

**Proceedings of the Conference-debate on
"TERRORISM, THE LAW AND VICTIMS' RIGHTS"
1st march 2006
www.eureste.org**

The European Union and the fight against terrorism

By
Anne Weyembergh

Lecturer, Université Libre de Bruxelles, European Studies Institute

Introduction – The fight against terrorism at the level of the European Union

Combating terrorism is one of the European Union's priorities.

It did not start focussing on this issue after the terrorist attacks in Madrid or in London, or even in the aftermath of September 11, 2001. In fact, its interest in terrorism goes back to the 1970s', since the first efforts that were made by the European Community's Member States, as they were known at the time, to develop cooperation in policing and criminal matters to fight against what was then called "euroterrorism", i.e. the terrorism of the time that targeted Western interests from Middle-Eastern groups or from left-wing or right-wing extremists. But naturally, the dimension of the attacks of September 11, Madrid and London reinforced the European Union's attention on this issue.

In the aftermath of the terrorist attacks of 11th September 2001, an action plan was adopted by the European Council. This action plan was revised later, following the attacks on 11th March 2004 in Madrid. This plan demonstrates the EU's ambitions in this field and how high they are.

When you take a look at this action plan, you can see the cross-cutting, "transpillar" character of the fight against terrorism in the EU: the three pillars of the Treaty on the European Union serve as a framework for initiatives in the fight against terrorism.

These three pillars of the Treaty are :

- Community law (the Treaty on the European Community),
- Common foreign and security policy,
- Police cooperation and judicial cooperation in criminal matters.

In a way, each of these three pillars has been put to the service of the fight against terrorism.

Concerning the first pillar, instruments have been adopted regarding asylum, immigration and controls at external borders. A whole series of initiatives have been taken to reinforce the fight against counterfeit passports and false travelling documents.

Many measures in the framework of this pillar have also been introduced to increase security in ports, transportation, airports etc, as well as a series of initiatives seeking to reinforce the fight against the financing of terrorism.

**Proceedings of the Conference-debate on
"TERRORISM, THE LAW AND VICTIMS' RIGHTS"
1st march 2006
www.eureste.org**

There is, for instance, the Directive adopted in October 2005 that aims at the same time to fight against money laundering and against the financing of terrorism.

There are also, but these straddle the first and the second pillar, regulations and common positions that endeavour to implement United Nations legislation, Security Council resolutions for instance. The United Nations have adopted several instruments targeting terrorism, including for example the Security Council's resolutions requiring that the property and financial assets of people involved in terrorist acts should be frozen. At European Union level, several texts seek to implement these SC resolutions. These texts have led to many criticisms concerning the protection of fundamental rights.

The European Community's Court of First Instance made several rulings quite recently on the legality of these texts which, in a way, validates them. These decisions by the Court of First Instance were in turn subject to very critical comments.

In the first pillar, there is also a Directive on reparation for the victims of crime. This Directive does not only concern the victims of terrorism but the victims of crime in general, which means it is crosscutting. This Directive is not very ambitious. It attempts, among other things, to bring closer together, to approximate the Member States' legislations on victim compensation, but most of them are not formulated in a binding mode.

In this presentation, I particularly want to focus on the initiatives taken in the context of the third pillar of the Treaty on the European Union, i.e. in the area of police cooperation and judicial cooperation in criminal matters. This work was started in the 1970s', but for many years, it was at a standstill and only really gained momentum after the Treaty of Amsterdam came into force.

The work on police cooperation and judicial cooperation in criminal matters can be analysed following four different aspects:

- First of all, the efforts made to approximate the Member States' penal legislations
- Then, the work aimed at developing cooperation mechanisms at police level, on the one hand, and at judicial level in criminal matters, on the other.
- Work on trying to set up European actors in the field of police and judicial cooperation in criminal matters. I'm thinking more particularly here about EUROPOL, which is the European Police Office, and about EUROJUST, which is a European office for judges. These two actors both operate in The Hague and are up and running on a daily basis.
- The fourth aspect concerns the EU's external judicial work on criminal matters. Indeed, the EU has external contacts with organisations such as the United Nations, but also with Interpol, the Council of Europe and the Financial Action Task Force on Money Laundering concerning

**Proceedings of the Conference-debate on
"TERRORISM, THE LAW AND VICTIMS' RIGHTS"
1st march 2006
www.eureste.org**

money laundering and the fight against the financing of terrorism. The EU also has many contacts on this issue with third countries like the United States.

I shall try to underline, for each of these four aspects, the initiatives that seem to me to be most symptomatic of what the Union is doing in terms of combating terrorism.

1. The approximation of legislations on crime

Aims : A Framework Decision was adopted on 13th June 2002 seeking to approximate the legislations of the EU's Member States in terrorist matters. It attempts to approximate the definition of terrorist incriminations, give common definitions of terrorist offences and also seeks to bring closer the levels of penalties for punishing these terrorist offences.

A small measure appears in this instrument on the rights of the victims. However, this stipulation is not very binding since it simply provides, among other things, that "*each Member State shall, if necessary, take all measures possible to ensure appropriate assistance for victims' families*".

Impact : As far as the impact of this Framework Decision is concerned, as I mentioned earlier, this Decision was adopted in the context of the third pillar of the Treaty on European Union. But the third pillar of the Treaty is intergovernmental by nature... and one of the consequences of this intergovernmentality is that the decisions made do not have direct effects. For the Framework Decision to be implemented, i.e. for it to be applied in practice, each Member State has to adopt the necessary measures to incorporate it into their legislation. This is true for all texts. Most of the time, the Member States dig their heels in when it come to taking the necessary integration steps. This can be explained by the fact that we are in the criminal domain and therefore at the heart of the Member States' national sovereignty. This Framework Decision had to be implemented by 31st December 2002 at the latest. Most Member States have taken steps at the present time to incorporate the text but some have still not done so, and among the States who have taken steps, some integrations are pretty "unfaithful".

Belgium brought its legislation in line with this Framework Decision but did so after the deadline with the Law of December 2003. This Framework Decision has been widely criticised, as have been the integration laws regarding the protection of fundamental rights. Among the main bones of contention were the definitions of terrorist offences laid down in the Framework Decision. They are very vague and not clear. These texts are criticized for endangering the infamous principle of the "legality of offences", a principle according to which definitions must be sufficiently detailed. There was in fact an appeal to the Belgian Arbitral Court seeking to annul the approximation law of the Framework Decision

**Proceedings of the Conference-debate on
"TERRORISM, THE LAW AND VICTIMS' RIGHTS"
1st march 2006
www.eureste.org**

in question. However, the Arbitral Court's ruling of 13th July 2005 rejected this appeal for an annulment and "validated" the approximation law in question.

Concerning yet again the approximation of legislations in criminal matters, a Framework Decision was adopted in 2001 seeking to effect a "rapprochement" between the legislations of the Member States in the area of victims' rights in criminal procedures. Once again, this Framework Decision is crosscutting, not unlike the Directive on reparation for victims in the first pillar. As a result, it does not only concern the victims of terrorism but also the victims of crime in general and, as in the case of the Directive adopted in the first pillar, several stipulations of this Decision leave the Member States with plenty of room to manoeuvre.

2. Simplifying the mechanisms of cooperation concerning the police and criminal judicial proceedings

a. Judicial cooperation at criminal level

Aims : The work carried out since the 1970s' has attempted to reduce sluggishness, speed up and loosen up the organisations for juridical cooperation in criminal matters. Since the extraordinary Tampere European Council in 1999, work has taken on the form of the well-known process of mutual recognition of judicial decisions. The idea is mutual trust within the European Union in spite of the remaining divergences between our criminal law systems, to recognise the judicial decisions of each Member State and to implement them because we are all part of the same space.

The first concrete outcome of this process is the Framework Decision of 13th June 2002 on the European arrest warrant and surrender procedures. This Framework-Decision is crosscutting inasmuch as it seeks to simplify present-day extradition procedures and replace them with a simple surrender procedure for almost all types of crime.

These measures do not only target terrorism but target terrorism among others. Adopting such a Framework Decision was strongly affected by the context of the fight against terrorism in that it was negotiated upon and adopted very quickly in the aftermath of the attacks of September 11, 2001. Everyone agrees that if it had not been for the post-September 11 context, this Framework Decision would certainly not have been adopted as "quickly" or as "easily" as it was. In the third pillar, all of the texts were adopted unanimously by the Member States, and the adoption of a text concerning criminal judicial matters is, I repeat, at the heart of national sovereignty for the Member States and thus very difficult to adopt unanimously.

**Proceedings of the Conference-debate on
"TERRORISM, THE LAW AND VICTIMS' RIGHTS"
1st march 2006
www.eureste.org**

Impact : As far as the European arrest warrant is concerned, all of the EU's Member States have incorporated it at the present time but many are showing delays in this respect regarding the deadlines that they were supposed to follow. Furthermore, again, many incorporations are not faithful to the Framework Decision.

In this case, Belgium is a "good pupil" in that it has not only respected the deadlines (it implemented the European arrest warrant via the Law of 19th December 2003) but also because its incorporation was pretty faithful to the Framework Decision.

This European arrest warrant, as well as the process of mutual recognition as a whole, have suffered many criticisms based yet again on the protection of fundamental rights.

For instance, the principle that is precisely the foundation of mutual recognition was criticised, i.e. mutual trust. The possibility of attaining mutual trust was doubted. When the Framework Decision was adopted, distrust was generally the rule between the judicial authorities. The legitimacy of this mutual trust was also criticised because it is all very well to say that "we shall trust each other in spite of our disagreements" but these divergences exist not only from the point of view of material law (i.e. the definition of offences, the level of the sentences) but also at the level of the criminal procedure. Certain constitutional jurisdictions, notably the Polish, German and Cypriot Constitutional Courts, attacked the internal incorporation laws concerning the European arrest warrant.

A claim was also made before the Arbitral Court against the Belgian incorporation law concerning the European arrest warrant. The Court has not yet really ruled on the issue. It has asked the European Community's Court of Justice preliminary questions. These preliminary questions are really very important because they concern the legality of the Framework Decision of the European Union itself. Among the questions posed, there are questions about the judicial instrument, i.e. the Framework Decision (Is this type of instrument really appropriate to implement a European arrest warrant?). One question also concerns compliance with the principle of legality in criminal law terms.

These questions are very important for the future of the European arrest warrant. That said, it does not seem to me that there is much suspense in the matter since the Court of Justice, in several recent rulings, has shown itself to be extremely in favour of deepening and developing the European criminal law space. I may be wrong but I do not see it bringing into question the legality of such a Framework Decision, which is extremely important for the development of this space.

Before I say a few words on police cooperation, I would just like to stress that the process of mutual recognition is not, of course, limited to the European arrest warrant. There are many other texts that aim to make the process come to life and that have an interest in combating terrorism, for instance a Framework Decision on implementing decisions to freeze assets and evidence, a Framework Decision on the mutual recognition of confiscation decisions and, finally, a Framework Decision on the

**Proceedings of the Conference-debate on
"TERRORISM, THE LAW AND VICTIMS' RIGHTS"
1st march 2006
www.eureste.org**

European evidence warrant which aims to develop judicial cooperation concerning pieces of evidence, but this latter document is still being negotiated, and the negotiations are particularly heated.

b. Police cooperation

Crosscutting texts have been adopted which aim to combat terrorism and seek to develop the exchange of information on the subject between not only national authorities but also between national authorities on the one hand, and EUROJUST and EUROPOL on the other.

Then, there are far more cross-sectoral texts that aim to develop police cooperation in general and, among other things, to develop the exchange of information. In this respect, I should like to mention the principle known as the principle of availability laid down in the Hague Programme which implies that the information held by the police services of one Member State is to be made available to their counterparts in other Member States. A proposal has been tabled and is at the negotiation stage. This principle is to police cooperation what mutual recognition is to judicial cooperation in criminal matters. But while mutual recognition aims to guarantee the free circulation of judicial decisions, the principle of availability aim to ensure the free circulation of information.

3. The development of European actors in the policing and judicial sectors

I have told you about EUROPOL and EUROJUST, who both have competencies in combating terrorism. I am thinking for instance about EUROPOL, in which an "Antiterrorist Taskforce" was created.

There are also common investigation teams that are set up and that enable several magistrates or several police officers from different Member States to work together and to carry out investigation on another States' territory. The priority field of action of these investigation teams is precisely the fight against terrorism. The basic idea is to exploit to the full these European actors and the means they have at their disposal to reinforce the fight against terrorism.

Obviously, this is much easier said than done... and generally speaking, the European actors in this field suffer from mistrust on the part of their national authorities, on the police side and on the judicial side.

4. The EU's external relations in the judicial sector concerning criminal matters

I shall simply say that, following the attacks of September 11, 2001, the EU's relationships with third countries such as the United States but also Russia, Morocco etc... have considerably developed,

**Proceedings of the Conference-debate on
"TERRORISM, THE LAW AND VICTIMS' RIGHTS"
1st march 2006
www.eureste.org**

notably in the area of combating terrorism. The same applies to the Union's contacts with other organisations.

Conclusion

To conclude, I would like to stress the two-pronged effect of combating terrorism on the European judicial space in criminal matters.

First of all, I think there is a positive effect to fighting terrorist within this space because it is the fight against terrorism which made the development of the European penal space possible in the 1970s' and its extension in depth following the terrorist attacks of September 11.

But I also think that a negative effect is working on the European judicial space in criminal matters and more precisely on what might be referred to as the European judicial penal space's "shield pole".

Criminal law has a complex relationship with the protection of fundamental rights. In this respect, criminal law has two functions. First of all, it works as a "sword" which aims to combat crime and therefore to protect individuals and crime and secondly, as a "shield" which aims to avoid excesses on the part of the repressive authorities and to, in a way, provide guidance for the use by the public authorities of legitimate violence.

Since the launch of European criminal law in the 1970s', its priority has very clearly been the "sword" pole and therefore the fight against crime. Very few measures have been taken in the "shield" area, and this is all the more obvious when we look at victims' rights. As you will have certainly noticed, I have said almost nothing about victims' rights for the simple reason that, at the moment, the European Union is not developing many initiatives in this area. A few crosscutting texts have been adopted. I told you about the Directive on reparation for the victims of crime. I also talked about the Framework Decision on the status of victims in criminal trials.

As far as the victims of terrorism in particular are concerned, I told you about very timid measures that appear in the Framework Decision of January 2002 on combating terrorism. There is also the decision to declare the 11th March as the European day for the commemoration of the victims of terrorism. And, following the Madrid attacks of 11th March 2004, a new budget line was inserted into the Community budget to help the victims of terrorism, a budget line that, incidentally, feeds this pilot project.

**Proceedings of the Conference-debate on
"TERRORISM, THE LAW AND VICTIMS' RIGHTS"
1st march 2006
www.eureste.org**

For the rest, the European Union's antiterrorist action plan says almost nothing about victims' rights, which is of course a problem since the Amsterdam Treaty mandated the European Union to set up a European space of freedom, security and justice.

Thank you.