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At the Limits of the Rule of Law: EU-US Counter-Terrorism Cooperation

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At the Limits of the Rule of Law: EU-US Counter-Terrorism Cooperation

Participants of past EU-US summits have clearly expressed that terrorism remains one of the greatest challenges of our time. The United States and the European Union form a security community – with NATO as its institutional basis and democracy as its firm normative foundation. However, as far as cooperation in the area of counter-terrorism is concerned, the two partners differ significantly from one another, both in their evaluations of the challenges posed by terrorism and in their choices of adequate means for meeting these challenges. Ever since 9/11, the United States has considered terrorism as an existential threat to its security – one reaction to this threat was launching a military intervention in Afghanistan. The EU and its member states, on the other hand, view terrorism first and foremost as a problem of internal security to be dealt with by selecting appropriate policing measures. This difference of opinion is not simply a matter of interstate coordination. Quite to the contrary, the counter-terrorism measures that are currently under debate raise serious human rights issues and affect the balance between security and freedom in both Europe and the United States.

Enforcing transatlantic counter-terrorism policy poses a dilemma: deciding in each case between a strict orientation towards the principles of the rule of law or a greater emphasis on concrete protection measures and the concomitant security policy needs. From the European perspective, making this decision might in some cases mean having to choose between transatlantic cooperation and acting independently – in other words, deciding for or against cooperation with the United States. In such cases, acting independently might be important not only in view of immediate security policy concerns but also in view of issues of overriding importance.

Against this backdrop, the following questions arise: Has the policy of the Obama administration or the EU's enhanced capacity to act following the entry into force of the Lisbon Treaty given fresh impetus to the transatlantic community of values? Or do the differences stemming from the years of the Bush administration still remain? To paraphrase a frequently quoted thesis by Robert Kagan, how far are "Mars" and

"Venus" really from one another in the field of counter-terrorism? And finally: What are the implications of the transatlantic rift for future cooperation between the EU and the United States? The broad differences of opinion on important issues can be explained by the divergent perceptions in the EU and the United States of the relationship between security and the rule of law.

This study presents a differentiated picture of the situation:

1. The essential difference between the United States and the EU is that the United States sees itself at war against al-Qaeda and its terrorist affiliates, whereas the EU and its member states base their counter-terrorism efforts primarily upon policing measures and intelligence services. This is why the transatlantic partners differ markedly also in their interpretations of threat situations and their choices of measures in the fight against terrorism. The so-called Obama factor has not helped to overcome the conflicts that were provoked under the Bush administration. Its only noticeable impact has been limited to the area of data protection. Although most EU member states support US policy on the fight against terrorism or follow an approach that differs only slightly from it, there are, nevertheless, fundamental differences concerning the objective of data protection and the passenger data agreement, extraordinary renditions of suspected terrorists, as well as the closure of the detention facilities in Guantánamo and Bagram. The more that the parliaments get involved in transatlantic relations, the less cooperation there is, as the political assessments of the legislative chambers on both sides of the Atlantic regarding the adequate means to combat international terrorism are more divergent than ever.

2. An overview of the areas of cooperation between the United States and the EU shows that this cooperation can take very different forms. It also demonstrates that transatlantic cooperation does not necessarily improve the conditions for complying with the principles of the rule of law. As far as terrorist lists and data protection are concerned, the EU's standards of legal protection have been set high. The Union has also been dealing – albeit hesitantly – with the issue of taking in Guantánamo inmates. On the other hand, EU member states prefer to turn a blind eye on extraordinary renditions and secret detention centres in Europe. In addition, many member states have been providing indirect support to the United States in detaining and killing terror suspects – amongst them also EU citizens – in Afghanistan.

3. There is a deep division in approaches to transatlantic counter-terrorism policy when it comes to dealing with human and civil rights. Most measures listed in the Stockholm Programme and concerning the internal space of the European Union aim at ensuring that listed terrorist suspects have the right of access to a court. However, outside Europe and North America, one can observe that the protection of fundamental rights of EU citizens has deteriorated and basic human rights are being disregarded – the practices used in the United States detention facility on the Bagram airbase in Afghanistan as well as drone attacks on suspected terrorists are examples of this trend. The EU and its member states have by no means taken on the role of firm defenders of human rights, but instead have either passively accepted US policy or even actively supported it.

4. The relationship between security and the rule of law will remain precarious as long as the EU cooperates with a partner that fights a non-state actor by military means. In the medium term, the constant manoeuvring at the limits of the rule of law is bound to impact the credibility of European Justice and Home Affairs policy. For this reason, it is important to clarify the status of the principles of the rule of law in transatlantic counter-terrorism cooperation. Three options for determining the relationship between international and transnational cooperation, on the one hand, and the rule of law, on the other, are conceivable. The first one consists in focussing strictly on security and strengthening the executive actors in Europe. The second option emphasises adherence to the principles of the rule of law, accompanied by a full parliamentarisation of this policy area. However, considering the fact that close cooperation with the United States is a cornerstone of both German and European policy, a third option – sensitive management of the emerging legal grey areas – seems most likely to be chosen. A first step in this direction would be for the member state to openly name the grey areas and publicly thematise the impact these have on transatlantic counter-terrorism cooperation.

New Legal and Political Framework

The political and institutional framework for transatlantic cooperation has, contrary to expectations, changed for the worse since the beginning of 2009.[1] Although President Obama's White House is marked by a new style of policy-making, this has had no substantial impact on practical policy. The United States still sees itself at war against al-Qaeda and its terrorist affiliates. The EU and its member states, on the other hand, combat international terrorism above all with policing measures. In addition, on the legislative level, the transatlantic partners have moved even further from one another. In Europe, the Lisbon Treaty strengthened the European Parliament and, consequently, brought questions of data protection and civil rights to the fore. In the United States, in comparison, the Republican Party won the majority of seats during elections for the House of Representatives in November 2010, meaning that security will again be given priority over civil rights.

Legal Framework in the EU: Prioritising Prevention

The EU considers international terrorism as one of the biggest threats to its security.[2] However, since the very beginning, the Union has also recognised the importance of respecting human rights. After the terrorist attacks in Madrid (2004) and London (2005), the member states of the EU adopted their own counter-terrorism strategy[3] at the end of November 2005. In the document, the EU proclaims to "combat terrorism globally while respecting human rights and allowing its citizens to live in an area of freedom, security and justice". The focus is particularly on *prevention*. By means of military and civilian missions under the auspices of the former European Security and Defence Policy and the current Common Security and Defence Policy, the EU's foreign policy aims at improving the Union's security environment and thereby influencing the conditions for radicalisation and reducing the propensity to violence in third states. As examples, the EU lists its mission to contribute to border protection in Rafah (Gaza) as well as the missions in Ramallah and Afghanistan.[4]

The self-imposed commitment of the EU to respect human rights and international law in its counter-terrorism policy is also expressed in the Stockholm Programme[5] of April 2010. To implement the programme, the Commission published a document listing future legislation in the area of Justice and Home Affairs. The document contains altogether 170 different proposals to be adopted by 2014. Particularly important are the proposals to improve data protection in the EU, to strengthen the rights of defendants in criminal proceedings, to establish a European Passenger Name Record, and to introduce an entry-exit system. The EU emphasises that all legislative proposals must respect the Union's Charter of Funda-

1 For a rather optimistic outlook, see Anthony Dworkin, *Beyond the "War on Terror": Towards a New Transatlantic Framework for Counterterrorism*, London: European Council on Foreign Relations, May 2009 (Policy Brief; 13); Wyn Rees, "Securing the Homelands: Transatlantic Co-operation after Bush", in: *The British Journal of Politics and International Relations* 11 (2009), pp. 108–121; Richard J. Aldrich, "US-European Intelligence Co-operation on Counter-Terrorism: Low Politics and Compulsion", in: *British Journal of Politics and International Relations* 11 (2009), pp. 122–139.

2 Cf. *A Secure Europe in a Better World. European Security Strategy*, 12 December 2003, <http://ue.eu.int/uedocs/cmsUpload/78367.pdf>.

3 The most recent action plan on implementing the strategy was published at the end of November 2009. Cf. Council of the European Union – EU Counter-Terrorism Coordinator (CTC), *EU Action Plan on Combating Terrorism*, 15358/09, Brussels, 26 November 2009, pp. 1–33; Annegret Bendiek, *Die Terrorismusbekämpfung der EU. Schritte zu einer kohärenten Netzwerkpolitik*, Berlin: Stiftung Wissenschaft und Politik, August 2006 (SWP-Studie 21/2006); Andreas Maurer/Roderick Parkes, *Democracy and European Justice and Home Affairs Policies under the Shadow of September 11*, Berlin: Stiftung Wissenschaft und Politik, December 2005 (SWP Working Paper 11/2005).

4 Cf. Markus Röhrl, "Internationale und europäische Zusammenarbeit", in: *Zeitschrift für Außen- und Sicherheitspolitik*, 3 (2010) 3, pp. 289–298; Ronja Kempin/Muriel Asseburg (ed.), *Die EU als strategischer Akteur in der Sicherheits- und Verteidigungspolitik? Eine systematische Bestandsaufnahme von ESVP-Missionen und -Operationen*, Berlin: Stiftung Wissenschaft und Politik, December 2009 (SWP-Studie 32/2009), pp. 150–163.

5 "The Stockholm Programme – An Open and Secure Europe Serving and Protecting (2010/C 115/01)", in: *Official Journal of the European Union*, C 115/1, 4 May 2010.

mental Rights. In the case of data retention, this means prioritising the protection of citizens over the fight against terrorism. To this end, the EU plans to reconsider the rules of data retention so that the principle of proportionality will be better taken into account. Last but not least, the EU underlines its will to play an independent role in the fight against terrorism by publishing a draft for an "EU internal security strategy".

By introducing the Charter of Fundamental Rights and stating the Union's aim to join the European Convention of Human Rights, the Lisbon Treaty ensures that the EU's counter-terrorism policy is, more than ever, anchored within the framework of the rule of law and international law. Article 21 of the Lisbon Treaty declares that the principles of the rule of law as well as the protection of human rights and international law are the guidelines of the EU's external action. Article 83 of the Treaty on the Functioning of the European Union, on its part, extends the use of the ordinary legislative procedure to the fight against terrorism and organised criminality. In practice, this means that the European Parliament is allowed to be involved in drafting legal acts in this policy area. Also, international agreements falling within the jurisdiction of this policy area need to be approved by the European Parliament.

Counter-Terrorism Policy of the United States: No Demilitarisation

When Barack Obama took office in January 2009, a majority of the general public in Europe interpreted this as a hopeful sign and a promise of a new beginning.[6] Also, the declaration of US Secretary of State Hillary Clinton at the end of March 2009 that the United States would no longer use the term "war on terror" was met with great approval.[7]

In the United States, the strategic orientation of counter-terrorism policy is laid down in the National Security Strategy (NSS).[8] Barack Obama presented his first NSS at the end of May 2009.[9] The preamble of the document states that "for nearly a decade, our Nation has been at war with a far-reaching network of violence and hatred". Expressions such as "Jihad", "radical Islamism", and "terrorism" are avoided in the whole text to distance it from the National Security Strategies of Obama's predecessor, George W. Bush, that date back to 2002 and 2006. Obama's chief counter-terrorism advisor, John Brennan, justified the terminology used in the NSS by noting that the leaders of al-Qaeda are "nothing more than murderers" who cannot claim to be religious leaders or to defend a holy cause.[10] At the same time, it has to be noted that Obama's NSS does not aim at demilitarising the fight against terrorism. Consequently, no approximation to the European perception of counter-terrorism as an issue to be dealt with by policing measures is in sight. On the contrary, the NSS simply replaces the old term "war on terror" with a new one: the United States is now "at war against al-Qaeda and its terrorist affiliates". This is why the Obama administration will take the fight against terrorism to places where terrorist attacks are planned and terrorists are trained: "to Afghanistan, Pakistan, Yemen, Somalia and beyond".[11]

In the NSS of 2010, the Obama administration confirms its will to achieve multilateral cooperation with old and new partners.[12] The basis of this cooperation

6 Peter Rudolf, *Renaissance des Multilateralismus? Neuer Führungsanspruch der USA und transatlantische Beziehungen*, Münster 2009; Peter Rudolf, *Barack Obama's Afghanistan/Pakistan-Strategie*, Berlin: Stiftung Wissenschaft und Politik, May 2010 (SWP-Studie 11/2010).

7 Andrian Kreye, "Bushs Kriegsrhetorik hat ausgedient", in: *Süddeutsche Zeitung*, 1 April 2009.

8 Interview with Mary Lee Warren, Senior Justice Counselor for the EU and International Criminal Matters, United States Mission to the EU, Trier, 7 June 2010.

9 *National Security Strategy 2010*, Washington, D.C., May 2010, <www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf> (accessed on 20 October 2010).

10 Matthias Rüb, "Amerika: Im Krieg gegen al-Qaida. Obama legt erstmals Nationale Sicherheitsstrategie vor", in: *Frankfurter Allgemeine Zeitung*, 28 May 2010, p. 5.

11 The NSS of 2010 is the first one to deal in greater detail with the issue of "home-grown terrorism". This comes against the backdrop of a terrorist attack in Fort Hood, Texas, in November 2009 and the attempted terrorist attacks on a Detroit-bound passenger aircraft on Christmas Day and later in Times Square. The threat posed by terrorists who were born or have been raised in the United States has increased in recent years. The terrorist network al-Qaeda has intensified its efforts to recruit American citizens and legal immigrants to carry out terrorist attacks on the United States. This has brought a new, internal dimension to the fight against terrorism. The United States is not only at war with a transnational network, it also fights terrorism irrespective of territorial borders.

12 Cf. Harold Hongju Koh, "The Obama Administration and International Law", Annual Meeting of the American Society of International Law, Washington, D.C., 25 March 2010, pp. 1–14, <www.state.gov/releases/remarks/139119.htm>; Philip H. Gordon, "The Obama Administration's European Agenda, Thursday, 17 November 2010", <www.state.gov/p/eur/rls/rm/2010/151110.htm> (accessed 18 November 2010).

is to be international law and the United Nations is granted a new status. However, by "declaring war" on al-Qaeda, the US administration simultaneously takes up a political position with far-reaching consequences that are likely to cause opposition not only in Europe. The declaration of war on "al-Qaeda and its affiliates" creates a permanent state of emergency. This course of action generates conflicts between the humanitarian international law applied in war, on the one hand, and the national and international legal provisions that apply to policing missions, on the other.

To make matters worse, all past attempts to work out a universal definition of terrorism within the framework of the United Nations have failed. The United States still claims the right to act unilaterally and to use military means in cases in which the UN refuses to support it. The United States justified its military actions in Pakistan and Yemen by pointing to its right to self-defence and did not even try to get formal authorisation from the Security Council. In sum, US counter-terrorism policy will be characterised by an instrumental use of multilateral structures also under President Obama.[13] The essential difference between the United States and the EU remains that the United States combats terrorism by military means, whereas the EU and its member states concentrate on policing and intelligence measures.

Transatlantic Declarations with Little Substance

Regardless of these differences, the threats posed by terrorism are assessed in a similar manner on both sides of the Atlantic.[14] The efforts to take coordinated action are also apparent. Former EU Justice Commissioner Jacques Barrot saw in 2009 "a chance for a new partnership between Europe and the United States"[15] and called for the creation of a "transatlantic security zone". Since mid-2009, four EU-US declarations on counter-terrorism have been adopted in quick succession, with the first one concerning the closure of the detention facility in Guantánamo and future counter-terrorism cooperation based on international law and respect for human rights.[16] This declaration was followed four months later by another one on enhancing transatlantic cooperation in the areas of justice, freedom, and security.[17] The EU-US Joint Declaration on Aviation Security, adopted on 21 January 2010 in Toledo, Spain,[18] substantiated the preceding general declarations of intent and created a common basis for dealing with attempted attacks on aviation. The "Toledo declaration" is, however, not an official EU-US statement, as not all EU member states agreed on the text. The latest EU-US declaration, dating back to June 2010, emphasises the necessity to respect both international law and human rights law and backs an enhanced cooperation between intelligence services.[19] According to a report prepared by EU Counter-Terrorism Coordinator Gilles de Kerhove for the European Council, there has so far been "no significant counter-terrorism investigation" in Europe in which US support had not played a crucial role.[20] This is a clear indication of the partners' willingness to cooperate. Since 9/11, the EU and United States have extended their police and judicial cooperation. To prevent, detect, and prosecute criminal offences, both allow one another to access personal data of their citizens.

13 Johannes Thimm, *Whatever works. Multilateralismus und Global Governance unter Obama*, Berlin: Stiftung Wissenschaft und Politik, September 2010 (SWP-Studie 23/2010).
14 Cf. Europol, TE-SAT 2010, *EU Terrorism Situation and Trend Report*, <www.consilium.europa.eu/uedocs/cmsUpload/TE-SAT%202010.pdf>.
15 "Interview Justizkommissar Barrot: Ein transatlantischer Sicherheitsraum ist nötig", *Euronews*, 20 January 2009, <http://de.euronews.net/2009/01/20/jacques-barrot/>.
16 Cf. Council of the European Union, *Joint Statement of the European Union and Its Member States and the United States of America on the Closure of the Guantanamo Bay Detention Facility and Future Counterterrorism Cooperation, Based on Shared Values, International Law, and Respect for the Rule of Law and Human Rights,* 15 June 2009, <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/108455.pdf>.
17 Cf. Council of the European Union, *EU-US Statement on "Enhancing Transatlantic Cooperation in the Area of Justice, Freedom and Security"*, Adopted in Washington D.C. on 28–29 October 2009, <www.dhs.gov/xlibrary/assets/privacy/privacy_eu_us_joint_statement_oct_2009.pdf>.
18 Cf. Council of the European Union, *U.S.-EU Joint Declaration on Aviation Security*, 21 January 2010, <www.dhs.gov/ynews/releases/pr_1264119013710.shtm>.
19 Cf. Council of the European Union, *EU-U.S. and Member States 2010 Declaration on Counterterrorism: Forging a Durable Framework to Combat Terrorism within the Rule of Law*, <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114874.pdf>.
20 EU Counter-Terrorism Coordinator (CTC) to Council/European Council, *EU Action Plan on Combating Terrorism*, 15358/09, 26 November 2009, <http://register.consilium.europa.eu/pdf/en/09/st 15/st15358.en09.pdf>.

However, the declarations not only represent a well-functioning transatlantic cooperation. They also make it clear that the EU finds it difficult – even after the entry into force of the Lisbon Treaty – to appear as a unified actor. The Union's actions often remain non-binding because it has only limited legal competencies vis-à-vis its member states. To offer an example, the EU cannot decide whether individual member states should take in prisoners from the detention facility in Guantánamo. Time and time again, the member states have shown a lack of resolve in working out a common position, as exemplified with the Toledo declaration concerning aviation security. Critical declarations and demands of the European Parliament are followed by significantly less critical actions of the executive authorities of the member states. And while the European Parliament continuously insists on human rights and data protection, 21 of the 27 EU member states took or are taking part in the US-led Operation Enduring Freedom in Afghanistan – either directly by sending troops and arms or by offering indirect support.[21] After all, the member states themselves make the final decision about participating in military operations and other international missions, regardless of whether these involve fighting terrorists or not.

At the same time, the EU has only limited legal competences. For this reason, the Union remains, for the time being, only one of the many partners in Europe when it comes to questions related to counter-terrorism.

21 Belgium, Czech Republic, Cyprus, Denmark, Germany, Estonia, France, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Poland, Portugal, Romania, Sweden, Slovakia, Slovenia, Spain, United Kingdom.

Problematic Issues in Transatlantic Cooperation

Counter-terrorism cooperation between the EU and the United States is marked by a great degree of diversity and heterogeneity. This results from the fact that while the European Parliament and the European Commission set high legal standards in accord with the principles of the rule of law, in practice the EU's member states seldom live up to them. Above all, in view of protection against concrete terrorist threats, the member states value the results of investigations and proceedings even when these have been obtained by means that violate the Union's standards. The different areas and forms of transatlantic cooperation have differing impacts on the principles of the rule of law.

Terrorist Lists

Since the terrorist attacks of 9/11, individual nations like the United States but also other actors such as the United Nations and the European Union have been aiming at systematically freezing the financial assets of terrorists. One of the most important instruments to achieve this goal is compiling lists of individuals and organisations that are suspected of involvement in terrorist activities. People are often placed on a terrorist list without due judicial process and on the basis of undisclosed intelligence. Once on the list, terrorist suspects are denied access to their accounts and thus cut off from domestic and international transactions. The new US administration, just like the old one, is directing its counter-terrorism strategy at both the potential channels and the sources of terrorist funding. The government has demanded stricter customer due diligence requirements for banks in order to combat money laundering and increased the scrutiny of donations originating in the rich Gulf countries. The authorities has also investigated all Islamic charities and, furthermore, placed them under the supervision of either the US State Department or the Treasury. If an Islamic charity wants to send money abroad, the transaction now has to be approved by the Federal Reserve.[22] A rejection of this policy, which was started already under the Bush administration, is not foreseeable.

Compiling terrorist lists is very problematic from the perspective of those upholding the rule of law. The source of information is often a piece of data received from a friendly intelligence service. For political reasons, these sources cannot be disclosed in court and the information can thus only seldom be verified. Individuals and organisations on a terrorist list can end up having to prove their innocence without knowing what they are accused of.[23] In practice, the listing procedure limits the right of access to a court. Thus, it openly conflicts with the principle of the due course of law and the international legal obligations of the EU member states.[24] The right to a fair trial and the right of defence are laid down not only in the national constitutions of all member states, but also in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, as well as in Article 6 of the European Convention on Human Rights.

Despite this, the idea of compiling terrorist lists attracts little criticism in the EU. Instead, the lists are seen as a necessary instrument to take action when there is not enough incriminating evidence against a person or an organisation, or when this evidence cannot be disclosed.

22 Cf. Viktor Kocher, "Terrorgeld, Almosen und Islam-Feindbilder. Die Folgen der Terrorbekämpfung für die humanitäre Arbeit", in: *Neue Zürcher Zeitung*, 21 September 2010, p. 9.
23 Cf. Kathrin Peiffer and Patricia Schneider, "Menschenrechte gelten doch auch für Terrorverdächtige. Das Urteil des EuGH zur Umsetzung von VN-Sicherheitsrats-Resolutionen und die Auswirkungen auf die Terrorismusbekämpfung durch gezielte Sanktionen mit Hilfe von Terrorlisten", in: *Hamburger Informationen zur Friedensforschung und Sicherheitspolitik* 44 (December 2008), pp. 1–12 (7).
24 For the legal discussion, cf. Takis Tridimas, "Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order", in: *European Law Review* 34 (2009) 1, pp. 103–126; Gráinne De Búrca, "The European Court of Justice and the International Legal Order after Kadi", in: *Harvard International Law Journal* 51 (2009) 1, pp. 1–49; Piet Eeckhout, "Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolution. In Search of the Right Fit", in: *European Constitutional Law Review* (2007) 3, pp. 183–206.

The listing and de-listing procedures themselves, however, have been heavily criticised.[25] The criteria according to which individuals, groups, and entities involved in terrorist activities can be put on the EU's terrorist list are defined in Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and in Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism. The persons on the list are subject to enhanced measures related to police and judicial cooperation in criminal matters within the framework of the Treaty on European Union. In addition, the financial assets of these persons are frozen. All requests to be taken off the list submitted by listed persons, groups, and entities, or by member states and third states, are discussed by the "Common Position 931 Working Group". Only after this does the Council decide about reviewing the list. In July 2010, the Council was forced to take a number of organisations off its terrorist list because there were no sufficient legal grounds for keeping them listed.[26]

The EU terrorist list has to be distinguished from the regulation of the EU to support UN Security Council resolution 1390/2002. The latter aims at freezing the funds of individuals and entities associated with Osama bin Laden, al-Qaeda, or the Taliban (Council Regulation (EC) 881/2002). After the European Court of Justice published its decision in Joined Cases C-402/05 P and C-415/05 P (Yassin Abdullah Kadi, Al-Barakaat International Foundation against the Council and the Commission), Council Regulation (EC) 881/2002 had to be changed. The listing procedure now has to ensure the right of defence – first and foremost the right to be heard. According to the modified procedure, every listed person, group, and entity has to be notified of the reasons for their inclusion on the list, as provided by the al-Qaeda and Taliban Sanctions Committee of the United Nations. This should give each affected party the possibility to state its view about the reasons for its inclusion. The emphasis on the standards of the rule of law in European counter-terrorism policy is apparent also in more recent rulings. In its decision of 30 September 2010, the European Court of Justice annulled Council Regulation 1190/08, on the basis of which the financial assets of the Saudi Arabian citizen Yassin Abdullah Kadi had been frozen. According to the court, Kadi had been granted insufficient access to the evidence used against him.

The member states accepted the Court's decision. The Stockholm Programme of the European Council that was adopted in 2010 allows no deviations from the principle of the rule of law:[27] protecting the rule of law, fundamental rights, and fundamental freedoms is seen as "one of the bases for the Union's overall counter-terrorism work." Counter-terrorism measures "must be undertaken within the framework of full respect for fundamental rights and freedoms" and the Union "must ensure that all tools are deployed in the fight against terrorism while fully respecting fundamental rights and freedoms."

No comparable process has taken place at the international level. The legal standards were improved by adopting UN resolutions 1617, 1730, 1735, and 1822.[28] However, the fundamental problem remains that there is no judicial authority in the United Nations that individuals can turn to, as only states may refer cases to the International Court of Justice. Even the establishment of the post of a UN ombudsman in line with UN resolution 647 (2009) helps only to a limited extent. The investigations conducted by the ombudsman are not legal procedures and the final decision about removing a name from the terrorist list is in the hands of the sanctions committee, which consists of high-ranking officials of the states concerned for the case in question. The ombudsman is only mandated to collect information and present it to the sanctions committee. The procedure thus hardly improves the legal protection of the affected parties.[29]

25 The initiative to seek a legal opinion on terrorist listings came from three states (Germany, Sweden, Switzerland). Cf. Thomas Biersteker and Sue E. Eckert, *Strengthening Targeted Sanctions through Fair and Clear Procedures*, Rhode Island: Watson Institute for International Studies, March 2006 (White Paper); Michael Bothe, "Security Council's Targeted Sanctions with Human Rights Standards", in: *Journal of International Criminal Justice* 6 (2008) 3, pp. 541–555.

26 Council Implementation Regulation (EU) No 610/2010 of 12 July 2010 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism states that the Council has carried out a complete review of the persons, entities, and groups on its list and concluded that some of them should be removed from the list. The new list consists of 52 entries. The most recent terrorist list can be found under <www.consilium.europa.eu/showPage.aspx?id=1878&lang=EN>.

27 "The Stockholm Programme" [see footnote 5].

28 Cf. Council of the European Union, *Joint EU-U.S. Experts' Report on Terrorism Finance Financial Sanctions Workshop on Implementing SRIII,* Period of time covered by the report: April 2005–May 2008, 8093/10, Brussels, 29 March 2010, pp. 1–8.

29 For a more detailed account on the procedure, see Clemens Feinäugle, "Individualrechtsschutz gegen Terroris-

As far as the listing of persons and organisations suspected of involvement in terrorist activities is concerned, the legal developments in the EU have taken an independent course. Placing greater emphasis on the principles of the rule of law, Europe is well ahead of the developments at the international level and in the United States.

Data Protection

The debate about data protection revolves around the question when and under which conditions should the United States have the right to access data on European citizens and companies.[30] The debate has escalated because the data protection policies of the United States and the EU have recently developed in opposite directions. The Patriot Act has enhanced the competences of the US government to collect private data, whereas the EU Data Protection Directive 95/46/EG, the Charter of Fundamental Rights of the European Union, and the new competencies granted to the European Parliament have had the exact opposite effect. Questions regarding data protection are highly disputed among the transatlantic partners. The most significant disputes concern the Passenger Name Record (PNR) and the Terrorist Finance Tracking Program (TFTP), which entered into force on 1 August 2010. A new data protection agreement planned by the European Commission is likely to cause further discord. All three cases are expressions of the increased influence of the European Parliament and the insistence of the Union on high legal standards.

In the case of the TFTP, even the commencement of negotiations bowed to the European Parliament's view that the United States dealt too carelessly with the bank data that had been transferred to it.[31] The point of departure of the negotiations was the existing bank data agreement between the EU and the United States, which ensures that American secret service officials have immediate access to financial transactions between EU member states and third states through the server of the Society for Worldwide Interbank Financial Telecommunication (SWIFT), a service provider company for banks involved in international transactions. US security services previously had access to the SWIFT network because parts of its servers were situated in the United States. The new agreement is a reaction of the EU to the transfer of one of the servers to Europe, which restricts the US authorities' control of the retained data.[32] In the future, US authorities will be allowed to access data only under the supervision of an EU official. The member states also aim at introducing a similar system for monitoring bank data in the EU in the coming years. After that, larger quantities of data would no longer be sent to the United States for assessment, only individual pieces of information obtained by Europeans themselves. One of the most important innovations is that Europol should inspect each future request coming from the United States to determine whether it complies with the agreement.[33] The agreement also limits the transfer of data to cases in which there is a well-founded suspicion of terrorism and stipulates that as little data as possible should be transferred. Furthermore, in order to transfer data of a citizen of an EU member state further on to a third state, the US authorities need the approval of the member state in question. The data should also not be retained for more than five years. The US government should, furthermore, guarantee that every affected party – regardless of nationality or state of residence – has the possibility to appeal to the administration or a civilian court.

The greater self-confidence of the EU is visible also in questions concerning the Passenger Name Record.[34]

tenlistung? Ein kritischer Blick auf die 'Ombudsperson' in der neuen Resolution 1904 (2009) des Sicherheitsrates der Vereinten Nationen", in: *Zeitschrift für Rechtspolitik* (2010) 6, pp. 188–190.

30 Cited in: Katja Galinski, "Ein atlantischer Vergleich. Freiheit, Sicherheit und Datenschutz aus amerikanischer und deutscher Sicht", in: *Frankfurter Allgemeine Zeitung*, 28 May 2010, p. 10.

31 Jörg Monar, "The Rejection of the EU-SWIFT Interim Agreement by the European Parliament: A Historic Vote and Its Implication", in: *European Foreign Affairs Review*, 15 (2010) 2, pp. 143–151.

32 Cf. Edna Dretzka/Stormy-Annika Mildner, *Anything but SWIFT: Why Data Sharing Is Still a Problem for the EU*, Washington, D.C.: American Institute for Contemporary German Studies, May 2010 (AICGS Issue Brief), pp. 1–8.

33 See European Commission, *Commission Report on the joint review of the implementation of the implementation of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program*, 17-18 February 2011, Brussels, 16.03.2011.

34 European Parliament, *EU External Strategy on Passenger Name Record (PNR). European Parliament resolution of 11 November 2010 on the global approach to transfers of passenger name record (PNR) data to third countries, and on the recommendations from the Commission to the Council to authorise the opening of negotiations between the*

More and more states are taking advantage of passenger data to fight terrorism and organised criminality. Law enforcement authorities can use booking data to prevent and solve crimes or to make risk analyses. No new agreement has, however, been negotiated by the EU and the United States concerning the Passenger Name Records. There is only a bundle of proposals made by the Commission that should, in the future, replace the still valid interim agreement.[35] Nevertheless, the political debate about the issue makes it clear that a new agreement can be reached only on the basis of extensive data protection and the guarantee to respect the principles of the rule of law. The PNR data "raises important issues about protection of personal data,"[36] explained EU Commissioner for Home Affairs, Cecilia Malmström. At the moment, differing regulations apply to the exchange of PNR data with third states. This means that the United States is allowed to retain passenger data for 15 years.[37] The European Parliament has heavily criticised the current agreement from the beginning: in the Parliament's view, the agreement provides EU citizens and airlines with an insufficient degree of legal certainty and fails to ensure that US authorities respect fundamental principles of data protection. In addition, within the framework of the current agreement, the EU committed itself to transferring passenger data to the United States, whereas the United States merely offered to try to get the US airlines to send their data in the opposite direction.[38]

The new proposal of the Commission includes more comprehensive safeguard provisions than the current agreement, but is, nevertheless, criticised for being insufficient. European Data Protection Supervisor Peter Hustinx complained that "the proactive use of PNR data of all passenger for risk assessment purposes requires more explicit justification and safeguards."[39] He also pointed out that stricter conditions should apply to processing of sensitive data as well as to transfers to other authorities.

Both the TFTP agreement and the negotiations for a new passenger data agreement demonstrate the EU's willingness to work towards an extended protection of personal data. The same can be said about the new data protection agreement that the Commission is striving for. At the end of May 2010, the Commission adopted a draft mandate to start negotiations with the United States. The future agreement should regulate the protection of personal data in the common fight against terrorism and crime. The aim is to set high standards for the protection of personal data such as passenger and financial data. EU citizens should also receive the right to seek judicial redress, in case their data is unlawfully processed in the United States, as well as the right to delete or rectify their data.[40]

Extraordinary Renditions and Secret Detention Facilities

In early 2002, the US government started to arrest terrorist suspects – often without due process – and detain them in secret prisons around Europe. The Council of Europe estimates in its report of June 2006 that around 100 persons were captured by the CIA in European territory and brought to other countries, often only after they had been held in one of the so-called black sites: secret detention centres run by the CIA in cooperation with different European governments. A report of the European Parliament published in February 2007 suggests that it is possible to list a total of 1,245 flights heading from Europe to countries in which it was possible to subject the detainees to torture, thus infringing Article 3 of the UN Convention against Torture. With its so-called High Value

European Union and Australia, Canada and the United States, P7_TA-PROV(2010)0397, 11 November 2010.

35 See Commission Staff Working Paper "Impact Assessment. Accompanying Document to the Proposal for a European Parliament and Council Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offenses and serious crime", SEC(2011)132 final, Brussels, 2 February 2011.

36 "European Commission Adopts an EU External Strategy on Passenger Name Record (PNR)", IP/10/1150, Brussels, 21 September 2010.

37 "The Passenger Name Record (PNR) – Frequently Asked Questions", Memo/10/431, Brussels, 21 September 2010.

38 For the origins and preparation of the Passenger Name Records Agreement, see Javier Argomaniz, "When the EU is the 'Norm-taker': The Passenger Name Records Agreement and the EU's Internalization of US Border Security Norms", in: *European Integration* 31 (January 2009) 1, pp. 119–136.

39 "EU External Strategy on Passenger Name Record: EDPS Calls for Stricter Conditions for the Use and Transfer of Passenger's Personal Data", EDPS/10/14, Brussels, 19 October 2010.

40 Above all the Privacy Act of 1974 – which grants legal protection with regard to erasing and rectifying personal data – only applies to US citizens. The EU demanded that its citizens should be treated on a par with US citizens – ideally by changing the Privacy Act – but the United States is not willing to modify its domestic legislation. This position is not likely to change with the Republicans now taking over the Congress.

Detainee programme, the CIA wanted to capture, place into custody, and even kill terrorist suspects. Many member states tolerated the illegal actions of the CIA and cooperated only extremely reluctantly with the Council of Europe when the latter wanted to investigate the issue. According to the second report by Council of Europe special rapporteur Dick Marty, there is enough evidence to prove the existence of illegal prisons in Poland and Romania between 2003 and 2005. The report also emphasises the role of NATO as the CIA's collaborator.[41]

With the executive order of 22 January 2009, the Obama administration banned interrogation tactics involving torture and launched an investigation in the unlawful activities of the Bush era.[42] In the United States, this has so far not led to criminal prosecutions against individual US officials or their conviction by a court, unlike in Europe, where a Milanese court convicted former CIA agents. The United States has not completely abandoned the practice of arbitrary arrests either. The CIA was prohibited from opening new detention centres, but was, at the same time, allowed to run the already existing facilities if they are used "only to hold people on a short-term, transitory basis."[43] In April 2009, CIA Director Leon Panetta confirmed the practice of short-term detentions of terrorist suspects.[44]

The European Parliament has repeatedly pointed out that extraordinary renditions and secret detentions entail a number of human rights violations. These include violations of the right to liberty and security; of the freedom from torture and cruel, inhuman, or degrading treatment; of the right to an effective remedy; and, in extreme cases, of the right to life.[45] This is why the European Parliament exhorted the Council and the member states "to issue a clear and forceful declaration calling on the US government to put an end to the practice of extraordinary arrests and renditions."[46] Extraordinary renditions and secret prisons infringe international human rights norms, the United Nations Convention against Torture, the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the Charter of Fundamental Rights of the European Union.

The fact that many member states tolerate the illegal practices of the CIA is in line with the actions of many European intelligence services. These use intelligence even if it has been obtained in countries in which torture is a common practice.[47] Taking this into consideration, Martin Scheinin, UN special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, and Manfred Nowak, UN special rapporteur on torture, came to the conclusion in their joint study of February 2010[48] that the federal government of Germany, for instance, was jointly responsible for the illegal detention of German citizen Muhammad Zammar in Syria.[49]

The human rights organisation Human Rights Watch laments the lack of adequate and transparent rules for cooperating with intelligence services of

41 Council of Europe, Parliamentary Assembly, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, 11 June 2007, sections 85–91, <http://assembly.coe.int/Documents/WorkingDocs/Doc07/EDOC11302.pdf>.

42 The White House, *Executive Order: Ensuring Lawful Interrogations*, 22 January 2009. Attorney General Eric Holder did not shy away from calling "water-boarding" – an interrogation technique used by US forces – torture.

43 Cf. ibid., Section 2 (g). For the discussion on this issue, see Charlie Savage and Scott Shane, "Experts Urge Keeping Two Options for Terror Trials", in: *New York Times*, 8 March 2010.

44 Leon Panetta, *Message from the Director: Interrogation Policy and Contract*, 9 April 2009, <https://www.cia.gov/news-information/press-releases-statements/directors-statement-interrogation-policy-contracts.html>.

45 "European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200 (INI))", in: *Official Journal of the European Union*, C 287 E/309, 29 November 2007, Paragraph F.

46 Ibid., Article 8.

47 Cf. *Unterrichtung durch das Europäische Parlament vom 19. Februar 2009 zu der behaupteten Nutzung europäischer Staaten durch die CIA für die Beförderung und das rechtswidrige Festhalten von Gefangenen*, Bundesrat, Bundesratsdrucksache 256/09, 23 March 2009.

48 *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, UN Doc. A/HRC/13/42, 19 February 2010, <www2.ohchr.org/english/bodies/hrcouncil/ docs/13session/A-HRC-13-42.pdf>.

49 Muhammad Zammar was arrested in Morocco in 2001, tortured, and then transferred to Syria. During his detention in Syria, he was interrogated by the German federal police and the intelligence service. Also Murat Kurnaz, a legal resident of Germany, was interrogated by the Federal Intelligence Service BND during his detention in the US prison in Guantánamo. Cf. Deutscher Bundestag, *Kleine Anfrage der Abgeordneten Ulla Jelpke u.a. und der Fraktion Die Linke. Umsetzung des Folterverbots*, Deutscher Bundestag, 17. Wahlperiode, Drucksache 17/2813, 26 August 2010, pp. 1–3; Deutscher Bundestag, *Antwort der Bundesregierung auf die Kleine Anfrage* (see above), Deutscher Bundestag, 17. Wahlperiode, Drucksache 17/2997, 21 September 2010, p. 2.

countries in which torture is known to be practised.[50] In addition, the mechanisms for controlling intelligence services in general are underdeveloped. In its decision of 17 July 2009, the Federal Constitutional Court of Germany strengthened the rights of the Bundestag and its Supervisory Committee.[51] Similar developments will most likely take place in the EU: in the future, a Special Committee of the European Parliament should have access to confidential documents of the Council in order for the Parliament to better exercise its right of access to information. Information obtained through torture is, nevertheless, used in court cases in the United States. That is why one has to pose the question: Does the continuation of extraordinary renditions and the existence of secret detention facilities undermine the agreements on judicial cooperation and extraditions between the United States, on the one hand, and the EU and individual member states, on the other? And if this is the case, can these agreements still be upheld?

Taking in Guantánamo Inmates

Since 9/11, the United States has held 779 terrorist suspects in a detention facility at the naval base in Guantánamo Bay in Cuba.[52] At the end of 2010, altogether 600 prisoners were transferred to third states, whereas the future of 172 inmates is still being disputed. With regard to the transfer to third states, the United States has to carefully examine the diplomatic assurances made by third states in order not to circumvent the principle of non-refoulment.[53] In a verdict adopted in the summer of 2008, the Supreme Court of the United States ruled the practice of detaining terrorist suspects without due process illegal. According to the Court, all the Guantánamo detainees have the right to a habeas corpus review of their cases by a civil court.[54] Barack Obama reacted to the unlawful detainment of terrorist suspects directly after his entry into office. Already on the second day of his term, he declared his intention to close the Guantánamo detention facility within a year. At the same time, he prohibited the use of violent interrogation methods with immediate effect.

In the United States, Obama's policy of a rapid closure of the detention facility attracted only limited support. Congress blocked the transfer of Guantánamo detainees to the United States by refusing to provide the government with the necessary financial means. Obama did order a revision of the guidelines of the Guantánamo military committees that had been introduced by George W. Bush.[55] However, the possibility of sentencing terrorist suspects detained in Guantánamo as "unprivileged enemy belligerents" remains.[56] Following a decision adopted by the House of Representatives on procedures governing the use of military tribunals to try terrorist suspects, the defen-

50 Human Rights Watch, *"Ohne nachzufragen": Geheimdienstliche Zusammenarbeit mit Ländern, in denen gefoltert wird. Frankreich, Deutschland, Großbritannien*, New York 2010, <www.hrw.org/de/reports/2010/06/28/ohne-nachzufragen-0>.

51 <www.bundesverfassungsgericht.de/entscheidungen/es20090617_2bve000307.html>.

52 For detailed information on the problems regarding the Guantánamo inmates, the web page of the *New York Times* is highly recommendable: <http://projects.nytimes.com/guantanamo> (accessed on 11 April 2011).

53 Article 33 of the United Nations Convention Relating to the Status of Refugees states that no refugee as defined in Article 1 of the Convention shall be expelled "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." In principle, "diplomatic assurances" make it easier to deport unwanted foreign citizens to countries in which they might face torture or mistreatment. As such transfers are problematic from the point of view of international conventions, the deporting government ensures that the receiving state gives an assurance not to torture the transferred person. In most cases, the extradited individuals are suspected of involvement in terrorist activities or seen as a threat to national security. Cf. <www.proasyl.de/fileadmin/proasyl/fm_redakteure/Newsletter_Anhaenge/120/dipl_zusicherungen.pdf> (accessed on 11 April 2011).

54 "Boumediene v. Bush" is considered as the most important Supreme Court decision on Guantánamo. The principle of habeas corpus guarantees effective legal protection only when unlawfully detained individuals manage to force their release, if need be by entering into US territory. If this possibility is denied, the "Boumediene" decision on the constitutional right to a court review threatens to become a farce. However, in February 2009, a federal appeals court ruled that it would constitute a breach of the division of powers if an American court ordered the government to allow Guantánamo detainees to enter into the United States.

55 The White House, Executive order-Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, March 7, 2011, <www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava>.

56 Cf. *US Military Commissions Act of 2009* (Reformed Military Commissions Provisions and Attendant Rules Included. H.R. 2647: National Defense Authorization Act for Fiscal Year 2010), <www.govtrack.us/congress/billtext.xpd?bill=h111-2647>.

dants now have improved chances of defending themselves. Notwithstanding these improvements, persons tried in a military tribunal do not have the same rights as those tried in a civilian court. The reformed bill does prohibit the use of evidence obtained through coercion and hearsay.[57] Nevertheless, the acting chief defence counsel at the Defence Department's Office of Military Commissions, Marine Colonel Jeffrey Colwell, described Obama's decision to prosecute Kalid Sheik Mohammed and his four accused co-conspirators – the suspected masterminds behind 9/11 – in a military tribunal as "a sad day for the rule of law."[58]

Concerning the difficult domestic situation in the United States and the problematic legal position of the detainees,[59] the European Parliament stressed that it is all the more important that European states take in Guantánamo inmates. It demanded that European states should seek the immediate return of their own citizens and residents who are illegally held by US authorities.[60] It was clear that inmates who were not accepted by the member states of the EU would face the risk of being transferred to a country with lower standards of the rule of law.

57 House of Representatives, *National Defense Authorization Act for Fiscal Year 2010*, Report 11-228, <www.govtrack.us/congress/bill.xpd?bill=h111-2647> (accessed on 21 October 2010).
58 Cited in: "Das Weiße Haus gegen Holder. Verhandlung gegen Terrorverdächtige vor Militärtribunal", in: *Frankfurter Allgemeine Zeitung*, 6 March 2010, p. 5.
59 Neither the government nor the Chairman of the Senate Judiciary Committee, Democrat Patrick Leahy, reacted to the appeals of judges who demanded that the guidelines for remand proceedings should be formulated in a clear and uniform manner. The controversial case in question (Kiyemba v. Obama) is about the Uigurian detainees – members of a Muslim minority from the Chinese province of Xinjiang – that were captured after 9/11 in Pakistan and Afghanistan and have been held in Guantánamo since 2002. In this process, the Supreme Court is investigating if the Uigurs have the possibility to force their entry into the United States by filing a habeas corpus petition. Lawyers also want to clarify if American civilian courts are able to prevent the extradition of Guantánamo inmates to countries in which they could be subjected to political persecution or torture. The Obama administration, like the Bush administration before it, wants to keep the court from dealing with Guantánamo as the judges have, in the past, complained about the treatment of detainees, which has limited the room for manoeuvre of the executive authority.
60 "European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200 (INI))", <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2007-0032+0+DOC+PDF+V0//EN> (accessed on 11 April 2011).

Nonetheless, the EU member states were not ready to act in a coordinated manner. All negotiations considering the transfer of Guantánamo inmates were conducted between the member state in question and the United States bilaterally. To date, the EU member states have taken altogether 48 former Guantánamo detainees.[61] Three of them live in Germany. Two were accepted only in September 2010 following a decision by the Ministry of Interior, which had acted very hesitantly until then. The ministry originally justified its hesitancy by arguing that it had not received enough information about the prisoners, and the requirements laid down in the Residence Act (Paragraph 22) had thus not been met. The passage in question gives the interior minister the possibility to give a residence permit to a foreign citizen on the grounds of international law or urgent humanitarian reasons. Most of the *Länder* (states) voiced their unwillingness to accept Guantánamo inmates. For example, Armin Laschet, former minister of integration of North Rhine-Westphalia, pointed out that if the United States was capable of setting up an illegal prison camp, it should also be able to close it by itself and transfer the few remaining inmates to the United States.[62]

Transfer of Detainees to Bagram

On its Bagram military airbase in Afghanistan, the United States operates the so-called Bagram Theater Interment Facility – in military jargon also known as the Bagram Holding Facility. The facility holds around 700 terrorist suspects who have been arrested in the course of Operation Enduring Freedom.[63] Presently, the United States considers transferring some of the remaining Guantánamo inmates to Bagram. The United States has so little evidence concerning some 50 Bagram inmates that it would not be enough even

61 The reason for the reserved attitude is that, according to a Pentagon study, one in seven prisoners released from US custody (again) becomes a combatant and usually turns even more radical. Cf. Nigel Inkster/ Robert Whalley, "Europe, Guantanamo and the 'War on Terror': An Exchange", in: *Survival*, 51 (June–July 2009) 3, pp. 55–70 (57).
62 "Laschet: 'Das ist eine Sache der Vereinigten Staaten.' Aufnahme von Guantanamo-Insassen weiter in der Diskussion", *Deutschlandfunk*, 9 April 2010, <www.dradio.de/dlf/sendungen/interview_dlf/1159730/> (accessed on 11 April 2011).
63 The list can be accessed via the American Civil Liberties Union, Press Release, "ACLU Obtains List of Bagram", 15 January 2010, <www.aclu.org/national-security/redacted-list-detainees-held-bagram-air-base> (accessed 11 April 2011).

for a trial in a military tribunal. These detainees are, however, considered so dangerous that the United States is not willing to release them.[64]

In its dealings with terrorist suspects, the Obama administration has, in principle, adopted the hard line taken by the Republican administration of his predecessor George W. Bush. The detainees are refused due legal process by arguing that only the norms of humanitarian international law apply to them. The inmates cannot contact a lawyer and are not tried in a court. Bagram is also, to a great extent, cut off from the outside world. The names of the imprisoned persons are published, but all the details concerning the length and reasons of their detention are made unrecognisable. Human rights activists criticise that the Bagram inmates have even fewer rights than the Guantánamo detainees.[65] As a reaction to the criticism directed at its internment practice, the United States wants to hand the military prison over to the Afghan security forces. Former commander of the US forces in Afghanistan, General McChrystal, revealed that the United States wanted to support the Afghan government to run the remaining detention facilities in accord with international standards and international law.[66]

The internment practice of the United States infringes all the principles of the rule of law. Thus, the European Parliament demanded as early as 2007 that all the member states conducting military missions in third states should "ensure that any detention centre established by their military forces is subject to political or judicial supervision." The member states should also "take active steps to prevent any other authority from operating detention centres which are not subject to political and judicial oversight or where *incommunicado* detention is permitted."[67]

In practice, this has not been the case. Instead, it is to be assumed that at least some of the member states involved in the Operation Enduring Freedom hand over prisoners to the US military. By doing so, they offer indirect support to the illegal practice of detaining individuals without a warrant, a judge to investigate their case, or the possibility to contact a lawyer. In addition, German soldiers of the Special Command Forces (*Kommando Spezialkräfte*, KSK) participated time and time again in US-led military missions ending with the capture of terrorist suspects. Formally, the KSK were always prohibited from handing over prisoners to the American, Afghan, or Pakistani security forces (principle of non-refoulment). In practice, this cannot be evaded when operations are conducted in cooperation with the security forces of other states. Furthermore, German security forces have in their investigations taken advantage of information obtained from terrorist suspects held on the US airbase in Bagram.[68]

Even if this applies only to individual cases, it is doubtful whether it would be even possible for the *Bundeswehr* to participate in the International Security Assistance Force (ISAF) and at the same time comply with all the norms that apply to this operation. After all, each coalition partner tends to interpret the humanitarian norms applicable to this kind of a conflict in a different way.[69]

A clear example of how difficult it is to draw a line between international humanitarian law and the principles of criminal law is the practice of compiling so-called Joint Prioritized Effects Lists. These list persons who are – in view of existing evidence – considered as posing a concrete threat to ISAF or the Afghan security forces. The list includes two categories. Those Taliban and al-Qaeda combatants placed under the heading "capture" are to be taken prisoner, and those put in the category "kill" to be killed using unmanned aerial vehicles or other means. According to the Federal Government of Germany, the *Bundeswehr* participates in compiling such lists, but disapproves of killing

64 The numbers are based on Reymer Klüver, "Schließung des Lagers rückt näher", in: *Süddeutsche Zeitung*, 20 March 2010, p. 4.

65 Cf. HRW, *Counter-terrorism and Human Rights. A Report Card on President Obama's First Year*, 14 January 2010, <www.hrw.org/en/news/2010/01/14/counterterrorism-and-human-rights-report-card-president-obama-s-first-year> (accessed on 11 April 2011).

66 *COMISAF's Initial Assessment, Initial United States Forces-Afghanistan (USFOR-A) Assessment*, 30 August 2009, Annex F, p. F–1.

67 "European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200 (INI))", P6_TA(2007)0032, Paragraph 196, <www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0032&language=EN&ring=A6-2007-0020> (accessed on 11 April 2011).

68 A good example is the case of Ahmad S., who was arrested in Kabul in the beginning of July 2010 and interrogated by American specialists at the US military airbase in Bagram. Cf. Hans Leyendecker, "Hochkonkret oder abstrakt? Die Gefahrenlage in Deutschland", in: *Süddeutsche Zeitung*, 2 November 2010, p. 2.

69 For the legal definitions, see Christian Schaller, *Rechtssicherheit im Auslandseinsatz. Zum völkerrechtlichen Charakter des Einsatzes der Bundeswehr in Afghanistan*, Berlin: Stiftung Wissenschaft und Politik, December 2009 (SWP-Aktuell 67/2009).

Overview
Problematic issues and the level of transatlantic cooperation

	Problems related to the rule of law	*Actors*	*Consequences for the EU-US cooperation*
Listing	Access to court	European Court of Justice	Independent course of action (EU)
Data protection	Informational self-determination	European Parliament, European Commission, member states	Accommodating European demands (USA)
Extraordinary renditions	Unlawful imprisonment	National and European legislatives	Breaking off cooperation
Guantánamo, military commissions	Habeas corpus	Member states	Minimal support by EU member states
Bagram	Habeas corpus, non-refoulment	European Parliament	Refusal

enemy combatants by means of drone attacks. Until the beginning of September 2010, a total of 15 persons were put on a Joint Prioritized Effects List at the suggestion of the *Bundeswehr* (10 of them after June 2009).[70] The *Bundeswehr* is not allowed to participate in US operations that involve killing the targeted persons. However, no answer has been given to the following questions: How do the US forces handle situations in which it is not possible to take the target persons prisoner? Have drone attacks been used in such situations? So far, no publicly accessible evaluation of such situations exists. In any case, it is worth noting that the use of drone attacks has increased massively since early 2010 and become a central instrument of the United States in the fight against the Taliban and terrorist suspects.

70 *Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Dr. Frithjof Schmidt, Omid Nouripour, Katja Keul, weiterer Abgeordneter und der Fraktion Bündnis 90/Die Grünen*, Deutscher Bundestag, 17. Wahlperiode, Drucksache 17/2884, 8 September 2010, p. 11.

European Options: Between Freedom and Security

While the United States considers it necessary to fight terrorism also by military means, the EU and the Federal Government of Germany prefer police measures that are more human rights sensitive. An overview of the areas of cooperation between the EU and United States shows that the transatlantic cooperation takes many forms and that it is sometimes very difficult to respect the principles of the rule of law within the framework of this cooperation. The nature of transatlantic cooperation varies greatly from one area to another. In the areas of terrorist listings and data protection, an emphasis on the European achievements can be noted, whereas EU member states only hesitantly cooperate with the United States in taking in Guantánamo prisoners. As far as the CIA's secret detention facilities in Europe are concerned, member state authorities prefer to turn a blind eye. Last but not least, a number of member states provide indirect support to the United States in detaining and killing terror suspects in Afghanistan.

In its counter-terrorism cooperation with the United States, the EU manoeuvres at the limits of the rule of law. Such a position cannot be maintained without compromising the rule of law. For this reason, it is of utmost importance to clarify the status of the principles of the rule of law in transatlantic counter-terrorism policy. Three options for determining the relationship between international cooperation and the rule of law are conceivable. The first one gives priority to security, the second one to the rule of law. The third option, in comparison, consists of a sensitive management of the legal grey areas. This option gives precedence to the EU's capacity to act in transatlantic relations. The aim is to reconcile the discrepancy between the actual threat and the real possibilities of EU-US cooperation by working out a compromise. For this reason, the third option is most likely to be chosen.

Prioritising Security

The first option departs from the notion that the terrorist threat is actually the biggest challenge democracies face since the end of the Cold War. Following this logic, terrorism has to be fought by all available means. Otherwise, democracies not only give in to radical and anti-democratic groups, they also run the risk of being attacked with weapons of mass destruction. The terrorist attack of 9/11 would pale in comparison with such an attack.

From this perspective, it is absolutely necessary to extend the administrative resources of the executive authorities on both sides of the Atlantic. The EU Future Group has presented some proposals on internal security in Europe and promotes in its 2008 report the establishment of a transatlantic security zone. This would, however, require some additional reforms such as regular consultations between all the relevant administrative actors and a more intensive exchange of information between the intelligence services on both sides of the Atlantic. Already at present, high-ranking officials of the EU and the United States meet at regular intervals within the framework of the EU-US Justice Affairs Ministerial Meeting and the Senior Officials Meeting in Justice and Home Affairs. Additionally, a structured cooperation between the EU working groups – Committee on Counter-Terrorism, Committee on Internal Security, and Committee on Transatlantic Relations – would be necessary. In view of the cross-border character of terrorism, joint meetings between the Political and Security Committee, on the one hand, and the Committee on Internal Security, on the other, would also be a promising way to better coordinate both the EU's internal counter-terrorism efforts and transatlantic counter-terrorism policy.

Considering the fact that the EU's complex competence structure is very difficult to unravel from the outside, the EU Joint Situation Centre should be established as the central contact point within the European External Action Service to coordinate transatlantic counter-terrorism cooperation. To this end, the Situation Centre should also be equipped with enough personnel. One should also push ahead with the extension of Europol into a European federal police force, following the example set by the FBI. Together with a concomitant strengthening of the existing Joint Investigation Teams, these reforms

would raise hopes of a more effective cooperation between security authorities.

In addition, cooperation between the security services should also be intensified. The Counter-Terrorism Group of the Berner Club already functions as an arena for information exchange for the leaders of the intelligence services of the EU member states as well as Norway and Switzerland. The United States currently holds only an observer status in the club and should thus first be accepted as a formal member.

Parliamentarian and public control mechanisms are important, but should not unduly limit the powers of the executive. If security is given priority, the integrity of the rule of law requires that the EU has to follow the United States and declare war on al-Qaeda. This is the only way to avoid the delicate legal balancing act between a de facto conduct of war and the formal use of criminal law. This step would also guarantee that the soldiers in Afghanistan have the necessary instruments and ensure their legal security.

Prioritising the Rule of Law

If principles of the rule of law and freedom are to form the basis of counter-terrorism policy, fighting al-Qaeda by military means together with the United States is no valid option for either Germany or the EU. Seen from this perspective, the terrorist threat should be neither neglected nor exaggerated. The policing measures used so far work out well enough to make any military actions superfluous. In fact, from this point of view, Afghanistan represents a good example of the powerlessness of the military in the face of terrorism, as Pino Arlacchi, a Member of the European Parliament, suggests in his recent report on the country. Even worse, a continuation or expansion of the military operation in Afghanistan would undermine the foundations of the rule of law and the European human rights principles, and thus end up doing exactly what the terrorists are aiming at.

Following this logic, one comes to the conclusion that transatlantic cooperation has to be reduced to a minimum as long as the US government views itself as being at war. Taking this step requires renouncing the use of intelligence obtained in the detention facilities in Guantánamo, Bagram, or other places in which the human rights standards of the Council of Europe or the Basic Law of the Federal Republic of Germany are not respected. As long as there is no guarantee that the US security services and the US military apply the same standards as the Europeans, European forces should not hand over prisoners to the United States. In addition, Europeans must not compile lists of terror suspects or cooperate with others to compile such lists. Cooperation between security services should not take place either.

On the institutional level, the aim should be strengthening the European Parliament and the rights of control of national parliaments. The competences of the reformed Special Committee of the European Parliament to support the work of the Committee on Foreign Affairs should be interpreted as broadly as possible. The Committee should be given access to all classified documents, but this access should be restricted in accord with the "originator principle". According to this principle, the member states can decide what information is provided to each member of the committee. Executive and international actions should be fully transparent and not evade the critical eye of the public. Also, the Transatlantic Legislator Dialogue – a forum for members of parliament from both sides of the Atlantic to discuss latest developments – should be strengthened. This would mean establishing a new specialised framework to complement the existing broad and general one. The new framework should bring together representatives of important committees that could, on the European side, include the Committee on Civil Liberties, Justice and Home Affairs, and the Committee of Foreign Affairs; on the American side, it could include the Committee on Homeland Security of the House of Representatives, and the Subcommittee on Terrorism and Homeland Security of the Senate. Only a continuing discourse between specialised committees would ensure that the US Congress has the means to understand the legitimate European interests concerning the rule of law and data protection.

This framework would include also the EU-US dialogue on the rule of law involving members of the EU Council Working Group on Public International Law as well as of the State Department. This dialogue should be extended to underline the unlawfulness of certain practices from the point of view of international law and human rights law. Such practices include extraordinary renditions, detaining terror suspects in secret detention facilities, as well as replacing civil courts with military committees.

The United Nations, in its role as the only institution with the legitimacy to authorise military interventions, should be supported. At the same time, NATO's claim to legitimise military interventions

should be rejected. Should NATO not be ready to take a subordinate role, the legitimacy of NATO-led operations and the cooperation between the EU and NATO in counter-terrorism should be called stronger into question. In addition, one should think about how critical and independent non-governmental organisations could be supported in their bid to promote universal rule of law and the protection of human rights. Transparency International, for example, is already an important ally of the EU in the fight against corruption. Following this example, one could consider offering support to organisations like Wikileaks so that they would gain legitimacy for their work and continue to expose infringements of human rights and international legal standards according to criteria that have to be precisely defined.

Publicly Managing the Grey Areas

The third option relies on the premise that terrorism is going to remain a relevant security political challenge in the medium-term. It can also be assumed that neither a declaration of war on al-Qaeda and other terrorist groups nor a withdrawal from multilateral military counter-terrorism policy are viable options. It also seems likely that both European and German security authorities will (have to) use intelligence obtained by means that are not in accord with European human rights and data protection ideals in order to protect their citizens from terrorist threats. This logic also dictates that not every deadly attack on the *Bundeswehr* can be prosecuted by policing measures and not every potential terrorist attack can be deterred without the help of the military. In addition, the fight against terrorism makes transatlantic cooperation necessary, in view of pragmatic reasons and considerations of overriding global importance. At the same time, the rule of law and respect for human rights are such precious commodities that they should not be undermined. At least formally, they have to form the foundation of every policy. German policy thus presents a difficult situation with no easy way out. Also in the future, Germany will have to operate in a grey area between humanitarian law and the standards of the rule of law.

The essential political challenge related to the third perspective is thus not the illusory idea of doing away with the grey areas in counter-terrorism cooperation, but the possibility of actively shaping these grey areas. What kind of deviations from the norms of the rule of law can be tolerated when making this difficult balancing act? To what extent can an ally conducting a war be supported? At what point is it pure hypocrisy to condemn measures that are so important for Europe and Germany in view of preventing terrorism and without which the security of both would be put at risk? There is a need for a broad political and social debate about how a state founded on the rule of law should deal with transnational violence and if, when, and under which conditions deviations from the principles of the rule of law are justifiable. The precondition for such a debate is, however, the willingness of policy-makers to openly discuss the limits of freedom and security as well as all dimensions and limitations of transatlantic counter-terrorism cooperation.

List of Abbreviations

CFSP	Common Foreign and Security Policy
EC	European Community
ISAF	International Security Assistance Force
KSK	Kommando Spezialkräfte (Special Command Forces)
NATO	North Atlantic Treaty Organization
NSS	National Security Strategy
PNR	Passenger Name Record
SWIFT	Society for Worldwide Interbank Financial Telecommunication
TFEU	Treaty on the Functioning of the European Union
TFTP	Terrorist Finance Tracking Program
UN	United Nations