2000) for being in possession of two documents that could be used to further terrorist activities. He denied ever having seen one of the documents but said that the other one was given to him by the leader of a resistance movement in Libya opposed to Gaddafi. His argument was that he was a freedom fighter against a tyrannical government and he therefore had a 'reasonable excuse' as set out in Section 58(3) of the Terrorism Act (2000). The judges held that being a 'freedom fighter' is not a defense stating, "... the terrorist legislation applies to countries which are governed by tyrants and dictators. There is no exemption from criminal liability for terrorist activities which are motivated or said to be morally justified by the alleged nobility of the terrorist cause"<sup>26</sup>. The recent wave of revolutions in the Arab world has led to the fall of tyrant regimes, paving the way for these countries to enjoy the freedoms enjoyed by others in democratic regimes such as that of the UK. Therefore, one cannot help but wonder if the courts in Great Britain will still uphold this judgment in light of the Arab spring.

A definition detached from any reference to values (like democracy or *Rechtsstaat*) or reasons for committing the terrorist act (like freedom fighting) leads to problems if a State wishes – maybe for good reasons – not to condemn certain violent acts as terrorist acts. This problem gets worse as a trigger mechanism for a duty to criminalize "terrorism" is set by superior law, like in the EU. This means that States cannot react individually to the particular challenges that they as individual States may face, such as the existence of a national political movement which has members who may resort to violence in an attempt to achieve their ends.

Some examples, drawn from the list of Nobel peace laureates, illustrate the problem of individuals perceived by some States to be pursuing an illegal cause, and who could even be defined as "terrorists". They include *i.e.* Menachem Begin (head of Irgun Tzvai Le'umi, recipient of the Nobel Peace Prize in 1978); Yassir Arafat (for belonging to the PLO, and a Nobel Peace Prize winner in 1994); Nelson Mandela (for belonging to the ANC, equally a Nobel Peace Prize winner).

<sup>26</sup> [2007] 2 All ER 193, [2007] EWCA Crim 243, [2007] 3 WLR 164.

Today however, the discussion about drawing the line between legitimate freedom fighters and terrorists is replaced by the functional approach of looking at the actions as such<sup>27</sup>.

### 3. *Terrorist acts*

In Article 1(1) of the 2002 FD, specified acts which are criminal are defined first. These include attacks upon persons' lives or their physical integrity, kidnapping or hostage taking, or interfering with or disrupting the supply of water, power or any other fundamental resource the effect of which is to endanger human life, etc.

Whereas the 2002 FD only obliged Member States to punish a rather limited number of acts linked to terrorist activities in its Art. 3, such as aggravated theft committed with a view to facilitate terrorist acts, extortion committed with a view to the perpetration of terrorist acts, the drawing up of false administrative documents with a view to committing terrorist acts the 2008 FD broadened the obligation to include several more acts linked to terrorist activities or rather to prepare, organise or supporting terrorism, such as:

- a. "public provocation to commit a terrorist offence" – meaning distributing, or otherwise making available, a message to the public, with the intent to incite the commission of a terrorist act;
- b. "recruitment for terrorism" – meaning to solicit another person to commit a terrorist act;
- c. "training for terrorism" – meaning to provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or instructing individuals in other specific methods or techniques, for the purpose of committing a terrorist act.

Since the crime of terrorism itself is not defined in the EU framework, the 2008 FD effectively bases broadly phrased subsidiary offences for which terrorism remain inchoate<sup>28</sup>. During the legislative procedure several members of the European Parliament as well as members of national parliaments of EU Member States criticised the vagueness of the elements of the new offences<sup>29</sup>.

The amendment of the former Framework Decision was made, especially to include incitement to terrorism on the Internet<sup>30</sup>. The World Wide Web however brings together people (and jurisdictions) with quite diverging concepts of "public provocation to commit a terrorist offence" or "incitement to terrorism". Thus, a legal obligation to prosecute such behaviour must be well reflected in terms of legitimate jurisdiction. A possible solution would be the supply of specific definitions of the

<sup>27</sup> S. KRASCH and A. OHRMICHEN, "Judges gone astray: The fabrication of terrorism as an international crime by the Special Tribunal for Lebanon", *Durham Law Review Online*, 2011, p. 1-20, at p. 11-13.

<sup>28</sup> REPORT OF AMNESTY INTERNATIONAL, *op. cit.*, p. 2.

<sup>29</sup> L. MELLINGER, "Illusion of Security: Why the Amended EU Framework Decision Criminalizing 'Incitement to Terrorism' on the Internet Fails to Defend Europe from Terrorism", *Syracuse Journal of International Law and Commerce*, 2010, p. 339-368, at p. 354.

<sup>30</sup> *Ibid.*, p. 340-341.

outlawed behaviour. Otherwise the burden of defining the concepts will be on the national criminal courts and balancing the need for criminal prosecution with the right of free speech and other democratic freedoms.<sup>31</sup>

Moreover, the obligation to prosecute exists even if a terrorist offence was never actually committed in the end. This is provided for in Art. 3(3) of the 2008 FD. Art. 4 obliges Member States to punish the aiding or abetting, inciting or the attempt to commit terrorist acts.

Thus Member States' obligation to punish is quite broad and rather vague, and it appears unclear how national legislators will implement the EU parameters into national law.

### B. *Terrorism in (customary) international law – and the “just war” argument*

Did the EU lawmaker fall short in his duty to provide a comprehensive definition – or is the task of defining punishable terrorism (as opposed to justified freedom fighting) an unanswerable dilemma?

The definition of terrorism has been in law journal's headlines recently<sup>32</sup> following the decision handed down by the Special Tribunal for Lebanon which – among other things – defined terrorism as a crime according to customary international law<sup>33</sup> and thus in principle binding for all States, including EU Member States<sup>34</sup>.

According to the Special Tribunal for Lebanon rules of international law define terrorism as follows: the commission of a criminal act causing harm to life, limb and property, including a concrete threat or an attempt<sup>35</sup> to commit such an act, as the only objective element of the offence<sup>36</sup>. Many academics still hold the view that currently no universal definition of terrorism exists<sup>37</sup>. This position is

<sup>31</sup> *Ibid.*, p. 360-363.

<sup>32</sup> K. AMBOS, “Judicial creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?”, *Leiden Journal of International Law*, 2011, p. 655-675, at p. 655; S. KIRSCH and A. OBEHMICHEN, *op. cit.*, p. 1.

<sup>33</sup> Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/II/AC/RI766b5, 16 February 2011 (“Decision”), nos. 85 and 102.

<sup>34</sup> Whether the tribunal's judges were right to press ahead with a definition in the case before them, may be left open here. For a critique see K. AMBOS, *op. cit.*, p. 665-666; S. KIRSCH and A. OBEHMICHEN, *op. cit.*, p. 6-7.

<sup>35</sup> Art. 2(2) International Convention for the Suppression of Terrorist Bombings, A/RES/52/164 of 15 Dec. 1997, 2149 U.N.T.S. 256; Art. 2(3) International Convention for the Suppression of the Financing of Terrorism, A/Res/54/109 of 9 Dec. 1999, 39 I.L.M. 270; Art. 1(a) Convention for the Suppression of Unlawful Seizure of Aircraft, 16 Dec. 1970, 860 U.N.T.S. 106; Art. 2(1)(d) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 14 Dec. 1973, 1035 U.N.T.S. 168; all conventions can be found at [www.un.org/terrorism/instruments.shtml].

<sup>36</sup> Interlocutory Decision, no. 188.

<sup>37</sup> E.g. K. AMBOS, *op. cit.*, p. 666; E. STUBBINS BATES *et al.*, *Terrorism and International Law: Accountability, Remedies, and Reform: a Report of the IBA Task Force on Terrorism*, Oxford, Oxford University Press, 2011, p. 1; M. CH. BASSIOUNI, “Terrorism: the Persistent

exemplified by Schmid and Jongman<sup>38</sup> who have analysed 109 different definitions of terrorism and isolated 22 different elements characterising terrorism. Later, in a report, Schmid suggested a definition of terrorism, which has latterly become famous due to its simplicity: acts of terrorism are defined as ‘peacetime equivalents of war crimes’<sup>39</sup>. This definition blurs again however the legal parameters of such crimes, some of which are to be prosecuted as crimes in a national criminal justice systems and some of which, the more serious ones, which shall be taken care of by the nascent international criminal justice systems, or even outside of the criminal justice system altogether by triggering a reaction based on international humanitarian law.

Part of the dilemma terrorism poses to legal systems is that of drawing lines between criminal law measures and responses that may be labeled either as military or humanitarian interventions. Both of these forms of intervention lie beyond the scope of national criminal justice systems, and carry the risk of being viewed as acts of terrorism themselves.

The 2002 FD on combating terrorism deals with this paradox also, albeit only marginally: Recital 11 of the preamble asserts, that “Actions by armed forces during periods of armed conflicts, which are governed by international humanitarian law within the meaning of these terms under that law ... cannot be viewed as terrorism”. Ultimately, this exemption clause is based on a “just war” argument, too. The law makes the assumption that certain circumstances may exempt violence from the legal range of terrorism. Violence which could under different circumstances be considered to be an act of terrorism is defined into a certain act of freedom fighting<sup>40</sup>.

References to the “just war” argument have dominated political discussions mainly regarding the fight against terrorism, especially in the US, with regard to Al-Qaeda<sup>41</sup>. A reference to the “just war” argument in legal documents governing the States’ reactions to terrorism provoke however a series of questions, including: May such a principle be applied to (politically motivated) violence at all? If this is answered in the affirmative, certain justifications could be invoked to transform violence from an evil to a non-evil-action. Not only States themselves are provided with some protections in this way insofar as State intervention is exempted from any terrorism charge without further question, but also other groups or individuals as well.

Dilemma of Legitimacy”, *Case Western Reserve Journal of International Law*, 2004, p. 299-306, at p. 305; S. KIRSCH and A. OBEHMICHEN, *op. cit.*, p. 7-8.

<sup>38</sup> A.P. SCHMID and A.J. JONGMAN, *Political Terrorism – a New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature*, Amsterdam/New Brunswick, 2<sup>nd</sup> ed., 1988, p. 5-8.

<sup>39</sup> United Nations Office on Drugs and Crime: Definitions of Terrorism, at [http://web.archive.org/web/20070527145632/http://www.unodc.org/unodc/terrorism\\_definitions.html](http://web.archive.org/web/20070527145632/http://www.unodc.org/unodc/terrorism_definitions.html), last visited on 27 April 2011.

<sup>40</sup> S. PEERS, “EU Responses to Terrorism”, *International & Comparative Law Quarterly*, 2003, p. 227-243, at p. 236-238.

<sup>41</sup> See also A. OBEHMICHEN, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany and France*, Antwerp, Intersentia, 2009, p. 389 and f.

particularly important to the ability of a constitutional State to democratically shape its laws”<sup>46</sup>.

However, seven years earlier, the 2002 FD set out to compel Member States to punish certain acts of “terrorism” on the grounds of EU parameters laid out in the Framework Decision. And, this Framework Decision does not meet in all aspects the requirements of precise language and coherent concepts that govern most of the different Member States’ criminal justice systems.

One must furthermore always keep in mind the fact that, in practice, the importance of anti-terrorist legislation is often not the elements of crime that it defines, but the special investigative methods or other measure provided to deal with it<sup>47</sup>. Neither of these aspects are however laid down in the EU-Framework Decisions.

#### B. Expansion of jurisdiction

The EU-Framework Decisions also oblige the Member States to expand their criminal jurisdiction. According to Art. 9 of the 2002 FD on combating terrorism, each Member State shall take the necessary measures to establish

- territorial jurisdiction (extending the concept to vessels flying its flag and aircraft registered there),
- jurisdiction based on a broad concept of the active personality principle (including acts committed by “residents” and legal persons as well as citizens) and
- jurisdiction based on a broad concept of the protective principle, where acts are committed “against the institutions or people” of that Member State or an EU institution or body based there.

Given that EU-Member states have not yet settled on a legal act which allocates clear-cut jurisdiction to one EU-state in cases of a positive competence conflict, the obligation to expand jurisdiction and potentially intensify the problem of multiple jurisdictions is striking<sup>48</sup>.

#### C. Infringements of human rights?

In addition, anti-terrorist legislation always raises concerns about the adequate protection of human rights and civil liberties<sup>49</sup>; this is especially true in an atmosphere of “war against terrorism”<sup>50</sup>.

<sup>46</sup> BVerfG, 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, no. 252 at [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html).

<sup>47</sup> A. OEHMICHEN, “Incommunicado Detention in Germany: An Example of Reactive Anti-terror Legislation and Long-term Consequences”, *German Law Journal*, 2008, p. 855-887; S. PEERS, *op. cit.*, p. 237-243.

<sup>48</sup> See E.J. HUSABØ/L.BRUCE, *op. cit.*, p. 315-357.

<sup>49</sup> A. OEHMICHEN, *Terrorism and Anti-Terror Legislation*, *op. cit.*, p. 343 and f.; E. GUILD, *op. cit.*, p. 174-175.

<sup>50</sup> See e.g. F.D. NI AOLAIN, “Looking Ahead: Strategic Priorities and Challenges for the United Nations High Commissioner for Human Rights”, *Columbia Human Rights Law Review*, 2004, p. 469-491, at p. 487-491.

How these exemption clauses can be accommodated within the wider fight against terrorism and whether they simply open a Pandora’s box of difficulties remain moot questions.

#### 4. Fighting terrorism by means of criminal law

It would nevertheless be unfair to judge efforts designed to fight terrorism by means of the criminal law, like those foreseen in the EU-Framework Decisions, solely on the fact that they do not solve the historically difficult distinction between terrorism and freedom fighting. Criticism should rather focus on the special use of criminal law in a certain system, like that established by the Framework Decisions or in the national criminal justice systems of the Member States<sup>42</sup>.

The EU act basically does two things: (a) compel Member States to punish certain acts, and (b) force Member States to claim wide jurisdiction in order to ensure prosecution. These obligations correspond in general with the demands of the Special Tribunal for Lebanon, which deduced from rules of international law two obligations on States and non-State actors: (1) the obligation to refrain from engaging in acts of terrorism, and (2) the obligation to prevent and repress terrorism, and in particular to prosecute and try alleged perpetrators<sup>43</sup>.

##### A. Obligation to punish

The Framework Decisions – as explained above – oblige Member States to punish certain behaviour as terrorist acts. This fact can be interpreted quite differently: It could be viewed as progress towards a united fight against terrorism or as an EU infringement on State sovereignty and a violation of a democratically legitimized law.

The duty to criminalize, established by the Framework Decisions, is quite broad – as illustrated previously – especially if one bends the rather imprecise language to encompass all its possible meanings, for instance when criminalizing acts of preparation and/or conspiracy to commit acts of terrorism<sup>44</sup>.

The EU obligation is thus problematic, taking into account the basic question of a European competence to define criminal terrorist acts in the first place and the Framework Decision’s failure to frame punishable terrorist activities in a precise language<sup>45</sup>. Nonetheless, in attempting to come up with definitions it is important to keep in mind – as the German Bundesverfassungsgericht phrased it in its 2009 Lisbon Judgement – that: “decisions on substantive and formal criminal law are

<sup>42</sup> For a comparative overview see: A. OEHMICHEN, *Terrorism and Anti-Terror Legislation*, *op. cit.*; E.J. HUSABØ/L.BRUCE, *op. cit.*, p. 171-192.

<sup>43</sup> Interlocutory Decision, no. 102.

<sup>44</sup> For critical views see e.g. S. MELANDER, “The Use of Criminal Law in Combating Terrorism – a Nordic Perspective”, in K. LIGETI (ed.), *Homage to Imre A. Wiener*, Toulouse, Eres, 2010, p. 119-135, p. 121-123.

<sup>45</sup> A. KLR, *op. cit.*, p. 200; S. PEERS, *op. cit.*, p. 230-232.



as well as on the principle of legal certainty<sup>54</sup>. But there is still little relevant case law up to now.

Counter terrorism legislation often collides with the right to freedom of speech because it often seeks to suppress certain politically motivated acts<sup>55</sup>. Furthermore, terrorism, or rather the fear of terrorism, is also often used to justify the use of special police and prosecution powers that reduce the usual protection of fair trial guarantees relating to investigations, detention, and criminal proceedings<sup>56</sup>. Both are highly problematic from a human rights perspective.

European countries basically have abstained from the “war on terrorism”-terminology. The common understanding is that societies have to balance the need for criminal prosecution and democratic entitlements, especially the right of free speech<sup>57</sup>. These privileges are legally grounded in the Art. 10 ECHR as well as in Art. 19 ICCPR and Art. 20 ICCPR (International Covenant on Civil and Political Rights). Both grant the right of freedom of thought and expression, giving the individual the right to have an opinion and voice it without government intrusion<sup>58</sup>. The exercise of these rights, however, may be subject to such limitations as are lawful in a democratic society in order to protect national society and public safety.

## 5. Conclusion

The EU-Framework Decisions provide the grounds on which Member States have, at least partly, built their national criminal sanctions against terrorism. In doing so, legislators – at the European and the State level – have had to create systems which allow them to fight violent attacks effectively, avoiding unwanted consequences on other levels.

Basically the criminal justice systems face two problems: (a) Criminal prosecution and warfare instruments must be kept separately, *i.e.* as long as terrorism is regarded a crime, all alleged terrorists must be treated like alleged criminals and have the basic rights of criminal suspects; (b) criminal justice systems must draw an adequate line between those groups advancing legitimate political goals with controversial means

<sup>54</sup> Eur. Court HR, 26 April 1979, *Sunday Times v. United Kingdom*, no. 6538/74; Eur. Court HR, 30 January 1998, *United Communist Party v. Turkey*, 133/1996/752/951; Eur. Court HR, 13 February 2003, *Welfare Party v. Turkey*, nos. 41340/98, 41342/98, 41343/98, 41344/98.

<sup>55</sup> See e.g. F.D. NI A.O.L.A.M., *op. cit.*, p. 489-491; S. DOUGLAS-SCOTT, “The Rule of Law in the European Union – putting the security into the EU’s Area of Freedom, Security and Justice”, *European Law Review*, 2004, p. 219-242, at p. 221-224.

<sup>56</sup> See judgments regarding infiltration of undercover agents in terrorist organisation – Eur. Court HR, 5 February 2008, *Ramanuskas v. Lithuania*, no. 74420/01; or Eur. Court HR, 10 March 2009, *Bykov v. Russia*, no. 4378/02 – which are only legitimate if there is an adequate legal base and a guarantee of supervision of independent authority as well as a clear distinction between identifying perpetrators and inciting an innocent person; regarding collection and automatic procession of data (data mining), see Eur. Court HR, 4 May 2000, *Rotaru v. Romania*, no. 28341/95; and Eur. Court HR, 4 December 2008, *S. and Marper v. UK* (DNA storage), nos. 30562/04, 30566/04.

<sup>57</sup> L. MELLINGER, *op. cit.*, at p. 360-365.

<sup>58</sup> C. BRANTS and S. FRANKEN, “The protection of fundamental human rights in criminal process General report”, *Utrecht Law Review*, 2009, p. 7-65, at p. 28-29.

The European authorities have however realised by now that respect for human rights adds to the legitimacy of the fight against terrorism, and thus strive for compliance with human rights as well as spreading respect of human rights in order to ensure that there is a sound basis for cooperation with third countries.

On the face of it, such concern seems unnecessary anyway, since Art. 2 of the 2008 FD explicitly declares that: “[The] Framework Decision shall not have the effect of requiring Member States to take measures in contradiction of fundamental principles relating to freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.”

The legal effect and impact of Art. 2 of the 2008 FD in a particular case remains nonetheless somewhat unclear. Could a defendant raise an objection based on an infringement of Art. 2 of the 2008 FD? Or could a Member State raise, for instance, a reservation of national freedom of expression if its national criminal laws were to be screened before the ECJ because the penal statutes against terrorism were judged too lenient from a Brussels point of view?

Before the 2008 amendment, the 2002 FD on combating terrorism only stated in its preamble that the Union is “based on the principle of democracy and the principle of the rule of law” and that the Framework Decision “respects fundamental rights” as guaranteed by the European Convention on Human Rights (ECHR) and Member States’ constitutions and observes the principle recognised by the EU Charter of Fundamental Rights, agreed in December 2000<sup>51</sup>.

The European Court of Human Rights (Eur. Court HR) has however rejected the invoking of human rights protections to justify *violent* political acts committed in the territory of signatory States to the European Convention on Human Rights in general: Given that all of them are considered to be democratic countries, and have made a commitment to human rights protection, political violence may be treated like any other serious criminal offence<sup>52</sup>. However in recent judgements the European Court of Human Rights has been firm in Human Rights protection as regards of certain consequences like preventive detention as well as deportation or expulsion of terrorist suspects, if they cannot be convicted in a criminal trial<sup>53</sup>. Thus the FD’s parameters for substantive criminal law should only raise concern with regard to the incrimination of non-violent actions, such as alleged recruitment for terrorism in certain situations, which touch upon the freedom of association, the freedom of speech and expression

<sup>51</sup> The preamble further asserts that the Framework Decision could not be interpreted to “reduce or restrict fundamental rights or freedom such as the right to strike, freedom of assembly, of association and of expression, including the right of everyone to form and join trade unions... and the related right to demonstrate”.

<sup>52</sup> See furthermore Eur. Court HR, 18 January 1978, *Ireland v. UK*, no. 5310/71; Eur. Court HR, 27 September 1995, *McCann and Others v. UK*, no. 18984/91.

<sup>53</sup> See e.g. Eur. Court HR, 19 February 2009, *A. and Others v. UK*, no. 3455/05; or Eur. Court HR, 28 February 2008, *Saadi v. Italy*, no. 37201/06; or Eur. Court HR, 24 March 2009, *Ben Salah v. Italy*, no. 38128/06.



and those which have crossed the line, not only propagating illegitimate political goals, but using punishable means.

Addressing the problem, the European legislator has different possibilities:

To solve the first problem, requirements for phrasing the statutes incriminating terrorism could be modified in a way that "freedom activists" could be exempted, for instance by way of a negative definition entered. § 278(c)(3) of the Austrian Criminal Code provides an example for such exemption: According to that statute a violent act is not judged as terrorist act, if the aim is to establish or reconstitute democratic or constitutional power or to protect human rights<sup>59</sup>.

Another way out of a terrorist verdict could be the acknowledgement of "good cause" as an exceptional justification or excuse. The result is very similar as if the statute would itself carry an exemption clause. For reasons of criminal doctrine however it is different, whether there is no "legal wrong" ("Unrecht") committed or if a "legal wrong" is by way of exception justified or excused.

A third potential way to avoid unwanted terrorist charges could be a mechanism to drop charges if the prosecuting authorities or the courts realize that terrorist laws are applied in a case of legitimate freedom fighting or political activism of the "good sort".

The need for an outlet is obvious in the 2002 FD itself, namely in the exemption clause based on a "just war" argument: The assumption that certain circumstances may in fact transform violence from what may otherwise be considered to be an act of terrorism into an act of freedom fighting<sup>60</sup>. References to the "just war"-argument have dominated political discussions, especially in the US, with regard to Al-Qaeda. But Europe hopefully will not follow the example and construe criminal prosecution as warfare.

<sup>59</sup> § 278(c)(3) StGB: "(3) Die Tat gilt nicht als terroristische Straftat, wenn sie auf die Herstellung oder Wiederherstellung demokratischer und rechtsstaatlicher Verhältnisse oder die Ausübung oder Wahrung von Menschenrechten ausgerichtet ist" at [http://www.internetjurists.at/gesetze/bg\\_stgb01.htm#%C2%A7\\_170](http://www.internetjurists.at/gesetze/bg_stgb01.htm#%C2%A7_170).

<sup>60</sup> S. PEERS, *op. cit.*, p. 236.