

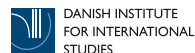


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FOREIGN POLICY AND DEFENCE

A New Standard for Fighting Terrorism under the Rule of Law

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The support of human rights and the rule of law are among the primary goals of the European Union's external policy. These principles are reaffirmed in the Lisbon Treaty, and there is a new obligation to ensure that they apply consistently across the EU's internal and external policies. One area where these principles have particular relevance is in fighting terrorism. In the years since the attacks of 11 September 2001, governments around the world – and most damagingly the United States – responded to the threat of terrorism with measures that violated human rights in far-reaching ways. Now there is an opportunity for the EU to take the lead, in collaboration with the Obama Administration in the United States, in defining a new set of principles for fighting the new security threats posed by international terrorism in a way that complies with human rights and the rule of law.

The response of the United States to the attacks of 11 September was widely decried in Europe. Such policies as indefinite detention of terrorist suspects at Guantánamo Bay, the use of interrogation techniques that Europeans generally regard as torture, and secret detention in 'black sites' did more than anything else to discredit the Bush Administration in European eyes. These policies also had direct and harmful consequences for EU member states. In the eyes of many Europeans, they provided a propaganda gift for Al-Qaeda and associated groups that threaten European countries as much as the United States. They made operational cooperation between EU countries and the US on the ground in Afghanistan and elsewhere more complicated, because Europeans could not presume that American forces and intelligence agents would comply with international standards. Most importantly, they drew many European countries into complicity with policies that violate EU principles, and prevented Europe from projecting a clear message about the importance of respecting human rights and international law while confronting terrorism.

For these reasons, the European Union responded enthusiastically to early moves by President Obama to reverse the legacy of his predecessor. In June 2009, European foreign ministers agreed a joint statement with the United States reaffirming that "respect for the rule of law and our respective obligations under international law, including international human rights,

refugee, and humanitarian law makes us more secure and strengthens us in the fight against terrorism”. The statement committed the EU and the US to deepen their dialogue on international legal principles relevant to counter-terrorism, and said the EU and US might explore “the possibility of developing a Set of Principles that might serve as a common reference point within the context of our shared efforts to counter terrorism”.

Not only would such a common set of principles put the EU and its closest security partner at the forefront of a principled approach to contemporary security threats, but it could also establish an international standard of ‘best practice’ and a reference point towards which the practices of other countries might be pulled.

This chapter aims to outline the contours of a possible set of principles, and to suggest how the European Union should pursue this objective in light of developments in the United States and globally since the agreement with the US was concluded last June. To reach agreement on a set of principles, the EU will have to refine its own thinking on some difficult issues raised by overseas military operations that engage with terrorist groups. It will also have to take account of the political climate in the United States, where issues of national security and international law have become the subject of intensely partisan debate.

European approaches to counter-terrorism

European countries do not all view terrorism in the same way, but it is possible to speak in broad terms of a European approach to fighting terrorism. Europeans regard terrorism, at least in its domestic manifestations, as a law enforcement problem, to be handled primarily through the system of criminal justice. Human rights law, in the form of the European Convention on human rights, provides a limiting framework. Where there is a threat to the life of the nation that cannot be met using criminal justice methods, European countries can derogate from some – though not all – human rights obligations, but only as far as is strictly necessary. Europeans also believe that human rights law provides the primary framework for action against terrorists overseas, except in a situation of armed conflict, where international humanitarian law is also relevant. There is no significant support in Europe for the concept of a world-wide armed conflict against terrorist groups that brings with it a global entitlement to kill terrorist suspects or detain them without trial.

There are some areas, however, where European thinking on counter-terrorism remains unresolved. Above all, European governments do not have clearly agreed policies on some difficult questions raised by external military operations against non-state armed groups, where the United States has largely taken the initiative. In Afghanistan, European members of NATO have struggled to deal with the problem of detaining people suspected of hostile activity. Initially, some European countries adopted a quiet policy of handing prisoners over to the US forces, but this approach became untenable after it was revealed that some of these

men had been transferred to Guantánamo. NATO subsequently agreed on a policy of handing all detainees over to Afghan authorities within 96 hours, but this has also attracted criticism because of widespread reports of abuse of prisoners by Afghanistan's National Directorate of Security. The underlying problem is that European nations do not have a common understanding of what the appropriate standards are for determining the detention authority of armed forces fighting against a non-state group on the territory of a third state.

An assessment of Obama's record

European officials were encouraged by the early actions of the Obama Administration to hope that a new common approach to counter-terrorism between the EU and the United States might be possible. Within two days of entering the White House, Obama directed that the Guantánamo Bay detention facility should be closed within a year, ordered the closure of the CIA's secret prison system, and restored the United States to a conventional understanding of the Geneva Convention standards for treatment of detainees. He also set up a series of task forces to advise about future US policies on detention, interrogation and the transfer of prisoners.

A year later, European perceptions are more mixed. The greatest cause for concern among European observers is that the Obama Administration has not renounced the idea of a global armed conflict against Al-Qaeda and affiliated terrorist groups (though it has abandoned the inflammatory concept of a "war against terror"). It is not clear (at the time of writing, in early January 2010) what the implications of this will be for US detention policy. Will the United States continue to assert that it is entitled to detain without criminal trial people alleged to be linked to Al-Qaeda, even if they were not apprehended in a zone of hostilities? Or will it move to put in place a standard for future detention that is more clearly limited to people detained in connection with an armed conflict as traditionally understood? The situation is complicated for the Obama Administration by the fact that it must not only determine policy for future captures, but must also deal with the legacy of the Bush Administration, in the form of just under 200 detainees held at Guantánamo. President Obama has said that there is a group of these prisoners against whom the United States cannot bring charges, but whom it is reluctant to release. Obama has also said he will miss his one-year target for closing the detention camp.

As Obama's team struggles with these complex questions, they have also been faced with a series of harsh attacks by Republican opponents charging that Obama is weakening US defences against terrorism. The attempted bombing of an airplane en route to Detroit on Christmas Day 2009 intensified the political debate within the United States on counter-terrorism policy. Against this background, US officials appear reluctant to move quickly to agree a new and comprehensive set of principles with the European Union. EU officials involved in discussions with the United States report that the Obama Administration does

not want to begin formal consideration of such an agreement before it has concluded its own review process. Senior US officials have made the same point in discussions with the present author. At the same time, these officials have said that the Obama Administration remains committed to the long-term project of establishing a shared framework for counter-terrorism between the United States and the European Union.

European officials had initially hoped to conclude a joint set of principles with the United States during the Spanish Presidency of the EU. This would have particular resonance in light of Spain's experience of Islamist terrorism with the Madrid bombings of March 2004. Spanish officials still intend to propose an EU-US declaration on terrorism during their Presidency, but it now appears highly unlikely that any substantive set of principles could be agreed in time to be attached to this declaration. It may therefore fall to the succeeding Presidencies of Belgium and Hungary to continuing working with the United States on principles for counter-terrorism. In addition, the declaration proposed under the Spanish Presidency might reaffirm the possibility of a joint set of principles in order to give continued momentum to the idea.

At the same time, a closed-door dialogue between EU and US legal advisers on counter-terrorism which was launched during the second term of the Bush Administration is set to continue. EU officials and EU member states have also had input into the task force reviews conducted by the Obama Administration. In these ways, discussions that promote mutual understanding and convergence between EU and US approaches are already taking place and can feed into any future work on a formal set of principles.

An outline of a common approach

While any precise outline of a suggested common framework must wait for the conclusion of the US internal reviews, it is still possible to sketch out the areas of likely agreement and potential discord.

General principles

An agreement on a shared framework of principles should start by affirming that terrorism represents a serious threat but that it must always be fought in accordance with the rule of law and human rights. There must be oversight and accountability for all forms of counter-terrorism activity, including that of intelligence agencies and military forces.

Detention

This remains the issue of greatest complexity, in particular regarding the definition of armed conflict and the detention powers associated with it. However it may be possible to agree principles that set reasonable limits to detention and prescribe meaningful forms of

due process. Such principles might include that detainees can only be held without charge if they are held in connection with an armed conflict or a state of national emergency (or perhaps where authorised by the UN Security Council); that even in these cases, security detention (except in the case of prisoners of war in an international armed conflict) can only be ordered on an individual basis for imperative reasons of security; that all security detainees are entitled to challenge the grounds for their detention before an independent body; and that they are entitled to regular review.

It seems likely, however, that EU officials will only regard such a principle as meaningful if the United States is willing to recognise some geographical limitation on its definition of armed conflict. One touchstone issue may be the fate of detainees at the US detention centre at Bagram in Afghanistan who were captured outside the Afghan military theatre. It would be helpful for European officials to try to clarify their own views on detention, and what their minimum requirements for an agreement with the United States would be.

Secret Detention

This issue has caused problems for EU member states as well as the US, following claims that the CIA maintained secret prisons on the territory of European countries including Poland, Romania and Lithuania. However both the EU and US should now be able to commit themselves to hold all detainees in a registered place of detention and give their names to an independent organisation such as the International Committee of the Red Cross.

Torture

The use by the United States of interrogation techniques widely regarded as torture, such as waterboarding (near-suffocation with water), was perhaps the most divisive issue between Europe and the US under President Bush. Since President Obama has renounced the use of such ‘enhanced interrogation techniques,’ it should be possible for both the EU and the US to reaffirm that the use of torture or cruel and inhuman treatment is never justifiable. A more complex problem, on which the EU should try to clarify its policy, concerns the questioning or provision of information about detainees held by third countries that do not comply with human rights standards.

Rendition

The policy of ‘rendition’ whereby individuals are transferred from one country to another outside any legal process of extradition was not invented by the Bush Administration. What was new in the Bush Administration’s use of rendition was that suspects were transferred not to face legal process but for the purposes of interrogation, often to countries with a well-documented history of using torture. While Obama’s government has suggested it will continue to transfer suspects outside legal processes, it has committed itself not to do so where there are substantial grounds for believing they might be tortured. Within Europe, too,

there is controversy about EU governments' use of diplomatic assurances to return foreign nationals to countries that are known to use torture. Although neither European countries nor the US appear willing to abandon the use of such assurances, which they claim provide effective protection against abuse, they should be able to reaffirm that there are no circumstances where individuals should be transferred to countries where they face a significant risk of torture.

Fair trials

The decision by President Obama to continue with the use of military tribunals for some terrorist suspects came as a disappointment to European officials, but at the same time the United States has introduced further protections for defendants. These include a complete ban on evidence obtained through coercive interrogation, restrictions on the use of hearsay evidence, and greater powers for the defence. For the EU, the important question is whether any trials before military commissions comply in practice with international standards of due process. Assuming they do, the EU and the US could jointly reaffirm that anyone charged with a terrorist offence is entitled to a fair trial before an impartial and regularly constituted court offering all essential procedural guarantees.

Targeted killing

This is one area where President Obama has continued the policies of the Bush Administration with little change. His administration has authorised a series of strikes by pilotless 'drone' aircraft over Pakistan, and in September 2009 it carried out a helicopter attack that killed a leading Al-Qaeda suspect in Somalia. Many European officials regard the widespread use of such targeted strikes as ill-advised, but there is little consensus in Europe about their legality. Moreover, the subject is clouded with ambiguity, as there is often little certainty about how far such attacks have consent of the government of the country where they are carried out. For these reasons, this topic should probably be omitted from any agreed set of principles.

Conclusion

The European Union has a strong interest in working with the Obama Administration in the United States to establish a new set of principles for combating terrorism in a way that respects human rights and the international rule of law. Such a set of principles would remove difficulties that European countries have faced in working together with their most important security partner. They would indicate to the world that the EU is firmly committed to the highest standards of human rights in its counter-terrorism policy. Most important, they would prevent injustice and would help establish an international standard for confronting new security threats in a legitimate and accountable way.

The domestic political situation in the United States, and the complexity of some of the issues involved, will probably mean it is not possible to conclude a full set of principles during the Spanish Presidency of the EU. However, the EU should seek to ensure that the commitment to explore the possibility of a set of principles is not abandoned – for instance, by including a reference to it in any declaration signed in the next six months. EU officials should work among themselves to refine their own views on the appropriate standards for counter-terrorism, especially regarding operations overseas, and should continue to deepen their dialogue with the United States. The ambition of working toward a new transatlantic framework for counter-terrorism should remain on the agenda for the forthcoming Belgian and Hungarian Presidencies.