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Preface

Dear readers,

With great pleasure we present the twelfth newsletter of the FP-6 project Transnational Terrorism, Security and the Rule of Law (TTSRL). This newsletter introduces the results of deliverable 12b of Work Package 6, entitled "The ethical justness of counterterrorism

measures". The results of deliverables 10, 11 and 12a of Work Package 6 have been presented in the newsletters II, III and VIII.

Deliverable 12b deals with the questions on the ethical justness of counterterrorism measures. These questions are highly relevant. Seven years after the attacks of 9/11, many policies, measures and regulations on counterterrorism, both on a national level as on an international or regional level, have been adopted. Although, the expediency with which some of these measures were adopted should be applauded, it turned out that not all of these measures excelled in their balanced approach. The main dilemma is the ever-lasting debate on whether security can be guaranteed while respecting liberty rights. As some argue that respecting liberty to the full extent will jeopardize the discretionary power which the government needs to guarantee security, and that sacrificing some of our freedom rights is a small offer to bring for our security, we should also remind ourselves that terrorism is a threat to the core values of our free democratic society, such as the rule of law, and that these core values should not be lost in our battle against terrorism.

It is in this light, that the analysis of deliverable 12b goes beyond a mere assessment of the legality of the measures and the respect for human rights. The selected counterterrorism measures of the EU and five European sample states with an extensive experience with (counter)terrorism (UK, Germany, France, Spain, and the Netherlands) are also analysed with regard to their legitimacy, which depends on (1) the determinacy of the formulation of the measures, (2)





the tradition in which a new measure might be adopted, (3) its coherence with other policies and underlying principles, and (4) its adherence to a larger dimension of fundamental values which might not directly follow from international obligations. Whether or not we are able to prevail the moral high ground while combating terrorism, depends on the degree of legitimacy of the counterterrorism measures, which follows from the outcome of the assessment of the aforementioned indicators. The degree of legitimacy of the measures, moreover, gives insight in the pull to compliance of the measure, and thus the effectiveness.

The results of this analysis, show that there are several ethical bottlenecks that hamper the legitimacy, and thus the effectiveness of counterterrorism policies. These outcomes are in a way illustrative for European efforts in the field: commendable for their eagerness to take action against terrorism, but without overseeing all the consequences, and dazzled with a foresight of short term success.

A number of policy recommendations are made, with suggestions to ameliorate the degree of legitimacy of these measures and to remedy the ethical bottlenecks. These proposed changes could thus contribute to a long term legitimate and more effective counterterrorism policy.

Kind regards on behalf of the TTSRL-consortium,

Bibi van Ginkel

Senior researcher of the Netherlands Institute of International Relations 'Clingendael'





2. Summary of Deliverable 12b: *On the ethical justness of counterterrorism measures*

Introduction

This deliverable assesses the ethical justness of the counterterrorism measures of the EU and five European sample states: the UK, Germany, France, Spain and the Netherlands. The selected five European states all have extensive past and present experience with terrorism and counterterrorism measures.

Since it has not been possible to assess all counterterrorism measures and policies of the EU and the sample states, a selection of measures has been made. The measures selected for the analysis all have to some extent impact on the lives of individual civilians. It is in this category especially that the 'ethical justness' of counterterrorism measures plays an important role in order to guarantee the credibility of the policy makers.

The research into the ethical justness of counterterrorism measures has been conducted along the lines of the questions into the legality and the legitimacy of the measures. This choice has been made in order to set up a general research framework for the assessments of the EU measures and the measures of the European sample states, since the connotation 'ethical' has many different meanings.

For the interpretation of the meaning of legitimacy (also a term with many different meanings), the framework of indicators developed by Thomas Franck have been used. The indicators determinacy, pedigree or symbolic validation, coherence and adherence of a measure, all provide information on the degree of legitimacy, and thus the pull to compliance of a measure. The extent to which a measure provides a pull to compliance, thus predicts its effectiveness, in the sense that any chance on material effectiveness starts with an effective implementation of the measure.

The assessments were based inter alia on reports of NGOs, court cases, parliamentary debates, news reports, reports of advisory councils that have to be consulted during the legislation process, and intelligence services reports or their supervisory bodies on complaints regarding irregularities in their activities vis-à-vis court decisions.

The outcome of the analysis of the case studies reveal the weaknesses in the counterterrorism policies, not necessarily because of their illegality or explicit





violation of human rights obligations, but because some of these measures score below par on the legitimacy scale for example as a result of a lack of determinacy in the wordings and the meaning of a measure. The weaknesses in the measures have been translated into ethical bottlenecks. These identified ethical bottlenecks weaken the overall effectiveness of the counterterrorism policies. This conclusion, therefore overrides the perceived dilemma between security and liberty rights. In contrast, it strengthens the believe that effective measures to preserve our security should be inclusive of liberty rights.

The policy recommendations that follow the analysis of the ethical bottlenecks, seek to rectify the shortcomings in the measures. They are recommendations that strive for prudent modifications, that will nevertheless greatly enhance the legitimacy of their respective legal frameworks.

Case studies

Each of the case studies started with a selection of the counterterrorism measures for the purpose of further analysis. Next these measures were analysed on their legality and legitimacy. In most cases, there was no serious problem with the legality. On few occasions, the legality is being challenged in court. The legitimacy of most measures, on the other hand, is seriously criticized.

European Union

The EU case study analysed the Framework Decision on Combating Terrorism, measures regarding the financing of terrorism, measures regarding the detention of data, the European Arrest Warrant, exchange of evidence and extradition, and measures regarding border control and travel documentation.

As an exercise in coordinating the counterterrorism measures of individual Member States, the EU measures are especially important in establishing a normative framework. Nevertheless, the analysis of the legality and the legitimacy of the EU counter-terrorism measures demonstrate considerable ethical bottlenecks. These bottlenecks arise especially in the application of the terrorist financing, data retention, travel documentation, and third state extradition.

The many ethical bottlenecks include: an overly broad definition of terrorism; a lack of fair trial principles in the terrorist financing; a lack of privacy





protection in data retention measures and travel documentation; and, a lack of human rights safeguards on third extradition processes.

Ethical Bottlenecks – European Union
Framework Decision on Combating Terrorism: Overly broad definition lacks predictability. Potential for including legitimate public protest. Potential for including legitimate free speech.
Data Retention and Travel Documentation: Ignores right to privacy. Ignores presumption of innocence.
Third State Extradition: No parliamentary oversight in ratification process. Potential for egregious human rights abuses- including torture and capital punishment.
Terrorist Financing Measures: Ignore right to due process. Lack democratic oversight.

United Kingdom

For the case study on the United Kingdom, the following measures were selected: the definition of terrorism; rules on detention; measure on the glorification of terrorism; the control orders; measures on undisclosed inquest; requirement of notification on whereabouts; disclosure notices; deprivation of citizenship; stop and search measures; and, restricted right to consult a solicitor.

The analysis into the legality and the legitimacy of the British counter-terrorism measures show that the UK has a substantial number of ethical challenges. Primary among these is their vague nature. Though terrorism is a protean threat, whereby the challenges are dynamic and the need to be flexible in response to these challenges is critical, the indeterminacy of British counter-terrorism measures inhibits, to a significant extent, the legitimacy of their execution. Generally, British measures are indeterminate, exemplified in the broad definition of terrorism in the Terrorist Act 2000, later amended in 2008.

Beyond this, a substantial number of the legal measures contradict the ambition of harmonizing counterterrorism policy with respect for human rights and civil liberties. All legal measures that are covered by an international agreement on human rights are out of line with those agreements or with general principles of law.





In sum, the British counter-terrorism measures have substantial ethical bottlenecks. This is due primarily to the perception of the terrorist threat on the part of the British government. In the pursuit of security, these measures were developed hastily and in the context of a heightened level of suspicion regarding Islamist terrorism. Consequently, they are broad in nature, unclear in application, and have the potential for discrimination.

Ethical Bottlenecks – United Kingdom
<p>Definition of Terrorism and Glorification Measures: Lack of predictability in establishing what clearly constitutes glorification. May include legitimate political protest and dissent.</p>
<p>Pre-Charge Detention: Not clear what is grounds for detention, i.e. what warrants pre-charge detention. Deprives right to liberty.</p>
<p>Control Orders: Meted out punishment for actions <i>before</i> they are committed. Challenges <i>onus probandi</i> principle in favor of 'on reasonable grounds' justification.</p>
<p>Stop-and-search: Potential for arbitrary use, infringing on <i>presumptio innocentia</i>. Possibility for ethnic, racial, religious, etc. discrimination through arbitrary use.</p>

Spain

The Spanish measures selected for the analysis are: the definition of terrorism, the law on the liability of minors for terrorist crimes, and the law of incommunicado detention.

The analysis showed that the legitimacy of the Spanish counter-terrorism measures is not particularly high. From this, the ethical bottlenecks have been extrapolated. Among the most controversial issues are allegations of torture or the ill treatment of detainees held in prison in connection with terrorism.

Without a doubt, the most problematic case of those analyzed is the law on incommunicado detention. According to studies by human rights organizations, the right of a citizen to security and proper legal representation and defense is seriously violated. The UN Special Rapporteur on Torture in relation to the incommunicado detention even warns for the creation of opportunities in which torture can take place.





The primary ethical bottlenecks of this measure are: the accused person cannot choose his own lawyer, but rather is only entitled to an assigned lawyer *ex officio*; his relatives or friends (or, if he is a foreigner, his embassy) do not have to be informed of his arrest; he cannot discuss his case with his assigned lawyer in privacy; and, finally, he can only be examined by a forensic medical examiner assigned by the authorities.

Ethical Bottlenecks – Spain
<p>Liability of Minors: Unclear how randomized urban violence is distinguished from terrorist acts. Out-of-date as it was originally focused on threat from ETA and not transnational jihadist terrorism; youth violence is not a major factor of the latter.</p>
<p>Incommunicado detention: Accused person cannot choose own lawyer. No privacy for accused person to discuss case with legal counsel. Authorities appoint a forensic doctor, which is a conflict of interest. Potential for human rights abuses, including torture. No official government review of the ethical quandaries.</p>

France

French counter-terrorism measures are confrontational, in the sense that they in principle attempt to directly affect the terrorists. The selection of measures for the analysis concentrate on the definition of terrorism as laid down in the French Penal Code, the softened procedural guarantees and special investigative techniques, and broad powers of magistrates.

The French counter-terrorism measures score relatively high on both legality and legitimacy. The challenges to the French approach in counter-terrorism policy, however, follow from the flexibility of the system, which, while useful in practice, especially runs the risk of undermining the transparency and predictability of the system.

The ethical bottlenecks that have been identified are: the vague definition of terrorist offences, and the friction between fundamental human rights and the softened procedural guarantees offered in terrorist cases and broad powers of counter-terrorism magistrates. Moreover, the narrow orientation on Islamist terrorism and the ensuing differentiated treatment of some national and immigrant groups endanger the respect of non-discrimination norm, risking





jeopardizing the fragile social peace in a multicultural country that France has become over the past decades.

Ethical Bottlenecks – France
<p>Definition of Terrorism: Overly broad definition lacks predictability. Potential for including legitimate public protest. Potential for including legitimate free speech.</p>
<p>Softened Procedural Guarantees: Infringements on several fundamental rights, including: right to liberty, right to security, right to legal privilege, right to free speech, and right to fair trial.</p>
<p>Broad Counter-terrorism Powers of Magistrates: No parliamentary oversight in ratification process. Potential for egregious human rights abuses- including torture and capital punishment. Potential for discrimination.</p>

Germany

The German counter-terrorism that have been analyzed are: the German Criminal Code, the Act on Joint Databases, the Fourth Financial Market Act and Money Laundering Prevention Act, the Act on Suppression of Terrorism, and the Draft Act of Preventing International Terrorist Threats.

The analysis of the above mentioned measures has revealed a number of ethical bottlenecks as regards counter-terrorism measures. These relate to compliance with legal measures in relation to both the Basic Law in Germany and to the international human rights obligations of Germany. Especially, The Act on Joint Data Bases, the Fourth financial Market Act, the Aviation Security Act, and the Act of Preventing International Crime have been questioned on legal grounds. The counter-terrorism measures introduced have also been questioned for not being legitimate. These questions have been raised primarily from an interpretation that the majority of measures lack clarity in terms of consequences for citizens and inhabitants. This is a critique raised against all the measures introduced. Applying the concept of determinacy highlights the principle of legal predictability and clarity. German measures demonstrate a trend, like other Member States, of ambiguity. As mentioned above, it is difficult to compel compliance if legal codes are not easily intelligible.





Laws are particularly less intelligible when they oversimplify the image of Muslims in Germany and do not render useful or correct information of the root causes of radicalization.

Related to the division of groups, an ethical dilemma arises out of the discussion of two of the measures, i.e. the Criminal Code and the Act on Joint Databases. Different principles are applied for terrorist crimes dependent on their status as national or international. In the case of the latter, politicians decide on prosecution, while in cases of domestic terrorist suspects, the decision to prosecute is administrative. For observers in Germany, it is difficult to find an explanation for these differences in policies.

Finally, the conflict between strengthened state control and surveillance and protection of privacy stands out as the major ethical dilemma lying at the core of the debate about legality and legitimacy with regards to counter-terrorism measures in Germany.

Ethical Bottlenecks – Germany
Rewarding and approving crime: Unclear how `rewarding and approving are construed as vis-à-vis terrorism.
Joint Act on Databases: Lacks adequate standards for use of data. Challenges right to privacy.
Terrorist Financing and Money Laundering: No effective de-listing procedure. Lacks legal predictability.
Counter-terrorism Measures in general: Too focused on specific ethnic and religious groups, i.e. Islamist terrorism.

The Netherlands

The Dutch government has initiated a number of measures, created to confront the entirety of the terrorist threat. The first of these measures is Criminal Law, art 83 WvSr, which outlines the criteria of the *terrorist objective*. Related to this are articles 80 and 96 WvSr, in which the *motive* is established. Other Dutch counter-terrorism measures include preliminary investigation regarding data retention measures, control orders, intentional disturbance measures, custody guidelines for terrorist suspects, witness guidelines, and anti-terrorist financing





measures. In the table below, the measures are listed with their attendant descriptions.

Dutch counter-terrorism policy exhibits a proactive approach to combat terrorism from its inception, in addition to its perpetration. The pre-emptive and anticipatory character of Dutch counter-terrorism measures do, however, create an ethical bottleneck because they limit civil liberties, whether through legislation or police action. Limiting civil liberties arises because it conflicts with a key component of legitimate rule of law- the principle of predictability in the legal system. As in other case studies, the inability of laws to demonstrate penalized behavior clearly leads to ethical bottlenecks. Although vagueness allows for flexibility, legal transparency is a critical component of rule of law because it ensures that civil liberties will be protected. When laws are not clear, there is no explicit protection.

For example, the broad definition of terrorism lowers the legal bar arresting, detaining and investigating people. Furthermore, once people have been detained, they have no ability to examine the evidence being used against them. The right to fair trial is forfeited and is, thus, an ethical bottleneck.

Ethical Bottlenecks – Netherlands
Limiting movement of a person: Does not uphold presumption of innocence. Possibility for arbitrary treatment.
Police Disturbances: Intervention standards are not clear. Principle of proportionality is not present.
Terrorist Financing: Vague standards for inclusion. Individuals cannot effectively challenge the sanctions levied against them.

Policy recommendations

European Union

The first policy recommendation relates to the factor of foreseeability in the broad definition of terrorism. To overcome the lack of legal predictability inherent in the EU definitions, provisions should be made that differentiate between political dissent and the actual commitment of a terrorist act. The EU definition should





explicitly bifurcate between actual terrorism and acceptable free speech and association. The EU definition, should moreover, be amended to clarify who belongs to the target group.

The next policy recommendation have to do with protecting the right to privacy and the presumption of innocence especially through the implementation of data retention measures and the travel documentation measures that record passenger names and information. These provisions should be made to include explicit indications when data can be collected from citizens. Data collection should occur only when there is a clear and present danger attributed to the actions of a particular individual or group. A litmus test must be present to prevent the arbitrariness of data collection. Moreover, the legitimacy of recording passenger data can be improved when this data is only collected on persons of concerns and not the public at large.

The third policy recommendation relates to the measures on third state extradition. Since parliamentary oversight is missing in the process so far, this should be corrected for those states that yet have to ratify this agreement. We, furthermore, recommend that all states explicitly adhere to the long established European extradition pedigree in which refusal of extradition is a possible if the requested person faces egregious human rights abuse such as torture and/or capital punishment.

Finally, with regard to the measures on combating the financing of terrorism, it is necessary that the EU establishes an effective provision for individuals to challenge their inclusion on a sanctions list. Moreover, initial inclusion should be the product of an analysis by a qualified and impartial group of individuals and not merely intelligence services. Therefore, the establishment of an group of human rights experts, law enforcement officials, and counter-terrorism experts is recommended, to ensure that any inclusion on these lists is subject to legitimate governmental oversight. This group should include an ombudsman to liaise with the individuals who have been placed on these sanctions lists.

United Kingdom

In order to remedy the challenges to the individual that stem from the definition of terrorism and glorification measures, namely the rights to free speech and public protest, steps should be taken to include an explicit listing of public acts of





protest and dissent that are acceptable under the measure. Moreover, explicit guidelines should be drawn to determine what kind of behavior is allowed, and does not fall under the prohibition of glorification. Both measures should thus include a provision that details the limits of the scope of the measure.

With regard to the pre-charge detention measure, the charges that necessitate pre-charge detention should be made explicit. In addition, the conditions under which extensive pre-trial detentions can be ordered, should be formulated in detail.

The third recommendation entails the establishment of a more transparent framework in which control order investigations can be conducted. A clear level of evidence should be required before control orders are enacted.

Finally, the stop and search measures should be modified in order to uphold the presumption of innocence and to prevent discrimination. Constabulary activities, in the course of stop and search measures, should be executed through another set of parameters that forbid stopping and searching from being done arbitrarily or against people of a certain ethnic background.

Spain

As a general recommendation to Spain, we emphasize the importance of taking into account the claims made by several competent and independent observers. At the very least, this will demonstrate that the Spanish government is concerned about the claims made on the human rights violations, and will take appropriate steps to remedy them.

More in particular, we recommend that a new provision is included in the Organic Act on the Liability of Minors in relation to terrorist crimes. This provision should explicitly state what acts committed by minors will be treated as terrorism and which acts will be regarded as random urban violence.

With regard to the incommunicado detention, we recommend that the accused should be allowed to choose his own legal counsel. Moreover, privacy should be allowed for suspects to discuss their case with their self-selected legal council. And finally, a forensic doctor not appointed by authorities should make visits on suspects to further ensure that human rights abuses have not taken place.

France





The first set of policy recommendations deal with the ethical bottlenecks associated with the definition of terrorism. Due to its lack of determinacy, it is entirely possible that legitimate public protest and legal exercises of free speech are criminalized. Therefore, a simple elaboration of the explicit actions and speech that fall under the definition of terrorism must be implemented. In addition, provisions should be made so that the distinction can be easily drawn between the two for matters of punishing those who support terrorism and those who are exercising free speech rights.

The second recommendation relates to the softened procedural guarantees, that allows magistrates to circumvent human rights norms. A committee of experienced human rights judges and law enforcement experts should be convened to ensure that whatever action stems from the magistrates decision to deviate from normative concerns, is done with proportionality.

Finally, the broad counter-terrorism powers of magistrates should be subject to a form of oversight. Again, a group of experts should be convened to ensure that the potential for human rights abuses is kept to an absolute minimum. This group should also ensure that systemic discrimination against certain ethnic or religious groups does not take place.

Germany

The first recommendation relates to the measures regarding the glorification of terrorism. German authorities should establish a provision that specifies what behavior, speech, and actions will be interpreted as supporting terrorism, in order to enhance the predictability of the measure.

In order to protect the right to privacy, Germany should heed the advice of the European Data Protection Supervisor in establishing guidelines for the storage and use of electronic data. Furthermore, clear guidelines should be established for the joint use of this data between law enforcement, intelligence, and judicial agents of the German government. Likewise, clear guidelines should be implemented that establish a threshold for the collection of electronic data. Finally, a litmus test should be installed in order to only allow those people who present a clear and present danger to society to be targeted in the process of data collection.

Parallel to earlier recommendations in the context of combating financing of terrorism, an ombudsman should be empowered to liaise with individuals on





sanctions lists and the authorities responsible for listing. Likewise, recourse to legal measures of de-listing should be implemented for that individual to contest his accusations.

Finally, Germany should ensure that counter-terrorism measures do not unduly focus on German Muslims, thereby avoiding the risk that certain policies feed domestic radicalization.

The Netherlands

The first set of recommendation relates to the two ethical bottlenecks of limiting an individual's freedom of movement: the lack of the presumption of innocence and the possibility for arbitrary treatment. Dutch officials should make provisions in this measure that tighten the standards for its implementation. The measure especially does not establish what particular conditions necessitate limiting the movement of a person. A standardized set of requirements would prevent arbitrariness of this measure. Additionally, it will prevent infringing on the presumption of innocence.

With regard to the measure of police disturbances, a tightening of standards for their application would also enhance the legitimacy of the measure. Thus, we recommend that police disturbances be triggered only when the actions of an individual meet a particular threshold. Legal scholars, human rights advocates, and law enforcement should establish this threshold to ensure that effectiveness is balanced with human rights guarantees.

Finally, with regard to the ethical bottlenecks of terrorist financing, a set of recommendations similar to the measure's use in the EU can be posited. First of all, as called for elsewhere, the competence of the national ombudsman for dealing with individual's inclusion on a sanctions list would be helpful in streamlining the terrorist financing measure. Beyond this, individuals should be able to effectively challenge their inclusion on these lists.





3. Upcoming Events

TTSRL FINAL CONFERENCE

Brussels February 5-6, 2009

Dear Madam/Sir,

On behalf of the consortium partners of the research project '**Transnational Terrorism, Security and the Rule of Law**' (TTSRL), we have the pleasure of inviting you to our concluding conference **February 5-6, 2009 in Brussels**. We are pleased to confirm that Alex P. Schmid, Director of the Centre for the Study of Terrorism and Political Violence, will be the keynote speaker.

TTSRL constitutes a research project in the scope of the 6th Framework Programme of the European Union, and is financed by the European Commission. It frames the current nature of the threat of terrorism in the European Union and generates insight about a variety of response options.

The two day conference is organised as a final event to conclude the TTSRL research project. The main findings and conclusions will be presented by senior-researchers during plenary and discussion sessions on Thursday and Friday, February 5-6, 2009. The outcomes of the conference will supplement the final report presented to the European Commission.

Given your background and current activities, we believe that the results presented at the conference will be of interest and relevance to you. **This will also be an excellent opportunity to exchange knowledge and insights and we welcome your personal contribution during the discussion sessions.**

A preliminary program and all publications, newsletters and policy briefs of the project to date are available on our website <http://www.transnationalterrorism.eu>. For more details about our conference, please contact transnationalterrorism@cot.nl. If you would like to join us, we kindly ask you to **RSVP by January 27, 2009**.

Yours sincerely, on behalf of the TTSRL consortium,

Prof. dr. Uri Rosenthal

Prof. mr. dr. Erwin Muller

