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The Position of the European Terrorism Suspect under the Treaty of Lisbon: Improvement of Protection

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THE POSITION OF THE EUROPEAN TERRORISM SUSPECT UNDER THE TREATY OF LISBON: IMPROVEMENT OF PROTECTION

Tessa Duzee & Lia Versteegh

We reject as false the choice between our safety and our ideals
Barack Obama, inaugural speech, 20 January 2009

Introduction

It seems unjustifiable that a person can be arrested before a crime has been committed. Nevertheless, in counter-terrorism, since 11 September 2001, the preventive detainment of someone suspected of planning to commit an act of terrorism has become a common measure. Since then European preventive measures have been enacted to combat terrorism and subsequently implemented in national laws of the Member States.

Apparently Islamic fundamentalist terrorism has resulted in a paradigmatic switch from legal protection with regard to counterterrorism. No longer does the basic rule of only sentencing a suspect after a criminal offence has been proven apply, as is traditionally provided for in criminal law of modern states. Here the criminal offence is the planned attack and the goal is the prevention of the attack. Examples of such national measures can be found in English and Hungarian codes of conduct which will be demonstrated in this paper.

Recently introduced in the European Union was the Reform Treaty of Lisbon, consisting of two parts, that is: the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). This treaty

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provides a new legal basis for the accession of the European Union to the European Convention on Human Rights and Fundamental Freedom of the Council of Europe. Without doubt the existing regular dialogue between the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) will be developed. Also, in the same treaty, the Charter of Fundamental Rights of the European Union has become binding.

This paper is about the special position of the European terrorism suspect, who is subject to national, European and international rules. The study particularly looks at the question as to whether the European Union under the 2009 Treaty of Lisbon will be invited to concentrate on the protection of society with as ultimate option the “ticking bomb scenario” or on the protection of the individual, respecting the protection of fundamental rights of terrorism suspects. The protection of fundamental rights according to the Lisbon treaty and the Charter of Human rights is part of the EU policy to fight crime in the area of freedom, security and justice. At the same time EU’s goal is that EU Criminal Policy should foster citizens confidence in a European freedom, security and justice.

Protection of Whom: Society or the Suspect?

Civil society is that aspect of society in which citizens meet each other for purposes excluding economic or political interest. It designates those organisations to which people belong voluntarily, outside the influence of the authorities, the market or family and friend relations. In the perspective of counterterrorism, the protection of civil society can be viewed from different angles. First, civil society as a whole can be a target for terrorists, against which the civil society is forced to protect itself. Furthermore, potential terrorists can be a part of the organised civil society. In both cases, the authorities have a task: on the one hand,

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3 In this article the articles of the new treaty of Lisbon will be mentioned while the former articles, if any, will be put into brackets.


the obligation to safeguard the constitutional freedoms which enable civil society to flourish. Guaranteeing the safety of civil society can lead to restrictions of constitutional rights that can result in unlawful violation of rights, which appear from examples of nations in which citizens are being arrested under the pretext of counterterrorism, as soon as they participate in legitimate demonstrations.\(^7\)

The legal framework of the terrorism suspect within civil society encompasses those liberties that are included in the constitutional rights that apply for all citizens in society. However, it also includes the right to be protected as a citizen against impediments from governments. With regard to this, Article 6 TEU, by referring to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe makes this treaty applicable to all European citizens. This Article provides for the right to a due process and is based on the presumption that a person is only guilty if his guilt has been established before a court. In the context of counterterrorism, ‘safety’ is often emphasized as a human right for which the rights of a terrorism suspect must be set aside. This interpretation implies that the concept of human rights within the frame of counterterrorism implies a double responsibility for the state, that is, the protection of society and the protection of the individual.\(^5\) The rights of interested parties have to be weighed and form a field of tension.\(^9\) The question is whether the same rules should govern the interrogation of ordinary suspects and suspects of crimes of terrorism. This dilemma comes especially to the fore in the proceedings brought before the ECJ, for instance, when this Court has to decide whether freezing assets of the suspects is contrary to fundamental rights. This problem is particularly of interest in view of the American practice referred to as the “ticking bomb theory”, which denies respect for weighing rights within the framework of investigations into terrorist activity. The priority given to social safety above protection of human rights is the result of the vast acceptation of this theory.\(^10\) Due to the legal connection between the European Member States and also in respect of the relationship between the EU and the 1999 International


Convention for the Suppression of the Financing of Terrorism, it is not unimaginable that this theory has found its way to Europe after the attacks of 11 September 2001.

*The “Ticking Bomb Scenario” and Preventive Policies*

Although terrorism is not new, the opinions on this phenomenon and the approach to dealing with it, have changed radically since the attacks of 11 September 2001. One of the reasons put forward is the nature of present terrorism. The Islamic fundamentalist terrorism is determined by religious convictions that are particularly expressed in the motivation of the perpetrators of the attacks. It is found useless to impose extremely severe punishments for committing such attacks because of the risk of martyrdom. Preventive action prevails. This should be executed by gathering information and infiltrating organisations. The necessity of preventive counterterrorism action is seen as evident, while the concern for a possible violation of privacy rights is seen as less important if it serves to protect society.

In the United States under the Bush administration, the possibility to legalize torture in cases of emergency was debated. Advocates of this idea pleaded that torturing a possible perpetrator having crucial information on a planned attack in the near future, would be legitimate if it would protect society. This qualifies as the “Ticking Bomb Scenario” based on the assumption that somewhere there is a time bomb about to explode and that a suspect has been arrested who has access to relevant information with which the attack could be prevented. It is a utilitarian concept behind the idea that sacrificing the rights of the suspect is justified if a larger group can be saved. The crux of the “Ticking Bomb Scenario” is that it is a pure trade-off of freedom and safety. The need for protection of society, in the wording of UN Resolutions, without the observation of human rights, might be inspired by this scenario. The danger of applying this theory is that terror is answered with torture and principles of protection of human rights are denied. From the start, this theory has been opposed and fiercely disputed,

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especially by human rights movements.\textsuperscript{14}

The “Ticking Bomb Scenario” has not just been used in action serials such as \textit{24},\textsuperscript{15} as a result of which torturing has been accepted as normal by the majority of the population.\textsuperscript{16} It has also been widely debated between prominent politicians and academics. Torture has been accepted as a last remedy in the opinion of people against torturing.\textsuperscript{17} Although the interrogators may not be the ones that disrespect people, in the end they are not the ones making decisions about the suspect. To simplify the judicial decision, Dershowitz, professor at Harvard University, pleas on a possible extended scope of the right of self-defence – provided for in Article 51 of the United Nations Charter – to include measures of torturing as legal possibility.\textsuperscript{18} The debate demonstrates the wide scope of possible concepts on preventive action. The scenario appears to be not just misleading, but also dangerous. In this utilitarian view the individual interest is fully subordinated to the common interest.

The danger of this scenario is that preventive torturing presumes the legalisation of torturing.\textsuperscript{19} Also, professional torturers will need training in order to work efficiently. It is possible that such ‘professionals’ might achieve the standing of faithful, patriotic citizens, instead of sadistic tyrants.\textsuperscript{20} The result is predictable: human rights will slip further and further.

In spite of human rights being violated under the Bush administration, and authorities committing torture in the prisons of Guantanamo Bay and Abu Ghraib,\textsuperscript{21} torturing has not been legalized. Non-official, unacknowledged torture, especially by human rights movements.\textsuperscript{14}
cannot be justified in a strict interpretation of the prohibition of torturing in human rights conventions.\textsuperscript{22}

The reality of the “Ticking Bomb Scenario” in the United States, did not receive official attention and is not referred to in the official policy of the EU. However, one can imagine the potential political impact of this vision from the United States on international, national and European law. First, we look at the situation of the suspect under European law.

\textit{United Nations and European Union}

Primarily the rules provided for by the United Nations (UN) apply to Member States. As a matter of fact, all EU Member States are members of the UN. The resolutions of the UN Sanctions Committee are based on the competence of the Member States pursuant to Article 24 of the United Nations Charter\textsuperscript{23} and can impose binding decisions on member states and binding sanctions as well. These can not be ignored by a national judge. While imposing a sanction, there is no need for the UN Sanctions Committee to take other international obligations into account.\textsuperscript{24} Even more so, the UN Sanctions Committee may use its discreional powers to impose binding decisions, even in the interior of a member state, if peace is threatened pursuant to Article 39 UN Charter. The member states do not have the competence to interpret these decisions.\textsuperscript{25}

In Resolution 1373 of 2001, the UN Sanctions Committee has generally imposed on all member states the obligation to prevent the financing of terrorism.\textsuperscript{26} The UN Sanctions Committee furthermore drafted two lists of individuals and groups suspected of financing terrorism and the member states are obliged to

\begin{footnotes}
\footnote{Bellamy, A J (2006) , ‘No pain, no gain? Torture and ethics in the War on Terror’ 82 \textit{International Affairs}, p.127.}
\footnote{Pursuant to Article 24 (1) UN Charter: “In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf”.}
\footnote{Ibid. p. 556: here Oosthuizen states that a right to interpretation would make the UN system impossible to work in.}
\footnote{Nollkaemper, A (2007) \textit{Kern van het internationaal publiekrecht} (Den Haag: Boom Juridische uitgevers) , p. 327.}
\end{footnotes}
implement these lists and measures in national legislation. The list pursuant to Resolution 1267 of 1999 concerns the Taliban and the other list pursuant to Resolution 1333 of 2000, concerns Osama bin Laden and Al Qaeda.

In view of the question in what respect the EU law before the entry into force of the Lisbon treaty could offer protection to suspects of terrorism, we first need to distinguish between the origin of the Regulations, or as the case may be Common Positions. The Council of the EU drafted the more general and Common Positions and those regulations which distinguished between individuals who are terrorism suspects originating from within and outside of the EU, respectively. The suspects from outside the EU were covered by a legal rule that was implemented in the EU in regulations based on the first pillar, the communitarian pillar that dealt with economic matters for which the EU had been attributed competences by its member states and for which the Court of Justice was competent to judge. Common Positions and Regulations that specifically were related to the Taliban and Al-Qaeda and its followers, contained names that have been listed in UN context. Complaints about economic sanctions regarding the suspects of terrorism, e.g. freezing of goods, could be brought before the Court of Justice. In its verdicts the Court of Justices makes use of fundamental rights by referring to the European Convention of Human Rights, such as the right to property which implies measures of protection for the suspect of terrorism against governmental actions.

On the other hand, the suspects with a European background were legally protected pursuant to the former third pillar, the pillar for the police and cooperation of the judicial authorities. Member States kept their autonomy under this pillar. The person seeking justice under the third pillar could only indirectly apply to the European Court of Justice, that is for as far as the national judge pursuant to Article 35 EU Treaty referred the case to the European Court of Justice. Basically, the suspect of terrorism could not claim the applicability of fundamental European rights since the Court of Justice was not competent to judge.

The distinction implied that a person seeking justice under the first pillar because of the priority of EU law over national law could claim protection under


European law. The suspect could not claim this course of justice under the laws of the third pillar.

The Lisbon Treaty and the Area of Freedom, Security and Justice

The Lisbon Treaty entered into force in December 2009. The Member States and the citizens of the European Union were greatly in favor of this new treaty. By means of this treaty, the non-binding rules for European criminal law issues have become history. This treaty offers the possibility of a European legal order with respect to criminal law and human rights. The European Union has a single legal persona, the former ‘third pillar’ in the area of justice and home affairs has disappeared entirely and all decisions on subjects of the ‘third pillar’ on police and justice matters are taken with the method of qualified majority voting. This implies a more effective way of decision making in favor of the protection of society. As a consequence, the powers of the EU are extended to the Union’s policies on interior affairs, although Member States will still maintain competences in certain cases. They are able to use an emergency procedure in case a specific decision will be against national fundamental interests. In short, the treaty offers the possibility of a European legal order with respect to criminal law. Whether, and to what extent, preventive measures will be used and to what extent the suspect can rely on his fundamental rights is not yet clear.

The treaty clarifies that taking criminal law measures will predominantly apply to economic fields. In relation to counterterrorism there are two important provisions: Article 75 of the TFEU offers a direct legal basis for the freezing of funds. Furthermore, Article 86 TFEU offers the opportunity to establish a European Public Prosecutor's Office, which can only be established when the financial interests of the Union are at stake. As such can be seen the economic

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32 This will be the case after a five year transition period.
34 UK and Ireland have specific protocols allowing them to opt into or opt out. Article 5 of the Schengen Protocol; Protocol on the position of the UK and Ireland in respect of the area of freedom, security and justice.
sanctions. Besides these articles, Article 82 and 83 TFEU are relevant because these will serve as legal basis for future criminal law directives (apart from economic interests). These provisions will provide for harmonization of criminal law of the Member States. All in all, this treaty increases the possibilities for preventive action.

The question is in what respect suspects of terrorism could claim protection under national legal measures.

**National Legal Counterterrorism Measures**

After the introduction of the 1999 UN Convention for the Suppression of the Financing of Terrorism and the 2002 EU Framework decision on combating terrorism, EU Member States sought to establish counterterrorism measures and anti-terrorist legislation aimed at reducing the chance of attacks. Suspects of terrorism in EU member States claiming rights against national measures at national courts will be judged according to national and international legislation (EU legislation). National measures include search and arrest, incapacitation of suspects, deportation and the seizing and freezing of assets. In the following we will look at two national legal systems within the European Union, the United Kingdom and Hungary, with legal measures taken to combat terrorism and which could be harmful for the suspects of terrorism.

The UK Government reacted to September 11 with the introduction of the Anti-Terrorism, Crime and Security Act 2001. This Act led to discussions on the subject of the rights of liberty provided by the European Convention that guarantees that no one is ‘to be deprived of his liberty save in the lawful arrest or detention of a person [...] against whom action is being taken with a view to deportation or extradition’. The Terrorism Act 2000 contained a definition of terrorism as ‘the use or threat of certain types of action where the use or threat is designed to influence the government or to intimidate the public or a section of the public, and the use or threat is made for the purposes of advancing a political, religious or ideological cause. The action can take place outside the United Kingdom, and can be directed towards a government or people outside the United Kingdom. That broad definition speaks of “any action or threat”. The Prevention of Terrorism Act 2005 provided for two kinds of orders if the obligations it imposes on the individual are incompatible with his right to liberty under Article

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35 Article 5 (1) (f) of the European Convention.
5 of the Convention. The Terrorism Act 2006, including the definition of the Terrorism Act 2000, created a number of new offences, such as dissemination of terrorist publications, preparations of terrorist attacks, training for terrorism of even attending a place for terrorist training. In practice, there does not have to be any certainty about the level of a suspect’s involvement in terrorist activities. The particular crime committed could be judged as ‘being concerned’ in terrorism, but it could also mean ‘to be involved’ in terrorism. The latter could imply the commission of an act or the attempt to commit an act. According to the definition of terrorism, UK police powers are designed to be wide.

In the Hungarian Criminal Code under the title Acts of Terrorism, the Hungarian legislator has constructed a crime, a delictum compositum, which can easily be committed, because of the circumscription of the crime of terrorism in the criminal code. Section 261 circumscribes as an act of terrorism the following:

1. Any person who commits a crime listed in the Subsection (9) in order to
   a. coerce a state organ, another state or an international body into doing, not doing or countenancing something: b. intimidate the general public; c. conspire to change or disrupt the constitutional, economic or social order of another state, or to disrupt the operation of an international organization, is guilty of a felony punishable by imprisonment between ten to twenty years of life imprisonment.

2. Any person who seizes considerable assets or property for the purpose defined in Subsection (1) (a) and makes demands to government agencies or international organizations in exchange for refraining from having said assets and property or for returning them is punishable according to Subsection (1).

The crimes which are circumscribed in the catalogue of crimes listed in Subsection (9) are broadly indicated, such as violence against public officials, persons performing public duties, persons aiding a public official, interference with public works etc. But the legal requirements of ‘coerce a state organ, another state or an international body into doing, not doing or countenancing something’ can easily be proven if a person or an organization shows to be aggressive against any public institution. The broad legal description of the crime of terrorism classifies a group of persons performing aggressive activities against authorities easily as a terroristic group.

In case of violation of human rights and after finishing national proceedings, suspects of terrorism can use their right to start proceedings at the ECHR. The different national measures and laws on this subject can be judged by the human rights standards of this court. The ECHR judges the particular facts of the case in

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36 It provides for control orders, a derogating one if the obligations are incompatible with Article 5 of the Convention but non-derogation otherwise.
light of the national laws on terrorism and measures taken. Its judgements are of importance to all Member States of the European Convention.\textsuperscript{37} In that respect the ECHR has indicated that powers to search under domestic law should be sufficiently circumscribed and should be subject to adequate legal safeguards to offer the individual sufficient protection. Also, the requirement to show a reasonable suspicion should be demonstrated.\textsuperscript{38} However, the protection of a group will be difficult under European Convention of Human Rights as the articles of the Convention require that suspects should demonstrate their specific interests as a group.

Furthermore, the ECJ can be involved in proceedings of suspects of terrorism against the EU Member State when the applicability of EU measures at issue should be cleared by a national judge. To that purpose the national judge will ask for a preliminary ruling to the ECJ and this court will have to interpret EU law and international law.

\textit{International Legal Order}

Counterterrorism legislation is criticized because it is highly contrary to the liberties of citizens. The attention paid to the motives of the perpetrators implies the violation of the privacy of the citizen, for example, in case of suspects undergoing a DNA test or wiretapping the suspect’s telephone. The ticking bomb theory is also opposed by several UN member states. Mexico has pioneered within the UN in this respect. In 2002, the Mexican government took the initiative to critically expose its own human rights practices and successfully put forward a resolution in the General Assembly of the UN that was the basis for Resolution 1456 of the Security Council of January 2003.\textsuperscript{39} This resolution concentrated on the damages to the presumption of innocence, human rights, the rule of law and the requirements of democracy. The Secretary General of the UN took the view that the protection of human rights was not only an obligation of the member states of he UN but also relevant to the prevention of terrorism since violation of human

\textsuperscript{37} The European Convention consists of 47 Member States of which 27 are Member States of the European Union.

\textsuperscript{38} Gillan and Quiton v UK (2010) The Times 15, ECHR where the court considered an individual to be submitted to a detailed search of his person, his clothing and his personal belongings at any time, without notice and without choice amounted to a clear interference with his right to respect for his private life under 8 ECHR regardless of whether in any particular case correspondence or diaries were discovered and read or other intimate items revealed.

rights would cause hatred and distrust towards governments under those parts of the population from which terrorist leaders were recruited. Due to the fierce national political movements, US could no longer resist the arguments in relation to the protection of human rights. The states that did not want to weaken the position of the UN in counterterrorism therefore supported resolution 1456 that contained the appointment of a human rights expert. Though, it is still unclear how it functions in procedures against terrorism suspects.\textsuperscript{40} Resolution 1735 dated 2006, refers to situations that cause removal from the list of suspects. However, there is no obligation for the UN Sanctions Committee to comply if the situation arises.\textsuperscript{41}

By now, the possibility has been created that suspects can directly apply to the UN requesting to be removed from the list\textsuperscript{42} and sanctions can only be imposed if specific procedures have been followed.\textsuperscript{43} However, now suspects under UN law will not be informed on the grounds of inclusion on the list, one may assume that the “defence” cannot be adequate. Moreover, there is no possibility to appeal as that applies in national law systems. Pursuant to the directives of 12 February 2007,\textsuperscript{44} the member state will be informed of the listing and have to inform the individual on measures taken and the procedures regarding the listing.

The directives provide special rights for the suspect. The state must furnish evidence which must enable the Committee to objectively value the case. A formal decision of the Committee is required. Injured parties can commence a delisting action and can revert to a \textit{focal point}\textsuperscript{45} on UN level which has a political nature and is based on consensus without any legal guarantees.\textsuperscript{46} The national authorities can accept and reject objections and the Sanction Committee will adopt these advices without explanation. The furnishing of evidence, for the delisting, lies on

\begin{footnotesize}
\begin{enumerate}
\item Fassbender B (2007) 'Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to Ensure Fair and Clear Procedures are Made Available to Individuals and Entities Targeted with Sanctions under Chapter VII of the UN Charter’ UN Documentation.
\item VN Doc. S/RES/1735 dated 22 December 2006.
\item SC Res. 1526, 30 January 2004, S/RES.1526 (2004) forces member states to hand over as much background information as possible with a request to listing; SC Res. 1617. 29 July 2005, S/RES/1617 (2005) forces member states to clarify “to be associated with”.
\item SC Res. 1730 of 19 December 2006, para. 1.
\end{enumerate}
\end{footnotesize}
the suspect.\textsuperscript{47} For that matter, the UN Sanctions Committee is obligated to annually review all names that are on the consolidated list.\textsuperscript{48} The question emerging in this respect is whether the competence of the UN Sanctions Committee can be restricted by international obligations. This question can be answered with Article 103 UN Charter, providing that in the event of a conflict member states’ obligations under the present Charter shall prevail.\textsuperscript{49} The restriction of competence cannot be based on other documents.

\textit{Human Rights Protection under UN Law?}

The procedure of the UN Sanctions Committee is now based on the rule of law, which balances the lack of an appeal possibility. The protection offered to the suspect is still insufficient. Individuals continue to lack the right to be heard and the due process starts to be of importance after it becomes apparent that the sanctions are not imposed as a preventive measure.\textsuperscript{50} There is no legal procedure to appeal to an independent body. Moreover, in the UN context, there are no human rights the suspect can revert to.\textsuperscript{51} In addition, every Member State of the Security Council can oppose the delisting, also if the Member State that requested the listing requests delisting.\textsuperscript{52} Such facts played a role in the case of Sayadi and Vinck against Belgium in which in the end an individual complaint was submitted to the Human Rights Committee of the UN based on the optional protocol of the International Covenant on Civil and Political Rights 1966.\textsuperscript{53} The Human Rights Committee judged that it had jurisdiction to judge whether a member state violated the rights of the UN Convention, irrespective of the origins of the obligations of that state. The Belgian authorities that requested lifting the sanctions because the suspects were no danger for the public order, later concurred with the resolutions

\textsuperscript{47} Committee Guidelines in the amended version of 12 February 2007, para. 8 (a).
\textsuperscript{49} Oosthuizen, op.cit., p. 558.
\textsuperscript{50} Keller and Fischer, op.cit., p. 259.
\textsuperscript{52} Keller & Fischer, op.cit., p. 259 - 260.
of the UN Sanctions Committee.\textsuperscript{54} The Human Rights Committee judged in that respect that Belgium had to do all the possible to delist names of the applicants,\textsuperscript{55} which indicates that the UN Sanctions Committee had not been stopped by the problem of legitimacy, but wished to express that Belgium is bound to the rule of law. In this respect, the decision could be regarded as filling the institutional gap of an international legal body competent to appoint the scope of protection of human rights.

Although the members of the UN Security Council can simply circumvent the national regulatory framework protecting human rights,\textsuperscript{56} the decision of the Human Rights Committee is directional for the future. The relevance cannot be sufficiently stressed now that even the United States opposes individual legal protection.\textsuperscript{57} By now, it is known that one of the first official deeds of President Obama was to direct an executive order to immediately cease the procedures of the military commission against the terrorist suspects at Guantanamo Bay. The highest Court established that ‘enemy warriors’ that are held at Guantanamo Bay by US military, had the constitutional right to request a ‘writ of habeas corpus’\textsuperscript{58} from the federal judge. In this decision, the political power of the Congress was being criticized, in the sense that the restriction provided for in the Military Commission Act 2006 was contrary to the requirements of the Constitution’s Suspension Clause.\textsuperscript{59} Although this decision in the main case was based on the ‘de facto’ sovereignty of the United States, the result is that the highest judge judged presuming the personal freedom of the suspect that is on American soil.\textsuperscript{60} The

\textsuperscript{54} See previous note, par. 4.12 and 6.3; the Belgian authorities took the view it had done anything to delist the suspects which had the result that no complaint could be filed for a lack of fair trial.

\textsuperscript{55} See note 51, op.cit., par. 12.


\textsuperscript{57} See Foot, op.cit., p 514.

\textsuperscript{58} In the Anglo-American tradition the “Great Writ” is important because the “habeas corpus” implied more than a formal, judicial defense, but contains the fundamental principle that a prisoner of the government can claim that the government explains the grounds to deprive him of his freedom. See in this respect: Jenkins D (2008) ’Habeas Corpus and Extraterritorial Jurisdiction after Boumediene: Towards a Doctrine of “Effective Control” in the United States’, 9:2 Human Rights Law Review, p 307.

\textsuperscript{59} Article 1 (9) (2), of the US Constitution provides “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it”.

\textsuperscript{60} See previous note, op.cit. , p326.
formerly dominant theory of a “Ticking Bomb Scenario” cannot be found in it.

Case Law of the European Court of Justice on Terrorism before the Entering into Force of the Lisbon Treaty

In the EU, the Council has adopted the aforementioned Common Positions and Regulations, which do not provide for rights of the suspect. In the case of L’Organisation des Modjahedines du Peuple d’Iran against the Council in 2006, the European Court of Justice judged that within the context of European law, protection must be offered to organisations suspected of terrorist activity if the right to be heard was violated. In this case the European Court of Justice took the grounds that the right to due process and effective legal protection must be guaranteed by the EU authorities. This includes the right to be informed on the reason on which basis one is listed. The ECJ has judged that this right needs to be granted to the suspect as part of the national course of justice. At least at European level this right must be respected. The legal relation between UN law and EU law was exposed in the case Yusuf and Kadi for the Court of First Instance. The UN had decided that applicants were connected to the Al-Qaeda network and the Taliban, and therefore were also inside the scope of the measures of the UN Sanctions Committee. For the Court of First Instance, complaints were submitted regarding the correctness of the legal basis, violation of human rights by freezing their assets. The Court of First Instance took the grounds that the legal basis for the European Regulations was legitimate. The Council alleged to be bound to the resolutions and the so-called blacklists, drafted by the UN Sanctions Committee. The Regulations based on these lists could not be tested against human rights conventions because UN law would have priority over EU. In fact, this Court took the grounds that the protection of property, the right to a fair trial and access to a judge was part of the ius cogens that introduces a hierarchy besides criteria for

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the validity of other legal rules. It took the view that it could not test against provisions regarding the European human rights. This view resulted in overwhelming criticism: the Court of First Instance would have given priority to the UN law over EU law and it would have fully ignored the rights of the suspects, especially the right to effective legal protection and the right to property. The assets of the suspects in the Yusuf and Kadi case were frozen without informing them and without having had a possibility to legally dispute the freezing. On 3 September 2008, the ECJ finally rendered its judgment in the appeal of the Kadi case. The former judgment was reversed. The ECJ took a different approach and had the view that the community judge had to verify the legitimacy of community acts, which pursuant to the Court, also relates to acts that are a result of UN resolutions; subsequently, the ECJ instituted a right to test against fundamental rights, these are protected by European law. Without taking grounds on the hierarchy between UN law and EC law, the ECJ concluded that the rights of Kadi, had been violated and annulled the particular regulation.

The question arises whether the ECJ experienced the limits of the legal possibilities in the international political context. The claimed violations include the violation of the right of property, the right to defense and the right to effective judicial remedy. Also, the applicants were forbidden to refute the proof gathered against them. These are severe restrictions on the freedoms of persons and associations. It is clear that the ECJ tried to offer protection to the listed suspects, leaving the correctness of the listing aside.

The judgment in Kadi was followed by Hasan and Ayadi. Also this case was related to the sanctions list prescribed by the UN Sanctions Committee and implemented by Regulation No 881/2002. In this case applicants’ assets had been frozen by Regulation 881/2002. The applicants’ action for annulment and their questions were rejected by the Court of First Instance. This Court held that, since

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68 See last note, para 326.

the sanctions list originated in UNSC resolutions, it did not have the jurisdiction to examine the compatibility of Regulation No 881/2002 with fundamental rights as they are protected in the EU legal order. It restricted itself to the requirements of the *ius cogens* norm. In the meantime the Commission, following the judgment in the Kadi case, included them in the sanctions list amending Regulation No 881/2002 by introducing Regulation 954/2009.\textsuperscript{70}

The ECJ had to answer the question whether the retroactive effect of the new regulation could be judged by the ECJ. The ECJ answered, that although the purpose of the applicants’ action was to have their name removed from the sanctions list, the new regulation could not make the appeal devoid of purpose.\textsuperscript{71} Also, in the view of the ECJ, Regulation No 954/209 was not definitive in that it could be challenged and be subject to annulment. The ECJ allowed the appeal on the grounds that the CFI’s reasoning was wrong by the same errors in law as those of its judgment in Kadi. It went on to annul Regulation No 881/2002 applicable to appellants. The effects of Regulation No 954/2009 on the listing were still in force.

**Discussions of ECJ judgments**

The above-mentioned judgments are very relevant for further protection of suspects of terrorist activities. First of all, in Kadi, the ECJ took the grounds that former Article 308 EC Treaty could not bridge the gap between EC law and EU law, but the Article related to the operation of the common market and intended to achieve one of the goals of the Community. This implied that Article 308 EC Treaty did not offer the possibility to achieve the goals of a common foreign and safety policy.\textsuperscript{72} The article could be used as a legal basis for the disputed regulation in connection with the two other articles.\textsuperscript{73} Another interesting aspect of this judgment was that the ECJ emphasized the relation between the UN and the legal order of community law: the European Community is based on the rule of law and the Court of First Instance cannot verify the legitimacy of a regulation that implements a UN Security Council resolution in relation to the general principles

\textsuperscript{70} Regulation no 954/2009 OJ 2009 L 269/20.

\textsuperscript{71} See note 75 above, para 61.

\textsuperscript{72} Kadi & Barakaat, above, para.202.

\textsuperscript{73} Kadi & Barakaat, above, para 226 and para.235. A democratic element was important in this establishment by the European Court of Justice, because it enabled the European Parliament to participate to the decision-making related to the subject specifically on individuals, while this is not the case under Articles 60 and 301.
of fundamental rights. This would imply that the Court of First Instance indirectly judges the legitimacy of the UN resolutions.

The ECJ took other grounds. It concentrated on the EU Regulations that had been instituted pursuant to EU law and decided that these could always be tested against fundamental rights. However, this point of view did not hold for UN resolutions. Without taking grounds on the hierarchy between UN law and EC law, the ECJ concluded that the rights of Kadi had been violated.

The strange combination of, on the one hand having to maintain the listing of the suspect and, on the other hand the ECJ criticizing the violation of the suspect’s fundamental rights, seems bizarre. Did the ECJ experience the limits of the legal possibilities in the international political context? The claimed violations included the violation of the right to property, the right to defense and the right to effective judicial remedy. Also, the applicants had been forbidden to refute the proof gathered against them. These are severe restrictions on the freedoms of persons and associations. It is clear that the ECJ, by questioning the validity of Regulation No 881/2002, tried to offer protection to the listed suspects, leaving the correctness of the listing aside.

Case law of the Court of Justice on interpretation of Regulation No 881/2002

In the case of the Queen on the application of M and Others versus HM Treasury, the Court was called upon to interpret article 2 of that Regulation on the meaning of the word ‘funds’ for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee. The question was whether the prohibition caught but the Article 2 (2) allowed the payment of social security benefits to the spouses of listed persons. In its judgment the ECJ identified various differing language interpretations of the Regulation. For instance, in the English description of Article 2(2) of the Regulation the prohibition of the Article 2 (2) included making funds available indirectly for the benefit of a listed person. This might have include the payment of social benefit to the spouse of a listed person. The ECJ held that only funds that could be turned into funds capable of being used to support terrorist activities. Another remarkable finding of the ECJ was the

74 Cuyvers op cit., p163.
75 Case C- 340/08 The Queen on the application of M and Others v HM Treasury, April 29, 2010.
76 Article 2(2) of the Regulation No 881/2002 states: “No funds shall be made available, directly or indirectly, to or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex 1.”
77 See note 82, above, para 54- 58.
identification of differences in language versions of the UNSC resolution of which the very Resolution was the consequence. The solution to this problem was that Article 2 (2) should be interpreted in light of the purpose and the general scheme of counterterrorism legislation. The implication of this judgment is that the payment of social security benefit falls not under article 2 (2) of the Regulation. However, if the benefit was turned away in order to support terrorist activities, that would provoke a violation of the prohibition of Article 2 (2) and criminal penalty under UK implementing law will be the consequence. Without explicit reasoning the ECJ took a broad view on the subject of human dignity and respect for the right to family life. In fact, national laws on terrorism will be judged from these principles in order to protect suspects and the relatives of suspects of terrorism.

Protection of Suspects by the ECJ before the Lisbon Treaty

In proceedings before the ECJ the suspects who were not originally from the EU and are listed by the Council, would be, as has been said earlier, within the scope of the first pillar, the communitarian pillar of the EU, such as the Organisation de Modjahedines. If freezing of their funds was considered an economic sanction of the EU according to UN measures, they could direct claims on infringement of general principles on human rights to the ECJ.

The suspects with a European background came off worst. They lacked a direct application to the ECJ since the European listing of terrorist suspects was part of the second pillar of EU law which meant that the Court was not competent to judge cases on this subject. In other words, the ECJ could not fill the gap of legal protection. The choices made by the ECJ are daring, as the Court put stress on the rights of individuals in the context of protection of society as a whole. This leads to the question whether the limited competence of the ECJ can be expanded under the Lisbon Treaty in favor of the protection of the terrorism suspect.

Fundamental Boundaries

At the moment the EU is involved in the process of acceding to ECHR under the treaty of Lisbon. This is relevant in view of the commitment of the European

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78 See note 82, above, para 49.
79 Organisation de Modjahedines du peuple d’Iran against the Council of the European Union (2006) , Case T-228/02, December 12 2006 European Court of Justice and Court of First Instance.
institutions to the provisions of the ECHR. It is relevant that the EU has an autonomous legal order in which the ECJ can test against its fundamental rights and “in appeal” the ECHR can test against the principles of protection of human rights. The starting point will have to be the Kadi case, because accession to the ECHR and the reference to the Charter of Fundamental Rights would be without consequence if, the rules of the UN would belong to the highest level of international law, against which can not be tested. In that case, the EU will not bear its own responsibility to the application of human rights. The Treaty of Lisbon offers the possibility of protection to all suspects of terrorism since the EU rules on the area of freedom and safety will be judged by the ECJ and community law has an equivalent status to the law based on this area. The ECJ must balance variables of protection. In the first place, a suspect of terrorism will seek protection under national law that intends to protect national values. On the other hand European Union law and its Charter of Fundamental Rights give substantive fundamental rights. Especially Article 52 (4) of the Charter provides fundamental rights shall be interpreted in harmony with the constitutional traditions common to the Member States, It is the complexity of transnational life in the European Union that will cause difficulties.  

The Rights of the Suspect under the Lisbon Treaty

Although according to the Explanations Article 53 of the Charter is intended to maintain the high level of protection currently afforded within their respective scope by Union law, national law and international law’, it also will maintain the existing tension between the different sources of rights. In this respect suspects of terrorism will still be confronted with legal uncertainties. Moreover, there is not only the possibility that Member States have different standards from EU law, but also from each other which can mean a juxtaposition of attitudes towards the scope of the concept of human dignity. Conflicting norms in Member States and conflicting laws between EU and Member States can have the effect that suspects of terrorism will be judged by ECJ differently.

The Lisbon Treaty intends to improve the democratic character of the Union by different new measures. It symbolizes European and national values of which the reference to the binding character of the Charter and the reference to the European Convention of Human Rights are dominant. The Charter proclaimed as

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81 See Nic Shuibhne, op.cit., p. 240.
a treaty with binding force for the Member States introduced Protocol no. 30 giving specific measures for the United Kingdom and Poland, both countries being proponents of national exceptions to the legitimacy of the Charter.82

The reference in the EU Treaty to the Charter and the accession of the EU to the ECHR imply a strengthening of the fundamental rights and thus of the rights of the suspect. There is a right for any natural/legal person to bring a complaint against EU for violation of ECHR under the same conditions as for Member States acts. The case-law of ECJ and ECHR will develop more harmoniously after accession of the EU to ECHR. The recognition of the pivotal role of the ECHR in Europe will bind EU Member States and non-EU Member States being member of the European Treaty of Human Rights. What about the Article on fundamental rights in the treaty of Lisbon, providing guidance to suspects of terrorism? Article 6 para 1 TEU states that the European Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights and guarantees the legal value of the Charter which means that the EU binds itself to the Charter. The legal value of the Charter became visible in the case of Chakroun, where the ECJ decided that the particular Directive must be interpreted in the light of the fundamental rights enshrined in both the ECHR and the Charter.83 In this case the ECJ affirmed the text of Article 6 para 1 in particular demonstrating the rights of the individual under EU law system. What is of importance for the continuation of the human rights system in the EU is the explanation of the articles of the EU Charter of human rights. To that purpose Article 6 para. 1 TEU third paragraph makes clear that the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter.84 The articles of the Charter have the same legal value as the treaties. As a consequence, the suspect of terrorism can rely on the articles of the Charter providing for freedoms such as: the right to property (Article 17), the right to an effective remedy and fair trial (Article 47) and the presumption of innocence and the right of defense (Article 48).

82 Protocol no. 30 on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom; Declarations 61 and 62.

83 Court of Justice, Chakroun v Minister van Buitenlandse Zaken (2010) CO 5478/08, March 4, 2010, para 44.

84 Article 6 para 1 TEU states that “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 explanations referred to in the Charter, that set out the sources of those provisions.”
Reform of Judicial Cooperation in Criminal Matters

In the treaty of Lisbon are several articles of importance for the development for a European anti-terrorism policy. To start with, Article 75 of the Treaty on the Functioning of the European Union (TFEU) provides for a framework of “administrative measures with regard to capital movement and payment, such as the freezing of funds, financial assistance or economic gains belonging to, or owned or held by natural or legal persons, groups or non-state entities.” According to Article 82 (1) of the TFEU, judicial cooperation in criminal matters in the Union is to be based on the principle of mutual recognition of judgments and judicial decisions.\(^{85}\) In that respect, the Stockholm program\(^{86}\) provided for the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition. The new approach is based on the European Investigation Order (EIO), which is to be issued for the purpose of having one or several specific investigative measures.\(^{87}\) The EIO shall cover any investigative measure with respect to criminal proceedings brought by a judicial authority. Together with the mutual assistance clause of Article 222 TFEU which demands “a spirit of solidarity if a Member State is the object of terrorist attack or the victim of a natural man-made disaster, the European Union is competent to mobilize all the instruments at its disposal, including the military resources made available by the Member States, to prevent the terrorist threats in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack, assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack.” These articles, taken together provide for mutual assistance and solidarity and creates a demand upon EU Member States to assist one another in case of terrorism and crisis. Another article of importance for strengthening the internal coherence is Article 83 TFEU that provides for the possibility to establish minimum rules for cross-border criminal matters. The areas of crime have been circumscribed in this article:

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85 See Tampere European Council of 15 and 16 October 1999, where the cornerstone of judicial cooperation in criminal matters within the Union has been established.


87 Initiative regarding the European Investigation Order in criminal matters, OJ C 165, 24/6/2010, p. 0022-0039.
The European Parliament and the Council may, be means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human being and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering corruption, counterfeiting of means of payment, computer crime and organized crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

This article has been transferred from the former Treaty of the European Union to the TFEU which means that measures can be taken according to the community method instead of the intergovernmental method which used to be the applicable method hitherto. Some of the subjects were regulated before the entry into force of the Treaty of Lisbon according to the intergovernmental method. What is suggested by the sentence, “on the developments in crime, the council may adopt a decision identifying other areas of crime”, is not clear. The German Federal Constitutional Tribunal stated that a proposal of adding new crimes should be justified by criminological research. The second paragraph of Article 83 provides regarding the establishment of measures the following:

If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonization measures in question, without prejudice to Article 76.

The limit to harmonization is Article 83 paragraph, where a member of the council is made competent to request that the draft directive will be referred to the European council when the Member considers the draft directed would affect fundamental aspects of its criminal justice system. This article is mentioned the emergency brake system which allows the state a suspension on the sole ground of being against the proposal. The important question will be what should be understood by a “detrimental effect of a proposed regulation on the fundamental aspects of a state’s criminal justice system”. This should be judged by the ECJ in

88 Urteil des Zweiten Senats von 30 Juni 2009, BVerfG, 2 BvE 2/08, Absatz-Nr. 64.
the near future.\(^{89}\)

Since the entry into force of the treaty of Lisbon, a Communication on the EU Internal Security Strategy in Action has been issued\(^{90}\) that enumerates five strategy objectives for internal security. Likewise with terrorism, organized crime such as trafficking in human being, drugs and firearms trafficking, money laundering and the illegal shipment and dumping of was inside and outside Europe, should be disrupted. To prevent crime it is seen essential to disrupt criminal networks and combat financial incentives they are driven by. Another objective of the communication is to prevent terrorism and address radicalization and recruitment, which should lead to the action of cutting of terrorists’ access to funding and materials and follow their transactions. The scope of actions has been outlined in the TFEU which offers a framework for action. Although the treaty requires a test of whether criminal law measures should be necessary to achieve the goal of criminal cooperation, the necessary step should include a test of proportionality. The process of criminalization will be performed in respect of the area of freedom, security and justice for the European citizens. In fact, the European citizen will expect to be able to gain on protection by the security and enforcement agenda of the EU criminal law co-operation legislation.\(^{91}\) From this point of view should be looked at the 2012 Report from the Commission on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, that proposes to revise directive 2005/60/EC against the risk of money laundering and terrorist financing.\(^{92}\) Since the EU rules are based to a large extent on international standards adopted by the Financial Action Task Forces (FATF), the Commission’s proposal suggests the adaptation of the directive to be in line with the revised FATF guidelines. However, in its invitation to comment the Commission includes impacts on fundamental rights as

\(^{89}\) For Denmark, Ireland and United Kingdom the emergency brake system was not enough to protect their national sovereignty in criminal matters. They opted out in criminal matters with the result that they are only bound to EU provisions concerning criminal matters when they choose to opt into them.


\(^{91}\) Christopher Harding & Joanna Beta Banach-Gutierrez (2012), ‘The emergent EU criminal policy: Identifying the species’ European Law Review 7(6), at 766.

guaranteed by the Charter of Fundamental Rights of the EU.93

In conclusion

The terrorism suspect in Europe will face an abundance of international rules which mostly have a preventive nature. The ticking bomb scenario always puts prevention first and does not take into account the rights of the suspect. Although this scenario is not officially acknowledged in Europe, it seems as if the resolutions of the UN and its effect on the suspect, are highly in conformity with the idea of this scenario and that it does not leave any space to protect human rights. National legal counter-terrorism measures, like the UK terrorism Act 2006, and the Hungarian Criminal Code give broad descriptions of the crime of terrorism. However, there are signs of a change of tide. The Human Rights Committee of the UN, as well as the US Supreme Court are cautiously expressing views protecting suspects.

The applicability of fundamental rights does not affect the necessity to also combat terrorism with preventive measures. The Lisbon Treaty offers possibilities for effective measures as well as a better protection for the suspects. The reference to the Charter of Fundamental Rights of the European Union and the entry of the EU into the ECHR enables testing of acts of the Council against personal fundamental rights.

The protection of the suspect is not self-evidently guaranteed. He must expressly rely on the fact that the regulation which applies to him is instigated under EU law and is contrary to the fundamental principles of the EU. The new Articles on fundamental rights offer a direct basis for freezing funds of terrorism suspects and provide for a European Public Prosecutor's Office charged with the prosecution of terrorism suspects. The necessity for broader protection of human rights is recognized, to prevent society from sliding into a police state in which citizens are preventively picked up and in which there is hardly any protection of privacy. Preventive action may not set aside an adequate protection of human rights, not in the context of the UN, nor on a European or national level.94 This provision will have consequences for the acceptance of minimum rules, to be taken according to the communization method.

The European Union is developing a framework for EU criminal law which

93 Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union. COM 2010, 573 final.
refers to normative competences of the European Union. The TFEU provides for a legal framework to combat terrorism more effectively and it seems that the EU is willing to play a major role in the topic of security and justice. The EU is competent to issue rules in the framework of a crime policy, since the TFEU offers a legal basis for rulings on organized crime, terrorists, refugees, trafficked persons and trafficking in illegal drugs. However, the Commission realizes that legislative actions and implementation in national legal systems on criminal law subjects should be considered in respect of the European Charter of Fundamental Rights and the European Convention of Human Rights
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