

**TRADING HUMAN RIGHTS FOR PUBLIC SECURITY:  
EU ANTI-TERRORISM POLICY  
AND ITS IMPACT ON FUNDAMENTAL RIGHTS**

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**1. INTRODUCTION**

During the 38<sup>th</sup> European Conference of Presidents of Lawyers Organizations, held in Vienna, February 2010, the representatives of European lawyers expressed their great concern as to the growing imbalance between governments' efforts to increase public security and the protection of human rights and citizens' liberties. The Conference resulted in the adoption of a resolution addressed to the European Union's institutions, Member States and citizens. The resolution stresses that the European Union's primary obligation is to respect its residents' fundamental rights, and that counter-terrorism measures, adopted in order to enhance security, have in fact led to the erosion of such rights because of the unduly extensive possibilities they provide for the restriction and limitation thereof<sup>1</sup>.

This statement made by European lawyers is merely one of the voices that may be heard in the recently escalating debate concerning the

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<sup>1</sup> National Chamber of Legal Advisors in cooperation with Wolters Kluwer Polska, *Press note*, Kancelaria, April 2010, No. 20, at p. 10.

relationship between present day security threats and respect for civilians' human rights. Ensuring both the promotion and protection of human rights and the adoption of effective counter-terrorism measures inevitably gives rise to serious practical challenges. Balancing the competing demands of security and liberty is commonly said to be the central task of anti-terrorism policy.

This article aims to demonstrate the significance of the interrelation existing between the protection of human rights and combating terrorism. In this respect, although the problem is obviously topical worldwide, the article limits its analysis to the situation existing within the European Union, since both of the abovementioned fields of activity have recently been proclaimed as high priorities for the EU and indeed a few notable initiatives have been introduced. Given this limited scope, the present analysis does not purport to offer any comprehensive discussion of the EU's counter-terrorism strategy, nor its attitude towards protecting fundamental rights, but rather presents the premises upon which these respective EU policies are based. Finally, these remarks of a general character constitute a foundation for analysing some of the EU anti-terrorism measures in the light of the veiled threat they may pose to the fundamental rights of EU residents. The analysis aims to shed some light on the problem of how selected preventive measures, adopted in order to increase the security of individuals, may in fact limit the enjoyment of their fundamental rights and liberties.

## **2. The relationship between terrorism and human rights**

Terrorism clearly has a serious impact on the enjoyment of human rights – by its very definition it aims at the destruction of human rights, democracy and the rule of law. Acts of terrorism in all forms endanger and kill innocent people, jeopardize fundamental freedoms and seriously impair the dignity of human beings. As the security of the individual is a basic human right, protection of individuals remains a fundamental obligation of States and the European Union as a whole. Bearing in mind that the fight against terrorism represents one of the greatest challenges the international community currently faces, the obligation to ensure the human rights of nationals and others is to be fulfilled,

among others, by taking positive measures to protect them against the threat of terrorist acts.

Nevertheless, there exists a paradox with regards to all kinds of anti-terrorism efforts. On the one hand, counter-terrorism measures are aimed at protecting individuals from human rights violations caused by terrorist acts. On the other hand, such measures have often turned out to be equally perilous. In the aftermath of September 11<sup>th</sup>, it became known worldwide that, in their fight against terrorism, the United States engaged in various malpractices. Pictures from Guantanamo Bay – a symbol of the United States (US)-led “war on terrorism” – revealed the inconvenient truth that this “war”, waged in the name of protecting human lives, freedom and security, itself encompasses serious violations of the right to life, prohibition of torture and other ill-treatment, right to liberty and security etc. It appeared that the fight against terror may infringe the very same fundamental values it sought to protect. The logical question arises as to the actual legitimacy of such a fight, in which the fighters become terrorists themselves.

### **3. EU priorities: countering terrorism and protecting fundamental rights**

#### **3.1. EU counter-terrorism efforts**

The 2004 Madrid and 2005 London attacks “imported” the phenomenon of mass global terrorism into Europe, underlying the need for an increased security and anti-terrorist legal framework. While it was clear that Europe needed to be united in its response, it was also clear that the European countries could not meet this challenge separately. Acting as one, however, the European Union was capable of delivering results. Building an area of Justice, Freedom and Security became a high priority for the EU.

In general terms, the European Union adopted a non-military preventive approach in response to terrorism (notwithstanding the fact that certain individual Member States may have opted for a military response, either acting unilaterally or through the North Atlantic Treaty Organisation, NATO). The EU approach, as derived from various documents of either political or legal nature, considers terrorism as

a very serious form of criminal activity<sup>2</sup> (it must be noted, however, that no precise definition has been agreed yet) and introduces measures that will effectively counter terrorism and minimize the operational capability of terrorists. This approach was confirmed by the “The European Union Counter-Terrorism Strategy” document adopted by the Justice and Home Affairs Council in December 2005<sup>3</sup>. The Strategy may serve as a summary of all previous documents, statements, propositions and decisions of the EU and it aims to take the agenda of work set out in March 2004, i.e. “EU Action Plan on Terrorism”<sup>4</sup>, into the next phase. The Strategy is divided into four pillars – **Prevent, Protect, Pursue and Respond**.

The first pillar aims *to prevent people from turning to terrorism by tackling the factors or root causes which may lead to radicalisation and recruitment, both in Europe and internationally*. One of its key priorities is to address incitement and recruitment, notably by introducing new criminal offences covering such behaviour.

The second pillar seeks to *reduce vulnerability to attack, through improved security of borders, transport and critical infrastructure*. Its key priorities are to improve the secure nature of EU passports through the introduction of biometrics and enhance security within civil aviation.

The third pillar’s objective is *to investigate terrorists and impede terrorist planning, travelling, and communications*. Terrorist networks should also *be disrupted by cutting off their supply of both financial finding and operational materials*. One of its key objectives is to tackle terrorist financing.

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<sup>2</sup> See e.g. Article 83 of the Treaty on the Functioning of the European Union (TFEU), which constitutes the basis for establishing “minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crimes with a cross-border dimension [...] These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime”.

<sup>3</sup> The European Union Counter-Terrorism Strategy, available at: <http://register.consilium.eu.int/pdf/en/05/st14/st14469-re04.en05.pdf>, last visited 25.9.2010.

<sup>4</sup> EU Action Plan on Terrorism, available at: [http://www.consilium.europa.eu/uedocs/cmsUpload/EU\\_PlanOfAction10586.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/EU_PlanOfAction10586.pdf), last visited 25.9.2010.

Finally, the fourth pillar is aimed at *managing and minimising the consequences of any terrorist attack*. It clearly stipulates that any action within the “Respond pillar” may be taken only if the three preceding pillars fail to succeed.

Referring to the key priorities of the abovementioned pillars of EU Strategy, the most important and controversial – in the context of fundamental rights – instruments adopted after the September 11<sup>th</sup> attacks, for the purposes of the present article, may be listed and categorized as follows:

Within the area of the Strategy’s first pillar:

- Council Framework Decision of 13.6.2002 on Combating Terrorism<sup>5</sup> (which most importantly defines, for the purpose of the Directive, the terms ‘terrorist offences’ and ‘terrorist groups’ and requires Member States to criminalise incitement to terrorism), and
- Council Framework Decision of 28.11.2008 Amending Council Framework Decision on Combating Terrorism<sup>6</sup> (both of which contain provisions concerning incitement or provocation to commit terrorist offences).

Within the area of the Strategy’s second pillar:

- Council Regulation on standards for security features and biometrics in passports and travel documents issued by Member States of 13.12.2004<sup>7</sup>.
- Regulation of the European Parliament and of the Council on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002 of 11.3.2008<sup>8</sup>, together with Commission Regulation laying down detailed measures for the

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<sup>5</sup> Council Framework Decision on Combating Terrorism (EU) No. 2002/475/JHA of 13.6.2002, O. J. 2002, L 164, p. 3 (Council Framework Decision 2002).

<sup>6</sup> Council Framework Decision Amending Framework Decision 2002/475/JHA on Combating Terrorism (EU) No. 2008/919/JHA of 28.11.2008, O. J. 2008, L 330, p. 21 (Council Framework Amendment 2008).

<sup>7</sup> Council Regulation on standards for security features and biometrics in passports and travel documents issued by Member States (EC) No 2252/2004 of 13.12.2004, O. J. 2004, L 385, p. 1.

<sup>8</sup> Regulation of the European Parliament and of the Council on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002, No 300/2008 of 11.3.2008, O. J. 2008, L 97, p. 72.

implementation of the common basic standards on aviation security of 4.3.2010<sup>9</sup> (which introduce screening technologies of passengers, luggage and staff).

Within the area of the Strategy's third pillar:

- Directive of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks of 15.3.2006<sup>10</sup> (which is, among others, aimed at facilitating criminal investigations);
- Council Regulation imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban of 27.5.2002<sup>11</sup> (which concerns freezing the assets of alleged terrorists or terrorist supporters), and Council Regulation on specific restrictive measures directed against certain persons and entities with a view to combating terrorism of 27.12.2001<sup>12</sup> (which also concerns the freezing of assets but applies to persons not falling within the scope of Council Regulation 881/2002).

Actions taken within the Strategy's fourth pillar are, as noted above, absolutely exceptional and taken *post factum*, in the aftermath of the terrorist attack. Hence they fall outside the scope of the present article which concerns only preventive, administrative measures.

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<sup>9</sup> Commission Regulation laying down detailed measures for the implementation of the common basic standards on aviation security (EU) No. 185/2010 of 4.3.2010, O. J. 2010, L 55, p. 1, (former Commission Regulation 820/2008).

<sup>10</sup> Directive of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks No. 2006/24/EC of 15.3.2006, O. J. 2006, L 105, p. 54 (Data Retention Directive).

<sup>11</sup> Council Regulation imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (EC) No. 881/2002 of 27.5.2002, O. J. 2002, L 139, p. 9, which superseded the earlier Council Regulation (EC) No. 467/2001, O. J. 2001, L 67, p. 1 (Council Regulation 881/2002).

<sup>12</sup> Council Regulation on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (EC) No. 2580/2001 of 27.12.2001, O. J. 2001, L 344, p. 70 (Council Regulation 2580/2001).

For the sake of clarity, it shall also be mentioned that the EU carries out its anti-terrorism actions not only via EU-law instruments but also via its international cooperation with non-EU countries. Most importantly, reference should be made to cooperation with the United States of America<sup>13</sup>. Such international measures may also impact upon the individual rights of EU residents, however, they are not discussed in the present article.

### 3.2. EU fundamental rights

While the fight against terrorism has undoubtedly been granted a priority status, it must be noted that it is not the sole issue on the EU agenda. Another important value of the European Union is the improvement of the protection of persons in the exercise of their fundamental rights. According to Article 6 of the Treaty on European Union (TEU):

“1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the

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<sup>13</sup> EU and U.S. efforts are joint and complementary, and cover a wide range of areas, in particular: intelligence, law enforcement, judicial cooperation and transport security. See, for instance, **Council Decision 2003/516/EC of 6.6.2003 concerning the signature of the Agreements between the European Union and the United States of America on extradition and mutual legal assistance in criminal matters**; Council Decision 2007/551/CFSP/JHA of 23.7.2007 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the **processing and transfer of Passenger Name Record (PNR) data by air carriers** to the United States Department of Homeland Security (DHS); **Council Decision 2010/411/EU of 28.6.2010 on the signing, on behalf of the Union, of the Agreement between the European Union and the United States of America on the processing and transfer of financial messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program.**

explanations referred to in the Charter, that set out the sources of those provisions. [...]"

Thus, the basic set of rules protecting fundamental rights of European citizens is to be found in the Charter of Fundamental Rights of the European Union<sup>14</sup>, which gained binding legal force by the Treaty of Lisbon<sup>15</sup>. According to Article 52 of the Charter, however, in so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention<sup>16</sup>. Thus, the Convention has also been incorporated into the EU legal framework and plays an important role in the context of protecting human rights. Furthermore, the European Court of Justice has explicitly referred to the Convention's primary position (including European Court of Human Rights case-law).

While both instruments protect the most basic human rights, such as the right to life, prohibition of torture, right to liberty and security, right to fair trial (which are usually analyzed in the context of the relationship between terrorism and human rights), they also guarantee, *inter alia*, human dignity, the right to respect for private life (the Charter additionally guarantees the protection of personal data), freedom of expression and the right to an effective remedy. The Charter also guarantees economic and social rights, such as the right to property, access to education and employment, protection of human health.

Article 7 TEU provides for a mechanism whereby the EU may suspend certain of a Member State's membership rights where the existence of a serious and persistent breach of the principles of Article 6 TEU, or a risk of a serious breach of those principles, is found in a particular Member State. These provisions constitute the legal and political basis of the collective responsibility of the EU for the protection of human rights and fundamental freedoms throughout its territory. The EU is thus obliged to

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<sup>14</sup> Charter of Fundamental Rights of the European Union, O. J. 30.3.2010, C 83, p. 389.

<sup>15</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13.12.2007, O. J. 17.12.2007, C 306, p. 1.

<sup>16</sup> European Treaty Series, No. 5, Rome, 4.11.1950.



ensure that its own measures are in accordance with fundamental rights and also to identify and act upon a serious and persistent breach of fundamental rights or a clear risk of such breach in its Member States<sup>17</sup>.

### 3.3. EU counter-terrorism measures *versus* fundamental rights

One may argue that fundamental rights are not threatened by the EU's counter-terrorism strategy. The measures adopted focus upon prevention and protection, on tackling the factors or root causes, on reducing vulnerability to attack, on disrupting terrorist activities etc. Consequently, because of their non-military character, they are not likely to adversely affect basic human rights, which seem to be consistently violated in the course of military responses to terrorism, mainly by the US and its allies in the "war on terrorism". Such a statement would be wrong, however. The preventive and administrative character of European measures by no means eliminates the risk of impacting upon human rights.

Such measures are characterised by enhanced public control over citizens' socio-economic behaviour: by regulating and monitoring aspects of everyday life of the EU's residents in order to gather public information, which may be then used as a precious weapon to combat terrorism<sup>18</sup>. It is not difficult to detect the serious negative consequences for civil liberties and human rights to which such conduct of law enforcement may give rise. While, indeed, the application of such measures would rather not lead to the violations of the most basic rights, this article seeks to prove that it may, nevertheless, pose a threat to a different set of human rights, also very significant for democratic societies.

There are also certain other perilous aspects of such measures, differentiating them from those employed in the "war on terror". Firstly, "the common man" – a potential victim, is much more likely than the suspected offender to be affected by such measures. This undermines the very essence of any counter-terrorism measures which theoretically shall serve the purpose of protecting civilians. Secondly, preventive and

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<sup>17</sup> *Human rights dissolving at the borders? Counter-terrorism and EU criminal law*, Amnesty International EU Office Report, 31.5.2005, IOR 61/013/2005.

<sup>18</sup> M. Simoncini, *Risk Regulation Approach to EU Policy Against Terrorism in the Light of the ECJ/CFI Jurisprudence*, German Law Journal 2009, Vol. 10, No. 11, at p. 1527.

administrative measures are not employed exceptionally, to overcome certain emergency situations (in which temporary limitations of non-derogable rights, in order to guarantee public security, are generally regarded to be acceptable), but are maintained for a longer time period<sup>19</sup>. In contrast to “responding” to an actual crisis, which is temporary in nature, “preventing” is a rather permanent action, which falls outside the scope of the “emergency” notion. The application of traditional “emergency legislation” (allowing for certain limitations upon personal liberty) where no current emergency exists substantially increases the risk that the exercise of public powers may lead to an abuse of citizens’ subjective rights. As M. Simoncini notes, “the disguised emergency regime places in true danger the very foundation and the respect of the rule of law, (the?) core principle shaping the nature of Western democracies”<sup>20</sup>. Hence, the biggest risk with regard to such measures is that they are likely to cause a constant, but not so obvious, and thus not easily detectable, infringement of fundamental rights.

Bearing in mind the above, as well as the fact that the abovementioned 2005 European Union Counter-Terrorist Strategy commits the EU “to combat terrorism globally while respecting human rights, and to make Europe safer, allowing its citizens to live in an area of freedom, security and justice”<sup>21</sup>, it is clear that the conflict which arises between these equally important EU missions, may be difficult to resolve. That is because it stems from the everlasting tension between national security and civil liberties – values which need to be very carefully balanced.

The following analysis of how certain anti-terrorism measures adopted within the EU in the recent years have impact upon selected fundamental rights, proves that the desired balance has not been reached yet and that the risk of actual persistent violations of fundamental rights persists.

#### **4. The impact of adopted measures on specific fundamental rights**

Since it is not possible for this article to offer an in-depth analysis of all human rights concerns arising in connection with counter-terrorism

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<sup>19</sup> *Ibidem*, at p. 1528.

<sup>20</sup> *Ibidem*, at p. 1529.

<sup>21</sup> The European Union Counter-Terrorism Strategy, *supra* note 3.

measures, the following section seeks to offer a brief overview of the effects that the abovementioned measures may have upon the following fundamental rights and freedoms.

#### **4.1. The principle of legality (the definition of terrorism)**

First and foremost, it must be noted that the existing legal framework on counter-terrorism sets out obligations in relation to terrorism, without providing a comprehensive definition of the term. A precise definition is crucial as it establishes the basis for the application of counter-terrorism initiatives – since the adopted measures apply to “terrorism”, the fact that the term is vague and open to interpretation fosters abuse and clearly entails the risk of misapplication. The Council Common Position and Council Framework Decision 2002 touched upon the issue and established some criteria for defining “terrorists” and “terrorist groups”. These provisions, however, cannot be regarded as sufficiently clear and precise to ensure that they are not subject to interpretation. Such vagueness would unduly broaden the scope of the proscribed conduct, leading to the application of restrictive measures to activities which are unrelated in any way to acts of violence. Such a state of affairs remains contrary to the principle of the certainty of law – as Amnesty International Report suggests, the failure to agree on a precise definition on terrorism is the EU’s fundamental error<sup>22</sup>.

#### **4.2. Human dignity (Security Scanners)**

According to Article 1 of the EU Charter of Fundamental Rights, human dignity is inviolable and must be respected and protected. The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. Hence, none of the rights laid down in the Charter may be used to harm the dignity of another person and the dignity of the human person is part of the substance of the rights laid down in the Charter. It must therefore be respected, even where a right is restricted.

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<sup>22</sup> See Amnesty International EU Office Report, *supra* note 21, at pp. 8–11.

Serious doubts as to the conformity with the abovementioned provision have been raised recently in respect of the scanning technologies used at EU airports. Following the attacks of 11.9.2001, the EU established a common aviation security regime (Regulation 2320/2002), fully updated by a new framework Regulation 300/2008. Every passenger, piece of luggage and cargo departing from the EU airport or coming from a third country and transferring through the EU airport must be screened or otherwise controlled in order to ensure that no prohibited article is brought into security restricted areas of airports and/or on board aircraft. The legislation lists a number of methods which may be used for passenger screening – covered by EU standards and safeguards – for example, hand search, walk-through metal detection, hand-held metal detection and explosive trace detection. The attempted terrorist attack on Northwest Airlines flight 253 from Amsterdam to Detroit on 25.12.2009 confirmed, however, that metal detectors and manual searches have limitations in terms of detection capability. Several EU Member States (that is, Finland, the Netherlands and the United Kingdom; also France and Italy begun certain tests) started to use or have announced their intention to use body imaging technology in airports by exercising their right to apply security measures additional to those established by EU law (so far body screening technology falls outside the scope of the EU common framework on aviation security).

The Commission sought to include imaging technology as a permissible passenger screening method to be used at airports. However, the European Parliament in its resolution of 23.10.2008 opposed this technology and asked the Commission to carry out an impact assessment relating to fundamental rights, stressing *inter alia* that the “measure, far from being merely technical, has a serious impact on the right to privacy, the right to data protection and the right to personal dignity, and therefore needs to be accompanied by strong and adequate safeguards”, and that “doubts arise in relation to the justification of this measure and its proportionality and necessity in a democratic society”<sup>23</sup>. According to Commission’s latest communication in this regard

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<sup>23</sup> European Parliament resolution of 23.10.2008 on the impact of aviation security measures and body scanners on human rights, privacy, personal dignity and data protection, P6\_TA(2008)0521.

“[t]he capability of some screening technologies to reveal a detailed display of the human body (even blurred), medical conditions, such as prostheses and diapers, has been seen critically from the perspective of respect for human dignity and private life”<sup>24</sup>. In the Commission’s opinion, however, common EU standards for Security Scanners can ensure an equal level of protection of fundamental rights (a few possible alternatives to address the protection of human dignity have been proposed)<sup>25</sup>. Nonetheless, the EU Parliament continues to voice its concerns over airport body scanners. A human rights group said the Commission communication “offers too little guidance to address human rights concerns”. M. Scheinin, of the European University Institute and United Nations Special Rapporteur on Human Rights and Counter-terrorism, said:

“[f]rom a human rights perspective, the commission communication is a disappointment (...) the document does not include even an effort to subject the use of security scanners to a proper test of permissible limitations, including the assessment of the necessity, effectiveness and proportionality of the interference”<sup>26</sup>.

Thus, whilst it is clearly necessary to develop a common European solution to the problem of security at airports, the Commission and the Member States will have to take the concerns of the citizens more seriously and eliminate all doubts.

### **4.3. Due process and the right to a fair trial (the right to an effective remedy)**

Although in the context of fighting terrorism, issues of due process and the right to a fair trial are mainly linked to the use of military and special tribunals or courts to try terrorist suspects or review the

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<sup>24</sup> Communication from the Commission to the European Parliament and the Council on the Use of Security Scanners at EU airports, Brussels, OM(2010) 311 final of 15.6.2010, at p. 12. (Communication).

<sup>25</sup> See Communication, at p. 11.

<sup>26</sup> Press release of 21.6.2010, available at [http://www.theparliament.com/no\\_cache/latestnews/news-article/newsarticle/eu-parliament-voices-concern-over-airport-body-scanners/](http://www.theparliament.com/no_cache/latestnews/news-article/newsarticle/eu-parliament-voices-concern-over-airport-body-scanners/), last visited 27.9.2010.

lawfulness of their detention, preventive terrorism counter-measures may also impact these rights. Many of the employed counter-terrorism measures lack any procedural guarantees, thereby violating the right to effective judicial review.

The most obvious examples are the procedures for listing and delisting of individuals and groups of individuals suspected of terrorism. The relevant EU legislation, very controversial in this respect, is Council Regulation 881/2002, whose adoption is the result of implementing the United Nations (UN) Security Council's resolution orders to freeze the assets of alleged terrorists or terrorist supporters associated with Usama bin Laden. The implemented Security Council resolution also established a Sanctions Committee which maintains an updated list of individuals and entities whose assets are to be frozen. The persons concerned are not informed prior to their listing nor do they have any opportunity to directly challenge the decision of the Sanctions Committee. They may, however, request their delisting through their state of residence or citizenship or through an administrative organ established within the UN Secretariat. Since it is, ultimately, the Sanctions Committee that decides on the delisting request, the UN sanctions regime implemented by the EU provides no independent judicial or administrative review procedure for the persons whom it targets. The abovementioned list constitutes Annex I of the Regulation, which is updated by the European Commission based on determinations made by the UN Security Council or the Sanctions Committee (by contrast, it should be noted that the list of persons to which Council Regulation 2580/2001 applies is established, reviewed and amended solely by the Council and thus does not depend on the UN).

The lawfulness of this EU Regulation was the subject matter of a very important judgment of the European Court of Justice (ECJ) in the *Kadi* case<sup>27</sup>. In its judgement, the ECJ stressed that all legislative acts issued by EU organs have to comply with the fundamental rights guaranteed under EU law, and found that the Regulation violated the appellants' rights to be heard and to an effective judicial review<sup>28</sup>. The ECJ

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<sup>27</sup> *Kadi v. Council of the European Union, and Al Barakaat Int'l Found. v. Council of the European Union*, Joined Cases No. C-402 & C-415/05 P, Judgment of 3.9.2008, E.C.R. 2008, at p. I-6351 (*Kadi* judgement).

<sup>28</sup> *Ibidem*, paras 348-349.

also highlighted that restrictive measures such as those imposed by the contested Regulation do not escape review by the Community judicature with regard to the principle of effective judicial protection, even where they concern national security and terrorism<sup>29</sup>.

The Court, however, did not declare the Security Council Resolution to be inapplicable within the European legal order. It merely reminded the EU organs, as well as Member States, that the implementation of obligations under international law does not justify a total disregard of legal standards guaranteed under European law. It is now for the EU organs to find a way to guarantee human rights standards when it comes to the preventive freezing of assets of alleged terrorists and their supporters<sup>30</sup>.

#### 4.4. Freedom of expression (the prohibition of incitement to terrorism)

Since the counter-terrorism strategies have been shifted in the direction of prevention, law enforcement must interrupt attack-planning and recruitment, in order to stop terrorists before they cause civilian casualties.

Within the EU, the key provisions designed to target individuals who encourage others to commit terrorist acts by inciting or glorifying terrorism are included in the Council Framework Decision on Combating Terrorism of 2002, subsequently amended in 2008.

According to Article 4 of Council Framework Decision 2002 “[e]ach Member State shall take the necessary measures to ensure that inciting or aiding or abetting an offence referred to in Article 1(1), Articles 2 or 3 is made punishable” (emphasis added). The subsequent 2008 Amendment further requires Member States to enact legislation that criminalizes, *inter alia*, acts of public **provocation** to commit a terrorist offence.

Although none of the provisions of the Council Decisions explicitly circumscribe the freedom of expression, critics have alleged that governments might use the document to enact and justify legislation that could target demonstrations and protests<sup>31</sup>. As S. M. Boyne puts it:

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<sup>29</sup> *Ibidem*, para. 343.

<sup>30</sup> M. Payandeh, H. Sauer, *European Union: UN Sanctions and EU Fundamental Rights*, *International Journal of Constitutional Law* 2009, Vol. 7, No. 2, at p. 313.

<sup>31</sup> S.M. Boyne, *Free Speech, Terrorism, and European Security: Defining and Defending the Political Community*, *Pace Law Review* 2009–2010, Vol. 30, No. 2, at p. 448.

“[t]here are three main problems with the Council of Europe’s approach. First, the legislation potentially criminalizes legitimate democratic discourse. Second, the instrument dramatically attenuates the previously required link between speech and conduct. Finally, the instrument allows Member States to demonstrate only a tenuous link between the speech act and the subsequent violent conduct before sanctioning the speech”<sup>32</sup>.

The removal from the adopted definition of any requirement that the conduct directly incites the commission of terrorist acts, allows criminal sanctions to be imposed in respect of speech that has little chance of inciting violence. With regard to the definition of “public provocation to commit a terrorist offence”, which also does not require the offending conduct to be directly linked with the advocacy of terrorist offences, the International Commission of Jurists has alleged that this provision will allow Member States to criminalise “legitimate political debate”<sup>33</sup>. It is rather undisputed that the instruments of 2002 and 2008, read together, open the door to significant state regulation of speech and expand prosecutorial discretion to an unwarranted degree.

Bearing in mind that freedom of expression is an essential foundation of a democratic society and that enjoyment thereof is linked with other important rights, including the rights to freedom of thought, conscience and religion, belief and opinion, the anti-terrorism legislation in Europe substantially threatens to infringe free speech.

#### **4.5. The right to privacy (data protection)**

The terrorist attacks in both Europe and the US increased lawmakers’ focus on the issue of data storage due to the public’s strong desire to provide law enforcement with the power to access necessary information. The EU passed the Data Retention Directive to aid law enforcement

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<sup>32</sup> *Ibidem*, at p. 449.

<sup>33</sup> International Commission of Jurists, *Briefing Paper: Amendment to the Framework Decision Combating Terrorism-Provocation to Commit a Terrorist Offence 2* (2008), cited in: Boyne, *supra* note 38, at p. 452.



agencies in obtaining traffic and location data in order to facilitate criminal investigations. The present Data Retention Directive represents a shift away from prioritizing data privacy rights that the EU has historically protected. While previous European laws on data protection were generally aimed at protecting individual rights, the present rules on exchange of personal data constitute a critical form of EU cooperation on criminal matters; while the former were designed with market actors in mind, the latter regulate police<sup>34</sup>. In implementing such data storage laws, there are many competing factors to consider, with intrusion into an individual's private information representing merely one of the most important<sup>35</sup>. A clash with the fundamental right to privacy, specifically the right to be free of unwarranted police surveillance, seems to be inevitable.

According to Article 8 of European Convention of Human Rights, and the jurisprudence of the European Court of Human Rights, the storing and processing of personal data for purposes of fighting crime constitutes an interference with the right to private life under Article 8, but it may be permissible if it meets the following conditions: (i) it is authorized by law, (ii) the purpose is legitimate, (iii) the interference is proportional. While it may be argued that the Directive meets the two first conditions ((i) legal basis contained in the Directive, replacing divergent national laws; (ii) legitimate purpose limited to "investigation, detection and prosecution of serious crime"), the third criterion appears much more problematic. Its critical aspect lies in the length of the data retention period and the amount of data required to be retained by the Directive. It has been rightly questioned whether it is necessary to keep so much traffic data for so long to accomplish the crime-fighting purpose<sup>36</sup>. The Directive was criticized as disproportionate and representing a potential infringement of Article 8 of the European Convention on Human Rights even prior to its adoption<sup>37</sup>. Whereas according to its

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<sup>34</sup> F. Bignami, *Privacy and Law Enforcement in the European Union: the Data Retention Directive*, Chicago Journal of International Law 2007–2008, Vol. 8, No. 1, at p. 237.

<sup>35</sup> K. Ringland, *The European Union's Data Retention Directive and the United State's Data Preservation Laws: Finding the Better Model*, Shidler Journal of Law, Commerce & Technology 2009, Vol. 5, No. 3.

<sup>36</sup> F. Bignami, *supra* note 41, at p. 247.

<sup>37</sup> Ch. De Simone, *Pitting Karlsruhe Against Luxembourg? German Data Protection and the Contested Implementation of the EU Data Retention Directive*, German Law Journal 2010, Vol. 11, No. 3, p. 291, at p. 301.

Preamble “the adoption of an instrument on data retention (...) complies with the requirements of Article 8 of the ECHR (...)”, the operative clauses do not seem to take into account any of the above. Uncertainties in this respect remain – as best illustrated when the EU Interior Commissioner, C. Malmström, announced a review of the EU Data Retention Directive to determine its proportionality, effectiveness, costs, and compatibility with the Charter of Fundamental Rights<sup>38</sup>.

The other problematic EU measure, in the context of data protection, would be the Council Regulation on standards for security features and biometrics in passports and travel documents. Although the basic purpose of this document is to increase passport security and make passports impossible to counterfeit, the inclusion of personal data into a storage medium incorporated in the passport (fingerprints and other biometric identifiers) should not be disregarded. Their usage as security features raises important questions<sup>39</sup>. Given the very sensitive character of biometric data, further guarantees with regard to its circulation will be needed.

It is also noteworthy, that the European Data Protection Supervisor (EDPS), Article 29 of the Data Protection Working Party and the Fundamental Rights Agency expressed reservations in respect of airport Security Scanners creating images while screening – they were considered to have a considerable impact on the privacy and protection of passengers’ data<sup>40</sup>. The issue of Security Scanners has already been discussed in Section 4.2.

#### 4.6. Economic and social rights

Although the analysis of the impact of counter-terrorism measures on human rights usually focuses on civil and political rights, it must be noted that the adoption of specific measures may also have direct

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<sup>38</sup> *Ibidem*, at p. 317.

<sup>39</sup> V. Grammatikas, *EU Counter-terrorist Policies: Security vs. Human Rights?*, paper presented at the First Annual Conference on Human Security, Terrorism and Organized Crime in the Western Balkan Region, organized by the HUMSEC project in Ljubljana, 23–25.11.2006, at p. 7 available at: [http://www.etc-graz.at/cms/fileadmin/user\\_upload/humsec/Workin\\_Paper\\_Series/Working\\_Paper\\_Grammatikas.pdf](http://www.etc-graz.at/cms/fileadmin/user_upload/humsec/Workin_Paper_Series/Working_Paper_Grammatikas.pdf), last visited 25.9.2010.

<sup>40</sup> Communication, *supra* note 30, at p. 7.

impact on the enjoyment of economic or social rights. The best examples are targeted sanctions against individuals suspected of involvement in terrorist activity, such as freezing their financial assets. While cutting the financial resources of terrorists is rightly regarded as very effective in the fight against terrorism, the current regime poses a number of serious challenges, in particular related to the lack of transparency and due process in the listing and delisting procedures. In this respect, the comments made in section 4.3 with respect to process-related rights remain fully applicable and it is unnecessary to repeat them here. What should be added, however, is that in the aforementioned *Kadi* judgement the ECJ also found that the contested Regulation on freezing assets breached the applicant's right to property. The Court noted that the contested Regulation was adopted without furnishing any guarantee enabling the appellant to put his case to the competent authorities, where the restriction of his property rights was significant, and having regard to the general application and actual continuation of the freezing measures affecting him. The imposition of the restrictive measures, by including Mr Kadi in the list contained in Annex I of that Regulation, constituted an unjustified restriction of his right to property<sup>41</sup>. Again, the judgement did not declare the UN sanctions inapplicable within EU. However, until centralized standards are established at an international level, the EU is barred from implementing the UN terrorist lists, and freezing assets of enlisted individuals, in the absence of appropriate procedural guarantees.

As regards social rights, it must be mentioned that the Security Scanner technologies at EU airports (discussed in section 4.2) also raised serious concerns as to their compliance with fundamental rights in respect of public health principles. According to Article 35 of the EU Charter of Fundamental Rights, a high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities. Meanwhile, the employed scanning technologies emit low doses of radiation, ionising (x-ray) and non-ionising for detection purposes. As has been noted, the use of ionising radiation in particular raises serious health questions<sup>42</sup>.

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<sup>41</sup> *Kadi* judgement, *supra* note 34, at paras. 369–370.

<sup>42</sup> Communication, *supra* note 30, at p. 3.

Finally, it is also worth noting that, as the High Commissioner for Human Rights has noted, other targeted sanctions like imposing travel bans or other restrictions (such as control orders and the construction of physical barriers to limit the movement of certain individuals and groups) may also have serious consequences on the ability of the affected individuals and their families to enjoy economic and social rights, since their access to education and employment may be severely restricted<sup>43</sup>.

## 5. Conclusion

This article has sought to argue that the impact of certain counter-terrorism measures on individuals' rights and liberties may be significant, even where such measures are non-forcible, preventive and administrative in character.

Since not only terrorism itself, but also the strategies developed to counter it, may affect the enjoyment of human rights, it is crucial to highlight that any anti-terrorism strategy must not only be effective, but must also be in conformity with human rights standards. Effective counter-terrorism measures and the protection of human rights must be seen as complementary and mutually reinforcing objectives which must be pursued together as part of a State's duty to protect the individuals within its jurisdiction<sup>44</sup>.

With a specific regard to EU counter-terrorism strategy, Amnesty International suggests that:

“[i]n its policies and legislation on counter-terrorism, the EU has failed so far to properly address the serious issue of the protection of fundamental rights. While one element of the creation of the EU's Area of Freedom, Security and Justice is the promotion and protection of fundamental rights, this aspect has not been manifest in concrete proposals on counterterrorism”<sup>45</sup>.

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<sup>43</sup> *Human Rights, Terrorism and Counter-Terrorism*, Fact Sheet No. 32, Office of the United Nations High Commissioner for Human Rights, at p. 47.

<sup>44</sup> *Ibidem*, at p. 19.

<sup>45</sup> Amnesty International EU Office Report, *supra* note 21, at p. 2.

Accordingly, it appears that a deeper examination of the extent to which the measures adopted impact upon a foundational principle of liberal democratic governance – respect for human rights – is undoubtedly needed. Most likely, such an examination will also necessitate the revision of selected measures – during the aforementioned Vienna Conference, the European Lawyers called for the drawing-up of a plan of action for the revision of laws which impact on fundamental rights, both at national and European levels.

What is required is the development of counter-terrorism strategies that not only seek to prevent acts of terrorism but also promote and protect human rights and the rule of law. Any other strategy would simply be counterproductive – as V. Grammatikas rightly notes “the more negative impact a certain measure has on human rights, the less effective it is as a counter-terrorist measure”<sup>46</sup>.

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<sup>46</sup> V. Grammatikas, *supra* note 47, at p. 20.