



# **Ethical Justness of Counter-terrorism Measures**

## **EU measures**

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## 1. Introduction

The European Union employs a wide variety of measures to combat terrorism. For the analysis of ethical justness we concentrate on the adopted measures that especially impact the lives of individuals and challenge fundamental rights. The following measures *inter alia* are assessed: 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. These measures are significant because they touch on the individual rights of citizens in the Member States. Furthermore, they are the touchstone on which individual Member States develop and implement their own counter-terrorism policies.

Terrorism in Europe is not new. Europe has struggled against various forms of terrorism for centuries. Some critics contend the Jacobins in France during that country's revolution were Europe's first organized terrorist group. Centuries later, with European integration having an auspicious start and recognizing the continued threat of terrorism, the Council of Europe established the European Convention on the Suppression of Terrorism (ECST). This convention sought to bring contracting parties together to move towards the approximation of prosecutable offenses related to terrorism in Europe. This was in 1977. A groundbreaking feature of the Convention was that it was the first international counter-terrorism document to confront a wide spectrum of terrorist acts and to require states not to consider them as political offences, offences connected with a political offence or as offences inspired by political motives (Dumitriu, 2004). The objective of the ECST was to develop a composite definition of terrorism so as to facilitate the prosecution of these offences among the contracting parties.

As Europe integrated, terrorism was both a constant threat and a constant issue in the integration process. In 1992, the Treaty of the European Union (TEU) was established. Contained therein was Article 29, which implied that terrorism should be dealt with by the Member States so as to facilitate the creation of a European space of freedom, safety and justice (Art. 29, TEU). Various legal instruments have been established through the decades and they have played an important role in Europe's fight against terrorism. However, 11 September 2001

pushed terrorism to the very front of the EU's agenda and many new measures were introduced. The attacks in London and Madrid only added to this institutional momentum. With that, this case study charts the development of European counter-terrorism efforts both before and after September 11<sup>th</sup>. The objective is to analyze the legality and the legitimacy of the primary counter-terrorism measures currently employed in the EU.

Due to the fact that ethical obstacles are not dealt with when discussing legality, the methodology incorporates a framework for assessing the legitimacy of a policy or measure. As legitimacy is also subject to varying interpretations, this deliverable employs a standard framework developed by Thomas Franck, professor of international law at New York University. Based on this framework, legitimacy is taken to mean the ability for a policy or measure to demonstrate a pull towards compliance. In other words, legitimacy is the degree to which measures inculcate assiduity by policymakers and citizens. The four factors offered by Franck- determinacy, symbolic validation, coherence, and adherence- guide the methodological framework of analyzing legitimacy. Measures that demonstrate significant degrees of each of these four variables exhibit legitimacy. Each indicator is elaborated in its respective section.

The measures included encompass the broad approach taken by the EU against transnational terrorism. The first measure, the Framework Decision on Combating Terrorism is the flagship measure. This document sets out the general efforts of the EU in dealing with terrorism from a legal standpoint. The Framework Decision sets out the criminal justice model approach the EU takes to terrorism. The next set of measures is anti-terrorist financing measures. The impetus for these stem from United Nations Security Council resolutions. In dealing with contemporary terrorist threats, authorities have sought to limit terrorists' use of the worldwide financial architecture in furtherance of their destructive objectives. The third set of measures is the data retention context. These measures, similar to the way anti-terrorist financing measures limit terrorists ability to move money, limit the ability of terrorists to communicate and travel. However, as will be seen, they also limit innocent peoples' abilities to do the same. The fourth set of measures included in this case study is the Passenger Name Record (PNR) context. Related to data retention, these measures gather data regarding international airline passenger flying into and out of the European Union. The penultimate set of measures is the European

Arrest Warrant. A key component of the criminal justice model of counter-terrorism is extradition. The EAW plays the role of facilitating extradition among EU Member States. Finally, the US-EU Extradition Agreement is a proposed agreement between the two parties to establish a coherent trans-Atlantic extradition regime. In leading the fight against terrorism, the United States and the EU have increased their cooperation in many fields, extradition and legal assistance included.

After the analyses of legality and legitimacy, the case study concludes by pointing out the ethical bottlenecks of the measures. These are obstacles that must be remedied through policy modifications in order to rectify legal and legitimacy issues.

**2. Counter-terrorism Measures of the European Union**

This case study includes six sets of counter-terrorism measures operating or proposed to operate in the European Union. They have been selected on the basis of their impact on the lives of individual citizens and because of their public profiles. All of the included measures have received generous commentary from NGOs, governments, think tanks, and the European Union and its various instruments. In the table below, each measure is given, along with its attendant legislation designation. Additionally, a brief description is given.

Measure	Description
Framework Decision on Combating Terrorism	<ul style="list-style-type: none"> <li>• <i>Framework Decision 2002/475/JHA</i></li> <li>• The 'flagship measure' of EU CT efforts. Sets out a common definition of terrorism with three elements: context, aim, and specificity of the act (art. 1). Context refers to whether the act was intended to cause damage to a state or international organization. Aim refers to the objective of the act—whether it was to undermine a government or international organization, intimidate a population, or destabilize or destroy either. The specificity of the act is the type of act with is punishable, with a litany of actions given (art. 1, sec. a-j).</li> <li>• Also included are other punishable transgressions relating to terrorist activity (art. 2-4).</li> </ul>
Anti-Terrorist	<ul style="list-style-type: none"> <li>• <i>Implementation of United Nations Security Council resolution 1267 (1999)</i></li> </ul>

Financing	<p><i>through Common Position 2002/402/CFSP and Regulation 881/2002</i></p> <ul style="list-style-type: none"> <li>• <i>Implementation of United Nations Security Council resolution 1373 (2001) through Common Positions 2001/930/CFSP &amp; 2001/931/CFSP and Regulation 2580/2001</i></li> <li>• SC Resolution 1267 (1999) and follow-up resolutions set up the regime of freezing of financial assets of blacklisted individuals and entities related to the Taliban, Al Qaida and Osama bin Laden.</li> <li>• Common Position 2002/402/CFSP and Regulation 881/2002 copy the 'UN blacklist', and install a sanction regime applicable within the EU.</li> <li>• SC Resolution 1373 (2001) orders states to take measures against the financing of terrorism and implement legislation criminalizing terrorism.</li> <li>• Common Position 930 provides for a variety of commitments to combat terrorism, including criminalizing the willful provision or collection of funds for terrorist acts (art. 1). It freezes funds used or intended to use in furtherance of terrorist acts (art. 2). And provides for further suppression of terrorist support, such as recruitment or supply of materiel (art. 4)</li> <li>• Common Position 931 specifies how measures to combat terrorism should be applied at the Community level. It provides for the definitions of persons, groups and entities that can be considered terrorists (art. 1, para. 2-3). It also indicates the basis on which the decision for listing individuals as terrorists should be taken (art. 1, para 4).</li> <li>• Regulation 2580/2001 further implements the freezing of financial assets of those listed on the EU blacklist.</li> </ul>
Data Retention	<ul style="list-style-type: none"> <li>• <i>Directive 95/46/EC; 2002/58/EC; 2006/24/EC; Council Framework Decision 24/6/2008; 2008/977/JHA</i></li> <li>• Directive 95/46/EC promulgates that data processing can be utilized for explicit, lawful, legitimate, and adequate purposes related to the creation or maintenance of statistical, scientific, or historical databases.</li> <li>• Directive 2006/24/EC amended 2002/58/EC. The former sets out the data that can be collected and through for what means and for specified purposes. The amending directive establishes a standard applying exclusively to the collection of data in investigation of a crime, including terrorism.</li> <li>• Framework Decision 24/6/2008 lays out data collection cooperation between Member States by virtue of the fact that it promulgates the framework for extensive Member States cooperation on police and judicial matters.</li> <li>• Framework Decision 2008/977/JHA provides for the protection of data being gathered and processed for the 'purpose of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties' (Art. 6) falling under the third pillar of the EU.</li> </ul>
Passenger	<ul style="list-style-type: none"> <li>• <i>Passenger Name Record Framework Decision</i></li> </ul>

Name Records (PNR)	<ul style="list-style-type: none"> <li>Promulgates the making available of passenger name records (PNR) of passenger of international flights to the authorities of the Member States for the purpose of preventing and combating terrorism and organized crime (art. 1).</li> </ul>
European Arrest Warrant	<ul style="list-style-type: none"> <li><i>Council Framework Decision 2002/584/JHA</i></li> <li>Abolishes the principle of double criminality of an act. This involved the following five changes: First, the political element in the decision-making on extradition was removed by declaring the EAW to be dependent on a judicial decision (Art. 1 (1)) thus to be taken by judicial authorities. Second, the 'exception rule' blocking the surrender of own nationals, and three, the political offence exception was abolished (Art. 1 (2) and Art. 2 respectively). Four, grounds for an optional non-execution of the EAW were introduced (Art. 4) and five, the Framework Decision introduced strict time limits and procedures concerning the decision to issue a European arrest warrant (Art. 17).</li> </ul>
Evidence Exchange and Extradition	<ul style="list-style-type: none"> <li><i>Agreement on Extradition Between the European Union and the United States of America</i></li> <li>Enhances cooperation between the Member States and the United States regarding the extradition of criminals and terrorists. Sets out the process through which extradition between Member States and the United States should occur.</li> </ul>

**Table 1. Description of Counter-terrorism Measures**

### **3. Legality of European Counter-terrorism Measures**

The assessment of legality proceeds from the question related to which legal basis has been used for a specific measure, whether the right decision-making procedure has been followed, and whether the purposes and principles including human rights and fundamental principles as referred to in the Treaty have been respected. The keystone for respect for human rights and fundamental principles as one of the elements of legality is found in article 6 of the European Union Treaty (TEU). This article enshrines the principle that the EU should respect civil rights and fundamental freedoms of individuals. With that normative and legal foundation in place, the European Union (EU) has the power to adopt measures and implement them in ways obedient to the pillar structure of the Union.

The material legal basis for a measure is found in whether the European Union has the competence to act on the matter in question. There are some fields in which the EU has no competence to establish measures and other fields

in which the EU is able to operate. The legal basis for a measure, therefore, is found in the European treaties that posit competence.

In the context of counter-terrorism efforts, the EU has adopted a range of measures, stemming from all three of the pillars- the European Community, Common and Foreign Security Policy, and Police and Judicial Cooperation.

The Framework Decision on Combating Terrorism has its legal basis in the third pillar because the EU has competence to construct cooperative policies. The legal basis of the second set of measures, the anti-terrorist financing measures can be found in all three pillars, because they relate to aspects of free flow of financial goods, the common foreign and security policy, as well as the justice and home affairs.

Moving on to the third set of measures, the data retention context has its legal basis under both the Community pillar and the third pillar. This is because the data retention framework was in the first place established under the auspices of the single market, which is in the Community Pillar, but is moving more and more versus the topic of criminal prosecution, hence the third pillar.

The legal basis of the next set of measures on Passenger Name Records can be found third pillar. The third pillar enables the EU to have competence in facilitating police and judicial cooperation, which the provisions of the PNR Framework Decision entail. The legal basis of the penultimate measure, the European Arrest Warrant, is also based in the third pillar.

And finally, the US-EU Extradition agreement finds legal basis in the EU’s competence to conclude foreign treaties (art. 24, par. 1, TEU), which is a power under the second pillar.

The table below presents each counter-terrorism measure and its legal basis. For each measure, the legal basis is given in italics and is followed by a brief description.

Measure	Legality
Framework Decision on Combating Terrorism	<ul style="list-style-type: none"> <li>• <i>Articles 29, 31 (e) and 34 (2b) EU Treaty (TEU)</i></li> <li>• Article 29 promulgates cooperation between Member State’s police, judicial and other competent authorities through common institutions.</li> <li>• Article 31(e) calls for the approximation of rules between Member States on criminal matters such as organized crime, drug trafficking and terrorism.</li> <li>• Article 34(2b) enables the Council to make Framework Decisions, which are</li> </ul>

	<p>binding on Member States, but whose implementation is left to their discretion.</p>
Anti-Terrorist Financing	<ul style="list-style-type: none"> <li>• <i>United Nations Security Council (UNSC) Resolutions 1267 (1999) and 1373 (2001).</i></li> <li>• <i>Implementation of UNSC Resolution 1267 through Common Position 2002/402/CFSP and Regulation 881/2002</i></li> <li>• <i>Implementation of UNSC Resolution 1373 through Common Positions 2001/930/CFSP and 2001/931/CFSP and Regulation 2580/2001</i></li> <li>• UNSC Resolutions 1267 and 1373 fall under Chapter VII of the UN Charter and are binding on Member States.</li> <li>• Common Positions 2001/930/CFSP and 2001/931/CFSP are based upon articles 15 and 34 of the TEU. Their legal basis is thus founded in both the second and the third pillar of the EU, namely the Common Foreign and Security Policy and Justice and Home Affairs.</li> <li>• Regulations 337/2000 and 467/2001 are based upon articles 60 and 301 of the EC Treaty.</li> <li>• Regulation 881/2002 is based upon the articles 60, 301 and 308 of the EC Treaty.</li> </ul>
Data Retention	<ul style="list-style-type: none"> <li>• <i>For Directives 95/46/EC, 97/77/EC, 2002/58/EC and 2006/24/EC and for Regulation 2001/45/EC: Article 95 TEC (First Pillar); European Court of Justice (ECJ) Case C-301/06.</i></li> <li>• <i>For Framework Decision 2008/977/JHA: Articles 30, 31 and 34(2b) TEU (Third Pillar).</i></li> <li>• Article 95 EC Treaty (TEC) gives the European Community (EC) the power to “adopt the measures...which have as their object the establishment and functioning of the internal market” (Article 95 TEC, ex article 100a). The decision to situate the legal basis under the first pillar was to mandate binding procedures for data protection within the single market- the EC. The second and third pillars, on the other hand, would have allowed EC member states to maintain their full sovereignty in issues that were nevertheless important, but did not stimulate the need to surrender sovereignty, such as judicial and police cooperation and foreign policy.</li> <li>• Article 30 TEU promulgates ‘common action in the field of police cooperation’ (Art. 30(1)).</li> <li>• Article 31 TEU promulgates ‘common action on judicial cooperation in criminal matters’ (Art. 31(1)).</li> <li>• Article 34 TEU allows the Council to adopt Framework Decisions with the view towards approximating the laws and regulations of the Member States for the purpose of reaching a Community goal. Framework Decisions grant Member States the discretionary means to implement the provisions contained therein (Article 34(2b)).</li> </ul>

Passenger Name Records (PNR)	<ul style="list-style-type: none"> <li>• <i>Articles 30(1b) and 34(2b) TEU; Articles 62(2a) TEC</i></li> <li>• Article 30(1b) promulgates common police actions regarding “collection, storage, processing, and exchange of relevant information” subject to data protection standards.</li> <li>• Article 34(2b) enables the council to make binding Framework Decisions, though the implementation is left to the Member States.</li> <li>• Article 62(2a) TEC allows the Council to enact legislation regarding border control, including passenger data.</li> </ul>
European Arrest Warrant	<ul style="list-style-type: none"> <li>• <i>Articles 31(a, b) and 34(2b) TEU</i></li> <li>• Article 31 promulgates common action among Member States with the purpose of facilitating extradition procedures (par. 2) and cooperation between the ‘competent ministries and judicial or other equivalent authorities of the Member States...in relation to proceedings and the enforcement of decisions’ (par. 1).</li> <li>• Article 34 provides the Council with the competence to establish binding Framework Decision, though the implementation of which is left to the discretion of the Member States.</li> </ul>
US-EU Extradition Agreement	<ul style="list-style-type: none"> <li>• <i>Article 24 TEU</i></li> <li>• The legal basis that allows the EU to conclude international agreements is provided by Article 24 of the EU Treaty that stipulates “when it is necessary to conclude an agreement with one or more states or international organizations in implementation of this title, the Council may authorize the Presidency...to open negotiations to that effect. Such agreements shall be concluded by the Council on recommendation from the Presidency” (TEU, Art. 24, par. 1).</li> <li>• Further, Art. 24 TEU prescribes that “the Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions” (par. 2). As extradition falls under the third pillar, unanimous decision-making within the Council is necessary.</li> </ul>

**Table 2: Legality of Counter-terrorism Measures**

### **3.1 Assessing Legality: Challenges to Counter-Terrorism Measures**

There are considerable challenges to the legality of some of these measures. Specifically, data retention measures and anti-terrorist financing measures have been the subjected to the strongest challenges, by way of court cases. Lesser challenges have been levied against all of the measures as well, in the form of expert opinions and NGO criticisms. This section examines the significant court cases of regarding the data retention and anti-terrorist financing measures and

presents the challenges offered by other interested parties against the measures in general. The cases covered here have been selected on the basis of their widespread attention. They should be taken as examples of the legal challenges to counter-terrorism measures, as they are not exhaustive. A list of recent and current cases is given in the appendix at the end of the case study.

### *Challenge to the Legality of Data Retention measures*

The first case deals with data retention. European Court of Justice Case C-301/06 concerns the applicability of Directive 2006/24/EC. The fact that the core business of this Directive seems to be within the area of Justice and Home Affairs (Third Pillar EU), and not Community business, resulted in Ireland filing a claim to the European Court of Justice contesting the legal basis of this Directive. Ireland argues that the predominant objective of this directive is "clearly and unambiguously directed towards the fight against serious crime, in particular terrorism" and other objectives pursued by this Directive should be purely regarded as coinciding with the main objective of combating crime. "Other objectives" refer to avoid the distortion of internal market by setting up a standard for data retention. The Irish government therefore maintains that Article 95 TEC, which is about the approximation of national law for the purpose of attaining a well-functioning internal market, provides an inappropriate legal basis for this directive. As the latter comprises, a "sole objective", namely the fight against serious crime and terrorism in particular, Ireland suggests as the "only permissible legal base" for this Directive Title VI with special reference to articles 30, 31 (1) c and 34 (2)(b). The latter provides the Council with the power to adopt Framework Decisions under issues falling under the 2<sup>nd</sup> and 3<sup>rd</sup> pillar. Consequence would be that the co-decision procedure would not apply, meaning that the European Parliament could merely advise during the procedure. However, a new legal basis would also mean that the Framework Decision could only be adopted by unanimity, giving each Member State more say in the procedure.

The articles that the Irish government considers as the correct legal basis for Directive 2006/24/EC are exactly the ones on which the Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters is based. The Framework Decision makes reference to the fact that the

instruments that so far exist at the Union level do not suffice to guarantee fundamental rights where data are retained in the course of judicial and criminal cooperation between the member states. The Framework Decisions refers thereby to the Directive 95/46/EC which applies only to data being gathered and processed within the scope of the Community law. Therefore the Framework Decision provides for the protection of data being gathered and processed of data for "the purpose of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties"(6), thus for action falling under the 3<sup>rd</sup> pillar of the EU.

On October 14, 2008 ECJ Advocate General Bot, however, argued that the single market competence under article 95 of the EC Treaty was a sufficient legal basis, and rejected the idea that the Directive should be based on the Third Pillar of the EU. He argued: "In the absence of harmonisation, a provider of electronic communications services would be faced with costs related to the retention of data which differ according to the Member State in which he wishes to provide those services. Such differences may constitute obstacles to the free movement of electronic communications services between the Member States and may therefore create obstacles to the establishment and functioning of the internal market in electronic communications. They may, in particular, slow down the cross-border development of new electronic communications services that are regularly introduced in the information society. They may also give rise to distortions in competition between undertakings operating on the electronic communications market."

The argumentation of the Advocate General is rather strange, in the sense that he does acknowledge the stated crime-fighting purpose of the legislation, but does not translate that in a different legal basis. He, moreover, completely ignores the importance of the protection of personal data, which is in sharp contrast with the privileged position Europe has given to this area of human rights protection over the past half century (Virginie Keyder in Jurist, The End of the Road for Personal Data Protection in the EU). At the time of writing of this report, the European Court of Justice has not given a final ruling in this case yet.

### *Challenge to the Legality of Anti-Terrorist Financing measures*

Many challenges to the legality of the anti-terrorist financing measures have been filed to the European Court of Justice. Complicating factor, however,

is that one of the categories of measures reflects an exact copy of a UN Security Council resolution. Questions regarding the legality of these measures, thus, seemed to also question the legality of the Security Council resolution. A very important case in this respect is the Kadi and Al Barakaat case. The European Court of Justice in the Kadi-case (Joined Cases C-402/05 P and C415/05 P, 3 September 2008) decided that the Court of First Instance (Case T-306/01 *Yusuf and Al Barakaat international Foundation v Council* and Case T-315/01 *Kadi v Council and Commission*, 21 September 2005) erred in law, and moreover annulled the Council Regulation 881/2002 freezing the assets of Yassin Abdullah Kadi, and the Al Barakaat International Foundation.

The main complaints of Kadi and the Al Barakaat Foundation, after the Court of First Instance (CFI) had rejected all their complaints, were the lack of competence of the Council to adopt these regulations and the infringements by the sanction regimes of their fundamental rights.

Whereas the CFI had ruled that the Court did not have the competence to review Security Council decisions, the Court of Justice concludes that Community Courts must ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to resolutions adopted by the Security Council (C-402/05 and C-415/05, par. 326).

Indeed, the Court ruled that the rights of the defense, in particular the right to be heard, and the right to judicial review were not respected. Especially the failure of the EC Regulation to include procedures to communicate the evidence justifying the inclusion of names of persons or entities infringed fundamental rights. Although the Court ruled that the Council was competent to adopt the freezing measures, the lack of guarantee enabling Mr. Kadi to put his case to the competent authorities led to the unnecessary infringement of his right to property. Because of the serious and irreversible effect of the annulment, the Court orders that the effects of the regulation are to be maintained for a period of three months, in order to allow the Council to remedy the infringements found.

This sets a precedent that led to the potential dismissal of every subsequent challenge in the EU Courts brought by individuals or groups

designated as associates of the Taliban or Al Qaida (Statewatch 2008). It could furthermore trigger more challenges to the listing by the EU of other terrorists.

Meanwhile numerous cases had also been filed against the freezing lists that were drafted by the EU itself. The development in the case law shows that the Court finds that Regulations are invalid if no statement of case is made, and the individual or entity is not properly informed of the fact and the consequences of being on a blacklist. Ironically, this meant that although the contested Regulation might be declared invalid, the follow-up Regulation with an updated blacklist was not contested, and thus the result of the judgment did not truly create an effect for the applicants.

### *Challenges to the Legality of the European Arrest Warrant*

In 2006 an association of Belgian lawyers, "Advocaten voor de Wereld" (Lawyers for the World) brought a challenge to the implementation of the EAW in Belgium to the Belgian Court of Arbitration. The Belgian Court of Arbitration referred the matter to the European Court of Justice (Case C-303/05). The arguments behind their challenge are found in the principle of double criminality. Advocaten voor de Wereld argued that the removal of the double criminality principle undermined non-discrimination principles because some offences required verification in both states, while others did not.

The court demurred and upheld the dual verification process on the grounds that offences that did not require the verification in both requesting and executing states were of a substantially serious nature. This removed the necessity of dual verification. Dual verification was only required for lesser crimes, such as theft. The Court further stated that the Framework Decision establishing the European Arrest Warrant mandated states adhere to human rights principles. Removing the dual verification process from extradition did not remove the principle of legality of criminal offences and penalties. The Court upheld the EAW Framework Decision as it stood.

### *Other Legal Challenges*

The above cases highlight the challenges made against the bases of a pair of counter-terrorism measures in the European Union. However, other challenges also exist, though they are not necessarily court cases. This section highlights some of challenges regarding the legality of the remaining measures.

With regard to the Framework Decision on Combating Terrorism, specifically its proposed amendment, the International Commission of Jurists (ICJ) has offered criticisms. The ICJ expresses concern over the breadth of the definition of terrorism employed by the Framework Decision. The ICJ offer that the Framework Decision's definition is beyond the scope of other accepted definitions, such as the Council of Europe Convention's definitions (both from 1977 and 2005). The Council of Europe relies on the composition of various treaties elaborating terrorist acts. The ICJ finds that the Framework Decision, instead, offers its own definition. The trouble, according to the ICJ, is that the Framework Decision's definition 'conflicts with the principle of legality...which requires that laws be sufficiently clearly formulated for individuals to foresee to a reasonable degree the application of the law and to regulate their conduct accordingly (ICJ, 2008: p. 4).' The principle of legality is challenged, according to the ICJ, because the definition of terrorism included in the Framework Decision is beyond the scope of the Council of Europe's definition; it finds that certain acts contained in the Framework Decision's definition may constitute acts of legitimate political protest. Although the amendment has not been implemented yet, it is unlikely that substantial refinements will be made. Dealing with the radicalization and recruitment processes based on the Internet is a critical part of counter-terrorism efforts in the European Union.

Next, with regard to the PNR framework, a challenge was made against a peripheral PNR measure. The measure in question allowed the exchange of information between the EU and the US. However, the ECJ ruled that "neither the Commission decision finding that the data are adequately protected by the United States nor the Council decision approving the conclusion of an agreement on their transfer to that country are founded on an appropriate legal basis" (ECJ C-318/04). The European Parliament had contended that the Commission had misused its powers and breached data protection regulations of Directive 95/45/EC, along with the fundamental rights and the principle of proportionality. The Parliament contended that the Council ignored the provisions for personal data protection established by Directive 95/45/EC. The European Court of Justice sided with the Parliament, judging that data transfer to the United States was illegal. Though not a challenge to the actual legal basis of the PNR framework, this episode nevertheless points to the challenges made against data retention and PNR measures vis-à-vis the right to privacy.

Finally, regarding the US-EU Extradition Agreement, while there have been no cases brought forward against it, the legal basis of states to conclude treaties is uncontested. What is likely, however, is that challenges will be made regarding the principles of legality and proportionality, similar to those made against the EAW. The human rights dangers in this agreement ensure that this will be the case.

#### **4. The Legitimacy of European Counter-terrorism Measures**

In the following chapters, the indicators of legitimacy are analyzed vis-à-vis the counter-terrorism measures of the European Union. As stated above, the indicator framework was developed by Thomas Franck. This framework assesses the multi-dimensional construction of legitimacy through a broad based analysis that answers the following questions: is the measure intelligible? Is it the measure inline with historical precedent? Do the principles behind the measure fit with other principles used in European legislation? And, finally, are the legal obligations of the measure inline with other obligations incorporated into European legislation? Each of these questions corresponds to one of Franck's indicators. This portion of the case study begins with the first question: the indicator of determinacy.

#### **5. Determinacy of European Counter-terrorism Measures**

The indicator of determinacy answers the question: is the measure formulated clearly or is there latitude for excessive discretion? An answer in the positive confers a high degree of determinacy. This, in turn, enables the measure or law to positively regulate individual behaviour. Citizens act more inline with a determinate law than with an indeterminate law. When laws are formulated clearly, it is difficult to justify non-compliance or to interpret a spectrum of permissible behaviour. For a law to be determinate, it should be explicitly formulated, leaving minimal room for overly broad interpretation.

With relation to legitimacy, the indicator of determinacy is a necessary component. This is because legitimacy, according to Franck, is "a property of a rule or rule-making institution which itself exerts a pull toward compliance" (Franck, 1990). For a measure to compel individuals toward compliance, clarity is necessary. Rules that cannot be succinctly and correctly interpreted cannot

compel compliance. However, as the sum of an amalgam of factors, legitimacy is not determined anymore by determinacy than by any of the other three of Franck’s measures. A measure may have a high level of determinacy, but still be considered to lack legitimacy. This may occur when the provisions included in the law unduly challenge the rights of the individual. Therefore, it is important to view all measures of legitimacy before conferring an overall assessment of a measure’s legitimacy.

In the table below, the counter-terrorism measures of the EU are presented with their degree of determinacy. Determinacy is described as low, moderate or high. Low determinacy is the outcome of ambiguous construction. This ambiguity provokes considerable NGO criticism. Moderate determinacy occurs when a measure has some provisions that are clear, while others lack clarity. The measure can compel obedience, but there remains considerable latitude for competing interpretation. Finally, a high degree of determinacy is the result of a law being easily understood. Measures with high determinacy enjoy little NGO criticism and their purpose and implementation is explicit.

Measure	Determinacy
Framework Decision on Combating Terrorism	<ul style="list-style-type: none"> <li>• The Framework Decision exhibits low determinacy.</li> <li>• The definition of terrorism used here is beyond the scope of other accepted definitions (ICJ, 2008, p. 4). It is broad to the point that public protest can conceivably be classified as terrorism.</li> <li>• The same issue blights the proposed amendment to the Framework Decision- an overly broad definition of terrorism. The ICJ finds the ambiguity of the document as ‘unacceptably wide and <i>indeterminate</i>’ (ICJ, 2008: p. 3, emphasis added)</li> </ul>
Anti-Terrorist Financing	<ul style="list-style-type: none"> <li>• Implementation of the Security Council resolutions through Regulation 467/2001 has moderate determinacy. The requirement of freezing assets is clear.</li> <li>• Conditions for initial inclusion on the sanctions lists are not explicit, however, running the risk for capricious individual sanctions.</li> <li>• With regard to de-listing, the measures have low determinacy (Common Position 2001/931/CFSP); the de-listing process is ambiguous.</li> <li>• Though the United Nations Security Council implemented a de-listing procedure in Resolution 1730 (2006), EU legislation to that effect has yet to be implemented.</li> </ul>

<p>Data Retention</p>	<ul style="list-style-type: none"> <li>• The determinacy of the data retention measures is low.</li> <li>• Generally, the Directives stipulate that deviations from data protection may occur for matters of national security, but there is no further elaboration as to what constitutes an appropriate national security matter (Statewatch 2007; Article 29 Data Protection Working Party, 2006).</li> <li>• The Article 29 Data Protection Working Party finds that Directive 2006/24/EC lacks adequate and specific safeguards as to the treatment of communication data and that it leaves room for diverging interpretation and disparate implementation by Member States. It proposed the following safeguards: purpose specification, access limitation, data minimization, no data mining, judicial/independent scrutiny of authorized access, retention purposes of providers, system separation and sundry security measures.</li> <li>• Framework Decision 2008/977/JHA is vague in describing the purposes of data protection under the auspices of police and judicial cooperation in criminal matters. Especially, if further processing is needed for reasons other than the one originally legitimating data processing, the Framework Decision fails to clearly specify the series of derogations to the purpose limitation principle (Article 3 and 11).</li> </ul>
<p>Passenger Name Records (PNR)</p>	<ul style="list-style-type: none"> <li>• Determinacy of the PNR measure is low.</li> <li>• The intended objective is unclear- whether for profiling or to aid in on-going investigations.</li> <li>• The proposal states that data may be collected to identify “associates” of criminals or terrorists without elaborating what constitutes an associate. The term is imprecise; associates could be anything from family to friends to business contacts, conceivably people with no criminal or terrorist interest (European Union Agency for Fundamental Rights, 2008).</li> </ul>
<p>European Arrest Warrant</p>	<ul style="list-style-type: none"> <li>• Determinacy of the EAW is strong.</li> <li>• The process through which extradition among Member States is to occur, as well as the exemptions, is well expressed.</li> <li>• Further, the human rights protections are explicit, with explicit prevention of extradition on grounds of ethnicity, sex, religion, nationality, political orientation, etc. (para 12, 13).</li> <li>• The process of extradition is further refined with the ‘specialty rule’ in which a person can only be prosecuted on the crime for which the extradition request was made (article 27, para. 2).</li> <li>• Mutual competence is explicit in that Member States cannot deny extradition requests except for extremely rare circumstances, such as the expectation that the requested person will be subject to torture (articles 17 and 23).</li> <li>• Time limits on extradition requests are explicit (articles 17, 23).</li> <li>• Despite these strengths, the competence of authorities issuing and granting</li> </ul>

	requests is not clear(article 6). The only stipulation is that competent authorities handle the process, not necessarily those authorities who are savvy with human rights obligations (Amnesty International, 2005: p. 18).
US-EU Extradition Agreement	<ul style="list-style-type: none"> <li>• Determinacy is low.</li> <li>• The preamble makes cursory reference to human rights protections, but there is little mention of international human rights obligations (Amnesty International UK, 2003).</li> <li>• Article 6 eliminates the diplomatic channel of request between requesting and requested parties. Instead, respective justice ministries are to handle the extradition process. Similar to the issue with the EAW in which judicial authorities may be unfamiliar with human rights obligations, this inter-ministry form of request has potential for the same problem (Statewatch 2005).</li> </ul>

**Table 3: Determinacy of Counter-terrorism Measures**

### 5.1 Assessing the Determinacy of European Counter-Terrorism Measures

The table above demonstrates a general trend of low determinacy. On the whole most measures suffer from ambiguity. Many of the measures are broadly constructed, which makes obeisance a difficult task. Where there is a high measure of determinacy- specifically with the European Arrest Warrant- the measure deals with a long-standing legal process in extradition. Building on the norms that have governed extradition in Europe before its creation, the EAW's determinacy is owed to the fact that it the basic framework for human rights protection was already in place. The agreements governing the extradition process in Europe prior to the creation of the EAW stressed the importance of human rights protection. The EAW build on these stresses, but was modified to deal with contemporaneous issues, including terrorism.

Clarity, therefore, is best demonstrated by measures that are concerned with long-standing principles. The EAW has high determinacy because the legal principles of extradition have been well-developed over the course of several decades. What is witnessed by measures exhibiting low and moderate determinacy is that they deal with relatively nascent issues. However, this should be qualified by highlighting that it is not the objectives of the measures which are new, it is the impetus for the policy behind those objectives: transnational terrorism. The role that the threat of terrorism has played in the development of new legislation is considerable. It is the product of two dynamics. The first is that the EU has sought to approximate measures throughout the Union to have a

standardized legal framework in place to deal with terrorism. The second dynamic is the threat of continuing terrorism (BBC, 2007). Together these two factors have contributed to the development of ambiguous counter-terrorism measures.

Approximating counter-terrorism efforts across the Union occurs through the use of various legal instruments the EU has at its disposal. Many of these, whether their legal basis is rooted in the first, second or third pillars, leave implementation to the individual Member States. By constructing ambiguous measures implementation can be tailored to the peculiar conditions of a Member State, while still ensuring a workable framework to coordinate counter-terrorism efforts at the EU level (Dumitriu, 2004). However, because of the influence of the second dynamic- the ongoing threat from terrorism- the construction of measures has been expedited, foregoing review processes that may render a more determinate product (see European Data Protection Authorities, 2007 and Statewatch, 2007 for analysis of how expedited measures can be a detriment to legitimacy) This results in measures which seek to deal with the terrorist threat in the most broad based manner possible. Ambiguity becomes a key component of this manner because in order to deal with terrorism as broadly as possible, Member States must interpret EU measures in a local context. A measure, therefore, must actually lack determinacy in order for the Member States to interpret and implement it in a suitable fashion.

For example, the determinacy of the Framework Decision on Combating Terrorism is low. On the one hand, EU dedication to maintaining a secure atmosphere that respects human rights and the rule of law is expressed cogently. Furthermore, acts of terrorism are elaborated- what constitutes such an act- as well as the prescription for punishment for those who commit terrorism. Additionally, implementation is laid out clearly. Finally, previous treaties and conventions are invoked and recalled to establish the lineage of this decision vis-à-vis the counter-terrorism effort of the European Union. As will be addressed below, this aids significantly in the measure of symbolic validation.

However, there is considerable debate regarding the broad definition of terrorism offered in the Framework Decision. The International Commission of Jurists (ICJ) expresses concern over the breadth of the definition of terrorism employed by the Framework Decision. They find that the Framework Decision's overly broad definition of terrorism 'conflicts with the principle of legality...which

requires that laws be sufficiently clearly formulated for individuals to foresee to a reasonable degree the application of the law and to regulate their conduct accordingly' (International Commission of Jurists, 2008: p. 4). The principle of legality is challenged, according to the ICJ, because the definition of terrorism included in the Framework Decision is beyond the scope of the Council of Europe's definition; it finds that certain acts contained in the Framework Decision's definition may constitute acts of legitimate political protest. Because the Framework Decision is not clear enough, compliance is difficult. This impugns on the measure's legitimacy.

The Framework Decision on Combating Terrorism has its legal basis in the second pillar and third pillars. It is binding though its implementation is left to Member States. During its creation, consideration was given to previous operative definitions of terrorism. However, not all Member States were able to agree upon an acceptable definition for use throughout the Union (Dumitriu, 2004). Thus, the definition incorporated into the Framework Decision was broadened. The need to develop an EU-wide measure and the continuing threat of attack prevented prolonged development of the Framework Decision.

This example demonstrates not only the difficulty in actually defining terrorism, but of the pressures on policymakers to pass acceptable measures against the threat of terrorism. Determinacy suffers as a result of the need to develop acceptable measures and to implement them quickly. In sum, where counter-terrorism measures have evolved out of pre-existing legal frameworks, such as the EAW, they tend to demonstrate a higher level of determinacy than the measures that have been developed in explicit response to terrorism.

## **6. Symbolic Validation of European Counter-terrorism Measures**

Symbolic validation, or pedigree, is the extent to which a law is supported by its authenticity. Authenticity is conferred on a rule when it has a pedigree, or historical legal foundation. As mentioned above, the extradition process in the EU has a long-standing pedigree. Its symbolic validation is high because, despite being a new measure, it originates in a context that is not only long established, but has become widely accepted. The age of a measure is an important component in assessing its legitimacy.

With regard to counter-terrorism measures in the European Union, symbolic validation has a necessary, though sometimes secondary, role to play in a measure’s overall legitimacy. On the one hand, contemporary measures (measures developed after September 11<sup>th</sup>, 2001) may not necessarily demonstrate a high level of symbolic validation. September 11<sup>th</sup>, for many observers, ushered in a new type of threat from transnational terrorism. Measures that were developed in response to this new threat were forced to adapt to the current environment. Drawing on pedigree may not have been desirable because previous measures did not adequately address new threats.

Thus, in assessing symbolic validation, the below table weighs a number of factors. It first considers to what extent the measure has pedigree or, what Franck calls, longevity (Franck, 1990: p. 94). The European Arrest Warrant is an example of a measure with a considerable pedigree. Where a measure has no pedigree, the degree to which it can be considered a genuine evolution from a pre-existing framework is considered. For example, although data retention has existed in the EU for quite some time, the measures included in this case study have been found to have a low level of symbolic validation. This is because their application deviates significantly from the overall spirit of their progenitors.

It should be noted that symbolic validation, while important, does not substantially alter the overall legitimacy of a measure. Despite a measure’s relative youth, as long as that measure is found to uphold human rights obligations and confront the terrorist threat, a low level of symbolic validation may not be necessarily destructive towards overall legitimacy. The importance of symbolic validation, therefore, is that it reflects historical constraints on government power to the principle of human rights (Franck, 1990: p. 98).

Measure	Symbolic Validation
Framework Decision on Combating Terrorism	<ul style="list-style-type: none"> <li>• Strong symbolic validation.</li> <li>• The document is backed up by numerous efforts by the EU and the greater international community to deal with terrorism.</li> <li>• The proposed amendment also has strong validation for the same reasons.</li> </ul>
Anti-Terrorist Financing	<ul style="list-style-type: none"> <li>• The symbolic validation of Anti-Terrorist Financing measures is moderate. This is because the precedent is relatively recent and the procedures of the listing and sanctions processes are not transparent.</li> <li>• However, there is precedent. In November 2000 Belgium, France and</li> </ul>

	<p>Sweden offered a proposal for a Framework Decision on the Freezing of Assets of Suspects. It was originally intended as a mechanism against “drug trafficking, EC budget fraud, money-laundering, counterfeiting of the euro, corruption and trafficking of human beings (den Boer, 2003: p. 197)” the precedent for freezing assets is clear.</p>
<p>Data Retention</p>	<ul style="list-style-type: none"> <li>• Data retention has a symbolic validation in the European Union. However, later measures diverge from their pedigree.</li> <li>• Beginning with Directive 95/45/EC several subsequent Directives and Regulations were implemented, including Directive 97/77/EC, Regulation 2001/45/EC and Directive 2002/58/EC. These measures facilitated data protection while guaranteeing the free flow of personal information within the EU in general as well as in the electronic communication area.</li> <li>• Directive 2006/24/EC is not symbolically validated by these earlier measures as it focuses on making data available for investigative purposes. It threatens to limit the fundamental individual rights on privacy in the name of an ever-widening definition of state security (Keyder). Additionally, the Article 29 Working Group on Data Protection found that 2006/24/EC was an ‘unprecedented one with a historical dimension’ (Article 29 Data Protection Working Party, 2006).</li> <li>• The symbolic validation of 2008 Framework Decision on data retention is low. It undermines the 1981 Convention for the Protection of Individuals with Regard to Automatic Data Processing, as well as the Directives and Regulations listed above. This is manifested in less stringent privacy protections regarding the purposes of retention, time limits on retention and use of information.</li> <li>• The provisions of the 2008 Framework Decision are unprecedented (Article 29 Data Protection Working Party, 2006). In previous measures, data retention had clear purposes, in the 2008 Framework Decision, only “serious crime” requires data retention without elaboration (Article 29 Data Protection Working Party, 2006).</li> </ul>
<p>Passenger Name Records (PNR)</p>	<ul style="list-style-type: none"> <li>• The symbolic validation of the proposed measure is low.</li> <li>• Collecting passenger data has a precedent in the EU under the Advanced Passenger Information Directive (Council Directive 2004/82/EC), but its provisions are much more limited than the proposed PNR Directive (Statewatch 2005).</li> <li>• Despite the precedent, the fledgling nature of PNR and the challenges regarding its necessity (given the existence of the API measure) against it render a low symbolic validity (Article 29 Data Protection Working Party, 2004).</li> <li>• The Article 29 Data Protection Working party, stating that there was no conclusive need for its establishment, has levied a challenge to its</li> </ul>

	necessity. This is based on the experiences with the US PNR scheme and the faults of the API scheme in incorrectly identifying innocent passengers as threats (Article 29 Data Protection Working Party, 2007)
European Arrest Warrant	<ul style="list-style-type: none"> <li>• The symbolic validation of the EAW is strong and can be seen as a natural evolution of closer cooperation among Member States.</li> <li>• The extradition process in Europe has a long history, dating to the 1957 European Convention on Extradition, promulgated by the Council of Europe.</li> <li>• The importance of extradition as a counter-terrorism tool dates to the 1977 European Convention on the Suppression of Terrorism.</li> </ul>
US-EU Extradition Agreement	<ul style="list-style-type: none"> <li>• Not applicable</li> <li>• The agreement has not been ratified and was negotiated away from public view.</li> <li>• However, Statewatch finds the agreement's scope 'introduces a sentence threshold, not a list of offences' for extradition. Furthermore, in article 4, the threshold for offences is merely a one year prison sentence, which is an exceptionally low threshold (Statewatch, 2003). This subverts the legal process because the bar is set so low for extraditable offences that it can, in effect, offer extradition of requested persons for broadly contrived reasons of even minor offences. This is anathema to prior extradition agreements in the EU.</li> </ul>

**Table 4: Symbolic Validation of Counter-terrorism Measures**

### **6.1 Assessing Symbolic Validation of European Counter-terrorism Measures**

The general trend of symbolic validation of European counter-terrorism measures is towards moderate symbolic validation. As stated in the above chapter on determinacy, some measures have been developed only recently, in response to the terrorist attacks in the United States (2001), Spain (2004), and England (2005). Others measures have evolved out of a well-developed legal context, such as the EAW.

The measures with strong symbolic validation, the Framework Decision on Combating Terrorism and the European Arrest Warrant derive their symbolic validation from a mix of factors. The Framework Decision, despite lacking determinacy, is considered to have a pedigree because 1) there are a number of prior counter-terrorist conventions with similar provisions, both within the EU and the international community, from which it draws inspiration and 2) because the aims and objectives of the document- to punish terrorists, protect citizens, and uphold human rights- are tangible. These aims and objectives comprise the

practice of good governance (Aguilera and Cuervo-Cazurra, 2004). The Framework Decision demonstrates these principles, which, in turn, confers a strong degree of authenticity. The authenticity of the measure is expressed because government recognizes and acts on the need to protect citizens and to respond to transnational terrorism. The EU does this by way of reference to older counter-terrorism measures and incorporation of human rights protections in the Framework Document. Together, these give the measure a high level of symbolic validation. The same is true for the European Arrest Warrant; it builds on prior measures and demonstrates a genuine effort to uphold human rights responsibilities.

The measures with moderate symbolic validation, the anti-terrorist financing measures and the data retention measures, exhibit similar traits. Both have historical precedent, which themselves have adequate authenticity, but neither exude a high level of human rights protection. Thus, the dichotomy between pedigree and good governance, leads to their scores of moderate symbolic validation. These two sets of measures are strong examples of the difficulty in developing effective and ethical counter-terrorism measures (Wolfendale, 2007). In confronting terrorist threats, some measures can be modified based on existing arrangements. However, it is not a stretch for modifications to unduly infringe on individual rights, as is the case with these two measures (United Nations High Commissioner for Human Rights, 2008).

Finally, measures with low symbolic validation- passenger name records and the US-EU extradition agreement- are beyond the scope of their pedigree. This damages their authenticity. The PNR measures, especially, have no demonstrated need for implementation (Article 29 Data Protection Working Party, 2007). The development of a measure without apparent need has potent symbolism. Franck states that this symbolism may not be malevolent, but by virtue of the fact that the law is created without need (in the case of the PNR context, a similar measure has been operational for quite some time), it does not indicate true authenticity (Franck, 1990: p. 123). What is more, the PNR measure is criticized for expanding the blanket of security so far that it considers everyone to be a suspect because it retains data on *all* passengers entering the European Union (Statewatch 2005). The US-EU extradition agreement, though not ratified, was not developed with parliamentary oversight. In addition to not having a precedent, this detracts from the good governance principle of

transparency (Aguilera and Cuervo-Cazurra, 2004). Several criticisms have been levied against the agreement for this. What is more, many of the provisions in the agreement significantly diverge from prior extradition conventions, severely undermining the agreement's authenticity (Statewatch, 2003).

In sum, there is a spectrum of symbolic validation present in European counter-terrorism measures. Some measures have a strong pedigree, both with regard to prior measures and good governance obligations. Other measures are split and have moderate symbolic validation. And some measures have weak symbolic validation. With regard to legitimacy, symbolic validation influences the pull toward compliance by helping to confer authority to both the rule and the rule maker (Franck, 1990: p. 96). Citizens obey laws when they are convinced that it is right for them to do so. Laws that have pedigree are substantially imbued with power to convince citizens that it is right to obey. New laws can also convince citizens that compliance is right, provided they are developed to confront a particular need and not from arbitrariness. When laws are both novel and outside the scope of necessity, legitimacy is damaged. Counter-terrorism measures that infringe on the human rights of the individual and are developed with questionable necessity will not exhibit symbolic validation.

## **7. Coherence of European Counter-terrorism Measures**

Coherence is related to the indicator of symbolic validation in that it assesses the nature of the rule's relationship to a broader scheme. For symbolic validation, that scheme is historical and rooted in governance practices. For coherence, however, the scheme is based on the principles behind the measure. Franck finds the relationship between symbolic validation and coherence in stating that "pedigreed status depends in part on the *coherence*" with the principle behind that status (Franck 1990: p. 136). A measure with symbolic validation should not only be inline with historical precedent to possess authenticity, but it must also be inline with the spirit of the laws in its lineage.

For example, a measure that discriminates against a particular group would be anathema to the contemporary democratic norm of non-discrimination. The discriminatory measure would not hold coherence with the democratic principle of non-discrimination. But, it is possible that a measure has strong symbolic validation, but does not cohere with contemporary norms. For example, the anti-terrorist financing measures do have some pedigree within the European

Union. However, because of the way in which the terrorist list and sanctions regime is executed, the measure has low coherence with the principles of fair trial and presumption of innocence. Coherence implies that like cases are treated similarly. When citizens are accused of a crime they have the right to legal recourse. In the anti-terrorist financing context, however, accused people are penalized without legal recourse. As elaborated above, this results in checkerboarding, which undermines the legitimacy of a measure.

Also incorporated into this case study is the European Counter-terrorism Strategy. This document set out the strategic framework for European counter-terrorism efforts through a four-strand design. These strands- prevent, protect, pursue and respond- establish the EU efforts in dealing with terrorism. The measures included in this case study are judged against the European Counter-terrorism Strategy as well. The measures’ coherence with a particular strand is given as well. The CT Strategy has been included because it establishes the strategic context for EU CT efforts. These are not laws, however, but develop the four “norms” of European counter-terrorism efforts. The counter-terrorism measures themselves are judged against these norms.

In the table below, the coherence of the counter-terrorism measures is analyzed. The coherence of the measures is assessed based on how well they align with human rights norms and obligations. In this case study, the norms and obligations are found in the European Convention for Human Rights, the European Union Charter on Fundamental Rights, and other human rights instruments. Measures inline with the principles of those instruments are said to have strong coherence.

Measure	Coherence
Framework Decision on Combating Terrorism	<ul style="list-style-type: none"> <li>• Strong coherence with the general human rights principles of other EU policies.</li> <li>• The Framework Decision is in-line with firmly established normative ideals of democratic society: freedom, security of human rights and the rule of law.</li> <li>• An important caveat to the level of coherence, however, is the <i>potential</i> for public protest and dissent to be viewed as terrorism. This could lead to considerable divergence with the norm of free speech, which is deeply enshrined in democratic society.</li> </ul>

	<ul style="list-style-type: none"> <li>• The measure coheres with the European Counter-terrorism Strategy, setting out the parameters for Member States to implement counter-terrorism measures.</li> </ul>
Anti-Terrorist Financing	<ul style="list-style-type: none"> <li>• Coherence with the human rights principles of other EU policies is low.</li> <li>• Inclusion on the sanctions lists and the opaque de-listing process undermine the right to fair trials and the presumption of innocence promulgated in the European Convention on Human Rights (ECHR).</li> <li>• Coherent with the EU Counter-terrorism Strategy's pursue strand which promotes efforts in impeding terrorist planning. Constraining terrorist funding is a strongly effective means to accomplish this objective.</li> </ul>
Data Retention	<ul style="list-style-type: none"> <li>• Coherence with human rights principles is low, especially with later measures.</li> <li>• The earlier Directives and Regulations (Directive 95/46/EC, 97/77/EC and 2002/58/EC and Regulation 2001/45/EC) are in line with various human rights instruments such as article 8 European Convention on Human Rights, article 17 of the International Covenant on Civil and Political Rights and article 8 of the European Union Charter of Fundamental Rights.</li> <li>• However, later measures do not cohere with article 8 of the ECHR which enshrines the right to privacy of correspondence from government interference (European Union Agency for Fundamental Rights, 2008).</li> <li>• Directive 2006/24/EC diverges from the human rights related to data protection and privacy by making information available without adequate safeguards vis-à-vis private correspondence (Article 29 Data Protection Working Party, 2006).</li> <li>• The 2008 Framework Decision, despite pointing to the necessity of human rights protection in its preamble, does not elaborate when privacy of correspondence may be subverted other than for broadly conceived notions of national security threats. In that sense, coherence with human rights obligations is not strong.</li> <li>• Coherent with the EU's Counter-terrorism Strategy in that it upholds the third strand of that document- pursue. Data retention is necessary in impeding travel and communication activities of terrorists.</li> </ul>
Passenger Name Records (PNR)	<ul style="list-style-type: none"> <li>• Coherence with general human rights principles is low.</li> <li>• Despite the existence of other data retention measures, the PNR context 'places everyone under surveillance and makes everyone a suspect without any meaningful right to know how the data [being collected] is to be used' (Statewatch, 2007).</li> <li>• The PNR context challenges the presumption of innocence and the right to privacy, which are enshrined in Article 48 Charter of Fundamental Rights of the European Union and Article 8 ECHR, respectively. (European Union</li> </ul>

	<p>Agency for Fundamental Rights, 2008).</p> <ul style="list-style-type: none"> <li>• The inclusion of profiling in the proposed measure raises concerns regarding the prohibition of discrimination of Article 21 of the Charter of Fundamental Rights of the EU (European Union Agency for Fundamental Rights, 2008).</li> <li>• Coherent with the EU’s Counter-terrorism Strategy’s second strand- protect. This strand calls for the protection of vulnerable infrastructure and improved border security.</li> </ul>
European Arrest Warrant	<ul style="list-style-type: none"> <li>• The coherence of the EAW with human rights principles is strong.</li> <li>• Under the provisions of the EAW, those arrested have guaranteed access to a lawyer, as well as an interpreter if one is required. This right is present in all Member States. In addition, the principle of <i>ne bis in idem</i>, or double jeopardy, is upheld. Requested persons cannot be prosecuted for a crime if that person has already been or is being tried for the same crime in another Member State.</li> <li>• The European Convention on the Suppression of Terrorism (1977) explicitly states that offences for which extradition request may occur (article 1). It goes on to posit that states ‘may decide not to regard as a political offence’ certain crimes listed in article 1. In other words, by not regarding the elaborated transgressions as political offences, states facilitate extradition of requested persons for prosecution abroad. The EAW similarly, though not explicitly, coheres with this principle. Because of the principle of mutual recognition established in the EAW, extradition requests made on the basis of certain crimes (listed in the EAW in article 1) cannot be refused unless certain exceptions can be made. However, none of these exceptions include the possibility of a state viewing a crime as a political offence. Thus, the principle of extradition for terrorist offences, wherever they occur, is maintained.</li> <li>• Coherent with the EU’s Counter-terrorism Strategy third strand- pursue and with the fourth strand- respond. Bringing terrorists to justice through cooperation is a component of the former. Improving the capabilities to deal with the co-ordination of the response is a component of the latter.</li> </ul>
US-EU Extradition Agreement	<ul style="list-style-type: none"> <li>• Coherence with general principles of extradition and other human rights principles is low.</li> <li>• Double criminality is included, but is qualified through the stipulation that offences need not be in the same category of punishment in different contracting parties. Additionally, because the standards for extradition are set so low, double criminality is almost a moot point. Because there is no common standard of offences and because extradition can occur for even minor transgressions, the agreement, even with double criminality, fails to demonstrate strong coherence with extradition procedures that gave impetus to the EAW (see above).</li> </ul>

- Coherent with the EU's Counter-terrorism Strategy third strand- pursue. That strand calls for pursuing and investigating terrorists across European borders. This measure aids in that process.

**Table 5: Coherence of European Counter-terrorism Measures**

### **7.1 Assessing the Coherence of European Counter-terrorism Measures**

The counter-terrorism measures included in this case study do not demonstrate any significant trend towards coherence or incoherence with general human rights principles. Some measures are indeed coherent, while others struggle with this indicator. Similar to the problems found for other diverging indicator scores, the reason coherence is mixed is due to the manner in which the measures were developed. Some measures have their genesis in well-defined contexts, others are nascent and found their impetus in the threat of contemporary transnational terrorism.

The measures that strongly cohere with underlying human rights principles are the Framework Decision on Combating Terrorism and the European Arrest Warrant. As stated above, these measures evolved out of well-developed legal frameworks. Coincidentally they both have strong symbolic validation. Just as measures that exhibit strong symbolic validation garner their status from the extent to which they can be placed in a lineage of legislation, these same measures also cohere with the normative foundation of that lineage. The Framework Decision on Combating Terrorism coheres with the principles of democratic society underpinning all pre-existing counter-terrorism conventions in Europe and the international community: freedom, security, and the rule of law. Despite its broad construction, this is a problem of determinacy and not of coherence. The fact that acceptable public protest can be incorporated into the definition of terrorism used in the document has more to do with the vagaries of the definition than with a lack of protection for human rights. Likewise, the European Arrest Warrant coheres fairly well with the human rights principles inherent in other extradition agreements in the EU. The measure upholds the principles of double jeopardy and non-refoulement, as well as enforcing time limits for request and execution of arrest warrants. Finally, it maintains the protection of individuals from being extradited if they are at risk for torture or capital punishment. Both of these measures are elaborated out of long standing legal frameworks, giving them symbolic validation. But in addition to this, both

measures also cohere with the principles behind those frameworks. This is not always the case.

Measures with low coherence generally have not been operative for very long. However, it should be noted that their fledgling nature does not necessarily mean that they will lack coherence with human rights measures. It is their newness coupled with the threat from ongoing terrorism that has resulted in harsher measures (United Nations High Commissioner for Human Rights, 2008). Modern terrorists make wide use of current technologies and other aspects of globalization, such as air transport, data networks and international financial architecture (Cronin, 2002/03). Counter-terrorism measures have been implemented which limit terrorists' abilities to take advantage of these aspects of modernity, but which also limit human rights. Human rights obligations are victims to new counter-terrorism measures in the name of security (Amnesty International, 2005). In order to do whatever is necessary for protecting their citizens, they employ a wide blanket of security, which in the case of the PNR measure treats everyone as a potential suspect (Statewatch, 2007).

Thus, where terrorists have been able to make use of globalization's networks- either air travel, financial, or communication- policymakers have sought to limit their ability for such action. In an era when free movement of people is so prevalent, authorities have sought to document people whether or not they are connected to crime or terrorism, placed individual sanctions on them without recourse to due process, retained personal data, and allowed extradition to foreign states without human rights protections. All of these actions are incoherent with human rights responsibilities- the right to fair trials and presumption of innocence, the right to privacy, and the right to freedom from torture. In sum, the coherence of European counter-terrorism measures with human rights measures is variable. Some measures, when able to take advantage of a long-standing legal framework, are coherent with the human rights behind those frameworks. When measures are developed with an exceptional emphasis on security before drawing on their legal pedigree, they result in incoherence with human rights obligations of both the EU and the international community.

## **8. Adherence of European Counter-terrorism Measures**

Whereas coherence is the link with underlying principles of other legislation, adherence is the extent to which a measure complies with accepted legal concepts. In the hierarchy of laws, adherence demonstrates how well a measure fits within to its place vis-à-vis the measures governing its application and the measures governing its development. If coherence is the horizontal normative framework in which a law sits, adherence is its vertical legal placement. Franck defines coherence as the level of connectedness, "between one rule and other rules, through shared principles" (Franck, 1990: p. 180). Adherence, however, is the connectedness of the obligation of those rules. For example, if a rule promulgates retaining all data for just *one* ethnic group, there is no adherence to the hierarchy of rules in which the obligation to non-discrimination is found. This is, of course, related to coherence in that the *principle* of non-discrimination is undermined. But, the *legal responsibility* to not discriminate is also absent. The two are not mutually exclusive, however. One measure may be coherent with human rights principles, but diverge from the legal hierarchy that outlines its implementation.

In this case study, adherence is judged against the prescribed actions of other EU measures- specifically human rights obligations. Some of these measures promote human rights obligations, as found in the European Convention on Human Rights (ECHR). While the rights supported in the ECHR are not binding, the Convention plays a critical role in their protection. Its role is akin to that of a bill of rights in that it broadly defines what rights an individual should have; it does not establish legally binding rights. The Convention is the normative compass that sets certain human rights expectations among its parties. In its current iteration, the Convention allows individuals to seek redress through the European Court of Human Rights if their civil liberties have been infringed upon and if national laws have failed to provide recompense.

Returning to individual rights in the EU, other measures promulgate certain procedural rules, such as those for data retention and processing. For measures that proscribe normative obligations, adherence is determined by whether or not the counter-terrorism measure abides to the letter of those obligations. For example, the right to due process is promulgated in European law at both the EU level and within Member States. However, the anti-terrorist financing measures do not adhere to this right. Anti-terrorist financing measures include individuals on lists as terrorists and subject them to sanctions. The

mandate of due process is subverted; there is no adherence. For measures that promulgate procedural rules, such as data retention measures limiting the time allowed for data retention, adherence by the PNR measure is low. This is because the hierarchy of data retention rules is governed by earlier sets of measures that lay out the framework for keeping data in the EU. This framework expresses acceptable time limits for data retention. The PNR measure does not adhere to this hierarchy because it allows 13-year time limits for retaining data, considerably longer than those limits established by the data retention hierarchy.

In the table below, the six measures are presented with an assessment of their adherence to other EU laws. The hierarchy of rules is found in prior conventions and legislation and the provisions contained therein. These provisions can be procedural legal rules or obligations to human rights instruments. Following this is an analysis of the measures’ scores for this indicator.

Measure	Adherence
Framework Decision on Combating Terrorism	<ul style="list-style-type: none"> <li>Adherence of the Framework Decision to pre-existing laws is strong.</li> <li>The Framework Decision and the proposed amendment incorporate much of the same approaches to counterterrorism as laid out in prior counterterrorism documents such as the Tampere European Council, the Santa Maria da Meira European Council, the La Gomera Declaration (1995) and the Extraordinary European Council Meeting (2001).</li> </ul>
Anti-Terrorist Financing	<ul style="list-style-type: none"> <li>Adherence of anti-terrorist financing measures to pre-existing laws is low.</li> <li>These measures challenge the right of due process with regard to inclusion and de-listing, which is the “corpus of customary international law” (Fassbender, 2006).</li> <li>The presumption of innocence and the right to freedom from government intervention are also undermined by the anti-terrorist financing measures because inclusion on the lists cannot be contested. Individuals cannot challenge their inclusion and are subject to government intervention into their individual affairs (United Nations Human Rights Council, 2007).</li> </ul>
Data Retention	<ul style="list-style-type: none"> <li>Adherence of data retention measures to pre-existing laws is low.</li> <li>The data retention paradigm adopted by the 2008 Framework Decision stands in isolation to other data retention measures (Article 29 Data Protection Working Party, 2001).</li> <li>The Framework Decision adopted in 2008 does not include provisions for the protection of data after being retained by authorities (European Data</li> </ul>

	<p>Protection Supervisor, 2005).</p> <ul style="list-style-type: none"> <li>• The Framework Decision adopted in 2008 was not subject to democratic oversight and the recommendations of the European Data Protection Supervisor were ignored throughout the creation process. The 2008 Framework Decision, therefore, stands outside of the hierarchy of rules governing data protection, which undermines its adherence (Statewatch, 2007).</li> </ul>
<p>Passenger Name Records (PNR)</p>	<ul style="list-style-type: none"> <li>• The adherence of the proposed PNR measure to pre-existing laws, particularly data retention measures, is low.</li> <li>• Directive 95/45/EC promulgates that citizens have the right to know what personal data is being collected and for what purpose. Authorities are also obliged to make the data available to the individual citizen.</li> <li>• The proposed PNR scheme has no mention of the rights promulgated by Directive 95/45/EC and incorporates no such provisions (Statewatch, 2007).</li> <li>• The PNR framework exceeds even the 2008 Framework Decision in data collection, with the data being retained for 13 years. If passengers have been cleared of risk, there is no demonstrated need to keep data for this amount of time (Statewatch, 2007).</li> </ul>
<p>European Arrest Warrant</p>	<ul style="list-style-type: none"> <li>• Not applicable. As 2002/58/JHA was designed to fundamentally alter extradition procedures, adherence to other extradition processes is a non-starter.</li> <li>• Extradition agreements in the past, however, have sought to streamline the extradition process, while protecting the rights of the individual. In that sense, the EAW adheres in principle to other European extradition and counter-terrorism measures.</li> <li>• In 2004, the United Nations Security Council passed resolution 1566 in which it calls on Member States to make concerted efforts to bring terrorists to justice through extradition or prosecution. It follows by describing terrorist offences. While the resolution does not set forth extradition guidelines, it does point to the necessity of extradition as a tool of counter-terrorism. Thus, it reaffirms the importance of the EAW.</li> </ul>
<p>US-EU Extradition Agreement</p>	<ul style="list-style-type: none"> <li>• Adherence of the agreement to pre-existing laws is low.</li> <li>• There is an unacceptable margin of discretion with regard “to...refusing extradition in the face of the death penalty” in a report describing the human rights flaws of the agreement’ (Amnesty International, 2003). The European Convention on Human Rights and the EU Charter of Fundamental Rights explicitly prohibit extradition in cases where the requested person may face capital punishment. The agreement between the EU and the USA merely stipulates that, where there is the possibility for capital punishment in an extradition case, states <i>may</i> decide to refuse extradition; it is not</li> </ul>

	<p>mandatory.</p> <ul style="list-style-type: none"> <li>• The authority of the requested state determines the destination of the requested person, thus the potential for politics to enter the extradition process is strong. The extradition process, therefore, will not be judged according to a legal analysis, but to a political process. Accordingly, the EAW is breached, demonstrating low adherence to other extradition measures.</li> </ul>
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**Table 6: Adherence of Counter-terrorism Measures**

### **8.1 Assessing the Adherence of European Counter-terrorism Measures**

The above table shows that the adherence of European counter-terrorism measures to the hierarchy of rules is low, except for the Framework Decision and parts of the European Arrest Warrant. The other measures demonstrate low adherence to pre-existing laws. The lack of adherence is curious- is it part of a clean break with past traditions in dealing with terrorism or does it demonstrate the ineffectiveness of past measures in dealing with new terrorist threats?

The answer is likely both. Where as previous measures, such as the Advanced Passenger Information measure or Framework Decision 95/45/EC, both of which established the milieu for their respective sets of measures, were aware of the threat of terrorism in the European Union, their legal off-spring have been forced to confront different threats. In seeking to use the legalistic context as the preferred means for dealing with terrorism (instead of military means), the laws governing counter-terrorism in the European Union have been tightened considerably. However, in many cases this has come at a cost to the maintenance of human rights standards. With that, it is to be somewhat expected that a lack of adherence emerged. New threats- or the perception of new threats- has produced new laws. The openness of the EU, where individuals can move across borders and communicate their ideas with each other virtually, coupled with the ease with which money can be moved has proved to benefit not only regular citizens, but terrorists as well. International flights allow individuals to fly to terrorist training camps, receive money from clandestine sources, and share radicalized thoughts with fellow ideologues. To prevent this, new measures have been adopted which not only break with their legal hierarchies, but point to the shortfalls in the effectiveness of prior laws in confronting the modern threat posed by the transnational terrorist. NGOs and civil society do not see prior

measures as being inadequate, however. Many of these groups have questioned the necessity of new measures- such as with the PNR measure. Other groups have condemned the broadened scope of data retention measures for going substantially beyond their own legal framework and harming civil rights. The public outcry and court challenges do not point to the inadequacy of previous legal measures. It does, however, demonstrate the tension that policymakers confront when seeking to protect their citizens, uphold human rights, while at the same time punishing terrorists. "Laws must be seen to be in the general interest, must be made known to all, must be passed with the general consent of the people and must be applied impartially" (Chalk, 1994: p. 105). Many of the counter-terrorism measures operative in the EU do not enjoy these traits. As they fall outside of their own legal hierarchy by going beyond traditional legislative action, several of the counter-terrorism measures described do not enjoy popular consent. The lack of adherence, ostensibly a legal issue, has knock-on effects leading to decreased citizen support. Undermined civil rights obligations cause low support. Together, lack of public support and infringed human rights undermine overall legitimacy. To repair this lack of legitimacy, measures must show both effectiveness in mitigating the threat to liberal society, and protecting civil rights (Chalk, 1994: p. 110). In sum, the adherence of these measures is also low. Despite a stated objective of protecting European citizens from terrorism, the common theme among the adherence of these documents is the divergence from human rights obligations. Together, the adherence of these measures leads to a general limitation of the legitimacy of European measures as a whole.

## **9. Conclusion: Ethical Bottlenecks of European Counter-terrorism Measures**

The legitimacy of the European Union's counter-terrorism measures is lacking. This is attributable to the necessity of a flexible response in dealing with terrorism. Many of the measures suffer from ambiguity because of the need for flexibility. This ensures that these measures can deal with the myriad of protean threats that terrorism presents, while possessing enough legal guidelines to facilitate investigation and prosecution of terrorist suspects. However, in addition to suffering from indeterminacy, many measures lack adherence, as well as coherence to other legal norms and obligations in both human rights and counter-terrorism paradigms. These characterizations are attributable to the

institutional momentum provided by the September 11<sup>th</sup> attacks, the London transport bombings, the Madrid attacks, and ongoing threats throughout the Member States. Because the threat level remains significant, legal development must be expedited to ensure legislative responses to the terrorist threat in the European Union. Therefore, at the expense of some measures of coherence and adherence, many measures are implemented within that context of haste. Furthermore, the speed with which measures are implemented and the flexible requirement they must include proscribes, for many measures, a high level of symbolic validation. Although the need for governments to protect their citizens from violence is paramount, adherence to this dictum does not alone imbue counter-terrorism measures with the ability to uphold their legal pedigrees.

What follows are the ethical bottlenecks of the European counter-terrorism measures. It builds on the foregoing analysis of the legitimacy obstacles by presenting the policy relevant issues that stem from low values on legitimacy indicators.

The European Union has a broad counter-terrorism approach. As an exercise in coordinating the counter-terrorism measures of individual Member States, the EU measures are especially important in establishing a normative framework. Nevertheless, they demonstrate considerable ethical bottlenecks. These bottlenecks arise in the application of the terrorist financing measures, data retention, travel documentation, and third state extradition.

The ethical bottlenecks of the EU measures include: an overly broad definition of terrorism; a lack of fair trial principles in the terrorist financing context; a lack of privacy protection in data retention measures and travel documentation; and, a lack of human rights safeguards on third state extradition processes.

The Framework Definition on Combating Terrorism establishes a broad definition of terrorism. This is a trend that manifests itself throughout the measure of the Member States as well. As mentioned in the case study, Statewatch finds that the definition is overly broad because it has the potential of including the actions of individuals engaged in legitimate protest. Additionally, the inclusion of Internet based provocation acts could infringe on legitimate self-expression. Obviously, there is a line between allowing for political dissent and preventing terrorism, but the Framework Decision's lack of determinacy presents

a type of ethical bottleneck that precludes an individual from knowing exactly when and through what processes he or she has crossed the dividing line.

Terrorist financing measures have a dangerous tendency to ignore fair trial principles. This is a major ethical bottleneck in the EU counter-terrorism context. Common Positions 2001/930/CFSP and 2001/931/CFSP have been challenged on legality and legitimacy grounds. In terms of legitimacy, the measures are indeterminate. On the one hand, inclusion on a sanctions list is subject to intelligence agencies and not judicial findings. On the other hand, after being included on a sanctions list, there is no de-listing procedure and do not specify how individuals can challenge sanctions being implemented against them. Numerous court cases have been brought against counter-terrorism financing measures to this end. The ethical bottlenecks from terrorist financing measures, then, are the fact that they include no democratic oversight and do not allow individuals to challenge their inclusion on sanctions lists.

Rights to privacy are ignored in data retention and travel documentation measures. The EU does attempt to balance data retention against data abuse, but with increases in technology and the increased use of information technology by terrorists, the need to monitor and record the electronic profile of certain individuals is salient. The measures that lay out data retention procedures, including travel documentation, however, are not clear. Regarding data retention, there are no provisions in any of the EU documents that establish what legitimate conceptions of national security threats meet the threshold for retaining data. In other words, the ethical bottleneck stemming from this is there is no explicit 'trigger' for retaining an individual's electronic data. Likewise, the travel documentation data- passenger name recognition- makes no explicit framework for retaining data on aircraft passengers. There is no mention of what standards data should be collected and retained- whether discriminately or uniformly. Thus, the ethical bottlenecks of these two measures are the absence of the assumption of innocence and the right to privacy.

Finally, the extradition process with third states, particularly the USA, presents an ethical bottleneck as well. Unlike the European Arrest Warrant, which scores fairly highly on the indicators of legitimacy, the US-EU extradition agreement is open to substantial human rights abuses. Particularly acute in this respect is the fact that Member States are not obliged to refuse extradition if the requested person is facing torture or capital punishment. This, as Amnesty

International was shown to point out in the case study, goes against both European extradition protocols, as well as the European Convention on Human Rights. Beyond the human rights offences, the agreement attempts to subvert prior bilateral agreements between the United States and Member States. This ratification process is not just subject to parliamentary processes, but rather, as the product of executive authority. The ethical bottlenecks, therefore, are a lack of democratic oversight in ratification of the agreement and the potential for egregious human rights abuses.

## **Appendix: Court Cases Regarding EU Anti-Terrorist Financing Measures**

Challenges to the list drafted by the EU itself, based on Common Positions 2001/930/CFSP and 2001/931/CFSP and Regulation 2580/2001:

Court of First Instance, Case T-206/02, Judgment in the *Congrès National du Kurdistan (PKK) v. Council of the European Union and Commission of the European Communities*-case, 15 February 2005

European Court of Justice, Case C-229/05, Judgment in the *PKK v. Council of the European Union and Commission of the European Communities*-case, 18 January 2007

Court of First Instance, Case-T-229/02, Judgment in the *PKK v. Council of the European Union and Commission of the European Communities*-case, 4 April 2008

Court of First Instance, Case T-228/02, Judgment in the *Organisation des Modjahedines du Peuple d'Iran (PMOI) v. Council of the European Union and Commission of the European Communities*-case, 12 December 2006

Court of First Instance, Case T-47/03, Judgment in the *Sison v. Council of the European Union and Commission of the European Communities*-case, 11 July 2007

Court of First Instance, Case T-110/03, Judgement in the *Sison v. Council of the European Union and Commission of the European Communities*-case, 26 April 2005

Court of First Instance, Case T-338/02, Judgment in the *SEGI association and others v. Council of the European Union and Commission of the European Communities*-case, 7 June 2004

Court of First Instance, Case T-327/03, Judgment in the *Stichting Al Aqsa v. Council of the European Union and Commission of the European Communities*-case, 11 July 2007

Court of First Instance, Case T-253/04, Judgment in the *Kongra Gel and others v. Council of the European Union and Commission of the European Communities*-case, 4 April 2008).

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The Council of the European Union (2005) *The European Union Strategy for Combating Radicalisation and Recruitment to Terrorism*  
  
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Common Position 1999/727/CFSP *Council Common Position on Restrictive Measures Against the Taliban*, 26 February 2001  
  
Common Position 2001/930/CFSP *Council Common Position on Combating Terrorism*, 27 December 2001

Common Position 2001/931/CFSP *Council Common Position on the Application of Specific Measures to Combat Terrorism*, 27 December 2001

Framework Decision 2002/475/JHA on Combating Terrorism, 13 June 2001

Framework Decision 2002/584/JHA on the European Arrest Warrant and the Surrender Procedures between European Member States, 13 June 2002

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