

EUROPEAN AND UNITED STATES COUNTER-TERRORISM POLICIES, THE RULE OF LAW AND HUMAN RIGHTS

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HIGHLIGHTS

Key European and United States policy-makers, high-level officials from the United Nations and from international NGOs, and leading academics in the field of international and counter-terrorism law met at the European University Institute on 15 March 2011, within the framework of the GGP, to discuss current approaches to counter-terrorism law, practice and strategy.

The first part of the GGP High-Level Policy Seminar (HLPS) consisted of a transatlantic dialogue on legal issues in the fight against terrorism, with addresses by the Legal Adviser of the US Department of State, Harold Hongju Koh, and the EU Counter-Terrorism Coordinator, Gilles de Kerchove. The second part of the event consisted of focused discussions introduced by academics and clustered around four big themes: terrorist blacklisting, definitions of terrorism, detention, trial and the role of criminal law in the fight against terrorism, and finally the positions of the EU and the US in relation to counter-terrorism and the role of Islam.

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The GGP's goals are to develop new ideas on current global challenges, share knowledge, serve as a bridge between research and policy-making, and to promote the European perspective in shaping global governance.

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BACKGROUND

There has been structured EU-US counterterrorism cooperation since 1992, enabling an intense dialogue on various legal aspects of the fight against terrorism throughout these years. Similarities and differences in EU and US responses to international terrorism in the aftermath of 11 September 2001 have flavored this dialogue during a full decade.

Article 4 of the Treaty of Lisbon makes it very clear that member states of the European Union still have the main responsibility for the security of their citizens; the EU is only supporting its member states. The general European approach to counter-terrorism can be described as a multilateral, norm-based, law-enforcement-driven approach to counter-terrorism, attaching a lot of importance to human rights. The European Commission for instance has a duty to assess all legislative proposals on their compatibility with the EU Charter of Fundamental Rights. The US on the other hand is seen to prefer a unilateral, practice-based, bottom-up approach, which looks primarily at international humanitarian law as a framework for its counter-terrorism policies. While these descriptions are clichés, there is nevertheless some truth hidden in them.



Intense discussions at the GGP High-Level Policy Seminar European and United States Counter-Terrorism Policies, the Rule of Law and Human Rights, 15 March 2011.

Europeans have applauded President Barack Obama's rhetorical move away from the 'Global War on Terror' (GWOT) paradigm, also because this paradigm had a counterproductive effect on the potential radicalization of some groups in society. The counter-terrorism policies of the EU and the US converged again closer to each other since the election of President Obama. This could be seen for instance in the US-

EU joint statement on 'Closure of Guantanamo Bay and Future Counterterrorism Cooperation' of June 2009. However, many European experts expressed concern that a number of aspects of the GWOT paradigm are still being retained in the 'Global War against Al Qaida', especially in the US policies of targeting and detaining terrorist suspects.

KEY ISSUES

On the basis of the first part of the HLPS, five specific issues can be identified in which there appear to be remaining transatlantic differences in how best to counter terrorism.

1. CLOSURE OF GUANTANAMO BAY

The delay in the closure of the detention facility at Guantanamo Bay is a continued source of European and international concern, in particular as the US does not appear to have a clear timeline or strategy for closing Guantanamo Bay. This is largely due to differences of opinion between political camps and branches of government in the US. Another uncertainty relates to the security situation of some countries of nationality of the remaining detainees, in particular Yemen. Further, within the US there is a sentiment that Europe could and should do more to help with closing Guantanamo by taking more Guantanamo Bay detainees on European soil.

2. THE GEOGRAPHIC SCOPE OF THE BATTLEFIELD

There are differences between the EU and the US as to when and where the fight against terrorism qualifies as an armed conflict in the meaning of international law. For European actors, international terrorism is primarily a form of serious crime, while the US is much more inclined to speak of a 'war' with Al Qaida. Some US experts believe that the need for certainty regarding the geographic scope of an armed conflict is less important than following the law in particular cases, including under the right of self-defence when someone in, for instance, Somalia is about to launch an attack on the United States, and the responsible territorial sovereign is unable or unwilling to counter this threat. That said, prosecutions against terrorist suspects have also in the US often been dealt with by using the law enforcement paradigm.

3. USE OF DRONES IN THE 'WAR' AGAINST TERRORISM

An issue related to the geographic scope of any armed conflict is the permissibility of targeted killings of active terrorists, often by unmanned aerial

vehicles. The use of such drones is seen as an effective measure in the fight against terrorism, and European experts do understand that if there is an ongoing armed conflict, there are persons that constitute legitimate targets. Nevertheless, questions still remain about who exactly could be targeted, and which legal steps, including review procedures, are to be taken before such a targeting decision is made. Among many US experts there is agreement that the current technology and the protocols in place make sure that everything is done to minimize collateral damage and ensure that only valid targets are selected.

4. EXECUTIVE ORDER ON PERIODIC REVIEW

In March 2011, President Obama issued a new Executive Order on Periodic Review, related to the detention of Guantanamo Bay detainees. While European experts appreciate the securing of periodic review over the lawfulness of continued military detention, they remain concerned at the seemingly indefinite duration of detention in many cases and the prospect this may turn an originally legitimate case into one of arbitrary detention over time.

5. MILITARY COMMISSION TRIALS

Even after being revised by the Obama administration, the US Military Commissions Act is seen by many experts as unable to secure due process or to meet the international standards for a fair trial. Concerns remain about the recent resumption of military commission trials in Guantanamo Bay, in particular given the fact that such trials are exclusively reserved for alien terrorist suspects. European and US experts have widely praised the capacity of US federal courts to deliver a fair trial in complex terrorism cases, with a much stronger track record than the military commissions. However, due to domestic political opposition, that avenue appears to have been blocked for Guantanamo Bay inmates, including so-called high-value detainees.

The second part of the HLPS event was clustered around four big themes that are of general relevance to European and United States counter-terrorism policies, due to their importance on the global level, and to certain specifically European challenges that relate to those issues. Here, we are not so much dealing with differences between EU and US approaches but, rather, with common challenges.



US and European policy-makers, UN and EU officials, and academics at the GGP High-Level Policy Seminar

TERRORIST LISTING

The listing of Al Qaida and Taliban terrorists by the United Nations Security Council, under the 1267 sanctions regime, has become subject to increasing criticism, including by the judiciary at the national level in the UK and Canada, and on European level, most recently in the *Kadi II* decision by the European Union General Court.²

The question of how the European Court of Justice will react to the modalities expressed by the General Court for full judicial review of the lawfulness of the contested regulation in light of fundamental rights remains open. It can be argued that the standards set by *Kadi II* are impossible for the EU bodies to meet, as they require a full disclosure of actual evidence to the listed individual or entity. It is contested whether even the Security Council has full access to the evidence.

Even assuming that it will not be necessary to share all evidence directly with the suspect, there needs to be an appropriate level of due process. Further, it must be clarified whether appropriate judicial control should be found at the national/regional level or at the UN level and what model of due process would satisfy the courts.

While the Security Council has made progress in providing some procedural guarantees for listed individual and entities, its terrorist sanctions regime remains a political system, and it can be questioned whether it will ever be able to replicate a legal procedure.

The role of the Office of the Ombudsperson, established under Security Council resolution 1904, remains an open issue. Possible improvements of the regime include the Security Council providing better statements of reasons for listings and strengthening the role of the Ombudsperson, including by providing him/her with better access to information, following his/her recommendations for delisting, prolonging his/her mandate, providing increased resources to her Office and adding some form of sunset clause for all entries on the 1267 list. Further it appears timely that the Security Council should continue to collect relevant information from states to review all listing decisions in an attempt to remove individuals from the list whenever appropriate.

Since September 2001, there has been wide criticism of insufficient attention to human rights by the Security Council's Counter-Terrorism Committee, established under resolution 1373. Today, however, it appears that the Committee might be more responsive to such pressures than is evident from its

² See Case T-85/09, *Yassin Abdullah Kadi v European Commission*, General Court of the European Union, 30 September 2010.

public activities and may be increasingly engaging with member states to promote a stronger human rights law element.

THE PROBLEM OF A MISSING COMMON INTERNATIONAL DEFINITION OF TERRORISM

A general international legal definition of terrorism still does not exist, while UN Security Council Resolution 1373 requires all states to criminalize 'terrorism'. Despite some initial resistance of certain states, almost all states have complied with Resolution 1373. States were however left to their own interpretations of what constituted 'terrorism', and these interpretations vary widely. Such a situation raises the question of how all these different definitions which lack a common denominator, and sometimes include even very problematic elements, contribute to the common goals of 'fighting terrorism'. This is especially relevant since Resolution 1373 applies globally, and not only to constitutional states which adhere to the rule of law.

There is no agreement whether the lack of a common definition of terrorism is among the most pressing issues to resolve on a political or international law level. Some argue that it is more important to clarify the exact delineation between international human rights law and international humanitarian law, in order to clarify detention and targeting practices.

DETENTION, TRIAL AND THE ROLE OF CRIMINAL LAW

There are clear differences between national rules regarding detention and the criminal justice system. Generally speaking in the EU the disclosure rules are less broad, and certain offences such as incitement to terrorism do not even exist at the US level. It was noted that the problem of transforming intelligence into evidence is also a bigger problem for common law systems as opposed to civil law systems.

One particular problem in the US context is that the Bush administration did not detain people with an expectation of bringing these suspects ever into the criminal justice model. In the overwhelming majority of cases there would be no sufficient evidence assembled to allow for prosecution. This difficulty is exacerbated by the problem that unlawful methods, even torture, were used against many of the detainees. However, US federal courts so far have tried successfully more than 400 terrorist

cases, while military commissions only secured six convictions, of which only one was the result of a contested trial. The other five convictions consisted of plea bargains and resulted in rather 'light' sentences.

A need was identified for more policy research about detention schemes that 'work'. Comparative discussions tend to focus on the number of days or hours someone can be held in pre-trial or pre-charge detention, but this type of comparison is often flawed due to differences between legal systems and does not show to policy-makers which detention schemes are effective and which ones not. More comparative and historical research is needed to show how detention regimes have changed throughout times of war and emergencies.

COUNTER-TERRORISM AND THE ROLE OF ISLAM

The common belief that there exists a continuum between moderate Islam and a radical 'terrorist vanguard' can be challenged. Measuring radicalization on a religious scale is a narrative by Al Qaida, and it would be counterproductive, and even foolish, for policy-makers to fall into this trap.

One particular feature of Al Qaida is that it includes a high proportion of converts, who subsequently commit terrorist attacks. It appears that these recently radicalized people are often attracted to the narrative of an individual hero that gives his life for a common cause.

One way to fight radicalization is to debunk this two-fold narrative. On the one hand Al Qaida terrorists should be 'trivialized'; these people should be exposed as ordinary criminals and 'losers' who often fail also in their terrorist attempts.

The recent events in Tunisia and Egypt are perfect examples to destroy the Al Qaida narrative. The main actors of the Tunisian and Egyptian streets could rightfully be labeled as 'heroes'; and in comparison to them (wannabe) terrorist would look like 'losers'.

RECOMMENDATION

On the basis of the HLPS, the authors of this policy brief recommend continued interaction between European and US counter-terrorism officials and experts. In order to bridge transatlantic differences on the relationship between counter-terrorism policies, the rule of law and human rights, increased interactions between legal experts from both sides of the Atlantic, including law professors, should be stimulated, as many of them are not merely academic scholars but are also involved on a more practical level, for instance by advising governments or litigants, or appearing in the media. Due to its European nature and good contacts with academics and practitioners in the United States, the EUI and its Global Governance Programme could facilitate such interactions in the future.