

The EU's External Cooperation in Criminal Justice and Counter-terrorism: An Assessment of the Human Rights Implications with a particular focus on Cooperation with Canada

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Abstract

This paper examines the increasing importance of EU external cooperation in the field of criminal justice and counter-terrorism and its impact on the interplay between justice and home affairs and common foreign and security policy. It goes on to look at the effect of counter-terrorism policy on the listing of terrorist organisations, and the effect that moves to combat the financing of terrorism in this field has on NGOs. It studies the ways in which such cooperation can be used to promote human rights. Finally, it highlights the problem of accountability for human rights abuses in international cooperation on counter-terrorism and in rule of law missions, particularly as the EU is not a signatory to the ECHR and the EU Charter is not yet binding. All of these issues are addressed broadly and with a specific focus on EU-Canada cooperation.



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This project assesses the relations between the European Union (EU) and Canada in the area of Justice and Home Affairs (JHA). It aims at facilitating a better understanding of the concepts, nature, implications and future prospects related to the Europeanisation of JHA in the EU, as well as its role and dilemmas in the context of EU-Canada relations.

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THE EU'S EXTERNAL COOPERATION IN CRIMINAL JUSTICE AND COUNTER-TERRORISM:

AN ASSESSMENT OF THE HUMAN RIGHTS IMPLICATIONS WITH A PARTICULAR FOCUS ON COOPERATION WITH CANADA

CEPS Special Report/September 2008

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The cross-border nature of the security issues covered by EU Justice and Home Affairs (JHA), namely immigration and cross-border crime, has meant that the extension of cooperation to third countries and international organisations was a logical step to ensuring the effectiveness of enhanced internal cooperation. The EU cannot act alone to combat the international phenomena of illegal migration, terrorism and organised crime. To ensure its internal security, it is imperative that it engages with other countries and regions to improve security globally. In addition, just as the policy of internal cooperation in JHA within the EU recognises that there cannot be security in the absence of freedom and justice guaranteed by the rule of law, the EU is obliged to engage with the respect for human rights and the rule of law in the third countries it cooperates with.

This paper will focus on the development of the external dimension of the area of freedom, security and justice (AFSJ) with a particular focus on the protection of human rights and the implications of the EU's counter-terrorism strategy. It will concentrate on criminal justice cooperation rather than dealing with the broader aspects of immigration and asylum that are also a part of JHA external cooperation. It will start by setting out the parameters for external cooperation in criminal justice in general and then take a closer look at the particular issues related to EU-Canada relations in these areas and provide a set of policy recommendations for future developments.

The paper is divided into three parts, the first describing the framework for the external dimension of JHA, the second highlighting issues relating to the external aspects of the EU counter-terrorism strategy and the third identifying the human rights issues raised by external cooperation in this field.

1. Strategy for the External Dimension of JHA: Global Freedom, Security and Justice

1.1 History

Cooperation in the field of justice and home affairs had been developing internally within the EU since the 1970s but the first steps towards EU cooperation in this area with third countries and international organisations came with the Treaty of Maastricht. The objective of providing additional security for EU citizens required the EU to address a wide variety of threats – whether they originated internally or externally¹ – and it was with the entry into force of the

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¹ Gilles de Kerchove, "Introduction", in Gilles de Kerchove et Anne Weyembergh (eds), *Sécurité et justice: enjeu de la politique extérieure de l'Union Européenne.*, Editions de l'Université de Bruxelles, 2003, p. 5.

Amsterdam Treaty that the external dimensions of the Area of Freedom, Security and Justice (AFSJ) started to meet that need and to develop seriously.

The institutional framework of the EU makes cooperation in this field a complex issue. The work of the EU is divided in its current format into what are known as three ‘pillars’. Each pillar covers a different thematic area and implies differing powers for the EU institutions – the Council, the Commission, the Parliament and the European Court of Justice. The first pillar addresses areas of ‘community competence’, which include asylum and immigration in the area of justice and home affairs. The second pillar covers the EU’s common foreign and security policy. Finally the third pillar covers criminal justice issues. External cooperation in the field of justice and home affairs can, therefore, involve elements from all three pillars but the choice of institutional framework in which decisions are taken has significant consequences for the democratic and judicial accountability of the actions of the EU.

A small number of second pillar instruments were adopted in relation to penal matters under the Treaty of Maastricht. These took the form of common positions that allowed member states to coordinate their actions and policies in criminal matters in the context of international organisations and negotiations on international treaties. For example, the EU adopted Common Positions on negotiations in the Council of Europe and the OECD relating to corruption² and adopted a Joint Position on the draft United Nations convention against organised crime.³ This type of instrument allowed the then 15 EU member states to coordinate and strengthen their negotiating position in other international fora and to ensure that concerns and standards that were common to them would be reflected in the agreements they made externally.

The Treaty of Amsterdam introduced two new features allowing for the development of external cooperation in the field of justice and home affairs that reflected an increased political will for such cooperation. These new elements allowed for the stronger coordination of EU member state positions in international organisations and at international conferences in relation to JHA⁴ and, importantly, allowed for the EU, through the Presidency to make agreements⁵ with third states or international organisations on JHA matters.

These developments allowed for actions in the external dimension of the AFSJ to multiply. In addition to the adoption of new common positions, the EU concluded three agreements with the US on the basis of Articles 24 and 38 TEU⁶ and four other agreements with the associate Schengen partners.⁷ These trends were pushed on by an increased political will and awareness that the internal security of the Union relies on enhanced global security. A series of EU horizontal work programmes confirmed the importance of establishing the EU as an actor on the international scene in the fields of justice and home affairs.

² 6 October 1997 and 13 November 1997.

³ 29 March 1999.

⁴ Art. 37 TEU with Arts. 18 and 19 TEU.

⁵ Art. 38 TEU with Art. 24 TEU.

⁶ Agreement on Extradition between the European Union and the United States of America, OJ L181 Brussels 3 June 2003 at p.27-33; Agreement on mutual legal assistance between the European Union and the United States of America, OJ L181, Washington 25 June 2003; Council decision 2004/496/EC of 17 May 2004 on the Conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security.

⁷ Iceland, Norway, Switzerland and Liechtenstein.

The Tampere Council Conclusions 1999, as well as providing the starting point for drafting of the EU Charter on Fundamental Rights and Freedoms, put the need for external relations in this area firmly on the political agenda. They state that:

8. The European Council considers it essential that in these areas[JHA] the Union should also develop a capacity to act and be regarded as a significant partner on the international scene. This requires close co-operation with partner countries and international organisations, in particular the Council of Europe, OSCE, OECD and the United Nations.⁸

More broadly it called for a stronger external action bringing together the competences and instruments at the disposal of the Union to build the area of freedom, security and justice with a focus on external relations.

The European Council Conclusions of Santa Maria de Feira of June 2000 built upon the Tampere Conclusions establishing a set of geographical and substantive priorities and objectives for external cooperation in the field of JHA. In relation to the Mediterranean Region, for example, it highlighted the importance of fomenting a climate of protection for human rights and the rule of law, developing effective cooperation on migration and, in relation to organised crime providing extensive technical assistance to the Mediterranean partners to help them with institution building and the implementation of international instruments.

It is clear from the way that these objectives are formulated that the EU has been conscious of the dual needs to ensure security and to bolster the freedom and justice aspects of justice and home affairs through cooperation in its external relations. This paper will take a close look at whether or not it has been successful in this twin-track approach.

The Hague Programme of November 2004 confirmed the need for development in this area and pushed forward the agenda specifying the need for a coordinated strategy:

Notably in the field of security, the coordination and coherence between the internal and the external dimension has been growing in importance and needs to continue to be vigorously pursued.

Finally, these developments culminated in a dedicated 'Strategy on the External Dimension of the Area of Freedom, Security and Justice' in October 2005.⁹

1.2 Strategy on the External Dimension of the Area of Freedom, Security and Justice

The Strategy on the External Dimension of the Area of Freedom, Security and Justice¹⁰ highlighted five political priorities for the development of relations with third countries in this field, namely:

- Human rights
- Strengthening institutions and good governance
- Migration, asylum and border management
- Fight against terrorism
- Organised crime, including trafficking in persons, drugs and human organs, counterfeiting, economic and financial crime and cybercrime.

⁸ Tampere Council Conclusions 1999.

⁹ COM (2005) 491 final, Brussels, 12 October 2005.

¹⁰ Ibid.

This paper will focus on the issues of human rights and the fight against terrorism while other issues will be covered by parallel working papers being developed within the scope of this project.

The strategy establishes a set of clear guiding principles for the development of policy towards third countries:

- Geographic prioritisation
- Differentiation: a tailored approach is required to respond to the particular situation of individual countries and regions
- Flexibility – allowing the EU to respond swiftly to new priorities
- Cross-pillar coordination
- Partnership with third countries – respecting the principle of ownership
- Relevance of external action – there should be a clear link between internal activities aimed at creating an area of freedom, security and justice and external actions to support the process
- Added value – requiring a regular exchange of information on activities in third countries between member states and the Commission to avoid duplication and ensure complementarity between actions
- Benchmarking – evaluation mechanisms must assess progress in third countries and the relevance for the EU’s external relations objectives.

The issue of duplication and complementarity is one which is important for the EU in relation to the exchange of information with Canada on activities and projects in third countries. There is a degree of overlap between Canadian and EU priorities in geographical regions such as the Mediterranean region where information on lessons learned could also be useful in terms of designing future programmes.

1.3 The roles of the institutions in external cooperation on JHA

A study of any Presidency Programme of external relations shows the breadth and resource implications of the EU’s external relations in the third pillar.¹¹ The scale and complexity of these developments involves many aspects of the EU’s institutional structure in a variety of different ways. The simplification of structures through the abolition of the pillar system that is introduced by the Lisbon Treaty¹² may, in the light of the Irish referendum rejecting the Lisbon Treaty, have to be reconsidered. At the very least, the coming into force of the Lisbon Treaty is currently indefinitely postponed and, in view of this uncertainty, this paper will focus on the current position of the EU Institutions rather than speculating on the provisions of the Lisbon Treaty.

EU Institutions

EU external relations on justice and home affairs necessarily involve an interaction between the second pillar of common foreign and security policy and the third pillar of criminal justice

¹¹ Hans G Nilsson, “Organs and Bodies of the Third Pillar as Instruments of External Relations of the Union?” in De Kerchove and Weyembergh (eds), op. cit., at p. 201.

¹² See Philippe de Bruycker and Anne Weyembergh, “The External Dimension of the Area of Freedom, Security and Justice”, in M. Telo (ed.), *EU and Global Governance*, London: Routledge, forthcoming.

cooperation. The complex institutional frameworks for second and third pillar activities mean that the interaction between the two can appear relatively arcane, even by EU standards.

The highly sensitive political nature of both common foreign and security policy and cooperation in the field of criminal justice means that both spheres of activity are dominated by the political control of the Council. Member states tend to take strong and varied national positions on both sets of issues, a factor which adds to the complexity of decision making in this sphere.

Within the Commission, the issue of external cooperation in justice and home affairs is a matter worked on by two Directorates General, Justice, Liberty and Security and External Relations, a situation which can create difficulties in relation to competing priorities.

The Strategy for the External Dimension of JHA: Global Freedom, Security and Justice¹³ identifies the parameters for institutional action to develop external cooperation:

13. As building an area of freedom, security and justice is high on the political agenda of the EU Member States there is a need to ensure a commensurate priority is given to JHA issues in the EU's external action. This requires a co-ordinated and coherent response in the EU's relations with third countries. At present JHA issues are not dealt with as consistently as they might be. Although good results have been achieved in some fields, in others key issues are not progressed.

This is easy to say, but coherence and coordination in such a complex institutional framework is perhaps not so easily achieved. In order to improve the situation, the Commission and Council Secretariat are tasked with the systematic monitoring of JHA external activity, reporting to the JHA Council and the General Affairs and External Relations Council (GAERC) every 18 months. The first of these reports was published in December 2006¹⁴ and the second is due in the autumn of 2008. Based on these reports, a number of action-oriented papers to supplement the process are to be produced by the Presidency working with the Council Secretariat and Commission, and supported in particular by groups of interested member states. The conclusions of such papers are to be agreed, where appropriate, in partnership with the countries or regions concerned.¹⁵

One area in which the complex institutional nature of EU external action was highlighted was in the conclusion of agreements with the US on extradition and mutual legal assistance.¹⁶ The negotiations of these agreements caused controversy relating to the legal personality of the EU under current treaties and on the very nature of the EU Institutions:

The agreements constitute a precedent of third pillar action in the field and their very conclusion may be used to argue that – notwithstanding the lack of legal personality of the European Union in the current treaties – the Union has a de facto legal personality in counterterrorism and criminal matters by virtue of the very conclusion of international agreements in the third pillar. This precedent may explain the willingness of the relevant EU institutions to negotiate and conclude the agreements and may

¹³ 14366/3/05 REV 3, Brussels, 30 November 2005, p. 8.

¹⁴ “Progress Report on the implementation of the Strategy for the External Dimension of JHA: Global Freedom, Security and Justice”, SEC (2006) 1498, 16 November 2006 and “Report on the implementation of the ‘Strategy for the implementation of the External Dimension of the JHA: Global Freedom, Security and Justice’ for the year 2006”, Doc. 15001/06, 20 November 2006, considered at the 2768th Justice and Home Affairs Council Meeting, Brussels, 4-5 December 2006.

¹⁵ “Strategy for the External Dimension of JHA”, op. cit., p. 8.

¹⁶ Op. cit.

challenge the generally accepted view that EU action in the field was merely a response to US pressure...¹⁷

The advancement of external cooperation in JHA can thus, from a critical perspective be viewed as a vehicle for the advancement of the status of the very EU institutions that are tasked with developing such cooperation.

The role of the European Parliament is extremely limited in both the second and third pillars. The sensitive areas covered by this external cooperation are, however, subjects that are of great interest to parliamentarians and some of the activities of the European Parliament, such as the inquiry¹⁸ into the use of rendition flights in European territory in the fight against terrorism, which have given higher profile to the pitfalls of such cooperation. While legally the European Parliament's competences in this field may not have great weight, politically the European Parliament has a capacity for scrutiny and the ability to put issues firmly on the political agenda and in the public domain across Europe. Some related issues, such as the exchange of Passenger Name Record (PNR) data on flights to the US,¹⁹ however, come within the EU's community competence and in this area, the European Parliament has been able to flex its muscles by using its ability to challenge developments in the European Court of Justice where necessary.²⁰

Europol and Eurojust

The two dedicated EU criminal justice agencies, Europol dealing with police cooperation and Eurojust dealing with judicial cooperation, clearly have an important role to play in external cooperation as well as internal cooperation on these issues. Both agencies have a mandate that allows them to make agreements with third countries but the way in which that mandate operates in each agency is different.

The procedure for Europol to begin negotiations with a third country or body is extremely complex and cumbersome.....As can be seen, this procedure means that the Council is involved in all stages of the procedure and can exercise political control over with whom Europol is negotiating, of the content (when the Council gives its authorisation it may impose conditions on Europol) and has a final say in determining also the end result – if the Council is not satisfied with the end result of the negotiations, it is always in a position to ask Europol to seek to achieve another result.²¹

This heavy political control over the capacity of Europol to engage in agreements with third countries or bodies is perhaps attributable to sensitivities about the nature of police activities

¹⁷ Valsamis Mitsilegas, "The External Dimension of EU Action in Criminal Matters", *European Foreign Affairs Review* 12: 457-497, 2007, p. 474.

¹⁸ Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, "Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners", 30 January 2007. Rapporteur: Giovanni Claudio Fava.

¹⁹ See, for example, Council decision 2004/496/EC of 17 May 2004 on the Conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security and Commission Decision 2004/535/EC of 14 May 2005 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection, annulled in the joined cases C-317/04 and C-318/04 *European Parliament v Council of the European Union* OJ C 178 of 29 July 2006, p. 1 and Mitsilegas, *op. cit.*, pp. 477-487.

²⁰ Another paper is being prepared specifically dedicated to the issue of PNR within the context of this project so this paper will not look at this issue in any greater detail.

²¹ Nilsson, *op. cit.*, p. 202.

and the need for political oversight. These sensitivities and the lack of genuine trust that member states have in relation to policing have meant that Europol's powers to work on operational matters internally have also been severely hampered to the extent that it could be argued that effective cooperation with third countries is more likely on a bilateral basis rather than through Europol as a central conduit in any event.

On the other hand:

In stark contrast to the very detailed and constraining rules mentioned as regards Europol... stands the simplicity of Eurojust's external relations in the Council Decision setting up Eurojust with a view to reinforcing the fight against serious crime.²² OJEC, no L63, 6 March 2002, p. 1

One reason that has been put forward for this disparity is:

...that the Council has probably considered that Eurojust has a character of a quasi-judicial body and that the Council as a political body would not interfere with the business of a body of such a nature. However, in [the author's] opinion, the Council will probably have to change its stance in this matter as time passes. In addition, by exercising political oversight over Eurojust's external relations, the Council would in no way infringe on judicial independence as regards specific cases.²³

It seems then that while the EU is, rightly or wrongly, increasingly putting faith in the quality of its judges and their trustworthiness in relation to external cooperation, it is a long way from allowing the same free rein to the police.

1.4 EU Cooperation with other international and regional organisations

One of the key areas of external cooperation on criminal justice matters is in the EU's engagement with international and regional organisations. This can take the form of common positions on negotiations on international conventions, in particular in the Council of Europe and the United Nations. On issues where there is Community competence, the European Commission may also become a party to international conventions. This allows the EU to ensure that commitments agreed to by member states in other contexts are consistent with existing Union and Community law standards. As has been pointed out by commentators:

At the same time, standards adopted in international instruments and bodies can have an influence on internal Community and Union law – both by being copied or followed in internal legislation and by influencing the interpretation of internal law by the Court of Justice.²⁴

An important example of the kind of cooperation that the EU engages in with international organisations is the agreement of the United Nations Convention on Transnational Organised Crime signed at Palermo in 2000, and its Protocols. In order to coordinate member states' positions during the negotiations and to ensure that the text of the convention would be consistent with existing Community and Union law and standards, the Council adopted a joint position in 1999²⁵ according to which the Commission would be 'fully associated' with the coordination even though many of the matters at issue were properly in the domain of the third pillar. As with many such instruments, the matters covered by the Convention included third

²² Ibid. p. 205.

²³ Nilsson, *op. cit.*, p. 207.

²⁴ Mitsilegas, *op. cit.*, p. 489.

²⁵ OJ L 87, 31 March 1999.

pillar issues such as the criminalisation of organised crime as well as issues covered by the Community competence such as anti-money laundering standards. The Community therefore decided to conclude the Convention with a declaration on the exact areas upon which the Community has competence but leaving the path open for future development of Community law in the future to cover areas not covered at the time of conclusion of the convention.²⁶ The exact nature and extent of Community competence has been a matter of debate in the conclusion of this kind of declaration.²⁷

The EU has also been very active in the field of criminal justice cooperation developments in the Council of Europe. The Council of Europe and the EU share both a geographical space and, to a great extent, the same core values and standards. Before the EU began to develop work on criminal justice cooperation, the Council of Europe was the primary standard-setter in the field in Europe. Council of Europe Conventions on Extradition²⁸ and Mutual Legal Assistance²⁹ formed the background of European cooperation upon which the EU has built advancements such as the EU Convention on Mutual Legal Assistance³⁰ and the European Arrest Warrant.³¹ In addition, the European Convention on Human Rights and Fundamental Freedoms (ECHR)³² and its interpretation through the jurisprudence of the European Court of Human Rights provides the primary standard of human rights protection by which all EU member states are bound and is the backbone to the human rights standards that are applied in criminal justice cooperation throughout Europe. Council of Europe standards have informed EU developments and are an important element in the armoury of EU discussions on criminal justice cooperation with third states that are also Council of Europe members.

The Council of Europe and the EU have, however, in recent years begun to develop a rather less smooth relationship than their purported shared values would lead one to expect. In relation to the agreement of international conventions in the field of criminal justice cooperation, the insistence on the part of the EU to include what are known as ‘disconnection clauses’ into Council of Europe criminal law conventions has caused discord. These clauses stipulate that in matters covered by the convention in question where there exist parallel Union or Community rules, the EU member states will apply those rules in their mutual relations. They are justified by the Community as being necessary to protect the institutional structure of the EU and to prevent member states from avoiding their Union or Community obligations in their relations between themselves by invoking rights and obligations arising out of such conventions in the Council of Europe. While the EU may justify the clauses as protecting what might be higher EU standards, some fear that the disconnection clauses may be used in fact to dilute the Council of Europe standards and avoid their application in relation to EU member states. This has led to

²⁶ Council Decision on the conclusion, on behalf of the European Community, of the United Nations Convention against Transnational Organised Crime, OJ L261, 6 August 2004, p. 69 at p. 115. See Mitsilegas, *op. cit.*, p. 490 for full assessment of these declarations.

²⁷ See for example discussions in relation to the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention Against Transnational Organised Crime, Council doc. 5535/2/06 REV 2, Brussels, 16 February 2006.

²⁸ European Convention on Extradition 1957.

²⁹ Council of Europe Convention on Mutual Assistance in Criminal Matters 1959.

³⁰ Council of Ministers, Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, adopted on 29 May 2000, pp. 1-2.

³¹ Council of Ministers, Framework Decision on the European Arrest Warrant and the Surrender procedures between Member States, OJ L 190, adopted on 13 June 2002, pp. 1-20.

³² European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

calls for these clauses to be replaced by 'modulation clauses' which would have the effect of ensuring that EU member states cannot apply standards that would be lower than those applicable under Council of Europe Conventions.³³

As one commentator has pointed out:

The debate over disconnection clauses may reflect a broader scepticism on behalf of the Council of Europe regarding the expanding size and role of the Union in traditional areas of Council of Europe action such as criminal law. The very insertion of disconnection clauses however, raises important issues regarding external action competence for the Community. As the Court of Justice noted in its opinion on the Lugano Convention, disconnection clauses, which are designed to ensure compliance with Community law and avoid conflicts between different legal orders, may not necessarily guarantee that internal Community rules are not affected: on the contrary, they may provide an indication that these rules are affected. This may hint at the assertion of possible exclusive competence for the Community in the area which is potentially affected.³⁴

It is clear that when the EU works together in negotiations, the 27 member states represent over half the Council of Europe's membership. This means that the negotiating position of the EU may be decisive in negotiations where member states negotiating separately may not have so much weight. This leads to concerns from non-EU member states that an EU agenda will dominate discussions in the Council of Europe.

In addition to fears of EU encroachment on Council of Europe territory in relation to criminal justice matters, the establishment of the new EU Fundamental Rights Agency (FRA) led to a clamour of complaint³⁵ about duplication from the Council of Europe, which sees human rights as its primary domain. The final mandate for the FRA,³⁶ however, has restricted its area of competence to strictly Community areas. This, combined with the delay to the Lisbon Treaty coming into force will mean that the FRA is likely to be of little assistance in relation to protecting human rights in the sphere of external cooperation in criminal justice and counter-terrorism. It is unfortunate that the importance of effective human rights protections seems to have been lost in this particular assessment of the boundaries between the EU and the Council of Europe.

1.5 EU Cooperation with third countries versus bilateral cooperation

The issue of whether or not EU level cooperation is preferable to bilateral cooperation with third countries depends, in many cases, on the nature of political relations between particular EU member states and other countries. Historical connections may facilitate bilateral cooperation in some cases and in others may mean that old conflicts preclude active cooperation on a bilateral basis. Some member states may engage with some partners in other international fora. An example of this is the UK engagement with the Commonwealth, of which Canada is also a member. In relation to cooperation in criminal matters, cooperation between Commonwealth

³³ Council of Europe Parliamentary Assembly, Recommendation 1743 (2006). See also Report by J.-C Juncker, Council of Europe-European Union: 'A sole Ambition for the European Continent', Strasbourg, 11 April 2006.

³⁴ Mitsilegas, *op. cit.*, pp. 491-2.

³⁵ See Juncker, *op. cit.*

³⁶ Council regulation (EC) No 168/2007 of 15 February 2007 (OJ L 53, 22 February 2007, pp. 1-14), Preamble, para 8.

member states is facilitated to a degree by the shared system of common law, which means that cooperating authorities can more easily understand the system of their cooperating partner.

Cooperation with third countries on an EU level, however, can add weight to the negotiating power of member states and to the importance that other states may give to the need for effective cooperation. The EU is increasingly an important economic and strategic power on the world stage and, while losing favour with one member state may not have significant consequences, losing favour with the block of 27 with all that that implies, may encourage states to engage with the EU on sensitive issues such as counter-terrorism and human rights. While this may be the case for states that want to keep open their markets in the EU and the possibility of receiving EU grants and subsidies, states such as the US can play off their bilateral relations against relations with the EU as a whole when they are negotiating agreements at EU level as can be seen in the negotiations around the agreements on extradition and mutual legal assistance.³⁷

The EU policy relating to the external dimension of JHA reflects the geo-political priorities of the EU as a whole rather than the diverse interests of particular member states. This is reflected in the differing approaches to the various countries and regions with which the EU engages on the external dimension of JHA. The European Neighbourhood Policy allows the EU to engage with neighbours in capacity building projects aimed at improving the security of the region and at strengthening good governance and the rule of law. The strategic partnership with Russia leads to engagement on priority areas such as the rule of law, the fight against terrorism and organised crime as well as border management. EU cooperation with the US seeks to strengthen operational cooperation while trying to maintain EU standards on issues such as data protection and the death penalty.

One of the criticisms levelled at EU level international agreements has been the lack of Parliamentary Scrutiny and debate around their adoption. One of the benefits, however, of EU level agreements is that they reflect the concerns of the 27 member states and therefore one would hope that they are less likely to reflect the pure political expediency that might be seen in a bilateral approach representing the interests of just one member state.³⁸

1.6 Canada-EU cooperation on JHA

EU cooperation in justice and home affairs matters with Canada is generally considered in the context of ‘transatlantic’ cooperation, which is often overshadowed by cooperation with the United States. The Commission Progress Report on the Implementation of the Strategy for the External Dimension of JHA: Global Freedom, Security and Justice of 2006, dedicates a section to the US and Canada that reveals the secondary importance given to Canada as a partner in transatlantic cooperation:

‘3.5 U.S. and Canada

The **strategic nature of our security partnership with the US** is based on a well established dialogue, built on common values and trust and largely focused on the fight against terrorism and border security.

³⁷ For a thorough discussion of these agreements see Mitsilegas, *op. cit.*, pp. 471-477 and section 2 below.

³⁸ See, for example, the Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America, signed at Washington on 31 March 2003, which appears to give even fewer protections than the EU-US agreement on extradition.

The EU had to denounce the 2004 EU-US **passenger name records (PNR)** agreement following the European Court of Justice ruling of 30 May 2006. The EU and US recently concluded a new agreement, thereby providing legal certainty to economic operators and ensuring an adequate level of data protection.

Despite frequent contacts and persistent representations by the EU to all levels and branches of the US Government, there has been scant progress on **visa-free travel** for citizens of all EU Member States to the US. The Commission reported twice to the Council on visa reciprocity noting progress, including full visa waiver reciprocity, with some countries. For countries with unsatisfactory progress, notably the US, the Commission could envisage proposing measures in relation to diplomatic and service passport holders. Meanwhile the Commission will pursue work to achieving full visa-waiver reciprocity for all Member States; another progress report is due in March 2007.

The Commission and the Member States continued to cooperate with the US, other countries and ICAO on the introduction of **biometric passports** to enhance scrutiny of identity documents at borders while not disrupting legitimate travel, including to the US in the framework of the Visa Waiver Program. The studies launched by the

Commission on the implementation of a '**Trusted Traveller Programme**' to make it easier for bone fide travellers to cross the border are likely to be of interest to the

US

As regards **counter-terrorism**, radicalisation and recruitment, and terrorist financing were particularly topical issues, the latter focusing on asset freezing, financial investigations and the non-profit sector.

At operational level, **EUROJUST and the US** finalised a **co-operation agreement** on judicial cooperation on criminal matters. It goes further than the **EU-US Mutual**

Legal Assistance Agreement which, together with the extradition agreement, is expected to enter into force in late 2006. **EUROPOL-US cooperation** increased qualitatively and quantitatively but has not yet reached its full potential. For the first time, however, the US contributed to EUROPOL's Organised Crime Threat Assessment.

The strategic alliance with **Canada** also includes a justice, freedom and security component. The Commission's contacts with Canada regarding reciprocal visa-free travel revealed a wider interest in cooperation on international migration. As a consequence, a framework was established which provides for a regular dialogue on visa, immigration and asylum policies including a working group to inform the review of visa requirements. Progress has been made with Canada which exempted Estonian citizens from the visa obligation.⁷

Cross-pillar troika³⁹ meetings take place between the EU and Canada to discuss second and third pillar issues but such meetings are becoming less and less frequent, having been reduced from one meeting per semester to one per year. Difficulties in scheduling meetings have meant that so far in 2008 the counter-terrorism troika meeting between the EU and Canada has been postponed twice and a new date is currently being sought under the French Presidency. The topics generally on the agenda of such meetings include trends and developments, the United Nations, Canadian-EU developments, possible cooperation on technical assistance and

³⁹ The Troika represents the EU in its common foreign and security policy and brings together the European Commissioner in charge of external relations, the Minister of Foreign Affairs of the member state holding the Presidency of the EU and the Secretary General/High Representative for common foreign and security policy.

exchange of views and experiences on radicalisation and recruitment. The meetings in practice seem to be little more than an exchange of views on issues of common interest such as counter-terrorism rather than an opportunity to discuss joint action and strategy. It is questionable what the practical value of these meetings is if they do not go deeper than they do at present and one interlocutor wondered whether one meeting a year might even be too much given the actual substance of the meetings.

From the EU perspective, Canada can be viewed as a non-threatening transatlantic partner. There is an assumption that Canada and the EU share similar principles and values in a kind of benign approach to foreign policy. Canada has proved to be a useful partner in international fora such as the 3rd Committee⁴⁰ at the UN where coordination and support for EU policies to promote human rights have proved invaluable. Canada has also provided a lead in international law-making initiatives and the EU and Canada cooperated in promoting the International Criminal Court in the face of opposition from the US. EU institutions have few perceived difficulties in cooperating with Canada and there are clear indications that the relationship is much less fraught than that with the US. Despite the apparent ease of cooperation, however, there is very little practical development.

In the past, Canada was a like-minded country with which the EU agreed on human rights issues.⁴¹ It seems, however, that the Canadian position has shifted with the new government so that the active promotion and protection of human rights has slipped down the agenda. An example of this is the fact that recently Canada has not even taken up the issue of the death penalty concerning its own nationals sentenced to death in the US.⁴²

Canada was selected as one of six strategic partners in the European Security Strategy (though sidelined next to the importance accorded to the US) and is an important partner in European Security and Defence Policy operations and rule of law missions, notably in Afghanistan and Bosnia. This paper will look at that cooperation in its third chapter covering human rights and accountability in external missions.

From the Canadian perspective, relations with the EU are crucial to ensuring that there are no difficult triangulations with their key partner, the US, in cooperation on security matters. There is a general overarching interest for Canada that EU-US relations should be as smooth as possible. This seems to be the driving concern for Canadian cooperation with the EU.

The fact that Canada and the EU share many core values and agendas for the promotion of human rights on the international stage also makes the EU an interesting partner as the EU is perceived as a driver for change; things that start in the EU often lead to developments on a global scale. Canada also views the EU as a useful lever providing momentum and focus. One example of that is the EU Police Mission in Afghanistan, supported by Canada but a project which Canada could not have considered entering into alone. Many of the priorities of the EU and Canada in relation to the prevention of radicalisation and technical assistance for states to improve the rule of law, increase the capacity of police and prosecutorial institutions and promote human rights globally are shared but it seems that concrete operational coordination is limited, leading to a risk of duplication of funding and other resources, particularly in the

⁴⁰ United Nations General Assembly Third Committee (Social, Humanitarian and Cultural [SOCHUM]).

⁴¹ Canada was also a big promoter of the principle of the responsibility to protect pushing the United Nations General Assembly Resolution, World Summit Outcome (A/Res/60/1), 24 October 2005, supported by the EU. The EU and Canada jointly fund a The Global Centre for the Responsibility to Protect in New York.

⁴² “‘No More Clemency Appeals for Canadians on Death Row in US’: Tories”, 1 November 2007 (<http://www.cbc.ca/canada/story/2007/11/01/death-penalty.html>).

Mediterranean region. A more systematic and practical approach to exchanging information on technical assistance to third states to ensure that work is complementary and coordinated would benefit the EU, Canada and the third states concerned.

Canada can often seem like a sideshow to the real transatlantic cooperation going on between the EU and the US and there is considerable frustration on the part of Canadians at the sense that the EU goes ahead with agreements and negotiations with the US and then expects Canada to tag along as an afterthought. In many areas, such as data protection and the death penalty, where cooperation with the US is fraught with disagreement and complications arising out of incompatible systems, Canada could provide a simpler starting point for cooperation as these are issues upon which the EU and Canada agree in principle. Rather than treating cooperation with Canada as an add-on to cooperation agreements with the US, the development of cooperation with Canada on JHA issues could provide a gateway for further developments with the US and other countries, in particular on issues such as data protection. The fact that Canada is viewed as a like-minded state should put it at the forefront of EU external cooperation rather than lagging behind.

One area where EU-Canadian cooperation has clear practical value is in the establishment of the position of Counsellor of International Criminal Operations to the Canadian Mission to the EU in 2002, a post currently occupied by Elaine Krivel QC.⁴³ This development allows for the kind of speedy communication between judicial authorities that EU member states enjoy through the use of liaison magistrates and the national members of Eurojust. The creation of such a post is evidence of the practical nature of EU-Canadian cooperation in concrete cases of judicial cooperation in criminal matters, even in the absence of clear institutional and political frameworks for the development of cooperation with third countries. Despite this practical move, there have been no agreements between the EU and Canada relating to extradition and mutual legal assistance as there have been with the US. Some discussion was given to the possibility of such agreements, although it seems that this was rather an afterthought to developments with the US.⁴⁴ Although the negotiation of such agreements with Canada would be simpler than that with the US, as with Canada there are no problems of data protection and the death penalty, there seems to be little political will or practical benefit to be gained from such an intensive legislative process, as Canada already has bilateral arrangements with most EU member states. Although Canada has an agreement with Europol, it does not have an agreement with Eurojust as yet.⁴⁵ Such an agreement would improve its capacity to cooperate with the EU in a practical way on international criminal cases.

Relations between the EU and Canada are affected in practice by bilateral relations and by the domestic political agenda in Canada. Fruitful cooperation will often be based on good relations between Canada and the incumbent presidency of the EU and it is to be hoped that the Summit planned for autumn 2008 under the French Presidency will provide an opportunity for new and concrete developments. As the Lisbon Treaty's future is currently unsure, the relations between Canada and the EU will continue to be governed by the overarching political reality of relations with the member state in the Presidency.

⁴³ Counsellor, International Criminal Operations at the Canadian Mission to the European Union in Brussels.

⁴⁴ See "Les relations Canada-union europeenne dans le domaine de la cooperation policiere et judiciaire penale", Anne Weyembergh, researcher at the Institut d'Etudes europeennes de l'Université Libre de Bruxelles (unpublished).

⁴⁵ See, however, the European Union-Canada Joint Summit Statement, Ottawa 18 December 2001 for discussion on judicial cooperation. See also on cooperation with Europol, "Co-operation Agreement between the Government of Canada and the European Police Office", The Hague, 24 November 2005.

The situation of the Canadian Mission to the EU is a complex one as it is a large mission with no clear role in relation to the EU institutions – not being an EU member state. The Mission has a coordinating function and has developed complex strategies to ensure that Canada's interests are heard by the EU institutions in areas of common concern. Informal cooperation and exchange of views are an important part of the work that is done rather than cooperation on a more formal level but this can lead to a lack of clarity as to the exact nature of this particular transatlantic relationship.

As one commentator has put it, the informal nature of the transatlantic dialogue has not allowed for a clear definition of the bilateral or trilateral transatlantic relationship. It is not clear whether Canada is involved in all transatlantic discussions or whether Canada has any right to know the actions, if not the detailed texts of one of its neighbour's most important partners. The contrast between this historically informal EU cooperation with the US and Canada and the very structured dialogue with other countries such as Russia in the framework of Partnership and Co-operation agreements is striking.⁴⁶

The kind of informal cooperation that occurs between the EU and Canada could, however, be better developed to ensure that there is sufficient and systematic exchange of information; that work in other countries is truly complementary so as to avoid duplication, and that the interests of both the EU and Canada are best advanced.

1.7 Why external cooperation is increasingly important for the EU

The idea of a European judicial space allowing for the free movement of justice around the European Union that forms the basis for continued developments in judicial cooperation in particular, is premised on the idea that EU member states share a common set of values that are reflected in the practice of criminal justice across the EU. One of the more idealistic concepts behind external cooperation in justice and home affairs is that the utopia of European Union justice may be shared with justice systems across the globe as a shining example. As one commentator has put it:

In the broadest sense, the European criminal justice model... amounts to a patrimony of values which the Union hopes to promote in the framework of its foreign policy, independent of its direct contribution to the security of the citizens of the Union. One thinks of the various fundamental rights guaranteed by the European Convention on Human Rights and by the EU Charter of Fundamental Rights and protected by both the European Court of Human Rights and the European Court of Justice as well as of principles such as the protection of personal data, the removal of higher state interests or of the protection of bank secrecy as a justification for the refusal of cooperation in criminal justice, etc.⁴⁷

This is the aspirational and principled side of the EU that seeks to share its good fortune with the rest of the world and that believes that the relative peace, security and prosperity of Europe is really founded in the respect for human rights and fundamental freedoms that has been fostered in a gradually enlarging Europe over the past half century. It is the notion that the EU should 'share the wealth' of its experience to the betterment of the wider world and it is this extension of the ideas upon which the area of freedom, security and justice is founded which

⁴⁶ Translation of Wouter van de Rijt, "Une Politique Externe de l'Union Européenne en Matière pénale - Problematique Generale", in De Kerchove et Weyembergh (eds), op. cit., p. 172.

⁴⁷ Translated from De Kerchove, op. cit., p. 6.

reveals the strength of a potential European identity arising out of EU cooperation in the fields of justice and home affairs.⁴⁸

This notion of human rights and the rule of law being at the heart of the criminal justice systems of the EU, however, did not translate into the agreement of a Framework Decision on procedural safeguards for suspects and defendants in criminal proceedings, which would have applied across the EU. Protracted negotiations on a Commission proposal⁴⁹ designed to improve the protection of defence rights in the EU finally stalled as it became clear that any agreement that could be reached would be far from an improvement. It seemed that an agreement at EU level would, in fact, fall short of the standards already applicable through the jurisprudence of the European Court of Human Rights confirming that the EU is unlikely to be a helpful forum for standard setting in human rights protections in criminal justice.

The ongoing teething troubles that have beset the development of police and judicial cooperation advances in the EU have, paradoxically, allowed judicial and police authorities to identify the boundaries in their practices that are drawn by the judgements of the European Court of Human Rights and by national courts enforcing national human rights and due process standards. It seems that the problems that they have faced have, in some way, at least for those involved in criminal justice cooperation, led to a strengthening of the notion of a coherent European approach to criminal justice. This sense of a European identity (which may not translate itself into smooth cooperation and mutual trust in practice) of justice built on fairness leads to a deeper sense of responsibility and suspicion when dealing with justice systems outside the EU that are perceived as not sharing those values (even those such as Russia or other Council of Europe Member States, which are also signatories to the European Convention on Human Rights).⁵⁰

It would be naïve, however, to see this idealistic approach to improving justice across the world as the driving force for external cooperation in justice and home affairs. These developments are very much driven by the need for security and by an increasingly international politicisation of the threat of crime in general and of terrorism in particular. High profile terrorist attacks in EU member states as well as the obvious impact of the attacks of September 11th in the US have fed the political urge for cooperation to combat terrorism. The international phenomenon of organised crime, drug trafficking and trafficking in human beings has meant that police and prosecution authorities have found themselves increasingly relying on evidence and investigations that come from far beyond the borders of the EU. An increasingly globalised sense of threat to security is pushing the EU to adopt an increasingly globalised approach to guaranteeing security.

While from one end of the telescope the EU's approach to external cooperation in JHA can be seen as having some kind of altruistic 'civilising' aim, from the other end the drive to improve standards in other countries can be seen as a purely utilitarian need to be able to work together more effectively in the pursuit of criminals. Prosecutions in Europe will be frustrated if vital evidence is tainted with the suspicion that it has been obtained through the use of ill treatment or even torture. Extraditions and expulsions will be thwarted if international standards of prison conditions or fair trial cannot be guaranteed in third countries. The resulting impunity for serious crimes or increasing pressure on already overcrowded prisons in some EU countries are

⁴⁸ Henri Labayle, "L'espace penal europeen et le monde: instrument ou objectif?", in De Kerchove and Weyembergh (eds), *op. cit.*, p. 15.

⁴⁹ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, Brussels, 28.4.2004, COM (2004) 328 final.

⁵⁰ Translated from Labayle, *op. cit.*, p. 27.

matters that add to national criminal justice problems and can be extremely sensitive politically on a domestic as well as on an international level. If the EU is to attack serious criminality within its borders, it needs to rely on the criminal justice systems of countries outside its borders and over which it has little or no control. For all its faults, the EU is generally an area where the principle of the rule of law is respected and what that means in terms of external cooperation is that if EU authorities are to protect the integrity of the rule of law at home, they need to ensure that it will be respected in whichever country they are cooperating with.

1.8 Interplay between JHA and CFSP

In principle, the external activities of the EU relating to criminal justice and the fight against terrorism should reflect the needs of the internal strategy. It seems, however, that the political drive for external cooperation has outstripped the internal agenda. This is particularly so as enlargement to 27 member states while maintaining the need for unanimity in the third pillar has meant that there has been a great slow-down in the development of EU criminal justice legislation. The technical approach of the development of the area of freedom, security and justice has therefore found itself hijacked by the political approach of the external dimension. One commentator regretted that this shift to a political approach had not come early enough to have ensured that fundamental rights were at the heart of the enlargement process in relation to justice and home affairs:

Overall, it is clear that the external dimension has obliged the criminal justice area to go beyond a strictly technical approach and to position itself in political terms. It is right, therefore, that the question of fundamental rights has become the centre of gravity in its construction despite the obvious reticence of Member States and the paternity claims of the Council of Europe. One will come to regret, however, that the question of fundamental rights only played a secondary role in the enlargement process and that the European Union has lacked the courage to impose a reference to the European Convention on Human Rights in the links that it has forged with its external partners as the export of such an instrument would have been laudable...⁵¹

If one considers that the drive for these developments is governed by the common foreign and security policy of the EU rather than its internal agenda, where then does this drive originate? The push for international cooperation to combat terrorism in the post 9/11 world caught the EU in its wake and the need to be seen to be taking action against terrorism led to a series of groundbreaking developments in EU internal cooperation such as the European arrest warrant⁵² and the EU definition of terrorism,⁵³ which may not have been possible without the backdrop of the external dimension. Certainly, in the absence of such an international fervour to act against terrorism, such instruments could never have been agreed so quickly. The rapid and groundbreaking development of the principle of mutual recognition and the high profile given to EU cooperation in criminal justice can be put down to external political factors as much as they can to the internal desire to improve cooperation in criminal matters.

Some of the counter-terrorism measures such as the decisions implementing UN Security Council Resolution 1373 demonstrate a degree of technical and legal virtuosity on the part of the Council⁵⁴ which, while impressive, shifts counter-terrorism policy in the EU into a black

⁵¹ Translated from Labayle, *op. cit.*, p. 28.

⁵² Framework Decision on the European Arrest Warrant, *op. cit.*

⁵³ Article 1 of the Framework Decision on Combating Terrorism, adopted by the Council of Ministers on 13 June 2002, OJ L 164, pp. 3-7.

⁵⁴ Labayle, *op. cit.*, p. 24.

hole lost between pillars and governed by external political forces. The fight against terrorism has effectively permitted the third pillar and the community pillar to be put into the service of the political imperative of the common foreign and security policy. This development has arisen from the political will of the member states and has significant consequences. The lack of democratic transparency or court jurisdiction over actions in the second pillar may give a clue as to the reasons for choosing this institutional route for urgent measures. The internal logic of the fight against terrorism resulted in the creation of a kind of parallel institutional order, not based in the treaties but using them as a kind of background music.⁵⁵

The variety and complexity of developments in external cooperation in criminal justice make it hard to see the wood for the trees. This confusion is a threat to the rule of law and to the coherence of the EU area of freedom, security and justice. Surely the EU should be defining its own priorities from within with a firm eye on its own security needs and its own legal framework. There is a danger that too much imagination in finding ways to reach out in external cooperation will compromise the integrity of the EU institutions and the goal of the EU to ensure justice, freedom and security to the people within its borders.

It is perhaps timely for the EU to pause and consider how to put its own house in order before reaching out to help others. It has somehow found itself caught up in the excitement of the post 9/11 world with its brash statements that 'the rules of the game have changed'.⁵⁶ In Europe, at least, the rules of the game have not, in fact changed and the stalling of the Lisbon Treaty as a result of the Irish referendum is a stark reminder to the political forces at the head of the EU that the European public may be deeply suspicious and reticent about the idea of having their external relations governed by people that they do not know in Brussels.

1.9 Recommendations for the General Framework of Cooperation between EU and Canada on Justice and Home Affairs

- There should be a more systematic exchange of information on technical assistance projects with third countries to ensure complementarity and non-duplication.
- There should be a deeper exploration of the practical possibilities of using cooperation with Canada as a gateway to developed cooperation with the US rather than as an afterthought to EU-US agreements.
- The EU and Canada should explore areas of common interest such as data-protection with a view to improving protection and providing models of cooperation to encourage greater protections in agreements with third countries.
- EU-Canada Troika meetings should be more practical and operational, providing in depth analysis of how the EU and Canada can support each other in both security and human rights agendas.

⁵⁵ Paraphrasing Labayle Ibid *'la lutte contre le terrorisme a bien été l'occasion de mettre le troisième pilier et le pilier communautaire au service du pilier PESC et de ses acteurs sans que cela relève du hasard ou plus simplement d'un choix technique. Cette option procède effectivement d'une volonté politique des Etats membres, comme on l'a vu et elle a des implications précises. L'absence de contrôle juridictionnel sur les actes du second pilier, bases juridiques du dispositif, le défaut de transparence démocratique de ce dernier, notamment en ce qui concerne l'intervention du Parlement et a fortiori en raison de l'urgence et de la période de leur adoption, éclairent quant aux motifs de ce choix. Sa logique a vu les priorités de l'action anti-terroriste de l'Union européenne se définir et se dégager dans un cadre institutionnel autre que celui du traité, ce dernier servant simplement à les mettre en musique'*

⁵⁶ Tony Blair, Prime Minister's Press Conference, 5 August 2005, text available at <http://www.number-10.gov.uk/output/Page8041.asp>.

2. EU External Cooperation in Counter-Terrorism

2.1 Overall framework

Counter-terrorism has been one of the main drivers for external cooperation in justice and home affairs and, indeed has provoked rapid development in both the internal JHA agenda and in common foreign and security policy. Terrorism is not a new phenomenon in Europe but terrorist attacks against major European targets in Madrid in 2004 and London in 2005 confirmed that the threat from al Qaeda is as real in Europe as it was for the US through the attacks on the World Trade Centre. The bombings in Madrid and London brought home the complexity of the threat that could originate within Europe itself or be carried out by foreign terrorists. The need for a comprehensive approach to terrorism in Europe became all too painfully clear.

The main issues at stake and the key problems for the EU can be identified through the desire to:

appear[ing] as an international security actor, to strengthen its cooperation in the field with external partners and to export its values. However this is quite challenging because of the various difficulties faced by the EU. Two of these difficulties deserve some explanation: they concern the current institutional framework and ‘pillarisation’ of the Treaty on the one hand and the quest for finding a right balance between the sword and shield functions of penal law on the other.⁵⁷

The stalling of the process of ratification of the Lisbon Treaty in Ireland⁵⁸ (and Poland) may mean that it will be some time before the EU’s institutional difficulties will be squarely addressed and in the meantime, external cooperation in penal matters will continue to develop across the pillar system. The continuation of developments on counter-terrorism and criminal matters through the use of second and third pillars combined poses a number of problems for the European Union. Firstly, the external dimension of the justice agenda is severely lacking in democratic and judicial oversight.⁵⁹ Secondly, the institutional complexity and ongoing legal challenges to the frameworks chosen for counter-terrorism instruments make it very difficult for third countries and international organisations to know who their EU interlocutors really are and to rely on agreements with the EU as providing a solid basis for partnership.⁶⁰ One example of the shaky legal bases upon which the EU has sought to cooperate in counter-terrorism was the agreement on exchange of passenger name records (PNR) concluded with the US by the European Commission within the first pillar of the Treaty in 2004.⁶¹ The legality of this agreement was challenged in the European Court of Justice by the European Parliament on the grounds that it was in breach of European data protection regulations and fundamental rights as well as that it was adopted on the wrong legal basis. The Court found that it had been agreed on an inappropriate basis as the exchange of passenger data in this context was purely for security and criminal law purposes and therefore did not come within the Community pillar that would permit the Commission to sign such an agreement.⁶² It has since been replaced by an agreement

⁵⁷ de Bruycker and Weyembergh, op. cit.

⁵⁸ Following the Irish referendum on the EU Treaty in June 2008.

⁵⁹ Ibid and Network of independent experts on fundamental rights, “Thematic study – Thematic comment No 2: Fundamental rights in the external activities of the EU in the fields of justice and asylum and immigration in 2003”, 4 February 2004, CRF-CDF.Them.Com.003.en.

⁶⁰ De Bruycker and Weyembergh, op. cit.

⁶¹ Signed 28 May 2004 (OJEU, no L, C 158, 15 June 2004, p. 1 and f).

⁶² CJEC 30 May 2006, C-317/04 and C-318/04, EP v Council and EP v Commission.

under the second and third pillars.⁶³ The issue of PNR agreements will be elaborated on in another paper as part of this research project but serves here to demonstrate that the EU institutional structure may undermine its credibility as a solid international partner while, at the same time, eroding its internal credibility by placing sensitive political issues beyond the oversight of the European Parliament or the European Court of Justice.

Aside from these institutional problems, the EU's credibility may also be undermined by issues such as the use of EU airspace and some EU member states' airports in CIA renditions (a topic also covered in another paper in this series). The fact that the EU engages so closely with the US on terrorism with EU-US agreements on extradition⁶⁴ and mutual legal assistance⁶⁵ in the face of the continuing phenomenon of Guantanamo Bay, secret detention centres and special military tribunals, smacks of double standards when the EU is holding up human rights as a reason why it cannot cooperate effectively with many other countries. This situation makes it hard to answer accusations of double standards when engaging with countries in the Euromed region and, of course, with Russia and China.

This section will describe the general frameworks for EU external action on counter-terrorism focussing finally on the implications of EU counter-terrorism policy on NGO's and the human rights implications of the EU terrorist listing procedures.

EU Counter-Terrorism Strategy

As well as forming one of the key components in the EU's strategy for external cooperation in JHA⁶⁶ and for the EU Security Strategy,⁶⁷ counter terrorism activities, both internal and external, are covered by the EU Counter-terrorism strategy 2005,⁶⁸ which states:

The European Union's strategic commitment: To combat terrorism globally while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice.

This statement clearly takes into account the global reality of terrorism and the need for an international approach to an international phenomenon. In relation to terrorism, the European Union's security relies on the security of other states and their ability to respond to terrorism and prevent terrorism in cooperation with the EU and other countries. One of the key areas identified in the strategy as providing added value of EU action on counter-terrorism is the promotion of international partnerships:

Working with others beyond the EU, particularly the United Nations, other international organisations and key third countries, to deepen the international consensus, build capacity and strengthen cooperation to counter terrorism

The strategy clearly sets out the importance of external relations as a cross-cutting issue in the panoply of EU measures to combat terrorism:

⁶³ OJEU no L204, 4 August 2007, p. 18 and f.

⁶⁴ Agreement on Extradition between the European Union and the United States of America, OJ L181, Brussels, 3 June 2003, pp. 27-33.

⁶⁵ Agreement on mutual legal assistance between the European Union and the United States of America, OJ L181, Washington, 25 June 2003, pp. 34-42.

⁶⁶ "Strategy for the External Dimension of JHA", op. cit.

⁶⁷ "A Secure Europe in a Better World – European Security Strategy", Brussels, 12 December 2003 (available at <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>).

⁶⁸ Council Doc. 14469/4/05, Brussels, 30 November 2005.

4. Across the four pillars of the Union's Strategy a horizontal feature is the Union's role in the world. As set out in the European Security Strategy, through its external action the European Union takes on a responsibility for contributing to global security and building a safer world. ...

5. Given that the current international terrorist threat affects and has roots in many parts of the world beyond the EU, co-operation with and the provision of assistance to priority third countries - including in North Africa, the Middle East and South East Asia - will be vital. Finally, working to resolve conflicts and promote good governance and democracy will be essential elements of the Strategy, as part of the dialogue and alliance between cultures, faiths and civilisations, in order to address the motivational and structural factors underpinning radicalisation.⁶⁹

The strategy goes on to establish four pillars of action to achieve this commitment – Prevent, Protect, Pursue and Respond. Of these four, two deal primarily with the internal infrastructure demands of protecting against terrorist attacks in the European Union through improving safety on public transport systems and the like and of responding appropriately in the face of an attack to ensure that the emergency response minimises the impact of an eventual attack on an EU target. The pillars of prevention and pursuit, however, contain an important external element which fully engages the EU's common foreign and security policy as well as the external aspects of criminal justice cooperation.

Prevent

The 'prevent' aspect of the EU counter-terrorism strategy targets the sources of terrorism and the ways in which terrorism spreads through society. Combating radicalisation is a complex and difficult task that involves not only government engagement but a broader public engagement as recognised in the EU counter-terrorism strategy.⁷⁰

A second element of the 'prevent' aspect of the strategy involves surveillance and the identification of trends which may be indicators of terrorist or 'radicalised' activity:

9. There are practical steps an individual must take to become involved in terrorism. The ability to put ideas into action has been greatly enhanced by globalisation: ease of travel, transfer of money and communication - including through the internet - mean easier access to radical ideas and training. We need to spot such behaviour for example through community policing and monitoring travel to conflict zones. We also need to disrupt such behaviour by: limiting the activities of those playing a role in radicalisation; preventing access to terrorist training; establishing a strong legal framework to prevent incitement and recruitment; and examining ways to impede terrorist recruitment through the internet.⁷¹

This part of the 'prevent' programme raises a number of civil liberties and human rights issues, in particular when it is applied beyond the borders of the EU. Monitoring of internet activity and communication engages the right to privacy and censorship of websites may infringe the right to freedom of expression. The use of the term 'radical ideas' as opposed to simply addressing the stricter notion of 'terrorism' opens up a Pandora's box – how are ideas identified as 'radical'? In many states, radical ideas may be equated simply with political opposition. In monitoring international internet activity and communications, how does the EU ensure that adequate data protection provisions are in place to preclude the possibility of abuse when data is shared across

⁶⁹ EU Counter-terrorism Strategy, op. cit., p. 7.

⁷⁰ EU CT Strategy, op. cit., para 8.

⁷¹ EU C-T Strategy, op. cit.

borders? Many states use censorship⁷² of the internet and monitoring of communications to quash any opposition to the state or to persecute human rights defenders and prevent independent accounts of what is going on inside the state reaching an international audience. The fight against terrorism is often used as an excuse for such excesses and where it is described in the broader terms of 'radicalisation' the possibility for abuse is extreme. While preventing terrorist recruitment and addressing the process whereby people become involved in terrorism is clearly an important part of a solution, extreme caution needs to be taken lest the solution becomes part of the problem. The EU Counter-Terrorism Strategy itself recognises this:

11. There is a range of conditions in society which may create an environment in which individuals can become more easily radicalised. These conditions include poor or autocratic governance; rapid but unmanaged modernisation; lack of political or economic prospects and of educational opportunities. Within the Union these factors are not generally present but in individual segments of the population they may be. To counter this, outside the Union we must promote even more vigorously good governance, human rights, democracy as well as education and economic prosperity, and engage in conflict resolution. We must also target inequalities and discrimination where they exist and promote inter-cultural dialogue and long-term integration where appropriate.⁷³

Although the EU Counter-terrorism strategy does recognise the need to ensure that EU policies do not exacerbate divisions in society, there is little discussion of how this will be done and almost no time is given to the need to ensure the protection of human rights within the European Union and in relation to the activities of member states as a means of preventing the spread of radicalisation.⁷⁴ The assumption generally seems to be that the problem is one of perception rather than the substance of EU policies and that the solution is a public relations exercise rather than the need for a fundamental consideration of the way in which such policies affect people on the ground. Combating radicalisation is an area where Canada has developed significant expertise and the Canadian experience could provide a useful example for the EU.

Protect

The international aspect of the 'protect' pillar of the strategy is primarily a matter of technical assistance to third states.

Pursue

The 'pursue' pillar of the strategy focuses on the ability to pursue and prosecute terrorists across borders, its goal being set out as follows:

22. We will further strengthen and implement our commitments to disrupt terrorist activity and pursue terrorists across borders. Our objectives are to impede terrorists' planning, disrupt their networks and the activities of recruiters to terrorism, cut off terrorists' funding and access to attack materials, and bring them to justice, while continuing to respect human rights and international law.

⁷² See for example China's State Council Order No. 292, September 2000, which prevents China-based web sites from linking to overseas news web sites or carrying news from overseas media without separate approval.

⁷³ EU C-T Strategy, op. cit.

⁷⁴ For an analysis of ways to combat radicalisation within the EU see European Parliament Briefing Paper PE393.277 of January 2008 – "Preventing Violent Radicalisation and Terrorist Recruitment in the EU – The Threat to Europe by Radical Islamic Terrorist Groups", Didier Bigo and Laurent Bonelli.

The mention of the respect for human rights and international law is welcome and important even if the strategy does little to clarify what this means in practice or how this element of the strategy will be implemented. What is not mentioned explicitly, though it is a clear problem for external cooperation on counter-terrorism, is the fact that many of the countries with which the EU and its Member States should be cooperating have human rights records which are so bad that they preclude effective cooperation.

The absence of any clear indications as to how or in what context the strategic commitment to respecting human rights would be implemented is a major flaw in the EU strategy and demonstrates a tendency to deal with human rights as a political gloss on the counter-terrorism strategy rather than a serious practical and legal issue to be addressed.⁷⁵

The strategy speaks of ‘creating a hostile operating environment for terrorists’ which involves the freezing of terrorist assets. While disrupting terrorist networks is clearly necessary as part of a comprehensive strategy to combat terrorism, the mention of the misuse of the non-profit sector is of concern. Care needs to be taken to ensure that measures taken to combat terrorism do not have a disproportionate and adverse effect on the activities of civil society, particularly the fragile development of civil society in areas of conflict.

The provision of assistance and coordination with the work of other donors,⁷⁶ such as Canada, is not, however, without its difficulties as will be discussed further below.

Respond

The external aspect of the ‘respond’ pillar will primarily rest on crisis management operations, technical assistance to third countries and consular and other assistance to EU citizens affected by terrorist attacks outside the EU. While it is not explicit in the strategy, it is to be hoped that EU citizens affected by counter-terrorism activities will equally be assisted by the EU.

2.2 Practical Measures for External Cooperation on Terrorism

Technical assistance and support

One of the key goals for EU external cooperation on terrorism is to provide technical assistance and support to third countries to bolster the rule of law, democratisation and human rights.⁷⁷ This kind of technical assistance is particularly targeted at countries in the Euromed region.⁷⁸ Technical assistance in this field is, however, a complex notion. It can involve training, capacity building for institutions, the provision of new equipment or training on new investigative techniques. It can also mean human rights training and assistance to put in place accountability and monitoring mechanisms to enhance human rights protections.

The EU Counter-terrorism strategy highlights the need for improving the protection of human rights in third countries as one of the elements of preventing terrorism. This needs to be at the forefront of technical assistance to third states. The EU notion of the area of freedom, security and justice as a model for the world drives the EU to want to export human rights and democratic values in this context. Technical assistance, though, requires the beneficiary state to

⁷⁵ Susie Alegre, “The EU Counter-Terrorism Strategy and Human Rights in Central Asia”, in Elspeth Guild and Florian Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Ashgate, 2008, op. cit., p. 281.

⁷⁶ CT Strategy, op. cit., para 30.

⁷⁷ Already highlighted in the Hague Programme, op. cit.

⁷⁸ EU C-T Strategy, op. cit.

be receptive to the type of assistance on offer. There can be a perception in third states that support and assistance in improving human rights is a patronising export from the West. Often states are not prepared to accept that there are systemic human rights problems that need to be addressed in their security and criminal justice systems. Worrying developments regarding the protection of human rights in EU countries in the context of counter-terrorism⁷⁹ can add to the sense of the EU providing technical assistance to others before setting its own house in order. In addition, EU member states' cooperation with the US in relation to rendition and the lack of strong, vocal condemnation of Guantanamo Bay on the international scene can undermine effective technical assistance on protecting human rights while countering terrorism. It is very hard to lecture on the need to improve human rights protections and accountability when such an important actor on the world stage is clearly flouting international standards with little or no consequences to its credibility or to its ability to cooperate with EU member states and the EU itself on counter-terrorism.

Many third countries, when they consider technical assistance from the EU, are really looking for assistance through the provision of new equipment and techniques for countering terrorism. There are many pitfalls in providing new equipment and advanced techniques to assist countries in countering terrorism. In particular, the EU needs to be sure that where it does provide equipment, that equipment will not be used to perpetrate human rights abuses. Equipment may also prove to be practically useless if there is not the expertise to use it or the resources to make it operational. In some countries basic equipment such as transportation for police and adequate salaries is required before anything that adds to the technical complexity of investigations and counter-terrorism operations would be useful.

While the idea of technical assistance to third countries as part of the EU's arsenal against terrorism is a good one, the practicalities of implementation may require further consideration and coordination with other donors to ensure complementarity and communication regarding lessons learned.

Operational and strategic agreements (Europol/Eurojust)

Operational agreements,⁸⁰ between Europol and Eurojust and third countries are another practical way in which the EU can cooperate with third countries to counter terrorism. Europol currently has operational agreements with the following non-EU countries: Canada, Croatia, Iceland, Norway, Switzerland and the USA, the most problematic being the agreement with the USA, which required a supplemental agreement on exchange of personal data and related information.⁸¹

In relation to the cooperation agreement with Canada, the Council of the EU concluded that there were no obstacles to the transmission of personal data forming a part of this agreement⁸² and the agreement elaborates the detailed rules governing transmission of data between Europol and Canada.

In addition to these operational agreements with close cooperation partners, Europol has strategic agreements with a number of other partners such as Albania, Bosnia and Herzegovina,

⁷⁹ (for example the shooting of Jean Charles de Menezes in London and the proposed introduction of counter-terrorism laws in the UK allowing for 42 days pre-charge detention in terrorist cases).

⁸⁰ P. 9, above.

⁸¹ Supplemental agreement between Europol and the USA on exchange of personal data and related information, available at <http://www.europol.europa.eu/index.asp?page=agreements>.

⁸² Council conclusions 14 October 2002, see also the Co-operation Agreement between the Canada and Europol, op. cit.

Colombia, the Former Yugoslav Republic of Macedonia, Moldova, Russia and Turkey. Amongst the objectives in the agreement with Russia is the fight against terrorism. The methods used for such strategic cooperation amount to an exchange of experiences and best practice and/or technical assistance.⁸³

Europol also has operational agreements with Eurojust and Interpol as well as strategic agreements with a number of international organisations and EU bodies.

Similarly, Eurojust has agreements with a number of non-EU countries including Iceland, Norway, Croatia and the US, which allow for the provision of contact points and liaison prosecutors to facilitate cooperation with Eurojust within the scope of its mandate. Despite the fact that Eurojust is more free⁸⁴ to conclude agreements with third countries according to its mandate, so far it has not developed this capacity as broadly as Europol has and has not yet concluded an agreement with Canada.

2.3 NGOs, counter-terrorism and human rights

Prevention of radicalisation

The prevention of radicalisation is one of the key themes of the EU counter-terrorism strategy. Exactly how radicalisation can be prevented is, however, an extremely complex issue.⁸⁵ There is a recognition within the EU Counter-terrorism strategy that some of the factors contributing to the creation of conditions conducive to terrorist recruitment include a perception of injustice regarding the policies of the EU and its member states and the absence of human rights and the rule of law in third states across the world.

In its 2007 ‘Call for proposals’ as part of the Commission programme on the prevention of and response to violent radicalisation,⁸⁶ the Commission recognised the need for cooperation between member states but also the need for the exchange of experiences with Euromed countries as a key target area.

The EU strategy for combating radicalisation and recruitment for terrorism⁸⁷ sets out the methods it intends to use:

6. To counter radicalisation and terrorist recruitment, the EU resolves to:
 - disrupt the activities of the networks and individuals who draw people into terrorism;
 - ensure that voices of mainstream opinion prevail over those of extremism;
 - promote yet more vigorously security, justice, democracy and opportunity for all.
7. Throughout we will ensure that we do not undermine respect for fundamental rights. To ensure our responses remain effective and appropriate, we will work to develop our understanding of the problem. In doing this, we will engage in dialogue with governments which have faced this problem, academic experts and Muslim communities in Europe and beyond.

⁸³ See for example, “Agreement on co-operation between the European Police Office and the Russian Federation”, Rome, 6 November 2003, article 5.

⁸⁴ Nilsson, *op. cit.*, p. 205.

⁸⁵ See Bigo/Bonelli paper, *op. cit.*

⁸⁶ Call for Proposals on Violent Radicalisation, OJ C 021 of 30 January 2007.

⁸⁷ Council doc 14781/1/05, Brussels, 24 November 2005.

One of the points highlighted in the delivery of the strategy is the need for the support and engagement of non-governmental groups including communities, religious authorities and other organisations across Europe “to play an active part in countering the rhetoric of the extremists and highlighting their criminal acts”.⁸⁸ It is clear that without the support of civil society in Europe and beyond, governments alone cannot combat the roots of radicalisation, which are complex and deep.

The involvement of NGOs, religious authorities and educational establishments in a process of preventing radicalisation can, however, be fraught with difficulties and open to abuse. In the absence of a clear view of what ‘radicalisation’ means, there can be a stifling of active debate and opposition to foreign policy or a particular world view. The danger is that in seeking to combat radicalisation, states abuse their powers and co-opt civil society into promoting a state-sponsored perspective. While civil society clearly has an important role to play in preventing violent radicalisation and combating the conditions conducive to terrorist recruitment, the engagement of civil society in the fight against terrorism must be treated carefully and the independence of civil society must be cherished. There is a danger that non-governmental organisations or religious organisations can be targeted as a source of intelligence on opposition activities. If NGOs are obliged to inform on those they are working with, particularly in relation to activities that fall short of planned terrorist or other criminal activities, the trust in and independence of NGOs will be eroded and their role in improving human rights and the rule of law will be undermined.

Listing of organisations – an analysis of developments in ECJ and UK courts

One of the ways in which organisations, including NGO’s are affected by counter-terrorism measures, is through the international listing of organisations and individuals as ‘terrorist’. This has the impact not only of stigmatising an organisation and its members, but can also lead to further consequences such as freezing, seizure or confiscation of assets, which will have a fundamental impact on the operation of an NGO’s activities both within Europe and beyond. The process of targeted sanctions and listing mechanisms stems from United Nations Security Council Resolutions,⁸⁹ some of which (such as UNSCR 1267 (1999)) involve the drawing up of a list of names by a Sanction Committee which is a subsidiary organ of the Security Council and which makes its decisions by consensus.⁹⁰ UN Security Council Resolution 1373, however, favours the approach of targeting financing terrorism in general but leaving the implementation up to national authorities and/or regional authorities in the case of the EU.

The European Union implementation of UN Security Council Resolutions combating terrorist financing as well as national implementation in EU member states is the subject of ongoing litigation in the European Courts and raises serious issues of due process and the protection of individual rights. This paper will focus on the developments at EU level and their potential impact on the continuation of these practices.

⁸⁸ Ibid at para 15.

⁸⁹ For a full analysis of listing mechanism see E. Guild (2008), “The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the ‘Terrorist List’”, *Journal of Common Market Studies*, Vol. 46, No. 1, January 2008, pp. 173-193 and Sabine Gless & Daniel Schaffner, “Judicial Review of Freezing Orders due to a UN listing by European Courts”, to be published in S. Braum and A Weyembergh (eds), *Quel contrôle juridictionnel pour l’espace pénal européen?*, Bruxelles, Ed. De l’Université Libre de Bruxelles, forthcoming.

⁹⁰ See UNSCR 1267 (1999).

Amnesty International in its 2005 report ‘Human Rights Dissolving at the Borders? Counter-terrorism and EU criminal law’ raised concerns about the complex nature of the legal bases of these instruments at EU level:

Of particular concern is the list contained in Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism which creates obligations on states in relation to those on the list, for example for the freezing of assets or for police and judicial cooperation with other Member States. It is a piece of legislation whose legal complexity within the framework of the EU makes it difficult to contest through judicial channels.

The Common Position is drawn up under the EU’s Common Foreign and Security Policy (CFSP, the second pillar of the EU), and as well as provisions on the freezing of assets which fall under Community law (first pillar) it has an effect relating to judicial and police cooperation between Member States (justice and home affairs, the third pillar). The second and third pillars of the EU are primarily intergovernmental in character. Decisions taken by Member States under the CFSP are not subject to judicial review within the EU. Under the third pillar (JHA), issues may only be referred to the European Court of Justice (ECJ) as a request for a preliminary ruling from Member States which have accorded the ECJ competence in this field.⁹¹

Likewise, the European Parliament in its report on the legislation:

Deplores the choice of a legal basis which falls under the third pillar for the definition of the list of terrorist organisations, thereby excluding all consultation and effective scrutiny both by the national parliaments and by the European Parliament, and also evading the jurisdiction of the Court of Justice.⁹²

The legal complexity seems almost to have been designed to avoid judicial or parliamentary oversight but this has not meant that the measures have avoided becoming the subject of scrutiny in the EU’s courts. A series of judgements, decisions and opinions has meant that the listing and delisting mechanisms have been evolving and a pending case before the ECJ may call into question the very foundations of the UN terrorist listing regime.

One of the most important cases to highlight the impact on freedom of association and the activities of organisations included on the lists was the case of the Organisation des Modjahedines du peuple d’Iran (the OMPI).⁹³ That case found ways to insert procedural safeguards and human rights protections into the opacity of the legislative framework surrounding EU listing. It made a number of crucial findings relating to the right to a fair hearing in this context, in particular:

- There is a safeguard of the right to a fair hearing even if neither the ECHR nor principles of Community law confer a right to be heard before the adoption of a legislative act.⁹⁴
- The adoption of these measures involves the exercise of the Community’s own powers it is therefore for the institutions to safeguard the right to a fair hearing.⁹⁵

⁹¹ IOR 61/013/2005, 31 May 2005 (available at http://www.aie.u.be/static/documents/2005/counterterrorism_report_final.pdf).

⁹² “Area of Freedom, Security and Justice – European Parliament Resolution on the Progress made in 2001 towards the establishment of the area of freedom, security and justice provided for in article 2, fourth indent, of the TEU”, P5_TA(2002)0048.

⁹³ Case T-228/02, Organisation des Modjahedines du peuple d’Iran v Council of the European Union.

⁹⁴ Judgment of the Court of First Instance, 12 December 2006, summary of CFI judgment, paragraph 3.

⁹⁵ Ibid, para 4.

- The safeguarding of the right to a fair hearing involves informing the person or organisation concomitantly or shortly after the listing of the information and material upon which the decision to list them has been based unless precluded by the overriding interests of the security of Member States or the conduct of their international relations.⁹⁶
- A statement of reasons for the national decision taken and the subsequent Community level decision must be provided unless precluded by the overriding interests of the security of member states or the conduct of their international relations.⁹⁷
- The right to a fair hearing only applies with regard to the elements of fact and law that are liable to determine the application of the measure in question to the person concerned, in accordance with those rules. This takes place in two stages:
 - At the level of national procedure to adopt the decision to include the person on the list; and
 - At the level of the Community procedure to adopt the list and to justify the retention of their name on the list.⁹⁸

The Court also found that its jurisdiction to judicially review such decisions was imperative as this is the only procedural safeguard to protect the rights of those listed on EU lists.⁹⁹ This case has had a wide-reaching impact including, in particular, the establishment of a new working group to examine proposals for listing and delisting. In addition, those listed are now informed *ex post* of the reasons leading to listing.¹⁰⁰

The implications of this judgement are now being felt in the courts of member states as well. In May 2008 the UK Court of Appeal¹⁰¹ refused to overturn a ruling by the Proscribed Organisations Appeal Commission that the OMPI should be removed from the UK blacklist. The OMPI case gives some hope for organisations wishing to challenge effectively their categorisation as 'terrorist' organisations but also highlights the arcane and opaque nature of the listing regime and the impact that it can have on organisations that may be wrongly listed.

In another case, that of Kadi,¹⁰² a judgement from the ECJ is expected in autumn 2008. If the ECJ follows the reasoning of the Advocate General in his opinion on the case, this may signal the end of any legitimacy for EU implementation of UN sanctions. The Advocate General takes on directly the issue of the interrelation between obligations arising from the UN Security Council and obligations arising from the fundamental rights framework of the EU and finds, ultimately for fundamental rights saying:

44. It is true that courts ought not to be institutionally blind. Thus, the Court should be mindful of the international context in which it operates and conscious of its limitations. It should be aware of the impact its rulings may have outside the confines of the Community. In an increasingly interdependent world, different legal orders will have to endeavour to accommodate each other's jurisdictional claims. As a result, the Court cannot always assert a monopoly on determining how certain fundamental

⁹⁶ Ibid, para 7.

⁹⁷ Ibid, para 8.

⁹⁸ Ibid, para 5.

⁹⁹ Ibid, para 10.

¹⁰⁰ EU Counter-terrorism Coordinator Report October 2007, Council Doc. 11948/2/07, para 11, Brussels, 5 October 2007.

¹⁰¹ *Alton and others v Secretary of State for Home Department*, Times Law Reports, 13 May 2008.

¹⁰² Case C 402/05 *Kadi v Council of the European Union and Commission of the European Communities*.

interests ought to be reconciled. It must, where possible, recognise the authority of institutions, such as the Security Council, that are established under a different legal order than its own and that are sometimes better placed to weigh those fundamental interests. However, the Court cannot, in deference to the views of those institutions, turn its back on the fundamental values that lie at the basis of the Community legal order and which it has the duty to protect. Respect for other institutions is meaningful only if it can be built on a shared understanding of these values and on a mutual commitment to protect them. Consequently, in situations where the Community's fundamental values are in the balance, the Court may be required to reassess, and possibly annul, measures adopted by the Community institutions, even when those measures reflect the wishes of the Security Council.

The fact that measures were taken in the context of the fight against terrorism did not, according to the Advocate General, diminish the need to protect fundamental rights. A judgement is expected in this matter this autumn from the ECJ, should the ECJ choose to follow the Advocate General's reasoning, the resulting shockwaves in international relations between EU member states and the Security Council will have ramifications well beyond the EU as UN member states across the globe reconsider the legitimacy of the UN terrorist listing system. This decision will no doubt impact on developments in Canada as well as EU member states. Should the Advocate General's views be followed, it will mark a victory for fundamental rights and the rule of law over political expediency.

Impact on NGOs of international CT policy

In addition to the problem of terrorist listing, discourse that links civil society organisations with the financing of terrorism and/or money-laundering can create an environment in which NGO's find it very hard to sustain their funding streams and where they may risk putting themselves in danger of prosecution.

In 2005, the European Commission produced a Communication that addressed the "vulnerabilities of the non-profit sector to the financing of terrorism and other criminal abuse".¹⁰³ The Communication identified non-profit organisations as one of the conduits for terrorist financing and sought to establish a code of conduct that would improve transparency and accountability of non-profit organisations to combat criminal abuse. While the aim to reduce criminal abuse of non-profit organisations is clearly laudable, the stress given to non-profit organisations as a vehicle for terrorist financing is of concern.

In many countries around the world, civil society is undermined by extremely burdensome registration and tax regimes,¹⁰⁴ which are often imposed precisely on the justification that it is to ensure that there is no illegal activity going on in NGOs. The exploration by the Commission of ways to improve transparency and accountability of non-profit organisations mirrors the type of activity that is very commonly used to destroy freedom of association. In many of the regions that the EU is cooperating with in the fight against terrorism, civil society is an extremely fragile and necessary partner in improving human rights and the rule of law. Care must be taken on the part of the EU not to provide fuel for the fire of those who would use counter-terrorism as a justification for quashing opposition and closing down civil society.

¹⁰³ COM (2005) 620.

¹⁰⁴ See for example Section 5.2 of Kazakhstan's Constitution, which prohibits state financing of public (citizens') associations. See further Vsevolod Ovcharenko, "Government Financing of NGOs in Kazakhstan: Overview of a Controversial Experience", *The International Journal of Not-for-profit Law*, Vol. 8(4), 2006, p. 21.

In addition to this direct association between the non-profit sector and terrorist financing, as will be discussed in a parallel paper in this series,¹⁰⁵ legislation criminalising financing of terrorism can have unforeseen consequences for the funding of NGOs working in some of the most vulnerable and difficult areas of the world where certain territories may be governed *de facto* by organisations classified as terrorist, which means that effective work in those territories may require a certain degree of contact with those organisations where, for example, they are in control of hospitals, schools and transport networks.

2.4 EU-Canada cooperation on counter-terrorism

Canada and the EU share a number of common threads in their approach to counter-terrorism and external relations. In particular, both Canada and the EU support technical assistance projects in the Middle East and North Africa and elsewhere. Technical assistance to support the rule of law, human rights and counter-terrorism efforts is complicated due to the competing needs and desires of the donor and the receiving country. In order to maximise efforts for capacity-building through technical assistance, the EU and Canada need to ensure that their projects and programmes in this field are complementary and coordinated.

It would be useful to set up a regular informal consultation between the EU and Canada at operational level to ensure that there is an exchange of information on current and planned projects and to provide the chance to discuss best-practices and lessons learned in the provision of technical assistance. There is a great deal of overlap between Canadian and EU interests in this area and it is crucial that the financing and practical implementation of projects and the approach to receiving governments is mutually supportive.

In addition, a concerted exchange of best practice and experiences on combating radicalisation internally could add to the EU's ability to address this problem effectively.

3. Human Rights

3.1 General Framework

Article 6 of the Treaty on European Union states that:

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Those founding principles manifest themselves in a number of ways in the framework for EU cooperation with third countries. On the one hand, the EU pushes human rights issues forward in its negotiations with third countries and uses the improvement of human rights protections as a lever in discussions on a wide range of issues including trade and support in counter-terrorism. On the other hand, EU external cooperation on JHA can touch on some of the most fundamental elements of human rights protection such as the prohibition on torture in relation to exchange of evidence and the transfer of persons. External cooperation in JHA therefore engages the need to

¹⁰⁵ Ref. to other paper on Canada....

protect human rights in the actions of the EU as well as an active impulse to promote human rights externally for the greater security of citizens within the EU.

Article 51 of the EU Charter of Fundamental Rights provides that “the institutions and bodies of the Union ... shall respect the rights, observe the principles and promote the application thereof”.¹⁰⁶

It does not exclude any policy areas or institutional frameworks in which the Charter would not apply.¹⁰⁷ Although the Charter is not binding and the hold ups over the Lisbon Treaty push it further into the future, it does provide the basic human rights blueprint for the EU institutions and their activities and should be applied across the board, including in external activities relating to justice and home affairs.

In addition, Article 11 TEU sets out the objectives of the EU’s common foreign and security policy:

1. The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:
 - to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter,
 - to strengthen the security of the Union in all ways,
 - to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders,
 - to promote international cooperation,
 - to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

The last objective “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”, is clearly relevant when the EU is cooperating with third states in relation to justice and home affairs matters.

When the EU cooperates externally on JHA issues, it needs to take on board the human rights responsibilities of member states under the European Convention on Human Rights. In the case of *M & Co v Germany*,¹⁰⁸ the European Commission on Human Rights found that: “the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection.”

This means that in order to be able to act on behalf of member states in external cooperation in such a way that will not undermine their obligations under the ECHR, the EU will have to ensure that it provides equal or equivalent protections to those provided by the ECHR. The effective interruption of the process of ratification of the Lisbon Treaty following the Irish referendum¹⁰⁹ has put a halt to the process of EU accession to the ECHR whereby the EU institutions would have been bound by the ECHR in the same way that member states are, thus removing any question of a lack of equivalent protection in the EU. The legitimacy of EU

¹⁰⁶ European Charter of Fundamental Rights, 2000/C 364/01, Nice, 7 December 2000.

¹⁰⁷ See EU Network of Independent experts on fundamental rights, “Thematic Comment No 2”, op. cit.

¹⁰⁸ ECommHR *M & Co v Germany*, Admissibility decision of 9 February 1990 (13258/87; D&R 64,138), see also EU Network of Independent Experts on Fundamental rights “Thematic comment 2”, op. cit.

¹⁰⁹ Friday 13 June 2008, see statement by Commission President Barroso following the Irish referendum on the Treaty of Lisbon, Brussels, 13 June 2008.

actions, in particular in relation to the agreement of treaties and activities externally is dependent upon adequate human rights protections. It may be the time to consider taking action on accession to the ECHR aside from ratification of the Lisbon Treaty:

The question of accession to the ECHR is so important to the future of the EU that it should not be dependent on wider considerations about the development of the EU through the Reform Treaty. If, for whatever reason, the Treaty is not approved within the member states, they should try to address the issue of accession to the ECHR separately by way of a protocol.¹¹⁰

The restricted remit of the newly established Fundamental Rights Agency which can only focus on community law issues exacerbates the gap in the EU's institutional framework between objectives and principles relating to human rights and effective mechanisms to ensure that the Union acts in accordance with its own and its member states' obligations on justice and home affairs including the external dimension.

This section of the paper will highlight the risks for individual rights inherent in external cooperation on JHA, in particular focussing on the variable geometry of accountability for human rights in the international and national contexts.

3.2 Promotion of human rights as an element of EU JHA external cooperation

Fundamental rights are one of the core elements of the area of freedom, security and justice and one of the issues covered within the justice and home affairs portfolio by DG Liberty, Justice and Security. Despite that, however, effective work on fundamental rights in the broader context of JHA is very limited.

The Commission progress report on the implementation of the strategy for the external dimension of JHA¹¹¹ contains a section on fundamental rights protection (2.3). This section, however, contains only two points – a reference to the establishment of the EU Agency for Fundamental Rights due to start work on 1 January 2007 and the fact that the Commission has flagged the effective protection of children's rights as one of its priorities in 2005 and issued a Communication to that effect in July 2006.¹¹² As has already been pointed out, the FRA has had its mandate restricted to dealing with areas of community competence which means that, while it may address issues relating to asylum and immigration, even if it stretches its mandate it will not be able to have a strong voice on issues relating to criminal justice, counter-terrorism or external cooperation. Nor, presumably, will it be able to assist the EU in developing technical assistance in third countries in this area.

The FRA's work is generally restricted to working on the 27 member states although the FRA is open for the participation of candidate countries as observers (Turkey, Croatia, the FYRoM – the former Yugoslav Republic of Macedonia), after a decision of the relevant Association Council. The Council may also invite the Western Balkans countries (Albania, Serbia, Bosnia and Herzegovina, and Montenegro), once they have concluded a stabilisation and association agreement with the EU, to participate in the Agency as observers (followed by a decision of the relevant Association Council).¹¹³ This limited geographical remit, however, will not provide

¹¹⁰ Susie Alegre, "Human Rights and the Future of the European Union", *JUSTICE Futures Series*, pp. 6-7.

¹¹¹ Op. cit.

¹¹² COM (2006) 367, 4 July 2006.

¹¹³ http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&catid=45f1665036644#6.

much assistance for cooperation with key geographical areas such as the Euromed region, Central Asia and beyond.

In relation to children's rights, while this is clearly an important area globally, again, it is not an area that will have an enormous impact in relation to international cooperation in criminal justice except in the exceptional cases where international cooperation involves juvenile justice. There is also a mention that the Commission has undertaken "to promote relevant international human rights instruments in the political dialogue with third countries and use its policy instruments and cooperation programmes to address children's rights worldwide" but it seems that human rights in general have fallen off the page.

Serious external cooperation on the issues of freedom, security and justice require a credible approach to human rights as the backdrop for all cooperation. One of the difficulties in pushing forward this approach is the weakness of fundamental rights within the institutions with regard to the respect for human rights within the EU. In the absence of developments on procedural rights for suspects and defendants¹¹⁴ within the EU itself, for example, it is difficult to see how the EU can push for genuine implementation of fair trial rights in its dealings with third countries. Variable geometry in the implementation of human rights domestically in EU member states' systems exacerbates this. In a sense it is the internal weakness in JHA rather than the lack of will to address human rights externally that undermines the ability of the Union to promote human rights in its external cooperation in this field.

3.3 Human rights issues arising out of EU JHA external cooperation:

As well as the promotion of human rights as a part of EU JHA external cooperation, a number of ways in which the EU cooperates with third countries raise human rights questions that engage the negative responsibility of the EU and its member states not to engage in activities that violate human rights.

The EU Network of Independent Experts on Fundamental Rights produced a helpful thematic comment on fundamental rights in the external activities of the European Union in the fields of justice and asylum and immigration,¹¹⁵ highlighting the issue. This paper focuses on the field of criminal justice and cooperation against terrorism rather than asylum and immigration and so will be restricted to underlining the most important human rights themes in that field.

It is clear that fundamental rights need to be a key consideration in the activities of the EU in this field. The fact that member states hand over competence to the EU to engage in activities such as concluding international agreements does nothing to remove member states' own human rights obligations. The European Court of Human Rights has stated that:

Where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is

¹¹⁴ See discussions around the stalled proposed Framework Decision on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings, e.g. Commission Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union COM (2003) 75 Final.

¹¹⁵ EU Network of Independent Experts on Fundamental Rights, "Thematic Comment No 2", op. cit.

intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.¹¹⁶

It is crucial, therefore, that the possible human rights problems inherent in cooperation on justice and home affairs issues are addressed in relation to all of the EU's external cooperation activities. As the EU Network of Independent Experts has stated:

It is indeed important that when the EU takes action on behalf of its Member States in certain areas of external action linked to issues of justice and home affairs, this does not lead to a lowering of standards in respect of fundamental rights, despite the fact that the Union is not linked internationally to the same international instruments for the protection of human rights that are presently binding on the Member States. The emergence of an external dimension of Union policy in the areas of justice and home affairs is today leading to a debate on the demarcation of the respective responsibilities of the European Union and the Member States at the international level with respect to the observance of fundamental rights. There is a risk that the Union and its Member States will offload the responsibility to one another, so that eventually neither the Union nor its Member States consider themselves obliged to take this responsibility.¹¹⁷

Human rights issues arise in a number of different ways in relation to cooperation with third countries in the field of criminal justice. These are discussed below.

Exchange of information

One of the main ways in which police and judicial authorities cooperate with each other to combat international crime including terrorism is through the exchange of information, whether that is intelligence information or evidence for the purposes of prosecution. The risk that information received from the EU by a third country may be passed on to another country adds to the complexity of the issues, particularly in relation to the exchange of intelligence information. Depending on whether EU agencies or Member States are providing that information or evidence or receiving it, several important human rights issues, among others, arise, as described below.

Prohibition on torture. For EU Member States or agencies receiving information or evidence, the question of provenance is a crucial one for the protection of human rights in this context. If there is a risk that information provided from third countries may have been extracted through torture or ill treatment, that information will be inherently unreliable and to use it would undermine the *jus cogens* absolute prohibition on torture. This kind of information cannot be relied upon in trials and therefore does not assist in bringing criminals to justice.

The UN Convention against torture and other cruel, inhuman and degrading treatment¹¹⁸ prohibits the use of evidence extracted through prohibited treatment except in proceedings against the alleged perpetrator of torture. This applies whether or not the alleged torture was perpetrated by the authorities of the state in which proceedings are going on and whether or not those proceedings are criminal in nature. The then Council of Europe Commissioner for Human Rights put it very succinctly:

¹¹⁶ ECtHR *Waite & Kennedy v Germany*, judgment of 18 February 1999, application no 26083/94, para 67.

¹¹⁷ EU Network of Independent Experts on Fundamental Rights, "Thematic Comment No 2", op. cit., p. 13

¹¹⁸ UN Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987.

Torture is torture whoever does it, judicial proceedings are judicial proceedings, whatever their purpose – the former can never be admissible in the latter.¹¹⁹

This statement was in response to proceedings in the United Kingdom that sought to challenge the use of information obtained by the UK government from Uzbekistan and which the government wished to rely on in closed proceedings before the Special Immigration Appeal Commission as part of deportation proceedings.¹²⁰ That case, highlighted a number of the difficulties involved in cooperating with non-EU member states where there is a risk that information has been extracted through ill-treatment. These are issues which will affect all EU member states who cooperate with third countries whether between intelligence, police or judicial authorities. It may also impact on EU agencies such as Europol and Eurojust.

While the answer to the question of how such information must be treated seems, on the face of it, to be clear – torture evidence can never be adduced in judicial proceedings – the means of identifying such information as such, and the way in which such information should be treated when it is not intended ultimately to be used in judicial proceedings remains complex.

The absolute prohibition on torture is one of the most fundamental principles of human rights and is crucial to the protection of human rights globally. The international framework established to prevent torture recognises that through using information extracted through torture, a state effectively condones the use of torture even if it does not engage in torture itself. As the EU develops the external dimension of JHA cooperation, an examination of the issues relating to handling information and evidence from countries where torture is widespread should form a key part of that development. This includes the need to examine the requirement to disclose information received which may provide evidence against a torturer or to exclude evidence in criminal proceedings in other countries where such evidence has been extracted through torture.¹²¹ A serious and detailed consideration of this matter combined with a drive to provide technical assistance to support the abolition of torture and ill-treatment in countries which the EU seeks to cooperate with would be a useful way for the external dimension of JHA to assist both in the improvement of criminal justice cooperation and in the promotion of human rights globally. Any EU guidelines, or conclusions on this issue, however, must be clearly aimed at supporting the global prohibition on torture, rather than finding a way to bypass it in the short term interests of international cooperation against terrorism. All developments in this field should be aimed at stamping out the practice of torture, cruel, inhuman and degrading treatment globally rather than finding ways to accommodate such practices in the interests of security.

An additional issue arises where a state or agency provides information that ultimately leads to the ill-treatment of an individual. This issue arose in the case of Canada providing information to the US in relation to Maher Arar¹²² and ultimately paying compensation for his subsequent rendition and torture as part of the CIA rendition programme. This may have implications for EU member states and agencies which share information with third countries and may ultimately find themselves liable to compensate individuals for resulting breaches of their human rights.

¹¹⁹ UK Report by Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, 4-12 November 2004 (CommDH(2005)6).

¹²⁰ *A(FC) and others v Secretary of State for the Home Department* [2005] UKHL 71.

¹²¹ See judicial review proceedings taken by Binyam Mohamed against the UK Foreign and Commonwealth Office: <http://www.andyworthington.co.uk/2008/06/06/binyam-mohamed-uk-court-grants-judicial-review-over-torture-allegations-as-us-files-official-charges/>.

¹²² *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 287-88 (E.D.N.Y. 2006) – This case and the issue of rendition is more thoroughly dealt with in another paper in this series.

Fair trial. The provenance of evidence from third countries used in judicial proceedings may have an impact on the right to a fair trial of defendants facing prosecution within the EU. The procedures around the admissibility of evidence vary from member state to member state but all EU member states are obliged to exclude evidence extracted through torture and inhuman and degrading treatment.¹²³ It is less clear, as yet, how violations of other rights, such as the right to private life, can affect the admissibility of evidence and the ultimate fairness of proceedings but this is an issue that needs to be borne in mind where evidence is obtained in third countries.

Death penalty. The death penalty has now been abolished in the European Union following the entry into force of Additional Protocol no 13 to the ECHR on 1 July 2003. This position is confirmed by Article 2(2) of the EU Charter of Fundamental Rights.

There is a danger, in providing evidence to third countries, however, that that evidence may be used in proceedings against a person who is at risk of the death penalty. This possibility weakens the stand of the EU against the death penalty. In negotiations with the US on the EU-US agreement on mutual legal assistance, the issue of the death penalty was not dealt with head on, even though a number of member states will not provide evidence that may lead to the imposition of the death penalty. As the EU network of independent experts points out it is regrettable that this issue was not addressed more directly in the agreement.¹²⁴

As the death penalty is now prohibited across the EU, it is perhaps time for the EU to consider prohibiting mutual legal assistance with third countries where such assistance may lead to the imposition of the death penalty and incorporating this principle into the agreements that it concludes.

Data protection. Data protection has been a particular sticking point in agreements between the EU and the US as will be explored in depth in a parallel paper as part of this series, particularly in relation to Passenger Name Records (PNR). Discussions have resulted in a Final Report by the EU-US High Level Contact Group on Information Sharing and privacy and personal data protection¹²⁵ presented at the EU-US summit on the 12th June 2008. This report has been criticised by commentators:

the scope would cover “any criminal offence” however minor. There is no guarantee EU citizens will be informed that data and information on them has been transferred to the USA or to which agencies it has been passed or give them the right to correct it. Moreover, the agreement would apply to individual requests and automated mass transfers and allow the USA to give the data to any third state “if permitted under its domestic law”. It would be good to say that the USA must guarantee the same rights to people when personal information is transferred between EU states but this would be meaningless as the Council is about to adopt a Framework Decision which gives individuals few if any protections against misuse and abuse.¹²⁶

The Final Report clearly demonstrates the problems of external cooperation in JHA and the dangers inherent in agreements which result in an extremely lop-sided approach to cooperation. An example of this can be found in the definition of the scope of the discussions that would apply to exchange of information for ‘law enforcement purposes’ and the very different meanings given to ‘law enforcement purposes’ depending on which direction the information is

¹²³ See Art. 15 UNCAT and see ECtHR *Jalloh v Germany*, judgment of 11 July 2006, application no 54810/00.

¹²⁴ EU Network of Independent Experts on Fundamental Rights, “Thematic Comment No 2”, *op. cit.*, p. 24.

¹²⁵ 9831/08, Brussels, 28 May 2008.

¹²⁶ Tony Bunyan, *Statewatch* (<http://www.statewatch.org/>).

passing over the Atlantic.¹²⁷ This difference in interpretation of the very scope of the negotiations calls into question the possibility for any serious discussion of common ground. Again, however, the low standard of protection agreed on internally regarding data protection in the third pillar dictate the dilution of protections in the external dimension.

Extradition and deportation

Extradition and deportation to countries outside of the EU is another main element of external JHA cooperation. The transfer of persons from one state to another engages human rights protections where there is a risk of a violation of human rights.

The seminal case of *Soering v UK*¹²⁸ established the need for:

a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (...). As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application, in extradition cases [of the European Convention on Human Rights]¹²⁹

The ECtHR went on to clarify that the Convention would not prevent cooperation between States provided that such cooperation does not interfere with any specific Convention rights.¹³⁰

The rights most commonly engaged by extradition or deportation include:

- Prohibition on torture
- Death penalty
- Fair trial
- Right to family life

The prohibition on torture is absolute and the EU Charter Article 19.2 confirms the principle of *non-refoulement* and the effect of the prohibition on the death penalty in the European Union:

No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

In a series of cases, the European Court of Human Rights has elaborated on the practical effect of this principle, culminating in the recent case of *Saadi v Italy*¹³¹ where the Court rejected the need for a balance between the prohibition on torture and the interests of national security and clarified the parameters of the prohibition on torture in cases of extradition or expulsion strengthening the absolute prohibition on torture.

This case has clarified the practical effect of the prohibition on *refoulement* under the ECHR as reflected in the EU Charter. This is therefore the standard by which EU member states, and by

¹²⁷ EU-US High level Contact Group, "Final Report", op. cit.

¹²⁸ Judgment of 7 July 1989, application no 14038/88.

¹²⁹ Ibid, para 89.

¹³⁰ ECtHR *Stocké v Germany*, judgment of 12 October 1989, Series A no 199 para 167 and 169, cited by ECtHR *Ocalan v Turkey*, judgment of 12 March 2003, application no 46221/99 para 88.

¹³¹ ECtHR *Saadi v Italy*, judgment of 28 February 2008, application no 37201/06, paras 138-40.

extension the EU, is bound. In this sensitive and difficult area, the European Court of Human Rights is the appropriate body for setting the legal parameters while the European Union is the appropriate body to see that these parameters are respected with regard to EU external cooperation in the field of justice and home affairs.

In Italy, trials are currently underway of Italian officials¹³² who colluded in the abduction of Abu Omar from Milan by CIA officials. This case will highlight the criminal law implications for EU member states and agencies that cooperate with third countries in circumstances that may give rise to torture or other prohibited ill treatment. Also in relation to CIA renditions, Sweden has been found to have violated both the ICCPR and the UN CAT through assisting US and Egyptian authorities to deport two men to Egypt.¹³³ The implications of the practice of extraordinary rendition and the collusion of some EU member states in CIA activities in this regard will be dealt with in depth in a forthcoming paper in this series.

The issue of extradition to a country where there is a risk of the death penalty most commonly arises in relation to the US. While the Soering judgement, which involved possible extradition to the US for murder, did not prohibit extradition on the basis of the right to life and the prohibition on the death penalty but rather on the inhuman and degrading treatment that would arise from the death row phenomenon, it is accepted that with the entry into force of Protocol 13 to the ECHR, extradition to a risk of imposition of capital punishment would no longer be permissible from an EU country in any event. In order to address the concerns of many member states and to reflect the EU's position on the death penalty, the EU-US extradition agreement¹³⁴ states, at Article 13:

Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out. If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied.

National laws on this point vary across the EU but, while this formulation may be seen as “a slight improvement on the existing bilateral treaties and on the practice followed by the different Member States”,¹³⁵ it is regrettable that the obligation reflected in the EU Charter and arising out of the ECHR and its case law is not more clearly stated. As the EU Network of Independent Experts on Fundamental Rights has pointed out: “Although the extradition agreement refers to the possibility for a State to refuse extradition as a mere faculty, this should be considered as constituting an obligation on its part.”

¹³² On 4 March 2008 Italy's Constitutional Court re-scheduled the hearing in this case for 8 July. See further Amnesty International, “Europe: Victims of rendition and secret detention still seeking justice”, EUR 01/012/2008 (available at <http://www.amnesty.org/en/library/asset/EUR01/012/2008/en/eb9fbda6-42ae-11dd-9452-091b75948109/eur010122008eng.html>).

¹³³ *Agiza v Sweden*, CAT/34/D/233/2003, 24 May 2005 and *Alzery v Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006.

¹³⁴ Agreement on Extradition between the European Union and the United States of America, *op. cit.*

¹³⁵ EU Network of Independent Experts on Fundamental Rights, “Thematic Comment No 2”, *op. cit.*, p. 24.

The case of *Soering*¹³⁶ established that a flagrant denial of justice through a violation of the right to a fair trial as protected by Article 6 ECHR could also prevent an extradition. The EU-US extradition agreement does not deal with this issue directly but simply includes a mention in the preamble that the agreement is concluded by the parties “mindful of the guarantees under their respective legal systems which provide for the right to a fair trial to an extradited person, including the right to adjudication by an impartial tribunal established pursuant to law”. The Network of Independent Experts points out that:

These formulations remain exceedingly vague and ambiguous. In the absence of an explicit reference to the standards of a fair trial or to fundamental rights – and the exclusion of any form of judicial cooperation in criminal matters or extradition if this leads to or contributes to a violation of these standards -, any person facing prosecution does not know precisely enough the extent of the guarantees that he or she has, and the obligations of Member States of the European Union with which he or she is requested to cooperate remain uncertain.¹³⁷

This situation is of particular concern given the risk of people being subjected to trial by special courts and military tribunals in the prosecution of terrorism charges in the US. The UK House of Lords, Select Committee on the European Union recommended the practice of requiring an assurance that the extradited person would be tried before a normal federal or state court in cases where there was a risk that a trial by military or other exceptional court might be an option under US law.¹³⁸ While such a practice may be followed by EU member state courts concerned about possible breaches of the right to a fair trial, it is unfortunate that the EU did not take the opportunity of explicitly recognising human rights obligations which apply to all EU member states into an agreement with a third country on cooperation in criminal justice.

Other rights such as the right to family life are also engaged by the extradition or expulsion of people to third countries, but such qualified rights are unlikely to weigh heavily in a decision as to whether or not to extradite in cases involving serious crimes. The right to family life is more relevant in cases where the proportionality of an expulsion is in question. Given the Commission’s commitment to the rights of children and the recent ECtHR case of *Maslov v Austria*¹³⁹ which found that an exclusion order on a juvenile was disproportionate, this could be an area where the EU should seek to establish standards relating to the treatment of juveniles in this context.

Right to an effective remedy

One of the fundamental difficulties in international cooperation on justice and home affairs issues is how to guarantee the right to an effective remedy across jurisdictions with different levels of protections of human rights and through different layers of international responsibility. The principle of *non-refoulement* is such a key element of the prohibition on torture because the nature of the potential violation is so grave that, if it were to be allowed to happen, the consequences are so profound that no remedy could be genuinely adequate. The development of law relating to the extra-territorial application of human rights obligations in general is moving very quickly on an international level and in national jurisdictions. This is an extremely complex area which is evolving in fits and starts and leaves the protection of individual rights in

¹³⁶ *Soering*, op. cit.

¹³⁷ EU Network of Independent Experts on Fundamental Rights, “Thematic Comment No 2”, op. cit., p. 22.

¹³⁸ House of Lords, Select Committee on the EU, Session 2002-03, 38th Report, r 153 EU/US Agreements on Extradition and Mutual Legal Assistance, 15 July 2003, p. 12.

¹³⁹ Judgement of 23 June 2008, application no 1638/03.

this field in a very uncertain situation which, at least at the EU level, merits consideration and clarification. This is important in relation to EU external cooperation in criminal justice involving ESDP rule of law missions and the deployment of EU personnel in third countries.

The right to an effective remedy for violations of human rights obligations is crucial to ensuring that rights are real and effective, not illusory or theoretical.¹⁴⁰ The UN Human Rights Committee in its General Comment 31 on the Nature of the General Legal Obligation imposed on the States Parties to the ICCPR¹⁴¹ has clarified that:

15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person...

It could be argued that those persons affected by international cooperation in criminal justice and counter-terrorism measures are a category of person that is particularly vulnerable as the practicality of recourse to justice and effective remedies to vindicate their rights is severely curtailed by the complexity of international and institutional law and practice.

Cooperation between the EU and third countries is particularly susceptible to this problem as the type of legal instrument that is available within the EU (including the ability to take cases for violations of human rights ultimately to the European Court of Human Rights and, in certain cases, to take challenges to the European Court of Justice) cooperation with third countries, in particular those who are not signatories of the European Convention on Human Rights, leaves a person with no clear means of seeking redress for human rights violations that arise out of such cooperation. The difficulty in the absence of practical judicial remedies in relation to the EU institutions is exacerbated by the fact that little political accountability exists in relation to third countries should human rights violations occur. Within the Council of Europe, political accountability can be pushed in the Committee of Ministers and, within the European Union itself, Article 7 TEU provides a mechanism to take action where there is a clear risk of a serious breach of the principles of the EU in a member state. Many third countries, including the US¹⁴² with whom the EU enjoys very developed cooperation in this field, are not politically accountable in any international forum.

In addition to standard criminal justice cooperation, the EU is involved in rule of law activities in third countries as well as military missions. The existence of such missions raises further questions regarding the right to an effective remedy and the way in which responsibility for human rights protections is enforced in practice.

UN HRC General Comment 31 states:

4 ...Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty...

...

10. ...This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in

¹⁴⁰ Airey v Ireland, judgement of 9 October 1979, application no 6289/73, para 24.

¹⁴¹ CCPR/C/21/Rev.1/Add.13, 26 May 2004.

¹⁴² See JUSTICE Briefing on Extradition to the US, July 2003.

which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

This would appear to clarify the position regarding international missions and the obligations of the ICCPR, but the way that international human rights obligations are enforced in practice has been called into question by recent national and regional jurisprudence, which is crying out for a clearer framework to protect individual rights.

Europe

The European Court of Human Rights has found that the ECHR does have extra-territorial effect through a series of judgements but has not established a clear line as to how that effect is engaged and in what circumstances. In the case of *Bankovic*¹⁴³ the Court appeared to limit the extra-territorial application of the ECHR. This case involved NATO aerial bombing of Serbia and it was taken against ECHR signatory members of NATO for breach of the right to life of people killed during that bombing in Serbia, which was then not a party to the ECHR. The Court found, in that case, that although NATO was engaged in aerial bombing, it did not have effective control of the territory and that, therefore, the ECHR did not have extra-territorial effect in these circumstances. In the case of *Issa*¹⁴⁴ the court held that, a state might also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another state but who are found to be under the former state's authority and control through its agents operating – whether lawfully or unlawfully – in the latter state. Accountability in such situations stemmed from the fact that Article 1 of the Convention could not be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory. This clearly establishes the principle that the ECHR should be read so as to prevent states acting in a way incompatible with the Convention merely because they are acting outside their territory.

In May 2007, however, a decision from the European Court of Human Rights appeared to make an exception in cases where member states were acting under the auspices of the UN.¹⁴⁵ The joined cases of *Behrami/Saramati*¹⁴⁶ concerned allegations of violations of the ECHR by peacekeeping forces from Norway and France operating as KFOR in Kosovo under UNSCR 1244. The first case concerned a failure to clear up cluster-bombs left after NATO bombing resulting in loss of life alleged to be contrary to Art. 2 ECHR and the second concerned an alleged violation of Art. 5(1) the right to liberty due to an arrest by a Norwegian commander acting as part of a multi-national force whereby Mr. Saramati was detained for six months without trial as he was believed to be a threat to national security. In this case, the Court found that the UN had acted by delegating its powers to “willing organisations and member states” but concluded that the UN Security Council had retained ultimate authority and control over the mission although operational authority was delegated. As a result, the Court found that KFOR was exercising powers that had been lawfully delegated under Chapter VII of the UN Charter and that therefore the alleged conduct had been the responsibility of the UN rather than of Norway and France. On the basis of this finding, the Court held that it could not review such conduct.

¹⁴³ Admissibility decision of 12 December 2001, application no 52207/99.

¹⁴⁴ *Issa v Turkey*, Judgement of 16 November 2004, application no 31821/96.

¹⁴⁵ See, Keir Starmer, “Responsibility for troops abroad: UN mandated forces and issues of human rights accountability”, 2008, *European Human Rights Law Review* 318, for a full discussion of the implications of these judgements on accountability of forces deployed under the auspices of the UN.

¹⁴⁶ Admissibility decision of 2 May 2007, application nos. 71412/01 and 78166/01.

As one commentator has put it:

The obvious concern about the decision of the Grand Chamber of the European Court of Human Rights in *Behrami/Saramati* is that it might undermine the accountability of troops operating abroad that can be established through international human rights law. Such political accountability as there may be for the United Nations through the Security Council is no substitute for legal accountability under international human rights law. Either the approach taken in *Behrami/Saramati*, and perhaps the whole delegation thesis, has to be re-examined, or the accountability mechanisms of the United Nations have to be radically, and speedily, overhauled.¹⁴⁷

The EU, in its developing practice of deploying civilian and military missions abroad, needs to ensure that there is no accountability gap in relation to human rights protections involving EU personnel or the actions of third country partners such as Canada. The best way of filling the accountability gap would be for the EU to accede to the ECHR thereby making EU institutional actions directly justiciable in the European Court of Human Rights.

The European Court of Justice Case of Kadi,¹⁴⁸ currently pending judgement, should be watched with interest to see how the European Court of Justice addresses obligations to implement UN Security Council Resolutions under Chapter VII of the EU Charter when such obligations are contrary to international human rights standards including the obligations of EU member states.

United Kingdom

Two recent UK cases involving the extra-territorial application of the Human Rights Act 1998 in the context of Iraq are worthy of note in this regard though they provide a far from clear line.

The first, *Al Skeini*,¹⁴⁹ concerned six Iraqi civilians allegedly killed by UK troops in Southern Iraq. The majority of the House of Lords in this case found that the Human Rights Act applied to the legal systems of the UK but put an obligation on public authorities to act compatibly with the Human Rights Act and protect ECHR rights even when their actions were outside UK territory. The majority held, however, that that obligation would only apply where the UK had sufficient control over an area to make it possible to secure Convention rights in that area and therefore found that the Human Rights Act only applied to the one person who died in a detention unit on a UK military base but not to innocent bystanders caught up in shooting when UK forces were under attack. The House of Lords thus made it clear that the Human Rights Act has extra-territorial effect but took a very limited approach to the scope,¹⁵⁰ perhaps for fear of opening the floodgates of litigation in the UK in the absence of a clear line from Strasbourg.¹⁵¹

The second, *Al Jedda*,¹⁵² addressed the question of whether the UK was responsible for a violation of the right to liberty as protected by Art. 5(1) ECHR for its use of internment in Iraq. The House of Lords found, in this case, that the responsibility for actions carried out subsequent

¹⁴⁷ Starmer, *op. cit.*

¹⁴⁸ Discussed in detail *op. cit.*, p. 32.

¹⁴⁹ (*Al-Skeini and others*) v. Secretary of State for Defence (The Redress Trust and others intervening) [2007] UKHL 26, [2007] 3 W.L.R. 33.

¹⁵⁰ Preferring the approach in *Bankovic* (*op. cit.*) to that in *Issa* (*op. cit.*); per Lord Rodger at paras 75-81; Lord Brown paras 124-131, Baroness Hale at para 91.

¹⁵¹ It could also be said that ECtHR reluctance to apply the ECHR extra-territorially is likewise a fear that the floodgates would open on extremely politically sensitive areas. For full analysis, see David Feldman, "Case Comment – The Territorial Scope of the Human Rights Act", *Cambridge Law Journal* 8, 2008.

¹⁵² *R (on the application of Al-Jedda) (FC) v Secretary of State for Defence* [2007] UKHL 58.

to UN Security Council Resolution 1546 was attributable to the UK or the UN.¹⁵³ It found, however, that the right to liberty as protected by the Human Rights Act 1998 was qualified in this case by the operation of Articles 25 and 103 of the United Nations Charter as UK forces were then operating as part of a multinational force. By UNSCR 1546, the Security Council gave the multinational force “authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution”. One of the letters annexed to the resolution stated that the force might undertake internment where “necessary for imperative reasons of security”.¹⁵⁴

These two cases demonstrate that, at least in the UK, human rights protections apply extra-territorially. The limited scope of application of those protections and the subjugation of human rights protections to the international security imperative, however, is worrying in relation to accountability and the right to an effective remedy as guaranteed by the ICCPR and the ECHR. It is also unclear how these protections would apply in practice if UK forces were, for example, to hand over prisoners to Canadian forces who, in turn, handed them over to Afghan forces with the result that the prisoners were subjected to torture, cruel, inhuman or degrading treatment.

*Canada*¹⁵⁵

In Canada, in March 2008, a Court¹⁵⁶ found that the Canadian Charter of Rights and Freedoms did not apply to individuals detained by the Canadian Forces in Afghanistan. This case was brought by Amnesty International Canada on the basis of allegations that individuals who had been detained by Canadian Forces had been handed over to the Afghan authorities and had, thereafter, suffered ill treatment contrary to the prohibition on torture, cruel, inhuman and degrading treatment. The judge found that the agreement between the Government of Canada and the Government of Afghanistan concerning the deployment of Canadian Forces applied international law (she specified international humanitarian law rather than human rights law) and Afghan constitutional law to this situation but that the Canadian Charter of Rights and Freedoms did not apply. The judge herself noted that the scope and enforcement mechanisms for the protection of international human rights law are weaker and more limited than that provided by the Charter and she voiced concern about the position that while the Canadian authorities could take action after the fact against members of the armed forces mistreating detainees under their control, they could not take preventative action as they could have done had the Charter been applicable. Notwithstanding her concerns, however, she felt that detainees did have rights conferred on them by the Afghan Constitution and by international law, in particular international humanitarian law.

This judgement raises deep concerns about the way in which Canada makes its international human rights obligations practical and effective by providing accessible remedies in its activities overseas. It builds on an earlier Supreme Court Judgement (*R v Hape*¹⁵⁷) which established that the Canadian Charter did not apply to the activities of Canadian law enforcement authorities engaged in collecting evidence in the Turks and Caicos Islands. These two judgements give cause to consider how human rights protections can be guaranteed in the context of international cooperation with Canada on criminal justice issues and in the context of

¹⁵³ See Starmer, *op. cit.* for an in depth analysis.

¹⁵⁴ See Times Law Reports, 13 December 2007.

¹⁵⁵ These judgements will be dealt with in more detail in another paper in this series.

¹⁵⁶ *Amnesty International Canada and British Columbia Civil Liberties Association v Chief of Defence Staff for the Canadian Forces, Minister for National Defence and Attorney General of Canada* 2008 FC 336.

¹⁵⁷ 2007 2 SCR 292.

Canadian involvement in EU rule of law missions. Careful consideration needs to be given to the ways in which EU member states can be certain of fulfilling their domestic and international human rights obligations when cooperating with Canada in this context.

3.4 Conclusions on Human Rights in the External Dimension of JHA

The increased use of EU international missions, including rule of law missions requires consideration of accountability for human rights violations by EU member states and third country partners such as Canada, which are involved in such missions.

EU Status of Mission Agreements with host countries establish extensive diplomatic immunity for mission members exempting them from local jurisdiction:¹⁵⁸

the jurisdictional immunities granted to ESDP missions and their personnel may have implications for the protection of fundamental human rights, above all the right of private individuals in the host state to have their civil rights and obligations determined before a court or tribunal in accordance with Article 6(1) of the European Convention on Human Rights (ECHR), assuming that the Convention applies to them. The right to access courts or tribunals enshrined in Article 6(1) of the ECHR is not absolute, but may be restricted subject to certain conditions. First, it may not be limited in such a way or to such an extent that its very essence is impaired; secondly, the restrictions in question must pursue a legitimate aim and a reasonable relationship of proportionality must exist between the means employed and the aim sought to be achieved.¹⁵⁹

The complex institutional and legal status of EU missions under the ESDP, combined with the rapidly evolving discourse in international law on the extra-territorial effect of human rights law, in particular where States are operating in a multi-lateral context, leaves individual human rights unprotected in practice. Ironically, there is a serious risk that EU rule of law missions may, themselves, be above the law in relation to effective human rights mechanisms. As the EU extends its activities in the external dimension of JHA, arguably taking legal personality upon itself in the conclusion of agreements with third countries such as the US¹⁶⁰ the need for a mechanism to ensure the accountability of EU institutions is becoming urgent.

In the light of this accountability gap, the postponement of the coming into force of the Lisbon Treaty is deeply worrying as it delays the EU's accession to the ECHR and prevents the EU Charter from becoming legally binding on the institutions. In these circumstances, member states should consider opening negotiations on EU accession to the ECHR by way of a protocol¹⁶¹ as a matter of urgency.

¹⁵⁸ For a full discussion of SOMAs and SOFAs see Aurel Sari, "Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice Status of Forces and Status of Mission Agreements under the ESDP", *EJIL* 2008 19 (67).

¹⁵⁹ *Ibid.*, p. 80.

¹⁶⁰ Extradition Agreement between the EU and US, *op. cit.*

¹⁶¹ Article 48 TEU, "The government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded.

If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area.

Amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements."

3.5 Recommendations on Human rights issues specific to EU-Canada cooperation

- The EU and Canada should continue to support each other in pushing forward human rights issues in international fora.
- The EU and Canada should jointly explore the issue of accountability for human rights violations committed by personnel involved in rule of law missions in third countries.
- The EU and Canada should exchange best practice in relation to the protection of human rights in international cooperation in criminal justice, in particular in the field of data protection.
- A careful analysis of domestic systems for human rights protections should be carried out to ensure that cooperation in the external field of justice and home affairs will not result in a reduction in protections.

4. Conclusions and Recommendations on the External Dimension of JHA

While some actors in the EU may view the external dimension of EU criminal justice and counter-terrorism strategy as an opportunity to export the EU's justice model as a paragon of fundamental rights protection and the rule of law, this idea requires some adaptation before it can be put into practice.

Firstly, the EU needs to address human rights more squarely in its own internal developments on cooperation in criminal justice and counter-terrorism. One important step in this direction would be to extend the mandate of the Fundamental Rights Agency to cover third pillar issues as well as the external dimension of justice and home affairs.

Secondly, the EU needs to address the lack of judicial and political oversight in the second and third pillars as quickly as possible and, in the absence of this oversight, take it upon itself to be as transparent as possible about developments in this field.

Thirdly, the EU must, as a matter of urgency, address the accountability gap that is created by EU institutions taking actions in sensitive areas that impact on human rights while the EU Charter of Fundamental Rights and Freedoms is not a binding instrument and the EU is not a signatory to the ECHR.

Fourthly, the EU should assess its own internal mechanisms for the protection of human rights and should require a thorough assessment of domestic human rights protections in the countries with which it cooperates on such sensitive issues.

Finally, the EU needs to ensure that its approach to fundamental rights and the rule of law in the external dimension of JHA does not reflect the double standards that arise out of political interests of foreign policy. The practical and technical approach to external cooperation in JHA should outweigh the foreign policy imperative.

Canada could be an important partner to the EU in the promotion of human rights in relation to counter-terrorism in international fora. The depth of cooperation will depend, however, on changing political interests while the cooperation remains informal. More could be done to ensure that Canadian and EU activities in this area are complementary. Both Canada and the EU need to address fundamental problems relating to accountability for human rights violations in rule of law missions in third countries and ensuring the respect for the rule of law in criminal justice cooperation externally to the same degree as it is applied internally.

4.1 For the EU

- Ensure that human rights are at the heart of developments on the external dimension of EU criminal justice and counter-terrorism measures.
- Enhance coordination between institutions and internal and external aspects of cooperation in criminal justice and counter-terrorism.
- Take a strong, principled stand in relation to international cooperation with third countries in criminal justice and counter-terrorism, in particular in relation to the abolition of the death penalty and the absolute prohibition on torture.
- Ensure that the political imperatives of foreign policy do not cloud technical and practical aspects of criminal justice cooperation and the protection of fundamental rights.
- Keep the process for listing and delisting of terrorist individuals and organisations under review from the perspective of ensuring the protection of fundamental rights.
- Address the question of fundamental rights in relation to internal cooperation in criminal justice, in particular by extending the mandate of the Fundamental Rights Agency to cover third pillar issues.
- Extend the mandate of the Fundamental Rights Agency to cover CFSP and engage the Fundamental Rights Agency in the provision of technical assistance in third countries.
- Ensure that civil society is engaged in a positive and sensitive way in EU developments on counter-terrorism and criminal justice.
- Ensure that an adequate framework for judicial and political oversight exists in relation to measures taken in the external dimension of EU criminal justice and counter-terrorism measures.
- Address the accountability gap in relation to potential violations of human rights by EU personnel involved in rule of law missions in third countries.
- Take steps to accede to the ECHR, if necessary by way of a protocol if the ratification process of the Lisbon Treaty is held up.
- Explore ways to break the deadlock on the reform of the Treaties, in particular in relation to making the EU Charter of Fundamental Rights and Freedoms a binding document which will govern the activities of EU institutions.

4.2 For the EU and Canada

- The EU and Canada should support each other on human rights issues in international fora.
- The EU should explore ways in which Canada can provide a gateway to a stronger Transatlantic dialogue rather than approaching Canada as an afterthought to cooperation with the US.
- While the informal nature of cooperation has some benefits, the need for a more formal framework for cooperation between the EU and Canada should be explored.
- There should be a consideration of the need for an agreement between Eurojust and Canada to improve practical judicial cooperation in criminal matters.
- The EU and Canada should develop a systematic exchange of information on funding and technical assistance projects aimed at capacity building of rule of law institutions and fundamental rights in key geographical areas to ensure that there is no duplication.
- Troika meetings should be used as an opportunity for practical exchange of best practice, in particular, the EU could learn from Canada's experiences in combating radicalisation.
- Consideration should be given to the ways of ensuring the accountability of Canadian personnel engaged in EU rule of law missions.

Bibliography

Publications and reports

- Adam, A. (2006), “L’échange de données à caractère personnel entre l’Union européenne et les Etats-Unis: Entre soucis de protection et volonté de coopération”, *Revue Trimestrielle du Droit Européen*, Vol. 42, No. 3, pp. 411-437.
- Ahmed, T. and I. de Jesús Butler (2006), “The European Union and Human Rights: An International Law Perspective”, *European Journal of International Law*, Vol. 17, No. 4, pp. 771-801.
- Alegre, Susie (2008), “Human Rights and the Future of the European Union”, JUSTICE Futures Series.
- Alegre, Susie (2008), “The EU Counter-Terrorism Strategy and Human Rights in Central Asia”, in Elspeth Guild and Florian Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Aldershot: Ashgate.
- Amnesty International (2005), “Human Rights Dissolving at the Borders? Counter-terrorism and EU criminal law”, IOR 61/013/2005, 31 May (http://www.aieu.be/static/documents/2005/counterterrorism_report_final.pdf, accessed on 4 July 2008).
- Amnesty International (2008), “Europe: Victims of rendition and secret detention still seeking justice”, 1 December (<http://www.amnesty.org/en/library/asset/EUR01/012/2008/en/eb9fbda6-42ae-11dd-9452-091b75948109/eur010122008eng.html> accessed on 05/07/08).
- Anderson, M. and J. Apap (eds) (2002), *Striking a Balance between Freedom, Security and Justice in an Enlarged European Union*, Centre for European Policy Studies, Brussels.
- Apap, J. (ed.) (2004), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement*, Cheltenham: Edward Elgar.
- Apps, K.M. (2006), “Case C-176/03, Commission v. Council: Pillars Askew: Criminal Law EC-style”, *Columbia Journal of European Law*, Vol. 12, No. 2, pp. 625-637.
- Baldaccini, A. and E. Guild (eds) (2007), *Terrorism and the Foreigner*, Leiden: Martinus Nijhoff Publishers.
- Balzacq, T. and S. Carrera (eds) (2006), *Security Versus Freedom? A Challenge for Europe’s Future*, Aldershot: Ashgate.
- Bignami, F. (2005), “Transgovernmental Networks vs. Democracy: The Case of the European Information Privacy Network”, *Michigan Journal of International Law*, Vol. 26, No. 5, pp. 807-868.
- Bigo, D. (2001), “The Möbius Ribbon of Internal and External Security(Ies)”, in M. Albert et al. (eds), *Identities, Borders, Orders*, Minneapolis: University of Minnesota Press, pp. 91-136.
- Bigo, D. (2005), “La Mondialisation de l’(in)sécurité? Réflexions sur le champ des professionnels de la gestion des inquiétudes et analytique de la transnationalisation des processus d’(in)sécurisation”, *Cultures et Conflits*, Vol. 58, No. 2, pp. 53-100.
- Bigo, D. (2007), *The Principle of Information Availability*, Paris: CHALLENGE.
- Bigo, D. et al. (2006), *Illiberal Practices of Liberal Regimes: The (In)Security Games*, Paris: L’Harmattan.
- Bigo, D. et al. (2007), *The Changing Landscape of European Liberty and Security: Mid-Term Report on the Results of the CHALLENGE Project*, Challenge Papers No. 4, Centre for European Policy Studies, Brussels.
- Bigo, D and L. Bonelli (2008), *Preventing violent radicalisation and terrorist recruitment in the EU – The threat to Europe by radical Islamic terrorist groups*, European Parliament Briefing Paper, PE 393-277, January.
- Bruln, H. (2003), “La protection des données: quête et errements dans le Troisième Pilier”, *Actualités de Droit Pénal Européen*, Bruxelles: La Charte, pp. 133-152.
- Carrera, S. and F. Geyer (2007), *Terrorism, Borders and Migration: The Commission’s 2008 Policy Strategy in the Area of Freedom, Security and Justice*, CEPS Policy Brief No. 31, CEPS, Brussels.
- CEPS et al. (2007), *Joint Study - The Treaty of Lisbon: Implementing the Institutional Innovations*, CEPS, Brussels, Egmont – The Royal Institute for International Relations, European Policy Centre.

- Cesoni, M.L. (2006), "Compétence pénale: la Cour de justice des Communautés européennes périmè-telle le principe de légalité?", *Journal des tribunaux (Belgique)*, Vol. 125, No. 6227, pp. 365-373.
- Challenge Project, Work Package 12, University of Athens (2007), "Rival Freedoms in Terms of Security: The Case of Data Protection and the Criterion of Connexity" (<http://www.libertysecurity.org/article1671.html>, accessed on 1 December).
- Chalmers, D. (2005), "The Court of Justice and the Third Pillar", *European Law Review*, Vol. 30, No. 6, pp. 773-774.
- Conway, G. (2005), "Judicial Interpretation and the Third Pillar", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 13, No. 2, pp. 255-283.
- Cullen, P. and L. Buono (2007), "Creating an Area of Criminal Justice in the EU: Putting Principles into Practice", *ERA Forum*, Vol. 8, No. 2, pp. 169-176.
- Cultures et Conflits (2006), *Arrêter et juger en Europe. Genèse, luttes et enjeux de la coopération pénale*, Paris: Editions L'Harmattan.
- Curtin, D. (1993), "The Constitutional Structure of the Union: A Europe of Bits and Pieces", *Common Market Law Review*, Vol. 30, No. 1, pp. 17-30.
- Curtin, D. and I. Dekker (1999), "A 'Layered' International Organisation: Institutional Unity in Disguise", in P. Craig and G. de Burca (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, pp. 83-136.
- de Bruycker, Philippe and Anne Weyembergh (forthcoming), "The External Dimension of the Area of Freedom, Security and Justice", in M. Telo (ed.), *EU and Global Governance*, London: Routledge.
- de Kerchove, Gilles (2003), "Introduction", in Gilles de Kerchove and Anne Weyembergh (eds.), *Securité et justice: enjeu de la politique extérieure de l'Union Européenne*, Brussels: Editions de l'Université de Bruxelles.
- de Kerchove, G. and A. Weyembergh (2005), "Quelle Europe pénale dans la Constitution", in M. Donny and M. Bribosia (eds), *Commentaire de la Constitution de l'Union européenne*, Brussels: Editions de l'Université de Bruxelles, pp. 317-353.
- de Kerchove, G. and A. Weyembergh (eds) (2002), *L'espace pénal européen: enjeux et perspectives*, Brussels: Editions de l'Université de Bruxelles.
- de Kerchove, G. and A. Weyembergh (eds) (2003), *Securité et justice: enjeu de la politique extérieure de l'Union Européenne*, Brussels: Editions de l'Université de Bruxelles.
- De Witte, B. (1998), "The Pillar Structure and the Nature of the European Union: Greek temple or French Gothic Cathedral?", in T. Heukels et al. (eds), *The European Union after Amsterdam – A Legal Analysis*, The Hague: Kluwer Law International, pp. 51-67.
- Den Boer, M.G.W. (2006), "Fusing the Fragments: Challenges for EU Internal Security Governance on Terrorism", in D. Mahncke and J. Monar (eds), *International Terrorism: A European Answer to a Global Threat*, Brussels: Peter Lang, pp. 83-111.
- Douglas-Scott, S. (2006), "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *acquis*", *Common Market Law Review*, Vol. 43, No. 3, pp. 629-665.
- Eeckhout, P. (2007), "Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit", *European Constitutional Law Review*, Vol. 3, No. 2, pp. 183-206.
- Feldman, David (2008), "Case Comment – The Territorial Scope of the Human Rights Act", *Cambridge Law Journal* 8.
- Gallego-Casilda, Y. (2003), "El Libro Verde de la Comisión Europea sobre las garantías procesales para sospechosos e inculpados en procesos penales en la Unión Europea", in A. Galgo Peco (ed.), *Derecho penal supranacional y cooperación jurídica internacional*, Cuadernos de Derecho Judicial XIII-2003, Madrid: Consejo General del Poder Judicial, pp. 235-256.
- Geyer, F. (2007), *Fruit of the Poisonous Tree – Member States' Indirect use of Extraordinary Rendition and the EU Counter-terrorism Strategy*, CEPS Working Document No. 263, Centre for European Policy Studies, Brussels.

- Gill, P. (2006), "Not Just Joining the Dots but Crossing the Borders and Bridging the Voids: Constructing Security Networks after 11 September 2001", *Policing and Society*, Vol. 16, No. 1, pp. 27-49.
- Gil-Robles, Alvaro (2004), "UK Report by Council of Europe Commissioner for Human Rights", 4-12 November (CommDH(2005)6).
- Gless, Sabine and Daniel Schaffner (forthcoming), "Judicial Review of Freezing Orders due to a UN listing by European Courts", in S. Braum and A. Weyembergh (eds), *Quel controle juridictionnel pour l'espace penal europeen?*, Brussels: Ed. De l'Universite Libre de Bruxelles.
- Guild, E. (2008), "The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the 'Terrorist List'", *Journal of Common Market Studies*, Vol. 46, No. 1, January, pp. 173-193.
- Guild, E. (2007), *Security and European Human Rights: Protecting Individual Rights in Times of Exception and Military Action*, Nijmegen: Wolf Legal Publishers.
- Guild, E. (2004), "Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice", *European Law Journal*, Vol. 10, No. 2, pp. 218-234.
- Guild, E. (2004), "The Variable Subject of the EU Constitution, Civil Liberties and Human Rights", *European Journal of Migration and Law*, Vol. 6, No. 4, pp. 381-394.
- Hagemann, S. (2007), *The EU Reform Treaty: Easier Signed than Ratified?*, EPC Policy Brief, European Policy Centre, Brussels.
- House of Lords, Select Committee on the EU (2003), Session 2002-03, 38th Report, r 153 EU/US Agreements on Extradition and Mutual Legal Assistance, 15 July.
- Jacqué, J.P. (2002), "La question de la base juridique dans le cadre de la justice et des affaires intérieures", in G. de Kerchove and A. Weyembergh (eds), *L'espace pénal européen: enjeux et perspectives*, Brussels: Editions de l'Université de Bruxelles, pp. 249-256.
- Jimeno-Bulnes, M. (2004), "After September 11th: The Fight Against Terrorism in National and European Law. Substantive and Procedural Rules: Some Examples", *European Law Journal*, Vol. 10, No. 2, pp. 235-253.
- Juncker, J.-C. (2008), Council of Europe-European Union: 'A sole Ambition for the European Continent' (<http://assembly.coe.int/Documents/WorkingDocs/doc06/EDOC10897.pdf> accessed on 23 June).
- JUSTICE (2003), "Briefing on Extradition to the US", July.
- Labayle, H. (2003), "L'espace pénal européen et le monde: instrument ou objectif?", in G. De Kerchove and A. Weyembergh (eds), Brussels: Editions de l'Université de Bruxelles.
- Labayle, H. (2006), "Architecte ou spectatrice? La Cour de justice de l'Union dans l'Espace de liberté, sécurité et justice", *Revue Trimestrielle de Droit Européen*, Vol. 42, No. 1, pp. 1-46.
- Lavranos, N. (2003), "Europol and the Fight against Terrorism", *European Foreign Affairs Review*, Vol. 8, No. 2, pp. 259-275.
- Mahncke, D. and J. Monar (eds) (2006), *International Terrorism: A European Answer to a Global Threat*, Brussels: Peter Lang.
- McGinley, M. and R. Parkes (2007), *Data Protection in the EU's International Security Cooperation: Fundamental Rights vs. Effective Cooperation?*, SWP Research Paper No. 5, Berlin: Stiftung Wissenschaft und Politik.
- Mitsilegas, Valsamis (2007), "The External Dimension of EU Action in Criminal Matters", *European Foreign Affairs Review* 12: 457-497, p. 474.
- Moïny, Y. (2005), *Protection of Personal Data and Citizens' Rights of Privacy in the Fight against the Financing of Terrorism*, CEPS Policy Brief No. 67, Centre for European Policy Studies, Brussels.
- Monar, J. (2002), "The Problems of Balance in EU Justice and Home Affairs and the Impact of 11 September", in M. Anderson and J. Apap (eds), *Police and Justice Co-operation and the New European Borders*, The Hague: Kluwer Law International, pp. 165-182.
- Morgan, C. (2006), "Proposal for a Framework Decision on Certain Procedural Rights Applying to Proceedings in Criminal Matters throughout the European Union", in M. Leaf (ed.), *Cross-border Crime: Defence Rights in a New Era of International Judicial Co-Operation*, London: JUSTICE publication, pp. 93-102.

- Nettesheim, M. (2007), "UN Sanctions against Individuals – A Challenge to the Architecture of European Union Governance", *Common Market Law Review*, Vol. 44, No. 3, pp. 567-600.
- Nilsson, Hans G. (2003), "Organs and Bodies of the Third Pillar as Instruments of External Relations of the Union?", in G. De Kerchove and A. Weyembergh (eds), Brussels: Editions de l'Université de Bruxelles
- "No More Clemency Appeals for Canadians on Death Row in US': Tories", CBC News, 1 November 2007 (<http://www.cbc.ca/canada/story/2007/11/01/death-penalty.html> accessed on 29 June 2008).
- Ovcharenko, Vsevolod (2006), "Government Financing of NGOs in Kazakhstan: Overview of a Controversial Experience", Vol. 8(4), *The International Journal of Not-for-profit Law*.
- Peers, S. (2006), *EU Justice and Home Affairs Law*, Oxford: Oxford University Press.
- Peers, S. (2007), *Statewatch Analysis EU Reform Treaty Analysis 1: JHA Provisions*, 23 July (www.statewatch.org/news/index.html, accessed on 1 December 2007).
- Puntscher Riekman, S. (2007), "In Search of Lost Norms: Is Accountability the Solution to the Legitimacy Problems of the European Union?", *Comparative European Politics*, Vol. 5, No. 1, pp. 121-137.
- Sari, Aurel (2008), "Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice Status of Forces and Status of Mission Agreements under the ESDP", *EJIL* 2008 19 (67).
- Scharpf, F.W. (2003), *Problem-Solving Effectiveness and Democratic Accountability in the EU*, Working Paper 03/1, Köln: Max Planck Institute of the Study of Societies.
- Scharpf, F.W. (1999), *Governing Europe: Effective and Democratic?*, Oxford: Oxford University Press.
- Scheppele, K.L. (2004), *Law in a Time of Emergency*, University of Pennsylvania Law School, Scholarship at Penn Law Paper 55, Philadelphia: University of Pennsylvania Law School, pp. 1-77.
- Spence, D. (ed.) (2007), *The European Union and Terrorism*, London: John Harper Publishing.
- Starmer, Keir (2008), "Responsibility for troops abroad: UN mandated forces and issues of human rights accountability", *European Human Rights Law Review* 318.
- Ubeda Tarajano, F.E. (2006), "La labor del Tribunal de Justicia de la Unión Europea en orden a la protección de los Derechos Fundamentales", *Boletín de Información del Ministerio de Justicia*, No. 2023, 15 October, pp. 4251-4291.
- van de Rijt, Wouter (2003), "Une Politique Externe de l'Union Européenne en Matière pénale - Problematique Generale", in G. De Kerchove and A. Weyembergh (eds), Brussels: Editions de l'Université de Bruxelles
- Walker, N. (2002), "The Problem of Trust in an Enlarged Area of Freedom, Security and Justice: A Conceptual Analysis", in M. Anderson and J. Apap (eds), *Police and Justice Co-operation and the New European Borders*, The Hague: Kluwer Law International, pp. 19-33.
- Warbrick, C. (2004), "The European Response to Terrorism in an Age of Human Rights", *European Journal of International Law*, Vol. 15, No. 5, pp. 989-1018.
- Ward, A. and S. Peers (2004), *The European Charter of Fundamental Rights*, Oxford: Hart Publishing.
- Weiler, J.H.H. (1993), "Neither Unity nor Three Pillar – The Trinity Structure of the Treaty on European Union", in J. Monar et al. (eds), *The Maastricht Treaty on European Union*, Brussels: European Interuniversity Press, pp. 49-62.
- Weyembergh, Anne, "Les relations canada-union europeenne dans le domaine de la cooperation policiere et judiciaire penale", l'Institut d'Etudes europeennes de l'Université Libre de Bruxelles (unpublished manuscript).
- Wouters, J. and F. Naert (2004), "Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures against Terrorism after '11 September'", *Common Market Law Review*, Vol. 41, No. 4, pp. 909-935.

EU Documents

“A Secure Europe in a Better World – European Security Strategy”, Brussels, 12 December 2003 (available at <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>, accessed on 1 July 2008).

European Commission

Commission Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM (2003) 75 Final.

Commission Decision 2004/535/EC of 14 May 2005 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection.

Commission Communication, “The Prevention of and Fight against Terrorist Financing through enhanced national level coordination and greater transparency of the non-profit sector”, COM (2005) 620.

Commission Communication, “Towards an EU Strategy on the Rights of the Child”, COM (2006) 367, 4 July 2006.

European Commission, Call for Proposals on Violent Radicalisation, OJ C 021, 30 January 2007.

European Council of Ministers

Council Joint Position of 29 March 1999 on the proposed UN Convention against Organised Crime, OJ L 87, 31 March 1999.

Council of Ministers, Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, adopted on 29 May 2000.

Council of Ministers, Framework Decision on the European Arrest Warrant and the Surrender procedures between Member States, OJ L 190, adopted on 13 June 2002.

Council of Ministers, Framework Decision on Combating Terrorism, OJ L 164, adopted on 13 June 2002, pp. 3-7.

Council of the European Union, Conclusions of 14 October 2002.

Council decision 2004/496/EC of 17 May 2004 on the Conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security.

Council Decision on the conclusion, on behalf of the European Community, of the United Nations Convention against Transnational Organised Crime, OJ L261, 6 August 2004, p. 69 at p. 115.

Council regulation (EC) No 168/2007 of 15 February 2007 establishing a European Agency for Fundamental Rights, OJ L 53, 22 February 2007, pp. 1-14.

European Parliament

European Parliament, “Area of Freedom, Security and Justice – European Parliament Resolution on the Progress made in 2001 towards the establishment of the area of freedom, security and justice provided for in article 2, fourth indent, of the TEU”, P5_TA(2002)0048.

General

European Charter of Fundamental Rights, 2000/C 364/01, Nice, 7 December 2000.

EU strategy for combating radicalisation and recruitment for terrorism, Council doc 14781/1/05, Brussels, 24 November 2005.

EU Counter-terrorism strategy 2005, Council Doc. 14469/4/05, Brussels, 30 November 2005.

EU Counter-terrorism Coordinator Report October 2007, Council Doc. 11948/2/07, para 11, Brussels, 5 October 2007.

EU-US High Level Contact Group on Information Sharing and privacy and personal data protection, “Final Report” 9831/08, Brussels, 28 May 2008.

Network of independent experts on fundamental rights, “Thematic study – Thematic comment No 2: Fundamental rights in the external activities of the EU in the fields of justice and asylum and immigration in 2003”, 4 February 2004, CRF-CDF.Them.Com.003.en.

Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention Against Transnational Organised Crime, Council doc. 5535/2/06 REV 2, Brussels, 16 February 2006.

Progress Report on the implementation of the Strategy for the External Dimension of JHA: Global Freedom, Security and Justice SEC (2006) 1498, 16 November 2006.

Report on the implementation of the "Strategy for the implementation of the External Dimension of the JHA: Global Freedom, Security and Justice" for the year 2006, Doc. 15001/06, 20 November 2006.

Strategy on the External Dimension of the Area of Freedom, Security and Justice COM (2005) 491 final, Brussels, 12 October 2005.

Strategy for the External Dimension of JHA: Global Freedom, Security and Justice 14366/3/05 REV 3, Brussels, 30 November 2005 (note from Presidency to Council).

Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, "Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners", 30 January 2007 (http://www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm, accessed on 30 June 2008).

EU Bilateral Agreements

US

Agreement on Extradition between the European Union and the United States of America, OJ L181, Brussels, 3 June 2003, pp. 27-33.

Agreement on mutual legal assistance between the European Union and the United States of America, OJ L181, Washington, 25 June 2003, pp.34-42.

Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security, OJEU no L204, 4 August 2007, p. 18 and f.

Supplemental agreement between Europol and the USA on exchange of personal data and related information (<http://www.europol.europa.eu/index.asp?page=agreements>, accessed 1 July 2008).

Russia

Agreement on co-operation between the European Police Office and the Russian Federation, Rome, 6 November 2003.

Canada

European Union-Canada Joint Summit Statement, Ottawa, 18 December 2001.

Co-operation Agreement between the Government of Canada and the European Police Office, The Hague, 24 November 2005.

Council of Europe documents

European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

European Convention on Extradition, 1957.

Council of Europe Convention on Mutual Assistance in Criminal Matters, 1959.

Council of Europe Parliamentary Assembly, Memorandum of understanding between the Council of Europe and the European Union Recommendation 1743, 2006.

UK legislation

Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America, signed at Washington on 31 March 2003.

UN legislation

United Nations Security Council Resolution 1267, 1999.

United Nations General Assembly Resolution, World Summit Outcome (A/Res/60/1), 24 October 2005.

UN Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987.

Cases

United Kingdom

- A(FC) and others v Secretary of State for the Home Department [2005] UKHL 71.
(Al-Skeini and others) v. Secretary of State for Defence (The Redress Trust and others intervening) [2007] UKHL 26.
R (on the application of Al-Jedda) (FC) v Secretary of State for Defence [2007] UKHL 58.
Alton and others v Secretary of State for Home Department, Times Law Reports, 13 May 2008.

Canada

- R v Hape, 2007 2 SCR 292.
Amnesty International Canada and British Columbia Civil Liberties Association v Chief of Defence Staff for the Canadian Forces, Minister for National Defence and Attorney General of Canada 2008 FC 336.

US

- Arar v. Ashcroft, 414 F. Supp. 2d 250, 287-88 (E.D.N.Y. 2006).
European Court of Justice and Court of First Instance
Case T-228/02, Organisation des Modjahedines du peuple d'iran v Council of the European Union, 12 December 2006.
C-317/04 European Parliament v Council and C-318/04 European Parliament v Commission, 30 May 2006.
Case C 402/05 Kadi v Council of the European Union and Commission of the European Communities, judgement forthcoming.

European Court of Human Rights

- Airey v Ireland, judgment of 9 October 1979, application no 6289/73.
Soering v UK, judgment of 7 July 1989, application no 14038/88.
Stocké v Germany, judgment of 12 October 1989, Series A no 199.
Waite & Kennedy v Germany, judgment of 18 February 1999, application no 26083/94.
Bankovic and other v Belgium and 16 other contracting states, admissibility decision of 12 December 2001, application no 52207/99.
Ocalan v Turkey, judgment of 12 March 2003, application no 46221/99.
Issa and others v Turkey, judgment of 16 November 2004, application no 31821/96.
Jalloh v Germany, judgment of 11 July 2006, application no 54810/00.
Behrami v France and Saratami v France, Germany and Norway, admissibility decisions of 2 May 2007, application nos. 71412/01 and 78166/01.
Saadi v Italy, judgment of 28 February 2008, application no 37201/06.
Maslov v Austria, judgment of 23 June 2008, application no 1638/03.

European Commission of Human Rights

- M & Co v Germany, admissibility decision of 9 February 1990, (13258/87; D&R 64,138).

UN jurisprudence

- UN Human Rights Committee, General Comment 31 on the Nature of the General Legal Obligation imposed on the States Parties to the ICCPR, CCPR/C/21/Rev.1/Add.13, 26 May 2004.
Agiza v Sweden, CAT/34/D/233/2003, 24 May 2005.
Alzery v Sweden, CCPR/C/88/D/1416/2005, 10 November 2006.

Other sources

- European Fundamental Rights Agency website (<http://fra.europa.eu>).
Statewatch website (www.statewatch.org).

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