

# EUROPEAN APPROACHES TO FIGHTING TERRORISM

ELIES VAN SLIEDREGT\*

## INTRODUCTION

In this contribution to the *Duke Journal of Comparative & International Law* symposium on “War Bound by Law,” I take the opportunity to discuss European approaches to counterterrorism. I start off by making two preliminary observations. *First*, while it may be that U.S. authorities have been heavily criticized for not respecting the rule of law because of the detention policies in Camp Delta and Guantanamo Bay and because of the trials before military commissions instead of civilian courts, it is by now very clear that such criticism equally applies to other western democracies, amongst which a number of European states. Countries such as England, Germany, Italy, and the Netherlands have adopted anti-terrorism measures that challenge human rights, criminal-justice principles, and due process. Some of these measures will be discussed today.

*Second*, the emphasis on security, which emanates from the fight against terrorism and challenges due process and human rights, is not a recent phenomenon. It is not solely a reaction to the terrorist attacks in New York, Madrid, and London. These tragic events have increased policy makers’ attention to security issues, but attention to such issues existed before these events. Policymakers that govern, and citizens that live, in what may be termed the “risk society,” are greatly concerned with security. A risk-free society is a goal that can never really be achieved but that is strived for in a society that attempts to manage and control risks. Anti-terrorist measures and their effect on the criminal law, are not *new* developments, but are merely extensions of existing developments.

One distinctive feature of European anti-terrorism measures is its emphasis on criminal law enforcement. Unlike the United States, most European states have refrained from adopting measures under the laws of war. Therefore, this contribution to the symposium focuses primarily on criminal law measures. In Part I and Part II, I briefly outline some of the anti-terrorism measures that have been taken in the aftermath of 9/11 at the European Union level and at the Member State level, respectively. In Part

---

\* Professor of Criminal Law, VU University Amsterdam.

III and Part IV, I discuss the characteristics of these measures and their effect on criminal law and its underlying principles, respectively. I conclude with a few comments on the relationship between law and terrorism.

## I. EUROPEAN UNION AND COUNTERTERRORISM

### A. EU Framework Decisions

On September 28, 2001, a few weeks after the terrorist attack on the World Trade Center, the Council of Ministers of the European Union presented two legislative proposals to the European Parliament: one for a Framework Decision on combating terrorism<sup>1</sup> and one for a Framework Decision on the European arrest warrant<sup>2</sup> (“EAW”). The Framework Decision on combating terrorism contains a definition of terrorism that has been implemented at the Member State level and that harmonizes the laws of the member states as to the definition of terrorism.<sup>3</sup> It defines terrorism as

offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

—seriously intimidating a population, or  
—unduly compelling a Government or international organisation to perform or abstain from performing any act, or  
—seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,

shall be deemed to be terrorist offences: (a) attacks upon a person’s life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing

---

1. The Commission of the European Communities, *Proposal for a Council Framework Decision on Combating Terrorism*, COM (2001) 521 final (Sept. 19, 2001).

2. The Commission of the European Communities, *Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between the Member States*, COM (2001) 522 final (Sept. 25, 2001) [hereinafter EAW-FWD].

3. See discussion *infra* Part II.

fires, floods or explosions the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life; (i) threatening to commit any of the acts listed in (a) to (h).<sup>4</sup>

In 2008, the Framework Decision was amended by adding offences that are linked to terrorism: public provocation, recruitment, and training for terrorism.<sup>5</sup>

The EAW entered into force on January 1, 2004. The EAW is the first instrument applying the principle of mutual recognition of judicial decisions.<sup>6</sup> This means that “each national judicial authority should *ipso facto* recognize requests for the surrender of a person made by the judicial authority of another Member State with a minimum of formalities.”<sup>7</sup> The procedure offered by the EAW differs from classic extradition because the surrender procedure is expedient and tied to fixed terms, while the executive no longer plays a role in the decision-making process.<sup>8</sup> Moreover, certain classic refusal grounds, such as the non-extradition of nationals, no longer apply. The speciality rule—a long-standing protection in extradition which prohibits a person from being prosecuted in the requesting country for offences not listed in the extradition request—that is laid down in Articles 27 and 28 of EAW is much narrower than in classic extradition law and can be waived by the requested/surrendered person. The EAW differs most clearly from classic extradition in that it partly abolishes the dual criminality verification for 32 categories of offences listed in Article 2 (“List-offences”). The act in relation to which an EAW is issued must be punishable under the law of the issuing state “by a custodial sentence or a detention order for a maximum period of at least 12 months,” or when the sentence has already been imposed, the sentence must be for a period “of at least four months.”<sup>9</sup> Terrorism is a “list-offence.” The EAW

---

4. Council Framework Decision 2002/475/JHA, art. 1(1), 2002 O.J. (L 164) 4 (EU).

5. Council Framework Decision 2008/919/JHA, art. 1, 2008 O.J. (L 330) 22-23 (EU).

6. *See generally* The Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament: Mutual Recognition of Final Decision in Criminal Matters*, COM (2000) 495 final (July 26, 2000) (illustrating how mutual recognition of judicial decisions is the cornerstone of EU cooperation in criminal matters as recognized for the first time in the EU Meeting in Tampere, Finland in 1999).

7. EAW-FWD, *supra* note 2, preamble.

8. *See generally* Elies van Sliedregt, *The European Arrest Warrant: Between Trust, Democracy and the Rule of Law*, 3 EUR. CONST. L. REV. 244 (2007).

9. Council Framework Decision 2002/584/JHA, art. 2(1), 2002 O.J. (L 190) 2 (EU). *Cf.* Elies van Sliedregt, *The Dual Criminality Requirement*, in *THE EUROPEAN ARREST WARRANT IN PRACTICE* 51, 67 (2009) (arguing that the EAW can be regarded as an expedited and more efficient form of extradition).

had been on the shelf of the European Commission for some time; it was a controversial proposal, especially for the removal of the dual criminality verification. The specter of terrorism hastened the legislative process within Brussels. After the 9/11 attack the Council of Ministers felt the need to push for this proposal.

## B. Blacklisting and the Freezing of Assets

In the fight against terrorism, the Security Council of the United Nations imposed sanctions on the basis of Chapter VII of the U.N. Charter against certain individuals and/or organizations allegedly associated with bin Laden or the Taliban.<sup>10</sup> By blacklisting persons and organizations, authorities can issue financial sanctions of a preventive nature on such entities. These sanctions include the freezing of financial funds and assets of persons or organizations. The Sanctions Committee, an organ of the Security Council, maintains a regularly updated list of designated persons and entities and considers requests for listing and de-listing from states and regional organizations. Targeted individuals and entities are entitled to submit requests for de-listing through their countries of origin or through a “focal point” in the U.N. Secretariat.

On May 27, 2002, the European Community Council enacted Regulation 881/2002 giving effect to measures against those who were blacklisted by the U.N. Security Council at the European Member State level. As a result, the assets of blacklisted individuals and organizations have been frozen throughout the European Union. As a result of an order by the former U.S. President George W. Bush, Yasin Abdullah Kadi, a national of Saudi Arabia and the Al Barakaat International Foundation were put on the U.N. blacklist. Through Regulation 881/2002, their names were added to Annex I, which implemented the U.N. blacklist. Kadi and Al Bakaraat sought to annul the E.C. regulations. They argued that the EU Council lacked competence to adopt the regulation and they argued that their right to respect for property, the right to be heard and the right to effective judicial review had been violated.<sup>11</sup> On September 21, 2005, the Court of First Instance (“CFI”) rejected all claims and ruled that the CFI

---

10. *See, e.g.*, S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1699, U.N. Doc. S/RES/1699 (Aug. 8, 2006); S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005); S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004); S.C. Res. 1456, U.N. Doc. S/RES/1456 (Jan. 20, 2003); S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002); S.C. Res. 1363, U.N. Doc. S/RES/1363 (July 30, 2001); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

11. *See* Action Brought on 18 December 2001 by Yassin Abdullah Kadi Against the Council of the European Union and the Commission of the European Communities, Case T-315/01, Kadi v. Council, 2005 E.C.R. II-3649 (2002 O.J. (C 56) 16).

had no jurisdiction to review (i) the lawfulness of the contested regulation and (ii) the lawfulness of the Security Council resolution adopted under Chapter VII.<sup>12</sup> The CFI held that Security Council Resolutions are binding upon the E.C. member states and that pursuant to Article 103 of the U.N. Charter obligations under U.N. law prevail over obligations under the E.C. Treaty.

Kadi and Al Bakaraat appealed to the European Court of Justice (“ECJ”), which joined the two cases. The ECJ disagreed with the CFI’s finding on lack of jurisdiction. It confirmed its full competence to review E.C. acts by emphasizing that the E.C. Treaty is “an autonomous legal system which is not to be prejudiced by an international agreement.”<sup>13</sup> Yet, the ECJ stayed away from determining the lawfulness of the Security Council resolution. It held that a judgment by an E.C. court that an E.C. act implementing a Security Council resolution is contrary to the E.C. legal order did not “[e]ntail any challenge to the primacy of that resolution in international law.”<sup>14</sup> On the merits, the ECJ ruled that the appellants’ right to effective judicial review and the right to be heard had been violated and that the right to property had been unjustifiably restricted.<sup>15</sup> The contested E.C. regulations were annulled, but the Court gave the European Community Council three months to remedy the flaws.<sup>16</sup> The European Community Council gave Kadi and Al Barakaat the opportunity to be heard and to comment on the information that formed the basis of their inclusion on the list. Kadi and Al Barakaat still feature on the U.N. list maintained and updated by the Sanctions Committee.<sup>17</sup> It is therefore no surprise that a month before the three-month period expired, the European Community adopted Regulation 1190/2008, which re-entered the names of Kadi and Al

---

12. Case T-315/01, *Kadi v. Council*, 2005 E.C.R. II-3649, para. 58; Case T-306/01, *Yusuf v. Council*, 2005 E.C.R. II-3533, para. 77.

13. Joined Cases 402/05 & 415/05, *Kadi v. Council*, 2008 ECJ Eur-Lex LEXIS 1954, para. 316 (Sept. 3, 2008).

14. *Id.* para. 288.

15. *Id.* para. 334-70.

16. It remedied the flaws by introducing Regulation 1268/2009 of 22 December 2009 “amending Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban.” Council Regulation 1268/2009, 2009 O.J. (L 346) 42 (EU).

17. The Consolidated List Established and Maintained by the 1267 Committee with Respect to al-Qaida, Usama bin Laden, and the Taliban and Other Individuals, Groups, Undertakings and Entities Associated with Them, <https://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf> (last updated Apr. 22, 2010).

Barakaat on the blacklist.<sup>18</sup> On February 26, 2009 Kadi instituted new proceedings before the CFI.<sup>19</sup>

## II. ANTI-TERRORISM LEGISLATION IN EUROPE

The analysis that follows concerns the specific anti-terrorism legislation at the national level in the Netherlands, Italy, Germany, the United Kingdom. I analyze the specific experiences of terrorism and the reactions of each country. In particular, I chose to analyze the common law/adversarial experience of the United Kingdom as a counterpoint to the civil law systems of the Netherlands, Germany, and Italy. While Germany, Italy, and the United Kingdom have a history of anti-terrorism legislation, the Netherlands is relatively new to it.<sup>20</sup> The four types of treatment may make explicit certain differences that would otherwise go unnoticed. For instance, the emphasis in English anti-terrorism law on reverse onus provisions can be understood against the strict evidence rules in English law and the adversarial legal system in general.

### A. The Netherlands

The Moluccan islands, part of the former Dutch colonial empire in the Far-East, were seized by Indonesian troops shortly after declaring its independence in April 1950. The Moluccan community in the Netherlands, a large part of whom had fought side by side with the Dutch against the Axis powers during the Second World War, turned to the Dutch authorities for support. When it turned out that the Netherlands was not going to support the quest for independence, a part of Moluccan youth turned against the Dutch authorities. In the 1970s, Moluccan youth terrorized Dutch society in their struggle to regain the independence of the South Moluccan Islands. The government responded with a non-criminal policy based on dialogue and negotiations. This became known abroad as “the Dutch approach.” Since September 11, 2001, the government has departed from a non-criminal approach and has now criminalized terrorism. The “Dutch approach” to negotiation has disappeared completely. In part, this is because Islamic terrorism is very different in nature from Moluccan terrorism. The latter was not religiously inspired, remained limited to the Netherlands as a movement, and pursued narrowly defined political goals.

---

18. Council Regulation (EC) No. 1190/2008 of 28 November 2008 (amending for the 101<sup>st</sup> time Council regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban.).

19. Case T-85/09, *Kadi v. Commission*, 2009 (C-90/56). The application is available at <http://curia.europa.eu>.

20. The results of this research have been published in E. van Sliedregt, *Tien tegen een. Een hedendagse bezinning op de onschuldpresumptie* (with English summary), The Hague 2009.

However, Moluccan terrorism was not less dangerous than Islamic terrorism. On the contrary, the Moluccan attacks, which included two train hijackings and the occupation of a primary school, claimed more victims in the Netherlands than the Islamic terrorism that has held the world in its grip since the attacks on the World Trade Center and Pentagon. In the Netherlands, the death of Theo van Gogh, film director and producer who was assassinated by a Dutch-Moroccan Muslim for his critique of the treatment of woman in Islam, can be regarded so far as the only fatality of post 9/11 Islam-extremism.

After 2001, the Dutch legislature adopted measures that criminalize terrorism at a preliminary stage, meaning *before* any harmful acts have taken place. The Dutch Terrorism Act (*Wet terroristische misdrijven*)<sup>21</sup> criminalizes conspiring to commit terrorism (a breakthrough considering the controversy over the concept of conspiracy in the 1970s which was held to be criminalizing thought and thus violating fundamental human rights), recruiting for “armed combat” (i.e., *jihād*) and participating in and cooperating in terrorist training camps.<sup>22</sup> Moreover, the Dutch Terrorism Act increased the severity of sentences for certain common crimes committed with a terrorist purpose.<sup>23</sup> It expanded investigatory and prosecutorial powers by lowering the threshold that triggers special investigative powers: now, authorities may investigate or prosecute suspects if they have “indications” (of a terrorist crime) instead of a “reasonable suspicion” as is required for ordinary, non-terrorism crimes. Moreover, the Act permits pre-trial detention for terrorism charges on the basis of an “ordinary” suspicion instead of the more stringent requirement of “incriminating evidence” as is required for ordinary, non-terrorism crimes.<sup>24</sup> The pre-trial detention can last until the start of the trial, subject to a maximum of 27 months. During that period, the accused can be denied access to his or her file and may not be informed of the incriminating evidence against them. Intelligence provided by officers and special agencies, heard in a separate procedure by a special magistrate, can be used as evidence in a criminal trial. Lastly, participating in the continuation of the activities of an organization that is included on a U.N. or EU sanction list is a crime and punishable by one year imprisonment.

---

21. Bulletin of Acts and Decrees (*Staatsblad*) 2004, 290 and 373.

22. Parliamentary papers II, 2007-2008, 31 386, nr. 3, p. 5.

23. Bulletin of Acts and Decrees (*Staatsblad*) 2004, 290 and 373.

24. Art. 67(1) of the Dutch Code of Criminal Procedure stipulates that pre-trial detention can be imposed for crimes that incur a prison sentence of four years or more.

## B. Italy

Italy also passed anti-terrorist legislation after 9/11, although it already had taken radical measures in the 1960s and 1970s to combat domestic terror from both leftists (Brigate Rosse) and rightists (neo-fascists). The new terrorism legislation punished inciting, forming, organizing, leading, or financing terrorist organizations.<sup>25</sup> A second set of measures adopted just after the bomb attacks in London in 2005 added to the list crimes committed for terrorist purposes<sup>26</sup> and the recruitment<sup>27</sup> and training<sup>28</sup> of terrorists. In certain cases, a person can now be held in preventive custody for five days without any actual suspicion against them, during which that person may also be examined without the assistance of a lawyer.<sup>29</sup> Italy further enacted strict immigration measures which permit the administrative detention and deportation of non-nationals if they appear to constitute a threat to national security. In addition, Italy has expanded the executive's authority to record confidential communication and gather information.<sup>30</sup> Such information is gathered for preventive purposes—information obtained can be used only for the purposes of investigation and not at trial. However, the basis for instigating information gathering is vague: “when it is indispensable for the prevention of terrorist activities.”<sup>31</sup> This authority can be exercised for 40 days, but can constantly be extended by 20 days, in theory, infinitely.

---

25. *Id.* art. 270. (1) Codice penale: Chiunque promuove, costituisce, organizza o dirige o finanzia associazioni che si propongono il compimento di atti di violenza con finalità di terrorismo o di eversione dell'ordine democratico (2) è punito con la reclusione da sette a quindici anni. Amended by Act n. 438, 2001 Decreto-Legge 18 ottobre 2001, N. 374 coordinato con la Legge di Conversione 15 December 2001, n. 438 (Disposizioni urgenti per contrastare il terrorismo internazionale). See [www.parlamento.it/parlam/leggi](http://www.parlamento.it/parlam/leggi). For comments, see Leonardo Filippi, 'Terrorismo internazionale: le nuove norme interne di prevenzione en repressione', *Diritto Penale en Processo*, 2/2002, at 163-176; Vittorio Patanè, 'Recent Italian Efforts to Respond to Terrorism at the Legislative Level', 4 *Journal of International Criminal Justice* at 1166-80, (2006); *Italian Contribution to the NCTb (National Coordinator for Counterterrorism) Counterterrorism Project, Research and Documentation Centre (WODC)*, Università degli Studi di Trento – Università Cattolica del Sacro Cuore (Milano), January 2006, at 24.

26. Codice penale [C.P.] art. 270 sexies (Condotte con finalità di terrorismo) [Conduct with a terrorist purpose].

27. C.P. art. 270 quarter (Arruolamento con finalità di terrorismo anche internazionale) [Recruitment for the purpose of international terrorism].

28. C.P. art. 270 quinquies (Addestramento ad attività con finalità di terrorismo anche internazionale) [Training for the purpose of international terrorism].

29. Act n. 155, 2005 (Nuove disposizioni in materia di arresto e di fermo) [new rules with regard to arrest].

30. Codice di Procedure Penale [C.P.P.] art. 226 (Intercettazioni telefoniche preventive) [wire-tapping for preventive purposes].

31. C.P.P. art. 226(1) (“[Q]uando siano ritenute indispensabili per la prevenzione di attività terroristiche . . .”).



### C. Germany

Germany also has experience with counterterrorism. In the 1960s and 1970s, it suffered and fought against terrorist attacks committed by the Rote Armee Fraktion (“RAF”). Several far-reaching counterterrorism laws were passed in reaction to these attacks.<sup>32</sup> The most well known and controversial measure from that time is the *Kontaktsperregesetz*,<sup>33</sup> which made it possible to detain RAF suspects in complete isolation and seriously limited their right to legal assistance.<sup>34</sup> Eight days after the 9/11 attacks, the German government presented a set of counterterrorism measures to Parliament.<sup>35</sup> These measures were especially important to the German government because of the discovery that three of the four Arabic hijackers had planned the attack on the 9/11 attack while they were living in Hamburg. The measures expanded the description of the crime of membership of a terrorist organization,<sup>36</sup> and restricted the right of association.<sup>37</sup> A second set of measures passed several years later broadened powers of the security services, toughened immigration laws, and facilitated the exchange of information (intelligence) and storage of data.<sup>38</sup> While no new criminal provisions or powers were created, the German government took an old investigation method used against the RAF in the 1970s and decided to re-apply it: *Rasterfahndung*.<sup>39</sup> *Rasterfahndung* warrants the searching of the files of banks, libraries, universities, benefit agencies, and airline companies without any criminal

---

32. Gesetz zur Ergänzung des Ersten Gesetzes zur Reform des Strafverfahrensrechts [Act extending the first Act reforming the Code of Criminal Procedure], Dec. 20, 1974, BGBl. I 1974 at 3686; Gesetz zur Änderung des Strafgesetzbuches, des Strafprozessordnung, des Gerichtsverfassungsgesetzes, des Bundesrechtsanwaltsordnung und des Strafvollzugsgesetzes [Act amending the Code of Criminal Law, the Code of Criminal Procedure, Code on Court Constitution, the Attorney’s Act and the Act on the Penal System], Aug. 18, 1976, BGBl. I at 2181; Gesetz zur Änderung der Strafprozessordnung [Act amending the Criminal Procedure], Apr. 14, 1978, BGBl. I at 497.

33. Kontaktsperregesetz [The Act limiting the Advocate-Client Contact], Sept. 30, 1977, BGBl. I S at 1877.

34. The German Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] ruled that the Act was constitutional. BVerfG Aug. 1, 1978, 49, 24.

35. Terrorismusbekämpfungsgesetz [The Counter-Terrorism Act], Jan. 9, 2002, BGBl. I 2002 at 361 *et seq.*

36. Vierunddreißigstes Strafrechtsänderungsgesetz - § 129b StGB [The 34th Amendment Act], Aug. 22, 2002, BGBl. I at 3390.

37. Erstes Gesetz zur Änderung des Vereinsgesetzes [First Act on Amending the Assembly Act], Dec. 14, 2001, BGBl. I at 3319.

38. Terrorismusbekämpfungsergänzungsgesetz [Additional Terrorism Control Act], Jan. 5, 2007, BGBl. I at 2 (F.R.G.).

39. For a critical review, see generally Rolf Gössner, *Computergestützter Generalverdacht: Die Rasterfahndungen nach “Schläfern” halten einer bürgerrechtlichen Überprüfung kaum Stand* [Computer-backed General Suspicion: Dagnet Investigations for “Sleeper Cells” Hardly Stand Up to Civil Rights Standards], 3 VORGÄNGE 41 (2002).

suspicion for the purpose of using a certain profile or certain characteristics to identify and monitor suspected persons or dormant cells.

#### D. United Kingdom

The United Kingdom has ample experience with fighting terrorism on its own territory. Since the fight against the Irish Republican Army began in 1922, the English legislature has adopted different measures, both criminal and non-criminal in nature.<sup>40</sup> Emergency legislation in those years made internment and preventive detention possible. This hard line has continued after 9/11. For instance, part 4 of the Anti-Terrorism, Crime and Security Act 2001<sup>41</sup> (“ACTSA”) provides for administrative detention of foreign terrorism suspects<sup>42</sup> against whom there is insufficient evidence to detain in criminal proceedings. In 2004, the House of Lords ruled that the detention order was in conflict with the right to liberty and the ban on discrimination since the measure affected only non-nationals.<sup>43</sup> The successor to the ACTSA (which replaces Part 4 of ACTSA), the Prevention of Terrorism Act 2005,<sup>44</sup> (“PTA”) provides for house arrest and other restrictions, called a “control order,” instead of detention.<sup>45</sup> When the conditions under which a control order is imposed are breached, such a transgression is considered a criminal offence.<sup>46</sup> The U.K. government adopted the Terrorism Act 2006 (“TA 2006”) after the bomb attacks in London in 2005.<sup>47</sup> The Act introduced several new crimes. For instance, it

---

40. See generally CLIVE WALKER, BLACKSTONE’S GUIDE TO THE ANTI-TERRORISM LEGISLATION (2002) (providing an overview of recent anti-terrorism legislation).

41. Anti-Terrorism, Crime and Security Act 2001, c. 24, pt. 4, §§ 21-36 (U.K.) [hereinafter ACTSA], available at [http://www.opsi.gov.uk/acts/acts2001/pdf/ukpga\\_20010024\\_en.pdf](http://www.opsi.gov.uk/acts/acts2001/pdf/ukpga_20010024_en.pdf). See also Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?*, 65 MODERN L. REV. 724 (2002) (providing a criticism of the ATCSA).

42. See ACTSA, *supra* note 41, at c.24, pt. 4, § 23.

43. *A v. Sec’y of State for the Home Dep’t* [2004] UKHL 56, at 47, 100, [2005] 2 A.C. 68, at 144, 175 (appeal taken from Eng. & Wales) (U.K.).

44. Prevention of Terrorism Act 2005, c. 2 (U.K.) [hereinafter PTA], available at [http://www.opsi.gov.uk/acts/acts2005/pdf/ukpga\\_20050002\\_en.pdf](http://www.opsi.gov.uk/acts/acts2005/pdf/ukpga_20050002_en.pdf).

45. The Act provides for two types: a control order which *restricts* the right to liberty, *id.* at § 2, and a control order which *violates* the right to liberty, *id.* at § 4. In the latter case, this is a derogating control order, an order which, on the basis of Article 15 of the European Convention on Human Rights (“ECHR”), derogates from the rights guaranteed by the ECHR because an emergency situation exists. *Id.* at § 5(9). A derogating control order can be imposed by a court at the request of a Minister if “on the balance of probabilities” (the civil standard of proof) a suspect is involved in terrorism-related activities. *Id.* at § 4(7).

46. *Id.* at § 9. For a critical discussion of control orders, see generally Lucia Zedner, *Preventive Justice or Pre-Punishment? The Case of Control Orders*, 60 CURRENT LEGAL PROBS. 174 (2007).

47. Terrorism Act 2006, c. 11 (U.K.) [hereinafter TA], available at [http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga\\_20060011\\_en.pdf](http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060011_en.pdf).

criminalized inciting terrorism, distributing terrorist writings, training terrorists, and being present at places where terrorists are trained.<sup>48</sup>

In criminalizing terrorism, the legislature frequently used (and still uses) legal presumptions that result in placing the burden on the accused to prove her/his innocence.<sup>49</sup> These so-called “reverse onus provisions” are controversial and have in certain cases been nullified by the courts for being a violation of the presumption of innocence. For instance, in *Kebilene*,<sup>50</sup> the House of Lords held that the decision to prosecute three Algerian men under Section 16A (1) for “possession (of an article) in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with the commission . . . of acts of terrorism” should be reviewed since Section 16A was applied in violation of the presumption of innocence.<sup>51</sup> After all, the defense available in Section 16A(3), which stipulates that “a person charged with an offence under this section” requires the defendant to “prove [beyond reasonable doubt] that the article in question was not in his possession for such a purpose.”<sup>52</sup> The use of evidential burdens, as opposed to the legal burden of proof, requires a lower standard of proof. It requires “proof” on a balance of probabilities instead of beyond reasonable doubt and is generally not considered a violation of the presumption of innocence.<sup>53</sup> Thus a defendant can be asked to come forward and “prove” on a balance of probabilities that he meets the criteria of a defence and is not criminally liable. In the conjoined appeal in *Sheldrake v. DPP* and *Attorney General’s Reference No. 4 of 2002*<sup>54</sup> the House of Lords decided by a majority that the reverse-onus provision in section 11(2) of the Terrorism Act 2000 (membership of a terrorist organization) infringed the presumption of innocence and then converted it from a legal to an evidential burden of proof.

---

48. *See id.* at §§ 1, 5, 2, 6, and 8.

49. *See, e.g.*, Andrew Ashworth, *Four Threats to the Presumption of Innocence*, 10 INT’L J. EVIDENCE & PROOF 241 *passim* (2006); Andrew Ashworth, *Security, Terrorism and the Value of Human Rights*, in SECURITY AND HUMAN RIGHTS 203, 218-19 (2007); Victor Tadros & Stephen Tierney, *The Presumption of Innocence and the Human Rights Act*, 67 MODERN L. REV. 403 *passim* (2004).

50. *R. v. DPP, Ex p. Kebilene*, [2000] 2 A.C. 326.

51. Prevention of Terrorism (Temporary Provisions) Act, 1989, § 16A amended tot s. 57 of the Terrorism Act 2000.

52. For an analysis, see generally Paul Roberts, *The Presumption of Innocence Brought Home? Kebilene Deconstructed*, 118 L. Q. REV. 41 (2002).

53. GLANVILLE WILLIAMS, *THE PROOF OF GUILT: A STUDY OF THE ENGLISH CRIMINAL TRIAL* 184-86 (1963). *See also* BEN EMMERSON ET AL., *HUMAN RIGHTS AND CRIMINAL JUSTICE* 350-52 (2007).

54. AG’s Reference (No 4 of 2002), [2004] UKHL 43, [2005] 1 A.C. 246.

Other anti-terrorism measures that have been adopted relate to preventive detention. The TA 2006 permits the extension of “detention without charge” from 14 to 28 days. The original Bill had gone further and provided for 90-day detention. Then Prime Minister Tony Blair defended the 90-day rule in the House of Commons by arguing that the police and judicial authorities need more time to gather incriminating evidence against terrorism suspects in order to prepare for trial. He did not receive the desired support. This episode will go down in history as his first defeat in the House of Commons. Prime Minister Gordon Brown, who succeeded in obtaining an extension of detention without charge for up to 42 days from the House of Commons, was defeated in the House of Lords on October 14, 2008.<sup>55</sup>

### III. CHARACTERISTICS OF COUNTERTERRORISM LEGISLATION

One can observe several characteristics of counterterrorism legislation from this survey of measures taken at EU and national levels: first, terrorists are now criminalized at a preliminary stage—or as the Germans say, “*Vorfeldkriminalisierung*”—before any terrorist attacks have occurred. This is done in the European countries studied here, partly because of EU legislation and the ensuing obligation for Member States to punish terrorist acts such as public provocation, recruitment, and training for terrorism. Criminalization in the preliminary stage is possible in different ways: in an objective way, by criminalizing certain acts of endangerment, and in a subjective way by criminalizing the purpose for which a certain action is performed.<sup>56</sup> In the United Kingdom, criminalization at the preliminary stage is done on the basis of the objective model, e.g., the crimes of endangerment. In contrast, the Netherlands have criminalized terrorism subjectively by focusing on terrorist purpose.

Second, legislation at the EU and Member State level reflect a broadening of investigative powers by lowering thresholds that trigger such powers. The lower threshold is evident in the “indication” standard in the Netherlands that permit special (i.e., intrusive) investigatory powers. In Italy, the threshold that triggers application of investigative powers has even been completely separated from an actual offence. Confidential communication can be recorded if it is “indispensable for the prevention of

---

55. Brown was defeated by a vote of 309 votes to 118 votes. See Nicholas Watt, *Falconer Leads Assault on 42-day Plan*, GUARDIAN (U.K.), June 2, 2008, <http://www.guardian.co.uk/politics/2008/oct/14/terrorism-uksecurity1>.

56. A subjective approach has been chosen in the Netherlands. Stamhuis regrets this and argues that it would have been more logical for the legislature to criminalize terrorist crimes and conspiracy, just as the other crimes of endangerment in the Dutch Penal Code, by using the objective model. E.F. STAMHUIS, GEMEEN GEVAAR 21-32 (2006).

terrorist activities.”<sup>57</sup> *Rasterfahndung* in Germany goes just as far: intelligence units search files of banks, libraries, and universities in order to use a certain profile to catch sight of dormant cells, although authorities have no suspicion of terrorist activities.

Third, these laws evince the expansion of the possibility of pre-trial detention. Pre-trial detention is already possible in the Netherlands on the basis of an “ordinary” suspicion. In the United Kingdom, the possibility of detention without charge has been broadened from 14 to 18 days. In Italy, authorities may institute preventive detention for up to five days without an actual suspicion, during which time a person can be examined without the assistance of a lawyer.<sup>58</sup>

Fourth, recent European legislation manifest the use of non-criminal measures to achieve a repressive effect that is similar to criminal law measures. For instance, the U.K. practice of control orders are effectively a type of house arrest, yet do not rise to the level of criminal law. The EU sanction list may also be termed as quasi-criminal for its punitive effect caused by the freezing of assets. It is notable with regard to these non-criminal measures that criminal law is “smuggled in” through the back door. Violation of a control order is a criminal offence in England, as is participation with an organization named on a sanction list under Dutch law.

Fifth, these laws demonstrate that special evidentiary measures have been developed to balance the rights of the accused and to protect the security of information/intelligence. In the Netherlands, a special magistrate during a separate procedure can hear intelligence officers, whose statements can later be used at trial as evidence. In the United Kingdom, special advocates argue the cases of those who appeal the Home office certification of being a “threat to national security,” which triggers the imposition of control orders.

#### IV. EFFECTS ON CRIMINAL LAW

Human rights advocates, nongovernmental organizations like Amnesty International and Liberty, criminal law scholars, and the judiciary have criticized anti-terrorism legislation in Europe. They claim that these measures violate fundamental principles of criminal law, most prominently the presumption of innocence. The debate over the presumption of innocence becomes most vigorous in the context of expanding measures of pre-trial detention. The presumption of innocence as part of due process is

---

57. C.P.P. art. 226(1) (“[Q]uando siano ritenute indispensabili per la prevenzione di attività terroristiche . . .”).

58. *Id.* at 13 Act n.155.

further used by the above-mentioned critics of anti-terrorism legislation to demonstrate the unconstitutionality of quasi-criminal law measures such as blacklisting and control orders. These measures render criminal law and the presumption of innocence inoperative. Furthermore, with regard to *Vorfeldkriminalisierung*, or criminalization at the preliminary stage, critics feel that the accused is presumed guilty and placed in a position where he or she must prove their innocence.

In my mind, it is particularly *Vorfeldkriminalisierung* that violates the presumption of innocence. Once behavior becomes punishable before a harm has occurred, the line between punishable behavior and non-punishable, everyday behavior becomes more difficult to draw. The burden of proof for the accused to overcome consequently becomes heavier. If this were not the case, the internalization of punishable behavior could result in the criminalization of intentions without any objective/external element. Or, in case the behavior has been given shape as a crime of endangerment, it could lead to the acceptance of objective/strict liability. Increasing the burden of proof has two possible consequences. First, it may broaden the scope of intrusive investigation methods. Recent counterterrorism legislation already manifests the expansion of intrusive investigation methods. Second, increasing the burden of proof could result in a wider use of legal presumptions, which could put the accused in the position of having to prove their innocence. Furthermore, preventive substantive criminal law triggers investigative powers at a much earlier stage. Some critics argue that these offences have been created to enable the police to use its powers at an earlier stage.

Anti-terrorism legislation also strengthens state power. By lowering thresholds that trigger investigative and prosecutorial powers, the state enhances its grip on individual citizens. At the same time judicial oversight is limited because of security concerns. Legislation mindful of security concerns has already limited the rights of the accused, such as access to incriminating evidence and to have a counsel of choice.

### CONCLUDING OBSERVATIONS

The European measures discussed above strengthen the executive's power and weaken judicial control. It therefore parallels U.S. counterterrorism laws. The threat of terrorism and the quest for security emphasizes the law's repressiveness at the detriment of the law's protectiveness. This causes an imbalance, distorts the functions of law, and erodes the law's integrity. Constitutional and judicial oversight is essential to protect our values.

A recent example of such judicial oversight is the European Court of Human Rights (“ECHR”) ruling in *Quinton & Gillan v. UK*.<sup>59</sup> The applicants were journalists who complained that authorities who stopped and searched them at a demonstration pursuant to Sections 44-47 of the 2000 Terrorism Act violated their rights under Articles 5 (right to liberty), 8 (right to privacy), 10 (freedom of expression), and 11 (freedom of assembly) of the European Convention of Human Rights. The ECHR held that the authority to allow for stop and seizure powers as well as the powers themselves—applicable throughout Greater London during a 28-day renewable period—are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. The ECHR vigorously scrutinized the (alleged) safeguards, e.g., their limited temporal and geographical scope, by referring to statistics and annual reports indicating a disproportionate use of search and seizure powers. The safeguard system may have been adequate on paper, but in reality it did not constitute a real curb on the wide powers afforded to the executive.

The title of this symposium—War Bound by Law—makes it clear that the role of law in times of war/terrorism must be one of restraint and control. The power of the state in war must be governed by a rule of inverse proportion: the broader the state’s power the more strictly the state must be restrained by law. It is both necessary and possible for the judiciary to effectuate such control based on two basic elements: necessity and proportionality. Feldman has built upon these two elements in proposing criteria to determine the legality of anti-terrorism legislation: (i) there must be a clear necessity for restrictive measures, (ii) restrictions must go no further than required, (iii) measures must be controlled by law, and (iv) law must be cast in such a way to make sure that interference with liberty is clearly and rationally related to the aim of protecting security.<sup>60</sup> I wholeheartedly endorse these criteria especially bearing in mind Allen’s famous words in his treatise on the presumption of innocence, which have value beyond the presumption of innocence and apply to due process and human rights protection in general: “*Only when society is emancipated from fear – only when it can rely, in the main, on its organized protective forces – dare it give suspected persons the benefit of the doubt.*”<sup>61</sup>

---

59. *Gillan and Quinton v. United Kingdom* (Appl. No. 4158/05), Eur. Ct. H. R. (12 January 2010), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

60. David Feldman, *Human Rights, Terrorism and Risk: The Roles of Politicians and Judges*, 19 PUBLIC LAW 364, 371 (2006).

61. CARLETON KEMP ALLEN, *The Presumption of Innocence*, in LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE 252, 272 (1931).