ANTI- & COUNTER-TERRORISM AND HUMAN RIGHTS IN EUROPE:

5 SNAPSHOTS OF CURRENT CONTROVERSIES

Queen Mary University of London
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Abbreviations

AFSJ  Area of Freedom, Security and Justice
BND  Bundesnachrichtendienst (Germany)
CIA  Central Intelligence Agency (USA)
CJEU  Court of Justice of the European Union
CNCTR  Commission nationale de controle des service de renseignement (France)
ECHR  European Convention on Human Rights 1950
ECRIS  European Research Center for Information Systems
ECtHR  European Court of Human Rights
EDPB  European Data Protection Board
EDPS  European Data Protection Supervisor
EU  European Union
FRA  Fundamental Rights Agency
GCHQ  Government Communications Headquarters (UK)
ICCPR  UN International Covenant on Civil and Political Rights 1966
ICRC  International Committee of the Red Cross
IPA  Investigatory Powers Act (UK)
IMF  International Monetary Fund
ISIS  Islamic State in Iraq and Syria
NGO  Non governmental organisations
NSA  National Security Agency (USA)
OHCHR  Office of the High Commissioner for Human Rights (UN)
SIS II  Schengen Information System II
TFEU  Treaty on the Functioning of the European Union
UDHR  Universal Declaration of Human Rights
UNDP  United Nations Development Programme
WHO  World Health Organisation
WWII  World War II
Between 2012 and 2017, an interdisciplinary group of academics and legal practitioners met on a regular basis to discuss developments in the field of the fight against terrorism and human rights in Europe. Gradually, this group formalised itself into the QMUL Reflection Group on (Anti)Terrorism and Human Rights and found a place for itself within the Criminal Justice Centre of the Queen Mary University of London School of Law. With time, the activities of the group became more ambitious eventually including workshops on specific issues of human rights and anti- and counter-terrorism which took place either in London or Paris once or twice a year.

Initially, this report was intended to be a summary of those workshops, but this turned out to be unrealistic, as the field is so dynamic and the relationships among themes and subjects so compelling that a new approach was needed: snapshots of the controversies over the five year period. As we went through the summaries of the workshops prepared by an excellent group of PHD students, 1 the issues became even more fascinating and consuming. New research was needed and a new analysis of the developments in Europe in this field. With the help of a small grant from QMUL, we began the process of untangling the web of developments over the past five years and re-formulating the questions to reveal new knowledge.

Many people have contributed enormously to this project. First we must thank everyone who participated in the intellectual investigation with us through the meetings and workshops of the group. In particular we would like to thank Professor Valsamis Mitsilegas and Dr Niovi Vavoula QMUL and Professor Marie-Laure Basilien-Gainche Lyon III for their participation, support and encourage-

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1. Elif Mendos Kuskonmaz (QMUL), Sebastian Larsson (KCL), Alvina Hoffmann (KCL), Hager Ben Jaffel (KCL) and Aurel Niederberger (Sciences-Po).
ment. A full list of those who participated in the seminars is included at Annex 1. We would also like to thank Catherine Baker for editorial assistance on this project. We must also thank very much our discussants at the two launches of this report, in London: Professors Mitselegas and Huysmans of QMUL, Law and Politics respectively, and in Paris: Professor Graulich.

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Introduction

“The issue of terrorism is not new on the human rights agenda. Terrorism is a threat to the most fundamental human rights. Finding common approaches to countering terrorism serves the cause of human rights. Some have suggested that it is not possible to effectively eliminate terrorism while respecting human rights. This suggestion is fundamentally flawed.”

Mary Robinson, (former) UN High Commissioner for Human Rights, 20 March 2002

This report is about anti-terrorism, counter-terrorism and human rights in Europe. Each of these terms needs a working definition of our own as each of them is the site of a struggle about meaning and scope among the actors. Before proceeding any further we set out how we use these terms.

Defining the Terms: Terrorism, Anti-terrorism, Counter-terrorism and Human Rights

First terrorism: there is no internationally recognised definition of terrorism, notwithstanding very substantial international efforts to achieve one. Instead, the closest the international and academic communities have been able to come is to define terrorism as a form of violence (albeit against people or objects) which has political aims but in nevertheless illegitimate. There are many refinements of this ‘aims’ approach. Religious aims are often considered different from ‘normal’ political aims. But at the heart of the definition is not the violence itself but the purpose for which the violence is perpetrated. It is not motivated by the usual reasons of economic or other gain, personal revenge or rage. Instead, its capacity to strike fear into state authorities comes from the fact that this violence is carried out in order to influence the state (people, governance or territory) itself. ¹ We will return to this issue and its consequences for human rights in chapter 3.

Secondly, anti-terrorism: by this term we mean the action of state authorities within the framework of criminal justice systems and the scope of rule of law which seek to identify, try and punish those who commit acts of political violence (called terrorism) or conspire to do so. These state authorities are primarily criminal justice authorities, police, prosecutors, judges charged with combating terrorism. These authorities, within liberal democracies, are the only ones which are entitled to inflict the most serious violence against individuals – imprisonment. The complex and detailed procedures of criminal justice, the right to fair trial, the presumption of innocence and the right to defence, are all human rights which protect the integrity of the criminal justice systems. The legitimacy of punishment is founded on the capacity of the state to prove the guilt of the defendant to a high standard of proof. That guilt must be in respect of a criminal law which existed at the time of the offence. Punishment is the monopoly criminal justice authorities including in anti-terrorism actions.

Thirdly, counter-terrorism: by this term we mean the actions of state authorities in the military and signals intelligence fields, security and intelligence services of which most liberal democracies have a myriad, which normally do not participate in the criminal justice system. These activities, however, tend to be territorially limited by state constitutions (see chapter 2). The work of these authorities is to act abroad, in secret, to collect and analyse information on threats which analysis is provided to the executive. In collecting information they are normally not entitled to carry out interrogations, detention or other activities which are the monopoly of the criminal justice system. This is as true in respect of internal intelligence agencies as their external counterparts. Because these authorities are not part of the criminal justice system, the information which they collect is not subject to the strict rules of admissibility of evidence in criminal trials. Any information, for them may be valuable, even very speculative and incriminating information which lacks authority or substance. One of the many jobs of intelligence agencies is to sift through masses of information and to classify it in accordance to its reliability. But this does not necessarily include the rejection of unreliable information. In chapter 6 we will return to the problem of the sharing of information of dubious quality trans-nationally by intelligence services.

Fourthly, human rights: these are the rights which are set out in international and regional human rights agreements which states have (voluntarily) signed and ratified. For our purposes, the most important in Europe are the UN International Covenant on Civil and Political Rights 1966 (ICCPR) which has been ratified by all European states and the European Convention

2. As our focus is Europe we do not include the death penalty which has been outlawed by Protocol 13 ECHR. Medical authorities in most extreme situations may also have the power to restrain individuals but this is beyond the scope of our study.
on Human Rights 1950 (ECHR) also ratified by all European states. At the UN level other international human rights agreements are also of relevance such as UN Convention for the Elimination of all Forms of Racial Discrimination 1965 and the UN Convention against Torture 1984 (both of which have been signed and ratified by all European states). In total there are nine UN human rights agreements, not all of which have been ratified by all European states. Other regions also have human rights agreements such as the Americas and Africa but we will not address these here. The UN Human Rights Committee is responsible for the correct interpretation of the ICCPR and issues general comments on its provisions to assist states correctly to apply their obligations. Similarly, states are required to account to the UN Human Rights Committee on their application of their human rights obligations under each agreement on a periodic basis. The reports of the Committee following period review of each state are public and assist states better to implement their obligations. A number (but not all) of European states have signed additional protocols or accepted provisions of the agreements which recognise the jurisdiction of the Human Rights Committee to adjudicate on complaints by individuals against states regarding the protection of their human rights as contained in the particular agreement. The UN Human Rights Council (a part of the General Assembly) carries out a review of states compliance with their human rights obligations in a procedure known as Universal Periodic Review. This is a peer-to-peer evaluation of states’ compliance with their obligations carried out by a panel of other states. Extensive documentation from UN sources (reports of special rapporteurs, reviews by Committees etc) are made available before the UPR of each state and states are entitled to pose questions to the state authorities subject to the review procedure. The objective of UPR is to express the common interpretation of the international community of states’ human rights obligations and to encourage states to improve their compliance.

Moving to the European regional framework, the European Court of Human Rights (ECtHR) is responsible for adjudicating complaints by states or individuals regarding the correct application of the rights contained in the ECHR. We will review the judgments of the court in terrorism related cases to understand better how supranational human rights intersect with and act as a restraint on some anti and counter terrorism measures by states.

Fifth, for our purposes Europe is composed of two legal regimes – the European Union and the Council of Europe. The Europe of the Council of Europe comprises 47 countries. It includes the European Union and its 28 Member States (soon to be 27 when the UK departs in 2019). In respect of human rights the wider are the main focus. The main regional human rights agreement, the ECHR, which is interpreted by a supranational court, the ECtHR, belongs to the Council of Europe. All states members of the Council
of Europe must ratify the ECHR and accept the compulsory jurisdiction of the court including in respect of petitions by individuals against states.

Within the European Union, three states will come in for particular scrutiny in respect of oversight – France, Germany and the UK. These are the most important states with actors in the field of intelligence services which have over the 2016 – 2018 period legislated to provide both legal bases for much of the activities of their civilian intelligence services and oversight mechanisms. They are also among the states from which many claims to human rights breaches on the basis of anti-terrorism actions have arisen (Russia and Turkey are close contenders for first place).

The five snapshots which we present in the following six substantive chapters are:

• What are human rights in Europe and how do they intersection with anti- and counter- terrorism; this snapshot includes the definition of human rights in times of terror (chapters 1 and 2);

• What is terrorism and why is it so difficult to find a common definition internationally (chapter 3)?

• Anti- & counter- terrorism and the insecurity continuum: how do migration and racism become embedded in anti- and counter- terrorism activities (chapter 4)?

• After Paris 2015: a pivotal moment for EU anti- and counter- terrorism action was the attacks in Paris in November 2015 – constructing new functionalities (chapter 5);

• Oversight of intelligence services: among the important state actors in anti- and counter- terrorism are the intelligence services; but how are democracies to ensure that these services are fully respecting the human rights of those they watch (chapter 6)?

This report is central for political scientists and international relations experts and jurists who work with them. It explains the core of human rights law as European and international law which states have committed themselves to respecting. Part of that commitment has been the empowering of individuals to claim their human rights through national court systems with final recourse to the supranational courts. This report dismisses the notion that human rights are simply about moral arguments, discourses of politicians, adjustable at the will of the sovereign state authorities, and thus becoming a quagmire for justifying coercion. The misunderstanding of the ‘force
of the law’ in human rights has often blocked any truly transversal approach by setting up a false opposition: political science as a cynical vision of the world against a normative one inherited from moral philosophy and human rights. Both are rejected here in order to show how human rights laws and critical security studies can dialectically work together to build the framework for a democratic approach to anti- and counter-terrorism.

Outline of the report

In the first chapter we examine why there is a need for an in depth evaluation of anti- and counter-terrorism measures from a human rights perspective. In Europe, state action against terrorism has been the site of multi-agency activity. This has resulted in overlap of responsibilities among state and supranational actors and demands for greater coordination. In particular, the engagement of law enforcement and intelligence services, civilian and military, has resulted in an increasing rapprochement of the two frameworks – criminal justice on the one hand and asymmetrical war on the other. The agencies and their tools are very different. Criminal justice tools result in criminal trials and the possibility of conviction and incarceration of individuals. Asymmetrical war is an intelligence service/military term. The primary tools are surveillance and information analysis. The objective is to inform the executive about terrorist threats so that the executive can make informed political choices about appropriate action. However, both law enforcement and intelligence services have competences to prevent terrorist action, not only to react after the fact. This has led both law enforcement and intelligence services to engage in analysis designed to predict future threats and in so doing to seek to prevent (or disrupt) them before they become even sufficiently articulated to be conspiracy or attempt in criminal justice language. In order to understand the issue in the context of human rights accountability, we include an extensive overview of the jurisprudence of the E CtHR in a wide range of challenges to the legality of anti- and counter-terrorism measures.

In chapter two we examine anti- and counter- terrorism measures from the perspective of the crystallisation of human rights in the legally binding and justiciable ECHR and as given specific legal definition by the E CtHR. The issue of non-derogable rights and rights which are subject to limitations is explained as well as the limits which the E CtHR has placed on those limitations with specific reference to states’ anti- and counter-terrorism measures. It also examines the power given to states by the ECHR to derogate from some human rights on the basis of war or a public emergency threatening the life of the nation. Finally, the territoriality of human rights protection in anti- and counter-terrorism is explained by reference to the judgments of the E CtHR. The approach of the E CtHR is always to examine the claim to a human rights violation, the evidence and the law and to interpret the state’s
action through its consistency with rights. The ECtHR never defines terrorism.

The third chapter engages with the international community’s inability to agree on a definition of terrorism. Starting with the third recital of the preamble to the Universal Declaration of Human Rights (UDHR): the right of people, as a last resort, to rebel against tyranny and oppression we examine the controversies around the definition of terrorism and international terrorism. Notwithstanding efforts dating back to 1996, no definition has been agreed. Yet, the UN has developed a plethora of institutions charged with combating terrorism and coordinating states’ action in respect of it. While these institutions make frequent references to human rights, in the absence of a definition of what terrorism is, there is a disequilibrium between acts (which some states call terrorism) and human rights for which all states have agreed strict definitions and mechanism of common interpretation.

In chapter four, we look at the impact of anti- and counter-terrorism discourse and measures on migrants and seek to unravel the coded language of racism which underlies the relationships. There is an (in)security continuum which is embedded in many anti- and counter-terrorism measures including in border controls and restraints on free movement. These measures are defended on the grounds that they discriminate on the (permitted) basis of citizenship but in effect that ground of discrimination too often appears to be a proxy for discrimination on prohibited grounds such as religion, race and colour.

In chapter five we move to a specific manifestation of the challenge to human rights guarantees by anti- and counter-terrorism measures: France 2015. We analyse the Europeanisation of anti- and counter-terrorism measures as a result of the attacks in Paris of 13 November 2015. These attacks provided an new impetus to adopt at the EU level a series of measures on the ground of the need to react to the terrorism threat. But these measures had already been on the political table for some time and had been rejected on more than one occasion because of the invasive effects on human rights. A consequence of the Paris attacks was to deprive human rights advocates of the oxygen necessary to block measures of dubious human rights consistency. At the same time that this toxic effect was occurring at the EU level, the French President was declaring a national state of emergency and derogating from key human rights protections of the ECHR.

Chapter six looks at how the powers and activities of intelligence services should be controlled through effective oversight. The challenges which anti- and counter-terrorism measures and actions constitute for human rights guarantees need to be resolved effectively by rule of law processes before the
measure and actions are adopted. So far in this report we have focused on human rights violations because of states anti- and counter- terrorism acts. This chapter addresses the issue of preventing the adoption of state anti- and counter- terrorism measures and actions which are likely to result in human rights violations. It is insufficient only to offer people the right to claim a violation of their human right to privacy after the damage has been done. These services need to be subject to ex ante democratic controls which prevent the violations occurring in the first place. With regard to France, Germany and the UK which have all legislated legal bases for their civilian intelligence services and oversight mechanisms, we examine how effective oversight can be achieved.

The final chapter brings together the five snapshots of the report, revealing their inherent connections and intersections. The centrality of human rights as the framework within which anti- and counter- terrorism agencies and authorities must restrict their actions is the most important conclusion of this report. However, to fulfil its vocation, the framework must include as an essential element, civil society, in particular, non-governmental organisations which enable people to articulate their claims and information democratic institutions.
Chapter 1
Why a human rights perspective on anti- and counter-terrorism?

“The only long-term guarantor of security is through ensuring respect for human rights and humanitarian law. The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends. At the same time human rights and humanitarian law are tailored to address situations faced by States, such as a public emergency, challenges to national security, and periods of violent conflict. This body of law defines the boundaries of permissible measures, even military conduct. It strikes a fair balance between legitimate national security concerns and fundamental freedoms.”
Mary Robinson, (former) UN High Commissioner for Human Rights, 20 March 2002

Two fields of state action need to be understood and reconciled to fulfill Robinson’s call. First, there is the field of human rights as contained in international and regional agreements to which states have bound themselves. Secondly, there are state authorities’ choices regarding violence which they have designated as politically illegitimate and therefore terrorist and their responses thereto. The articulation of the two presents dilemmas for civil society, academics and observers. The central issue revolves around the political claim to an imperative to act quickly and effectively against terrorism. The solutions which the relevant state authorities, intelligence services and law enforcement (usually more reluctantly) claim are vital often include demands for the simplification of legal procedures to the detriment of the suspect, accused or defendant.

1. Mainly in the form of political actors, intelligence and law enforcement.
In human rights terms these may include demands to modify human rights guarantees to the individual. These pressures often reveal the interconnection of human rights among themselves. Among the first human rights affect, however, are the right to liberty, fair trial and in extreme instances (such as the CIA Extraordinary Rendition Program) the prohibition on torture. A second area where state authorities (normally intelligence services and law enforcement) demand greater powers to counter the threat of terrorism is a relaxation of limitations on surveillance of individuals whom they consider to be part of the problem. The human right at risk here is the right to privacy.

A third area where measures proposed (and taken) in the field of action against terrorism by state authorities create conflict with human rights are those designed to diminish the risk of terrorism. Here the action proposed is in respect of events which have not yet occurred. This means taking action in respect of individuals who have not committed any crime nor are in the process of preparing a crime (for instance conspiracy and attempt – which are crimes). It depends rather on identifying people who correspond to risk profiles which intelligence or law enforcement have produced on the basis of their experience and knowledge. Two human rights are engaged here. First, the prohibition of discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status is implicated by the production of profiles. Secondly, the presumption of innocence may be put at risk. Profiles are necessarily sensitive in their construction. Where they are informed and constructed on the basis of physical or religious characteristics of those persons last suspected of involvement in terrorism, the profiles may be tainted by unlawful prejudice.

While the majority of acts classified as terrorism in Europe are carried out by national liberation movements, those most feared are related to religious claims (ISIS, Al Qaida etc). These are associated with the ‘other’: foreigners, migrants and those associated with them (eg ‘foreign fighters’). The group which is liable to be constructed as by definition risky and therefore subject to intrusive measures are foreigners (migrants). This group is particularly vulnerable because the human right which prohibits discrimination normally does not expressly include citizenship.

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State coercive action in preventive mode has become increasingly important as technological developments in surveillance have grown. The arrival of the internet and electronic media to the homes and mobile devices of an increasing number of people around the world has been something of a Pandora’s Box of apparent goodies for some state intelligence services. The temptation to dip into people’s private conversations and activities on line to define profiles and seek to target ‘bad guys’ has been very difficult to resist. The fact that interferences with privacy without a court or other official warrant granted on the basis of evidence justifying such interference with the right to privacy are a breach of human rights has been difficult to instil into state authorities faced with such temptations. The protection of privacy in a digital age is complicated as so much personal data can be made available to state authorities. The data itself is now whizzing around different jurisdictions in its borderless internet seeking simply the fastest connection between place of departure and destination. The fluidity of jurisdiction has led to a sense of impunity among some authorities regarding the harvesting of this personal data.

States are required to protect the human rights of all persons within their jurisdiction. Limits based on state authorities’ definition of their own jurisdiction are blurred by the borderlessness of the internet hence also the human rights’ geography of jurisdiction. When someone is outside the jurisdiction, a state authority can claim, with a straight face, that it was unaware of the geographical position of the person at the time of the data interception. A specious argument comes into existence. This is that the privacy intrusive action does not give rise to human rights liability simply because the victim was not within the state’s jurisdiction at the relevant time.

In Europe, this argument is not sustainable as personal data belongs to the individual. This is independent of wherever the person might actually be. It is the passage of personal data through the jurisdiction of the state authorities interfering with it which gives rise to the obligation to respect the privacy of that data even when the owner is outside the jurisdiction. This is not necessarily the case in other jurisdictions such as the USA.

The challenges between state actions against terrorism and states’ human rights obligations become fraught because of the allocation of the etiquette of terrorism to violence. The solutions which intelligence and law enforcement authorities propose to their political leaders all too frequently involve lowe-

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ring standards of transparency and public accountability. The argument that
the danger of terrorism is so great, albeit a rare occurrence, 8 that these autho-
rities must be accorded the right to act secretly and to be accountable only to
the executive not to public oversight bodies and courts. These claims, made in
good faith by their authors, lead in the direction of a profound challenge to
the principle of rule of law and public accountability of state authorities,
essential elements to human rights protection. What emerges where political
leaders acceded to these demands is the validation of arbitrary state action. In
the language of politics such measures are steps on the dangerous road
towards the illiberal state and further down a road which leads to totalitaria-
nism.

Our societies are faced with three immediate options. Firstly, we, as civil
society, academics and observers, can accept the increasingly arbitrary exer-
cise of power in the field of state violence against terrorism. 9 Secondly we can
insist on the adherence to human rights obligations as the limits of the arbi-
trary exercise of power. 10 Thirdly, we can insist that adherence to human
rights obligations takes priority subject to which all anti- and counter- terro-
rism measures must be subordinated. 11 We have been convinced in the pro-
cess of this research that the only model possible for liberal democracies is the
third.

Regional Human Rights with or against anti- and counter- terrorism?

Human rights are not a luxury which can be disregarded depending on the
type of threat which a state’s authorities encounter. Human rights obligations
are designed to ensure that when state authorities are faced with profound
challenges, including, in the language of the ECHR: “in time of war or other
public emergency threatening the life of the nation” (Article 15) the safeguar-
ding of human rights are paramount to prevent the state’s descent into totali-
tarianism. In the extreme situations of a threat to the life of a nation, the
ECHR permits derogations from only some human rights obligations (but
never the right to life, 12 the prohibition on torture, the prohibition of slavery
or servitude or punishment without law). As the ECtHR has considered on a
number of occasions, a threat to the life of a nation is a very serious state of
affairs and does not include the possibility that a government might fall as a

8. See for example, the annual TESAT reports of EUROPOL on the frequency and level of
mortality of terrorist attacks in the EU.
9. Clarke RA. Against all enemies: Inside America’s war on terror. Simon and Schuster; 2008
Dec 9.
10. Cole D. Enemy aliens: Double standards and constitutional freedoms in the war on terror.
Publishing; 2014 Jun 27.
12. Except as a lawful act of war.
result of public action by the people (see chapter 2 where we develop on this). 13

The relationship of human rights obligations and state action against violence which it has designated ‘terrorism’ must be one of mutual reinforcement. The good faith application of human rights obligations must be not just the parameters within which intelligence services and law enforcement carry out their anti- and counter-terrorism activities, but human rights must be the central principle in respect of which anti- and counter- terrorism measures are adopted. The two fields only become oppositional when actors political and public, create false dichotomies of opposition pretending that human rights obligations are somehow an obstacle to effectiveness and efficiency. As we have seen with the US CIA led Extraordinary Rendition Program, when state authorities are relieved of their human rights obligations the results are not more effective or efficient pursuit of the ‘bad guys’ in the language of the former US president who authorised the program, but the torture and illegal detention of hundreds of people apparently selected on the basis of unlawfully discriminatory criteria which were used as a proxy for suspicion. 14

Accountability and responsibility of state actors for their actions, including in the area of anti- and counter-terrorism, depend on the quality of the law on which they are based. State actors must be accountable for their actions both politically and legally. Effective oversight mechanisms are an intrinsic part of achieving rule of law and the protection of human rights in complex and difficult fields such as action against terrorism.

Scrutiny, responsibility and accountability are central requirements of states’ human rights obligations. Without external oversight, state authorities too often become captured by bunker mentalities where they lose the wider perspective of the implications of their actions. This is particularly problematic where authorities are acting under time pressures and with political demands for effective results with minimum delays to reassure the public. But the temptation to start cutting human rights corners at such times must be resisted. Resort to coercive action by state authorities which are incompatible with their human rights obligations can never be justified. Scrutiny, responsibility and accountability structures must be effective not only to ensure ex post remedies for those whose human rights have been breached but which act ex ante – with sufficient powers to participate in deliberations about actions

https://www.feinstein.senate.gov/public/_cache/files/7c/7c85429a-ec38-4bb5-968f-289799b6fd0e/D87288C3A6D9FF736FP9459ABCF83210.sscistudy1.pdf).
potentially human rights compatible and with sufficient powers to stop the adoption or use of powers which are not consistent with human rights duties (see the Council of Europe Commissioner for Human Rights Report on Democratic and Effective Oversight of National Security Services https://rm.coe.int/1680487770)

Rule of law and judicial accountability for human rights in anti- and counter- terrorism actions

The jurisprudence of the ECtHR on cases where human rights violations have been alleged in the context of state anti- and counter- terrorism activities is the starting place in Europe to understand the complex relationship of rule of law and accountability of state actors. We will return to this jurisprudence in all the subsequent chapters examining the issues at stake from a human rights perspective. Here, we commence with an overview of the challenges which European state action for anti- and counter- terrorism objectives have presented for human rights of individuals affected by them and how the ECtHR has adjudicated these challenges.

The right to life is protected by Article 2 ECHR which as noted above cannot be the subject of a derogation except in the case of lawful acts of war.15 This right has been particularly important for the victims of terrorist attacks as regards two duties on states. First states must carry out their anti- and counter- terrorism activities in a manner consistent with the right to life of the victims. Secondly states must carry out effective and thorough investigations into the criminal (terrorist) actions which have resulted in loss of life. Two judgments against Russia are instructive regarding the scope of this right in the anti-terrorism context. The first relates to the siege in October 2002 of the “Dubrovka” theatre in Moscow by Chechen separatists.16 The families of victims claimed that there had been a violation of the right to life by virtue of the decision of the Russian authorities to resolve the crises by force and the use of gas. The ECtHR disagreed with the victims’ families and did not find that this decision by the authorities resulted in a breach of the right to life. However, the ECtHR did find that there had been a violation of Article 2 as regards the planning and implementation of the rescue operation, which, according to the

15. ARTICEL 2 Right to life
1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.
16. Finogenov & Ors v Russia (App no 18299/03) 20 December 2011.
evidence presented to it, was inadequate. Further the court found that the authorities’ investigation into the allegations of negligence in the plan and execution of the rescue operation and the lack of medical assistance for the hostages did constitute a breach of Article 2.

In a second case also against Russia, in respect of the attack on a school in Beslan, Russia which lasted for more than 50 hours, 180 children were killed. The victims’ families again claimed a breach of Article 2. 17 The court agreed. It held that there had been a violation of Article 2 on the ground that the state authorities had had sufficiently specific information of a planned terrorist attack in the area linked to an educational institution and failed to take action to protect potential victims. Security at the school had not been increased nor action taken to seek to disrupt the planning of the attack. Nor had the school authorities been informed of the known incipient risk of an attack. Further there was a violation of Article 2 in the investigation of the attack as it had not been capable of determining whether the force used by the state authorities had or had not been justified. The court found that there was a breach of Article 2 by reason of the use of lethal force by the security forces. This was triggered by the use of weapons such as tank cannon, grenade launchers and flamethrowers in a school.

Article 2 has also been considered by the court in respect of states’ claims to use of force in self-defence. These cases relate to the use of violence by the state to prevent terrorist attacks. The court found the UK in violation of Article 2 for the killing of three people, members of the Provisional IRA, in Gibraltar by UK special forces in 1988. 18 On the evidence, it found that the operation could have been planned and carried out without killing the suspects. Some years later, the UK was found not to have violated Article 2 in a prevention-of-terrorism killing in London. 19 The victim, a Brazilian, was mistaken for a suicide bomber by police and shot on an underground train. The investigation of the shooting did not result in any prosecution of the police who shot the man. The court found that the investigation had been thorough and sufficiently independent of the police to comply with the Article 2 threshold.

Article 3 contains an absolute prohibition on torture, inhuman or degrading treatment or punishment. 20 It has been the subject of more than 30 cases before the court in respect of terrorism and anti-terrorism action. The most common issue has been regarding the conditions of detention of persons sus-

17. Tagayeva & Ors v Russia (App no 26562/07) 13 April 2017.
20. Article 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
pected of terrorism or terrorist related activities. In a particularly important case, not least as it is an inter-state challenge, Ireland took the UK to the ECtHR over the treatment of people subject to extrajudicial powers of arrest, detention and internment in Northern Ireland. The court found a violation of Article 3 regarding the treatment of the prisoners in particular the practice psychological interrogation techniques (wall standing, hooding, subject to noise, deprivation of sleep, food and drink). In 1996 Turkey was found in violation of Article 3 because of the treatment it had administered to a detainee it considered a suspected sympathizer of the (banned as terrorist) PKK (Workers’ Party of Kurdistan).

A related problem in respect of Article 3 and anti- or counter-terrorism measures as determined by the court has been ill treatment of suspects while held incommunicado in police custody. These cases have led the court to find a breach of Article 3 where there has been an inadequate investigation of complaints of ill treatment by people held incommunicado because they are suspected terrorists. Spain has been the source country of a number of these cases regarding treatment of those suspected of being ETA members or sympathizers. The problem of secret custody itself will come up again under Article 5. For the purposes of Article 3, the link with incommunicado custody is the relative impunity of the state authorities where the control mechanisms of the criminal justice system, such as the presence of investigating magistrates or the entitlement of the detainee to a lawyer, are evaded. The court found that the failure to carry out a thorough and independent investigation of complaints by terrorist suspects that they had been subject to mistreatment constituted a violation of Article 3. In some cases, though, the court has gone so far as to find a violation of Article 3 on the substance of the treatment when the suspected terrorist was held incommunicado. In one case, the certificates of injuries which the applicants presented described injuries which could only have taken place while they were held incommunicado by the authorities. As no convincing or credible explanation had been provided by the Spanish authorities for the injuries, the court attributed them to the state’s actions.

A quite separate category of Article 3 violations relates to state decisions to expel migrants to a country where they are suspected of being terrorists and as a result likely to be at risk of treatment contrary to Article 3. This line of decisions commenced in 1996 when the court found that the expulsion of a Sikh separatist from the UK on national security grounds to India would be a violation of Article 3 because the Indian authorities were unable to protect him from torture, inhuman or degrading treatment by their own autho-

22. Aksoy v Turkey (App no 21987/93) 18 December 1996.
23. Etxebarriャ Caballero v Spain and Ataun Rojo v Spain (App no 1653/13) 7 October 2014.
ties. 26 There have been fifteen judgments of the court regarding this issue, mainly, but not all, finding a violation of Article 3 would occur should the expulsion take place. 27 Of particular concern have been those cases where the court has issued an order prohibiting expulsion of the individual to the state against which the complaint has been made until after the determination of the court on whether a violation of Article 3 would result but the state has expelled the individual anyway in defiance of the court’s direction. There have been six such cases. 28

The court has found violations of Article 3 in six cases where states have been complicit in CIA organized extraordinary rendition cases. 29 These are cases which arose as a result of the US’s post 11 September 2001 programme of taking people from various places in the world to other places (including the US base in Guantanamo Bay) for the purpose of enhanced interrogation (condemned now as torture itself). 30 While the European states themselves claimed not to have engaged in the practice of torture, the court has found that the degree of knowledge on the part of state authorities about the treatment likely to be suffered by the individual at the hands of the CIA constituted a violation of Article 3. In the Italian case which involved the abduction by CIA agents of two Egyptians in Italy and their transfer to Egypt for the purpose of torture, the violation was because of the participation of the Italian authorities in the abduction. The ECtHR condemned Romania of violation of the right to fair trial (Article 6) and exposing a person to the risk of the death penalty (Protocol 13) because it allowed a CIA detainee who had been held in Romania to be taken to the US base in Guantanamo Bay. At that destination he was subject to trial by a military tribunal which did not observe the criteria of fair trial. Further the charges against the man carried a maximum penalty of death.

Finally, on Article 3, a woman whose village and home had been burn down by state authorities in a counter-terrorism action to the extent that she and the other villagers had to leave, claimed a violation. The court concurred that there had been a breach of Article 3 stating that even in the most difficult circumstances, such as the fight against organized terrorism and crime, states’ actions must never include torture or inhuman or degrading treatment which this was. 31

27. UK: 5; France: 4; Italy: 2; 1 each for Georgia and Russia, Germany (inadmissible) Turkey, Slovakia and Belgium. Not all of the cases resulted in a violation.
28. Belgium, France (2ce), Italy, Slovakia and Turkey.
29. El Masri v Macedonia (App no 39630/09) 13 December 2012; Al Nashiri v Poland (App no 28761/11); Husayn (Abu Zubaydah) v Poland (App no 7511/13 ) 24 July 2014; Nasr & Ghabi v Italy (App no 44883/09) 23 February 2016; Al Nashiri v Romania (App no 3234/12) 31 May 2018; Abu Zubaydah v Lithuania (App no 46454/11) 31 May 2018.
Article 5, the right to liberty and security of the person has been an important protection for people suspected of terrorism. This provision has many subparts and most of them have been the subject of dispute between states and persons they suspect of terrorism. A common reflex among state authorities concerned about possible terrorist activities seems to be to put the suspects in detention. The normal rule of reasonable suspicion often becomes dispensable. The ECtHR has been vigilant in protecting the individual’s right to liberty and security of the person including in the face of state concerns about terrorism. The context of the Troubles in Northern Ireland has provided the setting for many of these cases. In a 1990 decision, the court held that the power granted to police to arrest anyone whom they suspected of being a terrorist and holding them for 72 hours was a violation of Article 5(1). The reason for the court’s ruling was that the evidence provided was insufficient to establish that there was an objectively determined reasonable suspicion that the persons were terrorists.

A variation on this theme is indefinite detention on the grounds of suspected terrorist affiliation. This came before the court in 2009 in a case where a

32. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
   (a) the lawful detention of a person after conviction by a competent court;
   (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
   (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
   (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
   (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
   (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

34. Fox, Campbell & Hartley v UK 30 August 1990. In two subsequent cases the UK was found not to have violated Article 5(1) as the standard of an honest suspicion on reasonable grounds was satisfied. Murray v UK 28 October 1994 and O’Hara v UK 16 October 2001.
number of migrants were held in detention indefinitely on the basis of the state authorities’ certification that they were suspected of involvement in terrorism. The court found that the detention was not justified by Article 5(1)(f) for the purposes of deportation as there was no prospect of deporting the men. A further complication in this case was the fact that the UK had derogated from Article 5 on the basis that there was a public emergency threatening the life of the nation as a result of the attacks of 11 September 2001 in the USA. The court accepted that the national judges who had examined the credibility of the threat to the UK had found it justified and refrained from reversing that position. However, there was a violation of Article 5 nonetheless, in conjunction with the prohibition on discrimination (Article 14), because the measure was only applicable to foreigners not British citizens, a discrimination which was arbitrary. 35

Article 5 entitles anyone arrested to be brought promptly before a judge or other officer authorized by law to exercise judicial power. The court found that arrest and detention for between four and six days without charge or being brought before a judicial authority was a breach of Article 5(3). The reason for the lengthy detention without charge was because the police suspected the men of terrorism but were unable to find evidence to that effect. 36 Following that decision, the UK made a derogation from Article 5 and when the next case came before the court in 1993 the court found no breach of Article 5 because of the derogation (notwithstanding the fact that the periods of detention were longer). 37 A suspect held in detention on remand while awaiting trial for five and a half years (after having been extradited to stand trial) did not constitute a breach of Article 5(3) according to the court. The charges were terrorist related – preparing a bomb attack which killed three persons. The court acknowledged that the investigation was particularly complex and that combating terrorism may present states with extraordinary difficulties. 38 However, in another case pre-trial detention of four and five years was found to be a breach as the court found no compelling reasons for it. The men detained were all suspected of terrorism. 39

Article 5(4) protects the right of a detained person to challenge the lawfulness of his or her detention. The court found that this right had not been violated where two men suspected of engagement in terrorism were held for 13 days. The complaint was that evidence regarding their detention which was

35. A & Ors v UK (App no 3455/05) 19 February 2009. The court also found violations of Article 5(4) the right to effective challenge any allegation and Article 5(5) the entitlement to compensation for violations of rights.
38. Chraïdi v Germany (App no 65655/01) 26 October 2006.
placed before the court was withheld from them and one court session had been partially held in a closed procedure (where the accused is not present). 40 Detention of foreigners after the end of their sentences for the purposes of deporting them has also come up in the context of anti- and counter-terrorism measures. A man was held in detention for a year and a half on the first occasion and four months on the second for the purposes of deporting him motivated by suspicions by the state that he was involved in terrorism. The court for a violation of Article 5(4) because there had not been a speedy determination of the lawfulness of his detention. 41

Article 6 contains the right to a fair trial. 42 The provision has a number of limbs all of which have come under scrutiny by the court in terrorism related cases. It found a violation of Article 6(1), the right to a fair trial and Article 6(2) the presumption of innocence in respect of an obligation which state authorities put on suspects to provide information of their movements at the time of a terrorist offence. The state authorities had not justified a provision of law which extinguishes the very essence of the individuals’ right to silence and against self-incrimination according to the court. 43 A terrorist suspect was not permitted access to a lawyer while in police custody for an offence within the jurisdiction of the state security courts even though he was a minor. The court found a violation of Article 6(3), the right to legal assistance of one’s own choosing and Article 6(1). 44 A prisoner was convicted of participation in a terrorist group on the basis of evidence in respect of which there was a real risk that it had been tainted by torture. The court held that there

40. Sher & Ors v UK (App no 5201/11) 20 October 2015.
41. M.S. v Belgium (App no 50012/08) 31 January 2012.
42. Article 6:
1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and the facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.
44. Salduz v Turkey (App no 36391/02) 27 November 2008.
Article 7 prohibits punishment without law. State authorities must not prosecute people on laws which postdate actions relied upon. The court extended this principle to final release of an individual convicted of terrorism. After a woman had been convicted of a terrorism offence, the national court applied to her case retroactively a new approach to remission which meant that her detention would be extended for a further nine years. The court found this a violation of Article 7.

The right to respect for private and family life (Article 8) has come up in a few cases around anti- and counter-terrorism measures. A case which was
held to be inadmissible involved a person whose citizenship had been revoked on the grounds of his terrorist activities. The court accepted that an arbitrary denial or revocation of citizenship might in some circumstances raise an issue of the right to respect for private and family life, it did not do so on the facts of this case. 54 A number of cases against France on deprivation of citizenship on grounds of terrorist activities are pending before the court. 55 The refusal of state authorities to return the bodies of dead terrorists to their families was found by the court to be a breach of Article 8. 56 A terrorism related interdiction against a foreigner to enter or move on the territory of a state was a violation of Article 8 as the man lived in an enclave surrounded by the state which prohibited his entry thus making it impossible for him to receive medical treatment. 57

Legislation on secret anti-terrorist surveillance which was prone to abuse and lacked judicial control constituted a violation of Article 8, the right to privacy, according to the court. 58 While the court accepted that governments may use new technologies to counter terrorism (possibly including massive monitoring of communications) such powers must be subject to safeguards against abuse.

Article 9 protects freedom of thought, conscience and religion. 59 The court found a violation of the freedom of religion where two people were convicted of making propaganda for a terrorist organization on account of attending a religious service in memory of three people killed by the security

53. Article 8:
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

55. Ghourni d v France (App no 52273/16), Charouali v France (App no 52285/16), Turk v France (App no 522302/16), Aberbi v France (App no 52294/16) and Ait El Haj v France (App no 52302/16).
56. Sabanchiyeva & Ors v Russia (App no 38450/05) 6 June 2013; Abdulayeva v Russia (App no 38552/05), Kushtova & Ors v Russia (App no 21885/07), Arkhustov & Ors v Russia (App no 22089/07) and Zalov & Khakulova v Russia (App no 7988/09) 16 January 2014.
57. Nada v Switzerland (App no 10593/08) 12 September 2012.
59. Article 9:
1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.
forces. The court found that the fact that the memorial service was in respect of members of an illegal organization which the state considered terrorist did not justify the interference with the right to freedom of religion. 60

Freedom of expression is protected under Article 10. 61 A book was banned on grounds of terrorism. The court held that there was nothing in the book’s content that suggested incitement to violence. It was about culture only. Thus there was a violation of Article 10. 62 A series of decisions by the court relate to criminal convictions of journalists for publishing press articles designating state agents as targets for terrorist organisations. The court found that the convictions constituted a violation of the freedom of expression as the arguments which the state authorities had given were inadequate to justify the interference. 63 A cartoonist was convicted for complicity in condoning terrorism following publication of a drawing concerning the 2001 attacks in the USA. The court did not consider that conviction an interference with the freedom of expression. 64 However, a state’s order suspending the publication of a number of newspapers on the ground that they favour a terrorist organization was found in breach of Article 10. The court considered that less draconian measures could have been used. 65 The conviction of journalists for publishing an article which contained a statement by an illegal armed organization was also a violation of this right. The court found that the text did not call for violence, armed resistance or insurrection. 66 A local leader of a political party was convicted for having illegal pictures and publications related to terrorism in his party’s offices. This was held to be a violation of Article 10 because the individual’s conduct could not be construed as supporting unlawful acts and the material did not advocate violence, armed resistance or an uprising. 67 On release from prison but on licence, a person was subject to a prohibition on disseminating any work or audiovisual production concerning

60. Güler & Üner v Turkey (App no 1942/08) 2 December 2014.
61. Article 10:
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
63. Falakaoglu & Saygili v Turkey (App no 22147/02) 19 December 2006 and others.
64. Leroy v France (App no 36109/03) 2 October 2008.
65. Ürper & Ors v Turkey (App no 14526/07) 20 October 2009. There are a number of similar decision against the same state.
66. Belek & Velioglu v Turkey (App no 44227/04) 6 October 2015.
67. Müdür Duman v Turkey (App no 15450/03) 6 October 2015.
the offences of which he had been convicted or to speak publically about them. This was not a violation of Article 10 according to the court because it was time limited and only concerned the individual’s convictions. 68 There was a breach of the right to freedom of expression where criminal proceedings were brought against 20 people who petitioned the state for schooling in their minority language. 69 The link to terrorism was not made out. The jurisprudence of the court is perhaps less than apparently coherent regarding Article 10.

Article 11 protects the freedom of assembly. 70 The link between assembly and terrorism is one which a number of states have made. State authorities accused a political party of being responsible for terrorism and banned it. The court found that there was no evidence of a link with terrorism and thus the ban was a violation of Article 11. 71 However, in another case where state authorities banned two political parties on the ground that they were terrorist, the court accepted on the facts that the state authorities’ argument that the parties were a threat to democracy and so there was no breach. 72 A minor was convicted of membership of a terrorist banned party after he participated in a demonstration. He was also convicted of disseminating terrorist propaganda. The court found a violation of Article 11 as there was no evidence that when the minor joined the demonstration he planned any illegal activity. Further the domestic court provided no reasons for the conviction on grounds of membership of a terrorist organization. 73

The importance of this jurisprudence cannot be overestimated. Even where it may be Delphic, it constitutes a strong judicial oversight on states anti- and counter-terrorism actions. It is because national courts have been unable or unwilling to provide remedies to people aggrieved by their state’s actions in anti- and counter-terrorism that so many cases have come before the ECtHR. It may be understandable that national courts are more easily swayed by state arguments of necessity in anti- and counter-terrorism than international courts. National courts are closer to their executives and often

69. Dönör & Ors v Turkey (App no 29994/02) 7 March 2017.
70. Article 11:
1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.
71. United Communist Party of Turkey & Ors v Turkey (App no 19392/92) 20 January 1998. There are several similar cases against the state state.
73. Gülcü v Turkey (App no 17526/10) 19 January 2016.
more sensitive to political and social fears and concerns. Supranational courts like the ECtHR are farther from the fray. They receive complaints from a wide range of countries and perhaps are able to have a clearer overview of how different states address similar issues of terrorism. It is also key that the ECtHR is specifically tasked with upholding human rights. It has no other obligation and no competence in other fields of law. Its focus on European human rights standards and their application in difficult cases involving state anti- and counter-terrorism actions allows it a perspective which is beyond the limits of the logic of state authorities.

Conclusions

State authorities, media and other commentators frequently focus on the threats and risk of terrorism and potential victims with less regard to the human rights of individuals otherwise engaged in political violence. The sensitivity of these actors to the protection of people is laudable. But, it must always be tempered by the human rights of those accused or under suspicion of terrorism. In this chapter we have focused specifically on the terrorism-related decisions of the ECtHR to reveal two aspects of anti- and counter-terrorism. First, states’ claims that certain people are terrorists is irrelevant to their entitlement to human rights. The allegation, even where validated by a national court’s decision, does not change this. Secondly, the means by which states seek to achieve their anti- and counter-terrorism objectives must be consistent with their human rights obligations. Terrorism is not a shield states can use to limit their human rights obligations or justify their actions which violate human rights. Thirdly, human rights are carefully defined and judicially adjudicated. They are not vague claims without content. If anything they are excessively content heavy – the richness of the jurisprudence of the ECtHR shows this. On the other hand, terrorism is an opaque term used by states to designate activities which are normally crimes in national law as particularly heinous crimes because they are motivated by politics. The asymmetry between the clarity and transparency of human rights obligations and the shadow world of states claims to the necessity of action in the name of fighting terrorism will be a constant feature of the chapters which follow.
Chapter 2
State struggles against terrorism and the implications for human rights

“It is important to recall that the issue of reconciling States’ obligations under human rights law with measures taken to eliminate terrorism did not commence on 11 September. The human rights system has extensive experience in addressing the use and abuse of emergency and security laws. This is why the international community has paid particular attention to safeguarding human rights standards in the context of emergency and political instability.”

Mary Robinson (former) UN High Commissioner for Human Rights, 20 March 2002

This chapter examines the wide field of the frontiers of legitimacy of state violence in pursuit of anti- and counter-terrorism aims. After 2001, the fight against terrorism has evolved from anti-terrorism to counter-terrorism measures in the name of the necessity to prevent (and not to wait for more violence as the risk was too great for civilians). This necessity to prevent by detecting and invisible enemy has been at the heart of the idea that we are living in a ‘global civil war’. Politicians and policy makers in Europe and the USA framed it as a ‘war on terror’ against asymmetrical enemies where territorial rules disappear. They declared that this is not traditional war with mutual declarations of war and defined armies facing one another, the actions of various non-state actors (sometimes with the covert or indeed overt approval of state authorities) are designated as a form of ‘unlawful or unprivileged combatants’ in pursuit of illegitimate political ends. ¹ This claim has three serious consequences for state responsibility for actions in anti- and counter-terrorism actions. First, the primary international law framework of war is humanitarian law governed by the four Geneva Conventions 1949 and their

1977 Additional Protocols. These conventions protect wounded and sick soldiers, shipwrecked military personnel, prisoners of war and civilians including in occupied territories. They cover both international and non-international armed conflicts. The International Committee of the Red Cross (ICRC) is mandated to supervise the application of the conventions and protocols. However, an individual cannot found a claim on the basis of these conventions. They are collective in nature. Yet, at the beginning of the US’s war on terror in 2001, it did not even accept the supervision by the ICRC of its detention centre in Guantanamo Bay on the ground that the people detained there were not prisoners of war. Instead, the US authorities claimed that they were unlawful or unprivileged combatants and as such could not enjoy the protection of international humanitarian law. This claim was impossible to maintain and within six months of the commencement of the terrorist detention project in Guantanamo Bay facility the ICRC had access to them (or most of them).  

The second consequence is that the traditional position regarding violence in war would apply and that there would be a margin of collateral damage, which includes the death of civilians, in the operations of military engagement. Even though the Geneva Conventions on war were contested to be inapplicable, a human rights framework where individuals are entitled to the right to life etc was excluded as well. It is the response of the ECtHR to this claim in respect of state responsibility for anti- and counter-terrorism actions that this chapter will focus.

The third consequence of the non-traditional war approach to terrorism was that the criminal justice framework was rejected. Terrorism, it was claimed, is something other than crime (more war than crime) and so criminal justice procedures should be inapplicable. This framework depends very heavily on the geographical position of the war on terror as outside the country engaging in it (ie USA or Europe). As soon as the acts and the suspects are on the territory of the state, it has been impossible to exclude the criminal justice system. This explains the objective of the CIA’s extraordinary rendition program to move suspects around the world to sites where they could be tortured never permitting them to touch US soil where the constitution would protect them. It also explains the legal argument regarding lethal drone strikes

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(which are always used outside the USA). As mentioned in the last chapter, state action in respect of violence within a state, whether politically motivated or not, constitutionally comes within the domain of the criminal justice system – police, magistrates, prisons. Some state authorities responsible for anti- and counter-terrorism in Europe have sought to modify the strict rules on criminal justice to permit information which does not satisfy the high standard of evidence in a criminal trial to be admissible nonetheless. The objective has been to enable intelligence information which is often hearsay or worse, to be put before judges and juries. This effort has largely been unsuccessful in the field of criminal justice but has had some success in the field of administrative law. This has had the rather perverse consequence that in the field of migration and asylum, intelligence information has permeated appeals in forms which protect the anonymity of the sources and exclude rigorous examination of its reliability.

The guarantee of human rights, as set out in the previous chapter, is frequently challenging for states in anti- and counter-terrorism actions. In this chapter we look at human rights adjudication from the other side of the coin. Our question is what accommodation do European human rights allow for state anti- and counter-terrorism action. What are the parameters of exception applicable to them? In order to understand human rights in this context it is necessary to examine how these rights have been adjudicated by the courts, in particular for our purposes, the ECtHR, in relation to anti- and counter-terrorism action. To put flesh on the bones of human rights (the bones being the articles themselves), the interpretation of the rights by the ECtHR in the context of individuals’ claims of violation is necessary. This framework of challenges and resolution brings human rights to life. They are no longer rhetorical claims used in political arguments but, in the language of the ECtHR, real and effective. It is always possible for a gap to appear between the judgments of the ECtHR and compliance by the state which has been found in violation. There is a section of the ECtHR and Council of Europe which addresses exclusively this problem of state compliance with court judgments. But, contrary to the impression of some political scientists and international relations experts, state compliance is actually high. While there are currently difficulties with a small number of states (Russia in particular), the history of supranational adjudication of human rights in Europe is one of success not failure.

6. Calhoun L. *Death from above: The perils of lethal drone strikes* [complete citation]
The tools available for assessing a state claim that a human rights violation was justified in anti- or counter-terrorism operations are those contained in the relevant human rights instrument. States cannot arbitrarily choose to disregard their human rights obligations because they may be inconvenient. They must found their claim to justification on the provisions themselves. It is not the situation which the state confronts which determines the applicability of its human rights obligations. Rather it is the consequence for individuals of state action (or inaction) which engages a state’s human rights obligations. Where states face challenges regarding duties which they find to be in competition, for instance the protection of the state from terrorism and the human rights of individuals, they must still act within the scope of their human rights obligations. There is scope for flexibility within the ECHR system. States may be able to rely on one (or more) of three possibilities to justify action which interferes with (some but not all) human rights including on anti- and counter-terrorism grounds. First, there is the ECtHR’s doctrine of a margin of appreciation; secondly, the scope of the exceptions available in respect of some human rights may be used and thirdly, there is the possibility of a temporary derogation from some human rights permitted under Article 15 ECHR. We will look at each of these options in turn from the perspective of terrorism threats.

A margin of appreciation

The ‘margin of appreciation’ is a legal construct used by the ECtHR to accommodate some legal pluralism. 10 Established by the judges early in the history of the court, it has recently been the subject of codification in the ECHR itself. Protocol 15 ECHR which was opened for signature on 24 June 2013, provides for the insertion of a reference to the principle of subsidiarity and the doctrine of margin of appreciation in the preamble of the ECHR. 11

The purpose of the doctrine is to accept some flexibility over uniformity so long as human rights guarantees are effectively observed. In its earliest form, it was related to Article 15 ECHR which permits states to derogate from certain human rights where there is an emergency threatening the life of the nation (we will return to this shortly below). In a question which arose in a 1958 inter-state case, 12 limits were set on a state’s discretion in appreciating the threat to the life of the nation. At that time, the European Commission on Human Rights (an institution of the ECHR which no longer exists) formed the view that states have ‘a certain measure of discretion’ on whether the action taken was strictly required by the exigencies of the situation. This for-

11. At the time of writing, four Council of Europe states had yet to ratify the protocol: Bosnia/Herzegovina, Greece, Italy and Spain https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=NIQio6WE accessed 4 June 2018.
mally became the doctrine of the margin of appreciation in 1976 again in a UK case, this time on freedom of expression. 13 Here the principle that the ECHR and its machinery are subsidiary was first enunciated and as a corollary that there is a margin of appreciation. But as Spielmann (the current President of the ECtHR) points out, the key question is subsidiary to what. 14 The answer, which is clear from the ECtHR itself, is that it is subsidiary to the national systems which safeguard human rights. The doctrine of margin of appreciation is no more than a tool for interaction between national authorities and the Convention enforcement mechanism, it is not and was never intended to be a vehicle of unprincipled deferentialism. 15

The ECtHR has permitted a wide or narrow use of the margin of appreciation depending on the human right at stake. This is also the case as regards the grounds for exception (see the next section). For instance, as regards the right to respect for private and family life (Article 8) to which states are permitted to interfere including in the interests of morals, the lack of a uniform European conception of morals has motivated the Court to allow a greater margin than on other grounds. 16 However, there is no margin of appreciation possible where the human right is absolute such as the prohibition on torture 17 or the abolition of the death penalty under Protocol 13. The margin is slightly wider where there are two human rights in conflict such as privacy and free speech where the courts must find a compromise between the two. Further, the margin of appreciation is frequently contentious in cases where state interferences with a human right (Articles 8 – 11) are justified as necessary in a democratic society. But this is not a concession to states but rather a devolution to the domestic level of responsibility for ensuring the observance of human rights. 18 As Spielmann puts it, the doctrine is an incentive to national courts to conduct the requisite ECHR review examining all aspects of public policy in the light of individual human rights and to scrutinise the proportionality of state interferences with rights.

The ECtHR’s doctrine of ‘margin of appreciation’ in state implementation of human rights obligations has not been widened to accommodate states’ claims regarding the legitimacy of human rights violations as collateral damage in the fight against terrorism. The military doctrine of ‘collateral damage’ has been rejected by the ECtHR even where the tools used by the state have been military in nature. In the previous chapter we noted the

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15. Mouvement Raëlien Suisse v Switzerland App No 16354/06 13 July 2012.
17. Saadi v Italy (App no 37201/06) 28 February 2008.
ECtHR’s decision in Tagayeva & Ors v Russia \(^{19}\) where the Russian authorities were found to have breached the right to life including as a result of the choice to use military weapons in a civilian hostage taking action labelled as terrorist by the Russian authorities. The ECtHR held “The use of lethal force during the operation is undisputed, including the use of indiscriminate weapons such as grenade launchers, flame-throwers and a tank gun…” (para 584). It refused however to apply a different (or lower) standard of human rights protection to the victims because of the state’s choice to use military weapons in the case. The Court’s priority was always the entitlement of the individuals to full protection of the human rights contained in the ECHR in accordance with the constant case law of the ECtHR. All arguments on behalf of the state that the intensity of the terrorism action impelled the state to adopt counter-terrorism (military) tools with the consequent extensive loss of life for the victims was rejected. While the ECtHR accepted that it was for states to choose the tools for actions against terrorism, it found that there was an insufficient and inadequate legal framework setting out the principles and constraints on the use of force in lawful anti-terrorism actions (para 599). It found that the state had indiscriminately used lethal weapons resulting in the deaths of civilians.

The scope of limitations

The second ground on which some states have sought to justify their anti- and counter-terrorism actions which result in violations of human rights has been through the exceptions expressly permitted in some provisions of the ECHR. This only applies to those human rights violation which can be justified. These are: the right to respect for privacy and family life (Article 8), \(^{20}\) freedom of thought, conscience and religion (Article 9), \(^{21}\) freedom of expression (Article 10) \(^{22}\) and freedom of assembly and association (Article 11). \(^{23}\)

20. “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
21. “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”
22. “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”
23. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or
Article 18 ECHR clearly states that restrictions on the rights and freedoms of the ECHR must not be applied for any purpose other than those for which they have been prescribed. Thus when states seek to restrict any of these qualified rights they must find a justification within the limited grounds set out in each article. Further their actions must be consistent with the reason they have been invoked. None of the other human rights set out in the ECHR are subject to similar grounds for limitation. While some other human rights permit state interference, for instance with the right to security and liberty of the person (Article 5), the grounds are strictly circumscribed.

Each of the exceptions which states may apply to the human rights contained in Articles 8 – 11 are slightly differently worded. The common features, however are: first, any exception must be proscribed by law; secondly, it must be necessary in a democratic society; thirdly, the reason for the interference must be consistent with the specific grounds permitted for each. For the right to respect for privacy and family life (Article 8) these are (a) national security, (b) public safety or the economic well-being of the country, (c) for the prevention of disorder or crime, (d) for the protection of health or morals, or (e) for the protection of the rights and freedoms of others. Freedom of thought cannot be limited, but the grounds for states to limit manifestations of the freedom of conscience and religion (Article 10) are: (a) public safety, (b) for the protection of public order, health or morals, or (c) for the protection of the rights and freedoms of others. Freedom of assembly and association (Article 11) can be limited on the following grounds: (a) national security, (b) public safety, (c) for the prevention of disorder or crime, (d) for the protection of health or morals or (e) for the protection of the rights and freedoms of others. Further, the right of assembly does not prevent the imposition of law-

24. “No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

ful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

In the jurisprudence of the ECtHR, the Court rarely questions the reason for which a state has sought to invoke a restriction on one of these rights. However, the ECtHR is particularly strict on the requirement that the interference must be proscribed by law. It is insufficient that the state has a law on which an interference is based. The law must fulfil the requirements which the Court itself has established regarding the necessary elements of a law for it to qualify as such for the purposes of limiting a human right. These are that the law must be sufficiently accessible and foreseeable, that is, formulated with sufficient precision to enable the individual - if need be with appropriate advice - to regulate his or her conduct. Further, for domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interference by public authorities with the rights safeguarded by the ECHR. As the Court has stated in its constant jurisprudence: “in matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.” This is a high threshold on the basis of which the ECtHR has frequently found human rights violations including in the areas of anti- and counter-terrorism measures. Effectively, the ECtHR has held that it is not for states to determine what the essential elements of law are. Rather this is a judicial responsibility, including and ultimately of the ECtHR itself as a necessary component of rule of law which is an inherent part of human rights. Simply put, a ‘law’ is not a law for human rights purposes just because a state passes it and calls it a ‘law.’ It must also conform to the definition of a law set out by the ECtHR. These elements are: (a) it must be sufficiently accessible and precise so that people can regulate their conduct accordingly; (b) there must be legal protection against arbitrary interferences by the state; (c) it must include safeguards for the individual affected; (d) law can never contain an unfettered discretion; any discretion conferred on state authorities must indicate the scope of any discretion and how it can be exercised.

Secondly, the ECtHR jurisprudence examines closely states’ claims that their actions which limit these human rights are ‘necessary in a democratic society’, a common characteristic of all four provisions. It is ultimately for the ECtHR itself to assess what this necessity includes, (bearing in mind the mar-

27. Quinton & Gillan (App no 4158/05) 12 January 2010 (paragraph 77).
28. This was the case also in Tagayeva & Ors v Russia (App no 26562/07) 13 April 2017.
gin of appreciation) this is not exclusively a state prerogative. In the first instance, it is for the state to determine what it considers necessary through its democratic processes. Secondly, it is for the state’s courts to adjudicate, in light of the ECHR whether the state’s assessment is correct. But the ECtHR carries out a final review of the necessity of the measure and frequently finds that the threshold has not been met. As the ECtHR has held “An interference will be considered ‘necessary in a democratic society’ for a legitimate aim if it answers a ‘pressing social need’ and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’.”

Human rights must be interpreted and applied in a manner that renders their guarantees practical and effective. This means that for a measure to be regarded as proportionate and necessary in a democratic society, there must be no alternative measure that would cause less damage to the fundamental right in issue whilst fulfilling the same aim. Even in cases where the state’s action is in the context of anti- and counter-terrorism, as in Nada, (compliance with a UN Security Council anti-terrorism sanction resolution) the ECtHR has found a violation of Article 8 because of the means by which the state implemented the sanctions regime. The Court found “that the restrictions imposed on the applicant’s freedom of movement for a considerable period of time did not strike a fair balance between his right to the protection of his private and family life, on the one hand, and the legitimate aims of the prevention of crime and the protection of Switzerland’s national security and public safety, on the other. Consequently, the interference with his right to respect for private and family life was not proportionate and therefore not necessary in a democratic society.”

In another context, the UN Human Rights Council has formulated the relationship of a human right and the exception as a strict one of hierarchy: “restrictions must not impair the essence of the right ... the relation between right and restriction, between norm and exception, must not be reversed.” This has been affirmed by the ECtHR.

Derogation (state of emergency)

In political science and international relations, a large part of the literature rejects the capacity of international human rights law to limit the state sovereign entitlement to declare a state of emergency. They promote the pri-

30. Nada v Switzerland (App no 10593/08) 12 September 2012 (paragraph 182).
32. Nada v Switzerland (App no 10593/08) 12 September 2012 (paragraph 198).
33. CCPR/C/21/Rev.1/Add.9 paragraphs 11 – 16.
34. Handyside v United Kingdom (App no) 5493/72, 7 December 1976.
macy of presidential or executive power over all other branches of government including the judiciary. We do not accept this position which is based on the principle that law must obey force not the reverse.

From this rule of law perspective, where states find themselves confronted by war or other public emergency threatening the life of the nation they may derogate from a limited number of ECHR rights. There can be no derogation from the right to life (Article 2) except as a result of lawful acts of war, the prohibition on torture, inhuman or degrading treatment or punishment (Article 3), the prohibition on servitude or slavery (Article 4(1)) or the prohibition on punishment without law (Article 7). Derogation from the protection of other human rights must be limited to what is strictly necessary to the exigencies of the situation. Further they must not be inconsistent with other obligations in international law. There is a notification requirement – a state must inform the Council of Europe’s Secretary General of the measures which it is taking and the reasons for them. It must also advise the Secretary General when the measures cease to have effect. At the time of writing, two states have derogations in force under Article 15 – Ukraine and Turkey. Eight States – Albania, Armenia, France, Georgia, Greece, Ireland, Turkey and the United Kingdom – have relied on their right of derogation in the past but have withdrawn the derogation already. Of these states, four have been required to justify the measures which they have taken before the ECtHR. These are Greece, Ireland, the UK and Turkey.

36. Article 15:
Derogation in time of emergency
1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.


39. See, for detailed information on the context of those derogations, the website of the Council of Europe Treaty Office. Most recently, France, which had entered a derogation in 2015 on grounds of the terrorism threat, lifted it on 1 November 2017.
The ECtHR has never been required to interpret the meaning of “war” in Article 15. However, on a number of occasions the correct meaning of a public emergency threatening the life of the nation has been considered. A threat must affect the whole population and constitute a threat to the organised life of the community. 44 A threat to the government is insufficient to justify triggering Article 15. An emergency must be actual and imminent though a threat limited to one part of the country can qualify. It must be so exceptional that normal measures for the maintenance of public order are clearly inadequate. 45 The ECtHR has most frequently deferred to state authorities regarding the nature of the emergency facing it. Only rarely and in quite exceptional circumstances has it substituted its appreciation for that of the state. 46 Examples of the ECtHR’s deference to states in this regard include the UK’s derogations in respect of Northern Ireland and Turkey’s regarding the PKK in the South East of the country. Similarly, the ECtHR did not challenge the UK’s derogation on the grounds of a terrorist threat after 9 September 2001, notwithstanding substantial scepticism in some quarters about imminence of the threat to the UK. 47

The ECtHR has been more vigilant regarding the definition of what is strictly required by the exigencies of the situation. States have been required to provide substantial detail about the justifications. In particular the ECtHR has held that a derogation must not serve as a pretext for limiting freedom of political debate. 48 Pluralism, tolerance and broadmindedness, according to the Court, are among the values of democratic states which must be safeguarded even in times of emergency. The proportionality of the measures adopted to deal with the emergency on the basis of which the derogation has been entered, is a strong concern of the ECtHR. It will test the measures against: whether ordinary laws would have been sufficient to meet the danger caused by the public emergency; whether the measures are a genuine response to the emergency; were they used for the purpose for which they were granted; whether the scope is limited and justified on the basis of the reasons provided;

41. Lawless v Ireland (No 3) (App no 332/57) 1 July 1961.
42. Greece v UK (App no 299/57) 17 September 1958; Ireland v UK (App no 5451/72) 18 January 1978; Brogan & Ors v UK (App no 11209/84) 29 November 1988; Brannigan & McBride v UK (App no 14553/89) 26 May 1993; McCann & Ors v UK (App no 18984/91) 27 September 1995; A & Ors v UK (App no 3455/05) 19 February 2009;
43. Aksoy v Turkey (App no 21987/93) 18 December 1996; Sakik & Ors v Turkey (App no 23878/94) 26 November 1997; Ocalan v Turkey (No 2) (App no 24069/03) 18 March 2014; Sahin Alpay v Turkey, Mehmet Hasan Altan v Turkey (App no 16538/17) 20 March 2018.
44. Lawless v Ireland (No 3) (App no 332/57) 1 July 1961; Denmark & Ors v Greece (App no 3321/67) 1967.
whether the measures have been kept under review; any extensions or widening of the measures; safeguards which were put in place; judicial control over interferences with the human rights derogated and whether that judicial control was accessible to those affected; the proportionality of the measures and whether they involve unjustifiable discrimination; the lawfulness of the measures adopted and the position taken by national courts. Nevertheless, the crack down on ‘fake news’ and ‘lone wolf’ radicalisation challenges these values of pluralism. Some of the measures adopted to counter ‘fake news’ and ‘lone wolf’ radicalisation must be thoroughly justified if they are not to breach human rights, such as the freedom of expression.

Article 15 places human rights derogations in the context of a mutually reinforcing system of international law. Thus any derogation which is inconsistent with another state obligation under international law will not be lawful under an ECHR derogation either. This is irrespective of whether the derogation might have been lawful under the ECHR but for the international law obligation. The consequence is that states take care where they notify a derogation under the ECHR that they also derogate (where permissible) from the equivalent right in the UN human rights conventions to which they are parties, most frequently the ICCPR.

These are the three ways in which states may seek to limit their obligations under the ECHR. From the least aggressive, the application of the doctrine of margin of appreciation, to the substantive use of the limitation provisions in the ECHR itself (which are only applicable to some provisions) to finally, the most extreme: derogation from (limited) provisions of the ECHR altogether. Unless a state can brings its anti- or counter- terrorism measures within one of these three categories, they will be unlawful in so far as they result in violations of human rights recognised in the ECHR.

**Geography, terrorism and human rights**

Jurisdiction in the form of territorial borders has played a major role in the conduct of states anti- and counter- terrorism actions. As mentioned at the outset, the ability of states to claim that their actions in this area are a form of military engagement rather than criminal justice activity is determined by the place where they take place. The claim is unsuccessful where strong national criminal justice authorities insist that terrorism is first and foremost crime rather than war. Their position within national administrations tends to be sufficiently strong to defeat the terrorism-as-war argument so long as this is

within the state. But once the anti- or counter- terrorism measure is taking place outside the state, the authorities driving those actions (primarily military and/or intelligence services) have more success in pursuing the argument. Generally, criminal justice authorities limit their activities and concerns to the physical territory of their state. The external dimension is usually revealed in extradition warrants issued by criminal justice authorities to bring persons they seek to charge and try into the territory for that purpose. These authorities do not take their trials abroad (though they may request another state to charge and try an individual where the person is on the territory of the other state).

The application of ECHR human rights standards within European states is far more straightforward than its application outside them. Article 1 ECHR requires states to secure to everyone within their jurisdiction the human rights of the Convention. Two issues arise here: first when does a state exercise jurisdiction outside its territory for the purposes of human rights obligations and its actions in respect of terrorism. Secondly, can a state fail to be responsible for human rights violations in anti- and counter- terrorism actions which take place under the jurisdiction of another state but on the territory of the first? The first question has been the subject of a developing doctrine before the ECtHR since 2001. There are three situations where the ECtHR has found states responsible for guaranteeing human rights extraterritorially. First, states have human rights responsibility for the acts of their diplomatic and consular agents who are generally outside the country. Secondly, where the government of a territory gives its consent that the authorities of another country (subject to ECHR human rights obligations) exercise all or some of the public powers normally exercised by the government those human rights apply. Thirdly, a state will be responsible for human rights guarantees where the use of force by a state’s agents operating outside its territory bring an individual under the control of the state’s authorities and thereby into its jurisdiction.

The UK’s participation in the occupation of Iraq from 1 May 2003 until 28 June 2004 has provided a number of cases which clarify the issue of extraterritorial human rights obligations in counter- terrorism actions which the UK designated as ‘military’. Suffice it to say that the UK authorities argued strenuously in all the cases that they could not be responsible for human rights violations which took place in Iraq at the time of its occupation of part


of it even where carried out by their own forces because the whole arena was outside the geography of the ECHR and they were acting in accordance with a UN Security Council Resolution. In Al Jedda the applicant travelled to Iraq in 2004 where he was arrested first by US soldiers on the basis of information provided by UK intelligence services and then transferred to a British military base in southern Iraq where he was interned. He was suspected of being a member of a terrorist group involved in weapons smuggling and explosive attacks in Iraq. The UK’s internment of Al Jedda was found to have violated his human right to liberty and security of the person (Article 5(1) ECHR). The UK had assumed, in Iraq, the exercise of some of the public powers normally to be exercised by a sovereign government. Specifically, the UK had assumed authority and responsibility for the maintenance of security in its part of occupied Iraq. The UN Security Council Resolution did not explicitly or implicitly require the UK to place an individual whom it considered to constitute a risk to the security of Iraq in indefinite detention without charge. Hence, Al-Jedda’s detention was a violation of his human right to liberty (Article 5 ECHR). In a similar case, the ECtHR expressly noted that the UK exercised its authority through its soldiers engaged in security operations in Iraq and in so doing had killed some civilians. This constituted a violation of their right to life (Article 2).

The second issue raised at the start of this section is whether a state can avoid human rights responsibility for the treatment of individuals on its territory by the authorities of another state. Between September 2003 and November 2005 Romania hosted a secret CIA prison where Al Nashiri had been detained and tortured for 18 months. He was subsequently moved to the US detention facility in Guantanamo Bay and is subject to proceedings before a military tribunal on charges for which the maximum penalty is death. The US authorities suspected Al Nashiri of Al Qaida-related terrorism, in particular of carrying out an attack on a US Navy ship in 2000 and on a French oil tanker in 2002. A case was brought before the ECtHR on Al Nashiri’s behalf claiming violations of Article 3, torture (both failure to investigate and substantive), Article 5, unlawful detention, Article 8, private life, Article 13, the right to an effective remedy in respect of events which took place in Romania. He also claimed a violation of Article 6 (fair trial) and

52. “The [UK] Government denied that the detention of the applicant fell within the United Kingdom’s jurisdiction. They submitted that he was detained at a time when United Kingdom forces were operating as part of a Multinational Force authorised by the United Nations Security Council and subject to the ultimate authority of the United Nations. In detaining the applicant, the British troops were not exercising the sovereign authority of the United Kingdom but the international authority of the Multinational Force, acting pursuant to the binding decision of the United Nations Security Council.” Al Jedda v UK (App no 27021/08) 7 July 2011, paragraph 64.
53. Al Jedda v UK (App no 27021/08) 7 July 2011.
54. Al Skeini v UK (App no 55721/07) 7 July 2011.
55. Al Nashiri v Romania (App no 33234/12) 31 May 2018.
Article 1 Protocol 6 (abolition of the death penalty) in respect of Romania’s complicity in his transfer to the US detention centre in Guantanamo Bay where he had been charged with terrorism related offences in a military tribunal which was did not comply with Article 6 fair trial guarantees and where if convicted he could be sentenced to death. The ECtHR found violations on all grounds.

The Romanian authorities sought to avoid liability for the violations claiming first that there was no evidence of the secret prison (so there had not been one). Secondly, they argued that even if such a prison had existed, they were not responsible for what happened within it as it was controlled by the CIA. They claimed that for an act to be characterised as an internationally wrongful act engaging state responsibility, it must be attributable to the state. This could happen in two ways, either direct knowledge and involvement by state authorities of the violation or indirect knowledge inferred from the assumption that a state exercising its jurisdiction over its territory should not ignore the commission of a violation on its territory. Romania claimed that both grounds of exception applied to it. The ECtHR held that the facts were established that there had been a secret prison run by the CIA in Romania and Al Nashiri had been tortured there. Further he had subsequently been moved to the US Guantanamo Bay facility with the complicity of the Romanian authorities. Accordingly, the ECtHR found the Romanian authorities responsible for all the violations because of its acquiescence and connivance in the CIA extraordinary rendition program resulting in the violation of Al Nashiri’s human rights. Effectively states are responsible for what takes place on their territory. The Romanian authorities cannot avoid liability by claiming that others (agents of another state) had carried out the violations without their knowledge when this could only have happened with their complicity.

Conclusions

In this chapter we have examined the available options for European states to seek exceptions from their human rights obligations in anti- and counter-terrorism actions. Human rights law does not recognise a difference as regards the duty to guarantee all human rights depending on what state authorities are acting. Whether the state uses police, military or intelligence services in its action against terrorism does not change the duty to guarantee human rights nor the standard to which the state will be held accountable. States can defend their actions in anti- and counter-terrorism on the basis that they are reasonably within the margin of appreciation which is a latitude provided to national authorities and controlled by the state’s judicial authorities. The margin of appreciation is not applicable to any absolute rights such as the prohibition of torture. Alternatively they can seek to justify their actions
where the right permits limitations. Finally, the state can derogate from some human rights if it considers that there is a public emergency threatening the life of the nation. The question of who has the last word between the executive and the supranational judiciary is never resolved. National executives claim that state sovereignty entitles them to the last word. Supranational courts examine the human rights outcomes for individuals of states’ actions. What then becomes central is the oversight (including human rights) of the executives.

In European law, states cannot escape their human rights obligations by undertaking their anti- and counter-terrorism activities outside the borders of the state. When a state exercises authority over an individual, wherever that may be in the world, it is bound to guarantee that individual’s human rights. Further, they cannot escape their liability by claiming that a UN Security Council Resolution delegating security duties to them authorised their agents to violate human rights. Finally, states cannot avoid their human rights obligations where they permit another state to carry out violations on their territory.
Chapter 3
Combating terrorism: in search of a definition

“I am particularly concerned that counter-terrorism strategies pursued after 11 September have sometimes undermined efforts to enhance respect for human rights. Excessive measures have been taken in several parts of the world that suppress or restrict individual rights including privacy, freedom of thought, presumption of innocence, fair trial, the right to seek asylum, political participation, freedom of expression and peaceful assembly.”
Mary Robinson (former) UN High Commissioner for Human Rights, 20 March 2002

The conundrum of terrorism is, perhaps best encapsulated by the third recital of the preamble of the Universal Declaration of Human Rights: “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.” Four essential elements are introduced here which are profoundly inter-related. The first is rebellion – people are entitled to rebel where the conditions entitle them to do so. Not only are people entitled to rebel but they may be compelled to do so. This wording indicates that it may be an obligation of people to rebel when the conditions are met. When does rebellion become terrorism and vise-versa? The condition for justified rebellion is the second element: tyranny and oppression. The entitlement to rebel is conditioned by the need for people to be subject to tyranny and oppression. Thus not only must there be an assessment of tyranny and oppression but those two characteristics of governance are what qualify rebellion as such and not terrorism. The third element is human rights, the effective guarantee of which is the key to determining whether people are subject to tyranny and oppression or not. Finally, rule of law is the last essential element. It is the stability of law which makes it an ideal medium through which effectively to deliver human rights. Law is profoundly conservative, it changes
only when forced to do so. It is also a vehicle available for use by political projects irrespective of normative content.¹ For this reason human rights through rule of law is the key element to the validity or otherwise of rebellion.

The drafters of the UDHR were fully aware of the meaning and consequences of including a right to rebellion in the document. In the drafting committees, there was much discussion about who had the right to rebel and the relationship between the right and tyranny. Cassin, one of the most important members of the drafting committee noted the “genuine duty for all citizens to obey the law could not be overlooked.” The view of the Chilean delegate, Santa Cruz prevailed: “the right to resist oppression was a fundamental right which was in its proper place among the other essential rights of the individual.”² The right is one to all individuals, not exclusively groups and while it is in the preamble of the UDHR, not a provision in itself (of which there was much discussion in the drafting committees and support), its purpose and objective were clear and widely supported.³

In seeking to define ‘terrorism’ all too often little attention is paid to this recital and the profoundly important relationship between the four elements. There is no mystery about the complexity of seeking an enduring definition of terrorism. The common adage that one man’s terrorist is another’s freedom fighter captures this ambiguity very well.

**The UN: defining terrorism**

In 1996 the UN General Assembly, in Resolution 51/210 of 17 December, established an Ad Hoc Committee to draft two international conventions. The first was for the suppression of terrorist bombings. The second was to cover the suppression of acts of nuclear terrorism, supplementing some existing international instruments. The objective was to address, by means of a comprehensive legal framework of conventions dealing with international terrorism, a new framework for international cooperation. The UN’s history of work on the issue was rather sectoral at the time. The Resolution makes reference to two previous Resolutions (49/60 of 9 December 1994 and 50/53 of 11 December 1995) which contain a declaration on measures to eliminate international terrorism and a call for states to cooperate on action against terro-

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rism. However, in the Resolution a long list of related conventions was included with a call to states to ratify them. This gives the impression of substantial activity but in fact the subject matters of the conventions are rather heterogeneous and sectoral. 

Each instrument addresses a particularly undesirable activity or action such as hijacking of airplanes or ships or hostage taking. By specifying the action in respect of which the convention has been prepared, the murky nature of the definition of terrorism did not need to be addressed.

It is worth noting that the Resolution calls for measures to eliminate international terrorism. As mentioned above, terrorism, because of its political content is primarily a national or regional issue. The legitimacy or otherwise of various political movements which use violence is often not shared among states, even in their own region let alone internationally. That political violence related to one struggle spills across borders into another state is all too frequent. But that those who may have been caught up in political violence in one state flee to seek protection in another state is also an internationally recognised right. Where the return of an individual to his or her state would result in his or her persecution on a ground of race, religion, nationality, membership of a social group or political opinion, the person will be a refugee entitled to asylum. Unless there are serious reasons for considering that the person has committed a crime against peace, a war crime or a crime against humanity or acts contrary to the purposes and principles of the UN states

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9. There is an argument that terrorism does now constitute a crime against humanity and against
parties to the Refugee Convention must provide asylum to the refugee. Further, if there is a serious risk that the person would be tortured if returned to his or her country, there is an absolute ban on return there.  

This constitutes a substantial challenge to the UN’s approach to international terrorism which includes an important containment element (to prevent terrorists from crossing international borders – see below) if those allegedly engaged in terrorism are also at real risk of torture in their country of origin. According to a UNDP report of 2017, 71% of the individuals interviewed pointed to ‘government action’ such as the killing of a family member or a friend or the arrest of a family member or a friend as the transformative trigger or tipping point that pushed these at-risk individuals from radical ideas to taking the step to joining a violent extremist group. Further the report indicates that over 75% of voluntary recruits place no trust in their politicians or in the state security apparatus. This does not mean that these recruits are necessarily refugees or entitled to protection against return to torture but it does indicate that political struggles which become violent struggles are often fuelled by bad governance. Bad governance which descends into persecution and torture creates an obligation on the international community to provide protection for those targeted. Thus the spilling over of people from a struggle which includes political violence or terrorism as designated by the state authorities of one country into the territory of other states (neighboring or more distant) is not necessarily convergent with the spreading of terrorism to other countries. It may be the legitimate flight of people at risk of torture from the illegal acts of their state authorities.

The grave concern of the international community in the 1990s and 2000s has been political violence which has been directed expressly against state authorities other than those where those planning the violence are resident. This aspect of the international character of terrorism is at the centre of the UN’s use of the term international terrorism. Accordingly, a UN call for measures in respect of international terrorism presents rather unique challenges to the international community. From the resolution itself it is unclear exactly

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what the General Assembly meant by ‘international terrorism’. In the fourth recital of the preamble the Resolution calls for the strengthening of international cooperation between states\textsuperscript{12} to prevent, combat and eliminate terrorism. The following recital calls for regional and international efforts to combat international terrorism. The Declaration on Measures to Eliminate International Terrorism, however, is somewhat more specific calling for an urgent review of the scope of the existing international legal provisions with the aim of ensuring that there was a comprehensive legal framework covering all aspects. A constant feature of all the General Assembly resolutions on international terrorism is a particular use of the word ‘terrorism’ as opposed to calls to act against ‘international terrorism.’ States are called upon to combat terrorism but when the international community is engaged, the efforts are to prevent international terrorism. This appears to be an effort to recognise the state’s sovereign entitlement to act within its territory (consistently with its international obligations) and the UN’s mandate to regulate international affairs. Thus only international terrorism is properly within the remit of the UN, not terrorism as such. That then begs the question what is international terrorism and leads back to the draft convention on its suppression.

The 1996 Resolution places terrorism in the context of criminal acts (paragraph 2). These criminal acts, according to the Resolution, are intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes. The obligation to ensure that measures are in accordance with standards of human rights is expressly stated in paragraph 3. The resolution then moves to a number of practical steps: improved capacity of governments to prevent, investigate and respond to terrorist attacks on public facilities; research and development regarding methods of detection of explosives; preventing the use of electronic or wire communications systems and networks to carry out criminal acts; prevent the abuse of charitable, social and cultural organisations from use as a cover for terrorists; adopt bilateral and multilateral agreements, arrangements and mutual legal assistance procedures; prevent and counteract the financing of terrorism (direct and indirect); exchange information on facts related to terrorism and avoid the dissemination of inaccurate or unverified information; refrain from financing, encouraging and providing training for terrorist activities; and ratify the list of international conventions.

The resolution established an Ad Hoc Committee to elaborate an international convention for the suppression of terrorist bombings and a second one for the suppression of acts of nuclear terrorism (adopted in 2005; currently 113 parties). Over time, the objective of the first convention changed to a

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\textsuperscript{12} Including international organisations, agencies, regional organisations and arrangements and the UN itself.
comprehensive convention on international terrorism. This did not help the committee to reach consensus. The first meeting of the Ad Hoc Committee was from 24 February – 7 March 1997. Thereafter, a two-decade long stalemate has taken place regarding the proposed Comprehensive Convention on International Terrorism. There have been 50 meetings of the Ad Hoc Committee but no meeting after 2014 has taken place. The stalemate has been, to significant degree, the result of an inability to agree on a definition of international terrorism.

UN counter-terrorism without a definition

In the meantime, a number of other international conventions related to terrorism had been adopted, not only the nuclear terrorism convention but also a 2005 protocol to the maritime navigation convention and another one regarding the fixed platforms on the Continental Shelf. The new conventions are: the International Convention for the Suppression of Terrorist Bombings adopted in 1997 currently has 169 parties; the International Convention for the Suppression of the Financing of Terrorism adopted in 2002 currently has 188 parties and an Amendment to the Convention on the Physical Protection of Nuclear Material adopted in 2005 currently has 116 parties. As mentioned above, these conventions focus on specific actions with potentially international consequences rather than the motives of the actors.

In 2013 the General Assembly addressed the issue in Resolution 68/119. In recital 4 of the preamble, it provides its own, now somewhat refined definition of terrorism and calls for the UN General Assembly’s Sixth Committee which deals with legal issues, to establish a working group to finalize the process of the draft Comprehensive Convention and the possibility of convening a UN high-level conference on the subject. Since then, the press releases of the Sixth Committee have been silent on the draft convention.

Generally, among the barriers to consensus on a definition have been disagreements over how to distinguish between acts of terrorism on the one hand and liberation movements and legitimate struggles for self-determination on the other. In 2010, the Organization of Islamic Conference called for the definition to exclude legitimate armed struggles and proposed exceptions of “the activities of the parties during an armed conflict, including in situations of foreign occupation” to the definition on this basis. It has also called

13. “Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them,” UN General Assembly Resolution 68/119, 18 December 2013, paragraph 4.
for there to be inclusion of “state terrorism” within the wider definition.\textsuperscript{15} An oral report of the Chairman of the Working Group under the Sixth Committee in November 2017 highlighted that the disagreement over the definition continued to be an outstanding issue preventing finalisation of the draft convention.\textsuperscript{16}

After the attacks in the USA in September 2001, the UN Security Council adopted its Resolution 1373(2001) on 28 September 2001 which established the Security Council Counter-Terrorism Committee. This was followed in 2006 by the General Assembly’s adoption of the UN Global Counter-Terrorism Strategy which established two further bodies, the Counter-Terrorism Implementation Task Force and the UN Counter Terrorism Centre. The Resolution commences with a strong condemnation of terrorism as a serious threat to international peace and security. There are very frequent references to the principles of justice and international law, human rights, non-discrimination and social and economic development. Terrorism is described as being “aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of states and destabilizing legitimately constituted Governments...”. This statement picks up on all the issues around the politics of violence which the 3rd recital to the preamble of the UDHR reveals. The Resolution ends with a plan of action which calls for condemnation of terrorism “in all its forms and manifestations” – the unavoidable problem of the lack of a definition of terrorism is evident here. The objective is to eliminate international terrorism which is undefined while protecting human rights and fundamental freedoms which are clearly defined.

The annex is divided into four sections which will become the four pillars of UN Global Counter-Terrorism Policy. The first is regarding conditions conducive to the spread of terrorism. Here the Resolution recommends the strengthening of UN capacities in the field; programmes to promote dialogue, tolerance and understanding; promotion of cultures of peace, justice and human development; the prohibition by law of incitement to commit a terrorist act; actions to promote the Millennium Development Goals; scaling up cooperation on rule of law, human rights and good governance and promoting victims’ needs. Under the heading measures to prevent and combat terrorism, the Resolution recommends: refraining from organising, instigating, facilitating, participating in, financing, encouraging or tolerating terrorist activities; a criminal justice approach to combatting terrorism through prosecu-
tion or extradition; exchange of timely and accurate information; combating crimes related to terrorism; checking that asylum seekers are not engaging in terrorist organisations both before giving them asylum and afterwards; strengthening national counter-terrorism mechanisms; creating an international centre to fight terrorism; applying comprehensive standards against money laundering; create a database on biological incidents; while respecting confidentiality, human rights and other international obligations, counter terrorist use of the internet; preventing the use of the internet to spread terrorism; improving border controls; making the UN travel bans more effective (including fair and transparent procedures for individuals on the lists and for removing them); coordinating all plans for responses to terrorist attacks and enhance security of vulnerable targets. The heading preventing and combating terrorism and strengthening the UN role includes the following recommendations: further voluntary contributions to the UN; share best practices; rationalize state’s reporting requirements; enhance exchange of information on cooperation and technical assistance; more coherence and efficiency on technical assistance and the engagement of a wide range of UN actors including the IMF and WHO. The final section is entitled measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.

The Global Counter-Terrorism Strategy designed in 2006 has been subject to biannual reviews. Its success as a venue is apparent by the expansion of subgroups and committees until such time as the whole architecture was reformed in 2017 to bring more coherence to the system. A new Office of Counter Terrorism was established as an umbrella to coordinate the 38 entities by then in existence. Further, the divergence of counter-terrorism activities of the General Assembly and the Security Council had also been a source of friction which the 2018 General Secretary’s report identifies for further work. However, the issue of how to define terrorism still had not been addressed. In designing, implementing and monitoring the four pillars of the UN’s Global Counter-Terrorism Strategy from 2006 to 2018, there has been no definition of what terrorism, international or otherwise is. This has been a substantial handicap to the whole project.

In the 2016 Secretary General’s report on activities to implement the strategy this was recognized. The continuing negotiations towards the comprehensive convention on international terrorism were referred to. However, by 2018 no further mention was made to the negotiations in the Report. The 2018 report does, obliquely recognize the problem of the lack of a definition.

It highlights the need to ensure that counter-terrorism measures themselves do no harm and do not fuel grievances. 21 Further, states’ responsibilities are expressly linked to their principal duty to protect populations from terrorist attacks. 22 The report acknowledges that the world has become increasingly polarized since 11 September 2001. The Secretary General accepts that increasing polarization and division sow the seeds for further conflict. But he calls on states to avoid the “terrorist-laid trap” of counter-productive responses. 23 In this context he stressed also that terrorism is not associated with any religion, ethnicity or race. 24 With specific reference to young people, the Report highlights three factors which contribute to their engagement with terrorist and violent extremist groups. These are: first a lack of opportunities in education and employment; secondly, discrimination and (social) exclusion and thirdly the oppressive nature of some counter-terrorism measures. 25 This recognition of the co-constituting element in terrorism and counter-terrorism which can lead to an escalation of violence is helpful. But it does not solve the problem of identifying what terrorism is. The emphasis in the report on “integrated field-level engagement and monitoring and evaluation” which the Office of Counter-Terrorism is supposed to undertake assisting states to prevent and counter terrorism rings rather hollow without a definition. 26 If the definition of terrorism is a national one, then assistance by the Office of Counter-Terrorism may stray exactly into the area which the Secretary General has identified as risks and instead of diminishing political violence contribute to its escalation.

The fourth Pillar of the Strategy addresses action to ensure respect for human rights in counter-terrorism action. The Secretary General affirms that the fight against terrorism cannot succeed without ensuring respect for human rights and rule of law: “The adoption of counter-terrorism laws and policies without adequate consideration of the implications for the protection of human rights is a major concern.” 27 He highlights the treatment of children associated with terrorist groups as security risks rather than as victims. A bet-

19. Activities of the United Nations system in implementing the United Nations Global Counter-Terrorism Strategy, Report of the Secretary General, 12 April 2016 A/70/826 “In addition, Member States continue to negotiate a comprehensive convention on international terrorism to further strengthen international cooperation. Moreover, many have developed their own national legislative framework on the basis of the existing international framework and have cooperated bilaterally and regionally to strengthen action against terrorism.” Paragraph 20.


22. Ibid paragraph 24.
23. Ibid paragraph 25.
25. Ibid paragraph 39.
26. Ibid paragraph 75.
27. Ibid paragraph 33.
ter framing of the issue would perhaps be that children are entitled to all the rights of the UN Convention on the Rights of the Child 1990 and being treated as a security risk is inconsistent with the key feature of the convention that the best interests of the child are paramount. Once again, the lack of a definition of terrorism contributes to the slide between a child as a holder of human rights to a security risk. The clarity of the human right at stake is evident, if only indirectly referred to in the report.

The Council of Europe: defining terrorism

The UN’s difficulties in defining terrorism are not unique. The Council of Europe has encountered a similar problem and has resolved it by references to the UN conventions. After the attacks in the US on 11 September 2001, the Council of Europe agreed to take steps to increase the effectiveness of the fight against terrorism. After substantial debate about the most effective direction to take, by May 2004 the Committee of Ministers instructed the Secretariat to prepare terms of reference for a draft convention on the prevention of terrorism. A convention was drafted and opened for signature not only to the 47 member states of the Council of Europe but also to five non-member countries. At the time of writing, 39 states (all Council of Europe) have ratified the convention.

Recital eight of the preamble sets out an indication of what terrorism might be: “Recalling that acts of terrorism have the purpose by their nature or context to seriously intimidate a population or unduly compel a government or an international organisation to perform or abstain from performing any act or seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation;” but this wording is not carried through to the convention itself as a definition. Instead, Article 1 of the Convention states that a “terrorist offence” means any of the offences within the scope and as defined in one of the UN conventions set out in the Annex. The Annex sets out eleven UN conventions relating to terrorism none of which, as we have discussed above, actually defines what terrorism is. As mentioned above the existing UN

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29. Canada, the Holy See, Japan, Mexico and the USA.
conventions focus on specific acts of violence (with the exception of money laundering which generally does not include violence). The motivation of the violence is secondary to the international agreement to act against the specific violence. This approach is indirectly inserted into the Council of Europe Convention. So the same problem regarding definition plagues the Council of Europe as it does the UN. An additional protocol to the convention was opened for ratification in 2015 the objective of which is to criminalise: first, participation in an association or group for the purposes of terrorism; secondly receiving training for terrorism; thirdly, travelling abroad for the purposes of terrorism; fourthly, funding travelling abroad for the purpose of terrorism and finally organizing or otherwise facilitating travelling abroad for the purpose of terrorism. The protocol does not take the problem of defining terrorism any further but does muddy the waters regarding the human right to leave a country including one’s own. At the time of writing the protocol had been ratified by eleven states (all Council of Europe, though it too is open for signature by the same five non Council of Europe states).

The European Union: Defining Terrorism

The European Union has taken a rather different approach to the definition issue in comparison with that of the UN and the Council of Europe. It established for its Member States a definition of terrorist offences (though not of terrorism as such). The first definition was included in a Framework Decision (a form of measure with limited legal effect) in 2002. The choice of how to define terrorism was to break it into two parts. First, there is the objective which makes an offence terrorist and then there are the substantive acts to which the application of the objective together makes it a terrorist offence. The Framework Decision was replaced by a directive in 2017 (legally binding) but did not modify the definition of a terrorist offence. However, the 2017 directive makes no mention of the UN efforts to define terrorism...
terrorism. The explanatory memorandum does make many references to UN Security Council Resolutions in particular 2178(2014) on foreign fighters. There is no reference to the General Assembly’s work or that of the Secretary General. This indicates a lack of regard to the jurisprudence of the Court of Justice of the European Union on the executive nature of Security Council Resolutions to the exclusion of their legally binding nature on the EU.

The definition is found in Article 3 which requires Member States to make offences of a variety of acts which are stated to be seriously damaging to a country or an international organization. The acts (including attempts/threats etc) are: attack on a person’s life; attacks on the physical integrity of a person; kidnapping or hostage taking; causing extensive destruction to a government or public facility; seizure of aircraft, ships or other means of transport; manufacture, possession, acquisition, transport, supply or use of explosives or weapons; release of dangerous substances or causing fires, floods or explosions which endanger human life; interfering with or disrupting water supply, power or any other fundamental natural resources which endangers human life and illegal system interference. This list is definitive. For any of these acts to be ‘terrorism’ they must be accompanied by an intention. There are three possibilities: first, the aim is seriously to intimidate a population; secondly, to unduly compel a government or international organization to perform or abstain from performing any act; and thirdly seriously to destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization.

The implementation of the directive, however, must be consistent with the EU’s Charter of Fundamental Rights. This is expressly stated in the preamble at recital 35. Specific mention is made to those human rights

41. “This Directive respects the principles recognised by Article 2 TEU, respects fundamental rights and freedoms and observes the principles recognised, in particular, by the Charter, including those set out in Titles II, III, V and VI thereof which encompass, inter alia, the right to liberty and security, freedom of expression and information, freedom of association and freedom of thought, conscience and religion, the general prohibition of discrimination, in particular on grounds of race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, the right to respect for private and family life and the right to protection of personal data, the principles of legality and proportionality of criminal offences and penalties, covering also the requirement of precision, clarity and foreseeability in criminal law, the presumption of innocence as well as freedom of movement as set out in Article 21(1) of the Treaty on the Functioning of the European Union (TFEU) and in Directive 2004/38/EC of the European Parliament and of the Council (18). This Directive
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(has included in the Charter) which are most at risk by anti- and counter-terrorism measures: the right to liberty and security, freedom of expression, freedom of association, freedom of thought, conscience and religion, the prohibition of discrimination, the right to respect for private and family life, the right to protection of personal data, the principles of legality and proportionality of criminal offences and penalties. It also requires states to ensure precision, clarity and foreseeability in criminal law, the presumption of innocence and freedom of movement. The directive further confirms that it has to be implemented taking into account the ECHR and ICCPR (and other human rights obligations under international law). The issues and interpretation of these rights by the ECtHR in anti- and counter-terrorism contexts has been examined in Chapter 1. All of this jurisprudence is made applicable to the implementation of the directive by virtue of the Charter as expressly acknowledged in the directive’s preamble.

The EU’s approach to a definition is hampered by its very broad approach. The acts which are included go from the very serious to the possibly marginal. The aims equally extend quite widely. While the first aim seems reasonable the second and third attract some criticism because of the vagueness which could permit people who are expressing legitimate discontent to be prosecuted for terrorism. Although the EU has a definition, the problem which is so eloquently set out in the preamble to the UDHR remains unanswered.

Conclusion

In this chapter we have examined the political nature of the term terrorism. What is apparent from the UN (and by extension Council of Europe) use of the term is its flexibility. There is no definition as such. Human rights on the other hand are clearly defined in the 9 core UN human rights conventions, the ECHR and the EU Charter of Fundamental Rights. As set out in the previous chapter, when anti- and counter-terrorism measures and actions result in allegations of human rights violations, the ECtHR has had no difficulty in interpreting the human right at stake and assessing the justifications provided by states for their actions. Human rights belong to individuals, are accessible to them and constitute restraints on the use of power to which states have voluntarily committed themselves. What constitutes terrorism, however, is opaque and ill defined. Because of the political dimension, the national, regional and even local dimension is decisive in whether an individual or group of individuals’ acts are categorized as ordinary crimes or terror-
rism. Even more problematic, is the use by some states of the entitlement to define some individuals and groups as terrorist and their actions as terrorism when there is a profound lack of consensus that those states are legitimate in doing so. This brings us back to the last resort right to rebel against tyranny and oppression where human rights are not protected by the rule of law. As the UNDP report indicates from their survey of people engaging in political violence, 71% said that the trigger for them was ‘government action’ such as the killing of a family member or a friend or the arrest of a family member or a friend. 42
Chapter 4

Anti- and Counter-Terrorism, Migration and Racism in Europe – a continuum of insecurity and the politics of fear

“On 10 December 2001, on the occasion of Human Rights Day, 17 Special rapporteurs and independent experts of the Commission of Human Rights expressed their concern over reported human rights violations and measures that have targeted particular groups such as human rights defenders, migrants, asylum-seekers and refugees, and ethnic minorities, political activists and the media. Ensuring that innocent people do not become the victims of counter-terrorism measures should always be an important component of any anti-terrorism strategy.”

Mary Robinson (former) UN High Commissioner for Human Rights, 20 March 2002

The actions of European states against terrorism have tended to be widely supported by public opinion. This is based on a perception or framing of terrorist acts as largely similar: conducted by hostile, clandestine organisations and targeting unarmed civilians in a random fashion. This gives an impression that these acts are always cruel and unjust and therefore deserving of harsh measures by the state in response. The basic response of the state to protect its population within its territory is therefore activated by a terrorist act, proving the state’s monopoly over ‘legitimate’ violence. Because of this framing, anti- and counter-terrorist practices have often been harsher than measures used to respond to other forms of crime and violence.

But as we have seen in chapter 3, the lack of clarity as to what constitutes a terrorist act has created a great deal of uncertainty regarding a legitimate response. At the less extreme end of the scale, violence during demonstrations or activist actions which include damage to property have been caught by some criminal law definitions of terrorism. At the more extreme end of the spec-
trum, torture and murder are most frequently not terrorism though they may be.¹ The powers of police to arrest, detain and interrogate on anti- or counter- terrorist grounds admits a substantial degree of discretion on the part of governments to determine and subject to frequent legislative changes. Yet, too wide a discretion has been found to contravene European human rights on the ground that the law is insufficiently clear for individuals to adjust their behavior accordingly.² Special courts and procedures and in some cases the disappearance of juries in favour of specialist judges have been all too frequent and legal challenges on human rights grounds not often successful.³

Opposition by the general public to anti- and counter- terrorist actions has generally been limited, as long as first, the hostile, clandestine groups are clearly designated, secondly, they have committed serious acts of violence, and thirdly, judicial procedures have largely respected the principles of rule of law. Opposition has occurred, however, particularly when evidence has been revealed that tools of anti- or counter- terrorism have been used to target broad categories of people based on vague criteria, commonly profiling without proof of individual culpability.

It is here that questions arise as to the links between belonging to a minority group and being associated with terrorism. To what extent is there a link between terrorism, protest and migration, based on a common designation of people perceived to be a danger to society? If the migrants arriving at the borders or the minorities living in the country are treated as potential terrorists by different anti-terrorist agencies, why is this so? Is there strong evidence of a general link between these themes?

The intrusion of counter-terrorism in other EU fields: border controls, asylum, migration

Debates have emerged between researchers about the existence and the strength of this link. Many authors have discussed how foreigners are often considered responsible for crime at a local level, based on rumour and what Stan Cohen has termed ‘moral panics’.⁴ Research on terrorism inspired by René Girard has shown the mechanisms by which specific groups, often those

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that are weak or negatively represented in their countries of origin, easily become targets, especially when police fail to quickly identify a perpetrator of a crime or terrorist act. ALESSANDRO DAL LAGO HAS EMPHASIZED HOW MIGRANTS HAVE BEEN CONSTRUCTED AS ENEMIES BY THE PRESS, EXPLAINING HOW MIGRANTS ARE TRANSFORMED INTO ‘NON PERSONS’, OR PERSONS WITHOUT RIGHTS. IT IS THIS ARGUMENT THAT THE WORK OF PHILOSOPHER GIORGIO AGAMBEN HAS BOTH POPULARIZED AND EXAGGERATED BY DE-CONTEXTUALIZING IT. IN A NUTSHELL, HE HAS CLAIMED THAT MIGRANTS AND REFUGEES DETAINED IN CAMPS WERE IN A POSITION OF ‘HOMO SACER’, OF HUMAN BEINGS THAT CAN BE SACRIFICED ANY TIME, IF THE WELLBEING OF THE SOCIETY NEEDS IT AFTER A CRISIS.

But, beyond these general arguments, there is also more precise evidence of how this link between terrorism and migration has affected the practices of security professionals in their methods, categories and tools. Some authors have evoked a securitisation of migration by analyzing the rhetoric of politicians who state overtly that migrants pose a threat, particularly when crossing the borders and creating a ‘burden’ on the society which ‘welcomes’ them. They consider that the question of migration is essentially a question of management and control of different types of illegality and the responsibility of police, border guards and customs officers. Border and anti- and counter-terrorist police (but also police agencies responsible for drug trafficking and money laundering) have increasingly worked together to exchange information, engage in undercover policing and use pro-active methods of infiltration, as well as electronic surveillance.

OLE WAEVER, DIDIER BIGO, JEF HUYSMANS AND MANY OTHERS HAVE ALSO Pos-ITED THAT BY THE BEGINNING OF THE 1990s, A PROCESS OF (IN)SECURITISATION HAD TAKEN PLACE, WHERE MIGRANT AND REFUGEE ISSUES HAD BECOME THE PRIMARY RESPONSIBILITY OF MINISTRIES OF INTERIOR, AND WITHIN THESE, OF THE PEOPLE IN CHARGE OF TERRORISM, DRUGS AND SERIOUS CRIME. They considered that this link was in some ways the construction of an insecurity continuum, transferring the legitimacy of the struggles against terrorism towards more dubious forms of illegality.

Numerous studies have shown that migrants have been increasingly associated with a rhetoric of illegality, linked to such crimes as drug trafficking, human trafficking, money laundering, and support for terrorism. These works have highlighted how the terminology of migration has been ‘contaminated’ by their proximity with criminal language and used to justify anti-crime means to tackle migration. If Waever has insisted on the role of language, other scholars emphasise information sharing between police organisations to expand their control beyond traditional crimes, and their attempt to gain more control over external security. They have also highlighted the European model of creating an area where systematic border controls internally were abolished, and where even nationals from third countries were allowed to move without presenting passports or ID documents, moving the ‘burden’ of controls onto the so-called external borders, and services belonging to countries managing the periphery of Europe. This is the Schengen regime which we will discuss in further depth below.

The three dimensions of the (in)security continuum

A security claim is not only a discursive practice – it is a mix of discursive and non-discursive practices. To analyse a process of (in)securitization, one has to examine how actors construct an (in)security continuum. This operates transversally by transferring the legitimacy of the fights against certain threats to other less legitimate priorities of the authorities, for example, the transfer of measures, special laws, technologies reserved for major violence and bombing, to drug trafficking, and migration management in the name of their ‘illegality’ or ‘unwantedness’.

Because the different categories of threats, risk, illegality, information concerning victims, are increasingly managed in a coordinated way by diverse bureaucracies in the public realm (intelligence services, police, border guards, immigration officers, consulates, asylum offices), and because they are often managed in the same network of interconnected databases, a virtualisation of the world is created which generates fear about possible futures and worst


case scenarios. This, in turn, creates spirals of preventive discourses and (in)security claims. All these elements have favoured the emergence of transnational guilds of professionals and experts, sharing the same way of justifying their ambiguous practices. 12 This has been called the process of (in)securitisation which is embedded in dynamics between actors. Most of the actors prefer to stay silent and to act quietly until they are obliged to explain their actions. They enact justification more than they frame securitisation by speech acts, but the two can work simultaneously. 13

As Jef Huysmans observed, security claims are not always about exceptional measures and existential threats. There may be more mundane examples other than big international crises. Security claims are an everyday practice of many actors. Their exceptionality is often embedded in law-making processes but do not suspend them. 14 Technologies play a central role in developing interconnections between previously separated domains of activities. They develop categories of thoughts concerning proactivity, intelligence-led policing, prevention and precaution which transform security practices and logics orienting them towards the logic of prevention, of monitoring the future, a form of virtualisation, morphing one future from the traces left from the past on the digital world.

In assessing the value of the notion of a ‘(in)security continuum’, it must not be reduced to a performative speech act designating a group of migrants as enemies. While speech acts are certainly important, especially in the realm of public debates and politicians’ speeches, they are also part of the framing of the law. But, if this is the first dimension, it is not the only one. From our perspective, the semantic continuum of (in)securities and the discursive operations that are taking place around contemporary conceptions of security, makes sense only if theses discourses reflects the practical continuum of coercion and surveillance practices of the different professionals of security (public and private) as well as the structure of their oppositions between often a law enforcement and criminal justice approach and a preventive, predictive intelligence led approach, which implement these discourses in everyday life. We disagree with the vision by which the narratives are creating the values which are then implemented. We insist on the contrary that the discourses are practical regimes of justification for practices which existed previously but where not acceptable. The core element of the (in)security continuum is therefore its second dimension, i.e. the routine and often silent practices that the

different professionals of security (police, border guards, immigration offices, intelligence services) are enacting, not independently, but in relation to what the others are doing, to play with the logics of distinction or to develop mimetic practices.

The strength of the insecurity continuum is therefore related to the success (or otherwise) in transferring practices and their regimes of justifications from one area where they are justified by a certain level of violence to areas where this level of violence is not apparent. But in these new spheres the fear of violence, or sense of uneasiness, exists and is fanned by preventive discourses. The continuum is therefore not linear. It depends on the situation in which migrants or refugees are associated either with terrorism (though this can also be with money laundering, as victims of traffickers or causes of trafficking). The inventiveness of the narratives is extreme, but the ‘grammar’ of the practices and their justification is based on a limited range of combinations constituting a settled repertory.

The continuum of practices linking anti- and counter-terrorism and migration is therefore not at all a soft mechanism of transfer of tools for better governance of violence or a hegemonic mechanism imposed by some sovereign speech acts. It is the expression of struggles between actors seeking to expand or shift their routine activities from one specialization to another. In so doing they engage people as allies in the political field as well as in the realm of industries selling technologies. This has also reflects the trajectories of the different police services and their missions. These struggles are about who benefits from the pathways created by the insecurity continuum justifying coercive and preventive measures beyond the realm of criminal law and invading administrative law with more coercion and less control by the judiciary. They are central to analysing the evolutions between police, border guards, customs, and even internal intelligence services, external intelligence and military operating inside their own territory on surveillance missions. A continuum is not synonymous with peace or simplicity, it is a boundary of bureaucratic fights. Further it is the proof that the expansionist move of security in different domains of life is not just the effect of a discursive political transformation, but an effect of the struggles for recognition between the different professionals of security and the reformulation which eventually politicians validate. 15

It is here that the third element of the process of (in)securitization is central as it affects profoundly people’s human rights without their awareness. This third element is the ‘mediation’ performed by the technological continuum induced by the use of dual or multi-purpose technological systems,

which ‘neutralize’ the internal fights by claiming they provide technical solutions to security. Their claim is that access to these technologies, once carefully regulated by right of access will pacify the services’ rivalries. This is why in our view security technology has become a mandatory component in the framing of EU security policies. Technology has been claimed to be necessary for the protection of EU citizens and a guarantee of ‘efficiency’ in the contemporary Europe (in)security landscape. 16 While certainly expensive, the efficiency of these instruments remains insufficiently evaluated.

So, if this argument of neutrality of technology and the transformation of the politics of security into a technique of security is shared by many actors, it is not only because of external factors. It is because most professionals consider that technologies are central to their own recognition as powerful players in the field of security. We need consequently to be aware that the differentiated uses of technological systems by the various security sectors, particularly between the field of defence and the field of policing, are not at all neutralised by the fact that they may use the same technology or the same inter-operable platforms between different databases. 17 Despite the development of, and investment in, so-called ‘dual use technologies’ which can be used both for military and civilian activities, and the growing reference to ‘security technologies’ intended to encompass both war- and crime-fighting, there seems to be no fusion at all, but rather trench warfare between these two domains. Furthermore, even when similar technological systems are put in place by the military and the police, these usages are nonetheless framed by differentiated doctrinal considerations – e.g. for so-called ‘non-lethal’ weapons. 18

The effects of the reliance on security technologies have also created difficulties for human rights, especially migrants: firstly, because most of the technical systems currently deployed for the purpose of border control and surveillance target migrants. Secondly, it made it possible to show how the scope of these technical systems was progressively widened to include EU citizens – via, for instance, the growing reliance on biometric identifiers or the devising of frequent traveler programmes for immigration control in airports. One key argument that was developed in this regard is that European border control and surveillance practices facilitated a blurring of the notion of freedom. 19 Freedom is confused with comfort or speed in a context where the surveil-

lance of travelers becomes generalised. Furthermore, even when a certain attention is dedicated to issues of privacy and data protection, other rights that might be endangered by practices of border control and surveillance such as human dignity or non-refoulement are obscured.

The present of the (in)security continuum in Europe

The construction of a semantic link between migrants as others who are dangerous for the people living in the state is then easily made. Migrants are constructed in the discourse as outsiders. They are strangers coming into the territory not for tourism but for other motives. They do so when they travel, cross the borders, regularly or irregularly, but overstay after entering. Even when they find work and acquire a legal status, indeed even when they themselves acquire citizenship or when their children are born citizens of the state, they are not considered real insiders. They are considered as different and associated with the outsiders and their country of origin or that of their parents. The old terminology of assimilation is no longer in fashion, but the terminology of integration is seen as a one-way effort for them to adjust and not for the society to adjust by giving them a place in it. The sense of unease is profoundly associated with right wing rhetoric on patriotism. But it can be heard in left wing parties when they play security arguments to protect some against others instead of playing the equality argument. Tabloid press in many countries contribute to the association between everyday petty crime, poverty and migration by covering differently crime and incivilities carried out by ‘visible’ migrants – those with visible immutable characteristics – and citizens.

Playing out the (in)security continuum

After the Paris attacks on 13 November 2015 which we will discuss in greater depth in the next chapter, anti-terrorism objectives became a justification for action on migration, asylum and border control. This was particularly so in regards to the securitisation of Calais and the reintroduction of intra-Schengen state border controls and managing the ‘refugee crisis’.

The 13 November 2015 attacks had a profound impact on policy makers not only in France but across the EU. One of the most pronounced was the struggle about the role of border controls in anti- and counter- terrorism action. This was because the means of accessing the EU by some of the attackers was within the chaos of the refugee arrivals mainly from Turkey in the summer and Autumn of 2015 which resulted in more than 1.2 million asylum applications in the EU that year. This was almost a doubling of the number of asylum claims the year before and took some EU interior ministries by surprise. The two fields – terrorism and migration – have a long history of being intertwined by some policy makers in Europe and elsewhere. The pre-
sentation of refugees and migrants as potential terrorists is not new but the flight of many people mainly from Syria through Turkey to Greece and onwards, including young men, was a source of much media interest. Academics also became increasingly interested and started to publish on the impact of the Paris attacks on refugees in Europe. The motif of terrorists as people who entered or re-entered the EU travelling with refugees occurred again and again over this period. There was a general assimilation of Islamic fundamentalism, terrorism and Muslim refugees seeking protection in Europe. This narrative became omnipresent irrespective of efforts in some quarters to keep the subjects apart.

The difficulty of keeping the two fields apart was exacerbated by the decision of the German Government on 13 September 2015 to re-introduce border controls with Austria as a result of the security deficit that the arrivals of unexpectedly large numbers of refugees (primarily from Afghanistan, Iraq and Syria) was creating in Germany. This affront to the Schengen system of passport-free travel across the Schengen area of 26 European states was justified by the German authorities including on the grounds of public order and internal security. A number of other Schengen states also introduced temporary border controls with their neighbours including France (on the basis of the terrorist risk), Austria (refugee arrivals), Denmark (refugee arrivals), Sweden (refugee arrivals), and Norway (refugee arrivals). At the time of writing the controls had been extended until 11 November 2018. By September 2015, the so-called refugee crisis in Iraq and Syria was gradually changing into a solidarity crisis by regarding forced migrants as a Schengen borders crisis. This privileged overtly the security of one state over the security of people fleeing danger and the institutions responsible for solidarity. In all cases the states claimed that their security was at risk because of the failure of some
state up the chain to control, register and fingerprint the refugees – the language of (in)security. The collision of refugees and terrorism in the language and practices of European states had taken place.

There were three main ways in which refugee movements were securitised by the EU in the period following the Paris attacks: border closure, hotspots, and relocation. The EU commenced using the terminology of hotspots to designate places in Greece (on some islands) and Italy where anyone arriving irregularly including asylum seekers were to be held and registered for the purpose of making an initial evaluation of their claim and then either relocating them (or at least some of them) elsewhere in the EU or expelling them. A complicated system for relocation from Greece and Italy was designed and adopted (in the face of great opposition from a number of Central and Eastern European Member States) for a temporary period from September 2016 and ending in September 2017. When it became apparent that relocation was not going to be a big success – 27,695 people were relocated from Greece and Italy to other Member States over the life span of the relocation decisions out of a promised 160,000 - the EU entered into an agreement with Turkey that irregular arrivals from Turkey would be sent back in a truncated procedure. They would be collected in hot spots whence return to Turkey would take place even if they were Syrian asylum seekers. But for the Syrians a 1 for 1 system was put in place whereby the EU would take a Syrian refugee directly from Turkey in exchange for the return of every irregularly arriving Syrian refugee (or asylum seeker) to Turkey from Greece. The idea was that people arriving irregularly in Greece and Italy would be stopped in the hotspots and then either relocated to another Member State, expelled outside the EU or (when arriving in Greece) sent to Turkey which would determine their asylum applications. For Italy, the point of departure is commonly Libya where no party has succeeded in consolidating a durable claim to governance over the whole of the territory since the fall of (former) President Gaddafi in 2011. So no deal like the EU Turkey one could be made with Libya, though undoubtedly that would have been the preference of a number of policy makers. Hotspots and relocation were legally based on the solidarity clause in TFEU but no effective remedy was included for refugees when

27. European Commission communication Back to Schengen COM (2016)120.
their right to non-refoulement guaranteed by the Refugee Convention, the Convention against Torture and the ECHR was at risk. Further, academic opinion regarding the safety of Turkey as a country of asylum for Syrian refugees has been overwhelmingly negative. ²²

One example of the way in which refugee movements were securitised by the EU was in the response to the humanitarian situation on Lesvos, Greece – one of the main places where hotspots were established. This included the differentiated granting of refugee status according to nationality a challenge to the principle of equality among refugees. ²³ A short hand that asylum seekers of some nationalities, in particular Syrians, were bona fide and others were not such as Afghans had consequences for the legitimacy of the hotspot regime. While Syrians and Iraqis were much more likely be given refugee status, others such as Afghans were more likely to be labelled as ‘economic migrants’ and refused any international protection status. ²⁴ The analysis that the authorities of Afghanistan, strongly supported by EU and US forces, were able and willing to protect their citizens was accepted by refugee determination authorities in many parts of Europe. The simple fact that Afghanistan was actually in a protected civil war was obscured. Many academic commentators have questioned the safety of Afghanistan for many of its nationals and consider that the civil war there is certainly sufficiently intense to justify providing humanitarian protection to Afghans in the EU. The theory was that those rejected would be expelled to wherever they had come from (usually Turkey) and become the burden (or opportunity) ²⁵ for that country not the EU. The practice was that expulsion was the exception and in fact most arrivals remained blocked on the Greek islands dependent on smugglers to get them further along their route or journey. ²⁶ Instead of reacting to the situation as one of a humanitarian nature, the EU took a security focused approach – obliging the

Greek authorities to control refugees movement off the islands by blocking ferry transport for them on the basis of specific identity documents. The Greek authorities agreed to permit only those assessed as vulnerable to leave the islands for Athens where a full range of services were available to asylum seekers and refugees.

Another example can be seen in the French Government’s response to the informal refugee encampments around Calais where people seeking to go to the UK accumulated in dreadful conditions. Calais as a magnet for people seeking to make asylum claims in the UK is an old story. In the late 1990s the Red Cross served a camp in Sangatte (a neighbourhood of Calais) where people congregated seeking to go to the UK. It was closed after an agreement between the UK and French authorities in 2002. The agreement included the UK accepting a substantial number of persons from the camp. However, the so called solution of ‘Sangatte’ was short lived. Calais is one of the closest ports to the UK from the continent and the place from which not only does the Euro-tunnel start ending in Dover but also the place where hundreds of thousands of vehicles arrive to cross by ferry to the UK (over 3.5 million per year). The possibility of managing to cross to the UK in this flow which includes cars, trucks, trains and buses makes Calais a destination for those seeking to move west. This actuality does not change with time but will only change when the UK is no longer an interesting destination (or removes border controls with France). The build-up of people living informally around Calais while seeking to leave France for the UK has occurred constantly since the UK put into place strong border control measures to prevent passage to persons without the right documents for regular passage from the late 1990s.

The Calais story has been around for 25 years yet it rises and disappears again as a policy crisis depending on the importance which political parties on both sides of the Channel place on border controls and the drama of their execution. The Sangatte experience was forgotten for a number of years though the phenomenon of people living irregularly there and seeking to catch a ride across the Channel continued. The political configurations in both France and the UK in the early 2010 permitted the issue to gather political salience again. Not to be outdone by the so called migrant/asylum crisis of 2015-

2016 on continental Europe with the movement of people across the Balkans into Austria, Germany and elsewhere, the Calais area became a matter of media attention again. This was also in part the result of the fact that some of the people who were tramping across the Balkans in search of safety had family or friends in the UK and hopes to get there to seek protection.

The French authorities sought to contain people by building a new camp out of shipping containers in 2016 and refugees were given three days to leave their informal camps and move into these. Those who entered the containers were fingerprinted and registered by the French authorities. The consequence of this, as the people themselves were all too aware, was that if they got to the UK, the UK would be able to identify them as the responsibility of France under the Dublin arrangements for allocation of responsibility for asylum seekers. In theory, if not in practice, they would be sent immediately back to France. But in any case they would have great difficulty entering the asylum system in the UK. So the solution offered by the French authorities would effectively frustrate the objective of the people living in the informal camp.

Further, conditions in the containers were poor, resulting in complaints by those who had been persuaded to move into them. In any event, the container option was no solution for the people who were supposed to be attracted by it as it made their objective of getting to the UK more difficult. Another French Government policy attempted in 2016 was to relocate people from the informal Calais camps to the south and east of France. This dispersal strategy failed because no durable reception conditions were put in place at the destinations so very rapidly those sent to the south and east were homeless again and without state assistance. The result was that many of those who had been relocated to the south or east went back to Calais because they wanted to go the UK.

The inability effectively to control the movement of persons, foreigners seeking asylum, coupled with the French authorities’ assurances to their UK counterparts that they would resolve the situation, gave rise to increasing use of violence. Media began to speculate on the possibility that terrorists were hiding among those in the irregular camps, a rumour which permitted the
escalation of violence in the state’s response. In a burst of rather excessive violence, the French authorities ‘closed’ the irregular camp in Calais in October 2016 following an agreement once again with the UK authorities that irregular departures to the UK would be stopped. Despite the French authorities’ attempts to clear the so-called Jungle in 2016, the informal camps in the Calais region persisted. Of course, this effort, highly mediatised as it was and of substantial expense to the French authorities did not end the arrival in the Calais region of people irregularly present in France but seeking to get to the UK. By April 2017 newspapers were reporting the ‘new’ jungle. However, the justification of the use of substantial violence against asylum seekers was based on their ambition to move and rumours of terrorist links. This wish to move led to these people becoming the legitimate targets of state violence.

**Justifying the unjustifiable?**

The intersection of anti-terrorism policy and asylum policy permits the justification of the application of greater state violence against people be they suspected terrorists or asylum seekers, refugees or migrants. The terrorist attacks in Paris in November 2015 coincided with the arrival of a few million asylum seekers and refugees primarily crossing into Europe from Turkey through the Balkans to get to places of safety – that is places where they were not subject to daily harassment and persecution. The arrival of people was viewed by some authorities in some European states as such a great danger to public order that even border controls on persons crossing between Schengen states had to be reinstated to bring order to the situation. In such a logic of control and the imperative to know who is crossing borders, the occurrence of terrorist attacks claimed by Islamic extremists in the Middle East provided a fertile environment for weaving together two quite separate issues: one a threat of terrorist attacks inspired by Islamic extremists, the other the arrival of more people than anticipated who sought international protection from parts of the world torn apart not least by Islamic extremists. Instead of separating the issues and dealing with them in their distinct policy and practice domains, a number of Member States and EU actors merged the two into one composite danger. This move then made possible the release of state violence against both suspected terrorists in a state of emergency and asylum seekers and refugees, a level and ferocity of state violence which is of questionable

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consistency with their constitutional protections and human rights obligations.

State violence has been made invisible by denying the right to leave countries in civil war such as Syria. The reason is that the protection of our citizens requires the violation of the human rights of others. Claiming the right to close borders allows those inside those borders to be less directly affected by the plight of those seeking international protection. A series of narratives work to change the image of solidarity towards refugees to an image of protection against invasion and the arrival of terrorists. But this transformation of the refugee into a risk and danger would not have been sufficient if without smart border controls and the creation of hot spots which displace the coercion elsewhere with the pretence that these technologies are innocuous and positive.
Chapter 5
After Paris, 13 November 2015
– a dance between France and the EU

“I am particularly concerned that counter-terrorism strategies pursued after 11 September have sometimes undermined efforts to enhance respect for human rights. Excessive measures have been taken in several parts of the world that suppress or restrict individuals rights, including privacy, freedom of thought, presumption of innocence, fair trial, the right to seek asylum, political participation, freedom of expression and peaceful assembly.”
Mary Robinson (former) UN High Commission for Human Rights 20 March 2002

This chapter examines how a series of high profile terrorist attacks in a very small number of EU states has resulted in very substantial new human rights challenges for the EU as a whole. The key Member State regarding these developments is France. This chapter constitutes the case study of this report which exemplifies the challenges to human rights protection which can occur even in liberal democracies when immediate and pressing problems of politically motivated violence termed terrorism result in substantial pressure on executives for action. In the next chapter on oversight we will examine mechanisms to alleviate and diminish the risk of negative human rights consequences of proposed anti- and counter- terrorism measures by ex ante supervision and oversight. This reflects the ECtHR’s concern about the failure of planning and organisation of anti- terrorism action by the Russian authorities in respect of the Dubrovka theatre siege.¹

A series of high profile terrorist attacks took place in 2015 and continued through to 2018 in France and a limited number of other Member States. In France on 7 January 2015 two assailants attacked the offices of the French satirical journal Charlie Hebdo and killed 12 persons, injuring another 11.

¹ Finogenov & Ors v Russia (App no 18299/03) 20 December 2011.
The assailants continued their attack two days later moving to a kosher supermarket and were killed by the police. According to Al Qaida Yemen which took responsibility for the attacks, the assailants were seeking revenge for satirical cartoons published in the journal and which offended their religious beliefs. The French authorities sought support in their condemnation of terrorism in particular on the grounds of religious intolerance and in favour of press freedom. On 11 January 2015 40 world leaders including a number of European heads of state participated in a rally of national unity against terrorism in Paris. The slogan “je suis Charlie” was widely adopted by people outraged by the attacks.2

On 13 November 2015, another series of coordinated attacks took place in Paris. First, three suicide bombers detonated their explosives at the Stade de France, a football stadium to the north of Paris.3 This took place during a football match. Secondly, men with automatic weapons shot customers sitting in cafes and restaurants at the same moment that another group launched an attack on a music venue, the Bataclan theatre, where 89 people were killed. In total 130 people were killed that evening by the attackers. This was the most important, in terms of numbers of persons killed or injured, terrorist attack in the European Union since the Madrid bombings in 2004.4 It also took place notwithstanding the high terrorist alert that France was under following the killings at the Charlie Hedbo journal in January 2015. Islamic State in the Levant claimed responsibility for the attacks of 13 November as retaliation for French airstrikes on targets in Syria. In the investigation which followed, it appears that the attacks had been planned in Syria but organized by a terrorist cell based in Belgium. Two of the attackers were Iraqis and all of them (the rest being French or Belgian nationals) had fought in Syria. Most of the attackers were killed at the scenes of the attacks and those who got away were the subject of a very considerable (and successful according to the authorities) manhunt.

It became apparent that some of the attackers had entered or re-entered the EU among refugees and migrants who were, at that time, crossing Europe in search of protection from the ongoing hostilities in Syria, Iraq and Afghanistan. The French Government declared a state of emergency introducing controversial powers to search residences without warrants.5 Two days

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3. These attacks will be referred to collectively as the Bataclan attacks.
after the attack, the French army launched its biggest bombing attack in Syria to that date. There was no rally of world leaders in France in respect of this second important attack in Paris.

The two attacks in Paris in 2015 were by no means the only terrorist attacks in the country that year. There had been a terrorist related stabbing in Nice in February, a rifle attack on the Thalys high speed train from Brussels to Paris in August that year and a series of attacks would take place after the Bataclan event in 2016 and 2017. This included a deadly attack in Nice in July 2016 and on the Champs Elysees in Paris 2017. A number of other EU countries also suffered terrorist attacks over the 2014 – 2018 period. Most dramatic were those in Belgium which included an attack on a Jewish museum in 2014 and at the national airport and various places in Brussels in March 2016. Germany was also affected by a series of one off attacks including a bomb attack in July and a Christmas market attack in December 2016. The UK suffered an attack in Manchester on 22 May 2017 in which 22 young people were killed and Spain an attack in Barcelona in August of that year. There is no unanimity in the press or among experts about the degree of relationship among the attacks but the majority of them had some relationship or were claimed by either Al Qaida factions or ISIS.

The events in Paris and the way the attacks were analysed and framed by actors in the political field including by authorities, academics, journalists and civil society allowed a policy pathway to be opened: more exchanges of personal data. Both French national authorities and EU framed the issue as one of finding new ways to share knowledge among anti- and counter-terrorism services. A counter-terrorism logic was envisaged by the (then) French prime minister and president which moved in the direction of practices associated with a ‘war’ on terror. This logic was unsuccessful both in France and the EU but it weakened the EU logic of anti-terrorism as criminal justice driven.

From a distance of four years, a consequence of the Paris and other terrorist attacks in the EU from 2014 onwards has been on the framing of the problem. It is often said that the EU rarely wastes a crisis from this perspective,

7. Collins, Thomas. “Manchester bombing: don’t blame the New York Times for printing leaked information.” The Conversation (2017). There were numerous smaller attacks in the UK over that period.
the apparent terrorism crisis of 2015 onwards, has had a profound impact on the institutional consolidation of anti- and counter-terrorism activities within the EU. The establishment of a Counter-Terrorism Coordinator in 2007 in the relatively grey area of competence of the Common Foreign and Security Policy was a political compromise of the time in respect of state claims to national sovereignty. 11 It survived the 2015 et seq attacks but its primacy in the field was challenged by new actors. EUROPOL, the EU's law enforcement agency, in 2016 established its European Counter Terrorism Centre designed as a hub for all EU activities in the field. 12

While EUROPOL had been responsible for the TE-SAT annual reports on EU Terrorism Situation and Trend Reports since 2007, the creation of the new hub provided it with much solicited resources and importance in the EU arena. The framing of anti-terrorism as a law enforcement concern and therefore within the remit of EUROPOL was accompanied by a widening of the remit of the agency towards a more intelligence oriented approach. FRONTEX, the European border and coast guard agency, also extended its activities in the field of terrorism. According to its 2018 Risk Analysis 13 the agency notes that its remit includes the fight against terrorism and that when amended, FRONTEX’s governing regulation included access to national and European databases for consultation purposes in pursuit of its objectives. The agency considers that borders provide opportunities for better countering terrorism. To this end its activities in screening, registration, document checks and voluntary de-briefing are all aids to the fight against terrorism. In particular it provides data to EUROPOL which while mainly focused on migrant smuggling “could possibly include information on terrorists”. 14

Another development would be the preponderance of the logic: join the dots. As a variety of attacks occurred around Europe but with particular force in France the push towards coordination and in the end interoperability of (some) databases, those containing personal data on third country nationals, became a solution to solve all problems. To make this logic work there needed to be some substantial obstacle for anti- and counter-terrorism authorities in some Member States which had the effect of conflating terrorism concerns with border control and law enforcement. For most state agencies in the field, knowledge is valuable and only shared where necessary and on a

reciprocal basis. Joined-up databases, arguable, would weaken the knowledge exclusivity of each agency and hence the value of their knowledge. The dots were the identities contained or captured in EU databases (see below).

Very rapidly after the Paris attacks the EU Council of Ministers began to work on ways to share information on their own nationals whom they suspected of involvement in terrorist activities. Many of these were the so called foreign fighters – EU nationals who had gone to zones in conflict (primarily Syria) to contribute to the armed insurrection against the forces of president Bashir al Assad. This initiated a very complex and fairly muddled politics because many EU states supported the opponents of Al Assad. Yet as the opponents of Al Assad became increasingly brutalised by the civil war in Syria, calls for revision of policy in many Western States followed fear of the radicalisation of the formerly well considered opposition and their engagement with the curious emergence of ISIS. That the ‘good guys’ had morphed into the ‘bad guys’ was at the heart of this change.

For young activists from EU states who had gone to the region to provide aid and succour to the embattled resistance, the transformation from ‘good guys’ to ‘bad guys’ was particularly violent. Everyone got tarred by the same brush of ‘Jihadi killers and maniacs’ by the Western press. The policy opportunity which this provided was the triumph of those who had argued for some time that the sacred cow of national citizenship should not be a shield against anti- and counter-terrorism information sharing activities. Suddenly there were a number of Member States whose authorities were willing to share information about their nationals who might be fighting in Syria. While substantial efforts were made to transform the Schengen Information System II (which contains a large section on third country nationals to be refused admission to the EU but also information on persons under surveillance) to accommodate this change of perspective, in practice it never got beyond an alert for border guards that someone whose details they had run through the SIS II system at the external border was subject to an alert. But border guards are not ‘real’ law enforcement agents. Their rights of arrest and investigation are generally limited. So the alert system was not considered sufficient. Instead, the EU criminal record system (ECRIS) which makes available to authorized users information about convictions of individuals in the EU by EU criminal justice authorities was brought into play.
Established in 2012, ECRIS provides a mechanism for the criminal justice authorities of Member States to request from one another information on convictions of specified individuals in other Member States. The revelation of the criminal justice history of an individual is considered, in the EU, part of the individual’s privacy. State authorities are not entitled to reveal such information unless legislation is in place which authorises such exchange of data in the specific circumstances. While this has been done in ECRIS, its purpose limitation was tightly tied to criminal justice which in turn limited the authorities with access to it. It would be difficult indeed to convince the relevant criminal justice actors to open access of the database to (non-judicial) anti- and counter-terrorism authorities. Yet, the political pressure was intense.

The solution found was to create a new ECRIS database which would only include information on third country nationals convicted of criminal offences. The argument made by the Commission was first “further horrific terrorist attacks in European cities have led to security issues for secure identification and generally the attitude towards data sharing and security has changed focusing on effectiveness and efficiency…Adoption of a new ECRIS-TCN Regulation to better protect the security of our citizens is one of the legislative priorities…”19 In the explanatory memorandum for the proposal, the Commission, as required by law, addressed the question of fundamental rights. It stated that the provisions were consistent with the EU Charter of Fundamental Rights and was without prejudice to the right to private and family life, the right to an effective remedy and to a fair trial and the presumption of innocence.20 No mention was made to the right to non-discrimination, which the measure clearly violates. The whole assumption of the proposal is that third country nationals are a greater security risk including in respect to terrorism than nationals of the Member States. Embedded in the logic of ECRIS-TCN is the argument that the privacy of foreigners is less protected as a human right than that of citizens. We will address this issue more fully below. The system is limited to third country nationals convicted by a criminal court in a Member State. However, this database will be open to a wider range of authorities than ECRIS, a matter which the EDPS raised in his (negative) report on the proposal.21 In an audacious move that has been successful so far, the Commission proposed that ECRIS-TCN included all persons who are dual nationals who thereby become assimilated to third country nationals and the quality of their citizenship of an EU state undermined.

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21. EDPS Opinion 11/2017 on the proposal for a regulation on ECRIS-TCN.
The stage was then set for the next move which is called interoperability. This is shorthand for connecting three EU databases on third country nationals and enhancing the search capacities so that all authorised users (to be determined by national authorities) can carry out simple searches which will turn up information held on multiple databases, personal data which has been collected under a variety of different privacy regimes and subject to a host of contrasting privacy protections. The personal data grab is the result of the politics of ‘join the dots.’ The EU’s primary response to enhanced terrorism threats is the outcome of the logic of never wasting a crisis. There is as yet little evidence that it provides real results in the anti- and counter-terrorism world but that it inscribes and perpetuates the inequalities in citizenship of EU citizens of minority ethnic origins in particular if there is any link with Islam is certainly an outcome. 22

The French state of emergency and human rights

In France, the (then) President, Holande declared a state of emergency on 14 November 2015 an act permissible under the French Constitution but for limited periods only. On 25 November 2015 the French authorities notified the Secretary General of the Council of Europe that it would be derogating from Article 5 in accordance with Article 15 ECHR. The state of emergency was extended five times and finally brought to an end on 1 November 2017 by President Macron on the adoption of new legislation providing for exceptional powers for law enforcement in the fight against terrorism. 23 Many aspects of the state of emergency have come in for criticism from a wide range of sources. The UN Special Rapporteur on the promotion and protection of human rights while counter terrorism stated in his 2017 Report in respect of the French emergency legislation regarding the widening of state surveillance powers: “The legislation has been criticized as providing the intelligence services with excessive, vaguely defined and highly intrusive surveillance powers, without adequate mechanisms of control and oversight (see CCPR/C/FRA/CO/5, para. 12).” 24

22. “The Special Rapporteur recalls that differential treatment of nationals and non-nationals, and of those within or outside a State’s jurisdiction, is incompatible with the principle of non-discrimination, which is a key constituent of any proportionality assessment (see CCPR/C/GBR/CO/7, para 24 (a) and CCPR/C/USA/CO/4, para. 24 (a).” para 33 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism A/HRC/34/61, 21 February 2017.

23. LOI n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme JORF n°0255 du 31 octobre 2017 accessed 8 June 2018; this was accompanied by the lifting of the Article 15 derogation.

France was subject to review in January 2018 under the UN’s Universal Periodic Review system regarding compliance with its human rights obligations. In preparation for the peer-to-peer review process, a compilation of official UN Human Rights Reports is produced on the country under review and made available. These documents reveal a number of human rights concerns regarding the extent and use of state powers in the state of emergency. In particular the following:

The institution of legislative and administrative measures to expand the powers of French authorities in the fight against terrorism: the Committee against Torture was concerned by reports of excessive use of force by the police during some search operations and recommended that France ensure that counter-terrorism measures did not infringe on the exercise of rights protected under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.  

In 2016, United Nations human rights experts stressed the lack of clarity and precision of several provisions of the state of emergency and surveillance laws, related to the nature and scope of restrictions to the legitimate exercise of the rights to freedom of expression, of peaceful assembly and of association and the right to privacy. In order to guarantee the rule of law and prevent arbitrary procedures, the experts recommended that France adopt measures for prior judicial control over antiterrorism measures.

A number of NGOs also criticised the practical measures taken under the powers granted to law enforcement in France according to the state of emergency. Human Rights Watch was among the most vocal. It produced a damning report on the extensive use of stop and search powers, search and seizure including in private homes and restrictions on movement evidenced in detail by some lawyers. The legislation passed to replace the state of emergency in November 2017 was also subject to criticism by HRW as inconsistent with France’s human rights obligations.

EU anti and counter-terrorism policy and the 2015 Paris attacks

The process towards ‘join the dots’ as the solution took a surprisingly short period of time to be rolled out. On 28 April 2015, the European Commission published its Communication setting out the European Agenda on Security.\(^{30}\) This was three months after the 14 January 2015 terrorist attacks in Paris on the offices of the satirical journal Charlie Hebdo. The EU security policy which followed that attack had the objective of ensuring that only people who live in the EU’s area of freedom, security and justice without internal frontiers are protected. While the weaving together of border controls and their absence with security was already present before the Paris attacks, it become explicit and dominant afterwards.

The European Agenda on Security called for a shared approach to tackling terrorism and other security threats. It set out three priorities – (a) developing a strong EU response to terrorism and foreign terrorist fighters. Already here the mixture of language of citizens and foreigners is pronounced. As regards the foreign terrorist fighters, the Communication states “European citizens continue to join terrorist groups in conflict zones, acquiring training and posing a potential threat to European internal security on their return.”\(^{31}\) The alleged foreign-ness of the terrorist fighters is somewhat contentious. (B) serious and organised cross-border crime is the second priority. This engages the issue of movement of persons across borders as it includes trafficking in human beings as well as organised crime groups involved in the smuggling of migrants. (C) Cybercrime is the third priority. This is the borderless crime par excellence. While border crime is the consequence of the existence of a border, cybercrime is very frequently presented as crime in a field (cyber) without border controls which is the source of the danger.

In the Agenda’s development of the theme: tackling terrorism and preventing radicalisation (which is how priority (a) is framed), an institutional approach is taken. The role of the EU’s law enforcement coordination agency, EUROPOL, is highlighted. Its terrorism expertise is presented as substantial and the Agenda calls for the bringing together of its anti-terrorism law enforcement capacities, pooling resources and maximising the use of existing structures, services and tools as available under a new umbrella a European Counter-Terrorism Centre (which came into existence in January 2016 and is based at EUROPOL).\(^{32}\) Its tasks are: (a) following ‘foreign terrorist fighters’ in other words EU citizens who are suspected of having engaged in hostilities in Syria, and related networks; (b) managing the EU-US terrorist financing

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tracking programme (TFTP) – a controversial agreement with the US to provide data on electronic financial transactions which pass through the EU; 33 (c) a decentralised computer network supporting Financial Intelligence Units; and (d) capabilities on firearms and explosive devices.

Examining the archives of the EU Council regarding the terrorism docket following 13 November 2015, a sombre picture emerges. The first Council document which makes reference to the Bataclan and other attacks of November is a note of the Council and Member States meeting within the Council on Counter-Terrorism on 20 November 2015. 34 The Conclusions commence with a sound and appropriate denunciation of the attacks and condolences for the victims and their families. Solidarity with France was expressed and congratulations offered to the French authorities for their decisive actions. The attacks are categorised as an assault on European values of freedom, democracy, human rights and the rule of law with which one would not disagree. It calls for accelerating the implementation of all areas which are covered in its agenda, including: (a) the exchange of passenger name records on flights within the EU, 35 (b) firearms – adoption of an implementing regulation on common deactivation standards on 18 November 2015. 36 This call is much more problematic as it indicates a belief in the correlation of movement of people and terrorism.

This focus would take further form three years later with a package of EU legislative proposals in 2017 37 to establish a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration). They commence with the latest formulation of the interconnection of border controls, movement of persons and terrorism. The first statement in the explanatory memorandum states “In the past three years [2015-2017] the EU has experienced an increase in irregular border crossings into the EU, and an evolving and ongoing threat to internal security as demonstrated by a series of terrorist attacks.” 38 The logic of the integration of threats – irregular border crossing and terrorism – is at the centre of the justification for far reaching incursions regarding the human right to privacy. The proposals would link together a number of disparate EU databases created for different purposes: EURODAC, which contains the fingerprints of asylum seekers (and persons irregularly crossing the external frontiers of the EU) primarily to determine which Member State is responsible for determin-

36. Regulation 2015/2403 establishing common guidelines on deactivation standards and techniques for ensuring that deactivated firearms are rendered irreversibly inoperable.
ning their asylum claim; the Visa Information System which contains all the information which third country nationals subject to a mandatory visa requirement must produce to obtain a visa; the Schengen Information System II, a networked database like system which includes identity information on third country nationals to be refused admission to the EU for a variety of reasons; the proposed ECRIS TCN database, which has not yet received legislative approval but would, if adopted, create a separate database of third country nationals (and dual nationals) with criminal convictions and the Entry Exit System database, which has received legislative approval and when implemented will create a database of personal data on all persons entering and exiting the EU and the proposed European Travel Information and Authorisation System (ETIAS) the EU’s version of the US ESTA scheme; an on-line authorisation procedure which all non-mandatory visa nationals would have to complete and have approved before travel to the EU. The linked systems would then be searchable by a range of officials engaged in law enforcement, policing and border control. Thus the proposal includes three existing databases, one which has been approved but not yet created and two which are in the legislative system.

The core elements of the system, as the EU Fundamental Rights Agency has helpfully set out are: 39

- a European Search Portal – ESP, to allow competent authorities to search multiple IT systems simultaneously, using both biographical and biometric data;

- a shared Biometric Matching Service – BMS, to enable the searching and comparing of biometric data (fingerprints and facial images) from several IT systems;

- a Common Identity Repository – CIR, containing biographical and biometric identity data of third-country nationals available in existing EU IT systems;

- a Multiple-Identity Detector – MID, to check whether the biographical and/or biometric identity data contained in a search exists in other IT systems so as to enable the detection of multiple identities.

The elephant in the room is the right to privacy linked to the right to non-discrimination.

The Human Rights Challenge

The Commission’s proposal for interoperability among the EU’s databases of personal information of third country nationals has not gone unnoticed by those agencies responsible for human rights in the EU. The European Data Protection Supervisor is an EU agency charged with ensuring that European institutions and bodies respect the right to privacy and data protection when they process personal data and develop new policies. It has three main roles: supervision, consultation and cooperation. On 16 April 2018 the EDPS issued Opinion 4/2018 on the Commission’s interoperability package. The Opinion criticizes the proposal as inadequately justified either on the ground that it is appropriate to the challenge or proportionate to the intrusion into the privacy of people whose data has been collected and stored in the different databases (and for different purposes). Further, the EDPS considers that the safeguards are insufficient to protect human rights (in EU speak – fundamental rights). The EDPS works closely with the European Data Protection Board (EDPB) composed of the data protection authorities of the Member States which is facilitated by the Commission. On 23 April 2018 it issued an Opinion (WP 266) on the Commission’s interoperability package. Like the EDPS it was highly critical of the proposal stating in its view “no evaluation of the specific security measures needed for these new EU-wide databases is foreseen. In addition, no analysis of less intrusive means to reach the goals set in these proposals has been provided to justify the choices made.”

The EU’s Fundamental Rights Agency was set up to provide expert advice to the institutions of the EU and the Member States on a range of issues. It is an EU agency which helps to ensure that the fundamental rights of people living in the EU are protected and reports to the European Parliament. On 19 April 2018 it also issued an opinion on the Commission’s package on interoperability. Like the EDPS and the EDPB, the FRA is highly critical of the proposals. It starts from the position that the new arrangements will interfere with the right to respect for privacy (Article 8 ECHR; Article 7 EU Charter of Fundamental Rights). It then examines whether there is a justification for such an interference and finds a failure of purpose limitation, legitimate objective and necessity.

42. As of 25 May 2018 the Article 29 Working Party ceased to exist and has been replaced by the European Data Protection Board (EDPB). This was the result of a new data protection regime coming into force in the EU which provides a strong statutory basis for the body.
Only the FRA report makes reference to the problem of discrimination.

Implicit in the interoperability proposals is the idea that the privacy of third country nationals can be the subject of greater intrusion than that of citizens. This also underlies the creation of a separate ECRIS database with only information on third country nationals’ convictions to which much more relaxed access is available. The argument, express or implicit is that the privacy and data protection of third country nationals in the EU may be protected to a lower standard than that of citizens. More state authorities can have access to the databases on third country nationals and on wider grounds than they can have to databases with information about EU citizens, something which is underlined by the interoperability proposals.

The question which then arises is whether this is lawful. Are states entitled to protect the privacy and data of their own citizens to a higher level than that which they apply to third country nationals? This question has yet to be answered by the Court of Justice of the European Union (or the ECtHR). However, the Office of the UN High Commissioner for Human Rights (OHCHR) has addressed this matter in its report on privacy in a digital age (A/HRC/27/37). Interpreting the right to privacy in the International Covenant on Civil and Political Rights, OHCHR states clearly that the right to privacy is also subject to the principle of non-discrimination contained in Article 26. According to OHCHR the privacy of citizens and foreigners must enjoy the same standard of protection against arbitrary interference. This position is supported by the UN Human Rights Committee’s concluding observations of the compliance of the USA with the ICCPR and in particular Articles 17 and 26 (CCPR/C/USA/CO/4, 23 April 2014) “measures to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity regardless of the nationality or location of individuals whose communications are under direct surveillance.” The international community as represented by the UN seems fairly clear that the right to privacy read in conjunction with the prohibition of discrimination means that the standard of protection of privacy and data of citizens and foreigners is a common one.

45. Only the FRA report makes reference to the problem of discrimination.
Conclusions

The relationship of well justified concern in one country about terrorism threats to the adoption of measures of dubious human rights consistency both in a regional organization and domestically is the story of this chapter. What is important about the impact of a series of attacks in France is that not only have they had a negative effect on human rights protection in that country but they have been a catalyst for the proposal of a system of interference with the right to respect for privacy of third country nationals (foreigners) which affects immediately 28 other countries (the EU Member States) most of which have been only most tangentially (if at all) affected by the conflict with ISIS. Many of these states on the Eastern side of the EU are far more caught up by what they see as state sponsored terrorism by Russia in the Ukraine. Yet, the human rights of people both inside and outside France and the EU will be profoundly affected if the current interoperability proposals go ahead. What is worth noting is the relative ease with which some actors are able to push the ‘security’ agenda into areas which are deeply problematic for human rights. The resistance within the governance structures of both France and the EU which recognised the problem were unable to reverse the slide away from human rights compliance. This raises the question what kind of democratic oversight is needed to ensure that this kind of slippage does not occur. In the next chapter we will examine some of the options which have been proposed and promoted for this purpose.
Chapter 6
Democratic Oversight in Europe: avoiding human rights violations before they happen?

“Intelligence services are explicitly prohibited from undertaking any action which contravenes the constitution or international human rights laws. These prohibitions extend not only to the conduct of intelligence services on their national territory but also to their activities abroad.”


Rule of law which incorporates, as an essential element, human rights is the foundation of successful anti- and counter-terrorism actions. As discussed in chapter 2, the UDHR states that human rights protected by rule of law is the defining characteristic which differentiates between the right of people to rebel against tyranny and oppression and terrorism. The same is true of anti- and counter-terrorism actions by states. To be lawful they too need to be authorised by law, to be proportionate to the threat to hand and necessary in a democratic society in accordance with the standard set by the E CtHR. For instance, all types of arms and weapons used by anti- and counter-terrorism forces against targets need to be authorised by law. If they are not then in the event that there is a claim to a human rights violation the state will be liable on this ground alone. 1

The plan of any anti- or counter-terrorism action must take into account the human rights of all those affected in a manner which maximises the protection of those rights and minimises the risks attendant by the action. 2 For instance, as the E CtHR has insisted, authorisation procedures must be subject

1. Finogenov & Ors v Russia (App no 18299/03) 20 December 2011.
2. Finogenov & Ors v Russia (App no 18299/03) 20 December 2011.
to control to ensure that they are not ordered haphazardly, irregularly or without due and proper consideration. Where in anti- and counter- terrorism actions, states authorise surveillance of individuals, which by its nature will be an interference with the right to privacy, the scope and review of the authorisation as well as the content of interception must be reviewed before the authorisation is given. This feature of ex ante control as an essential element of human rights was also highlighted by the Council of Europe Commissioner for Human Rights.

Establishing a sound legal basis for anti- and counter- terrorism action has been a subject of detailed consideration and examination by parliaments in a number of European countries and in the EU as well. At the centre of the issue has been how to design laws which underpin the activities of intelligence services which are compatible with European human rights standards. One of the key components of such legality has been oversight mechanisms. Simply put, if human rights violations are to be avoided in the context of states’ anti- and counter- terrorism actions then the first step is to ensure that those actions have a legal foundation. There must be a law which sets out what the parameters of such action can include and what is prohibited. That law needs to include mechanisms whereby the operation of the relevant services can be fully and effectively supervised including as regards their likely human rights impacts.

Police and criminal justice authorities tend to be fairly well regulated in Europe. They are subject to detailed laws which regulate their powers, the ways in which they operate and their objectives. Any deviation from these laws can result in severe sanction not least civil actions against the police for abuse of power or the rejection of evidence from criminal trials because of the improper way in which the information was obtained. Intelligence services, however, have grown up over time within a framework with much less clear legal rules. Many of the European services have been in existence for centuries and date from periods when the rule of law was weak. The need for democratic or judicial control was not generally appreciated as important for these services which were considered emanations of state sovereignty beyond the law. The necessity to provide a sound legal basis for intelligence services in Europe is still a contested subject.

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However, it is also important to remember that the lack of a legal basis and democratic oversight of intelligence services has also been a source of services’ vulnerability to human rights violations. As the ECtHR cited in its judgment in Al Nashiri 9 regarding the CIA’s choice of partner in Poland (and elsewhere in Europe) for detention centres “the CIA would be in charge, sole charge, of the operations and that if requested, the member countries would provide cooperation, as a general rule through military secret services; not the civilian services because, generally speaking, the military secret services are far less closely monitored, in so far as there is any monitoring, than the civilian secret services”. 10 What the CIA explicitly sought were detention facilities in which they could torture their victims, something which they could not do on US soil. The lack of oversight rendered military intelligence services in some European countries particularly vulnerable to the CIA’s approaches. The consequence was profound human rights violations which were the responsibility of the European states (see above chapter 1).

In this chapter we will examine how the legality of intelligence services and their activities have been underpinned in Europe. We will start with an overview of the EU’s agencies and their oversight and then look at the challenges from a human rights perspective. The pressure for oversight gained traction after July 2013 as a result of the Snowden disclosures about NSA large scale surveillance and the contribution made by some EU states to it. We will focus on three European states’ legislative activity in this area between 2014 – 2017. These states are France, Germany and the UK. Our perspective is on the extent to which human rights was an essential part of the laws adopted regarding the intelligence services and the extent to which human rights protection was included in the mandate of oversight mechanisms put into place.

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7. Guittet EP. La genèse de la coopération antiterroriste en Europe et l’implication de l’Espagne dans la (re) définition de l’identité européenne: de la raison d’Etat à la raison de la gouvernementalité européenne? (Doctoral dissertation, Paris 10). Guittet notes that one of the Spanish services proudly advises visitors that it is the direct continuity of the Spanish Inquisition.


9. Al Nashiri v Poland (App no 28761/11) 24 July 2014 paragraph 168. “According to our sources, the CIA determined that the bilateral arrangements for operation 24 June 2014 of its HVD programme had to remain absolutely outside of the mechanisms of civilian oversight. For this reason the CIA’s chosen partner intelligence agency in Poland was the Military Information Services (W_o_j_s_k_o_w_e_s_l_u_j_o_r_m_a_c_y_j_n_e_,_o_r_,_W_S_I_), whose officials are part of the Polish Armed Forces and enjoy ‘military status in defence agreements under the NATO framework. The WSI was able to maintain far higher levels of secrecy than the two civilian agencies due to its recurring ability to emerge ‘virtually unscathed’ from post-Communism reform processes designed at achieving democratic oversight. ....” citing the Parliamentary Assembly, Council of Europe Report Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report by Senator Dick Marty 7 June 2007.

Supervision of EU coercive agencies

As the powers of EU coercive agencies began to expand in the 2000s, concern for their oversight emerged. The agencies of particular concern were EUROPOL, Eurojust, the EU’s judicial cooperation body and Frontex, the European Border and Coast Guard Agency. Some concern was also expressed about EU INTCEN (at the time entitled Sitcen) the intelligence body of the EU’s External Action Service, but because EU competence is much restricted as regards this body, less progress on oversight was possible.

The LIBE Committee of the European Parliament commissioned a report which was highly influential on Parliamentary Oversight of Security and Intelligence Agencies in the European Union which was published in 2011. Among the recommendations of the report were that to achieve effective democratic oversight of the agencies, the European Parliament should focus on their policies, administration and finances. It should ensure that it receives threat assessments from the bodies in order to make its own assessment about security needs in the EU. Importantly, the report recommended regular dialogue between the European Parliament and the supervisory bodies of Eurojust and EUROPOL with sharing of knowledge and expertise to achieve oversight which is both statutory and democratic. Not surprising in light of the extraordinary rendition revelations (discussed above) the report proposed that the Parliament should have either a sub-committee or specialised non-parliamentary body charged with providing independent assessments of the human rights records of agencies in third states with which the EU bodies cooperate and in light of which any proposed information sharing or cooperation agreements would be reviewed (and made available to the Parliament). Access to classified information should be made available to the Parliament’s designated body as it considers necessary and relevant to its oversight mandate. A number of recommendations related to the organisation of the European Parliament to fulfil these new oversight functions.

Quite a number of the recommendations were taken on board. Importantly, with the study, the issue of effective and comprehensive oversight became a standard concern whenever new powers were proposed in legislation for any of the agencies. The Parliament uses its post 2009 extended legislative powers to achieve more comprehensive oversight mechanisms for the agencies. The fact that the EU agencies are all created by EU law in the late 20th century meant that they are much more susceptible to modern
oversight mechanisms than services which have very long and deep roots in sensitive areas of state sovereignty. For the three states we will examine, it took a paradigm shift in public perception of the legitimacy of intelligence services’ activities to bring about sufficient pressure to revise and underpin their activities in domestic legal regimes. This shift was brought about by the revelations of a US contractor, Edwards Snowden, about the extent of the US NSA’s large scale electronic surveillance activities and the complicity of European partners in the project.

The challenge of oversight and human rights

The expansion of the internet and other electronic media from the 1990s onwards has transformed the availability of personal information and data. These developments have had a tremendous impact on the ways in which personal data becomes available to a wide range of actors, both public and private, and the power of the individual to control access to his or her personal data. The commercialisation of this transformation has taken place rapidly with the development of new market participants with a whole menu of products. These are based on knowledge of individual choices and preferences gleaned from internet and related sources which can be sold to businesses so that they can refine their reach to their customers in a more precise manner.

While state bodies and most specifically intelligence services traditionally had the greatest access to information about people (in particular their own nationals) over a short period of time they feared finding themselves at a disadvantage in comparison with a transnational private sector. The private sectors’ capacity to peer into anyone’s private life was in the process of outstripping that of the state. There are a variety of reasons for this change in power relations which is not self-evident, bearing in mind the amount of information which state bodies collect and retain about their people. Various constitutional and civil rights-related rules hindered or prevented the sharing of personal data among different state actors (most common is the prohibition of access by other state bodies to information about citizens held by the tax authorities). The private sector was under no such obligation and it took some time for data protection authorities to start catching up with the private sector and squeeze out the worst practices of interference with individual’s right to protection of their privacy.

One of the most enticing capacities of the private sectors’ access to personal data from the perspective of intelligence services has been its apparent borderlessness. Unlike other government ministries which by and large only have information on their own citizens, residents and those foreigners who have applied for residence permits, the private sector through the tools it was developing to trawl the web and social media (often with purported consent of the data subjects) has a worldwide reach which is accompanied by capacities to identify the venues of consumers and their preferences, the tools which create saleable products for commercial entities. The possibility for intelligence services to have access to vast amounts of personal information about people living in far flung parts of the world was an exciting new possibility. What is important for our purposes is that the development of technology of the internet and its use by the private sector does not imply automatically that we are losing our privacy. Nor does it mean we have to live in a society of surveillance. Privacy can drive digital technology with appropriate restraints in law. The key is strong legal frameworks which include oversight and purpose limitations. The human rights issue was in the first instance the right to privacy.

There are multiple sources of the right to respect for privacy and the right to privacy. These include Article 17 ICCPR ratified by 170 countries including all in Europe and the Americas. Regional sources of the right to privacy include Article 8 ECHR and Article 11 of the American Convention on Human Rights (not ratified by the USA). The EU protects two related rights – the right to privacy and the right to data protection in Articles 7 and 8 of the EU Charter of Fundamental Rights. All of these sources of the right

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22. Article 17
   1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
   2. Everyone has the right to the protection of the law against such interference or attacks.
23. Article 11. Right to Privacy
   1. Everyone has the right to have his honor respected and his dignity recognized.
   2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
   3. Everyone has the right to the protection of the law against such interference or attacks.
24. Article 7
   Respect for private and family life
   Everyone has the right to respect for his or her private and family life, home and communications.
   Article 8
   Protection of personal data
   1. Everyone has the right to the protection of personal data concerning him or her.
   2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right
guarantee it to ‘everyone’ irrespective of citizenship. So international and regional human rights law is quite clear that the same high standard of privacy and the related right to data protection applies to both citizens and foreigners. However, this position is unwelcome to many commercial users of the internet and to the intelligence services which piggyback on the data harvest from these sources. They prefer the more limited sources of rights of national constitutions which frequently provide substantially different privacy rights to citizens and foreigners. Relying on national law, often constitutional, permits all sorts of slippage between the rights of citizens and foreigners including different standards of protection and entitlement. It also muddies the water as regards the practices of private sector enterprises which can legitimately claim that they cannot discern the nationality of users of the internet or telephones particularly on VoIP technologies.

The human rights consequences of mass surveillance do not end with privacy. As discussed in chapter 1, many human rights may be affected from the right to life (lethal drone attacks based on information gleaned from mass surveillance data) to the prohibition on discrimination (using mass surveillance data to profile on the basis of ethnic origin or religion etc).

**The impact of the Snowden revelations of NSA surveillance**

In June 2013, a former contractor for the US NSA revealed the astonishing extent of US intelligence service interception of personal data provided to the services mainly by enterprises in the communications field. The sheer volume of data being collected far exceeded public knowledge to date about state surveillance capacities and engendered a multinational controversy regarding the legitimacy of the practices. Until these revelations, the focus of transnational surveillance by intelligence services revolved around personal data collection, usage and exchange by the so-called Five Eyes: a post WWII intelligence alliance originally limited to the Angloworld (Australia, Canada, New Zealand, UK and USA). The alliance was gradually opened to an increasing number of third states based on their utility and intelligence prox-
mity in particular to the US agencies. 30 Edward Snowden’s revelations showed that the NSA and the Five Eyes plus alliance (which had grown to almost 18 countries related intelligence services by 2013) were not slow to start to capitalise on new functionalities the private sector was developing to collect and trace information on computer owners – SIGINT. The term SIGINT entered the general vocabulary, no longer an arcane term of intelligence services, describing (electronic) signals intelligence 31 as distinct from HUMINT which describes human intelligence, which by 2013 had been completely overshadowed by SIGINT. 32 The intelligence services began to enter into new arrangements, both coercive and voluntary with data services providers to enable them to have access to this treasure trove of personal data. 33

Many European intelligence services became caught up in the activities apparently initiated by the NSA, most spectacularly the British GCHQ but also to a substantial degree a number of other European intelligence services. 34 Secret, large scale, intrusive surveillance of millions of computers belonging to persons supposedly interconnected worldwide for activities regarding national security (transnational terrorism, crime, industrial espionage are the most commonly cited) have transformed the way intelligence services operate and the relationship between watchers and the watched. 35 A form of transnational westernised alliance has tried to pool their efforts to trace supposedly threatening communications among the overall global flows of digital communication. The voluntary diminution of a clear legal framework shared across the states whose intelligence services and companies were contributing to the capture of personal data provided an excuse for the collection and use in particular of transnational communications without effective oversight. This was particularly true when agencies and businesses could claim that national constitutional protections enjoyed by citizens of the state where the activities were taking place were not engaged. 36

As an increasing amount of information became publicly available about these programmes, so some state authorities became increasingly uncomfortable about the number of persons affected and the seriousness of the personal data interference which was taking place. A number of NGOs engaged with the issue seeking to uphold the right to respect for privacy. These concerns were translated into legal actions in a number of countries, coming before courts often less than ready to engage with the highly political context. One, however, stands out as having been willing to engage with the individual’s right of privacy – the Court of Justice of the European Union. In a seminal decision (Schrems), the court held that adequate protection of the privacy and personal data of EU citizens was not safeguarded by an European Commission decision and agreement with the US known as Safe Harbour, according to which private sector parties were authorised to transfer personal data back and forth across the Atlantic. The reason for the inadequacy of the arrangement was, according to the court, because US intelligence services had access to the data without protection for the individual’s privacy. The implication of the judgment is that the data of EU citizens (and residents) cannot be sent to the US without an interference of the individual’s right to privacy occurring. The justifications provided for this interference were neither sufficiently clear in law nor compelling to prevent a violation of the right to privacy and to data protection. Further, where personal data is stored in a country outside the EU, that country must be able to ensure that a level of data protection equivalent to that applicable in the EU applies. The US could not provide such an assurance of equivalence so long as the NSA has access to all data falling into the hands of private sector actors in the USA without adequate controls.

40. ECCLI:EU:C:2015:650.
This judgment put the proverbial cat among the pigeons. It let loose what had become an imperative for many commercial actors regarding the collection and use of personal data gleaned from the internet and related sources against the intelligence services and their insistence of access to this personal data. Either the private sector actors had to exclude the NSA from access or it would have to hold the personal data of EU citizens at least, far from the snooping eyes of the NSA in databases in Europe (or elsewhere). The judgment also raised the stakes enormously for oversight authorities responsible for protecting the right of people to respect for their privacy, primarily the Data Protection Authorities. While the case resulted from the failure of the Irish data protection authority to protect Mr Schrem’s Facebook account from transfer to the US (though the Irish DPA was strongly in favour of greater controls to protect his data), and thus was the result of an individual taking action to protect his own privacy (with the help of a foundation to assist with the costs) it was also the equivalent of a high voltage electric jolt to DPAs across the EU. Their role was effective transformed from friendly, sleepy observers and regulators of private sector activities generally seeking negotiated solutions to various data protection issues, into the equivalent of investigative magistrates charged with ferreting out data protection prohibited activities of other government departments, eg intelligence services, as carried out on the backs (or independently but this seems less the case) of private sector providers. Private sector providers had a new ally in re-establishing their reputations as protectors of their customers’ personal data in the form of the new role of the DPAs (and realised that competition for profit implied more and more interesting cryptography).

Into this rather toxic mix of rights, duties, adventurism, dubious opportunities and temptations, the threat of terrorism became central to the debate. For the intelligence services, continued access to the personal data which the private sector was amassing about people everywhere and anywhere in the world depended on a legally valid reason. State authorities’ access to commercial data collection activities or ‘curiosity’ about statistical abnormalities alone was insufficient to justify the interference with the right to respect for privacy. For an interference with the right to respect for privacy to be legitimate a limited number of reasons can be put forward. These grounds are established in international and regional human rights guarantees of the right. The investigation of crime is one, but this ground is firmly in the hands of the criminal justice authorities with whom the intelligence services do not always

have excellent relations. Tax avoidance is another, but presents equally problematic issues for the services faced with the territoriality and secrecy which is the culture of their tax counterparts. Terrorism, however, was a field in which the intelligence services have a legitimate right of action and where other state authorities were less dominant. In particularly, so-called Islamist terrorism had become a focus of governments and their intelligence services in a number of Member States. As we have seen, a spate of such terrorist attacks in the Belgium, France, Germany and the UK had heightened concerns in a substantial range of government departments regarding what might be or could be effective activity to counter this.

European human rights standards require that any interference with a human right, such as the right to privacy must be provided for by law (see Chapter 2 above). In response to public outcry following the Snowden revelations, a number of EU states revised the laws governing their civilian intelligence services. In these reviews, the legality of intelligence services’ anti- and counter-terrorism activities have been placed on a legislative basis (which was not always the case before) and made subject to a more codified oversight. The scope, intensity and powers of oversight have been to a large extent redrawn. The changing nature of the job of the intelligence services has placed increasing importance on data collection, management and interpretation in those activities. This has also changed the demands on oversight bodies and intensified the call for new and more effective powers for them. In some ways, the supervision of civilian intelligence services became closer to that exercised over their criminal justice counterparts (even if their military counterparts still appear to be beyond reach).

Supervising the activities of intelligence services

Three European states with substantial intelligence capacities, two implicated in cooperation with the NSA data harvest, revised their laws to clarify the powers of their services and the oversight mechanisms applicable to them. These were France, Germany and the UK. The first state to act was France,
adopting in 2015 a new law on surveillance of electronic communications. 52 The French intelligence services had been less affected by the Snowden revelations than their German and UK counterparts. The UK, which was most heavily implicated in the cooperation with their US counterparts, legislated in November 2016. 53 Germany, caught in the Snowden revelations, was next to revise its law in December 2016. 54 While the French and German laws have come into effect fully, the British law is only partially implemented as a month after its adoption, the CJEU struck down its predecessor (which shared many features with the new UK law) as incompatible with EU privacy standards. 55 A further reference from a British court on the compatibility of the new legislation with EU privacy requirements is pending at the time of writing. 56 Its resolution will determine what (if anything) the UK needs to amend to bring its standards into line with EU obligations.

Oversight reform in the three countries only affected some intelligence services. As the FRA report shows in Annex 2, France has six agencies, Germany has 19, and the UK three. Military intelligence in all three countries by and large escape oversight altogether. This is perhaps unfortunate in view of the vulnerability of military intelligence because of its lack of oversight, to manipulation by allied services in other countries. 57 The most highly regulated in terms of law and oversight in all three countries are the internal intelligence agencies which affect most directly the lives of citizens. External intelligence agencies are less regulated but have been touched by the new laws at least tangentially. In all three countries, the regulation of surveillance by internal intelligence agencies is subject to a higher privacy standard than that required of the external intelligence agencies or of surveillance activities which engage only communications outside the state. This reveals the profundity of some state actors’ commitment to the principle that citizens are owed a higher standard of privacy than foreigners. As argued above, this position is not consistent with international human rights law in particular the prohibition on discrimination.

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54. Gesetz über den Bundesnachtrichtendienst, BND law and the Law on parliamentary intelligence oversight.
55. C-203/15 Tele 2 & Watson ECLI:EU:C:2016:970. The law which the CJEU found incompatible was that which had been adopted very rapidly after the CJEU’s judgment C-293/12 Digital Rights Ireland ECLI:EU:C:2014:238 where it struck down the directive which required data retention by the private sector. The UK legislated a national legal basis for the obligation on the private sector to retain data.
57. See above regarding extraordinary rendition.
The legislative passage of the three acts varied somewhat in the intensity of parliamentary scrutiny which the proposed bills received. In France and Germany the bills were presented at the end of parliamentary sessions and were adopted in a rather quick manner without substantial debate and virtually no amendment. The UK law had a rougher ride through parliament being proposed on 1 March 2016 and not adopted until 29 November that year though critics were dissatisfied with the wide powers to adopt secondary legislation which deprive parliament of an effective future role in legislating use of powers.

One of the most noticeable aspects of legislation in France, Germany and the UK regarding the legal basis for the activities of a variety of intelligence services is the introduction and proliferation of supervisory authorities. These authorities have taken a variety of forms: parliamentary bodies, expert bodies, ombudspersons and national human rights institutions. However, as a range of scandals have affected the work of intelligence services, so diversification of supervisory mechanisms has been a common response. The new French law created the Commission nationale de controle des service de renseignement (CNCTR) with wide ranging powers in respect of surveillance by the interior intelligence service. It joined the Commission nationale de controle des techniques de renseignement and the Conseil d Etat special formation as expert bodies of oversight. The German law added a new Unabhängiges Gremium or independent committee to review the BND’s strategic surveillance of data coming from and received outside Germany and its legality. It also created a new Ständiger Bevollmächtigter, an institution of permanent intelligence oversight. These new bodies joined that G10 Commission (named after the provision of the constitution which protects privacy) and the Trust Panel (a rare body with ex ante powers) and the Control Panel. The UK created a new Investigatory Powers Commissioner to oversee the use of the consolidated powers in the IPA, bundling many of the previous oversight mechanisms into one.

59. Wetzling T. Germany’s Intelligence Reform: More Surveillance, Modest Restraints and Inefficient Controls.
63. Wetzling T. Germany’s Intelligence Reform: More Surveillance, Modest Restraints and Inefficient Controls.
In all three countries control by the executive was the first issue to be addressed. In France, the new law changed how coordination takes place within the executive. A coordinator responsible for ensuring consistency of action among agencies and implementation of the president’s instructions (including providing advice on priorities) was created. In the UK little changed on this front as the Joint Intelligence Committee remained in the executive driving seat. Similarly in Germany the new law did not change the Federal Chancellery’s role as supervisor of the BND.

The mandates of the various oversight bodies vary substantially. Perhaps the most interesting development in respect of electronic intrusive surveillance has been the role which the DPAs have assumed in all three countries. The engagement of the private sector as a passage for the collection of communications information for intelligence services has brought them into the picture more fully. One of the advantages that DPAs have in respect of oversight is wide powers and greater independence than some other types of oversight bodies. Further their powers are statutory and embedded as well in EU data protection law. Notwithstanding carve outs which exist in all three countries for national security, in all three countries the DPAs treat intelligence services as data controllers and thus subject to limitations on the processing of data.

The powers of expert bodies in the three countries vary. In France the CNCTR can only recommend to the prime minister that a surveillance measure be interrupted and any data collected destroyed. If the proposal is not followed the CNCTR can bring the matter to the Conseil d’Etat. But the CNCTR has complete and direct access to the implementation reports and registries regarding surveillance techniques, collected intelligence and transcriptions and extractions. In Germany the new Unabhängiges Gremium

67. Wetzling T. Germany’s Intelligence Reform: More Surveillance, Modest Restraints and Inefficient Controls.
68. Fundamental Rights Agency Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU Volume II: field perspectives and legal update October 2017, Vienna.
reviews the legality and necessity of the BND’s strategic foreign-foreign communications data surveillance and reviews requests for approval of surveillance measures where they relate to EU and Member State institutions. In the UK the IPA creates the Judicial Commissioner’s post, which will have the power to reject warrants. The IP Commissioner is also charged with keeping under review safeguards to protect privacy.

One of the weaknesses which the Snowden revelations made apparent was the lack of control over international intelligence cooperation. A serious problem of this kind of cooperation is the quality of the information exchanged and the use made of it by the partners. In all three countries the new legislation provides for some control over this aspect. In Germany the scope of oversight of activities undertaken in the context of third country agreements is dependent on the type of surveillance. However, the Unabhängiges Gremium has the power to control at all times foreign-to-foreign data transfers. In France and the UK executive approval of all agreements with third countries’ intelligence services is required but parliamentary oversight is excluded. Where information is communicated by foreign services or international organisations there is no oversight body with competence to review the information.

The UK’s IPA was caught by the CJEU judgment in Tele2 & Watson because it replaced an earlier piece of legislation which had been hurriedly adopted to provide continuity of obligations on telecom and other communications businesses to continue to retain communications data. As there were many provisions which remained the same in the earlier and subsequent legislation, the UK was caught out. Neither France nor Germany found themselves in such a difficult position vis-à-vis the courts and their new intelligence services laws. The human rights challenges to the IPA as articulated by the CJEU fall into four main categories. First, communications data even without content is personal data and “taken as a whole, is liable to allow very precise conclusions to be drawn concerning the private lives of persons whose data has been retained, such as everyday habits, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.” So retention of communications data, including meta-data and geographical data is personal data which is protected by EU law and part of
the individual’s privacy. This is data which is capable of being used to establish a profile of the person and can be even more sensitive than content data. Secondly, an interference with privacy (which may also be a breach of data protection) must be justified on one of the grounds set out in Article 8 ECHR (Article 7 EU Charter of Fundamental Rights) as discussed above in chapter 2. The necessity of the interference with the right to privacy must be justified. The CJEU held that the fight against serious crime and terrorism could not in itself justify “the general and indiscriminate retention of all traffic data and location data”. 75 This might be sufficient for more limited and targeted data retention but there needed to be clear and precise rules and effective safeguards (which the UK law at the relevant time lacked and which absence was carried through to the IPA). Thirdly, access to retained data must be subject to a prior review by a court or an independent administrative authority. This means that the bodies which are reviewing whether data can be accessed need to fulfil the EU’s rules on judicial independence. 76 Finally, anyone whose information is accessed must be notified once the potential to jeopardise the investigations has gone. 77 This requirement is particularly unwelcome by some agencies as the notification requirement means that people are made aware of the services’ activities in watching their personal communications and is likely to result in many more challenges to the lawfulness of that surveillance. Because of the enhanced risk of challenges by individuals once they become aware that they have been the subject of surveillance, senior officers in the intelligence services are more likely to be cautious about what they propose for authorisation. Further, the duty to notify people subject to surveillance after an investigation has finished plays havoc with mass or bulk surveillance. It is difficult to imagine how a general notification on the internet addressed to the subjects of large scale surveillance that their personal data has been the subject of an interference would work.

In respect of the UK’s IPA, there are problems with a number of provisions starting with the justification which is simply preventing crime (not even serious crime). Authorisations and warrants do not require judicial approval. The strict necessity and safeguards required may not be consistent with provisions allowing thematic and bulk surveillance. Further, the EU’s General Data Protection Regulation which had to be implemented by 25 May 2018, also creates friction with the IPA. It requires that data must be limited to what is necessary in relation to the purposes for which they are processed 78 which is difficult to square with general and indiscriminate data retention (as

75. Ibid para 103.  
76. C-403/16 El Hasani ECLI:EU:C:2017:960 “[T]he concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision.” Para 40 citing C-506/04 Wilson EU:C:2006:587, para 49.  
77. C-203/15 Tele2 Sverige AB and C-698/15 Watson ECLI:EU:C:2016:970 para 121.  
78. Article 5(1)(c) Regulation 2016/679.
per the IPA). The determination of the case currently pending before the CJEU on the UK legislation may clarify the UK’s position however, it may also create problems for the new French and German legislation.

Conclusions

The challenges to effective oversight of intelligence services’ intrusive electronic surveillance are substantial. Whistle blowers risk their jobs, reputations and sometimes even their lives in revealing egregious excesses in intelligence surveillance. Yet the executive response in the form of enhanced oversight is not always satisfactory.

While necessity in the fight against terrorism is often used to justify many diverse and contradictory policy measures, there is an important element of novelty in the technological capacities of the private sector. This fuels an impetus to ‘catch up’ among intelligence services. But technology does not need to be used to the maximum. In the interests of public good, many technologies are not – such as the capacity of cars to run much faster than speed limits. Commercially sold cars are designed not to achieve the speeds of cars designed for Formula 1 racing. A similar approach to technology may be valuable in the field of surveillance and oversight. The right of people to their privacy may require limits both in the private and public sectors. It is always instructive to remember that as the Berlin Wall fell and the totalitarian regimes in eastern European countries crumbled, among the first acts of the jubilant populations was to destroy the intelligence services’ archives – an expression of the desire for privacy and the disgust at intrusive state surveillance.

The solution to guaranteeing privacy in a digital age, to use the UN’s language, requires both state measures in the form of effective controls over their intelligence services and active participation by civil society. Oversight mechanisms have been put in place in multiple forms in many European states. Problems, however, continue, not least as regards the powers of these oversight bodies, their access to information, technical resources and independence. Yet, these bodies play a vital role in reining in excesses of over enthusiastic personnel in some intelligence services. The courts provide a long stop where human rights violations have taken place and in Europe seem ready to accept the challenge of guaranteeing and giving real effect to the human right to privacy. Whether this is a short or long term commitment remains to be seen. Democracy depends on privacy. The limits to state interference with that right must be clear and effective to permit democracies to operate within not only the rule of law but in full compliance with human rights.
Chapter 7
Conclusions

“Impunity for those who have committed gross violations of human rights and grave breaches of humanitarian law remains widespread. Impunity for violations induces an atmosphere of fear and terror. It produces unstable societies and delegitimizes Governments. It encourages terrorist acts and undermines the international community’s efforts to pursue justice under the law.”

Mary Robinson (former) UN High Commissioner For Human Rights, 20 March 2002

Human rights are not a discourse, they are law and an inherent part of rule of law. They are multi-level: national, regional and international intersect. It might be posited that anti- and counter-terrorism is a discourse around the image of the enemy between war and crime which becomes a practice. But human rights are real law interpreted by courts in individual cases.

In this report we have focused on five snapshots of controversies around human rights and anti- and counter-terrorism measures in Europe. The first and most important lesson regarding this relationship is that it is one of law, clear and precise in the context of human rights, but blurred and disputed in respect of terrorism. As we have set out in chapters 1 and 2, ‘human rights’ is not a discourse. It is a set of supranational rules to which European states have voluntarily committed themselves and in respect of which there are effective adjudication and enforcement mechanisms. Human rights are set out in laws and embedded in implementation structures which guarantee access by individuals to adjudication and if a violation is found remedies. Human rights law requires any state action which is challenged as resulting in a human rights violation to be set out in law. That law must be accessible to individuals and sufficiently precise that those affected by it can understand its scope and act accordingly. This is a common failing of anti- and counter-terrorism laws in Europe. As the FRA has pointed out in numerous states, even with legal advice it is unrealistic to think that a lay person can understand the surveillance legislation. ¹
In the first two chapters, we examine the snapshot from two perspectives, first what does human rights in the form of precise obligations on states and rights to individuals bring to actions in respect of anti- and counter-terrorism. Secondly, we turn the question around and examine how states in their struggle with terrorism engage with their human rights obligations. The purpose of this duality between chapters 1 and 2 is to reveal first, how Europe’s most important human rights court the ECtHR, applies the standard rules of human rights even to actions which the state itself claims are necessary to fight terrorism. The ECtHR does not modify human rights because states claim there is a terrorism imperative. Instead, in chapter 2 we demonstrate how states which claim that they need latitude to combat terrorism must bring all their actions within at least one of three possible routes: first that there is a margin of appreciation in how human rights are delivered which is left to states; secondly some human rights are subject to limitations which are open to states to claim in their anti- and counter-terrorism activities and thirdly in times of emergency states may derogate from the delivery of some rights. But all of these three mechanisms are themselves subject to judicial interpretation. States cannot simply claim that they have a margin of appreciation in their anti- and counter-terrorism actions, if their actions result in challenges of human rights violations, it is for the courts, and ultimately the ECtHR, to determine the scope of an exception. This will include examining whether the state’s action was indeed necessary or the result could have been achieved by less intrusive means. Further, states cannot necessarily escape their human rights obligations when they carry out violations outside of their own territory nor where they allow other states to carry out violations on their territory.

Next we move to the problem of defining terrorism. Starting from the preamble of the UDHR, the duty of all persons to rebel against tyranny and oppression we ask the question when does this right to rebel become terrorism? The UDHR states that the dividing line is where a state no longer protects human rights (as set out in the UDHR) through rule of law. The UN has not been able to reach agreement on a definition of terrorism. It can agree on conventions against certain acts, like hijacking airplanes or interfering with offshore platforms, including where these actions are politically motivated but less on what that motivation is which transforms the act into terrorism. Yet without a definition the UN has been very active in counter-terrorism coordination and support. The problem is apparent, as UNDP discovered in its study on terrorist groups carried out in 2017, 71% of the individuals interviewed pointed to ‘government action’ such as the killing of a family member

or a friend or the arrest of a family member or a friend as the transformative trigger or tipping point that pushed these individuals from radical ideas to taking the step to joining a violent extremist group. The report also indicates that over 75% of voluntary recruits to violent extremist groups place no trust in their politicians or in the state security apparatus.

It is not possible to discuss anti- and counter-terrorism measures in Europe without examining the intersection in official discourse and practices around migration and asylum as inextricably linked to terrorism. A range of political actors have drawn links not only through their discourses but even more importantly through their practices which bind these two subjects together. In examining the three dimensions of the (in)security continuum we reveal how this problematic framing is constructed and why it works as a political project. The outcome however, facilitates the justification of the use of increasingly extreme levels of state violence against migrants and refugees, in particular those who seek to move.

The 13 November 2015 attacks in Paris turned yet another page in Europe's approach to anti- and counter-terrorism with problematic consequences for human rights. The answer which EU leaders agreed on after the attacks as the road to a solution was to make the main EU databases containing personal data, including sensitive data, about third country nationals interoperable. So a search in one database would reveal information in any or all of them. But each database was constructed for a different purpose and with different objectives. For instance the Eurodac database contains the fingerprints of all asylum seekers in the EU but its primary purpose is simply to allocate responsibility for determining asylum applications to specific countries. The join-the-dots logic of linking up the databases has been strongly condemned by the EDPS, the FRA and other EU institutions responsible for human rights protection. But for the moment at least, their advice has been disregarded. This raises profound questions about the effectiveness of human rights oversight in Europe. The only bodies which states and the EU seem willing to respect are the courts. The intersection of rule of law through the courts with the protection of human rights seems to be the only way to protect human rights. From the experience with interoperability, the oversight mechanisms which are non-judicial are too easily disregarded.

In our final snapshot we focus on a specific human rights challenge of our times: mass or bulk surveillance of communications carried out by intelligence services. A US contractor, Edward Snowden, revealed the extent of NSA mass surveillance of communications data around the world, which included the participation of a number of European intelligence services. The first human right at issue is that to privacy. Other human rights can become implicated, even to the point of the right to life, for instance where the profiling of risk
through personal data collected in mass surveillance exercises results in the targeting of an individual for a lethal drone attack. The international outrage at the extent of NSA surveillance had a number of consequences. First the EU had a good hard look at the oversight of its coercive agencies and updated the powers of control. A number of EU states came to terms with the need for a legal underpinning of the work of their civilian intelligence services. Three in particular passed extensive laws between 2014 and 2016 to provide a legal framework and oversight mechanisms for their services with particular attention to mass or bulk surveillance. Yet, it is by no means clear that the laws adopted conform to the obligatory human rights standards. Challenges are outstanding.

Among the most important angles of these five snapshots has been the tremendous importance of civil society activism. First, so many of the victims of anti- and counter-terrorism actions and measures who have been able to challenge their states on human rights grounds, have only been able to do so because of the assistance and support they received from non-governmental organisations. Civil society organisations have also been central in challenging the categorisation of actions as terrorist and in resisting coercive supranational efforts to smear protest actions as terrorist. Similarly, the support for migrants and refugees which civil society has demonstrated in Europe is impressive. At the time of writing a new coalition government in Italy is seeking to criminalise volunteers from across Europe who have purchased boats and put their own lives at risk seeking to save from drowning migrants and refugees fleeing Libya. Many church groups have similarly been very active in providing succour to refugees and migrants. These groups challenge and refuse the (in)security continuum which merges migrants and refugees with terrorists as somehow related. Finally, in our last snapshot, without the dedication and activism of civil society, European states were unlikely to react to the egregious privacy abuses which their intelligence services were engaged in. All of the key court challenges were made possible because of the support provided by civil society bodies. These court decisions have shaken the sense of impunity within some intelligence services regarding their mass and bulk surveillance activities. The continuing efforts of many non-governmental organisations have kept the issue on the table and convinced numerous states in Europe to revise their laws and to insert more effective oversight into their legislation to control the snooping activities of their intelligence services.

Effective democracies need active civil societies to demand and at times extract from unwilling executives real and effective human rights compliance. While human rights obligations are entered into by states, it is civil society which makes them real and accessible to their intended beneficiaries – the people.

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Workshop 3: 16 June 2016: (Counter)Terrorism, Human Rights and Discrimination/Racism: A European Challenge
Workshop 4: 28 – 29 November 2016: Surveillance, Oversight and Human Rights in Counter Terrorism
Workshop 5: 14 December 2017: The Great Data Extortion Exercise: Investigating the Trump Travel Bans

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5 snapshots of current controversies

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