

# UNIVERSALIS

## Liber Amicorum Cyrille Fijnaut

Toine SPAPENS  
Marc GROENHUIJSEN  
Tijs KOIJMANS  
(red.)



intersentia

Antwerpen – Cambridge

# FIGHTING TERRORISM IN A “RECHTSSTAAT”

Sabine GLESS\*

## 1. INTRODUCTION

*Niet alle middelen om deze legitieme doelen te bereiken, zijn echter in een democratische rechtsstaat aanvaardbaar.*<sup>1</sup> – with these words Cyrille Fijnaut commented on a discussion about state reactions to a series of exceptionally brutal assaults upon targets of civil daily life, such as supermarkets, restaurants and factories in Belgium. The individuals responsible for the attacks, attributed to a group calling itself Bende van Nijvel, were never found. But Belgium and its neighbours were in shock and discussed at length the limitations of a legal system when confronted with acts of terrorism.

15 years later, the 9/11 terrorist attacks in New York took place, which dramatically altered the whole context of discussions about fighting terrorism, in the US as well as in Europe.<sup>2</sup> Since then the EU has launched several initiatives and has adopted various legal acts, which are looked upon as necessary by politicians and law enforcement agencies, but have been criticized by civil liberties organizations. The killing of Osama bin Laden by US special forces in Pakistan in May 2011, has ultimately shown that terrorism takes a legal system to its limit by blurring the lines of criminal justice enforcement and armed conflict.

Cyrille Fijnaut, who started his working career as a policeman, always held firm beliefs about *Rechtsstaatlichkeit* and the importance of a fair trial, not only during his days on patrol but also later in his academic work. His work related to the fight against terrorism illustrates his core belief, that a criminal justice system cannot bend to accommodate security concerns, not even those of international

---

\* Professor Criminal Law and Criminal Procedure, University of Basel.

<sup>1</sup> C. Fijnaut, ‘Terrorisme, politiek en wetenschap’, in: *Panopticon*, 1986, p. 1: “Not all measures are available in a democratic state governed by the rule of law, even if the goal to achieve may be a legitimate one.”

<sup>2</sup> See V. Mitsilegas, ‘Transatlantic Counter-Terrorism Cooperation after Lisbon’, in: *Eu crim*, nr. 3, 2010, pp. 111–117, p. 111; A. Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator?* (Antwerp, 2009), pp. 341–356.

efforts. Each measure must serve the purposes of criminal law or rather criminal punishment, and must fit into the broad concept of a democratic society respecting human rights and the rule of law.<sup>3</sup>

During Cyrille Fijnaut's professional life criminal justice systems all over the world, including those in Europe, have been pushed to the edge by international terrorism – or, rather, the measures adopted to fight such acts, because it is often the countermeasures used against terrorism that seem to blur important legal lines between the role of the criminal justice system and other measures, especially military interventions. The arguments following a “just war” reasoning pose a challenge, not least for the traditional European *rechtsstaat*.

## 2. EU-FRAMEWORK AS AN EXAMPLE

Combating terrorism has been high on the EU's criminal law agenda for quite a while. After the terrorist attacks of 11 September 2001, the Commission immediately set in motion a series of initiatives to establish Framework Decisions defining terrorism and to provide punishment parameters for Member States. The Commission also established the means for more efficient cooperation between Member States, such as the introduction of the European Arrest Warrant, which now basically replaces traditional extradition procedures within Europe. Several other legal acts followed. The listing of terrorists, the freezing of their assets without legal remedies and the removal of certain fair trial guarantees has led to some now well-known and interesting case law re-asserting the principles of due process.<sup>4</sup> Today, legal instruments that give Member States access to personal data and enable its exchange between them are considered key tools in the pursuit of terrorists.<sup>5</sup> Two EU Framework Decisions serve as the anchor – for which Cyrille Fijnaut has asked frequently<sup>6</sup> –

<sup>3</sup> See e.g. C. Fijnaut, ‘The attacks on 11 September 2001, and the Immediate Response of The European Union and the United States’, in: C. Fijnaut, J. Wouters en F. Naert (eds.), *Legal instruments in the fight against international terrorism; a transatlantic dialogue*. (Leiden, Martinus Nijhoff Publishers, 2004) pp. 15–36, pp. 22–26.

<sup>4</sup> See e.g. ECJ “Kadi” of 3 September 2008 Joined Cases C-402/05 P and C-415/05 P; EC “Omar” of 11 June 2009, T-318/0; ECJ “E.F.” of 29.6.2010 Case C-550/09; see G. de Búrca, ‘The European Court of Justice and the International Legal Order After Kadi’, 51 *Harvard International Law Journal* (2010), pp. 1–50; S. Gless and D. Schaffner, ‘Judicial review of freezing orders due to a UN listing by European Courts’, in: S. Braum and A. Weyembergh (eds.), *Le contrôle juridictionnel dans l'espace pénal européen, The judicial control in EU cooperation in criminal matters*. (Bruxelles, 2009), pp. 163–193.

<sup>5</sup> See e.g. V. Mitsilegas (2010), pp. 111–113; K.L. Scheppele, ‘Other Peoples’ PATRIOT Acts: Europe's Response to 9/11’, in: *Loyola Law Review*, 50, 2004, pp. 89–148.

<sup>6</sup> See C. Fijnaut (2004), p. 24.

for the various follow-up measures that aim to fight and prevent terrorism. These are:

- Framework Decision 2002/475/JHA on combating terrorism of June 13<sup>th</sup>, 2002;<sup>7</sup>
- Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism.<sup>8</sup>

The Framework Decisions are predominantly vehicles for the harmonization of substantive criminal law as, in addition to defining terrorism, and guiding criminal procedure and the law of mutual legal assistance in criminal matters, they also oblige Member States to criminalize certain behaviour as terrorist acts and extend their jurisdiction in order to enable them to prosecute these acts (or extradite the individuals concerned to another State for prosecution). The Framework Decisions are quite detailed in many respects. Despite, or rather because of the regulations, two basic questions however remain: 1) What acts are actually punishable as acts of terrorism? 2) How should EU Member States react to terrorism – given their commitment to the *democratische rechtsstaat*, human rights, and the principle of proportionality?

The two legal acts and their implementation by EU Member States demonstrate the challenge of special terrorist legislation. Four aspects are of particular interest:

- a) the definition of terrorism currently governing EU law;
- b) EU Member States' duty to punish, even on the grounds of imprecise EU parameters;
- c) the obligation to expand the scope of Member States' jurisdiction in order to fight terrorism; and
- d) possible infringements of human rights.

### 3. DEFINITION OF TERRORISM

One core issue in the legal fight against terrorism is settling on a valid definition of terrorism itself, since a common definition is a prerequisite for harmonization as well as for the effective cooperation between States to combat the various aspects of terrorism.

<sup>7</sup> Official Journal of the European Union, L 164 of 22 June 2002.

<sup>8</sup> Official Journal of the European Union, L 330 of 9 December 2008.

### 3.1. THE CONTEXT

The EU definition of terrorism is established in Article 1(1) of the 2002 Framework Decision on combating terrorism, and is basically three-fold: consisting of the *aim* of the *action*, the intention of the actor and the specific *act* being committed.

The Framework Decision defines aim, or rather context and intent, matter-of-factly as being: “to seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation”. There is 1) neither reference to core values, like democracy, liberty, equality ruling that system nor 2) the cross-border or international element.

The second gap appears at first sight to be a rather technical aspect: According to EU law, namely Article 83 of the Treaty on the Functioning of the EU, the EU is only competent to “establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particular serious crime with a *cross-border dimension*”.<sup>9</sup> But the establishment of an EU parameter for terrorism, which will hereafter encompass all forms of alleged terrorist activity goes beyond the scope of Article 83 because it obliges all EU Member States to fight internal national activism according to the EU standards, and thus impinges of a State’s sovereign right to solve internal conflict issues according to its own agenda. The importance of this aspect becomes clear when looking at the first mentioned gap in the definition of terrorism, i.e. the lack of a reference to the long term intentions of an actor: Is it the same in the eyes of the law whether a liberal democracy shall be destabilized or a dictatorship? Must all violent acts be labelled terrorism?

### 3.2. ACHIEVEMENT OF A POLITICALLY NEUTRAL DEFINITION

What appears as a shortcoming at first glance might, however, turn out to be a big achievement. There has been a lively debate since the 1950s, especially within the United Nations, as to whether national liberation movements should be excluded from the definition of terrorism.<sup>10</sup> In 1977 the Council of Europe agreed on a common European definition of terrorism, which did not take into account the long-term projects violent actors might have. This was because distinguishing a terrorist from a freedom fighter is very difficult, as the often

<sup>9</sup> OJ, C 83/47 of 30 March 2010.

<sup>10</sup> C. Greenwood, ‘War, Terrorism and International Law’, in: C. Greenwood (ed.), *Essays on War in International Law*. (London, 2006), pp. 409–10.

quoted phrase "One man's terrorist is another man's freedom fighter" demonstrates.

It has thus often been deemed unwise to put a criminal court, responsible for handing down a verdict of personal guilt in a certain case, in the position of having to pass judgment on a political situation at the same time.

A definition detached from any reference to values (like democracy or *Rechtsstaat*) or reasons for committing the terrorist act (like freedom fighting) nevertheless leads to problems if a state wishes – maybe for good reasons – not to condemn certain violent acts as terrorist acts. This problem gets worse as a trigger mechanism for a duty to criminalize "terrorism" is set by superior law, like in the EU. This means that States cannot react individually to the particular challenges that they as individual States may face, such as the existence of a national political movement which has members who may resort to violence in an attempt to achieve their ends.

Some examples, drawn from the list of Nobel peace laureates, illustrate the problem of individuals perceived by some States to be pursuing an illegal cause, and who could even be defined as "terrorists". They include *inter alia* Menachem Begin (head of Irgun Tzvai Le'umi, recipient of the Nobel Peace Prize in 1978); Yassir Arrafat (for belonging to the PLO, and a Nobel Peace Prize winner in 1994); Nelson Mandela (for belonging to the ANC, equally a Nobel Peace Prize winner).

Today however, the discussion about drawing the line between legitimate freedom fighters and terrorists is replaced by the functional approach of looking at the actions as such.<sup>11</sup>

### 3.3. TERRORIST ACTS

In Article 1(1) of the 2002 EU Framework Decision, specified acts which are criminal are defined first. These include attacks upon persons' lives or their physical integrity, kidnapping or hostage taking, or interfering with or disrupting the supply of water, power or any other fundamental resource the effect of which is to endanger human life, etc.

Whereas the first Framework Decision of 2002 only obliged Member States to punish a rather limited number of acts linked to terrorist activities in its Article 3, such as aggravated theft committed with a view to facilitate terrorist acts. Extortion committed with a view to the perpetration of terrorist acts, the drawing up of false administrative documents with a view to committing terrorist acts

<sup>11</sup> S. Kirsch and A. Oehmichen, 'Judges gone astray: The fabrication of terrorism as an international crime by the Special Tribunal for Lebanon', in: *Durham Law Review Online*, nr. 1, 2011, pp. 11–13.

The 2008 Framework Decision broadened the obligation to include several more acts linked to terrorist activities or rather to prepare, organise or supporting terrorism, such as:

- a) “public provocation to commit a terrorist offence” – meaning distributing, or otherwise making available, a message to the public, with the intent to incite the commission of a terrorist act;
- b) “recruitment for terrorism” – meaning to solicit another person to commit a terrorist act;
- c) “training for terrorism” – meaning to provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or instructing individuals in other specific methods or techniques, for the purpose of committing a terrorist act.

Moreover, the obligation to prosecute exists even if a terrorist offence was never actually committed in the end. This is provided for in Article 3(3) of the 2008 Framework Decision. Article 4 obliges Member States to punish the aiding or abetting, inciting or the attempt to commit terrorist acts.

Thus Member States’ obligation to punish is quite broad and rather vague, and it appears unclear how national legislators will implement the EU parameters into national law.

### 3.4. TERRORISM IN (CUSTOMARY) INTERNATIONAL LAW

Did the EU lawmaker fall short in his duty to provide a comprehensive definition – or is the task of defining punishable terrorism (as opposed to justified freedom fighting) an unanswerable dilemma?

The definition of terrorism has been in law journal’s headlines recently<sup>12</sup> following the decision handed down by the Special Tribunal for Lebanon which – among other things – defined terrorism as a crime according to customary international law,<sup>13</sup> and thus in principle binding for all States, including EU Member States.<sup>14</sup>

According to the Special Tribunal for Lebanon rules of international law define terrorism as follows: the commission of a criminal act causing harm to

<sup>12</sup> K. Ambos, ‘Judicial creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?’, in: *Leiden Journal of International Law*, 2011, p. 1; S. Kirsch and A. Oehmichen (2011), p. 1.

<sup>13</sup> Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/II/AC/R176bis, Feb. 16, 2011 (‘Decision’), nos. 85 and 102.

<sup>14</sup> Whether the tribunal’s judges were right to press ahead with a definition in the case before them, may be left open here. For a critique see K. Ambos (2011), pp. 11–12; S. Kirsch and A. Oehmichen (2011), pp. 6–7.

life, limb and property, including a concrete threat or an attempt<sup>15</sup> to commit such an act, as the only objective element of the offence.<sup>16</sup> Many academics still hold the view that currently no universal definition of terrorism exists.<sup>17</sup> This position is exemplified by Schmid and Jongman<sup>18</sup> who have analysed 109 different definitions of terrorism and isolated 22 different elements characterising terrorism. Later, in a report, Schmid suggested a definition of terrorism, which has latterly become famous due to its simplicity: acts of terrorism are defined as "peacetime equivalents of war crimes".<sup>19</sup> This definition blurs again however the legal parameters of such crimes, some of which are to be prosecuted as crimes in a national criminal justice system and some of which, the more serious ones, which shall be taken care of by the nascent international criminal justice systems, or even outside of the criminal justice system altogether by triggering a reaction based on international humanitarian law

#### 4. SOLVING THE DILEMMA WITH JUST WAR ARGUMENTS?

Part of the dilemma terrorism poses to legal systems is that of drawing lines between criminal law measures and responses that may be labeled either as military or humanitarian interventions. Both of these forms of intervention lie beyond the scope of national criminal justice systems, and carry the risk of being viewed as acts of terrorism themselves.

The 2002 Framework Decision recognizes this paradox with recital 11 of the preamble asserting: "Actions by armed forces during periods of armed conflicts, which are governed by international humanitarian law within the meaning of

<sup>15</sup> Article 2(2) International Convention for the Suppression of Terrorist Bombings, A/RES/52/164 of 15 Dec. 1997, 2149 U.N.T.S. 256; Article 2(3) International Convention for the Suppression of the Financing of Terrorism, A/Res/54/109 of 9 Dec. 1999, 39 I.L.M. 270; Article 1(a) Convention for the Suppression of Unlawful Seizure of Aircraft, 16 Dec. 1970, 860 U.N.T.S. 106; Article 2(1) (d) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 14 Dec. 1973, 1035 U.N.T.S. 168; all conventions can be found at [www.un.org/terrorism/instruments.shtml](http://www.un.org/terrorism/instruments.shtml).

<sup>16</sup> Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/II/AC/R176bis, Feb. 16, 2011 ('Decision'), no. 188.

<sup>17</sup> E.g. K. Ambos (2011), p. 12; E. Stubbs Bates, IBA Taskforce on Terrorism, R. Goldstone, E. Cotran, G. de Vries, J. Hall, J. Mendez and J. Rehman, *Terrorism and International Law* (Oxford, Oxford University Press, 2011), p. 1; M. Ch. Bassiouni, "Terrorism: the Persistent Dilemma of Legitimacy", in: *Case Western Reserve Journal for International Law*, 36 (2&3), 2004; S. Kirsch and A. Oehmichen (2011), pp. 7–8.

<sup>18</sup> P. Schmid, A. Jongman and M. Stohl, *Political Terrorism – a New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature*. (Amsterdam/New Brunswick, North-Holland Pub. Co., 1988, 2<sup>nd</sup> Edition), pp. 5–8.

<sup>19</sup> United Nations Office on Drugs and Crime: Definitions of Terrorism. Available at: [http://web.archive.org/web/20070527145632/www.unodc.org/unodc/terrorism\\_definitions.html](http://web.archive.org/web/20070527145632/www.unodc.org/unodc/terrorism_definitions.html) (Accessed on 27 April 2011).



these terms under that law ... cannot be viewed as terrorism.” However, this exemption clause is again based on a “just war” argument, i.e. the assumption that certain circumstances may in fact transform violence from what may otherwise be considered to be an act of terrorism into an act of freedom fighting.<sup>20</sup>

References to the “just war” argument have dominated political discussions, especially in the U.S., with regard to Al-Qaeda. A reference to the “just war” argument in a legal document on terrorism provoked however a series of questions, including: may such a principle be applied to (politically motivated) violence at all? If this is answered in the affirmative, certain justifications could be invoked to transform violence from an evil to a non-evil-action. Not only States themselves are provided with some protections in this way insofar as State intervention is exempted from any terrorism charge without further question, but also other groups or individuals as well. How these exemption clauses can be accommodated within the wider fight against terrorism and whether they simply open a Pandora’s Box of difficulties remain moot questions.

## 5. FIGHTING TERRORISM BY MEANS OF CRIMINAL LAW

It would nevertheless be unfair to judge efforts designed to fight terrorism by means of the criminal law, like those foreseen in the EU-Framework Decisions, solely on the fact that they do not solve the historically difficult distinction between terrorism and freedom fighting. Criticism should rather focus on the special use of criminal law in a certain system, like that established by the Framework Decisions. Basically, the EU act does two things:

- a) compel Member States to punish certain acts, and
  - b) force Member States to claim wide jurisdiction in order to ensure prosecution.
- These obligations correspond in general with the demands of the Special Tribunal for Lebanon, which deduced from rules of international law two obligations on States and non-State actors:
- 1) the obligation to refrain from engaging in acts of terrorism, and
  - 2) the obligation to prevent and repress terrorism, and in particular to prosecute and try alleged perpetrators.<sup>21</sup>

<sup>20</sup> S. Peers, ‘EU Responses to Terrorism’, in: *International and Comparative Law Quarterly*, 52, 2003, pp. 236–238.

<sup>21</sup> Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R176bis, Feb. 16, 2011 (‘Decision’), no. 102.

## 5.1. OBLIGATION TO PUNISH

The Framework Decisions – as explained above – oblige Member States to punish certain behaviour as terrorist acts. This fact can be interpreted quite differently: It could be viewed as progress towards a united fight against terrorism *or* as an EU infringement on State sovereignty and a violation of a democratically legitimized law.

The duty to criminalize, established by the Framework Decisions, is quite broad – as illustrated previously – especially if one bends the rather imprecise language to encompass all its possible meanings, for instance when criminalizing acts of preparation and/or conspiracy to commit acts of terrorism.<sup>22</sup>

The EU obligation is thus problematic, taking into account the basic question of a European competence to define criminal terrorist acts in the first place and the Framework Decision's failure to frame punishable terrorist activities in a precise language.<sup>23</sup> Nonetheless, in attempting to come up with definitions it is important to keep in mind – as the German *Bundesverfassungsgericht* phrased it in its 2009 Lisbon Judgement – that: "decisions on substantive and formal criminal law are particularly important to the ability of a constitutional state to democratically shape its laws."<sup>24</sup>

However, seven years earlier, the 2002 Framework Decision set out to compel Member States to punish certain acts of "terrorism" on the grounds of EU parameters laid out in the Framework Decision. And, this Framework Decision does not meet in all aspects the requirements of precise language and coherent concepts that govern most of the different Member States' criminal justice systems.

One must furthermore always keep in mind the fact that, in practice, the importance of anti-terrorist legislation is often not the elements of crime that it defines, but the special investigative methods or other measure provided to deal with it.<sup>25</sup> Neither of these aspects are however laid down in the EU Framework Decisions.

<sup>22</sup> For critical views see e.g. S. Melander, 'The Use of Criminal Law in Combatting Terrorism – a Nordic Perspective', in: K. Ligeti (ed.) *Homage to Imre A. Wiener*. (Toulouse, AIDP No. 22, 2010), pp. 121–123.

<sup>23</sup> S. Peers (2003), pp. 230–232.

<sup>24</sup> BVerfG – 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, no. 252; see <[www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html)>.

<sup>25</sup> A. Oehmichen, 'Incommunicado Detention in Germany: An Example of Reactive Anti-terror Legislation and Long-term Consequences', in: *German Law Journal*, 9, 2008, pp. 855–887; S. Peers (2003), pp. 237–243.

## 5.2. EXPANSION OF JURISDICTION

The EU Framework Decisions also obliges the Member States to expand their criminal jurisdiction. According to Article 9 of the 2002 Framework Decision, each Member State shall take the necessary measures to establish:

- territorial jurisdiction (extending the concept to vessels flying its flag and aircraft registered there);
- jurisdiction based on a broad concept of the active personality principle (including acts committed by “residents” and legal persons as well as citizens);
- jurisdiction based on a broad concept of the protective principle, where acts are committed “against the institutions or people” of that Member State or an EU institution or body based there.

Given that EU Member States have not yet settled on a legal act which allocates clear-cut jurisdiction to one EU State in cases of a positive competence conflict, the obligation to expand jurisdiction and potentially intensify the problem of multiple jurisdictions is striking.

## 5.3. INFRINGEMENTS OF HUMAN RIGHTS?

In addition, anti-terrorist legislation always raises concerns about the adequate protection of human rights and civil liberties. The European authorities have, however, realised by now that respect for human rights adds to the legitimacy of the fight against terrorism, and thus strive for compliance with human rights as well as spreading respect of human rights in order to ensure that there is a sound basis for cooperation with third countries.

On the face of it, such concern seems unnecessary anyway, since Article 2 of the 2008 Framework Decision explicitly declares that: “[The] Framework Decision shall not have the effect of requiring Member States to take measures in contradiction of fundamental principles relating to freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.”

The legal effect and impact of Article 2 to a particular case remains nonetheless somewhat unclear. Could a defendant raise an objection based on an infringement of Article 2 of the 2008 Framework Decision? Or could a Member State raise, for instance, a reservation of national freedom of expression if its national criminal laws were to be screened before the ECJ because the penal statutes against terrorism were judged too lenient from a Brussels point of view?

Before the 2008 amendment, the Framework Decision of 2002 only stated in its preamble that the Union is "based on the principle of democracy and the principle of the rule of law" and that the Framework Decision "respects fundamental rights" as guaranteed by the European Convention on Human Rights (ECHR) and Member States' constitutions and "observes the principle recognised by the EU Charter of Fundamental Rights, agreed in December 2000."<sup>26</sup>

The European Court of Human Rights (ECtHR) has, however, rejected the invoking of human rights protections for *violent* political acts committed in the territory of signatory States to the European Convention on Human Rights in general: Given that all of them are considered to be democratic countries, and have made a commitment to human rights protection, political violence may be treated like any other serious criminal offence.<sup>27</sup> However in recent judgements the ECtHR has been firm in Human Rights protection as regards of certain consequences like preventive detention as well as deportation or expulsion of terrorist suspects, if they cannot be convicted in a criminal trial.<sup>28</sup> Thus the FD's parameters for substantive criminal law should only raise concern with regard to the incrimination of non-violent actions, such as alleged recruitment for terrorism in certain situations, which touch upon the freedom of association, the freedom of speech and expression as well as on the principle of legal certainty.<sup>29</sup> But there is still little relevant case law up to now.

Counter terrorism legislation often collides with the right to freedom of speech because it often seeks to suppress certain politically motivated acts. Furthermore, terrorism, or rather the fear of terrorism, is also often used to justify the use of special police and prosecution powers that reduce the usual protection of fair trial guarantees relating to investigations, detention, and criminal proceedings.<sup>30</sup> Both are highly problematic from a human rights perspective.

<sup>26</sup> The preamble further asserts that the Framework Decision could not be interpreted to "reduce or restrict fundamental rights or freedom such as the right to strike, freedom of assembly, of association and of expression, including the right of everyone to form and join trade unions ... and the related right to demonstrate".

<sup>27</sup> See furthermore ECtHR of 18 January 1978, no. 5310/71 (*Ireland v. UK*); ECtHR of 27 September 1995 no. 18984/91 (*McCann and Others v. United Kingdom*).

<sup>28</sup> See e.g. ECtHR of 19 February 2009, no. 3455/05 "A v. UK" or ECtHR of 28 February 2008, no. 37201/06 "*Sadi v. Italy*" or ECtHR of 29 March 2009, no. 38128/06 (*Ben Salah v. Italy*).

<sup>29</sup> ECtHR of 26 April 1979, no. 6538 (*Sunday Times v. United Kingdom*). ECtHR of 30 January 1998, no. 6538, (*United Communist Party v. Turkey*); ECtHR of 13 February 2003, nos. 41340/98, 41342/98, 41343/98, 41344/98, (*Welfare Party v. Turkey*).

<sup>30</sup> See precedent footnote as well as judgments regarding infiltration of undercover agents in terrorist organisation ECtHR of 5 February 2008, no. 74420/01 (*Ramanauskas v. Lithuania*) or ECtHR of 10 March 2009 (*Beykov v. Russia*), which are only legitimate if there is an adequate legal base and a guarantee of supervision of independent authority as well as a clear distinction between identifying perpetrators and inciting an innocent person; regarding collection and automatic procession of data (data mining), see ECtHR of 4 May 2000, no. 28341/95 (*Rotaru v.*

## 6. CONCLUSION

The EU Framework Decisions provide the grounds on which Member States have, at least partly, built their national criminal sanctions against terrorism. In doing so, legislators – at the European and the State level – have had to create systems which allow them to fight violent attacks effectively, but which do not cause unwanted consequences on other levels. Two tasks – to which Cyrille Fijnaut has drawn our attention for many years<sup>31</sup> – appear to be of most importance here:

First, the respective criminal laws must draw an adequate line between those groups advancing legitimate political goals with controversial means and those which have crossed the line, not only propagating illegitimate political goals, but using punishable means. This task, even in theory, has all the appeal of an impossible mission. In practice, within each of these two movements, the law must again distinguish between those who principally use violent means and those who advance the same political goal, but principally by non-violent means. In criminal law that line runs, for instance, between perpetrators and participants and the clean-handed. Once again, legal instruments have to take into account on the one hand the fact that political groups are often difficult to define and do not always control the actions of associated individuals, and, on the other, the fact that the perceived legitimacy of violence against the State is inevitably bound up with the perceived legitimacy of that State's political system.

Second, when the legislator has succeeded in defining punishable terrorism, he must follow a clear, deliberate and feasible agenda, for instance regarding cross-border cooperation in establishing a valid framework for exchange of alleged perpetrators or of evidence needed in criminal trials.

Using the criminal law against terrorists may prove to be not only difficult and sometimes ineffective, but in some situations dangerous itself. A careless phrasing of criminal law or a perfunctory framework for international cooperation as well as ill-founded, but harsh reactions to “terrorists” and their supporters potentially risks alienating moderate critics of the State, increasing the ranks of violent opponents of the system and thus paradoxically further increasing the risk to public safety. Most profoundly, a reaction to terrorism that undermines the protection of democracy and human rights, including the right to a fair trial, damages the very values and principles upon which liberal democratic states have founded their political legitimacy.

---

Romania) and ECtHR of 4 December 2008, no. 30562/04 and 30566/04 (*S. and Marper v. UK*) (DNA storage).

<sup>31</sup> E.g. C. Fijnaut, ‘General Introduction’, in: C. Fijnaut, J. Wouters and F. Naert (2004), pp. 4–5; C. Fijnaut, *De samenwerking tussen de lidstaten van de Europese Unie bij de bestrijding van het internationale islamistisch terrorisme*. (Leuven, Universitaire Pers Leuven, 2004); C. Fijnaut, ‘General Introduction’, in: C. Fijnaut and J. Ouwerkerk (eds.), *The Future of Police and Judicial Cooperation in the European Union*. (Leiden, Martinus Nijhoff Publishers, 2010), pp. 6–7.

