

Irina Wiegand

**The Protection of Human Rights
and Fundamental Freedoms
in the Fight against Terrorism**

The Case of the European Union after September 11, 2001

Irina Wiegand

**THE PROTECTION OF HUMAN RIGHTS
AND FUNDAMENTAL FREEDOMS
IN THE FIGHT AGAINST TERRORISM**

The Case of the European Union after September 11, 2001

ibidem-Verlag
Stuttgart

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

Bibliographic information published by the Deutsche Nationalbibliothek

Die Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available in the Internet at <http://dnb.d-nb.de>.

∞

ISBN-13: 978-3-8382-5894-2

© *ibidem*-Verlag
Stuttgart 2008

Alle Rechte vorbehalten

Das Werk einschließlich aller seiner Teile ist urheberrechtlich geschützt. Jede Verwertung außerhalb der engen Grenzen des Urheberrechtsgesetzes ist ohne Zustimmung des Verlages unzulässig und strafbar. Dies gilt insbesondere für Vervielfältigungen, Übersetzungen, Mikroverfilmungen und elektronische Speicherformen sowie die Einspeicherung und Verarbeitung in elektronischen Systemen.

All rights reserved. No part of this publication may be reproduced, stored in or introduced into a retrieval system, or transmitted, in any form, or by any means (electronical, mechanical, photocopying, recording or otherwise) without the prior written permission of the publisher. Any person who does any unauthorized act in relation to this publication may be liable to criminal prosecution and civil claims for damages.

Acknowledgements

I wish to thank Prof. Dr. Dr. Dr. h.c. mult. Georg Ress and Prof. Dr. Margrit Schreier for their extremely helpful suggestions, feedbacks and comments and for encouraging me to continue with this research. I would like to express my appreciation for the incredible degree of support that they offered me.

I would also like to thank all those who commented on my draft. Special thanks in this respect are due to Liuben Siarov for providing me with helpful comments throughout the whole process of writing this book.

Finally, I owe thanks to Andrew James Klassen for revising and proofreading the final text and to Michal Onderco for helping me to do the final editorial work.

Bremen, March 2008

Irina Wiegand

Contents

List of Abbreviations	viii
Introduction	1
Research Design and Structure	4
1. Legal Background on Terrorism	7
1.1 The Phenomenon of Terrorism	7
1.1.1 The Phenomenon of Terrorism – a brief historical Outline	8
1.1.2 Terrorism and International Law	10
1.1.3 The Notion of Terrorism in Europe	13
1.1.4 Summary	15
1.2 Terrorist Organizations	16
1.2.1 Al Qaeda	17
1.2.2 Summary	20
1.3 Terrorism as a Challenge to International Law	21
1.3.1 The Prohibition of the Use of Force	21
1.3.2 The Right of Self-Defense	22
1.3.3 The Shift from State-Actors to International Criminal Organizations	25
1.3.4 Summary	28
1.4 Summary	29
2. EU Reactions to Terrorism	31
2.1 Cooperation in the Fight against Terrorism before 11 September 2001	32
2.2 Reactions after 9/11	37
2.3 Reactions after the attacks in Madrid in March 2004 and London in July 2005	42
2.4 Summary	48
3. The Law of Human Rights and Fundamental Freedoms	51
3.1 International Human Rights Law	52
3.2 European Human Rights Law	54
3.2.1 Council of Europe and EU Human Rights Law	54
3.2.2 Convention for the Protection of Human Rights and Fundamental Freedoms	57
3.2.3 The Charter of Fundamental Rights of the European Union	58
3.3 Summary	60

4. European Reactions in the Light of European Human Rights Law	61
4.1 The Framework Decision on Combating Terrorism	62
4.1.1 The Definition of Terrorism	62
4.1.2 The Right to Freedom of Assembly	64
4.1.3 The Principle of Legal Certainty	68
4.1.4 Summary	71
4.2 The Lists of Terrorists and Terrorist Organizations	72
4.2.1 The two Lists set up in 931/2001/CFSP and Regulation EC 2580(2001)	73
4.2.2 The UN List implemented by Regulation EC 881(2002)	78
4.2.3 Summary	82
4.3 The European Arrest Warrant	83
4.4 The EU-US Agreements	85
4.4.1 The Extradition Treaty	86
4.4.2 The Agreement on Mutual Legal Assistance	88
4.4.3 The Passenger Name Records	89
4.4.4 Summary	91
4.5 Data Protection	92
4.6 Summary	94
Conclusions	95
Bibliography	99
Appendix	119
I. United Nations Conventions on Terrorism	119
II. Framework Decision on Combating Terrorism	120
III. European Convention for the Protection of Human Rights and Fundamental Freedoms	129
1952 Protocol to the ECHR	134
2002 Protocol to the ECHR	136
IV. List of Cases Relating to the “Terror Lists” at the European Courts	139
V. Article 9 of the Agreement on Mutual Legal Assistance between the European Union and the United States of America	151

List of Abbreviations

BR	<i>Brigate Rosse / Red Brigades</i>
CFR-CDF	EU Network of Independent Experts in Human Rights
EAW	European Arrest Warrant
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	Court of Justice of the European Communities / European Court of Justice
ECtHR	European Court of Human Rights
ETA	<i>Euskadi Ta Askatasuna / Basque Homeland and Freedom</i>
EU	European Union
Europol	European Police Office
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders
ICCL	Irish Council for Civil Liberties
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICtJ	International Court of Justice
ILC	International Law Commission
IRA	Irish Republican Army
JHA	Justice and Home Affairs
KFOR	Kosovo Force
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
PKK	<i>Partiya Karkerên Kurdistan / Kurdistan Workers Party</i>
PLO	Palestine Liberation Organization / <i>Munazzamat at-Tahrīr al-Filastīniyya</i>
PNR	Passenger Name Record
RAF	<i>Rote Armee Fraktion / Red Army Fraction</i>
SC	Security Council
TEU	Treaty on European Union, Maastricht Treaty
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNC	Charter of the United Nations
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council
US	United States (of America)
9/11	Terrorist attacks in the US on September 11, 2001

“The present situation shows that, for all of us, but especially for the U.S. and Europe, security in the 21st century can no longer be defined by the traditional categories of the 20th century.

A new totalitarianism, Islamist terrorism and its inhumane Jihad ideology, pose a threat to peace and stability, both regionally and globally¹.”

Introduction

Germany’s former Foreign Minister, JOSCHKA FISCHER, started a speech at the University of Princeton in 2003 with these words. Individual states are no longer able to counter the threat of terrorism and multilateral cooperation – on the EU level, but also trans-Atlantic and global cooperation – is needed to combat terrorism effectively. Spreading knowledge about and insisting on respect for fundamental values, in particular human rights, is of major importance in this cooperation aimed at fighting the threat of terrorism (FISCHER 2003).

Certainly, terrorism is not a new phenomenon: In the EU, terrorism has existed for decades and still does.. For example the Federal Republic of Germany and Italy were confronted with leftist terrorist movements, such as the RAF or the BR during the 1970s, while other parts of Europe have had to struggle with terrorist independence movements, such as the IRA or, in Spain, the ETA.

As long as these different terrorist groups have acted, the individual states have countered the threat resulting from their action. With respect to countermeasures, it has sometimes been claimed that states violate human rights. In the case of the Federal Republic of Germany for example, changes in the code of procedure were introduced as an anti-terrorist measure, in order to restrict the rights of the accused terrorists in their trial. Another example is solitary confinement of RAF terrorists, in the so-called dead wings of Germany’s prisons. Already in 1977, Amnesty International Germany expressed its deep concern about the curtailing of human rights in the fight against terrorism. Especially the imprisonment in complete isolation has been considered as a method of torture.

Terrorism, the fight against it and claims about human rights violations in this fight are thus not new in Europe. But whereas the terrorists’ goals were predominantly regional in scope in the past, the situation is different today.

With the terrorist attacks on the Twin Towers of New York's World Trade Center in September 2001, the terrorist threat has changed considerably. This event, where Islamic extremists hijacked four commercial passenger airplanes and intentionally crashed two of them into the World Trade center's Twin Towers, a third one into the Pentagon and the fourth failed and crashed in a field, has marked the beginning of the realization – and perhaps the practice – of a dimension of terrorism that can constitute a considerable threat on a global level. In the aftermath of these devastating attacks, European countries have also fallen victim to this 'new' form of terrorism, for example in March 2004 attacks on Madrid's commuter trains took place and in July 2005 a coordinated suicide bombing on several underground trains and busses took place in London.

Due to this internationality of terrorism, states are in need of more effective models for preventive actions and countermeasures to the increased threat of terrorist attacks. And, to come back to Joschka Fischer's speech, in order to be effective, the states have to act jointly. Within the framework of the EU, this has indeed increasingly happened. Cooperation had already begun long before 2001, but since 9/11, the EU has – based on the Treaty of Amsterdam – expanded its common anti-terrorism law and policies internally as well as on the international level (MONAR 2005b:425).

But howsoever the fight against terrorism is organized, it poses a challenge to the international community, insofar as the community has to “defend itself against the dangers of terrorism” (AREND and HEINZ 2005:5) while respecting its own values, such as human rights norms, that terrorists “aim to destroy” (ANNAN 2003). “Respect for human rights, fundamental freedoms and the rule of law” (ibid) should be essential in the effort to combat terrorism.

But if some European states have combated terrorism in the past by violating human rights and limiting civil liberties – at a time when the threat to international peace and security was far less than it is today – it might be that they now react in a similar way. The fact that the ICJ (2005:351) states in its 2004 adopted ‘Declaration on upholding Human Rights and the Rule of Law in Combating Terrorism’: “Terrorism poses a serious threat to human rights. (...) Since September 2001 many states have adopted new counter-terrorism measures that are in breach of their international obligations”, seems to indicate this and indeed, especially fundamental rights, such as the right to

¹ Germany's former Foreign Minister, JOSCHKA FISCHER, in a speech on November 19, 2003 at Princeton University.

privacy, are touched in the EU by some of the measures enacted in order to fight terrorism.

Whereas a lot is known about the practice of the US and their ‘war on terrorism’, less is known in the wider public about measures of the EU in order to counter the terrorist threat. This is on the one hand surprising, as the EC member states had already started cooperation with regard to terrorism in the 1970s; on the other hand, it is not surprising, because the fight against terrorism is anchored in the field of internal security – an area where the member states want to preserve as much sovereignty as they can. For this reason, the EU has only limited competencies. But it still has some scope of action and it has made use of it and agreed on a number of legislative measures.

In this book, I will mainly look at the EU reactions to terrorism after September 11, 2001, with special focus on the protection of human rights. The research question to be answered is thus:

How has the EU reacted to the ‘new’ threat of global terrorism and how do these post-9/11 reactions on terrorism relate to the law of human rights and fundamental freedoms?

Pursuing this research question and the topic in general bear significant value, as this constitutes an up-to-date issue and a matter of considerable debate. For example, there are severe controversies regarding the question of whether inhuman treatment of suspects of terrorism can be justified in the fight against terrorism or not. As the debate is a contemporary one, there are many recent publications on the topic, including books, journal articles but also newspaper articles. Different works evaluate the EU’s fight against terrorism and the compatibility of security and freedom or civil rights². Books focusing on human rights in the Bush administration’s ‘war on terror’ have also been published³, elaborating on questions such as whether human rights should be or are still universal in an age of global terrorism. This book will be a contribution to this ongoing debate.

² See for example KAHL (2006) or MÜLLER and SCHNEIDER (2006).

³ See for example WILSON (2005).

Research Design and Structure

This book will focus on legislative measures adopted on the EU level and their relation to the law of fundamental rights. For this reason, the underlying research design is that of a single case study. As the individual member states are not the units of analysis, the case study is holistic.

The research question to be answered basically consists of two parts, which are both descriptive: first the main legislative measures that have been adopted by the EU will be identified and in a second step, those measures that might be questionable from a human rights perspective will be evaluated in the light of existing human rights law.

Due to the nature of the topic, it is necessary to work with both primary and secondary sources. For those parts, explaining international law, mainly primary sources will be used, such as conventions, treaties or UN resolutions. For the part about the EU's actions, both primary sources, such as official EU or governmental documents, and secondary sources, like analytical books or articles will be used.

My analysis can lead to basically two different conclusions:

- a) the EU complies with fundamental human rights law in their actions; or
- b) the EU does not comply with human rights law in certain respects.

In order to give a comprehensive answer to my research question, the book will start with a chapter providing the necessary background information for dealing with the topic, namely what is terrorism, who is Al Qaeda and what is the legal framework for states being attacked by terrorist organizations?

This introductory part is important, because it is necessary to have a certain basic knowledge of terrorism and terrorist organizations in order to understand the states' reactions to the terrorist threat.

In the first sub-chapter "The Phenomenon of Terrorism and International Law" a brief description of terrorism and its relation to international law will be given, this includes a brief look at the historical roots of terrorism and the legal framework with regard to terrorism in Europe.

In the second introductory chapter, terrorist organizations will be dealt with. The chapter will essentially focus on Al Qaeda, as this network has been made responsible for the attacks on 9/11 and a number of other terrorist acts. Today's fight against terrorism is mainly focused on the Al Qaeda network.

The third introductory part will deal with the challenges that terrorism poses to international law, which is essentially inter-state law. But one of the main global threats today comes from a terrorist, non-state organization. What does this mean for a state's right of self-defense? This is the main question that will be answered in this part, which is important, because the EU has supported the US by invading Afghanistan in the aftermath of 9/11.

Having given this background information, the second chapter will focus on the European reactions to terrorism. It will start with a general overview of EU reactions to terrorism. As terrorism is not a new phenomenon in the European states, cooperation in the fight against it started decades ago, namely in the 1970s. The overview will begin with the conventions and measures adopted between this time and 9/11. In addition, the EU was founded during that time and the relevant legal framework for EU action was established. Basic information in this regard will also be given in this chapter. However, the main focus will be on the reactions after September 11, 2001 and the terrorist bombings in Madrid, in March 2004, and in London, in July 2005, in order to show how far these events have influenced the EU in the fight against terrorism. It is not possible to summarize and describe all measures decided and enacted in the fight against terrorism – more than 200 individual measures have been adopted since September 2001 –, therefore only the main reactions will be summarized, with a focus on those that might be questionable from a human rights perspective.

This part will be followed by a chapter about the law of human and fundamental rights in the EU, in order to provide the necessary background information for an evaluation of those EU reactions that might violate fundamental rights. In a first step, some basic information on human rights law on the international level will be given, by briefly looking at the main Declarations and Covenants of the UN, namely the 'Universal Declaration on Human Rights', the 'International Covenant of Civil and Political Rights' and the 'International Covenant of Economic, Social and Cultural Rights'. In a second part, I will turn to regional human rights law, by having a closer look at the 'European Convention for the Protection of Human Rights and Fundamental Freedoms' and the 'Charter of Fundamental Rights of the European Union'.

Having given this legal background, each of the measures and reactions that might be questionable from a human rights point of view will, in a fourth chapter, be described

in a more detailed way and be assessed in the light of human rights law. In this part, the implementation of these measures in national law might serve as examples. Furthermore, relevant judgments of the Court of Justice of the European Communities, of the Court of First Instance and the European Court of Human Rights will be taken into consideration. The book will finish with a conclusion, providing an answer to the research question.