Introduction and state of the debate

The war on terror is not only conducted in Afghanistan, Pakistan, and Yemen but has important domestic theatres in the US and Europe as well. Winning the war without losing the peace implies finding a domestic balance between individual freedom and collective security. This means reducing the terrorist threat without unduly violating human rights or undermining crucial democratic achievements. Many important political activities in this regard are conducted cooperatively between the US and the EU. The recent agreement on US access to EU banking transactions (SWIFT), the renegotiation of the PNR (Passenger Name Record) agreement, the transfer of former inmates of the Guantanamo prison to member states of the EU, and the informal cooperation between American and European intelligence services in various common institutions are cases in point.

This article analyses the decision-making processes that underpin Europe’s transatlantic policy in the area of counter-terrorism. It proceeds on the idea that European foreign policy (EFP) should be understood as a fragmented intergovernmental opportunity structure. This fragmented structure allows for uploading of national policies, for institutional forum-shopping, and for a strategic use of the EU’s political resources in order to pursue governmental interests. It is thus an important factor in the process of readjusting the balance between individual freedom and collective security that the EU and its member states have witnessed since 2001.

As counter-terrorism is a relatively new policy area, the amount of literature focusing specifically on the EU’s fight against terrorism is still limited. In the early years after 9/11, some scholars argued that counter-terrorism (CT) was simply not part of EU foreign policy (Keohane, 2008). This added to the perception that the EU was a mere ‘paper tiger’ in the area of CT (Bures, 2006). Adopting a different point of view, Javier Argomaniz (Argomaniz, 2009) explained that 9/11 was an external shock that had a significant impact on the establishment of this policy field on the EU level. However, since ‘member states are the pillars of European counter-terrorism and national authorities still do the lion’s share of counter-terror work in practice’ (Argomaniz, 2009: 168), the EU action has focused on coordination rather than on integration and harmonisation. More recently, a number of scholars have suggested that the Lisbon Treaty provides the legal basis for an increasing EU involvement in CT (MacKenzie, 2010). This trend is evidenced
by the inclusion of a CT clause in all the agreements signed between the EU and third countries, the use of the Instrument for Stability to combat terrorism in third countries, and the security dialogue conducted by the EU with the US (Aldrich, 2009; Dworkin, 2009; Monar, 2010; Rees, 2009), with the Maghreb region (Joffé, 2008), within the framework of Euro–Mediterranean cooperation (Wolff, 2009) as well as with several international and European organisations (Kaunert, 2010; Eckes, 2009). Furthermore, Geoffrey Edwards and Christoph O. Meyer (Edwards and Meyer, 2008) have argued that EU governance as a whole has been affected by the Union’s fight against international terrorism. They show how ‘[…] the study of the “politics of counter-terrorism” reveals more widely applicable phenomena in the evolution of EU governance, including the limits and dynamics of cross-pillarisation, the use of soft-law and peer-review, the commitment-implementation gap, cooperation outside the Treaty framework, growing accountability and legitimacy deficits and impact of the US and UN on EU policy-making’ (Edwards and Meyer, 2008: 4).

The two-track character of the EU’s foreign policy in CT

As opposed to most of the literature, I understand European foreign policy as encompassing all cross-border policies of the European Union institutions plus those of the member states. European foreign policy thus encompasses the European Commission’s policies, the treaties, decisions, and declarations concluded and adopted by the European Council and the Council, and the individual foreign policies of the member states. It is about policies between the member states and third countries as well as between the European institutions and third countries.

Such a broad understanding of EU foreign policy will sound unfamiliar to many EU scholars who are used to understanding EU foreign policy as comprising only those policies that are conducted under the legal and institutional umbrella of the CFSP. They might object that I analyse foreign policy in Europe rather than the foreign policy of the European Union. I submit, however, that the very nature of EU foreign policy defies any legalistic formalism. European foreign policy-making must be properly understood as a two-track process in which member states deliberately choose whether to conduct a foreign policy at the European or at the national level. The member states have over time established a de facto division of competencies between the national and the European level which is easily overlooked by approaches that equate European foreign policy with the policies of the European institutions: the European institutions have been equipped with the competence only to develop and implement ‘normative’ policies with a strong foundation in universal values such as foreign aid and the promotion of human rights. All these ‘track one-policies’ emphasise ‘positive conditionality’, common norms and values and refrain from entertaining open economic or military threats. They are evidence that the EU is established on a set of shared norms and values and that it is more than a technical problem-solving community or a purely functional regime. Track-one policies are, however, only a part of the story.

The EU’s foreign policies are simultaneously formulated on a second member state track that is in charge of the ‘non-normative’ policies. Military interventions and alliance-building, the fight against terrorism, or decision-making in the United Nations Security Council are not off the agenda of European politics. They are relegated to the national and international realm and are conducted without supranational interference. Another characteristic of European foreign policy that militates against a neat separation of the European and the national level is that many of the strategic partnerships and regional neighbourhood initiatives or interventions of the EU are de facto national or mini-lateral projects of a small group of member states. European politics is often European only in name. Many of the initiatives and missions conducted under the
European label are better understood as mini-lateral or even unilateral policies that are only tolerated by other member states. Individual member states, or small groups of member states, use the opportunity to upload their national foreign policies onto the European level in order to strengthen their bargaining power vis-à-vis third countries. Europe is considered instrumentally as a power multiplier that can be ignored or marginalised when strategic interests are involved. While member states frequently couch policy proposals as being in the ‘EU interest’, there is no real indication that a concern for the ‘common EU good’ is driving their national foreign policies. Rather, it appears that member states pursue their national interests by whatever means possible, with both small and large states attempting to ‘upload’ their national policy preferences to the EU level whenever the latter is perceived to be an effective ‘instrument’ for the pursuit of their interests.

From track-one idealism to track-two pragmatism: new legal and political framework

The development of the European two-track foreign policy over the last twenty years is a story of reducing overly ambitious aims and of realising that the member states, and not the European institutions, are – and probably will remain – in the driver’s seat. The main idea behind the launch of the CFSP in 1993 was to overcome the European foreign policy dissonance, to make Europe speak with one voice, and to enable the EU to secure peace in Europe and its neighbourhood. The summits of Cologne, Petersberg and St. Malo, and the European Security Strategy (ESS) were perceived as important milestones on that way. The EU would have a clear idea of its interests abroad and be equipped with the hard- and software to implement the necessary actions. Thorough treaty revision was suggested in order to streamline the institutions of the CFSP with a view to making the EU’s actions more coherent and effective and providing the European partners with a single responsible contact person for all external affairs (Tomuschat, 2010).

Few of these high ambitions have been realised in the meantime (Majone, 2009). The EU still has neither a single foreign policy voice nor the necessary institutional software for formulating a coherent foreign policy. The Lisbon Treaty has done little to improve the international standing of the EU. It failed to establish a powerful institution with the competence to formulate and implement the Union’s foreign policies. The pre-Lisbon idea to establish a single telephone number for third parties wanting to negotiate with Brussels has been realised; unfortunately, however, the telephone is answered by a President of the European Council who is more a chairman than a leader. He is merely in charge of reconciling differing points of view and encouraging the emergence of consensus among the 27 member states. This requires working in harmony with the president of the Commission and the newly appointed High Representative. The High Representative is also a rather weak actor who can speak for the member states only if they have agreed on the policy in advance. Foreign policy competences in the EU are still divided among the European Council, the High Representative, the Commission, the Presidency of the EU, and – last but not least – the twenty-seven member states.

It is true that the institutional fragmentation of the EU’s foreign policies is not a new phenomenon but has been criticised ever since the CFSP was launched in 1993. What is new, however, is that we are witnessing today a farewell to the very idea of a supranational institutionalisation of the common foreign and security policy. The old supranationalist idea that the European institutions should provide the member state foreign policies with a strong institutional framework has turned from a compelling normative vision into a political anachronism. Today, the 27 member states perceive and use the EU as an instrument for fostering national
interests. A pragmatic understanding and use of the EU has become predominant, especially in the field of CT in transatlantic cooperation.

The political and institutional framework for transatlantic cooperation has, contrary to most expectations, changed for the worse since the beginning of 2009 (Dworkin, 2009; Rees, 2009; Aldrich, 2009). Although President Obama’s White House is marked by a new style of policy-making, this has had no substantial impact on practical policy. The United States still sees itself at war against al-Qaeda and its terrorist affiliates. The EU and its member states, on the other hand, combat international terrorism above all with policing measures. In addition, on the legislative level, the transatlantic partners have moved even further from one another. In Europe, the Lisbon Treaty strengthened the European Parliament and, consequently, brought questions of data protection and civil rights to the fore. In the United States, by contrast, the Republican Party won the majority of seats during the elections for the House of Representatives in November 2010, and security was again given priority over civil rights.

**Legal framework in the EU: prioritising prevention**

The EU considers international terrorism as one of the biggest threats to its security. However, since the very beginning, the Union has also recognised the importance of respecting human rights. After the terrorist attacks in Madrid (2004) and London (2005), the member states of the Union adopted their own counter-terrorism strategy at the end of November 2005 (Coolsaet, 2010). In the document, the EU proclaims to ‘combat terrorism globally while respecting human rights and allowing its citizens to live in an area of freedom, security and justice’. The focus is particularly on prevention. By means of military and civilian missions under the auspices of the former European Security and Defence Policy and the current Common Security and Defence Policy, the EU’s foreign policy aims at improving the Union’s security environment. The goal is to influence the conditions for radicalisation and reduce the propensity to violence in third states.

The self-imposed commitment of the EU to respect human rights and international law in its counter-terrorism policy is also expressed in the Stockholm Programme (The Stockholm Programme, 2010) of April 2010. To implement the programme, the Commission published a document listing future legislation in the area of Justice and Home Affairs. The document contains altogether 170 different proposals to be adopted by 2014. Particularly important are the proposals to improve data protection in the EU, to strengthen the rights of defendants in criminal proceedings, to establish a European Passenger Name Record, and to introduce an entry-exit system. The EU emphasises that all legislative proposals must respect the Union’s Charter of Fundamental Rights. In the case of data retention, this means prioritising the protection of citizens over the fight against terrorism. To this end, the EU plans to reconsider the rules of data retention so that the principle of proportionality will be better taken into account. Last but not least, the EU underlines its will to play an independent role in the fight against terrorism with its newly established ‘EU internal security strategy’.

By introducing the Charter of Fundamental Rights and stating the Union’s aim to join the European Convention of Human Rights, the Lisbon Treaty ensures that the EU’s counter-terrorism policy is, more than ever, anchored within the framework of the rule of law and international law. Article 21 of the Lisbon Treaty declares that the principles of the rule of law as well as the protection of human rights and international law are the guidelines of the EU’s external action. Article 83 of the Treaty on the Functioning of the European Union, on its part, extends the use of the ordinary legislative procedure to the fight against terrorism and organised criminality. In practice, this means that the European Parliament is allowed to be involved in
drafting legal acts in this policy area. Furthermore, international agreements falling within the jurisdiction of this policy area need to be approved by the European Parliament.

**Counter-terrorism policy of the United States: no demilitarisation**

When Barack Obama took office in January 2009, a majority of the general public in Europe interpreted this as a hopeful sign and a promise of a new beginning (Rudolf, 2010). In the United States, the strategic orientation of counter-terrorism policy is laid down in the National Security Strategy (NSS). Barack Obama presented his first NSS at the end of May 2010. The preamble of the document states that ‘for nearly a decade, our Nation has been at war with a far-reaching network of violence and hatred’. Expressions such as ‘Jihad’, ‘radical Islamism’, and ‘terrorism’ are avoided in the whole text to distance it from the National Security Strategies of Obama’s predecessor, George W. Bush, that date back to 2002 and 2006. In spite of the changes in terminology, Obama’s NSS does not aim at demilitarising the fight against terrorism. Consequently, no approximation to the European perception of counter-terrorism is in sight. On the contrary, the NSS simply replaces the old term ‘war on terror’ with a new one: the United States is now ‘at war against al-Qaeda and its terrorist affiliates’. This is why the Obama Administration will take the fight against terrorism to places where terrorist attacks are planned and terrorists are trained: ‘to Afghanistan, Pakistan, Yemen, Somalia and beyond’. In the NSS of 2010, the Obama Administration confirms its will to achieve multilateral cooperation with old and new partners. The basis of this cooperation is to be international law and the United Nations is granted a new status. However, by ‘declaring war’ on al-Qaeda, the US administration simultaneously takes up a political position with far-reaching consequences that are likely to cause opposition not only in Europe. The declaration of war on ‘al-Qaeda and its affiliates’ creates a permanent state of emergency. This course of action generates conflicts between the humanitarian international law applied in war, on the one hand, and the national and international legal provisions that apply to policing missions, on the other.

To make matters worse, all past attempts to work out a universal definition of terrorism within the framework of the United Nations have failed. The United States still claims the right to act unilaterally and to use military means in the fight against terrorism. It justifies its military actions in Pakistan and Yemen by pointing to its right to self-defence and did not even try to get formal authorisation from the Security Council. The essential difference between the United States and the EU remains that the United States combats terrorism by military means, whereas the EU and its member states concentrate on policing and intelligence measures.

**Transatlantic declarations on track-one with little substance on track-two**

Regardless of these differences, the threats posed by terrorism are assessed in a similar manner on both sides of the Atlantic. The efforts to take coordinated action are also apparent. Since mid-2009, four EU–US declarations on counter-terrorism have been adopted in quick succession. However, the declarations are not only expressions of a well-functioning transatlantic cooperation. They also make it clear that the EU finds it difficult – even after the entry into force of the Lisbon Treaty – to appear as a unified actor. The Union’s actions often remain non-binding because it has only limited legal competencies vis-à-vis its member states. Critical declarations and demands of the European Parliament are followed by significantly less critical actions of the executive authorities of the member states. And while the European Parliament continuously insists on human rights and data protection, 21 of the 27 EU member states took or are taking part in the US-led Operation Enduring Freedom in Afghanistan – either directly
by sending troops and arms or by offering indirect support. After all, the member states themselves make the final decision about participating in military operations and other international missions, regardless of whether these involve fighting terrorists or not. At the same time, the EU has only limited legal competences. For this reason, the Union remains, for the time being, only one of the many partners in Europe when it comes to questions related to counter-terrorism.

Transatlantic CT in practice

Counter-terrorism cooperation between the EU and the United States is marked by a great degree of diversity and heterogeneity. This results from the fact that while the European Parliament and the European Commission set high legal standards in accord with the principles of the rule of law, in practice the EU’s member states seldom live up to them. Above all in view of protection against concrete terrorist threats, the member states value the results of investigations and proceedings even when these have been obtained by means violating the Union’s standards. The different areas and forms of transatlantic cooperation have differing impacts on the principles of the rule of law.

Track-one policies

Terrorist lists

Since the terrorist attacks of 9/11, individual nations like the United States but also other actors such as the United Nations and the European Union have been aiming at systematically freezing the financial assets of terrorists. One of the most important instruments to achieve this goal is compiling lists of individuals and organisations that are suspected of involvement in terrorist activities. People are often placed on a terrorist list without due judicial process and on the basis of undisclosed intelligence. Once on the list, terrorist suspects are denied access to their accounts and thus cut off from domestic and international transactions. The new US administration, just like the old one, is directing its counter-terrorism strategy at both the potential channels and the sources of terrorist funding. The government has demanded stricter customer due diligence requirements for banks in order to combat money laundering and increased the scrutiny of donations originating in the rich Gulf countries. The authorities have also investigated all Islamic charities and, furthermore, placed them under the supervision of either the US State Department or the Treasury. If an Islamic charity wants to send money abroad, the transaction now has to be approved by the Federal Reserve. A rejection of this policy, which was started already under the Bush Administration, is not foreseeable.

Compiling terrorist lists is very problematic from the perspective of those aiming at upholding the rule of law. The source of information leading to inclusion on the list is often a piece of data received from a friendly intelligence service. For political reasons, these sources cannot be disclosed in court, and the information can thus only seldom be verified. Individuals and organisations on a terrorist list can end up having to prove their innocence without knowing what they are accused of (Peiffer and Schneider, 2008: 7). In practice, the listing procedure limits the right of access to a court. Thus, it openly conflicts with the principle of the due course of law and the international legal obligations of the EU member states. The right to a fair trial and the right of defence are laid down in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, as well as in Article 6 of the European Convention on Human Rights.

Despite this, the idea of compiling terrorist lists is seen as a necessary instrument to take action when there is not enough incriminating evidence against a person or an organisation or when this evidence cannot be disclosed.
The listing and de-listing procedures themselves, however, have been heavily criticised (Biersteker and Eckert, 2006; Bothe, 2008). The criteria according to which individuals, groups, and entities involved in terrorist activities can be put on the EU’s terrorist list are defined in Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and in Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism. The persons on the list are subject to enhanced measures related to police and judicial cooperation in criminal matters within the framework of the Treaty on European Union. In addition, the financial assets of these persons are frozen. All requests to be taken off the list submitted by listed persons, groups, and entities, or by member states and third states, are discussed by the Common Position 931 Working Group. Only after this does the Council decide about reviewing the list.

The EU terrorist list has to be distinguished from the regulation of the EU to support UN Security Council resolution 1390/2002. The latter aims at freezing the funds of individuals and entities associated with Osama bin Laden, al-Qaeda, or the Taliban. After the European Court of Justice published its decision in Joined Cases C-402/05 P and C-415/05 P (Yassin Abdullah Kadi, Al-Barakaat International Foundation against the Council and the Commission), Council Regulation (EC) 881/2002 had to be changed. The listing procedure now has to ensure the right of defence – first and foremost the right to be heard. According to the modified procedure, every listed person, group and entity has to be notified of the reasons for their inclusion on the list, as provided by the al-Qaeda and Taliban Sanctions Committee of the United Nations. This should give each affected party the possibility to state its view on the reasons for its inclusion. The emphasis on the standards of the rule of law in European counter-terrorism policy is apparent also in more recent rulings. In its decision of 30 September 2010, the European Court of Justice annulled Council Regulation 1190/08, on the basis of which the financial assets of Saudi Arabian citizen Yassin Abdullah Kadi had been frozen. According to the court, Kadi had been granted insufficient access to the evidence used against him.

The Stockholm Programme of the European Council that was adopted in 2010 allows no deviations from the principle of the rule of law (The Stockholm Programme, 2010): protecting the rule of law, fundamental rights, and fundamental freedoms is seen as ‘one of the bases for the Union’s overall counter-terrorism work.’ Counter-terrorism measures ‘must be undertaken within the framework of full respect for fundamental rights and freedoms’ and the Union ‘must ensure that all tools are deployed in the fight against terrorism while fully respecting fundamental rights and freedoms’.

No comparable process has taken place at the international level. The international legal standards were improved by adopting UN resolutions 1617, 1730, 1735, and 1822. However, a fundamental problem is that there is no judicial authority in the United Nations that individuals could turn to, as only states may refer cases to the International Court of Justice. Even the establishment of the post of a UN ombudsman in line with UN resolution 647 helps only to a limited extent, as the investigations conducted by the ombudsman are not considered as legal procedures. Furthermore, the final decision about removing a name from the terrorist list remains in the hands of the sanctions committee which consists of high-ranking officials of the concerned states. The ombudsman is only mandated to collect information and present it to the sanctions committee. The procedure thus hardly improves the legal protection of the affected parties.

As far as the listing of persons and organisations suspected of involvement in terrorist activities is concerned, the legal developments in the EU have taken an independent course. Placing greater emphasis on the principles of the rule of law, Europe is well ahead of the developments at the international level and in the United States.
Data protection

The debate about data protection revolves around the question when and under which conditions the United States should have the right to access data on European citizens and companies. The debate has escalated because the data protection policies of the United States and the EU have recently developed in opposite directions. The Patriot Act has enhanced the competences of the US government to collect private data, whereas the EU Data Protection Directive 95/46/EG, the Charter of Fundamental Rights of the European Union, and the new competencies granted to the European Parliament have had the exact opposite effect. Questions regarding data protection are highly disputed among the transatlantic partners. The most significant disputes concern the Passenger Name Record (PNR) and the Terrorist Finance Tracking Program (TFTP). A new data protection agreement is likely to cause further discord. All three cases are expressions of the increased influence of the European Parliament and the insistence of the Union on high legal standards.

In the case of the TFTP, even the commencement of negotiations owed to the European Parliament’s view that the United States dealt too carelessly with the bank data that had been transferred to it (Monar, 2010). The point of departure of the negotiations was the existing bank data agreement between the EU and the United States which ensures that American secret service officials have immediate access to financial transactions between EU member states and third states through the server of the Society for Worldwide Interbank Financial Telecommunication (SWIFT), a service provider company for banks involved in international transactions. Previously, US security services had access to the SWIFT network because parts of its servers were situated in the United States. The new agreement is a reaction of the EU to the transfer of one of the servers to Europe, which restricts the US authorities’ control of the retained data.

The greater self-confidence of the EU is visible also in questions concerning the Passenger Name Record (PNR). More and more states are taking advantage of passenger data to fight terrorism and organised criminality. Law enforcement authorities can use booking data to prevent and solve crimes or to make risk analyses. A new PNR agreement was adopted at the end of November 2011. The agreement foresees stricter rules on police and law enforcement cooperation. The Department of Homeland Security will be obliged to share both PNR and analytical information obtained from this data with law enforcement and judicial authorities of the EU member states. The European Parliament has heavily criticised the past agreement and struggled for a new one that would provide EU citizens and airlines with a sufficient degree of legal certainty and ensure that US authorities respect fundamental principles of data protection. Within the framework of the past agreement, the EU committed itself to transferring passenger data to the United States, whereas the United States merely offered to try to get the US airlines to send their data in the opposite direction (Argomaniz, 2009). Both the TFTP agreement and the negotiations for a new passenger data agreement demonstrate the EU’s willingness to work towards an extended protection of personal data.

Track-two policies

Extraordinary renditions and secret detention facilities

In early 2002, the US government started to arrest terrorist suspects – often without due process – and detain them in secret prisons around Europe. The Council of Europe estimates in its report of June 2007 (Council of Europe, 2007) that around 100 persons were captured by the CIA in European territory and brought to other countries, often only after they had been held in one of the so-called black sites: secret detention centres run by the CIA in cooperation with
different European governments. A total of 1,245 flights have been listed heading from Europe to countries in which it was possible to subject the detainees to torture, thus infringing Article 3 of the UN Convention against Torture (European Parliament, 2007). With its so-called High Value Detainee programme, the CIA wanted to capture, place into custody, and even kill terrorist suspects. Many member states tolerated the illegal actions of the CIA and cooperated only extremely reluctantly with the Council of Europe when the latter wanted to investigate the issue.

With the executive order of 22 January 2009, the Obama administration banned interrogation tactics involving torture and launched an investigation in the unlawful activities of the Bush era. In the United States, this has so far not led to criminal prosecutions against individual US officials or their conviction by a court, unlike in Europe, where a Milanese court convicted a group of former CIA agents. For the time being, the United States has not completely abandoned the practice of arbitrary arrests either. The CIA was prohibited from opening new detention centres, but was, at the same time, allowed to run the already existing facilities if they are used only to hold people on a short-term, transitory basis (Panetta, 2009).

Extraordinary renditions and secret detentions entail a number of human rights violations. These include violations of the right to liberty and security; of the freedom from torture and cruel, inhuman or degrading treatment; of the right to an effective remedy; and, in extreme cases, of the right to life. This is why the European Parliament exhorted the Council and the member states ‘to issue a clear and forceful declaration calling on the US government to put an end to the practice of extraordinary arrests and renditions’ (European Parliament, 2007). Extraordinary renditions and secret prisons infringe international human rights norms, the United Nations Convention against Torture, the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the Charter of Fundamental Rights of the European Union.

The fact that many member states tolerate the illegal practices of the CIA is reflected in the actions of many European intelligence services. These use intelligence even when it has been obtained in countries in which torture is a common practice (Scheinin, Nowak et al., 2010).

The human rights organisation Human Rights Watch laments the lack of adequate and transparent rules concerning cooperation with the intelligence services of countries in which torture is known to be practised (Human Rights Watch, 2010). In addition, the mechanisms for controlling intelligence services in general are underdeveloped.

**Taking in Guantánamo Inmates**

Since 9/11, the United States has held 779 terrorist suspects in a detention facility at the naval base in Guantánamo Bay in Cuba. At the end of 2010, altogether 600 prisoners were transferred to third states, whereas the future of 172 inmates is still being disputed. In 2008, the Supreme Court of the United States ruled the practice of detaining terrorist suspects without due process illegal. According to the Court, all the Guantánamo detainees have the right to a habeas corpus review of their cases by a civil court. Barack Obama reacted to the unlawful detainment of terrorist suspects directly after his entry into office. Already on the second day of his term, he declared his intention to close the Guantánamo detention facility within a year. At the same time, he prohibited the use of violent interrogation methods with immediate effect.

In the United States, Obama’s policy of a rapid closure of the detention facility attracted only limited support. The Congress blocked the transfer of Guantánamo detainees to the United States by refusing to provide the government with the necessary financial means. Although Obama ordered a revision of the guidelines of the Guantánamo military committees that had been introduced by George W. Bush, the possibility of sentencing terrorist suspects detained in
Guantánamo as ‘unprivileged enemy belligerents’ remains, and persons tried in a military tribunal do not have the same rights as those tried in a civilian court. The reformed bill does, however, prohibit the use of evidence obtained through coercion and hearsay.

Concerning the domestic situation in the United States and the problematic legal position of the detainees, the European Parliament (European Parliament, 2007) stressed that it is all the more important that European states take in Guantánamo inmates, as inmates who were not accepted by the member states of the EU would face the risk of being transferred to a country with lower standards of the rule of law.

Nonetheless, the EU member states were not ready to act in a coordinated manner. All negotiations considering the transfer of Guantánamo inmates were conducted between the member state in question and the United States bilaterally.

Transfer of detainees to Bagram

On its Bagram military airbase in Afghanistan, the United States operates the so-called Bagram Theater Interment Facility – in military jargon also known as the Bagram Holding Facility. The facility holds around 700 terrorist suspects who have been arrested in the course of Operation Enduring Freedom. In its dealings with terrorist suspects, the Obama administration has, in principle, adopted the hard line taken by the Republican Administration of his predecessor George W. Bush. The detainees are refused due legal process by arguing that only the norms of humanitarian international law apply to them. The inmates cannot contact a lawyer and are not tried in a court. Bagram is also, to a great extent, cut off from the outside world. The names of the imprisoned persons are published, but all the details concerning the length and reasons of their detention are made unrecognisable. Bagram inmates have even fewer rights than the Guantánamo detainees. As a reaction to the criticism directed at its internment practice, the United States wants to hand the military prison over to the Afghan security forces.

The internment practice of the United States infringes all the principles of the rule of law. Thus, the European Parliament demanded that all the member states conducting military missions in third states should ‘ensure that any detention centre established by their military forces is subject to political or judicial supervision’. The member states should also ‘take active steps to prevent any other authority from operating detention centres which are not subject to political and judicial oversight or where incommunicado detention is permitted’ (European Parliament, 2007).

In practice, this has not been the case. Instead, it is to be assumed that at least some of the member states involved in the Operation Enduring Freedom hand over prisoners to the US military. By doing so, they offer indirect support to the illegal practice of detaining individuals without a warrant, a judge to investigate their case, or the possibility to contact a lawyer. Even if this applies only to individual cases, it raises the question whether it would be even possible for member states to participate in the International Security Assistance Force (ISAF) and at the same time comply with all the norms that apply to this operation. After all, each coalition partner tends to interpret the humanitarian norms applicable to this kind of a conflict in a different way.

A clear example of how difficult it is to draw a line between international humanitarian law and the principles of criminal law is the practice of compiling so-called Joint Prioritized Effects Lists. These list persons who are – in view of existing evidence – considered as posing a concrete threat to ISAF or the Afghan security forces. The list includes two categories. Those Taliban and al-Qaeda combatants placed under the heading ‘capture’ are to be taken prisoner, and those put in the category ‘kill’ to be killed using unmanned aerial vehicles or other means. Member states are not allowed to participate in US operations that involve killing the targeted persons. It is worth noting that the use of drone attacks has increased massively since early 2010.
and become a central instrument of the United States in the fight against the Taliban and terrorist suspects.

Conclusion

While the United States considers it necessary to fight terrorism also by military means, the EU prefers police measures that are more human rights sensitive. An overview of the areas of cooperation between the EU and United States highlights the two-track character of the EU’s foreign policy in transatlantic CT and that it is sometimes very difficult to respect the principles of the rule of law within the framework of this cooperation. In the areas of terrorist listings and data protection, an emphasis on the European achievements can be noted, whereas EU member states only hesitantly cooperate with the United States in taking in Guantánamo prisoners. As far as the CIA’s secret detention facilities in Europe are concerned, member state authorities prefer to turn a blind eye. Last but not least, a number of member states provide indirect support to the United States in detaining and killing terror suspects in Afghanistan. In its counter-terrorism cooperation with the United States, the EU manoeuvres at the limits of the rule of law. Such a position cannot be maintained without compromising the rule of law. In order to overcome the two-track character of EU’s foreign and security policy it is of utmost importance to clarify the status of the principles of the rule of law in transatlantic CT policy.

Notes

1 Look for all primary resources that have been used: Bendiek, 2011.
2 For detailed information on the problems regarding the Guantánamo inmates, the web page of the New York Times is highly recommendable: http://projects.nytimes.com/guantanamo (accessed on 11 April 2011).
3 In most cases, the extradited individuals are suspected of involvement in terrorist activities or seen as a threat to national security. Cf. www.proasyl.de/fileadmin/proasyl/fin_redakteure/Newsletter_Anhaenge/120/dipl_zusicherungen.pdf (accessed on 11 April 2011).

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