European Anti-Terrorism and Human Rights

Recent Conflict and Division

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European Anti-Terrorism and Human Rights: Recent Conflict and Division

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Abstract

This article constitutes a short version of my forthcoming Ph.D. thesis. It delivers a human rights-based analysis of anti-terrorism policies in a European context, looking at the cases of the UK, Germany, and the EU. The article claims that all three players have at times breached human rights norms, either in terms of legal standards or in terms of the wider aims of the concept of human rights. The EU, however, provides at the same time as it breaches human rights, safeguards for the protection of the same. Human rights breaches could for the mentioned cases be detected both in terms of a more narrow legal approach to human rights connecting to legally binding rights documents and court rulings (e.g. in terms of data retention), but also in terms of a broader understanding of human rights, connecting to the wider aims of rights, such as the guarantee of dignity, freedom and justice (the 'spirit of rights'). I further try to give some points on which short and long-term strategies might be alternatives to the rights-infringing policies that often are applied by European states when trying to counter-act the phenomenon of terrorism.

Introduction

The day the world public witnessed the collapse of the World Trade Center and an attack on the Pentagon created a new awareness for terrorism amongst many Western societies. The events of 9/11 were globally visible, reached extraordinary attention and gained an "iconic significance."[1] 9/11, by its sheer magnitude alone, triggered the impression of a new phase of terrorist threats among public and politicians. Terrorism and states' reactions to terrorism have since 9/11 become familiar issues and they have undoubtedly been shaping both public consciousness and political agendas in many Western states.[2] As a consequence, in the perception of many, the world has become a somewhat darker place since the attacks of 9/11. We have witnessed many appalling terror attacks on civilians, wars meant to eradicate the threat of terrorism, as well as the implementation of a range of anti-terrorism measures 'at home', sometimes connected with an onslaught on rights and freedoms.[3] Thus, not only acts of terrorism, but also states' and IOs' attempts to

[1] Richard English, *Terrorism: How to Respond*. Oxford: Oxford University Press, 2009.95.

[2] A range of scholars evaluated the event as defining an epoch; as changing the world for good. For example, Martin Amis wrote that "September 11 has given to us a planet we barely recognize"; and Fred Halliday held that "the crisis unleashed by the events of September 11 is one that is global and all-encompassing." Amis (2008) and Halliday (2002) cited in English (2009), 94.

[3] Awareness of terrorism after 9/11 was maintained by further prominent attacks. Every reader will be very aware of a range of terror attacks taking place in Western countries in the last years, many of the examples that spring to our minds have been carried out by Islamists. Allow me to address a few iconic examples of the same, without being exhaustive. Spain witnessed a bomb attack on the Metro in Madrid on March 11, 2004, killing 191 people. Bombings of underground trains and a bus in London on the 7th of July 2005 cost the lives of fifty-two travelers. After a few more 'calm' years in terms of Islamist terrorism in Europe, Western societies were stunned by a new and intensified wave of Islamist terrorism. In January 2015 the European public was in shock after an attack on the staff of Charlie Hebdo and a Jewish supermarket in Paris.[3] Later in 2015, on the night of November 13, a new, bigger series of attacks played out in Paris, killing more than 130. Both Paris attacks were committed

tackle terrorism[4] have been featuring high on the societal and political agenda in the last seventeen years and have likewise become a part of public consciousness. Most Western states tried to find quick and effective new responses to terrorism after 9/11. A range of new anti-terrorism and counter-terrorism measures was launched. The most aggressive reaction on the events of 9/11 was delivered by the US government with its proclamation of its 'War on Terror', which led the country (in collation with other states) to invade both Afghanistan and Iraq, while the infamous Patriot Act was supposed to tackle the problem of terrorism on the inside. Additionally, far-reaching surveillance measures were initiated by intelligence services such as the NSA (in cooperation with other Western services such as the British GCHQ or the German BND).[5]

European states contributed to the American War on Terror on several occasions (the invasions of Afghanistan and Iraq) and further perceived a need to likewise increase anti-terrorism policies at home. Thus, after 9/11 and the bombings in Madrid and London in 2004 and 2005, respectively, many European countries adopted new laws, procedures, and actions to tackle the threat of terrorism. Additional policies were adopted since the onset of the current wave of IS inspired terrorism. In general, anti-terrorism policies and actors have in a pan-European context experienced an increase in budgets, mandates, and functions.[6]

A violation of human rights norms and regimes is a risk not only for military counter-terrorist action on foreign soil (such as the US-led invasions in Afghanistan) but also on the inside of democratic states in the course of anti-terrorism policies, which are here defined as non-military. Thus, the question, in face of increased anti-terrorism policies by many Western states, is whether such measures by European states and the EU, do endanger or violate existing human rights norms or human rights regimes and if so, if curtailments would be justified (e.g., by arguing based on derogation clauses). This issue has been heavily discussed in the latest years, both among scholars and in the political arena.[7] It also forms the central question of this article.

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by individuals connected to IS. In July 2016 France experienced another grave terror attack, when an Islamist steered a truck into a crowd in Nice, killing eighty-four people. In December 2016 Germany was hit, when a truck drove into the crowd at a Christmas market in Berlin, killing twelve. In spring 2017 Islamist attackers stroke three times in the UK, in March a car drove into pedestrians on Westminster Bridge in London (killing five and injuring around fifty), in May a bombing of a concert in Manchester killed twenty-two people, and in June a group of attackers killed seven people on London Bridge via driving into pedestrians and subsequently stabbing passersby. Although Western societies focused mostly on Islamist terrorism in the years after 9/11, it is, for the sake of integrity, to be noted that significant non-Islamist terrorism played out as well. Especially the terror attack by committed Anders Breivik in Norway in 2011, killing seventy-nine people, most of them adolescents, raised worldwide attention.

[4] I would like to define terrorism as: *an act of severe violence against human beings (attempted or succeeded), functioning as a means of communication, committed by a sub-state group or individual, based on a political motive, aimed at instilling fear in the target society and triggering political change.*

[5] Ruth Costigan and Richard Stone. *Civil Liberties & Human Rights*. 11th ed. Oxford: Oxford University Press, 2017, 458.

[6] Claudia Hillebrand, *Counter-Terrorism Networks in the European Union: Maintaining Democratic Legitimacy after 9/11*. Oxford: Oxford University Press, 2012, 1-2.

[7] The formulation 'in latest years' shall not produce the perception that the issue of rights in terrorism policies was never discussed before 9/11. For instance, Grant Wardlaw and Paul Wilkinson, pioneers of terrorism

A range of leading European politicians has argued that such a violation of rights is either non-existent or that its current forms would be justified and defendable under derogation clauses of international human rights law. For instance, John Reid, the then British Home Secretary argued in 2006 that some freedoms would have to be 'modified' in the short run in order to save the same in the long run.[8] And Hans-Peter Friedrich, the then German Minister of the Interior, argued for a priority on the right to security in 2013 in order to defend derogations of other rights.[9] Among scholarship and NGOs, the question of whether anti-terrorism policies trigger a limitation of human rights in Europe has been addressed and evaluated in diverse manners. Some scholars seem to agree with the politicians mentioned above, by arguing, that the effects of European anti-terrorism have been limited, or that derogations of rights have been justified. For instance, James Piazza and James Walsh argued, in a cross-cultural study (based on a set of cases not limited to Europe), that empowerment rights, e.g., the rights to free speech, free movement and freedom of association, would generally not be curtailed by government policies after terror incidents.[10] They conclude that "governments do not respond to terrorist attacks by systematically restricting human rights across the board."[11] Focusing on the case of Germany, Wolfgang Heinz argued in 2007 that the country "has thus far maintained one of the most liberal and democratic counterterror policies, demonstrating that another way is possible".[12] Michael Freeman argued from a theoretical perspective that a free press and the separation of power (which is arguably given in many European states) would make it unlikely for governments to seriously restrict freedoms and human rights.[13]

Others, foremost scholars, and NGOs have, however, argued that European states and institutions have indeed sacrificed or endangered rights in course of domestic anti-terrorism and that such policies cannot be justified by derogation clauses. A range of measures that have been introduced by European countries and institutions (such as the UK and Germany, and the EU itself) to tackle terrorism have been criticized for being inconsistent with international human rights norms as e.g., defined in the UDHR (Universal Declaration of Human Rights) or the ECHR (European Convention on Human Rights). For instance, as e.g.,

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studies, already delved into that topic in the 1980s. Grant Wardlaw, „Terrorism, Counter-Terrorism and the Democratic Society," In *Government Violence and Repression: An Agenda for Research*, ed. by Michael Stohl and George Lopez. Westport: Greenwood, 1986. Paul Wilkinson, "Maintaining the Democratic Process and Public Support." In *The Future of Political Violence: Destabilization, Disorder and Terrorism*, ed. by Richard Clutterbuck. London: Macmillan, 1986.

[8] John Reid, August 9, 2006, quoted in Todd Landman, "The United Kingdom: The Continuity of Terror and Counterterror." In *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, ed. by Alison Brysk and Gershon Shafir. Berkeley: University of California Press, 2007, 75.

[9] Veit Medick and Philipp Wittrock, "Minister Friedrich und die NSA-Affäre: Der USA-Verteidigungsminister," Spiegel Online, July 16, 2013. http://www.spiegel.de/politik/deutschland/nsa-affaere-innenminister-friedrich-versagt-als-aufklaerer-a-911471.html

[10] James Piazza and James Walsh, "Transnational Terror and Human Rights." *International Studies Quarterly* 53, (2009), 126.

[11] Piazza and Walsh, 144-145.

[12] Wolfgang Heinz, "Germany: State Responses to Terrorist Challenges and Human Rights," in *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, ed. by Alison Brysk and Gershon Shafir. (Berkeley: University of California Press, 2007), 157.

[13] Michael Freeman, *Freedom or Security: The Consequences for Democracies using Emergency Powers to Fight Terrorism* (Westport: Praeger, 2003).

Todd Landman, Mary Volcansek or Conor Gearty point out, the UK breached the ECHR by implementing a regime of indefinite detention for foreign terror suspects in 2001 under the ATCSA legislation (under derogation from article 5 of the ECHR which protects the right to life and liberty).[14] In addition, research by Martin Scheinin, Javaid Rehman as well as Christina Pantazis and Simon Pemberton, and Tufyal Choudhury and Helen Fenwick pointed to discriminatory tendencies by UK authorities when carrying out terrorism policies, e.g, in stop-and-search practices of the police. Pantazis and Pemberton hold that Muslims have become the new 'suspect community' in Britain.[15] Quirine Eijkman and Baart Schuurman argue likewise when they claim that preventive measures (such as attempts to prevent radicalization) have led to the stigmatization of Muslim communities in some European countries, including the UK.[16] Conor Gearty argues in the same direction by pointing out that especially rights of minorities have been limited in course of British anti-terrorism, e.g. a curtailment of freedom of expression in attempts to prevent the glorification of terrorism.[17] Timothy Garton Ash holds that states (such as the UK) are heading in the wrong direction by prosecuting speakers and banning websites and organizations for non-violent extremism, causing a problem in terms of freedom of expression and he bemoans decreasing protection of privacy rights, leading him to the conclusion that citizens of traditionally free societies "are increasingly becoming glass people," and "tagged pigeons."[18] Clearly, stigmatization of religious or ethnic groups must raise concern in terms of the right to be protected from discrimination. Further, since the summer of 2013, the UK has faced criticism for its involvement in wide-ranging Internet surveillance, e.g. by scanning massive amounts of data by wiretapping transatlantic fiber-optic cables. Critics, such as Quentin Skinner, pointed here to a breach of privacy rights, as well as the right to liberty.[19] Scholars have voiced criticism towards Germany as well. For instance, as Oliver Lepsius points out, the German 'Air Security Law', from 2004, which in last consequence would have given the German Defense Minister the competence to order shooting down civilian airplanes in case such a plane was abducted and threats of using it as a weapon were given, violated the right to life,

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[14] Landman (2007), 84. Conor Gearty, *Liberty and Security*. Cambridge: Polity Press, 2013, 90. Mary Volcansek, "The British Experience with Terrorism: From the IRA to Al Qaeda." In *Courts and Terrorism: Nine Nations Balance Rights and Security*, ed. by Mary Volcansek and John Stack. Cambridge: Cambridge University Press, 2011. Javaid Rehman, "Islam, "War on Terror" and the Future of Muslim Minorities in the United Kingdom: Dilemmas of Multiculturalism in the Aftermath of the London Bombings." *Human Rights Quarterly* 29, No. 4 (2007): 831-878. Dick Leonard, "Counter-terrorism and human rights – is the EU on the right course?", *European Voice,* 2005.

[15] Martin Scheinin, "Terrorism." In *International Human Rights Law*, ed . by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran. Oxford: Oxford University Press, 2014, 560-561. Rehman (2007). Christina Pantazis and Simon Pemberton, "From the Old to the New Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation." *British* Journal of *Criminology* 49, No. 5 (2009): 646–666. Tuyfal Choudhury and Helen Fenwick, "The impact of counter-terrorism measures on Muslim communities." *International Review of Law, Computers & Technology* 25, No. 3 (2011): 151–181.

[16] Qurine Eijkman and Baart Schuurman, *Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation,* The Hague, ICCT, 2011.

[17] Gearty (2013) 99-102.

[18] Timothy Garton Ash, , *Free Speech: Ten Principles for a Connected World.* London: Atlantic Books, 2016, 283, 324, 331-332.

[19] Quentin Skinner, "Liberty, Liberalism and Surveillance: a historic overview." *openDemocracy*, July 26, 2013. https://www.opendemocracy.net/ourkingdom/quentin-skinner-richard-marshall/liberty-liberalism-and-surveillance-historic-overview

as well as human dignity as the German constitutional court decided.[20] Another example is the German data retention law, a law going back on an EU directive, which allowed for the saving of telecommunication metadata for six months.[21] And further, Martin Scheinin criticized the German policy of dragnet investigation, carried out in the years after 9/11 as potentially infringing the protection from discrimination, since it was linked to variables such as religious denomination and nationality.[22] The EU faced criticism for its post-9/11 anti-terrorism policies as well. Critical voices, such as Claudia Hillebrand, Gustav Lindstrom, Javier Argomaniz or Lilian Mitrou, pointed at the EU's initiatives regarding data retention, biometric passports or the planned Passenger Name Record, again based on allegations of breaching privacy rights (e.g. article 7 and 8 CFREU and article 8 ECHR).[23] Ian Brown and Douwe Korff pointed out that the EU data retention laws not only are at odds with privacy rights but touch on "on fundamental values of a democratic society." They further claim that such large-scale collections of data can lead to problematic processes of profiling and that the EU is actively involved in facilitating the necessary conditions for the state's intelligence agencies to carry out such profiling.[24] Similarly, Martin Scheinin claimed that the EU's recommendation to its member states to conduct terrorist profiling in the course of anti-terrorism, including physical, psychological and behavioral variables contributed to alarming trends of such policies from a human rights perspective.[25]

Thus, one can deduce a clash of perspectives regarding the question whether European states and the EU sufficiently uphold binding human rights standards while trying to tackle terrorism. My article will enter this debate. I will carry out an analysis of current European anti-terrorism policies from a human rights perspective. The countries in focus are Germany and the UK. The EU is added as a third case.[26] I will

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[20] Oliver Lepsius, "Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act." *German Law Journal* 7, 2006.

[21] Katja de Vries et al., "The German Constitutional Court Judgment on Data Retention: Proportionality Overrides Unlimited Surveillance (Doesn't It?)," In *Computers, Privacy and Data Protection: an Element of Choice*, ed. by S. Gutwirth, Y. Poullet, P. De Hert, R. Leenes. Dordrecht: Springer, 2011. Christian DeSimone, "Pitting Karlsruhe Against Luxembourg? German Data Protection and the Contested Implementation of the EU Data Retention Directive." *German Law Journal* 11, No. 3 (2010): 291-318.
Fabio Fabbrini, "Human Rights in the Digital Age: The European Court of Justice Ruling in the Data Retention Case and Its Lessons for Privacy and Surveillance in the United States." *Havard Human Rights Journal* 28 (2015): 65-95. Patrick Breyer, "Telecommunications Data Retention and Human Rights: The Compatibility of Blanket Traffic Data Retention with the ECHR." *European Law Journal* 11 No. 3 (2005): 365-375.

[22] Scheinin (2014), 560.

[23] Hillebrand (2012), 169-170. Gustav Lindstrom, "The EU's approach to Homeland Security: Balancing Safety and European Ideals." In *Transforming Homeland Security: U.S. and European Approaches*, ed. by Esther Brimmer. Washington: Center for Transatlantic Relations, 2006. Javier Argomaniz, „When the EU is the 'Norm-taker': The Passenger Name Records Agreement and the EU's Internalization of US Border Security Norms." *European Integration* 31, No. 1 (2009): 119-136. Lilian Mitrou (2010) further pointed to problems in connection with freedom of expression. Mitrou, "The impact of communications data retention on fundamental rights and democracy – the case of the EU Data Retention Directive." In *Surveillance and Democracy*, ed.by Kevin Haggerty and Minas Samatas. London: Routledge, 2010.

[24] Ian Brown and Douwe Korff, "Terrorism and the Proportionality of Internet Surveillance," *European Journal of Criminology* 6, No. 2 (2009): 119-134.

[25] Scheinin (2014), 560.

[26] The anti-terrorism policies of the EU and its member states are, (loosely) connected, as the EU owns an (albeit weak) coordination role, and as member states try to steer the EU's general approach on the issue of anti-

scrutinize both the legality and justifiability of the current terrorism policy of these policy actors from a human rights angle. In other words, I will analyze terrorism policies both from the perspective of the letter of the law and the spirit of the law.[27] I will show that human rights troubles do exist in the course of European terrorism policies and will thus contest the argument that domestic terrorism policies by (European) states have not violated human rights, or if so, that these violations have been insignificant. Thus, in this short article, I will try to defend the following **statement: Current policies regarding anti-terrorism on behalf of European societies risk the effect of curtailing essential human rights.[28] I will show that by providing an analysis of post 9/11 terrorism policies of the UK, Germany and the EU. Examples of rights that are curtailed are the right to non-discrimination, the right to life, liberty, and security of person, privacy rights, freedom of expression and the freedoms of association and movement.[29]**

In consequence, human rights violations in the course of European anti-terrorism threaten human rights standards, the relation between the individual and state (to the benefit of the state) and endanger the free unfolding of human beings and thus the continuation of democratic societies (since some of the human rights that are curtailed are the basis for the functioning of our idea of democracy, e.g., freedom of expression, a sense of liberty and privacy, as well as non-discrimination). Further, temporary rights curtailments often turn permanent, so that the extraordinary becomes normal.[30]

I will in the next section point to a few methodological issues of importance, before defining the two central concepts of this article, human rights and anti-terrorism. Thereafter I will in three empirical sections show how European anti-terrorism policies are in conflict with legal human rights norms or the wider aims of human rights, or both.

Methodological points

Case selection - My selection of cases can be regarded as unusual since it is a combination of two nation states and an intergovernmental/supranational institution and organization. It is thus appropriate to shortly discuss the reasons for integrating an organization into the case selection. First of all, there is no doubt that also the EU has been criticized by scholars and NGO's for violating or endangering human rights in the course of its anti-terrorism policies (e.g., in connection with the adoption of the data retention directive). This clarifies the general relevance of integrating the EU. Another important argument is the existing interrelation between the EU's member states and the EU in terms of understandings and

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terrorism.

[27] Ben Dorfman, *13 Acts of Academic Journalism and Historical Commentary on Human Rights: Opinions, Interventions and the Torsions of Politics*. Frankfurt: Peter Lang, 2017, 193-195.

[28] As current policies, I define policies implemented after the 9/11 attacks.

[29] As can be deduced from this list of human rights, it is largely civil and political rights I have in mind. I mean not only the rights of citizens but the rights of all individuals affected by the anti-terrorism policies of the political entities I am investigating. This means that I am appealing to an idealistic and fully universal concept of human rights.

[30] Mikkel Thorup and Morten Brænder, "Staten og dens Udfordrere – Vold som Terror eller Krig." In *Antiterrorismens idehistorie – stater og vold i 500 år*, ed. by Mikkel Thorup and Morten Brænder. Aarhus: Aarhus Universitetsforlag, 2007, 49.

definitions of terrorism and anti-terrorism, as well as the adoption of anti-terrorism policies and strategies. Member states like the UK and Germany are shaping the anti-terrorism policies of the EU, and their own policies are likewise shaped by EU policies. In terms of policy strategies, both 'uploading' and 'downloading' processes take place.[31] For example, the EU's Counter-Terrorism Strategy from 2005 oriented itself towards the British CONTEST strategy, which was first drafted in the UK in 2003.[32] At times, member states might use the EU level to implement policies that would be unpopular to adopt on a national basis.[33] This interrelation can be exemplified by the common EU definition of terrorism from 2002. Before the events of 9/11 no common definition of terrorism existed at EU level, however, after 9/11 the then fifteen EU member states quickly agreed on a common definition of terrorism. These points emphasize that European anti-terrorism connections are essential for the terrorism policies inside of the individual member states as well. Without being aware of the European level of terrorism policymaking, it might at times appear that it is exclusively the individual states that are responsible for certain terrorism policies, whereas the initiative for a certain policy might have come from EU institutions. As a consequence, very simply, one cannot discuss anti-terrorism policy at national levels in a European context without taking the larger, EU context into account.

The nation-states at center stage in my research are, again, Germany and the UK. Both reflect cases of big Western European states, therefore, my case study selection, in terms of the chosen country cases, constitutes rather a selection of typical cases rather than outlier cases. Due to a range of similarities in regard to anti-terrorism the two country cases fit well.[34] For instance, both, Germany and the UK are relevant cases since both countries have witnessed terror attacks on their soil in recent years, as well as in the more distant past, and they are both very active players in regard to anti-terrorism, having the full range of measures and policies available (from soft preventive measure to violent military actions). They have further both have intensified their policy-making regarding terrorism in the years after 9/11 and both states are two of the biggest players in the EU framework (although the UK is on its way out of the EU). This pertains to the EU's policy-making in general, as well as its more specific anti-terrorism policymaking. Further, both states have received criticism for several of their recent policies and therewith provide valid insight into the potential dangers for human rights in the course of terrorism policies.

Policy delimitation - My research has its focus on domestic and inner European processes and will only cover measures which are aiming at individuals inside of the EU, Germany and the UK. This delimitation makes good sense in face of my research statement above, as the maintenance of a high human rights level and the relationship between individual and state is directly influenced by domestic terrorism policies, not

[31] The first refers to the EU adopting national strategies into its own strategy framework, the second refers to the opposite process.

[32] Andrew Staniforth, *The Routledge Companion to UK Counter-Terrorism*. London: Routledge, 2013, 347.

[33] Such strategies of avoiding the implementation of policies 'at home' and rather adopting it at regional or international level is also called for policy laundering in the literature. See for instance Barry Steinhardt, "Problem of Policy Laundering," *American Civil Liberties Union*, August 13, 2004. http://26konferencja.giodo.gov.pl/data/resources/SteinhardtB_paper.pdf

[34] On comparative case studies see e.g., Shelagh Campbell, "Comparative Case Study," in *Encyclopedia of Case Study Research*, ed. Albert J. Mills, Gabrielle Durepos and Elden Wiebe, Thousand Oakes: SAGE Publications, 2010.

those carried out abroad. It is those domestic terrorism policies that are threatening the level of human rights, as well as the balance of power between individual and state (to the benefit of the state) and the free unfolding of all human beings and therewith the soundness of democracy inside of EU member states (indirect effects are nevertheless possible, e.g. via minorities that perceive an allegiance to certain other cultures or geographical areas). This said it is not intended here to give the impression that human rights violations abroad would be less important or appalling. However, the focus of this article is simply not on potential human rights violations and the effects on the same abroad.

Selecting relevant human rights categories - Terrorism policies potentially affect a wide range of human rights norms. However, I concentrate on civil and political rights (CPR). Economic, social and, cultural rights (ESCR) are not addressed. Yes, there may be infringements of ESCR in the context of terrorism policies as well as knock-on effects from civil rights violations; for instance, difficulties with one's legal status rarely help one's economic life (e.g., the freezing of assets of terror suspects might affect the economic rights of many more individuals than only the suspect's).[35] However, not only has the discourse regarding terrorism policies' rights 'performance' largely been spinning around CPR issues (e.g. at UN level),[36] but it is further the case that the most frequent negative effects of rights infringing terrorism policies are to be found in the area of civil and political rights. My article will thus operate in this sphere: rights that have to do with one's relation to civic polities, people's relation to the state, their possibility of realizing and unfolding themselves as humans and political actors versus that state. Still, one cannot focus on all rights infringements of civil and political rights either. This article will thus focus on some of those potential violations that are of 'systematic' character, in other words rather widespread, potentially hitting a wide range of individuals and of severe character, rather than unique cases of violations (however, such unique cases might under very severe circumstances still be relevant and will therefore not be ultimately excluded, see e.g., my example of the German air security law).[37]

Defining Human Rights

Human rights can be understood and defined in various ways. However, I would like to differentiate two major frameworks of understanding the concept. First, an understanding based on a legal perspective, grounded in important relevant human rights documents, and second an understanding of human rights that connects to the wider aims and meaning of the concept, or as I will call it here, the 'spirit of rights'.

Looking at the legal framework, one would point to the most relevant recognized human rights documents established over the last seven decades. The first such document is the Universal Declaration of Human Rights (UDHR), adopted in 1948. It entails a long list of rights (thirty) that individuals enjoy based on their common dignity and equality.[38] The UDHR, as a declaration, has no legal status. However, almost all rights

[35] On this see e.g., Joe Stevens, "UN Targeted Terrorist Sanctions and the Rule of Law: The UKs Response", *Journal of Terrorism Research* 3, No. 2, (2012).
[36] Scheinin (2014), 561.
[37] As matters of law, most anti-terrorism policies *do* have the potential to affect many people, however, the likelihood of this varies from policy to policy, e.g. a law on the usage of electronic tags for terror suspects will with a high likelihood hit far less people than a law enabling for data retention of all internet users.
[38] Freeman (2011), 73.

lined out in the UDHR gained legal status by the 1966 adoption of two international covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). The UDHR thus served as a moral and philosophical cornerstone for these other documents with legal status. The ICCPR, the ICESCR, and the UDHR together constitute the so-called International Bill of Human Rights. A big majority of the world's states is party to all these documents. The UDHR further delivered important inspiration for the most important Europe human rights documents, the 1950 European Convention on Human Rights (ECHR) by the Council of Europe and the Charter of Fundamental Rights of the EU (CFREU) which gained legal status at EU level in 2009. These documents, and arguably the idea of human rights as a whole, compose what Jack Donnelly called "a comprehensive vision of a set of goods, services, opportunities, and protections that are necessary in the contemporary world to provide the preconditions for a life of dignity."[39] However, human rights can only function as the groundwork for a life of dignity, when they are regarded as inalienable, as equally held by all humans, and as "universal, indivisible and interdependent and interrelated", as the 1993 Vienna Declaration puts it. The inalienability of human rights aims at the idea that humans cannot 'loose' their human rights, even if they commit crimes or act morally wrong.[40] Human rights are further held equally by all humans, no one enjoys more or fewer rights. Furthermore, states or other authorities cannot – at least from the perspective of human rights supporters - choose to only follow a few rights, they are one indivisible, interdependent and interrelated concept.[41]

An important feature of human rights legislation is the option to deviate from rights norms under certain circumstances, also called rights derogation. The general idea of derogation is to downscale the extent of rights, away from a maximalist approach, in order to preserve or restore a situation of stability, in which the preservation of a smaller amount of rights is much more likely. In other words, some human rights are restricted for a certain timeframe in order to secure the enjoyment of other rights, which are evaluated as more important at that specific point in time. For example, it might in the course of anti-terrorism policies be argued that in order to preserve the right to life of a certain number of individuals, other rights, e.g. the right to privacy or freedom of expression have to be restricted. The derogation of rights does not necessarily equal an immoral or unjustified act, there might be a virtue in the attempt to preserve a minimum amount of rights in an exceptional situation. However, at times rights derogations are implemented without absolute necessity, or they are crossing red lines that they should not cross or derogations are ever extended, both in terms of their reach and their validity period. Still, some human rights regimes define rights that can never be derogated. One might argue that defining a core of rights that are not to be derogated while allowing other rights to be restricted, conflicts with one of the core principle of the human rights concept: the indivisibility of rights.[42] Ironically, the human rights documents themselves would therewith provide for the subversion of a central cornerstone of the concept of human rights. Further, one might argue that derogated human rights are not *really* human rights at all*,* although states might not leave the space of legal permissibility by derogating on certain rights. Clearly, human rights norms and ideas were developed to provide for the maximum possible enjoyment of rights, not their

[39] Jack Donnelly (2013), *International Human Rights.* 4th ed. Boulder: Westview Press, 2013, 24.
[40] Donnelly (2013), 19.
[41] Donnelly (2013), 19-24.
[42] Freeman (2011), 82.

derogation. Additionally, *all* rights are – as mentioned – to be provided at the same time, therefore, it can be argued that derogating some rights undermines the human rights concept as a whole. This becomes ever more relevant in a situation in which it becomes a trend to derogate from rights in order to tackle a perceived threat (such as terrorism). In such a situation, knowing the enjoyment of human rights to be prevented by several derogations, the wider intentions, and aims, or spirit of rights, are prevented as well. Therefore, one might argue that in such a situation derogated rights are not really human rights.

Three of the human rights documents I use, entail general provisions for human rights derogations by governments. These are the ECHR, the ICCPR, and the CFREU. The ECHR thus lines out that the rights in the document can be derogated in situations that threaten "the life of the nation", such as war or public emergencies. Further, the derogation is only allowed "to the extent strictly required by the exigencies of the situation." Countries executing rights derogations are supposed to keep the Secretary General of the Council of Europe updated on the concrete derogation and the reasons for the same. However, not all human rights articles in the ECHR are derogatable, articles 2, 3, 4 (paragraph 1) and 7 cannot be restricted.[43] However, the ECHR holds special provisions for derogating on the rights to privacy and freedom of expression, omitting the demand for a threat to the life of the nation, but still demanding necessity, as well as a legitimate aim and proportionate measures. The ICCPR provides general conditions for the derogation from the human rights obligations it entails as well, given that certain conditions are met. Derogation can only be executed in situations "of public emergency which threatens the life of the nation." Derogation measures can only be carried out "to the extent strictly required by the exigencies of the situation." Further, no discriminatory measures are allowed and derogation measures are supposed to be only temporary. In 2001 the UN Human Rights Committee added to that conditionality that derogation is to be of an exceptional nature, object to the principle of proportionality and only legal based on the declaration of a state of emergency.[44] Further, certain specific articles of the ICCPR can never be the object of derogation. This pertains articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18, covering the right to life, the prohibition of torture, the prohibition of slavery and servitude, the prohibition of imprisonment merely based on inability to fulfil a contractual obligation, the prohibition of punishment outside of the law, the right to be recognized everywhere as a person before the law, as well as the right to freedom of thought, conscience and religion.[45] The conditions for derogation formulated in the CFREU arguably establish a relatively high level of protection against limitations of rights. One can make this argument since the CFREU establishes not only that rights limitations must be provided for by the law and must be necessary, they must also respect the essence of the CFREU's rights and freedoms and be subject to the principle of proportionality.[46]

Now, the question arises what a human rights violation actually is to be defined as. In this study, a human rights violation in the course of a terrorism policy is operationalized along with two human rights frameworks or two different modes or expressions of human rights. First, I operationalize a violation by

[43] These articles guarantee the right to life, the prohibition of torture, the prohibition of slavery and servitude, as well as the prohibition of punishment outside of the law.
[44] Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), http://hrlibrary.umn.edu/gencomm/hrc29.html#_edn3
[45] ICCPR, article 4.
[46] CFREU, article 52.

referring to the legal human rights framework to which the EU, the UK, and Germany institutionally connect, which is legally (or in case of the UDHR at least morally) binding human rights documents such as the ECHR and the CFREU in a European context and the ICCPR in a wider, global context.[47] A violation is thus operationalized as a breach of binding human rights documents (taken options for derogation into regard). When taking several different human rights documents as the basis for the evaluation of terrorism policies in general and the legality of restricting human rights, in particular, it can – despite the general similarities between the four chosen documents – be expected that certain discrepancies will at times be detected. I will thus apply the following strategy when such discrepancies occur: the human rights document with the strictest demands that are generally applicable will be regarded as the standard for evaluation. Logically, if a policy is eligible according to the most demanding human rights document, it is eligible in regard to the others as well. However, should it be ineligible, then a human rights infringement is detected, regardless of the question if it should be eligible based on a less strict regime. The legal benchmark for the EU institutions is, however, the CFREU, since the EU is not itself a party to the ICCPR or the ECHR (although the objective to join the ECHR as a party has existed since the implementation of the Lisbon Treaty).

However, besides being manifested in a more tangible way in certain international documents, human rights reflect a certain understanding of the human being; general personhood, the relation between individual and state, as well as citizen and state and the functioning of society. They further reflect the lifeworld of most individuals in Western societies. This affects, as mentioned that human rights not only represent 'letters of the law', but also certain intentions and aims, as well as a specific culture or spirit of rights.[48] The idea of the spirit of the law points to a wider understanding of rights, an understanding that emphasizes 'the big picture' of the *idea* of rights, the general idea behind the fundamental freedoms provided in rights documents, or in other words, the bigger meaning and aims of human rights (what rights are all about). For instance, the concept of human rights reflects a certain understanding of how individuals should treat each other, a treatment based on mutual *ethical* treatment reflecting senses of sympathy, empathy, and compassion for each other. One might go as far as speaking of a certain spirit of brotherhood in this regard. Clearly, humans do not and cannot be expected to act along these lines at all times, however, ethical treatment and a sense of responsibility and compassion for all humans and humanity are core elements of the general *atmosphere* that the idea of human rights tries to construct. One might argue that the bigger aims of such a spirit of rights understanding are the protection of human dignity, the unfolding of individual capabilities and the general wider aims of the human rights concept, which are freedom, justice, and peace in the world (see e.g. the Preamble of the UDHR).[49] An understanding that all humans own an inherent and inalienable dignity further constitutes the cornerstone of the central elements and the general atmosphere of rights.[50] This notion of dignity is at the same time one of the most common justifications for human rights.[51] The notion of human rights is here based on the idea that every human being has dignity; therefore, every human being is entitled to be treated in a way that mirrors this dignity.

[47] Clearly, the UN documents have been the foundations of the European documents.
[48] Dorfman (2017). An understanding of human rights existing in a wider context and entailing a certain spirit springs also from the UDHR.
[49] On the idea of human rights and the unfolding of human capabilities see Nussbaum (1997).
[50] Dorfman (2017), 176, 193- 195.
[51] Freeman (2011), 69.

Thus, human rights are not supposed to provide what humans need for survival but to what is needed "for a life of dignity."[52] Human rights are according to this thought a legitimate concept since they ensure a life in dignity for all human beings if all established rights are upheld. This justification of human rights can be found in various human rights documents as well, and it, therefore, emphasizes the point that the spirit of rights functions as the groundwork for legal human rights documents.

My study emphasizes this wider approach to human rights and will operationalize a violation of rights not only in legal terms, but also in terms of a breach of the overall aims and intentions of rights, or the spirit of the same. This second perspective of human rights is necessary, as it is insufficient to conduct a rights analysis of terrorism policies exclusively from a legal perspective. In fact, one might understand human rights laws as expressions of the wider intentions of human rights, or the embodiment of human rights ideals. The laws would in this sense be understood as the tools of the more general spirit of rights. Although such a perspective is necessary for the analysis of all terrorism policies, its importance shines through the clearest under certain circumstances. For instance, not all policies that appear critical from a rights perspective have been evaluated by a human rights court (or constitutional court) or a ruling is still pending, or two courts have different opinions on the same policy. Further, it is sometimes possible that a certain anti-terrorism policy has been declared legal and justified by a court, but the policy might despite its legal status still undermine the wider aims, spirit, and culture of human rights. And, of course, legal frameworks can change over time, and might thus change their relation to certain human rights. In these cases, one can only rely on argumentation that connects to the wider meaning and aims of rights, and the consequences of their potential curtailment. Thus, I will also check the terrorism policies in focus against their compatibility with the overall aims of human rights norms (freedom, justice, and peace in the world) and the general spirit of human rights.

An important paradox or problem of the concept of human rights is that certain rights can come into conflict with each other. This is a paradox since the rights springing from the different articles in the UDHR are declared inalienable and equal. However, certain rights can at times come in conflict. The UDHR itself acknowledges this problem in article 29. A relevant example in the context of anti-terrorism is potential clashes between the right to security of the person on the one hand and freedom of expression and the right to privacy on the other hand. For instance, several state organs have argued in their anti-terrorism campaigns that an effective way of preventing terrorism would be to crack down on extremist sentiments being spread on the internet. However, this can in effect amount to a curtailment of freedom of expression. In general, two different strategies are thinkable when having to deal with conflicting rights. The first would be to resolve the issue by assigning certain rights more importance than others. This would, however, clash with a central trait of the concept of human rights itself since all rights were defined as equal. Further, any such hierarchy of rights would face legitimate criticism of being arbitrary. The second idea would be that rights can only be curtailed when absolutely necessary; for instance in genuine emergency situations. Such curtailments would have to be carried out without discriminatory tendencies for the distribution of sacrifices to be fair. This would demand a context-specific evaluation of what is necessary, involving all pertained parties into the debate.[53]

[52] Donnelly (2013), 21.
[53] Freeman (2011), 82-84.

Defining Anti-Terrorism

I will now proceed to define anti-terrorism, the second central concept of this article. A definition of this term will make clear what kind of policies and state measures against terrorism it is that I will review here from a human rights angle. When reviewing scholarly publications, as well as official documents, it becomes clear that no standard definition of 'anti-terrorism' and 'counter-terrorism' exists. Instead one can discover a great confusion of terminology for terrorism policy in both academic literature and policy documents. Often, two different labels are used for policies trying to tackle the phenomenon of terrorism; that is 'anti-terrorism' and 'counter-terrorism'. The confusion of terminology consists of the fact that some policymakers and authors label all terrorism policies for 'counter-terrorism,' whereas some label all policies 'anti-terrorism'. And, others use the terms as synonyms, whereas another group of scholars tries to differentiate between the two. For instance, Andrew Silke, a major voice in the field, only uses the label 'counter-terrorism', when approaching states attempts to deal with terrorism. He uses this label both for highly repressive measures such as military interventions and for softer measures such as legislative acts and negotiations.[54] However, there are only a few scholars who exclusively use the label 'anti-terrorism' for descriptions of responses to terrorism. Still, some examples can be found, for instance, Fernando Reinares.[55] Sometimes policymakers or scholars treat the labels of anti-terrorism and counter-terrorism synonymously. The British state is an example, as it's legislation and strategy papers on measures tackling terrorism sometimes use the term 'anti-terrorism' and sometimes 'counter-terrorism' in the title. For instance, the UK saw the 2001 Anti-Terrorism Crime and Security Act (ATCSA), as well as the 2006 UK Counter-terrorism strategy CONTEST. However, some authors do distinguish between anti-terrorism and counter-terrorism as labels. Examples of such authors are Brigitte Nacos and Gus Martin.[56] I follow the last camp of distinguishing between anti-terrorism and counter-terrorism and will, therefore, deliver a definition of both. Without a working definition of both terms, the research would have to ignore the confusing situation regarding the labels in the literature and only speak of terrorism policy, although a qualitative difference between the two categories exists. A distinction in different categories of terrorism policies provides for a more refined terminological toolbox and prevents misinterpretations and misunderstandings based on confused labels.

Before differentiating anti-terrorism from counter-terrorism one is forced to gain an overview of measures that states or IOs apply in order to tackle terrorism. Thus, a list of typical measures, based on elaborations

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[54] Andrew Silke, "The Psychology of Counter-Terrorism: Critical Issues and Challenges." In *The Psychology of Counter-Terrorism*, ed. by Andrew Silke. London and New York: Routledge, 2011, 3. Further scholars, who exclusively use the label counter-terrorism when referring to acts of states facing terrorism, are Robert Art and Louise Richardson, *Democracy and Counterterrorism: Lessons from the Past.* Washington D.C.: United States Institute of Peace Press (2007), Richard English (2009), David Whittaker, *Terrorism: Understanding the Global Threat.* London: Longman Pearson, (2002), or Walter Laqueur, *The Age of Terrorism.* Boston: Little Brown, 1987.

[55] Fernando Reinares, "Democratic Regimes, Internal Security Policy and the Threat of Terrorism," *Australian Journal of Politics and History* 44, No.3 (1998): 351-71.

[56] Gus Martin, *Understanding Terrorism: Challenges, Perspectives and Issues*. Thousand Oakes: Sage Publications, 2013. Brigitte Nacos, *Mass-Mediated Terrorism: The Central Role of the Media in Terrorism and Counterterrorism.* Oxford: Rowman & Littlefield Publishers, 2002.

by scholars such as Paul Wilkinson, Robert Art and Louise Richardson, Andrew Silke, Gus Martin and Andreas Bock as well as police practitioners such as Barrie Sheldon, could look like the following: the usage of specifically trained police or military units to directly tackle terrorists (e.g. via commando actions), military intervention in areas controlled by terrorist groups or countries harboring terrorists, forceful campaigns of repression of terrorist groups, violent (sometimes lethal) retaliatory or pre-emptive strikes against terrorists or terror suspects (e.g., via drone-strikes), the surveillance of terrorists and terror suspects via intelligence measures, enhanced cybersecurity, the extension of police and intelligence powers, the introduction of various legal measures up to the adoption of emergency powers by state organs, the increase of security measures around potential targets (e.g. airports or tourist areas), the introduction of more severe penalties for alleged deterrence purposes, the prevention of funding of terrorism, the introduction of tougher detention regimes (e.g. detention without trial), the curbing of extremists online propaganda, the initiation of negotiations with terror groups including granting concessions to terrorists (e.g. amnesties), the distribution of non-extremist counter-narratives (to win the "hearts and minds" as Art and Richardson suggest), simple discursive reassurances of the public by political elites and further the implementation of social reforms aiming at tackling (perceived) root causes such as economic deprivation and discrimination, as well as the general tackling of underlying grievances (including the prevention of radicalization).[57] Many of these measures can be carried out by states in cooperation with other states or international institutions such as the UN or EU. Whereas this list resembles measures that are mentioned regularly in the literature, it is only one list of typical potential measures to tackle terrorism. Other lists might contain other measures and I could have included further measures, which are less often mentioned in the literature as well (e.g. intensified control regimes concerning firearms or the establishment of crisis management strategies). And, no list of terrorism policies will ever be exhaustive, since new measures are continually developed as terror threats change. This list shows that the terrorism policies of states consist of very different tools and measures. Some measures are highly repressive; others rather aim at prevention of terrorism (tackling root causes) and the elevation of resilience (e.g., by target hardening).

Now, in terms of finding a working definition of anti-terrorism and counter-terrorism, Gus Martin and Barrie Sheldon introduce some helpful differentiations in their accounts of terrorism policies. Sheldon, e.g., distinguishes between measures requiring the use of force and measures which do not require force. He mentions suppression campaigns, pre-emptive strikes, punitive strikes, and covert operations, as measures requiring force and intelligence, diplomacy, social reform, concessionary options, economic sanctions and enhanced security (e.g. at airports) as measures not requiring the use of force.[58] Martin describes counter-terrorism as "proactive policies that specifically seek to eliminate terrorist environments and groups," and anti-terrorism as "defensive measures seeking to deter or prevent terrorist attacks."[59] The American

[57] Silke (2011), 3. Barrie Sheldon. "Countering the terrorist threat," In *Policing Terrorism*, ed. by Christopher Blake et al. London: SAGE, 2012. (2012), 69-82. Martin (2013), 432-462. Paul Wilkinson *Terrorism versus Democracy: The liberal state response.* 3rd ed. London and New York: Routledge, 2011. Anne Sørensen, "I krig mod 'statfjende nr. 1' – vesttysk terrorbekæmpelse I 1970'erne." In *Antiterrorismens idehistorie – stater og vold i 500 år*, ed. by Mikkel Thorup and Morten Brænder. Aarhus: Aarhus Universitetsforlag, 2007, 169. Art and Richardson (2007), 16-17. Andreas Bock, *Terrorismus*. Paderborn: UTB, 2009.
[58] Sheldon (2012), 68.
[59] Martin (2013), 431.

Department of Defense (DoD) claims likewise that anti-terrorism resembles rather "defensive measures", whereas counter-terrorism rather signifies activities that are aiming at neutralizing terrorists.[60] I will use these variables of forceful versus non-forceful and offensive (aiming largely at eliminating) versus defensive (aiming largely at preventing) actions in order to find a differentiating definition of anti-terrorism and counter-terrorism.

Thus, my working definition of anti-terrorism and counter-terrorism looks as follows: counter-terrorist measures are measures which are highly offensive and aggressive; they include the use of force and aim at directly eliminating terrorist environments or terrorists themselves. This is valid whether this is carried out in 'the homeland' or abroad (although most Western counter-terrorism measures are currently carried out abroad).[61] In contrast, anti-terrorism measures are defensive, less-aggressive measures, (largely) not including force, aiming at prevention, protection, deterrence, and resilience. Whereas counter-terrorism measures often hit a potentially small amount of people (at least inside of current Western states applying them), vast amounts of people are prone to the effects of many anti-terrorism measures (although many people in Western society might not be aware of them on a daily basis). Counter-terrorism and anti-terrorism are here further understood as actions of state organs or institutions built on state organs (as e.g., the EU). Security measures by sub-state actors fall outside of this definition.[62] This distinction should not lead to the conclusion that anti-terrorism measures are exclusively 'good' or legitimate measures. Many defensive measures conflict with a range of human rights.

Now, the question persists, as to which concrete measures of terrorism policies can be placed under which category. Some measures with which authorities try to tackle terrorism are rather easily connected to one of the categories. The following are examples of measures falling in the category of counter-terrorism: military interventions and suppression campaigns (e.g. in the style of Operation Enduring Freedom), retaliatory attacks on state-sponsors of terrorists, targeted killings of terrorists or terror suspects by either pre-emptive or punitive strikes (e.g. by drone strikes), and kidnapping of terror suspects (e.g. carried out under the 'extraordinary rendition' program by the CIA).[63] Commando actions, e.g., covert operations by Special Forces would fall under counter-terrorism as well.

A large range of other measures can be collected under the category of anti-terrorism: the collection of intelligence, online or not (on terrorists or suspects), the construction of databases, aiming at filtering out potential terror threats, all legal measures and the enforcement of the same (from the introduction of

[60] US Department of Defense, DoD Dictionary of Military and Associated Terms. http://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf

[61] For instance, in terms of military action in Afghanistan, Iraq, Syria or Mali.

[62] Non-state counter- or anti-terrorism measures are not inconceivable, they are for instance carried out by so-called 'gated-communities' in Latin America. Thorup and Brænder (2007), 20.

[63] Andrew Tyrie, Roger Gough and Stuart McCracken, *Account Rendered: Extraordinary Rendition And Britain's Role.* London: Biteback Publishing, 2011. Claudia Hillebrand, *The CIA's extraordinary rendition and secret detention programme: European reactions and the challenges of future international intelligence cooperation.* The Hague: Netherlands Institute of International Relations Clingendael, 2009. https://www.clingendael.org/sites/default/files/pdfs/20090401_cscp_security_paper_hillebrand.pdf Rebecca Cordell, "Measuring extraordinary rendition and international cooperation." *International Area Studies Review* 20, No. 2 (2017): 179–197.

more severe penalties, over the extension of police and intelligence powers, or new internment regimes, up to the adoption of emergency powers), all efforts to enhance the protection of potential targets (public areas, tourist spots or transport facilities), efforts to establish enhanced cybersecurity (e.g., enhanced security efforts in digital control systems), the curbing of extremist internet content, efforts to undermine funding of terrorism, negotiations or the offer of concessions to terrorists, policies aiming at tackling the root causes of terrorism or undermining incentives for terrorism (encompassing de-radicalization programs or social reform programs in order to tackle economic deprivation or discrimination), and symbol politics (e.g. the installment of cameras to prevent terrorism) or acts of discursive reassurance.

In the context of a differentiation between offensive and defensive, aggressive and less aggressive measures, it is important to remember, that certain rather defensive anti-terrorism measures build the basis for aggressive and violent counter-terrorism measures. For instance, intelligence gathered by one institution (anti-terrorism) can lead to a cases 'extraordinary rendition', the use of Special Forces or targeted killings (counter-terrorism) by other institutions. However, based on my differentiation, it is to be acknowledged that currently rights infringing terrorism policies in Europe are overwhelmingly anti-terrorism policies. Of course, counter-terrorism measures can (and do) infringe human rights and have a negative effect on the relationship between state and individual as well.

Post 9/11 human rights breaches of UK anti-terrorism

The first issue I would like to point out in terms of British post 9/11 anti-terrorism is the possibility for indefinite detention of foreign terror suspects, without charge or trial, springing from the 2001 Anti-Terrorism, Crime and Security Act (ATCSA).[64] ATCSA was formed as an attempt to eradicate loopholes of earlier legislation and to implement "a rigorous system of protection and deterrence."[65] Based on the dramatic events of 9/11, the act "was rushed through Parliament."[66] Said indefinite detention measures against foreign terror suspects could be based on vague claims of 'national security grounds'. With this measure, the UK derogated from article 5 of the ECHR, as well as article 9 of the ICCPR (right to liberty of person). The British government argued for such derogation from the standpoint of a perceived public emergency. During indefinite detention, evidence could be kept secret and no communication with supplied lawyers was allowed. With this, the British government denied such detainees the right to an effective defense. The British government thereby derogated from article 6 of the ECHR, which emphasizes the right to a fair trial.[67] The measure also stands in opposition to article 11 of the UDHR and article 14 of the ICCPR, which spell out the right to a trial, including all guarantees necessary for defense (arguably knowledge of the evidence).

This point of the Act was debated in parliament and received opposition from the House of Lords and also civil liberty organizations challenged provisions of the ATCSA.[68] The Act did not pass without scrutiny by the

[64] Whittaker (2002), 175-178.
[65] Whittaker (2002), 175.
[66] David Whittaker, *Counter-Terrorism and Human Rights*. Harlow: Longman, 2009, 49.
[67] Whittaker (2009), 49. Gearty (2013), 88.
[68] Gearty (2013), 88.

House of Lords. Members of the British upper chamber uttered concern about the conventional presumption of innocence before any conviction of guilt as being in danger." There was also worry about "the prospect of the authorities trawling through confidential emails and Internet browsing."[69] Concern about the limitation of rights was in general present (as e.g., uttered by Lord Chief Justice, Lord Woolf).[70] As a consequence, the Lords thus provided for certain concessions: In regard to indefinite detention full legal representation of the suspects had to be provided and in connection to the criminalization of incitement clearer guidelines as to exactly should be understood as incitement to racial or religious hatred were demanded (otherwise, they argued, Salman Rushdie might have been convicted for his Satanic Verses'). Still, the overwhelming core of the ATCSA stayed intact and the provisions mentioned above entered into law, including indefinite detention for foreign terrorism suspects.[71] Consequently, eight foreign terror suspects were picked up in the week following the adoption of the ATCSA, more followed in the years after.[72]

However, indefinite detention of foreign terror suspects was, at last, deemed incompatible with Britain's own Human Rights Act of 1998 and the ECHR by the House of Lords Judicial Committee in 2004. It was thus eventually abolished in March 2005. The ruling was based on an evaluated breach of the right to liberty (art. 5 ECHR), as well as the discriminatory policy of indefinitely detaining foreign nationals only; providing a clear violation of the right to non-discrimination (art. 14 ECHR). The Committee deemed that a state of emergency allowing for a derogation of this right was not observable.[73] This constituted a debacle for the British government. Reflecting on ATCSA – with the fate of these provisions in mind - David Whittaker fittingly concludes that the ATCSA was a "tentative flexing of government muscle" and that "the balance between security and liberty in the context of threats from international terrorism was never got quite right."[74] The measure of indefinite detention further violated the wider aims and the spirit of human rights. By undermining legal guarantees and providing for discriminatory practices, the policy arguably was at odds with the wider idea of human dignity, as well as the aim of providing justice to all human (as mentioned in the UDHR). So already the first major anti-terrorism legislation that was implemented in the UK after 9/11 violated human rights obligations of the country. However, instead of trying to avoid further human rights violations, the government continued with a course of anti-terrorism policy-making that went to the boundaries of what is permissible in terms of human rights obligations; and not infrequently these boundaries were crossed.

After indefinite detention was declared to be in violation of human rights, new policy measures on terror suspects were initiated by the UK government. Thus, the Prevention of Terrorism Act 2005 was introduced, which as its core provision entailed the measure of so-called control orders. The major aim of the new Act was to reach a new procedure for detention and deportation of terror suspects while ensuring the public

[69] Whittaker (2002), 177.
[70] Whittaker (2009), 65.
[71] Whittaker (2002),177-178.
[72] Gearty (2013), 88.
[73] Whittaker (2009), 49+65. Gearty (2013), 90. Human Rights Watch, "U.K.: Law Lords Rule Indefinite Detention Breaches Human Rights," December 15, 2004. http://www.hrw.org/news/2004/12/15/uk-law-lords-rule-indefinite-detention-breaches-human-rights
[74] Whittaker (2009), 66.

that the government did not violate civil and human rights, providing a kind of substitute for the abolished indefinite detention practice. The control orders gave the British Home Secretary the possibility to impose a range of restrictions on the liberty of terror suspects. They could be imposed on anyone inside the British jurisdiction. In total fifty-two individuals (all suspected of connections to Islamist terrorism) were subject to control orders during their existence, some were living under the orders for only a few months, some for years.[75] Control orders essentially regulated and restricted movement and communication options of terror suspects, and included, for example, restrictions on the usage of mobile phones or the internet, of movement, residence or association with other individuals, and imposed curfews and house arrest, forced relocations, electronic tagging and in general constant monitoring. Further, such suspects were required to cooperate with surveillance of their communication or movements, as well as surrender their passports. Such control orders could be imposed for up to twelve months at a time, with renewals possible; a breach of the orders could be punished with a prison sentence of up to five years.[76] In terms of the measure of house arrest, a range of individuals became subject to a daily curfew of up to eighteen hours, without ever being faced with criminal charges. Control order thus operated outside of the regular law.[77] The establishment of so-called control orders triggered much controversy. David Whittaker reports of a "gale that blew in Parliament's two Houses and in the press."[78] The House of Lords e.g. demanded an automatic expiry of the Act and claimed that judges rather than politicians should decide on the orders (which did not become reality).[79] Whittaker criticized that the Act enabled politicians to deprive citizens of their liberty, "under a thin veneer of legality".[80] Conor Gearty claimed that control orders might be used against others than terror suspects, for instance, civil libertarian protests and that they consequentially could have a negative influence on the political freedom in the UK.[81] However, the British government claimed in 2007 that such control orders would only be used against a limited number of persons, that each order would receive a mandatory review by the High Court and that human rights of the pertained individuals would be protected by strong safeguards. They were evaluated by authorities to be a "necessary and proportionate response" to terror threats.[82] However, the UK judiciary challenged the practice of control orders in several instances. In April 2006 High Court Judge Justice Sullivan branded the control orders as "an affront to justice."[83] In June 2006 he quashed control orders against six terror suspects, based on his evaluation that they breached article 5 of the ECHR (the right to liberty). Sullivan claimed that he had taken the importance of protecting the public (from terrorism) into account, but that "human rights or international law must not be infringed or compromised".[84] In 2007 the Law Lords demanded changes to the control order process.

[75] Gearty (2013), 91-92.
[76] Whittaker (2009), 50+68. Matthew Ryder, "Control orders have been rebranded. Big problems remain," *The Guardian*, January 28, 2011. https://www.theguardian.com/commentisfree/libertycentral/2011/jan/28/control-orders-protection-of-freedoms-bill
[77] Gearty (2013), 91-92.
[78] Whittaker (2009), 68.
[79] Whittaker (2009), 68.
[80] Whittaker (2009), 69.
[81] Conor Gearty, "Terrorism and Human Rights." *Government and Opposition* 42, No. 3 (2007): 359.
[82] Whittaker (2009), 67.
[83] Vikram Dodd and Carlene Bailey, "Terror law an affront to justice - judge: Control orders breach human rights," *The Guardian*, April 13, 2006.
[84] Allan Travis and Audrey Gillan, "New blow for Home Office as judge quashes six terror orders," *The Guardian*, June 29, 2006. https://www.theguardian.com/politics/2006/jun/29/humanrights.terrorism

They declared that the practice of not giving the suspects insight into the evidence against them was ineligible. They further ruled that eighteen hour long curfews were indeed a breach of the human right to liberty. However, they ruled that shorter curfew was acceptable (possibly up to sixteen hours) and that the system as a whole could be upheld.[85] Thus, the successor regime to the indefinite detention scheme ran into human rights troubles as well, including a ruling acknowledging breaches of human rights obligations. One might point out that control orders undermined freedoms of association and movement as well. The control orders arguably breached the wider aim of human rights as well, as the ideas of justice (by imposing orders on individuals who did not face charges, based on secret evidence) and freedom (by imposing house arrests, etc.) were undermined.

As a third example, the Terrorism Act 2006 made 'glorification' of terrorism a criminal offense since this could in the understanding of British legislators incite people to terrorism. The provision of or training in terrorist techniques was defined as a criminal offense as well, together with the distribution of material that might induce others to terrorism or that could be useful in terms of preparing terror acts (e.g. manuals for producing explosives).[86] The Act defined that glorification was "a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism."[87] The criminalization of 'glorification' of terrorism, caused fierce debate. It was claimed that the definition of glorification was too broad. Concern was that this provision would undermine freedom of expression and might be used in unintended cases, e.g. against groups trying to topple a foreign repressive regime.[88] In effect, the criminalization of glorification of terrorism led to twenty-three convictions per year (on average) in the years following its implementation. An example is the conviction of a student under section 2 of the Act (Dissemination of terrorist publications). He had uploaded videos that showed attacks on forces of the international coalition in Iraq and Afghanistan. This upload resulted in a five-year jail sentence.[89] As Conor Gearty reports, the criminalization of terror glorification was clearly aimed at Islamist extremism, support for right-wing extremism was not subject to charges under the new legislation.[90] Critics rightly claim that the definition of 'glorification of terrorism' was too broad; the condition that a statement 'likely to be understood by some members of the public' to incite to terrorism, opens up for a wide range of potential convictions under this law. Such unclear provisions can cause doubt amongst the public concerning the legality of certain public statements. A chilling effect on public debate is thus a possibility when broad definitions of both 'glorification' and 'terrorism' are used. Further, the measure of criminalizing glorification of terrorism or dissemination of terrorist publications opens up for a grey area in which it is

[85] Peter Walker, "Control orders breach human rights, law lords say," *The Guardian*, October 31, 2007. https://www.theguardian.com/uk/2007/oct/31/terrorism.politics
[86] UK Terrorism Act 2006 http://www.legislation.gov.uk/ukpga/2006/11/pdfs/ukpga_20060011_en.pdf
[87] UK Terrorism Act 2006.
[88] Such positions were held by Jeremy Corbyn or human rights lawyer Geoffrey Bindman. Simon Jeffery, "Q&A: the glorification of terrorism," *The Guardian*, February 15, 2006. https://www.theguardian.com/world/2006/feb/15/qanda.terrorism
The Guardian, "Terrorism Act 2006," January 19, 2009. https://www.theguardian.com/commentisfree/libertycentral/2009/jan/19/terrorism-act-2006
[89] Gearty (2013), 100-102.
[90] Gearty (2013), 102.

hard to draw the line between permissible dissent in the spirit of freedom of expression and ineligible cases of hate speech and incitement to violence.[91] This grey area can potentially be used for banning controversial viewpoints or minority positions. Therefore, freedom of expression should only be curtailed if public utterances or images are supposed to lead to violence.[92] As there is no commonly recognized definition of terrorism, the criminalization of the glorification of a concept that is so fiercely debated will necessarily entail elements of arbitrariness. Not to be misunderstood, the criminalization of certain speech acts that clearly try to incite (terrorist) violence or even call for concrete acts of (terrorist) violence against others can and should be punishable, however, there must be concrete evidence that an act of communication is doing just that (concretely inciting violence). A provision in the fashion of 'likely to be understood as such by somebody' does not fulfill this demand. Therewith the criminalization of glorification of terrorism undermines legal rights to freedom of expression (e.g. defined in art. 10 ECHR or art. 19 ICCPR) and further undermines the wider spirit of rights. The option to freely voice one's opinion is a fundamental cornerstone of democratic societies and a condition for human dignity and freedom as wider aims of human rights. By endangering freedom of expression, and potentially setting processes of self-censoring in motion governments endanger an essential part of their citizens' individuality, societal influence, and humaneness.

As another example of questionable anti-terrorism policies in the UK since 2001 from a human rights perspective, one might point to the so-called Channel program under the Prevent stream of CONTEST (the UK's 'Counter-terrorism strategy'). A 2015 reform (based on the 2015 Counter-Terrorism and Security Act) of the program made it mandatory for employees in many public sectors to refer individuals to authorities whom they deemed as radicalized or vulnerable for radicalization (before referrals were an option, not a demand).[93] This includes youths and children. Such institutions are e.g., schools, prisons, or NHS trusts.[94] An official formulation by the British authorities reads that the program wants to ensure that vulnerable individuals "receive support before their vulnerabilities are exploited."[95] The definition of extremism that provides the groundwork for the procedure of referring 'extremist' individuals is as follows: "vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty, mutual respect and tolerance of different faiths and beliefs."[96] Counter-terrorism lecturer Rizwaad Sabir held that the definition of extremism would be too broad, especially when some values have never been clearly defined.[97] In practice, individuals are to be referred to the Channel program, which will then make an effort

[91] Art. 20 of the ICCPR states that: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."
[92] Garton Ash (2016), 331.
[93] Revised Prevent Duty Guidance: for England and Wales https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445977/3799_Revised_Prevent_Duty_Guidance__England_Wales_V2-Interactive.pdf
[94] Josh Halliday, "Almost 4,000 people referred to UK deradicalisation scheme last year," *The Guardian*, March 20, 2016. https://www.theguardian.com/uk-news/2016/mar/20/almost-4000-people-were-referred-to-uk-deradicalisation-scheme-channel-last-year
UK Counter-Terrorism and Security Act https://www.gov.uk/government/collections/counter-terrorism-and-security-bill
[95] Channel guidance https://www.gov.uk/government/publications/channel-guidance
[96] Prevent duty guidance of CONTEST strategy.
[97] Homa Khaleeli, "You worry they could take your kids': is the Prevent strategy demonising Muslim

to de-radicalize the referred person.[98] However, if the person refuses to engage with the Channel program, participation cannot be enforced.[99] Looking at current numbers, it can be constituted, that the practice of referring people to the Channel program has seen quite an increase in latest years. In 2015 3.955 individuals had been referred to, more than twice as many as in 2014 when 1.681 individuals had been referred to. People reported to Channel included children "aged nine and under."[100] In England and Wales 415 children aged ten or under had been referred in 2015, 1.424 of the referred had been between eleven and fifteen years old.[101] In the West Midlands, the only region delivering detailed data, sixty-eight children aged nine or under were referred in 2015, 183 were between ten and fourteen years old (out of a total of 788 referred individuals). Almost half of the referrals were made by educational institutions. Muslims constituted almost forty percent of the referred individuals. Although the program, in theory, is aimed at all forms of terrorism, including right-wing terrorism, this last number suggests that Muslims are highly overrepresented amongst referred individuals. This is suggested by slightly older numbers from 2013 as well. Then, only fourteen percent of the referrals were based on right-wing extremism, while fifty-seven percent of the referred were Muslims. Interestingly, only 20% of those referred were evaluated as being in need of an intervention, as the Guardian reported in September 2015.[102] The broadness of the approach, or in other words the broad definition of extremism, appears to be one of the reasons for this striking number.

This broadness enabled a range of referral cases, reflecting that already strong disagreement with the UK's foreign policy in the Middle East or British authorities in general, led to becoming a target of the referral measure, without any plans of carrying out violence. As Adrian Guelke rightly pointed out, hundreds of thousands e.g., disagree with Western foreign policy without ever committing a crime, let alone political violence.[103] In July 2015 almost 300 academics, lawyers, and public figures criticized the new duty to refer individuals in a public letter. They argued that the practice would "divide communities, clamp down on legitimate dissent and have a chilling effect on freedom of speech."[104] Arun Kundnani argues that the duty to refer individuals will lead to a process of self-censorship, "where young people don't feel free to express themselves in schools, or youth clubs or at the mosque." He argues that such an atmosphere of self-censorship might create even more potential terrorists, as angry youths with "nowhere to engage in a democratic process and in a peaceful way, […] that's the worst climate to create for terrorist recruitment."[105] The Guardian indeed reported that some educators had observed that "Muslim pupils had become more careful about what they talk about for fear of being referred."[106] Fittingly, terrorism

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schoolchildren?," *The Guardian*, September 23, 2015.

[98] Channel guidance.

[99] Khaleeli (2015).

[100] The steep increase in referrals suggests that awareness around the issue of radicalization has substantially grown in the UK. This might be a consequence of the civil war in Syria and the connected concern of a growing base of IS supporters in the UK. Halliday, (2016).

[101] Halliday (2016).

[102] Khaleeli (2015).

[103] Adrian Guelke, "Secrets and Lies: Misinformation and Counter-Terrorism." In *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English. Oxford: Oxford University Press, 2015, 104.

[104] Khaleeli (2015).

[105] Khaleeli (2015).

[106] Khaleeli (2015).

researcher Peter Neumann argues that non-violent extremism should be faced with "a healthy debate, not a punitive response."[107] Arguably, the human right to freedom of expression (art. 19 UDHR, art. 19 ICCPR, art. 10 ECHR, art. 11 CFREU) is undermined by such processes. Indeed, both relevant legally binding human rights documents for this case, the ICCPR, and the ECHR allow for derogation of freedom of expression in the course of measures establishing national security, however, the Channel program can in my opinion not be defended from a legal standpoint on derogation. The ICCPR might in legal terms allow for derogation as executed by Channel since the program is prescribed by law and is supposed to serve the aim of national security. However, the ECHR adds the condition of necessity in a democratic society. And indeed it appears that Channel undermines the conditions that are necessary for the survival of a healthy democracy. By undermining individuals' options to freely debate and exchange viewpoints in public, a central feature of democracy is diminished. Therefore the Channel program, in my opinion, violates the provision of the ECHR that derogations must be based on what is necessary *in a democracy* and therewith the program is to be evaluated as being in violating of the ECHR. In addition to this violates a restriction on expression the general spirit of human rights (see my argumentation on this above). Another human rights norm undermined by Channel, due to its clear focus on Muslims, is the right to non-discrimination. Via such policies authorities not only mute legitimate dissent and initiate processes of self-censoring but also divide communities and stigmatize children. Human rights aims of dignity and justice are, again, violated by this policy.

As a fifth example of rights infringing UK anti-terrorism, I would like to point to the UK's surveillance system. Just as many other countries, the UK supported the practice of retaining communication data of UK citizens and residents (or in other words, the bulk collection of metadata). This was possible via a 2006 EU directive (which had been agreed upon during the 2005 British European Council Presidency). Telecommunication data (phone calls, emails, and text messages) had to be stored by service providers for a minimum of six and a maximum of twenty-four months, with the aim to provide security services access to the same.[108] In 2014 the directive allowing for data retention was declared as ineligible with the CFREU by the ECJ. Subsequently, in order to enable security services continued access to telecommunication data, the British parliament adopted national data retention legislation in 2014, the Data Retention and Investigatory Powers Act (DRIPA). The Act was rushed through parliament as 'emergency legislation' leaving only a single day for debate. It received criticism for infringing the right to privacy by NGOs in the field, such as Liberty, Privacy International, and the Open Rights Group, but also by discordant MPs. On the initiative of two such MPs supported by the mentioned NGOs, the legislation was taken up by the British High Court. The High Court ruled in July 2015 that the DRIPA was unlawful, as it would not respect a previous ruling by the ECJ from 2014 and therewith be incompatible with EU law). The High Court underlined in particular, that there was no independent review of the usage of retained data from a court or other independent bodies.[109] After the High Court had declared DRIPA unlawful, the UK government

[107] Khaleeli (2015).
[108] DIRECTIVE 2006/24/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, March 15, 2006. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0054:0063:EN:PDF
[109] Carly Nyst, "Finally, the high court puts a brake on snooping on ordinary Britons," *The Guardian*, July 17, 2015. https://www.theguardian.com/commentisfree/2015/jul/17/high-court-brake-snooping-european-law BBC, "Commons passes emergency data laws despite criticism," July 15, 2014. http://www.bbc.com/news/uk-28305309

appealed and the case was thus referred to the ECJ. The ECJ decided in December 2016 that DRIPA was not legal, since "general and indiscriminate retention" of electronic communication" cannot be justified in a democratic system. Indiscriminate retention would provide for a serious interference in people's private life and would allow for accurate conclusions on the same, potentially triggering the perception of constant surveillance, the court argued. General and indiscriminate retention of the data of all members of society would exceed "the limits of what is strictly necessary."[110] The court further held that an unnecessarily excessive practice of data retention would be at odds with what is justified in a democracy.[111] Therefore, only targeted interception with the purpose to combat serious crime (including terrorism) would be legal. And each act of targeted retention would demand a prior authorization by a court or independent body. Further, individuals pertained by surveillance would have to be notified of the same as soon as such notification would not endanger investigations anymore.[112] These conditions were the 'safeguards' that the ECJ demanded in order for data retention to be combinable with EU law. In January 2018 the British Court of Appeal confirmed the earlier rulings by the High Court and the ECJ by declaring the DRIPA for unlawful. The appeal court followed the argumentation lines of the earlier rulings.[113] However, although DRIPA was declared unlawful, it had already paved the way for another piece of legislation, the Investigatory Powers Act (IPA), which should replace the DRIPA in 2016. And although DRIPA was replaced by the IPA, the position of the ECJ on DRIPA is still highly important, since the ruling bears great relevance for the legality of the IPA as well. The IP Act sought to formalize access of British security authorities to personal data and install a legal basis for bulk data collection.[114] It, in other words, sought to legalize the intense surveillance practices of the British intelligence service GCHQ that had been revealed to the public in the course of the revelations by whistleblower Edward Snowden. It encompasses mass surveillance and options for hacking electronic devices of individuals by state authorities.[115] Surveillance measures as revealed by Edward Snowden or as implemented via the IP Act are highly problematic in regard to the human rights obligations that the UK acknowledged via ratifying the UDHR, ICCPR, and ECHR. It can be argued that 'bulk interception' or mass surveillance violates several basic human rights enshrined in the mentioned human rights documents. Right to privacy and private life is enshrined in all the above-mentioned documents (art. 12 UDHR, art. 17 ICCPR, art. 8 ECHR). For example states the UDHR that "no one shall be subjected to arbitrary interference with his privacy or correspondence", and that "everyone has the right to the protection of the law against such interference or attacks" (art. 12). However, the mentioned surveillance measures result in just such arbitrary interference with privacy and correspondence. Since the mentioned practices of mass surveillance as carried out by the GCHQ, and the surveillance measures covered in the IP Act go much further than the practice of data retention which was already declared at odds with rights

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UK Data Retention and Investigatory Powers Act 2014
http://www.legislation.gov.uk/ukpga/2014/27/pdfs/ukpga_20140027_en.pdf
Owen Bowcott, „EU's highest court delivers blow to UK's snooper's charter," *The Guardian*, December 21, 2016.

[110] Bowcott, (2016).

[111] Bowcott, (2016).

[112] ECJ, "Judgment of the Court (Grand Chamber)," December 21, 2016
http://curia.europa.eu/juris/document/document.jsf?docid=186492&doclang=EN
Bowcott, (2016).

[113] Alan Travis, „UK mass digital surveillance regime ruled unlawful," *The Guardian*, January 30, 2018.

[114] Financial Times. "Human rights concerns spur review of investigatory powers bill," June 7, 2016.

[115] Privacy International 2016 https://privacyinternational.org/node/806 .Patrick Beuth, „Die weltgrösste Überwachungsmaschine," *Die Zeit*, September 25, 2015.

standards by the ECJ, it must infringe binding human rights obligations as well. It further undermines human dignity, since privacy is an integral part of what it means to be human and of every human life. Privacy is central to the development of every individual. The perception to be free from unnecessary control and limitation in terms of thought and action is essential; for individuals' abilities to define themselves, as well as their personal, moral and intellectual development. The same is valid for an individual's political engagement. Individuals have to have the possibility to think of their own in a democracy, without being obstructed by worries of a breach of their privacy. Consequently, humans both act and develop differently when they are aware of lacking privacy.[116]

This section delivered examples of questionable anti-terrorism practices by UK authorities from a human rights perspective. Policies were either declared as breached by relevant judicial institutions or violated the wider spirit and aims of human rights. The same is valid for the case of Germany as I will show in the next section.

Post 9/11 human rights breaches of German anti-terrorism

As the first example of human rights infringing anti-terrorism policies in Germany after 9/11 one might point to the tool of the dragnet investigations. Such investigations were already applied in Germany in the 1970s in the wake of the terror campaign of the RAF.[117] After 9/11 it was applied again in Germany. Dragnet investigations involved more than eight million people, approximately ten percent of the population.[118] Specific criteria were used to track down alleged potential radicals or terrorists. These were: male, age 18-40, Muslim, current or former student and a link to one or more countries with a predominantly Muslim population. In effect, more than 30.000 individuals were identified as potential terrorist sleepers and set for closer examination.[119] However, even after several months, not a single 'sleeper' had been identified although more than 1.600 individuals had been screened more closely. Not in a single case criminal charges were opened.[120] With a high probability, such dragnet investigations trigger the creation of a problematic discriminatory tendency on the side of investigators. While in the 1970s it was more likely to become a suspect of terrorism for being a younger left-wing activist, it was now more likely to come in focus of intense investigation when falling in the above-described category of men with

[116] Laura Donohue, *The Future of Foreign Intelligence: Privacy and Surveillance in a Digital Age.* New York: Oxford University Press, 2016, 101.

[117] Such Dragnet investigations, a way of searching for suspects that aims at the population at large to begin with, in order to filter out individuals via certain characteristics, were used for the first time in Germany in the 1970s. They were invented during the state's anti-terrorism campaign against left-wing terrorism, perpetrated by e.g. the RAF. As a result around five percent of the German population was subject to some form of surveillance. Bernhard Blumenau, "The United Nations and West Germany's efforts against international terrorism in the 1970s." In *An International History of Terrorism: Western and non-Western experiences*, ed. by Jussi Hanhimäki and Bernhard Blumenau. London, New York: Routledge, 2013, 67. Peter Katzenstein, "Same War—Different Views: Germany, Japan, and Counterterrorism." *International Organization* 57, No. 4 (2003): 741-42.

[118] Heinz (2007), 169.

[119] Scheinin (2014), 560.

[120] Scheinin (2014), 560. Tagesschau.de, „Sicherheitsmassnahmen in Deutschland: Im Namen der Sicherheit." August 11, 2016. https://www.tagesschau.de/inland/sicherheitsgesetze108.html

Middle-Eastern descent. Such tendencies are clearly quite problematic concerning the right to non-discrimination guaranteed by various human rights documents that Germany is a party to (e.g., art. 2 and 7 of the UDHR, art. 26 ICCPR, art. 14 ECHR). Indeed, the German constitutional court ruled in 2006 that the concrete usage of dragnet investigation by German authorities in the aftermath of 9/11 was unconstitutional. The judges held that the measure was only to be used in the face of a concrete threat, not in case of a general threat perception. A practice of using dragnet investigations as a preventive measure would not be compatible with the German constitution and the general presumption of innocence of every individual. Consequently, the practice of dragnet investigations was restricted considerably by the German constitutional court.[121] Further, dragnet investigation involving millions of individuals does not fulfill the demands of derogating from human rights, in terms of necessity and proportionality. Since the investigation was carried out as a preventive act, there was no acute emergency and therewith no absolute necessity to carry out the dragnet investigation. Further, since the investigation hit millions of individuals and led to intense check-ups on thousands the measure appears everything else but proportional, especially when having the resulting number of criminal charges (zero!) in mind. The measure was not only illegitimate on a legal basis, but also in terms of the general spirit of human rights. The inherent discriminatory tendency counter-acts human dignity, and so does the infringement of privacy rights of millions of individuals.

Another hotly debated terrorism policy that was implemented by the German government after 9/11 was the so-called air security law (Luftsicherheitsgesetz), adopted by the German parliament in June 2004. This law gave - in last consequence - the Minister of Defense the competence to order the Federal Armed Forces (Bundeswehr) to shoot down civilian airplanes, including civilian passengers. This was valid in case a plane was abducted and threats of using such a plane as a weapon or the suspicion of the same were given.[122] The law rested obviously on worries that a 9/11 scenario could be repeated in Germany. This concern was reinforced when in January 2003 a sports airplane with a confused pilot crossed Frankfurt's airspace for a couple of hours (the pilot had threatened to steer the plane into one of Frankfurt's skyscrapers).[123] Also in case of the air security law, the German constitutional court stepped in and declared this part of the law for unconstitutional (in 2006).[124] The court evaluated that the law infringed on the right to life of the passengers (art. 2 in the German constitution, but also art. 3 UDHR, art. 6 ICCPR, art. 2 ECHR and art. 2 CFREU). The law would further degrade the passengers to mere objects, thus violating the protection of human dignity as manifested in article one of the German constitution.[125] Dignity is also the cornerstone of modern concepts of human rights and the cornerstone of what I called the spirit of rights.

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[121] Scheinin (2014), 560. Tagesschau.de, August 11, 2016. FAZ, „Bundesverfassungsgericht: Rasterfahndung nur noch bei konkreter Gefahr," May 23, 2006. http://www.faz.net/aktuell/politik/bundesverfassungsgericht-rasterfahndung-nur-noch-bei-konkreter-gefahr-1329725.html

[122] Ulrich Schneckener, "Germany" In *Counterterrorism Strategies: Successes and Failures of Six Nations*, ed. by Yonah Alexander. Washington: Potomac Books, 2006, 88.

[123] Schneckener (2006), 89. Spiegel Online, „Luftfahrt: Entführtes Flugzeug versetzte Frankfurt in Angst," January 5, 2003. http://www.spiegel.de/panorama/luftfahrt-entfuehrtes-flugzeug-versetzte-frankfurt-in-angst-a-229487.html

[124] Schneckener (2006), 89.

[125] Schneckener (2006). Tagesschau.de, August 11, 2016. According to the court the law further violated the ban of domestic military usage of the German Federal Armed Forces.

Reflecting on the provisions of the law and taking the evaluations of the court in regard, the air security law constitutes another example of a terrorism-related policy that undermined or compromised human rights in the German case.[126]

A third example of a critical anti-terrorism policy in the German case is the German version of data retention (*Vorratsdatenspeicherung*). Here, a struggle evolved between the Christian Democrats, the Social Democrats (who changed position in 2015), the constitutional court as well as NGOs. The German data retention law should originally allow for the saving of telecommunication metadata for six months (going back on an EU directive from 2006).[127] Metadata do not deliver the precise content of an act of communication but deliver e.g. precise details on who is in contact with whom, at what time, for how long. In aggregate, such data provide a great amount of insight into an individual's life.[128] The purpose of storing these data was (allegedly) the prevention of terrorism as well as improved possibilities in regard to criminal prosecution. However, thousands of German citizens took legal action against the data retention law. The German Constitutional court declared the data retention law for unconstitutional in 2010 and ordered the deletion of all saved data. Further, in 2014 the European Court of Justice (ECJ) declared the EU data retention directive for invalid as it would allow security authorities too far-going and non-proportional data access. The directive would, therefore, be incompatible with the Charter of Fundamental Rights of the European Union. However, after the January 2015 terror attacks in Paris, the German government coalition between Christian Democrats and Social Democrats started a new attempt for adopting a reformed version of the data retention law.[129] The new version of the law passed the German parliament in October 2015 and obliged internet providers to save user data for either four or ten weeks, depending on the nature of data from mid-2017 onwards. Critics subsequently declared to once more appeal to the German Constitutional Court.[130] In December 2016 the ECJ decided in relation to data retention in Sweden and the UK that "general and indiscriminate retention" of electronic communication is not legal. Exclusively data interception with the purpose to combat serious crime (including terrorism) would be legal and only if the interception was targeted at specific individuals. Data retention would provide for a serious interference, it would allow for "very precise conclusions to be drawn concerning […] private lifes," the court held. Non-transparent and indiscriminate data retention would potentially leave the impression of "constant surveillance." Therefore, general and indiscriminate retention of the data of all members of society (since

[126] Clearly, the air security law can rather be seen as a counter-terrorist policy than an anti-terrorist policy from the standpoint of my definition provided above. However, the adoption of a legal basis for the potential downing of an airplane, as well as the preventive character of the action provides for the air security law to be located in the grey area between anti-terrorism and counter-terrorism and will thus be included here.

[127] Heinz (2007), 168. Ilija Trojanow and Juli Zeh, *Angriff auf die Freiheit: Sicherheitswahn, Überwachungsstaat und der Abbau bürgerlicher Rechte.* Munich: Carl Hanser Verlag, 2009, 13.

[128] Donohue (2016), 39.

[129] Court of Justice of the European Union "Press Release No 54/14: Judgment in Joined Cases C-293/12 and C-594/12 Digital Rights Ireland and Seitlinger and Others." April 8, 2014. https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140054en.pdf
Fabbrini (2015). Breyer(2005). Spiegel Online. „Vorratsdatenspeicherung: Minister wollen Daten bis zu zehn Wochen speichern." April 15, 2015. http://www.spiegel.de/netzwelt/netzpolitik/vorratsdatenspeicherung-regierung-stellt-verkehrsdatenerfassung-vor-a-1028714.html Tagesschau.de, August 11, 2016.

[130] Zeit Online. „CDU will Vorratsdatenspeicherung jetzt schon ausweiten." January 13, 2016. http://www.zeit.de/digital/datenschutz/2016-01/verfassungsschutz-vorratsdatenspeicherung-cdu

virtually all citizens in European societies use electronic communication) would exceed "the limits of what is strictly necessary."[131] The court thus argued on the basis of the condition of necessity in regard to the derogation of rights. The court further held that an unnecessarily excessive practice of data retention would be at odds with what is justified in a democracy.[132] This argument connects to my argumentation that data retention's negative impact on privacy rights undermines the necessary groundwork of democracy and the wider aims of human rights (see my argumentation on that point in the UK section).

In the spring of 2017, the German government decided to use the data obtained by data retention for tracking down offenders in cases of housebreaking. Therewith the government violated its own pledges to only use data retention on terrorism and the most severe forms of crime (such as genocide, homicide, high treason and distribution of child pornography). The data retention practice had been justified to the public by the threat of terrorism (and some severe crimes).[133] This move of the government further emphasized that governments will continuously find ways to use and re-use data once they are collected, no matter what the original purpose of the collection of the data was.

As a fourth example of human rights breaches in German anti-terrorism one can point to surveillance measures of German agencies. The German intelligence agency BND is, similar to the British GCHQ, involved in direct surveillance measures of online communication as well. For instance, the BND directly scans data transmitted through the world's biggest data junction point, the De-Cix, located in Frankfurt. The junction point has data traffic of up to six terabytes per second and encompasses data flows from big parts of Europe, but also Africa, the Middle East, and Asia. The BND is legally only allowed to scan foreign communication or communication between a German and foreign source, not domestic communication. However, a clear differentiation between the exact location of communicators appears technically extremely hard to achieve, given the vast amount of data and the complex ways online communication travels in the 21st century. Further, from a universalist human rights standpoint, it is irrelevant if surveillance affects citizens or non-citizens, residents or non-residents. Another, issue with this scanning practice is that the BND might hand over raw data or analyzed data to other intelligence services, such as the GCHQ or the NSA (due to the BND's cooperation practices with these services). The German Federal Administrative Court ruled in May 2018 that the BND's scan practice is legally justifiable given that a domestic legal framework provides for this possibility.[134] However, one might doubt the justifiability of this scanning practice, pointing to both valid human rights documents and the wider spirit of rights. Again, just as in case of the British surveillance privacy rights enshrined in several important documents (art. 12 UDHR, art. 17 ICCPR, art. 8 ECHR) are undermined by German surveillance practices and the same is valid for the

[131] Bowcott, (2016).
[132] Bowcott, (2016).
[133] Friedhelm Greis, „Gesetzentwurf : Vorratsdatenspeicherung wird jetzt schon ausgeweitet," *Zeit Online*, May 10, 2017. http://www.zeit.de/digital/internet/2017-05/gesetzentwurf-vorratsdatenspeicherung-ausweitung-einbruch
[134] Eike Kuehl, „Weiterhin frohes Datenfischen," *Zeit Online*, May 31, 2018. https://www.zeit.de/digital/datenschutz/2018-05/bnd-ueberwachung-de-cix-internetknoten-klage
Spiegel Online, "BND darf am Internet-Knoten weiter Daten abzapfen," May 31, 2018. http://www.spiegel.de/netzwelt/netzpolitik/de-cix-betreiber-von-internet-knoten-verliert-klage-gegen-bnd-a-1210243.html

wider spirit and aims of rights. Just as in the UK case surveillance is undermining individuals' personal, moral and intellectual development as well as political engagement.[135]

Just as in case of the UK several examples could be delivered, which show a breach of human rights norms, either in terms of legally binding norms or the norms springing from the wider aims and spirit of rights. It is such disputable policies that let criticism on German terrorism policies rise after 9/11. For example, Peter Katzenstein evaluated already in 2003 that the German state took "measures at home that tilted the balance between liberty and security toward the latter."[136] In the next section, I will look at the EU's involvement in rights infringing anti-terrorism.

The EU's involvement in rights breaching anti-terrorism

Although the inclusion of the EU, as mentioned, provides my study with another important and beneficial layer of analysis, it is clear that the three cases I have collected are not completely comparable entities. The EU, other than the two countries selected, does not maintain independent police, commando or military units. It does further not possess the same amount of legislative power in terms of security policy as the EU's bodies (still a wide range of security policy is at most coordinated at EU level, whereas legislative decisions are kept to national levels). Thus, the EU does not possess the whole range of tools to fight terrorism, as states do, therefore, the EU has thus somewhat of a special status in my study.

Overall, the EU is trying to establish grand scale of cooperation concerning terrorism policies. The EU is thus working to improve cooperation between its member states, but also between its member states and third states (just as between itself and third states, or itself and other organizations, such as the UN). EU organs – and here mostly the Commission and the Council – push for the creation of EU-wide anti-terrorism regulations which the member states are supposed to implement. Although the terrorism policies of the EU-member states are looking very different, and the states are remaining to be the major source of anti-terrorism activities, the EU is relevant as an initiator of an overarching anti-terrorism framework and of specific terrorism policies.[137]

For many years the EU was rather inactive in the field of anti-terrorism. However, the attacks of 9/11 and the bombings in Madrid in 2004 and in London in 2005 delivered an important push for EU anti-terrorism policies.[138] This push e.g. triggered the adoption of a common definition of terrorism and a common EU anti-terrorism strategy, as well as action plans facing terrorism. The EU bodies further adopted a range of policies directed towards terrorism. Due to this increased activity and the established common strategy and definition, the anti-terrorism policy of the EU and its member states are now connected, as the EU now owns a coordination role in terms of anti-terrorism. At the same time member states try to steer the EU's

[135] Donohue (2016).
[136] Katzenstein (2003), 749.
[137] TTSR-Research Project. *Mapping Counterterrorism: A categorization of policies and the promise of empirically-based, systematic comparisons*, 2008, 12-21.
[138] Daniel Keohane, Implementing the EU's Counter-Terrorism Strategy: Intelligence, Emergencies and Foreign Policy." In *International Terrorism: A European Response to a Global Threat*, ed. by Jörg Monar and Dieter Mahncke. Brussels: Peter Lang, 2006, 63. Hillebrand (2012), 186.

general approach on the issue of anti-terrorism. Although the coordination role of the EU is at times weak and not always delivering outcomes, the EU has produced results, including policies that infringe rights standards. I will deliver a couple of short examples of such policies.

First, the Justice and Home Affairs (JHA) Council e.g., agreed in 2005 on bringing forward data retention measures, making it mandatory for telecommunication service providers to store metadata for six to twenty-four months (as already, partly, discussed above).[139] However, after national data retention legislation had already come under pressure in some member states (e.g., Germany, see above), the EU's own data retention directive was declared non-valid as well, since the ECJ in 2014 ruled that it was for violating fundamental rights of EU citizens and therewith in conflict with the EU's CFREU. The court held that the directive undermined citizen's right to privacy and data protection in a non-proportional manner.[140] In 2016, as mentioned in the UK section, the ECJ renewed its stand on data retention in a ruling on data retention regimes in the UK and Sweden, and declared that indiscriminate and non-transparent retention would be ineligible, by exceeding the limits of necessity and in face of the needs of a democratic society (see above). Thus the EU's data retention directive breached human rights on a legal basis, but also in terms of the spirit of rights. By triggering a situation in which all individuals necessarily need to feel surveyed at almost all times, one cannot speak of a sound atmosphere of rights anymore. In such a situation human dignity, and the human capability to unfold oneself, to develop, to express opinions and freely attempt to gain political influence, are damaged. However, all of these points are central parts of what human rights in general tries to support, thus I argue that the wider aims and the spirit of rights are damaged by measures such as data retention as well. The data retention directive thus shows that the EU is not only contributing to rights breaching policies by providing a forum for the cooperation of member states but also itself implements such ineligible policies at times.

Another example of an EU anti-terrorism policy that exercises pressure on human rights norms is the Passenger-Name-Record directive (PNR) adopted in 2016. The directive makes it mandatory for airlines to save a range of data on passengers and transfer them to member state institutions, e.g. travel date, itinerary, other ticket information, contact details, travel agent, means of payment, seat number or baggage information. The data can further be delivered to authorities in the US, Canada or Australia.[141] The official purpose of the directive is to prevent "immediate and serious threats to public security." This rather vague definition of the purpose of the directive constitutes a problem, since states are not bound to specific situations in which the data are to be collected, but a general situation of threat, which arguably always can be interpreted to be existing. Therewith the directive might simply become another measure of regular surveillance. The directive thus undermines both the right to privacy and freedom of movement (art. 13 UDHR, art. 12 ICCPR, art. 2 Protocol 4 ECHR, art. 45 CFREU). The latter as some passengers might be held back from traveling or from entering a country based on the collected data. Further, it is quite likely that PNR databases might be used in a dragnet fashion, implementing discriminatory profiling practices,

[139] Paul Wilkinson, "International terrorism: the changing threat and the EU's response." *Chaillot Paper* 84, 2005, 32. https://www.iss.europa.eu/sites/default/files/EUISSFiles/cp084.pdf
[140] Court of Justice of the European Union "Press Release No 54/14."
[141] European Commission, "Passenger-Name-Record," June 11, 2018. https://ec.europa.eu/home-affairs/what-we-do/policies/police-cooperation/information-exchange/pnr_en

thus violating the right to be free from discrimination. One might argue that states might derogate from these rights in order to prevent severe threats, however, if the conditions of necessity and proportionality are upheld in case of the PNR deems at least questionable. To save extensive data on all air travel, in order to potentially catch a few terror suspects, appears just as non-proportional as the saving of communication data of all citizens (no proof has been provided how the PNR directive might prevent a terror attack). Again, it appears to be just another indiscriminate surveillance measure; and such indiscriminate surveillance has been declared ineligible by the ECJ in the past (see above).[142] And in terms of the transfer of PNR data to third states, the ECJ has already issued a negative opinion in 2017, forcing the EU to at least adopt additional safeguards. The ECJ at the same time declared that the EU has so far not successfully proven that the directive is necessary (a condition for derogating from mentioned rights).[143] Thus the EU looks at a potential future legal disaster in terms of the PNR as well. The directive is further at odds with the spirit of rights as well, since another surveillance measure, does rather damage than supporting an atmosphere of enjoyment of rights (see my point on this in the last paragraph).

It is, however, to be mentioned that the bodies constitute a certain paradox in terms of questionable anti-terrorism policies. While rights infringing measures have been adopted, the EU at the same time provides institutional protection of rights as well. The adoption of the CFREU as an important rights document valid for the EU is one example, scrutiny towards rights infringing policies by the ECJ and the European Parliament are further examples. For instance, the PNR directive was first proposed by the European Commission in 2011 but was shot down by the European Parliament, based on concerns for the freedom of movement in 2013.[144] This circumstance emphasizes that the different EU bodies often have different standpoints and priorities when weighing security and human rights against each other (the parliament seems to be most concerned about rights, whereas the state representatives at the Council often seem to be prioritizing additional alleged security measures). Recently the EU's General Data Protection Regulation (GDPR) directive came into force. The directive set stricter standards for the protection of data of individuals in the EU and delivered additional demands of data protection in the direction of companies and organizations.[145] Therewith the EU set a standard of data protection that is significantly higher than before and aims at giving citizens as much control over their data back as possible. The EP played an important role in the drafting and adoption of the directive.

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[142] Justine Chauvin, "EU-PNR directive: Overlooking EU fundamental rights will not make Europe safer ." *Politheor*, January 9, 2016. http://politheor.net/eu-pnr-directive-overlooking-eu-fundamental-rights-will-not-make-europe-safer/

[143] Estelle Masse, " Border surveillance: what Europe's "PNR" ruling means for your privacy," *accessnow.org,* September 7, 2017 https://www.accessnow.org/border-surveillance-europes-pnr-ruling-means-privacy/

[144]European Movement International, "Upholding freedom of movement and EU citizens' rights in the proposed PNR Directive," https://europeanmovement.eu/wp-content/uploads/2015/11/Call-for-action-PNR-Directive_ECAS-EMI.pdf

A second version of the PNR, introducing minor changes, was, however, adopted by the EP in 2016.

[145] The directive protects basic identity information such as name, address and ID numbers, web data such as location, IP address, cookie data and RFID tags, health and genetic data, biometric data, racial or ethnic data , political opinions and sexual orientation. Michael Nadeau, "General Data Protection Regulation (GDPR) requirements, deadlines and facts," *CSO Online*, April 23, 2018. https://www.csoonline.com/article/3202771/data-protection/general-data-protection-regulation-gdpr-requirements-deadlines-and-facts.html

The EU owns thus a double-edged role in terms of anti-terrorism and human rights. One the one hand it is responsible for the adoption of rights infringing policies, while it, on the other hand, provides legal and political institutions in order to protect rights against excessive terrorism policies.

Conclusion

As shown above, human rights have been violated by anti-terrorism policies and practices of all three players at the focus, endangering a range of rights of regular citizens, residents, and visitors, e.g. the right to privacy, freedom of expression, the right to liberty, freedom of movement, freedom of association and the prohibition of discrimination. Both, the rights we find guaranteed in legally binding rights documents, and the wider aims of the idea of human rights were violated. I tried to show the first e.g. by pointing to recent court rulings detecting rights violations in anti-terrorism. I further argued that infringements of the aims and spirit of rights can be detected since a range of anti-terrorism policies undermine human dignity, equality, justice and senses of individual freedom (e.g. versus the state). All of these are essential parts of the wider concept of human rights, which further provides the groundwork for the more narrow legally binding rights definitions. The UK has arguably implemented the policies with the gravest impact on human rights. Examples of such policies are the former practice of indefinite detention of foreign terror suspects, the implementation of control orders, the implementation of a system making the referral of extremist individuals mandatory for public employees as well as the construction of an intense surveillance system. Germany has violated rights in the course of anti-terrorism as well, e.g. via policies on data retention, a so-called air security law, dragnet investigations, and surveillance measures. Further, the EU is responsible for some criticizable policies as well, e.g. in relation to data retention directives and the PNR directive. Still, the EU at the same time provides institutions that protect rights against infringements in the course of anti-terrorism policies, e.g. the CFREU or the ECJ. Furthermore, the policy line by the players addressed here has gradually encompassed more and more individual rights, since alleviations have almost not been detectable, in other words, a softening of the general policy line has not taken place (even in years when the frequency of terror attacks dropped).[146]

The usage of human rights infringing anti-terrorism measures potentially has repercussions not only in a European context but also in terms of facilitating additional human rights violations in authoritarian or dictatorial regimes. Such regimes will gain the option to hide behind European malpractices or justifications in regard to their own human rights violations.[147] By not living up to their own standards, the states and the organization in focus in this study make it easier for other players to excuse the adoption of the continuation of policies which violate human rights. In this context scholars such as Tim Dunne warn against "copy-cat breaches of fundamental rights" in China, Russia, Israel or Egypt.[148] For example, in

[146] This is based on a tendency by states and organizations to keep policies that once were adopted based on the argument of necessity. Later, policies are then often kept with the argument that they would have been effective and should not be dropped any more (and this is the case even if a certain threat has declined again). Thorup and Brænder (2007), 49.

[147] Gearty (2013), 103.

[148] Tim Dunne, "The Rules of the Game are Changing: Fundamental Human Rights in Crisis After 9/11." *International Politics* 44 (2007): 281.

December 2015 the PRC passed a law which restricts the press in reporting on terror attacks, and which allows authorities to survey foreign companies. Fittingly, the Chinese leadership argued that these policies would simply be catching up on Western policies.[149]

After having criticized the approaches of the three players in focus, I would like to emphasize approaches that potentially will have a positive impact without endangering rights and democracy. These approaches are both short-term and long-term. This duality of approaches reflects state authorities' problem to be pressed to react swiftly to concrete acts of terrorism while trying to construct a long-term strategy in order to undermine the phenomenon.[150] Admittedly, also the following approaches will not eradicate the threat of terrorism but potentially contain and reduce it. Whereas long-term approaches seem more promising in terms of preventing terrorism in the first place, short-term policies are both legitimate and necessary in order to tackle the 'symptoms' of already existing terrorism. Legitimate short-term measures can thus, for instance, be: the surveillance of known violent individuals, (so-called endangerers), legal actions against those inciting to violence, banning people from joining a foreign war, banning weapons exports and strengthening the resilience of urban areas, police capacities, and cooperation of European security institutions. However, this must be done in accordance with human rights standards.

The upholding of rights standards is vital in connection with efforts to de-radicalize violence-prone extremists as well. For sure, de-radicalization programs are acting on a fine line, between potentially undermining freedom of expression and benefitting societal security and democratic political culture. It is vital for anti-terrorism policymakers and practitioners, to remember that carrying a non-mainstream political opinion does not equal a willingness to commit political violence. In fact, most political viewpoints that are perceived as extremist are covered by the right to freedom of expression; they are in other words not only legal but a natural function of every functioning democracy. Adrian Guelke rightly underlined that a sole focus on extremist viewpoints in efforts to prevent terrorism is illogic, given that these viewpoints are shared by hundreds of thousands "who have never broken the law."[151] However, if de-radicalization efforts and programs don't interfere with freedom of expression and other human rights, they can form legitimate tools of anti-terrorism. The prevention of violence-prone radicalization of minor age refugees would be an important application area for inclusive de-radicalization efforts. This is especially valid for those minor age refugees who entered Europe all alone and are thus particularly vulnerable to radicalization (as well as crime). Alone eight thousand minor age refugees have been reported missing in Germany alone in the last years (as of 2017). Many of them find themselves in desperate situations and are thus vulnerable to harmful influences, including radical violent Islamism. The same is valid for minors in prisons. A 2018 study amongst thirty-two German juvenile prisons showed that three quarters of them were dealing with radicalization issues of inmates (both Islamist and rights wing, spanning from simple

[149] Zeit. „China verabschiedet umstrittenes Anti-Terror Gesetz." December 27, 2015. http://www.zeit.de/politik/ausland/2015-12/meinungsfreiheit-china-anti-terror-gesetz-verabschiedung

[150] David Long recognized this problem already in 1995. David E. Long, *The Anatomy of Terrorism*, Free Press, 2008.

[151] Guelke (2015), 104.

possession of radical literature to incitement to violence), however, only half of the prisons were offering support programs for such inmates (e.g., exit support or anti-aggression training).[152]

A short-term approach on the side of the media and public would be to reduce alarmistic attitudes towards terrorism. For sure, attacks are tragic events; however, does every attack consequentially have to lead to new demands for ever sharper anti-terrorism policies? Clearly, ignoring the problem is not going to be effective as well, but there is a difference between hysteric alarmism and rational observation of developments (this includes the attitude of mass media as well). Therefore, 'to learn to live with it',[153] or an attitude towards terrorism that resembles the British 'Stiff Upper Lip'[154] towards the German Blitz in the 1940s would be a more prudent attitude. A change of attitude could also diminish the pressure perceived by leading politicians to be forced to deliver an ever enhancing anti-terrorism framework in order to please frightened citizens. Arguably, first signs of such a 'Stiff Upper Lip' are perceivable amongst European publics. For instance, the German public after the attack on the Christmas market in Berlin in December 2016 reacted not with hysteria, but with considerateness. However, German politicians were instinctively willing to tighten the anti-terrorism legislation, even before an analysis of the attack had been conducted. In exceptional situations derogations of (few) rights are conceivable as short-term measures, however, only if they are clearly necessary and effective in terms of reducing a threat, as well as transparent, and indeed short-term. Further, derogations cannot be of such frequency that they would become the rule instead of the exception (as it seems to be the trend in several European countries).

Generally, inclusive long-term approaches seem more promising in order to reduce the general level of potential terrorist violence, than trying to tackle the symptoms. Such approaches start with reconsidering the foreign policy, e.g. abandoning invasions that leave a power vacuum for extremist forces or reconsidering alliances with extremist regimes (such as the one with Saudi-Arabia), as well as successful developmentalism and conflict prevention.[155] Further, avoiding overreactions from the side of authorities, or reactions that are rights evasive or discriminatory, as well as over-militarized, will create less angry and frustrated individuals and will, therefore, be beneficial in the long-run. Additionally, Western societies need to look at their own shortcomings which higher the risk of people turning to terrorist violence. For example, to strengthen efforts of integrating youths with migrant backgrounds into the labor market, as well as society and culture at large, in order to prevent them from turning to other alternatives deems significant. Such efforts point at a full enjoyment of ESC rights as an element of preventing violent radicalization and

[152] Nadine Zeller, " Radikalisierung statt Resozialisierung: In Jugendgefängnissen verbreitet sich der Salafismus." *Allgemeine Zeitung*, February 25, 2018.
http://www.allgemeine-zeitung.de/lokales/rhein-main/radikalisierung-statt-resozialisierung-in-jugendgefaengnissen-verbreitet-sich-der-salafismus_18542353.htm
[153] English (2009), 120.
[154] Peter Lehr, World Counter Terror Congress (WCTC), London, April 19-20, 2016.
[155] Such ideas somewhat resemble a human security perspective. Alison Brysk, "Human Rights and National Insecurity." In *National Insecurity and Human Rights: Democracies Debate Counterterrorism,* edited by Alison Brysk and Gershon Shafir. Berkeley: University of California Press, 2007, 4.

terrorism and thus certainly concern a wide range of government action.[156] Questions of social inequality *have* to come to light in the course of such efforts.

On a broader note, the strengthening of the idea of human rights and of empathy is another potentially beneficial long-term strategy. Suffering and conflicts can be sources of political violence, including terrorism. If notions of empathy for human suffering and concern about political conflicts are in decline the probability that 'we' as a European community will be able to solve intercultural conflicts resulting in violence may decline as well. Therefore, strengthening human rights may be a way of preventing terrorism in the long run.

This article did not look at the deeper reasons for rights violations at a political and social level, research into these processes is a promising task for future research. For instance, one might test which variables contribute to more rights infringing anti-terrorism legislation in one country as compared to another. Potential variables could possibly be the perception of what terrorism is, which *kind* of terrorism constitutes the biggest threat (for instance in terms of ideological background or transnational vs. domestic terrorism), and how *big* this threat is.

[156] Martin Scheinin proposes such an approach. Scheinin (2014), 562. That some of those ideas in regard to prevention have been (at least partly) ingrained at high security levels was demonstrated by Rob Wainwright, head of Europol, who proposed effective community engagement, employment efforts and efforts towards social cohesion in a 2016 speech. However, implementation and prioritization of such ideas is still insufficient. Rob Wainwright, World Counter Terror Congress (WCTC), London, April 19-20, 2016.