EU Consolidated Efforts Towards Counter-Terrorism Legislation

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Abstract

EU Counter terrorism efforts becomes more effective after 9/11 terrorist attacks when Europe has felt intensely being at the risk of terrorism threat. Later on bombing events in London and Spain has brought the terrorism issue on the top priority of European security agenda. This has led to the adoption of several important changes in its legal counter terrorism framework. Under the legal framework the adoption of normal meaning of psychological oppressor offenses in Europe, presentation of the European capture warrant and utilization of bio-metrics technology be considered the ground-breaking legislations of EU counter illegal intimidation efforts. The paper aims to examine at giving a detail account of these pioneering legislations introduced in the legal counter terrorism framework, its achievements in suppressing terrorism in EU and more importantly the critical analysis of these legal tools according to the point of view of affecting the basic liberties of the individuals are discussed.
Keywords: EU, Terrorism, Legal Framework, Human Rights

Introduction

This article attempts to take an in-depth overview of the EU legislative efforts in countering terrorism and its threats. The EU has brought several changes in its institutional and legal framework for effectively curtailing the terrorism within Europe. Under the legal framework the most remarkable legislation adopted was the European Union Council Outline work choice on the shared definition of terrorism for countering terrorism within the EU. Besides that regulation on the European Arrest warrant as well as introduction of the use of biometrics is the few other pioneering legislative instruments under the legal framework for enhancing the efficiency of the EU in its fight against terrorism. Detail account of these legislative efforts is given in the present article and how far these proved to be effective in suppressing terrorism on the ground is analyzed.

EU Mutual Assistance and Consolidated Legislation in Criminal Matters

Since the very beginning EU has been quite active in adopting mutually agreed measures in an area of criminal law and cross border policing and terrorism. These measures were various. For instance, the EU mutual assistance in its counter terrorism efforts can be dated back to the year 1975 formulating two important legal instruments. The first was the establishment of the Extremism and global savagery bunch, Terrorism, Radicalism, and worldwide violent behavior group abbreviated as TREVI group and later the adoption of the European Convention on the concealment of illegal intimidation in the year 1977. The TREVI group was a composition of top level security officials and high cadre of interior and justice Ministers. It functions mainly in domain of terrorism and organized crime by exchanging information and providing mutual assistance. The Priests of equity and home undertakings of the then European Economic Community has approved formally the function of the TREVI group. However in year 1992 with the adoption of the Maastricht treaty it was absorbed in the Maastricht third pillar covering areas like asylum, immigration, customs, policing and legal co-operation.

Further development in the area of cooperation against terrorism and criminal matter was the setting up of new structure under the title 4 of the treaty of the European Union which has brought together European institutions dealing with customs, judicial and immigration issues along with the TREVI Group under the same structure. Title 4 of the treaty of the European Union also lay out the compensatory measures regarding terrorism and policing that can be taken upon the removal of the border control between the EU members states.

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Maastricht treaty also established a European Police office known as EUROPAL which becomes functional in the year 1998 after its role was defined by counter terrorism preparatory group in area of counter terrorism.7

Similarly, for the development of the EU area of freedom, security and justice the European Council had adopted a list of measures specifically related to the criminal procedure in its meeting in a Tempera on October 1999. This was considered a consolidated efforts and willingness of the member states to extend cooperation specifically in these areas.8 On the request of the European council the council agreed to develop a work program within a year on a mutual recognition of criminal matters and well as to establish a Euro just an organization within two years of the agreement for facilitating the cross border prosecutions.9 The work program was adopted in November 2000 which enlisted twenty four measures for facilitating cross border investigation, prosecution and enforcement of judgments.10 Various Member states responded positively by implementing the work program in their national laws. These States proposed for the ‘Frame work decision’ for harmonizing the national laws of the member states regarding orders and its enforcement relating to criminal matter within the member states national territories such as freezing of assets, evidences and enforcing judgment which imposed financial penalties.11 Besides that EU members agreed to work for harmonization of substantive criminal laws and as a result framework decisions were concluded concerning several areas such as counterfeiting the Euro, money laundering, forgery, fraud in the public procurement process, environmental crimes, trafficking in humans, child pornography and sexual exploitation as well as illegal entry or residence.12

Similarly for enhancing the efficacy and coordinating of policing within the EU, the member’s states agreed to extend the tasks of Europol by adopting the non-binding obligations.14 Besides those members states have agreed to consider the proposal for cross border national police surveillance.15 It is pertinent to note that despite establishment of bilateral cooperation in police and through other organizations the mutual coordination of the member states in the area of counter terrorism remained fairly limited. The basic reason

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9Ibid 227.
12Idem, 227.
13Idem, 227.
14Ibid, 227.
was that the member’s states were reluctant to give away their sovereignty to EEC in matters of security (Wilkinson, 2005).

The terrorist strikes in America has changed the scope of EU mutual assistance regarding criminal matters and included the offence of terrorism in it. The terrorist attack first in Madrid in March 2004 and then in London in July 2005 acted as a stimulus for the EU to undertake the extensive legislation to counter terrorism by strengthening EU and national institutions with a coherent legal framework. The most important development of the this legal framework work apart from the council decision on the definition and scope of terrorism of 13 June 2002, were the presentation of the European capture warrant and the utilization of biometrics on passport. The most important initiative tabled by the commission in this regard was for the definition and scope of the terrorism offence.

Towards A Counter-Terrorism Legislation in Europe

The event of 9/11 was considered instrumental in furthering a political integration and cooperation among the EU members in the realm of Justice, Homes and Affairs to such an extent unimaginable few years before. The event served as an impetus to speed up the task on the legislative proposals of the framework decision regarding the harmonization of the national laws to the development of the EU action plan on terrorism laws regarding the internal security of the member states. The flagship measures under the European counter terrorism legislation were the setting out of the definition of terrorist offences by the Framework decision. The adoption of the structure work choice on the definition and punishment of terrorism offences was considered a major breakthrough for intra-European counter terrorism co-operation. The inclusion of the agreed definition of the terrorist offences into the member’s legal system served as a cornerstone for the intra EU judicial and police cooperation.

Frame Work Decision on the Definition and Scope of Terrorism

The framework decision of the European Council of 13 June 2002 on the definition of the terrorism is considered to be very important legal instrument from the perspective of the

17 Steve Peers, EU Responses to Terrorism, 227.
21 Rik Coalseat, “EU Counter terrorism Strategy, Value added or Chimera” International Affairs, 86 No 4(2010). 859.
22 Ibid, 858.
23 Ibid, 858.
24 Ibid, 858.
EU legislation against the terrorism. The aim was to achieve the agreed definition of the terrorism and to harmonize the national laws of the member’s states to combat terrorism within the EU. It is necessary to do the analysis of the framework decision of the European council on the definition of the terrorism which is considered to be innovative and controversial legal instrument.25

Several issues with regard to the definition of the terrorism always comes into consideration while giving exact definition of terrorism in international law as well as in European law. One of the main issues of concern is the accurate legal definition of the terrorism and the offence of the terrorism. Furthermore, the issue regarding the acts or identifying the behaviors to be enclosed by the legal definition of terrorism thus raising the question to what extent the definition of terrorism shall be broadened. The identified behavior or acts to be covered by the definition of terrorism can readily help in pursuing its perpetrators as the terrorist26. European counter terrorism history has always been faced with the issue of one identified definition of terrorism. For instance, terrorism has been referred in the EU legislations and political documents but the term was without any juridical definition. Thus it becomes pertinent to have a shared juridical definition of terrorism especially after September 11 terrorist strikes in America, and council the framework decision on combating terrorism successfully gave a harmonized and comprehensive definition into EU legislation27.

The Framework Decision gives the three part meaning of the terrorism in Article 1(1) which involves setting, point of the activity and explicit demonstrations. To start with, the setting of the activity incorporates ‘purposeful demonstrations which may genuinely harm a nation or a global association’. The point of the activity incorporates such activities which may ‘genuinely threaten a populace’ or unduly force an administration to act or neglect to act or ‘truly undermine or obliterate the major political, protected, financial or social design of a nation or a worldwide association’. Thirdly the specific act can be one of the eight specific acts given in the list which includes ‘attack causing death, attack upon actual trustworthiness, capturing or prisoner taking, act making broad annihilation indicated public property or any private property, act jeopardizing human existence or bringing about major financial misfortune, capture of airplanes, ships or different method for public or great vehicle, ‘offenses associated with atomic, organic and synthetic weapons’, ‘arrival of risky substances or causing shoot, floods, or blasts’ with the impact of imperiling human existence’, slowing down or disturbing the inventory of water, influence or some other

crucial normal assets' with a similar impact. Indeed, even the taking steps to commit any of these eight specific offences given in the list was also included\(^{28}\).

The originality of the definition outlined by the Frame work decision is evident from the fact that the criteria of ultimate political goal given in the definition of terrorism distinguished it from the other ordinary offences. Previously the definition of terrorism given in the national common law and continental system was given from the perspective of inculpation irrespective to which the act is aimed or targeted at\(^{29}\).

Apart from the detail definition of the terrorism given in Article 1, offences concerning terrorist groups and offences concerning terrorism is given in Article 3 as well as liability of legal person concerning terrorism is given under Article 8 of the Frame work decision.

**Frame Work Decision Relating to Offences Concerning Terrorist Groups**

In article 2(1) of the frame work decision it is given that a part state can rebuff an offense of 'coordinating a psychological oppressor bunch or taking part' in that gathering by providing data or material assets, or by financing its exercises in any capacity, with the information on the way that such investment will add to the crimes' of the gathering. Connected offenses are likewise framed, for example, 'exasperated burglary or 'coercion' connected with any of the fear monger offenses given in Article 1(1) or 'drawing up a misleading authoritative records with the goal of committing psychological oppressor offense or partaking in a fear monger bunch. Further the punishments for illegal intimidation are passed on to the part states still up in the air for the psychological warfare as characterized by the casing work choice\(^{30}\). Article 5 required that offences of terrorism shall be extraditable and heavier sentences shall be imposed for terrorist offences and related inchoate terrorist offences except in instances where sentences are already maximum possible and in instances where there is absence of special intent\(^{31}\). Further 15 year maximum sentence shall be imposed for directing a terrorist group while 8 years maximum sentence shall be imposed in instance of participating in a terrorist group\(^{32}\).

However Article 6 curtail the penalty if the culpable of terrorist offence renounced the terrorism and helped in identification of offenders and helping the authorities with evidence to prevent the occurrence of any terrorist incident\(^{33}\).

**Frame Work Decision on the Liability of Legal Person Concerning Terrorism**

\(^{28}\) Ibid ,229
\(^{30}\) Ibid 68-72.
\(^{31}\) Ibid , 68-72.
\(^{32}\) Ibid 68-72.
\(^{33}\) Steeve Peers, ‘ E Responses to Terrorism ‘ 229.

1133 http://www.webology.org
For the very first time the frame work decision imposed the liability on legal person for the terrorist act ‘committed for its advantage by any individual, acting either exclusively or as a component of an organ of the legitimate individual, who includes a main situation inside the lawful individual 34. Similarly liability is imposed on the negligence of the legal person in instances such as ‘where the absence of oversight or control' by the legitimate individual or ‘for its benefit by a person under its authority’ has made possible the commission of criminal act35. Article 8 list detail sanctions that shall be taken against the legal person culpable of terrorist acts which shall take the form of ‘powerful , proportionate and dissuasive assents which will incorporate crook or non-criminal fines and may incorporate different endorses like ejection from public advantages or help, exclusion from the act of business exercises either brief or for all time, legal oversight, a wrapping up request or shutting down of foundation used to carry out terrorist offences.36

**Critical Analysis of the Frame Work Decision on Definition of Terrorism**

It would be important to discuss the criticism leveled against the Frame work decision on definition of terrorism. For instance the scholars criticized the language of the definition as ‘somewhat complex, and uncertain37. This gives the margin of interpreting the same fact in a contrary manner. For instance, the riots which has taken place in Paris and French cites is considered to be one the example which constitutes all the elements of terrorism as defined in the frame work decision such as its political orientation, intimidation of the population and endangerment of the social, political and constitutional structures. However, such instance was not perceived as the act of terrorism in France as well as abroad despite fulfilling the constituents given in the definition of the Frame work decision. 38This example still highlights the difficulty of contextualizing the offence of terrorism in a legal definition.

Despite the criticism leveled against the Frame work decision on the definition of terrorism it is still considered the remarkable achievement for giving the uniformed definition of terrorism to the EU member states and institutions. The definition may further be elaborated and refined in future however at the present the Frame work decision on definition of terrorism still constitutes the legal basis for the future legislation by giving common understanding on the constituent’s elements of terrorism to the judicial and political authorities dealing with it as a criminal offence39.

**European Arrest Warrant**

34 Ibid 230.
36 Ibid 230.
38Saul B., Defining Terrorism in International Law, Vaughan Lowe, ed., Oxford University Press, 2006, 164-166
39 David Casale, ‘‘ EU institutional and legal counter terrorism Framework ’’, 62.
European Arrest warrant is considered the most important legislative measure of the European legal framework. Apolitical agreement was reached between the European members after the idea was promoted by UK and Spain in the summit of European council in year 1999 that the ‘extradition shall be abolished among members states as far as persons are concerned who are fleeing from justice after having been finally sentenced and replace by simple transfer of such persons’\(^{40}\). The frame work decision on the European arrest warrant was finally adopted which replaced the previous extradition procedures among the member states on 13 June 2002\(^{41}\). The objective of the European arrest warrant was to obtain the of arrest and surrender of the individuals suspected of crime without delay which usually occurred in bilateral extradition procedure for the prosecution of suspected criminals as well as for the execution of the criminal sentences against them. The EAW is based on mutual recognition of the decision of the national courts of the member’s states by establishing a trust on the legal system of each other. Through this European Arrest warrant helped in the realization of the efficient area of freedom, security and justice in the European Union and is considered the cornerstone of the intra-European judicial co-operation\(^{42}\). Article 2 of the frame work decision of EAW list thirty two categories of offences such as terrorism, Human trafficking, Fraud, Pornography and child sexual exploitation are the few regarding which warrant can be issued. For instance the national judicial authority can request the arrest of the person accused of the criminal offence punishable with a penalty of ten years imprisonment\(^{43}\) or a person accused of an offence punishable with a four month penalty\(^{44}\). As the European arrest warrant is workable throughout the Europe the person against whom warrant is issued has to be surrender to the requesting member state accordingly. However, there are certain exceptions to the EAW. For instance, the arrest of the person can be denied if the he has been already tried for the same offence. Secondly, if the amnesty overage is providing to the offence in the executing state. Thirdly if the person requested is a minor as per the law of the requested state.\(^ {45}\)

Judging the effectiveness of the EAW, the European Commission on 23 February 2005 gives the first report regarding the effectiveness of the EAW and its implementation by the member’s states. The commission’s report underlines the fact that the issuance of 2, 603

\(^{42}\)Ibid, Preamble (6).
warrant justified the widespread use of the warrant among the judicial authorities of the member states. Further the time taken for the execution of the warrant has been reduced to 45 days\textsuperscript{46}. The use of EAW has been on rise as the statistics shows that in year 2005 6,900 EAW were issued. This figure reveals the reliance of the judicial authorities of the member states on the EAW as compared to the previous conventional extradition method between the member states. Further the issue regarding the conflict of the national laws which hampered the complete implementation of the frame work decision was overcome by the adoption of the new legislative measure in the year 2005-2006 resulting in the full implementation of the provisions of the EAW\textsuperscript{47}.

**Critical Analysis on the European Arrest Warrant**

The adoption of the European arrest warrant has given rise to constitutional issues in several member states. This in turn required the necessity of amendment in the constitutions of few member states\textsuperscript{48}. The very prominent example in this regard was Germany. The German constitutional court in its decision of 18 July 2005 declared the German Act provision void on the ground of implementing the provisions of the Framework decision EAW. These provisions were declared by it against the fundamental rights and guarantees granted to the citizens in Germany. It seems that although EAW provisions expedite the process of arrest however it resulted curtailment of the right of fair trial and defense available to the individuals in the member states\textsuperscript{49}. For instance European Arrest Warrant is mainly based on the model of recognizing the judicial decision and cooperation among the member states rather than on the process of the harmonization of the criminal law of the member states\textsuperscript{50}. Besides that the commission work to construct a typical criminal framework in view of the common qualities a thought given by the commission green paper on the European Public Prosecutor \textsuperscript{51} or by the project of the European corpus jurist\textsuperscript{52} has been impeded by the member states who want to maintain control over its criminal law matters. Thus the practical model of EAW is established by

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abolishing the legal barriers between the member states and rule out the option of the harmonization of the laws. However, this model of the reciprocal trust and mutual recognitions of the legal specialists of the part state resemble American national courts based on the principle of ‘full confidence and credit statement’. However the necessary guarantee is still present in the form of American Bill of rights which is altogether missing in the model of European Arrest warrant which has the effect of making the individual rights in member states quite vulnerable.

**Use of Biometrics Technology**

Among the counter terrorism methods, the introduction of the biometrics is considered the most innovative technological tool for controlling terrorism within the European Union. After the September 11, 2001 attacks the EU make use of the biometric identifiers for improving the security of the identity documents. It was then decided in the European council meeting at Laeken on December 2001 and later in Seville on June 2002 for the introduction of the biometric identifies in visa information system. The sole purpose was to prevent the ‘visa shopping’, and improvement of the common visa policy with the European union which in turn will be helpful for maintaining the internal security of the union and curtailing the terrorism.

Joint Research Centre for the European Commission gave the definition of the biometrics in its report drafted on the impact of biometrics in year 2005. Biometric is defined programmed acknowledgment of an individual utilizing recognizing attributes. The European Commission used face recognition, finger prints, DNA and iris recognition as biometric identifiers. The Commission gave proposals for the introduction of the biometrics in the visas and the residence permits for the foreign nationals in September 2003.

Critical Analysis on the Use of Biometrics Technology

54 David Casale “EU institutional and legal counter terrorism Framework”, 66.
56 Ibid
59 David Casale , “EU institutional and legal counter terrorism Framework ”, 67
The foremost criticism leveled against the use of biometrics system is the erosion of the personal freedom of the individuals. Once widely implemented its use will be expanding both in term of the data collected and its use in everyday life. This gives rise to the serious issue of keeping a balance between security and liberty. The rapporteur of the European parliament on biometrics in visas remarked about the sensitivity involve in the use of biometrics. He remarked about the proposals regarding the use of biometrics which could be systematic and results in a centralized capacity of sensitive individual information which ‘would resemble utilizing a demo hammer to open a nut’\(^60\). He observed that such storage of sensitive personal data may have the consequence to affect the civil rights more importantly the right to privacy\(^61\).

Besides that, the extensive use of the biometrics seemed to affect the trust model between the state and the citizen. The governmental aspirations to achieve the maximum security have challenged the fundamental concept of trust. This trend has given “rise to the risk of treating the customary residents being nearly treated as criminal suspects”\(^62\). Even if the citizens sacrifice their personal liberties for achieving the more secure world, however this sacrifice cannot be fruitful in a long run and may lead to a disintegration of confidence in states\(^63\).

Another sensitivity involved in the use of biometrics is that it can be linked to other personal information which can be shared with the third parties thus leading to the abuse of the sensitive information. It is said that introduction of the biometrics id cards and passports and EU health card based on biometric technology would be soon replaced by one single chip which would integrate all these identity documents resulting in setting up of a surveillance society in a near future\(^64\). This trend demands the need for the effective protection of the data and privacy. Visualizing the risk of biometric data abuse, the commission report strongly pointed towards establishing a legal framework for privacy and data protection of the personal information\(^65\). Though the data protection Act of 1995\(^66\) provide the protection on the use of the personal information however it is said that use of biometric technology recently have seemed to outstripped the said legislation. A European project named BITE (Biometric Identification Technology Ethics) was established over the
EU’s Sixth Research agenda. Aim was to study the moral implication of the use of the biometric technology and initiating a legal, social and ethical debate by involving all the stakeholders’ parties in the field over the use of biometrics\textsuperscript{67}.

**Conclusion**

From the above detailed discussion on the EU legal counter-terrorism framework, it can be construed that EU has taken extensive measures in the form of introducing the schema result on the terrorism, European arrest warrant and the use of biometric technology for its fight against terrorism. However, these measures are not devoid of criticism regarding its effect on the citizen’s human rights. The wider definitions given in the council framework decision on the definition of terrorism particularly of the offences of anti-terrorism, offences of the incitement to an apology for terrorism and offences of the membership of a terrorist group could even result in apprehending a person occupied in official political struggle by being recognized as terrorist due to the effect of these wider definition of the offences. Similarly, European Arrest Warrant can also risk the fundamental rights of the individuals against whom the arrest warrant can be given while disregarding the norm of the fair trial and right to defense available under the fundamental human rights. A similar concern is leveled against the use of biometrics information by law implementation strictly. All these cases sufficient safeguard need to be introduced so that European Union shall avoid adopting such terrorism measures which cost the fundamental rights of the citizens while routing out the terrorism. It must be underlined to facilitate the fight against terror campaign and security of humans’ right in the European Union shall not become conflicting rather complementary and mutually reinforcing determination.

**Note**

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