Recent European Anti-Terrorism and Human Rights

a double-edged case study analysis

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RECENT EUROPEAN ANTI-TERRORISM AND HUMAN RIGHTS

A DOUBLE-EDGED CASE-STUDY ANALYSIS

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Recent European Anti-Terrorism and Human Rights: A Double-Edged Case-Study Analysis

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To my parents. Thank you.

Abstract

This Ph.D. thesis delivers a human rights-based analysis of post 9/11 anti-terrorism policies in a European context, looking at the cases of the UK, Germany, and the EU. It enters the debate of whether these European states and the EU sufficiently uphold human rights standards while trying to tackle terrorism. The major claim of this thesis is that the mentioned entities *do* curtail essential human rights in the course of anti-terrorism since 9/11. Such curtailments threaten the free and full unfolding and development of human beings, the full enjoyment of human capabilities, and additionally change the power-relation between the individual and the state (to the benefit of the latter). Human rights curtailments could be detected via using a double-edged analytical framework, resting on a more narrow approach to human rights connecting to legally binding rights documents (such as the ICCPR or the ECHR) and court rulings, and a broader understanding of human rights, connecting with the wider idea and aims of rights, such as the guarantee of dignity, freedom, and justice (the 'spirit of rights'). Terrorism policies that are under scrutiny in this thesis are e.g. indefinite detention, dragnet investigations, data retention, intelligence mass surveillance, facial recognition systems, and various prevention measures. Pertained rights are e.g. the right to life, liberty and security, the right to privacy, the freedoms of expression, association, assembly, and movement and the right to be free from discrimination. Since this thesis does combine a long-term comparative approach with a double-edged human rights angle, including the EU and Germany, covers a range of rights issues, and adds to the understanding of newest developments, it does answer on a research gap. In terms of rights problems in the course of recent anti-terrorism, the UK owns the worst record. Germany has continuously run into rights problems as well in its attempts to tackle terrorism. The EU has become a major player in European anti-terrorism making in the last two decades and is, therefore, a proactive force behind some rights-curtailing policymaking as well. The three entities are additionally interrelated in their policymaking. Two major approaches are currently followed in such policymaking, one, the construction of an all-encompassing system of surveillance and two, a focus on Islamist terrorism triggering discriminatory tendencies towards Muslim minorities. It is the courts (and rights NGOs) that have been the major opposing forces to rights infringing European anti-terrorism, declaring policies for ineligible in several instances. Curtailing rights norms does not only interfere with legal norms and the spirit of rights but is also potentially counter-productive. By stirring resentment among those most affected by rights-intrusive policies, the groundwork for more and not less violence is established. Therein, I develop the argument that the protection of rights levels does bear potential as a cornerstone for more effective anti-terrorism. Lastly, I offer proposals for short and long-term strategies, aiming at a more inclusive and non-rights-

infringing anti-terrorism framework which might be viable as an alternative to the policies currently applied by European states.

Dansk Resume

Denne ph.d.-afhandling fremfører en menneskerettighedsbaseret analyse af post 9/11 antiterrorpolitik i en europæisk kontekst med Storbritannien, Tyskland og EU som cases. Afhandlingen introducerer en debat af, hvorvidt disse europæiske lande og EU tilstrækkeligt opretholder menneskerettighederne, mens de søger at bekæmpe terrorisme. Hovedpåstanden i denne afhandling er, at disse enheder rent faktisk indskrænker essentielle menneskerettigheder i forbindelse med antiterror siden 9/11. Sådanne indskrænkelser truer den frie og fulde udfoldelse og udvikling af mennesker, den fulde udnyttelse af menneskelige evner og yderligere ændrer de magtbalancen mellem individet og staten (i sidstnævntes favør). Indskrænkelser af menneskerettigheder kan afdækkes ved at anvende en tofoldig analytisk model baseret til dels på en mere snæver tilgang til menneskerettigheder koblet til bindende menneskerettighedsdokumenter (såsom ICCPR og Den Europæiske Menneskerettighedskonvention) og domsfældelser og til dels en bredere forståelse af menneskerettigheder koblet til den bredere ide og mål af rettigheder såsom garantien af værdighed, frihed og retfærdig ('spirit of rights'). De antiterrorpolitikker, der bliver gransket i denne afhandling, inkluderer bl.a. forvaring på ubestemt tid, elektronisk profilering som efterforskningsmetode, datalagring, efterretnings-overvågning, ansigtsgenkendelsessystemer og forskellige forebyggende foranstaltninger. Vedrørte rettigheder er fx retten til liv, frihed og sikkerhed, retten til privatliv, ytrings-, forenings-, forsamlings- og bevægelsesfrihed og retten til ikke at blive diskrimineret. Eftersom denne afhandling kombinerer en langsigtet komparativ tilgang med en tofoldig menneskerettighedsvinkel, inkluderer EU og Tyskland, behandler en række forskellige rettigheder og bidrager til en forståelse for den nyeste udvikling, dækker den et hul i forskningen. I forbindelse med rettighedsproblemer i relation til antiterror holder Storbritannien den værste rekord. Ligeledes er Tyskland løbet ind i rettighedsproblemer adskillige gange i forsøget på at tackle terrorisme. I de sidste to årtier har EU spillet en stor rolle i den europæiske antiterrorisme og er derfor også en proaktiv kraft bag nogle rettighedsindskrænkende politiske beslutninger. De tre entiteter er yderligere forbundne i deres politiske beslutningsprocesser vedrørende antiterrorisme. I øjeblikket bliver to hovedtilgange fulgt i antiterrorpolitik; et: konstruktionen af et altomfattende overvågningssystem, to: et fokus på islamisk terrorisme medførende diskriminerende tendenser mod muslimske minoriteter. Det er domstolene (og menneskerettigheds-NGO'er), som har været de instanser, der i størst grad har modsat sig rettighedskrænkende europæisk antiterrorisme, idet de flere gange har erklæret politikker for uberettigede. Indskrænkelser af rettighedsnormer står ikke blot i vejen for lovmæssige normer og 'the spirit of rights', men kan

også være kontraproduktive. Ved at vække foragt blandt de, der er mest påvirket af rettighedsforstyrrende politikker, etableres en grobund for flere og ikke færre voldshandlinger. Deri udvikler jeg argumentet for, at det at værne om rettighedsniveauet potentielt kan være en hjørnesten i en mere effektiv antiterrorpolitik. Endeligt præsenterer jeg forslag til kort- og langsigtede strategier med sigte mod en mere inkluderende og ikke-rettighedskrænkede antitterrormodel, som kan være et levedygtigt alternativ til de politikker, europæiske stater aktuelt benytter.

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Terrorism wins only if you respond to it in the way that the terrorists want you to; which means that its fate is in your hands and not in theirs.
-David Fromkin (1975)

The best — the only — strategy to isolate and defeat terrorism is by respecting human rights, fostering social justice, enhancing democracy and upholding the primacy of the rule of law.
- Sergio Vieira de Mello (2002)

Introduction: Thinking Anti-Terrorism and Human Rights

Entering the Realm of Terrorism (-Policy) and Rights

The day the world public witnessed the collapse of the World Trade Center and an attack on the Pentagon created a new awareness for terrorism within many Western societies. The events of 9/11 were globally visible, reached extraordinary attention and gained an "iconic significance."[1] 9/11, by its sheer magnitude alone, triggered the impression of a new era of terrorist threats among public and politicians. Terrorism and states' reactions to terrorism have since 9/11 become familiar issues and they undoubtedly shaped both public consciousness and political agendas in many Western states.[2] Consequently, in the perception of many, the world has become a somewhat darker place since these attacks. We have witnessed many appalling terror attacks on civilians, wars meant to eradicate the threat of terrorism, as well as the implementation of a range of anti-terrorism measures 'at home', sometimes connected to challenges for rights and freedoms.[3] Thus, not only acts of

[1] Richard English, *Terrorism: How to Respond* (Oxford: Oxford University Press, 2009), 95.
[2] A range of scholars evaluated the event as defining an epoch; as changing the world for good. For example, Martin Amis wrote that "September 11 has given to us a planet we barely recognize"; and Fred Halliday held that "the crisis unleashed by the events of September 11 is one that is global and all-encompassing." Amis and Halliday cited in English, *Terrorism: How to Respond*, 94. Obviously, the effect of the event can be discussed. The attacks of 9/11 were not the first international terror attacks against US targets; not even the first attack of bin-Laden's network against the World Trade Center, however, they indeed were unique in magnitude and impact on public consciousness.
[3] Awareness of terrorism after 9/11 was maintained by other prominent attacks. Every reader will be very aware of a range of terror attacks taking place in Western countries in the last years. Many of the examples that spring to our mind have been carried out by Islamists. Allow me to address a few iconic examples, without being exhaustive. Spain witnessed a bomb attack on the Metro in Madrid on March 11, 2004, killing 191 people. Bombings of underground trains and a bus in London on July 7, 2005 cost the lives of fifty-two travelers. After a few more 'calm' years in terms of Islamist terrorism in Europe, Western societies were stunned by a new and intensified wave of Islamist terrorism. January 2015 saw the attack on the staff of *Charlie Hebdo* and a Jewish supermarket in Paris. Later in 2015, on the night of November 13, a new, larger series of attacks played out in Paris, killing more than 130. Both Paris attacks were committed by individuals connected to IS. In July 2016, France experienced another grave

terrorism but also states', international organizations' (IOs) and federations' (such as the EU) attempts to tackle terrorism have featured high on the social and political agenda in the last seventeen years and have likewise become a part of public consciousness. Most Western states tried to find quick and effective new responses to terrorism after 9/11. A range of new anti-terrorism and counter-terrorism measures were launched. The most aggressive reaction to the events of 9/11 was delivered by the US government with its proclamation of its 'War on Terror', which led the country (together with other states) to invade both Afghanistan and Iraq, while the infamous Patriot Act (2001) was supposed to tackle the problem of terrorism on the inside.[4] Additionally, far-reaching surveillance measures were initiated by intelligence services such as the NSA (in cooperation with other Western services such as the British Government Communications Headquarters [GCHQ] or the German Bundesnachrichtendienst [BND]). European states contributed to the American War on Terror on several occasions and likewise increased anti-terrorism policies at home. After 9/11 and the bombings in Madrid and London in 2004 and 2005, respectively, many European countries

terror attack, when an Islamist steered a truck into a crowd in Nice, killing eighty-four people. In December 2016, Germany was hit, when a truck drove into the crowd at a Christmas market in Berlin, killing twelve. In spring 2017, Islamist attackers stroke three times in the UK. In March a car drove into pedestrians on Westminster Bridge in London (killing five and injuring around fifty), in May a bombing of a concert in Manchester killed twenty-two people, and in June a group of attackers killed seven people on London Bridge via driving into pedestrians and subsequently stabbing passersby. Although Western societies focused mostly on Islamist terrorism in the years after 9/11, it is, for the sake of integrity, to be noted that significant non-Islamist terrorism played out as well. Especially the terror attack committed by Anders Breivik in Norway in 2011, killing seventy-nine people, most of them adolescents, raised attention (I provide references for these attacks in the course of this thesis).

[4] Ruth Costigan and Richard Stone, *Civil Liberties & Human Rights*, 11th ed. (Oxford: Oxford University Press, 2017), 458. The militarized approach of the US received tremendous criticism, from all imaginable sources and levels. Critics aimed at the negative effects of this military approach on rights regimes, the rule of law and the American foreign policy architecture at large, as well as doubting the effectiveness of the approach in terms of curtailing the terrorist threat. A few examples of scholarly criticism will emphasize this point. For instance, Paul Hoffman argued, "a war on terror waged without respect for the rule of law undermines the very values that it presumes to protect". Paul Hoffman, "Human Rights and Terrorism," *Human Rights Quarterly*, Vol. 26 (2004): 932. Jack Donnelly evaluated that the war on terror "facilitated dangerous trends in American foreign policy, particularly the demonization of enemies and a tendency to act unilaterally." Jack Donnelly, *International Human Rights*, 4th ed. (Boulder: Westview Press, 2013), 241. Andreas Bock observed that "the fight against terrorism with military or violent means does neither have a deterrent effect nor can it increase security in societies threatened by terrorism." Andreas Bock, *Terrorismus* (Paderborn: UTB, 2009, 59). Fittingly, Alison Brysk argued that there exists "no credible evidence that post-9/11 policies have improved the security of American citizens or prevented further attacks", thus she concludes, "the cure has been worse than the disease." Alison Brysk, "Human Rights and National Insecurity," In *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, ed. by Alison Brysk and Gershon Shafir (Berkeley: University of California Press, 2007), 3.

adopted new laws, procedures, and actions to tackle the threat of terrorism as it was felt they were under a similar threat as the US and engaged in a shared conflict.[5] Additional policies were adopted since the onset of the most recent wave of IS-inspired terrorism. In general, anti-terrorism policies and actors have in a pan-European context experienced an increase in budgets, mandates, and functions.[6]

The violation of human rights norms is a risk not only for military counter-terrorist actions on foreign soil (such as the US-led invasions in Afghanistan) but also within states, including democratic states, in the course of anti-terrorism policies (seen here as non-military). To that extent, a question, in face of increased anti-terrorism policies by many Western states, is whether such measures by European states and the EU itself, endanger or violate existing human rights norms and if so, if curtailments of recognized international human rights, would be justified (e.g., by way of concepts of rights 'derogation' and 'limitation'). This issue has been heavily discussed in recent years, both among scholars and in the political arena.[7] Already in the first years after 9/11 and the subsequent push for enhanced anti-terrorism measures in many countries, public concern rose regarding a potential erosion of civil liberties in many Western states (e.g. Germany and the UK).[8]

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[5] This was often perceived as a 'Clash of Civilizations.'

[6] Claudia Hillebrand, *Counter-Terrorism Networks in the European Union: Maintaining Democratic Legitimacy after 9/11* (Oxford: Oxford University Press, 2012), 1-2.

[7] Fabio Fabbrini, "Human Rights in the Digital Age: The European Court of Justice Ruling in the Data Retention Case and Its Lessons for Privacy and Surveillance in the United States," *Havard Human Rights Journal,* Vol. 28 (2015): 66. Leaders of European nation-states have often declared that human rights are to be upheld while tackling terrorism, e.g., French President Francois Hollande declared in a speech on the crisis in Mali in 2014 that "the terrorists should be hunted, but human rights must be respected." Tages-Anzeiger, "Terroristen unter Respektierung der Menschenrechte jagen," February 2, 2013. http://www.tagesanzeiger.ch/ausland/naher-osten-und-afrika/Terroristen-unter-Respektierung-der-Menschenrechte-jagen/story/13259474?dossier_id=815

On the international institutional level, examples for the growing attention towards rights questions in terrorism policies can be easily delivered as well. For instance, the UN appointed a special rapporteur on the 'promotion and protection of human rights and fundamental freedoms while countering terrorism,' and at the EU level all anti-terrorism moves such as directives, action plans, strategy papers and the like emphasize that terrorism is supposed to be dealt with by upholding human rights standards, not undermining them.

The formulation 'in recent years' shall not produce the perception that the issue of rights in terrorism policies was never discussed before 9/11. For instance, Grant Wardlaw and Paul Wilkinson, pioneers of terrorism studies, already delved into that topic in the 1980s. Grant Wardlaw, "Terrorism, Counter-Terrorism and the Democratic Society," In *Government Violence and Repression: An Agenda for Research,* ed. by Michael Stohl and George Lopez (Westport: Greenwood, 1986). Paul Wilkinson, "Maintaining the Democratic Process and Public Support," In *The Future of Political Violence: Destabilization, Disorder and Terrorism*, ed. by Richard Clutterbuck (London: Macmillan, 1986).

[8] Adrian Hyde-Price, "Germany: Redefining its security role," In *Global Responses to Terrorism: 9/11, Afghanistan and Beyond*, ed. by Mary Buckley and Rick Fawn (London and

In entering these discussions, some scholars argued that the effects of European anti-terrorism on human rights have been limited. For instance, focusing on the case of post 9/11 Germany, Wolfgang Heinz argued that the country "has thus far maintained one of the most liberal and democratic counterterror policies, demonstrating that another way is possible".[9] Steven Greer argued that a tendency of (rights-) discrimination cannot be found in recent British anti-terrorism.[10] Additionally, David Omand (a former director of the GCHQ), held in 2015 that mass surveillance, and therein a reduction of privacy rights, would not take place in the UK.[11] Other scholars made the general point that rights problems would be a seldom phenomenon in (democratic) states in the course of anti-terrorism. For example, James Piazza and James Walsh argued in a cross-cultural study (based on a set of cases not limited to Europe) that the rights to free speech, freedom of movement and freedom of association, would generally not be curtailed by government policies after terror incidents. They conclude that "governments do not respond to terrorist attacks by systematically restricting human rights across the board."[12] Michael Freeman suggested that a free press and the separation of powers (which is arguably given in many European states) would make it unlikely for governments to seriously restrict freedoms and human rights.[13]

Others, scholars as well as NGOs, however, have argued that European states and institutions have indeed sacrificed or endangered rights in the course of anti-terrorism efforts and that such policies cannot be justified by legal claims concerning rights derogation and limitation. A range of measures introduced by European countries and institutions to tackle terrorism has been criticized for being inconsistent with international human rights norms. For instance, Todd Landman, Mary Volcansek or Conor Gearty point out that the UK breached the European Convention on Human rights (ECHR) by implementing a regime of indefinite detention for foreign terror suspects in 2001 under the Anti-Terrorism Crime and Security Act (ATCSA) (under derogation from article 5 of the ECHR which protects the right to life and

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New York: Routledge, 2003).

[9] Wolfgang Heinz, "Germany: State Responses to Terrorist Challenges and Human Rights," in *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, ed. by Alison Brysk and Gershon Shafir (Berkeley: University of California Press, 2007), 157.

[10] Steven Greer, "Anti-Terrorist Laws and the United Kingsom's 'Suspect Muslim Community'," *British Journal of Criminology*, Vol. 50 (2010).

[11] David Omand, "What Should be the Limits of Western Counter-Terrorism Policy?" In *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English (Oxford: Oxford University Press, 2015), 70.

[12] James Piazza and James Walsh, "Transnational Terror and Human Rights," *International Studies Quarterly*, Vol. 53, (2009): 126, 144-145.

[13] Michael Freeman, *Freedom or Security: The Consequences for Democracies using Emergency Powers to Fight Terrorism* (Westport: Praeger, 2003).

liberty).[14] Research by Martin Scheinin, Javaid Rehman as well as Christina Pantazis and Simon Pemberton, and Tufyal Choudhury and Helen Fenwick has pointed to discriminatory tendencies by UK authorities when carrying out terrorism policies in stop-and-search practices of the police. Pantazis and Pemberton hold that Muslims specifically have become the new 'suspect community' in Britain.[15] Quirine Eijkman and Baart Schuurman argue that preventive measures (such as attempts to prevent radicalization) have led to the stigmatization of Muslim communities in some European countries, including the UK.[16] Gearty argues in the same direction by pointing out that especially rights of minorities have been limited in the course of British anti-terrorism.[17] Thus, stigmatization of religious or ethnic groups has raised concern in terms of the right to be protected from discrimination. Furthermore, since the summer of 2013, the UK has faced criticism for its involvement in wide-ranging Internet surveillance, e.g. by scanning massive amounts of data by wiretapping transatlantic fiber-optic cables. Critics, such as Quentin Skinner, pointed here to a breach of privacy rights, as well as the right to liberty.[18] Moreover, Timothy Garton Ash holds that states (such as the UK) are heading in the wrong direction by prosecuting speakers and banning websites and organizations for non-violent extremism, causing a problem in terms of freedom of expression. He additionally bemoans decreasing protection of privacy rights.[19]

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[14] Todd Landman, "The United Kingdom: The Continuity of Terror and Counterterror," In *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, ed. by Alison Brysk and Gershon Shafir (Berkeley: University of California Press, 2007), 84. Conor Gearty, *Liberty and Security* (Cambridge: Polity Press, 2013), 90. Mary Volcansek, "The British Experience with Terrorism: From the IRA to Al Qaeda," In *Courts and Terrorism: Nine Nations Balance Rights and Security*, ed. by Mary Volcansek and John Stack (Cambridge: Cambridge University Press, 2011).

[15] Martin Scheinin, "Terrorism," In *International Human Rights Law*, ed. by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 560-561. Javaid Rehman, "Islam, "War on Terror" and the Future of Muslim Minorities in the United Kingdom: Dilemmas of Multiculturalism in the Aftermath of the London Bombings," *Human Rights Quarterly*, Vol. 29, No. 4 (2007). Christina Pantazis and Simon Pemberton, "From the Old to the New Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation," *British* Journal of *Criminology*, Vol. 49, No. 5 (2009). Tuyfal Choudhury and Helen Fenwick, "The impact of counter-terrorism measures on Muslim communities," *International Review of Law, Computers & Technology*, Vol. 25 No. 3 (2011).

[16] Qurine Eijkman and Baart Schuurman, *Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation* (The Hague: ICCT, 2011).

[17] Gearty, *Liberty and Security*, 99-102.

[18] Quentin Skinner, "Liberty, Liberalism and Surveillance: a historic overview," *openDemocracy*, July 26, 2013. https://www.opendemocracy.net/ourkingdom/quentin-skinner-richard-marshall/liberty-liberalism-and-surveillance-historic-overview

[19] Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World* (London: Atlantic Books, 2016), 283, 324, 331-332.

Scholars have voiced criticism towards Germany as well. For instance, Oliver Lepsius pointed out that the German Air Security Law from 2004, which in last consequence would have given the Defense Minister the competence to order shooting down civilian airplanes in order to prevent a 9/11 scenario, would have violated the right to life, as well as human dignity (the German Constitutional Court decided likewise).[20] Another example of German anti-terrorism receiving criticism is the German data retention law, a law going back on an EU directive, which allows for the saving of telecommunication metadata for six months.[21] Furthermore, Martin Scheinin criticized the German policy of dragnet investigation, carried out in the years after 9/11 as potentially infringing the protection from discrimination, since it was linked to variables such as religious denomination and nationality.[22]

The EU faced criticism for its post-9/11 anti-terrorism policies as well. Critical voices, such as Claudia Hillebrand, Gustav Lindstrom, Javier Argomaniz or Lilian Mitrou, pointed at the EU's initiatives regarding data retention, biometric passports, the centralization of databases or the planned Passenger Name Record, based on allegations of breaching privacy rights (e.g. article 7 and 8 of the Charter of Fundamental Rights of the EU and article 8 ECHR).[23] Ian Brown and Douwe Korff pointed out that the EU data retention laws not only are at odds with privacy rights but touch "on fundamental values of a democratic society." They additionally claim that such large-scale collections of data can lead to problematic processes of profiling and that the EU is actively involved in facilitating the necessary conditions for states'

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[20] Oliver Lepsius, "Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act," *German Law Journal,* Vol. 7, 2006.

[21] Katja de Vries et al., "The German Constitutional Court Judgment on Data Retention: Proportionality Overrides Unlimited Surveillance (Doesn't It?)," In *Computers, Privacy and Data Protection: an Element of Choice*, ed. by S. Gutwirth et al. (Dordrecht: Springer, 2011). Christian DeSimone, "Pitting Karlsruhe Against Luxembourg? German Data Protection and the Contested Implementation of the EU Data Retention Directive," *German Law Journal,* Vol. 11, No. 3 (2010). Fabbrini, "Human Rights in the Digital Age." Patrick Breyer, "Telecommunications Data Retention and Human Rights: The Compatibility of Blanket Traffic Data Retention with the ECHR," *European Law Journal,* Vol. 11 No. 3 (2005).

[22] Scheinin, "Terrorism," 560.

[23] Hillebrand, *Counter-Terrorism Networks in the European Union,* 169-170. Gustav Lindstrom, "The EU's approach to Homeland Security: Balancing Safety and European Ideals," In *Transforming Homeland Security: U.S. and European Approaches*, ed. by Esther Brimmer (Washington: Center for Transatlantic Relations, 2006). Javier Argomaniz, "When the EU is the 'Norm-taker': The Passenger Name Records Agreement and the EU's Internalization of US Border Security Norms," *European Integration,* Vol. 31 No. 1 (2009). Javier Argomaniz, *The EU and Counter-Terrorism: Politics, polity and policies after 9/11* (London and New York: Routledge, 2011), 151. Lilian Mitrou further pointed to problems in connection with freedom of expression. Lilian Mitrou, "The impact of communications data retention on fundamental rights and democracy – the case of the EU Data Retention Directive," In *Surveillance and Democracy*, ed.by Kevin Haggerty and Minas Samatas (London: Routledge, 2010).

intelligence agencies to carry out such profiling.[24] Similarly, Martin Scheinin claimed that the EU's recommendation to its member states to conduct terrorist profiling in the course of anti-terrorism, including physical, psychological and behavioral variables contributed to alarming trends of such policies from a human rights perspective.[25]

In general, especially the surveillance measures of the mentioned three entities, but also others (e.g. the US) have come under scrutiny by activists and academics. Micheline Ishay is one example of a human rights scholar voicing criticism against all-embracing surveillance. In a 2004 publication, she remarked, "measures protecting privacy have been removed, […] paving the way to an ever more pervasive surveillance society." She furthermore claimed, "the expansion of counterterrorist activities […] accelerated the rise of a more bureaucratized, cyber-controlled society."[26] She drew parallels – as others have done in the last years – between increasing surveillance in the name of anti-terrorism, and Jeremy Bentham's concept of the Panopticon prison.[27]

Looking at all this material, it seems clear that there is a clash of perspectives regarding the question of whether European states and the EU sufficiently uphold human rights standards while trying to tackle terrorism. My thesis intends to be part of this debate. My purpose here will be to carry out an analysis of current European anti-terrorism policies from a human rights perspective. The cases in focus will be Germany and the UK as well as the EU as an intergovernmental/-supranational actor. I seek to scrutinize the justifiability of recent and current anti-terrorism policy on the part of these actors vis-à-vis human rights. My intention is to analyze anti-terrorism from a legal perspective, yes, invoking the 'letter of the law', yet, doing that while analyzing anti-terrorism from a broader perspective grounded in the general aims and ideals of human rights, the 'spirit' of human rights.[28] Both perspectives are in this thesis seen as interrelated and mutually indispensable.

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[24] Ian Brown and Douwe Korff, "Terrorism and the Proportionality of Internet Surveillance," *European Journal of Criminology*, Vol. 6 No. 2 (2009).

[25] Scheinin, "Terrorism**,**" 560.

[26] Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004), 351-352.

[27] The Panopticon is the model of a prison in which the inmates would live in constant uncertainty about being surveyed or not, and would, therefore, eradicate all unwished behavior. Ishay, *The History of Human Rights*, 352. Michel Foucault built on Bentham's concept when he explained state control in his book *Discipline and Punish*. Foucault evaluated the Panopticon as a method by the state to assert effective and less visible forms of control, inducing a permanent consciousness of state power in the inmates, triggering an automatic functioning of power. Jeffrey Rosen, "A Cautionary Tale for A New Age of Surveillance," In *Terrorism in Perspective*, ed. by Pamala L. Griset and Sue Mahan (Thousand Oaks: SAGE Publications, 2003).

[28] Ben Dorfman, *13 Acts of Academic Journalism and Historical Commentary on Human Rights: Opinions, Interventions and the Torsions of Politics* (Frankfurt: Peter Lang, 2017), 176, 193-195.

Still, the spirit of rights perspective is seen as the basis for the legal framework in which rights exist. International legal rights norms, in this sense act as the 'tool' of the spirit of rights. I hope to show that human rights troubles have evolved in the course of European anti-terrorism policies and those temporary rights problems, in fact, turn permanent so that the extraordinary is normalized.[29] I will contest the argument that domestic terrorism policies on the part of European states as well as the EU itself have not curtailed human rights or claims that, if they have, that these curtailments have been insignificant. Thus, in this thesis I will defend the following statement:

Current policies regarding anti-terrorism on behalf of European societies curtail essential human rights.[30] **An analysis of the post 9/11 terrorism policies of the UK, Germany and the EU helps demonstrate this. The primary curtailed rights are the right to privacy, freedom of expression, the right to non-discrimination, the right to life, liberty and security of person, and the freedoms of association and movement.**

Such rights curtailments threaten the free and full unfolding and development of human beings, the full enjoyment of human capabilities, and additionally change the power-relation between the individual and state (to the benefit of the latter). Therein, the restriction of civil and political rights furthermore endangers essential components for the functioning of the idea of (Western liberal) democracy. Additionally, such rights curtailments are potentially aggravating the problem of terrorism, as the infringement of rights can very well lead to a growth of the number of individuals in a society willing to use violence in order to advance their political convictions instead of reducing this group (whereas upholding rights might reduce the amount of individuals taking up terrorist means). These points show the general relevance of the issue of human rights curtailments in anti-terrorism, as well as the relevance of this study.

The relevance of the research is mirrored in another point. Currently, the concept of human rights, both in legal terms and in terms of its basic idea is challenged in global (and European) contexts. The concept is pressed by e.g., a surge of success of right-wing parties and movements, the election of Donald Trump as president of the US, a rise of powers in the international arena that show a disregard of a wide range of human rights (Saudi Arabia or China), and the establishment of a set of anti- and counter-terrorism policies

[29] This is based on a tendency by states and organizations to make policies permanent, which once were adopted based on the argument of a context specific necessity. Policies are often kept in place by using the argument that they would have been effective (and this is the case even if a certain threat has declined again). Mikkel Thorup and Morten Brænder, "Staten og dens Udfordrere – Vold som Terror eller Krig," In *Antiterrorismens idehistorie – stater og vold i 500 år*, ed. by Thorup and Brænder (Aarhus: Aarhus Universitetsforlag, 2007), 49.

[30] As current policies, I define policies implemented after the 9/11 attacks.

and campaigns that have derogated from rights norms.[31] This pressure on human rights is, however, not a new phenomenon, but has been a constant for (most of) human history. Therefore, a sufficient or high level of human rights in human societies, cannot be taken as a given. The adherence of rights norms cannot be taken for granted in terms of my specific field of inquiry as well, as this has very often not been the case, not currently and not in the past. This, to a certain degree, puts the curtailment of rights in the course of anti-terrorism into perspective. However, this does not excuse such curtailments, or diminish their importance. Such infringements are wrong, especially morally and politically. They do, however, feed into a larger trend of developments that press the concept of human rights.

Structure of the Thesis

In order to defend the above thesis statement, I will take the steps offered below.

A first major step is to gain an overview and understanding of the key concepts at play, which are human rights, anti-terrorism, and terrorism. These conceptual chapters will provide the groundwork for the following empirical analysis and evaluation of terrorism policies in the three mentioned cases. The first concept I will focus on will be human rights. Here, I will shortly cover the history of the concept and will, especially, focus on the question of where in the historical timeline the starting point of the evolution of human rights can be traced. I will also cover some of the general theoretical basics regarding the concept of human rights, which are relevant for this thesis, meaning I will delve into different understandings of what human rights actually are and shed light on both a legal and a wider, "spirit of the law" understanding of rights. In a third section in this human rights theory part, I will delve into the specific rights that are at the focus of this thesis.

The second conceptual chapter of my thesis covers the concepts of terrorism, anti-terrorism, and counter-terrorism. Therein, I will elucidate the historical context of the term terrorism and provide an overview of the definitional quarrels regarding the term, before offering a definition of my own. Subsequently, I will deliver a differentiation and definition of the terms anti-terrorism and counter-terrorism. Without delivering a clarification of these terms, it would be rather confusing to go through some of the relevant empirical literature on terrorism policies. I would like to point out, that while I deliver the core of the conceptual and theoretical input for this thesis in those first chapters, I offer further theoretical input along the way in other chapters.

After addressing the major concepts at play, I will provide the empirical analysis of my thesis. Here, I will go through the three cases in focus. In each case, I will first provide a section focusing on the actor's

[31] On the rise of regimes showing a disregard of human rights, see e.g., David Rieff, "The End of Human Rights," *Foreign Policy*, April 9, 2018. https://foreignpolicy.com/2018/04/09/the-end-of-human-rights-genocide-united-nations-r2p-terrorism/

relation to the phenomena of terrorism. In this context, I will provide information on crucial terror attacks in the UK and Germany, as well as the reaction of the public and the political elite to the same. In terms of the EU, this part will talk less about specific attacks (since there is so far no – or only one – attack aimed at the EU as such).[32] Here, I will talk more about the change of context regarding terrorism policymaking at the EU level over the last decades, which is an important point to cover in order to understand the relevance of the EU for European terrorism policymaking. These context sections gain their relevance from anti-terrorism policies reflecting the history of threat in a country.[33] These sections will additionally provide some of the necessary background information, for evaluating conditions of rights derogation and limitation such as emergency and proportionality. After each context section, I will conduct a human rights-based analysis of the cases' recent anti-terrorism policies. I will for this purpose use my double-edged human rights framework, consisting of a legal approach and a wider (spirit of rights) understanding of rights based on the wider aims and ideals of human rights. I will therein present the relevant material on a policy, subsequently conduct the analysis on this policy, and then move to the next policy, thereby creating a repeating sequence of empiric information and analysis. Terrorism policies that will be scrutinized are e.g., surveillance regimes, data retention laws, stop-and-search practices, policies on preventing extremism, detention regimes or dragnet investigations. The last analysis chapter will develop a comparison between the three cases, elucidating similarities and differences in anti-terrorism policies and the status of human rights in the course of such policies.

Subsequently, I would like to offer a normative discussion. I.e., in the face of the results of my analysis, one might ask, how a more sound relationship between rights and anti-terrorism should look like. I will thus discuss if and to which degree rights should be compromised in order to establish alleged security against terrorism in society. I will cover the questions whether we need to balance rights against security, whether an increase in security measures always equals increased protection against terrorism, and whether the upholding of human rights possibly can be understood as an anti-terrorism measure in itself. I will here take inspiration from the academic discussion on these matters and develop my own standpoint.

I will conclude this thesis by summarizing my arguments and findings and will additionally emphasize approaches that potentially can contribute to reducing the danger posed by terrorism, without endangering rights and democracy.

[32] Of course, in a way, an attack on any EU state is an attack on the EU itself. However, what I point to here are direct attacks on physical EU institutions.
[33] Brysk, "Human Rights and National Insecurity," 1.

Methodological Issues

In this section, I would like to elaborate on some of the methodological issues of this study and account for some of the choices this thesis takes in that area.

- **Methodological Basics and a Double-Edged Database**

This study employs an interpretivist epistemology. Such an epistemology is primarily concerned with the understanding of social and human action. Interpretivism asserts that human beings act based on the meaning which they continuously assign to their environment, including the own actions, as well as the actions of others, such as in case of this study terrorism and anti-terrorism.[34] Hence, this study will *interpret* the qualitative data at hand, which oftentimes is already an interpretation by others (e.g. in case of the scholarly, NGO or journalist publications used). Thus, this study conducts an interpretive analysis of human rights relevant actions (the terrorism policies of Germany, the UK, and the EU) which have been undertaken by interpreting the social environment (e.g. the meaning or importance of human rights norms in face of a terrorist threat).

This thesis is based on a social constructionist ontological paradigm.[35] Hence, in the context of social constructionism, the major concepts of this study, such as terrorism, anti-terrorism, and human rights are understood as constantly revised social constructs. Social actors (governments, citizens, society at large) constantly assert new or different meaning to said phenomena, and consequently change their ideas about how e.g., states should react on terrorism and how important the protection of human rights should be in such a process. The same would be true for all research on this issue since research is operating inside of the boundaries of described social action.

In line with interpretivist and constructionist thinking, this thesis aims to underline (especially in the parts elucidating the empirical contexts) that anti-terrorism policies are dependent on the ideas and interpretations of actors

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[34] On the concept of interpretivism see e.g. Alan Bryman, *Social Research Methods*, 3rd ed. (Oxford: Oxford University Press, 2008), 15-17 or Norman Blaikie, *Designing Social Research*, 2nd ed. (Cambridge: Polity Press, 2010), 99.

[35] This paradigm asserts that all social phenomena are social constructs. Human beings construct knowledge by making sense of their environment (see above), taking contexts, concepts, and experiences into regard. This means that social phenomena do not possess a meaning per se, social actors (humans) are instead continuously producing said meaning by social interaction. Our social world is in this view not existing externally to us but build on our social interaction with each other. Consequently, social phenomena and their meaning are constantly revised by new interactions, for instance, all components of what we usually describe as a culture. As all researchers are a part of this process of constantly constructing and reconstructing meaning, all academic concepts and all research results have to be understood as part of this process. Scientific knowledge simply constitutes the interpretation of social phenomena by researchers. This means that knowledge is not indefinitely determinate, but rather the opposite, under constant change. Bryman, *Social Research Methods*, 19-21. Blaikie, *Designing Social Research*, 95. John Brewer and Albert Hunter, *Foundations of Multimethod Research: Synthesizing Styles* (Thousand Oakes: SAGE, 2006), 158.

of the political elite and populations, as to what terrorism is and how it can be or should be tackled. It is thus the underlying ideas and perceptions that shape reactions to terrorism, rather than materialist categories (e.g., technology, resources or military power).[36] For example, policy outcomes will greatly be affected by perceptions as to which kind of terrorism is the most dangerous, as well as by ideas on which strategies are the potentially most successful. The same holds good for the relations between human rights and anti-terrorism policy. The perception of the relation between the two shape policies that will either benefit rights over anti-terrorism policy or vice versa. For example, if (certain) human rights are interpreted as being too valuable to be sacrificed for anti-terrorism, we can expect a less rigid terrorism policy as a policy outcome. International Relations scholar Alexander Wendt famously claimed, "anarchy is what states make of it."[37] Following Wendt, it can be argued that the concepts of terrorism, anti-terrorism, and human rights are what states make of them.

As is typical for many studies with an interpretivist and constructionist approach, this thesis constitutes a qualitative study. It will use mainly qualitative methods, conducting an analysis of qualitative data. The major method employed in this study is content analysis, a specific form of 'non-reactive' research (as defined by Brewer and Hunter). Non-reactive research consists of research that works with "various unobstrusive observational techniques or artifacts, archives, official statistics, and other natural by-products of past social life."[38] Thus, the thesis works foremost with academic literature, policy papers, international documents, court rulings, NGO reports, and investigative journalist reports. Although the study clearly puts its emphasis on the interpretation of qualitative data, it occasionally integrates the interpretation of quantitative data (items like public surveys). Therefore, on these occasions, it inhibits traits of a mixed-methods investigation (the same is valid when this study takes up the results of fieldwork research).[39]

When addressing the nature of my data, it is worth mentioning what I see as my data's 'double-edged' nature. A range of the empirical data of my research, I would argue, is easily accessible. Accessibility is high especially concerning stories about terror attacks themselves, as well as the most notorious or debated state reactions on such attacks. For instance, states'

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[36] Michael Barnett, "Social Constructivism," in *The Globalization of World Politics*, ed. By John Baylis and Steve Smith (Oxford: Oxford University Press, 2005), 258-264.

[37] Alexander Wendt, "Anarchy is what States Make of it: The Social Construction of Power Politics," I*nternational Organization*, Vol. 46 No. 2 (1992).

[38] Brewer and Hunter, *Foundations of Multimethod Research,* 2. Norman Blaikie calls this kind of research, based on the traces that individuals leave behind in natural settings, e.g., documents, for research of 'social artefacts.' Blaikie, *Designing Social Research*, 22.

[39] Such an approach allows for compensating the "particular faults and limitations" of the different 'research styles.' The term 'research styles', points to non-reactive research, survey research, fieldwork and experiments. Brewer and Hunter, *Foundations of Multimethod Research,* 1-4.

surveillance programs or de-radicalization efforts (e.g., the British Channel program), have been extensively explained and discussed in the public sphere. Stories about terrorism and states' and the EU's reactions do fill newspapers and magazines on a regular basis.[40] This has, especially, been the case in the first years after 9/11 and has increased again with the new 'wave' of IS-inspired terrorism in Western countries in recent years. The revelations of Edward Snowden moreover shed light on the practices of intelligence services in regard to anti-terrorism. It has therefore not been necessary to 'dig' for data in archives or the like. Furthermore, a range of public surveys on terrorism and anti-terrorism are publicly available. The amount of empirical data potentially relevant to my thesis is thus growing on a daily basis. However, this at the same time represents a challenge. It is a tricky task to order the wide-ranging information on the topic regarding its individual importance, while simultaneously making sure not to 'drown' in information. I have thus tried to find the right balance between integrating a detailed and extensive amount of empirical data, without drowning in the ocean of empirical sources available on some of the issues discussed in the study.

Still, it is quite clear that some potentially very relevant information on states' terrorism policies and practices is not publicly accessible, but rather confidential. This is especially valid for the practices of security organs such as intelligence activities. Edward Snowden's disclosures about surveillance did also cause so much sensation because he shed light on confidential practices. The fact that not even many researchers active in the field of anti-terrorism had anticipated the magnitude of surveillance taking place shows that potentially important information about anti-terrorism is not known to the public, as well as researchers in the field. It might thus be the case, that certain information which would have an influence on the empirical analysis of this thesis and hence on its overall evaluation of the terrorism policies of the three cases at focus, is inaccessible until further. This, therefore, provides a certain limitation of my research; however, a limitation that is not uncommon in both social science and historical writing and that simply has to be taken into regard.

- **An Interdisciplinary Study**

Since this thesis draws (mainly) from two different research fields, human rights research and terrorism studies, and tries to bridge these fields, it constitutes a piece of interdisciplinary research.[41] In order to position this

[40] As indicated, this is valid for many state reactions on terrorism, however, not all. Some terrorism policies are less discussed in the public sphere.

[41] Moti Nissani defined interdisciplinarity as "bringing together distinctive components of two or more disciplines." Moti Nissani, "Ten Cheers for Interdisciplinarity: The Case for Interdisciplinary Knowledge and Research," *The Social Science Journal,* Vol. 34 (1997): 203. On interdisciplinarity see e.g., Tanya Augsburg, *Becoming Interdisciplinary: An Introduction to Interdisciplinary Studies*, 3rd ed. (Dubuque: Kendall/Hunt Publishing, 2016).

thesis in the broad array of current academic fields, I will now shortly reflect on the fields that this study connects with and will point to benefits of interdisciplinary research.

The field of human rights research encompasses a large range of subfields or topics, e.g., the content of rights, the history of rights, effectiveness of international conventions or rights in foreign policy, to name a few. My study connects to another topic in human rights research, which is the evaluation of the degree of rights compliance of rights-bearers (in this case states' and a federation's compliance with rights obligations under terrorism policies).[42] Human rights research can moreover be divided by looking at the general research approach. Malcolm Langford here differentiates between normative, empirical, and evaluative approaches. My research reflects the latter, as the evaluative approach combines normative and empirical traits in its attempt to determine compliance by actors with human rights norms. This compliance can be understood in both legal and non-legal terms.[43] My study will do precisely this and will carry out an evaluation of terrorism policies based on legal and non-legal perspectives in an interrelated fashion.

Human rights research is in this thesis combined with terrorism studies. Here, my study connects with both the traditional terrorism scholarship and the sub-field of critical terrorism studies (CTS). It connects with the first by relying on input and ideas of some major figures in the field, e.g. regarding elucidations of the definitional struggles surrounding the term terrorism, regarding the mapping and definition of anti-terrorism, or regarding a historical model of terrorism development (David Rapoport's four-wave model). However, my human rights-based analysis of terrorism policies connects well with the overall orientation of CTS. CTS has been intensely engaged with producing critiques of recent Western terrorism policies, covering everything from the US War on Terror to European counter-

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In employing an interdisciplinary approach, my thesis follows suggestions from the literature on human rights methodology. See e.g., Langford who argues that the field of human rights constitutes "a natural field for interdisciplinary endeavor." Malcolm Langford, "Interdisciplinarity and Multimethod Research," In *Human Rights Research Methods*, ed. by B.A. Andreassen, H.O. Sano and S. McIernet-Lankford (Cheltenham: Edward Elgar, 2017), 1. Coomans, Grünfeld and Kamminga, claim that the participation from researchers of multiple fields "is an indispensable element of human rights research." Fons Coomans, Fred Grünfeld and Menno Kamminga, "Methods of Human Rights Research: A Primer," *Human Rights Quarterly,* Vol. 32 (2010): 186. Jack Donnelly advocates for an interdisciplinary approach in human rights-related research as well, when he warns against distressing tendencies "toward disciplinary exclusivity and interdisciplinary blindness." Jack Donnelly, *Universal Human Rights in Theory and Practice,* 2nd ed. (Ithaca and London: Cornell University Press, 2003), 180.

[42] Coomans, Grünfeld and Kamminga, "Methods of Human Rights Research," 181.

[43] Langford, "Interdisciplinarity and Multimethod Research," 12.

radicalization.[44] CTS approaches, similar to this study, e.g. deal with the influence of terrorism policies on the extension of state power, the influence on minority communities, the reciprocal effects between terrorism and anti-terrorism and aim at evaluating terrorism policies via the categories of proportionality, effectiveness, and legitimacy.[45] Moreover, CTS shares this study's emphasis on disciplinary plurality and normative outlook.[46] CTS additionally connects itself to the broader aims of human freedom and the realization of human potentials and social well-being, social justice, equality and eradication of discrimination, notions that reflect, or at least come close to the aims of the human rights concept used in my thesis.[47] Now, a debate has been going on in the overall field in recent years concerning a gap between traditional terrorism studies and CTS. CTS scholars have accused traditional terrorism research of being too state centristic, too focused on policy prescription, too occupied with the analysis of anti-Western terrorist groups, lacking interdisciplinary input and historicity and maintaining institutional or intellectual links with state institutions.[48] Some traditional scholars rebutted by pointing out weaknesses of CTS scholarship (e.g. not living up to their research promises).[49] However, I would tend to agree with Richard English in his evaluation, that the portrayed gap between the two subfields is not necessarily as big as perceived by some. For instance, scholars who do not assign themselves to CTS have delivered research that is critical of state reactions to terrorism as well; especially military responses have been regarded rather critical by a wide range of scholars.[50] And one of the most iconic scholars of traditional terrorism studies, Paul Wilkinson, not only conducted research on state violence and state terrorism but often enough

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[44] Sondre Lindahl, "A CTS model of counterterrorism," *Critical Studies on Terrorism,* Vol. 10 No. 3 (2017): 523. Richard Jackson, "The Core Commitments of Critical Terrorism Studies," *European Political Science,* Vol. 6 No. 3 (2007): 6.

[45] Richard Jackson et al., *Terrorism: A Critical Introduction* (Basingstoke: Palgrave Macmillan, 2011). Richard Jackson, Marie Breen-Smyth and Jeroen Gunning, "Critical Terrorism Studies: Framing a new research agenda," In *Critical Terrorism Studies: A new research agenda*, ed. by Jackson, Breen-Smyth and Gunning (London and New York: Routledge, 2009), 228.

[46] Furthermore, CTS is sharing some of my epistemological and ontological basics, as e.g., awareness regarding the constructed nature of concepts. Jackson, "The Core Commitments of Critical Terrorism Studies," 1-6.

[47] Jackson, "The Core Commitments of Critical Terrorism Studies," 7. In this sense my study connects – besides the interpretivist paradigm - with the critical methodological research paradigm, a paradigm, which has an "emancipatory interest in human autonomy." Blaikie, *Designing Social Research*, 100. On the topic of critical theory see e.g., Jürgen Habermas, *Knowledge and Human Interests* (London: Heinemann, 1972).

[48] Jackson, "The Core Commitments of Critical Terrorism Studies," 1-2.

[49] David Martin Jones and M. L. R. Smith, "We're All Terrorists Now: Critical – or Hypocritical – Studies on Terrorism*," Studies in Conflict and Terrorism,* Vol. 32, No. 4 (2009). Mind that the authors dub CTS for *hypocritical* studies.

[50] See e.g. the evaluation of this point by Adam Roberts, "Terrorism Research: Past, Present, and Future," *Studies in Conflict and Terrorism,* Vol. 38, No. 1 (2015): 67-71.

emphasized the importance of human rights and civil liberties, thus following some of the ideals of CTS.[51] In the face of such tendencies, one may conclude, that the range of approaches and scholarly opinions in terrorism studies is much more complex than the idea of a clear-cut dichotomy in the field would suggest.[52] My research reflects a study that does not align itself with this idea of a necessary dichotomy between traditional and critical terrorism studies and will connect with parts of both.[53]

In its characteristic of evaluating and analyzing *policies*, this study additionally connects with the field of policy analysis. In its analysis of terrorism *policies*, my study follows (some) suggestions from policy analysis scholarship. For instance, several of the usual steps of the policy analysis process are employed in my thesis (e.g., the definition of a problem, the collection of evidence, the selection of evaluation criteria or the construction of potential alternatives).[54] However, this study does not reflect a 'conventional', objectivist, empiricist and technocratic version of policy analysis. Rather, it turns to a newer, more critical, argumentative and interpretative (qualitative) branch of policy analysis, as e.g., suggested by Frank Fischer.[55]

Since it is not always necessarily clear where the one field ends and the next starts, a clear demarcation of a discipline or field is not always easily delivered.[56] Thus, a definition of which fields or disciplines my study exactly touches upon is not absolute, especially since my core research fields see activity by a great variety of scholars with different backgrounds. This is specifically valid for the field of human rights research, which collects scholars from law, history, philosophy and social science (including sub-

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51 See e.g., Alison Watson, Introduction to *State Terrorism and Human Rights: International Responses Since the End of the Cold War*, ed. Gillian Duncan et al. (London: Routledge, 2013), 1-2.

52 Richard English, Introduction to "The Enduring Illusions of Terrorism and Counter-Terrorism," In *Illusions of Terrorism and Counter-Terrorism*, ed. by English (Oxford: Oxford University Press, 2015), 11.

53 Furthermore, drawing back on Andrew Heywood, it can be claimed that this thesis is engaging with a traditionally liberal perspective since "liberal thinking about terrorism has tended to be dominated by the ethical dilemmas that are posed by the task of counter-terrorism." Andrew Heywood, *Global Politics* (New York: Palgrave MacMillan, 2011).

54 See e.g. Eugene Bardach, *A Practical Guide for Policy Analysis: The Eightfold Path to More Effective Problem Solving.* 2nd ed. (Washington: CQ Press, 2005).

55 Frank Fischer, *Reframing Public Policy: Discursive Politics and Deliberative Practices* (Oxford: Oxford University Press, 2003), 1-23.

Several other smaller and larger fields or disciplines are touched upon in this thesis, e.g. human rights law, history, political theory or political philosophy.

56 Moti Nissani defined an academic discipline as an entity that owns a "self-contained and isolated domain of human experience which possess its own community of experts". Nissani, "Ten Cheers for Interdisciplinarity."

fields). In light of such developments, Langford fittingly pointed to an "erosion of disciplinary barriers" taken place in the last decades.[57]

Interdisciplinary research, however, provides some benefits. For instance, one might point to the benefit of an advancement of research frontiers triggered by interdisciplinary research. Overcoming such frontiers is beneficial since many of the currently pressing issues regarding human rights cannot "be answered within the confines of a single tradition," crossing disciplinary boundaries heightens the probability of arriving at more plausible answers in human rights research.[58] The same has been argued for research on terrorism and anti-terrorism.[59] Therein, one furthermore finds an argument supporting my choice of drawing on both legal and philosophic evaluations of terrorism policies (I explain how I employ these modes of evaluation below).

- **A Comparative Study with an Unusual Case Selection**

As my study will focus on several cases (Germany, the UK, and the EU), and will try to provide a comparison of the human rights problems of anti-terrorism efforts of these cases, my research constitutes a variety of a comparative case study design.

In general, comparative case studies constitute in-depth explorations or examinations with a high detail level and an emphasis on the specific context of the instances at hand.[60] Such studies strive for a "thick description" including both facts *and* context, which is also common for single case studies. Other than single case studies, comparative case studies provide the opportunity to discover differences, commonalities, and patterns across the cases. Specific characteristics of a case simply become more visible in comparison with other cases.[61] Additionally, studies based on multiple cases

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[57] Langford, "Interdisciplinarity and Multimethod Research," 1.

[58] Ibid., 4. For further advantages of interdisciplinary research see Moti Nissani, who points to not less than ten advantages of interdisciplinary research. Some of them resemble Langford's points, e.g., when Nissani speaks about a potential increase of communication between research fields or heightened possibilities for solving various intellectual, social or practical problems. An additional point of his take on the benefits of interdisciplinary research is, e.g., a general boost of creativity of research. Nissani, "Ten Cheers for Interdisciplinarity."

[59] Magnus Ranstorp, "Mapping terrorism studies after 9/11: An academic field of old problems and new prospects," In *Critical Terrorism Studies: A new research agenda*, ed. by Richard Jackson, Marie Breen-Smyth and Jeroen Gunning (London and New York: Routledge, 2009), 13.

[60] Martyn Hammersley, *What's wrong with Ethnography* (London: Routledge, 1992), 185. Linda Chmiliar, "Multiple-Case Designs," in *Encyclopedia of Case Study Research*, ed. Albert J. Mills, Gabrielle Durepos and Elden Wiebe (Thousand Oakes: SAGE Publications, 2010).

[61] See e.g. Todd Landman, *Studying Human Rights* (London and New York: Routledge, 2006), 66. Shelagh Campbell, "Comparative Case Study," In *Encyclopedia of Case Study Research*, ed. by Albert J. Mills, Gabrielle Durepos and Elden Wiebe (Thousand Oakes: SAGE Publications, 2010) or Chmiliar, "Multiple-Case Designs." Comparative case studies might further be understood as a replication of the issue or phenomenon, not dissimilar to experiments in quantitative research.

produce clues on how different contextual environments can influence individual cases. The generalizability (external validity) of such studies is naturally higher than of single cases studies.[62] Studies involving multiple cases are more powerful than single case studies; they deliver "more extensive descriptions and explanations of the issues" and demonstrate "the issues across a more varied range of circumstances."[63] In other words, comparative designs allow for a broader picture, which aligns this design with the broader aims of this study, since gaining at least a sense of the broader European context of terrorism policymaking is indeed an objective of this study. To have an insight into the policies and context of more than one case will allow for better and more considerate judgments in connection with the policies of each specific country. These advantages are the major reasons for choosing this design. A single country case would - put simply - not provide this opportunity. If the study would only look at one country it would e.g., be hard to evaluate how far-reaching that country's policy is concerning terrorism policies. In other words, the policies of a country can be put into perspective, and it will thus be possible to "establish what is unique in a particular context."[64] And indeed, both the similarities and the differences of anti-terrorism policies (and their human rights consequences), which this study aims to reveal are deemed important. Furthermore, a comparative design will not only provide the opportunity to deliver a more powerful take on the overall argument of this study (my thesis statement) but will additionally benefit the development of ideas (or hypotheses) on how to move forward in terms of European terrorism policies (in the Conclusion).[65]

However, a case study design, even a comparative case study design, means that my results will not be directly transferable to every other European country, resulting in limited generalizability (or external validity) of the findings for the whole 'population' of European states.[66] Still, the external validity does not equal zero. For cases that are similar to those in focus, my results should deliver indications and clues in regard to what human rights

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[62] Chmiliar, "Multiple-Case Designs." Landman, *Studying Human Rights*, 66.

[63] Chmiliar, "Multiple-Case Designs."

[64] English, *Terrorism: How to Respond*, 53. English makes his point in relation to research on terrorism, but it is valid for many areas of research.

[65] Bryman, *Social Research Methods*, 60. Campbell, "Comparative Case Study." Chmiliar, "Multiple-Case Designs."
Comparative approaches (especially of smaller selections of countries) are advocated for in human rights research. Landman, *Studying Human Rights*, 66. Fittingly, Jack Donnelly advocates for comparative approaches in the field of human rights when he holds that "the study of human rights must […] rest most heavily on the study of comparative politics." Donnelly, *Universal Human Rights in Theory and Practice*, 180.

[66] Of course, as Blaikie pointed out, all social science research results are limited in time and space and therefore limited in the scope of their generalizability, which makes generalizability beyond time and place always a matter of judgement, in qualitative but also quantitative research. Blaikie, *Designing Social Research*, 11.

might come under pressure should certain similar anti-terrorism strategies be implemented. Such clues can be expected to be strongest for other EU member states due to the existing interrelations between member states' and EU anti-terrorism policies.[67]

The cases at center stage in my research are again, Germany, the UK, and the EU. My case selection can be regarded as unusual since it is a combination of two nation-states and an intergovernmental/supranational organization. This might at first appear odd. It is thus appropriate and necessary to discuss the reasons for integrating the EU into the case selection.

Before coming to this issue, I will, however, shortly explain why the cases of Germany and the UK have been chosen. Both of my country cases are big Western European states, therefore, my case selection, in terms of the country cases, reflects rather a selection of typical cases than outlier cases. Therein, my study rather constitutes a most-similar design instead of a least-similar design. Both states are leading actors in global politics (e.g., at the G7 or G20 level), and they are two of the biggest players in the EU framework (although the UK is on its way out of the EU as we know). This pertains to the EU's policymaking in general, as well as its anti-terrorism policymaking. Both, Germany and the UK have implemented a range of terrorism policies in earlier decades and have intensified their policymaking regarding terrorism in the years after 9/11. Both countries have witnessed terror attacks on their soil in recent years, and have reacted to them by ever-intensified terrorism policies.[68] Therein, both countries have received criticism for several of their recent anti-terrorism policies. Consequentially, both cases promise to provide valid insight into the potential dangers for human rights in the course of terrorism policies. So, a range of similarities can be detected in terms of these two particular cases. Due to these commonalities, the two country cases make a fit for a comparative design.[69]

I have chosen not to include more country cases in my study. This is despite the fact that the inclusion of additional states would increase the possibilities for comparison and would thereby increase the strength of the overall arguments of my study and the transferability of my results. Several other relevant country cases can be found, for instance, France or Spain. Especially the former has implemented a range of questionable terrorism policies in the last years, reacting to several attacks by members or supporters

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[67] I am following the idea of transferability by Lincoln and Guba, who claimed that transferability of research results from qualitative case studies is possible, given that the contexts are similar. Yvonna Lincoln and Egon Guba, *Naturalistic inquiry* (Beverly Hills: Sage, 1985), 124-125.

[68] Of course, the UK and Germany have witnessed terror attacks in the more distant past as well (e.g. from the 1960s to the 1990s).

[69] On this see e.g., Campbell, "Comparative Case Study." Although a range of similarities between the UK and Germany exist, they do not constitute perfect matches. However, perfect matches are hardly existent in comparative case studies of countries or, in fact, social science in general, as Campbell points out herself.

of IS. However, the inclusion of additional countries would be too extensive. There would be too much empirical ground to cover in relation to the resources available for this study. Still, by including two countries and an intergovernmental/supranational organization, this thesis provides for a sound diversity of cases, establishing clues about the overall status quo of terrorism policies in the European context.

Now, I will come back to the point why the integration of the EU into the case selection of this thesis is not only justifiable but actually to the benefit of the study. As seen, the EU has been criticized by scholars for endangering human rights in the course of its anti-terrorism policies. This clarifies the general relevance of integrating the EU into this study. However, the overriding argument for integrating the EU into my case selection is the existing and growing interrelation between the EU's member states and the EU in terms of understandings and definitions of terrorism and anti-terrorism, as well as the adoption of anti-terrorism policies and strategies. Since 9/11, the focus of anti-terrorism has gradually shifted from the national to the international or transnational level. Therefore, the EU has become a more important player in anti-terrorism policymaking in the European arena.[70] Member states like the UK and Germany are shaping the anti-terrorism policies of the EU; however, their own policies are likewise shaped by the EU. European anti-terrorism is not only developed and coordinated at the state level anymore but increasingly at the EU level. Such interrelations can be exemplified by the common EU definition of terrorism from 2002. Before the events of 9/11, no common definition of terrorism existed at the EU level, however, after 9/11 the then fifteen EU member states quickly agreed on a common definition of terrorism. This common definition is ever more important in relation to member states that do not have their own definition. This is relevant for one of the country cases chosen for this research, Germany. Instead of deploying their own definition, German authorities lean on the official EU definition of terrorism. This example clearly shows the relation of EU bodies and member states in terms of understanding the phenomena of terrorism. Without taking the EU into regard one might conclude that Germany does simply not have any terrorism definition at disposal as a basis for its terrorism policies, this would, however, be a faulty assumption. Furthermore, EU member states are connected via the EU in terms of policy strategies, as well as common institutions that are supposed to tackle the threat of terrorism. In terms of policy strategies, both 'uploading' and 'downloading' processes take place, or in other words processes of Europeanization (uploading refers to the EU adopting national strategies into its own strategy

[70] Monica den Boer, "The EU Counter-Terrorism Wave: Window of Opportunity or Profound Policy Transformation," In *Confronting Terrorism: European Experiences, Threat Perceptions and Policies*, ed. by Marianne van Leeuwen (The Hague: Kluwer Law International, 2003), 185.

framework, downloading refers to the opposite process).[71] For example, the EU's Counter-Terrorism Strategy from 2005 oriented itself towards the British CONTEST strategy, which was first drafted in the UK in 2003. Tellingly, both strategy papers named four areas of anti-terrorism action, in the British strategy these four areas were called 'Prevent', 'Protect' 'Pursue' and 'Prepare' and in the EU strategy they were labeled 'Prevent', 'Protect', 'Pursue', and 'Respond'.[72] Furthermore, interrelations between the EU and its member states, as well as Europeanization processes are demonstrated by the circumstance that the EU is able to spread security politics from core countries of the EU to countries at the periphery of the institution (a 'downloading' process of Europeanization).[73] In other words, due to the mentioned interrelation between the EU and its member states, EU institutions or some of the core states do have an effect on the terrorism policies of less threatened countries (this way anti-terrorism policies can 'travel' from one country to another).[74] Moreover, at times, member states might use the EU level to implement policies that would be unpopular to adopt on a national basis (as was arguably the case with the EU data retention directive).[75] Such examples emphasize that European anti-terrorism connections are essential for the terrorism policies inside of the individual member states. By now, almost no policymaking initiative in EU member states does not include a European component, including anti-terrorism policymaking.[76] Since EU processes have become essential for understandings of terrorism, as well as efforts to

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[71] On the concept of Europeanization see e.g. Tanja Börzel and Diana Panke, "Europeanization," In *European Union Politics*, 5th ed., ed. by Michelle Cini and Nieves Perez-Solorzano Borragan (Oxford: Oxford University Press, 2016), 110-121. A widely used definition is the following one by Radaelli, who suggests that Europeanization is: Processes of (a) construction, (b) diffusion, and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things', and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic (national and subnational) discourse, political structures, and public policies." Claudio M. Radaelli, "The Europeanization of Public Policy," in *The Politics of Europeanization*, ed. by Kevin Featherstone and Claudio M. Radaelli (Oxford: Oxford University Press, 2003), 30.

[72] Andrew Staniforth, *The Routledge Companion to UK Counter-Terrorism* (London: Routledge, 2013), 347.

[73] Börzel and Panke, "Europeanization."

[74] Zygmunt Bauman supports this claim when he reasons that a rise of security measures in countries hit by terrorism does not only affect "the directly assaulted places but far away spots in the countries of "second speed" Europe – which the terrorists […] have no intention of attacking." Zygmunt Bauman, "A Few Comments on the Mis-Imagined War on Terrorism," *socialeurope.eu*, March 29, 2016.

[75] Such strategies of avoiding the implementation of policies 'at home' and rather adopting it at international level is also called for policy laundering in the literature. See for instance Barry Steinhardt, "Problem of Policy Laundering," *American Civil Liberties Union*, August 13, 2004. http://26konferencja.giodo.gov.pl/data/resources/SteinhardtB_paper.pdf

[76] Markus Beckedahl and Falk Lüke, *Die digitale Gesellschaft: Netzpolitik, Bürgerrechte und die Machtfrage* (München: dtv, 2012), 73.

tackle terrorism within a European context in the latest (two) decades, one cannot discuss anti-terrorism policy at national levels in a European context without taking the larger, EU context into account.[77] Ignoring the EU would not allow for any insights into the multi-layered nature of European anti-terrorism policymaking and might set the preconditions for misunderstandings on European anti-terrorism (e.g., it might appear, that it is exclusively states that are responsible for certain terrorism policies, whereas, in reality, the initiative for a specific policy might have come from EU institutions). However, by including the EU in my case selection, I gain a more diverse and multi-layered insight into European anti-terrorism.[78] Moreover, I claimed above that the results of my research would deliver some clues for other European country cases as well. By having an in-depth look at the EU in terms of terrorism policymaking and by elucidating the interrelation between member states and the EU, I strengthen my argument that my results deliver such indications for similar cases.

Furthermore, the EU is a relevant case to be included in this study, not only due to its relevance in terms of European anti-terrorism but also due to its relevance as an international rights player. The EU emphasizes the promotion of human rights and democracy as (part of) its *raison d' être*, while at the same time trying to oversee the human rights situation in its member states (and candidate countries).[79] Over the years, the EU's human rights

[77] Certainly, when looking at anti-terrorism policymaking in a European context one could look at other European institutions as well, since also other institutions are active in that policy field, for instance the Council of Europe (CoE). However, although other institutions are not without relevance, the EU is by far the most relevant and important actor in terms of European anti-terrorism. It owns more concrete policies than other institutions (e.g., in terms of data retention or biometrics) and it provides its members with a common definition of terrorism, as well as a common strategy to fight terrorism. Thus, the EU is not only the most important European player in terms of regional integration in general, but also in terms of anti-terrorism. Since I have to delimitate my focus I have chosen the EU over other European institutions.

[78] Such inclusion of diverse cases in comparative design is suggested in the literature. For instance, Jack Donnelly advocated for such a research design when he postulated, "we must pay greater attention to the interaction of national and international factors […]." Donnelly, *Universal Human Rights in Theory and Practice*, 181. My research is aiming precisely at the results of this interaction for the European human rights regime concerning European terrorism policies.

[79] For instance, the EU has adopted its own rights declaration, the CFREU. This charter was promulgated already in 2000 and gained the legal status of an EU treaty with the Lisbon Treaty in 2009. Additionally, the EU decided in the course of the implementation of the Lisbon Treaty to become a party to the ECHR. Furthermore, human rights are integrated into various documents of different importance in the EU framework. For example, human rights clauses are included in the Treaty of the European Union from 1992 (the Maastricht Treaty); which states that the "Union is founded on the values of respect for human dignity […] and respect for human rights" (article 2). It further states that the EU in its "relations with the wider world," is supposed to contribute to "the protection of human rights" (article 3). Newer treaties, such as the Lisbon Treaty, contain references to human rights as well. Rights clauses are also included in so-called Association Agreements with states surrounding the EU. However, although EU

agenda has evolved to become ever more ambitious. Therein, not living up to its own promises in terms of human rights, would harm the EU's credibility as an international rights player, and would constitute a negative example for its member states.[80]

Although the inclusion of the EU, as mentioned, provides my study with another important and beneficial layer of analysis, it is clear that the three cases I have collected are not completely comparable entities. The EU is not capable of carrying out the same kind and amount of terrorism policies as sovereign states. The EU, other than the two countries selected, does not maintain independent police, commando or military units. It does additionally not possess the same amount of legislative power in terms of security policy (still a wide range of security policy is kept to national levels). Thus, the EU does not possess the whole range of tools to fight terrorism, as states do.[81] Therefore, it has somewhat of a special status in my study. Still, I will provide an evaluation of human rights in the context of EU terrorism policy, based on the very reasons I lined out above: the general relevance of the EU as an anti-terrorism policy player (and rights player), the interrelation of EU-member-state policymaking, and the insufficiency that an ignorance of the EU in the European anti-terrorism policymaking would constitute.

- **Brexit**

I have before emphasized the interrelation between my two country cases and the EU in terms of anti-terrorism (the major reason for including the EU as one of my focal points in this study). In this regard, the current political process of Brexit is to a certain degree a challenge for my study. Clearly, the mentioned interrelation will likely become less strong in the course of Brexit. How the exact cooperation on anti-terrorism will look like, once Brexit becomes a reality is currently very uncertain; the possibility that current relations between the countries will be upheld is, however, present. This is based on potential incentives for such a continuation on both sides. Theresa May held at the Munich Security Conference in 2018 that she wishes to continue intense security cooperation with the EU (e.g. in terms of the European Arrest Warrant or with Europol) and expressed hopes for a security agreement that would provide for such cooperation.[82] Furthermore, since the

institutions have developed a human rights agenda, human rights ideals often have to take the backseat when coming in conflict with other political interests, e.g., security interests.

[80] Stephan Keukeleire and Jennifer Mac Naughtan, *The Foreign Policy of the European Union* (Basingstoke: Palgrave macmillan, 2008), 223-228.

[81] This limitation of the EU's capabilities is recognized by the EU itself, e.g., by EU Counter-Terrorism Coordinator Gijs de Vries. "The European Union's Role in the Fight Against Terrorism: The Role of the EU in the Fight Against Terrorism," *Irish Studies in International Affairs*, Vol. 16 (2005).

[82] Theresa May, Speech at the Munich Security Conference, February 17, 2018. https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018

UK has been evaluated as rather important for European anti-terrorism (e.g., the UK is evaluated as quite effective in terms of intelligence gathering) the perception that the UK's contribution is simply necessary for a successful European anti-terrorism might lead to incentives for continued cooperation on the EU's side.[83] This could still be valid despite member states' motivation to drive a harsh course on the UK in the Brexit process (based on the strategy of deterring other member states from going the same way as the UK).[84] However, at the very least, the overarching function of the EU in the field of anti-terrorism will not be valid anymore in regard to the UK. Sir Malcolm Rifkind, i.a. former Foreign Secretary and former Chairman of the British Intelligence and Security Committee hypothesized in April 2016 that anti-terrorism cooperation will continue despite Brexit, but that this cooperation will not be as effective anymore.[85] The anti-terrorism policy of the EU as a whole might also be looking different, as the EU's policies have significantly been shaped by influence from the UK (amongst other players). After the Brexit, the EU will find a different political context for security policymaking.[86]

Clearly, the Brexit will affect the relationship between the UK and the EU on anti-terrorism. It will, furthermore, influence the EU's overall anti-terrorism policy, given the previous strong role of the UK. However, the findings on the human rights troubles of the UK and the EU in the course of anti-terrorism produced in this thesis are not affected by the Brexit process. Only those observations that build on the concrete relation between the EU and the UK will possibly lose relevance once the UK formally exits the EU. And of course, as I write, the UK is still a member of the EU.

- **Delimitation of Focus**

When trying to analyze the terrorism policies of the three cases some delimitations are necessary concerning the focus of the study since one would not be able to analyze all terrorism policies of the three entities (anti-terrorism and counter-terrorism). I will employ the following points for delimitation of policy focus.

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[83] Claudia Hillebrand, "With or without you? The UK and information sharing in the EU," *Journal of Intelligence History*, Vol. 16 No.2 (2017): 91-94.

[84] Bernhard Blumenau, "International Cooperation & Intelligence Sharing" (presentation, The Future of Terrorism: Georgetown & St. Andrews University Conference, Washington, April 28-29, 2016).

[85] Malcolm Rifkind, "How Far is it Possible for the UK and its Security Services to Protect the Country from Terror?," World Counter Terror Congress, London, April 19-20, 2016.

[86] This position is e.g., shared by Rob Wainwright, Director of Europol, who claimed in the spring of 2016 that the Brexit equals the exit of one of the leading European forces in anti-terrorism. Rob Wainwright, "Protect: Cooperation and International Responses to Security and Counter-Terror Strategy in Europe," World Counter Terror Congress, London, April 19-20, 2016.

First, I will restrict myself to those policies that are playing out inside of the boundaries of my cases. Including both domestic *and* foreign terrorism policies, spanning over two decades, would be a far too extensive and potentially endless endeavor. To scan all domestic terrorism policies is already a challenging task, to include non-domestic policies as well, would let the range of this research grow beyond feasible boundaries. An inclusion of non-domestic terrorism policies would necessitate an analysis of e.g., the UK's and Germany's involvement in the 'War on Terror' in Afghanistan, or the UK's involvement in the Iraq War regarding potential human rights infringements. This would additionally open up for a foreign policy dimension, which is not at the heart of the discussion in this thesis (although a change of foreign policy might be a valuable tool for diminishing radicalization of certain groups 'at home'). My research will thus have its focus on domestic and inner European processes and will only cover measures that are aiming at individuals inside of the EU, Germany and the UK. This said it is not intended here to give the impression that human rights violations abroad would be less important or appalling. However, the focus of this thesis is simply not on potential human rights problems abroad (due to the above-mentioned reasons).

In addition, I will restrict myself to those policies and measures that are endangering the maintenance of a generally high human rights level. This means that I will not take up unique individual human rights violations (outlier events or exceptional cases), which have no further relevance regarding the importance of rights in a state's (or federation's) overall terrorism policy. Rather, I will focus on policies or measures that at least potentially affect a large range of individuals, that are of a severe character, or that resemble the general treatment of the idea of human rights while trying to tackle terrorism.[87] Thus, I will point to typical or systematic (one might also say widespread) human rights problems instead of individual instances of the same.[88] Hence, I will rather talk about systematic surveillance or discriminatory stop-and-search practices towards large or certain shares of populations, rather than

[87] Individuals are here understood universalistically, that means rights problems of all individuals inside the three entities will be at focus, not only the infringements of the rights of citizens or residents. This means that I am appealing to an idealistic and fully universal concept of human rights.

[88] For this reason I will, e.g., not go into the individual cases of Murat Kurnaz and Khaled El-Masri in the chapter on Germany. Kurnaz was abducted in the course of the US' rendition program and interned at Guantanamo Bay, and El-Masri was abducted by Macedonian police, handed over to the CIA, and interned in Afghanistan. Both were tortured during detention. In both cases, the German state did not provide much support to its resident and citizen respectively. Der Spiegel, "Lebenslänglich," May 13, 2013. Constanze Kurz, *Die Datenfresser* (Frankfurt: S. Fischer, 2011), 250-251. The cases have thus been chosen off for this thesis, not because the German state was here not involved in processes that are criticizable from a human rights perspective, but since they rather constitute special (or exceptional) cases (and furthermore played outside of the boundaries of Germany).

single or unique and non-systematic events of rights violation (e.g. violations spontaneously committed by single state representatives).[89]

My evaluation as to which terrorism policies might trigger such rights problems, and consequently which policies to focus on, is based on my research of the empirical data regarding the cases, consisting foremost of secondary sources, such as scholarly publications, as well as reports by NGO's and investigative journalism, but also primary sources such as court rulings. With the help of such documents, I have thus 'sampled' the most relevant issues in the course of conducting an extensive (semi-) systematic research. Therein, I went through all major policy packages and legislative acts for both country-cases as well as the EU and additionally, lean on evaluations from the scholarly literature and NGOs in the field as to which policies potentially trigger rights issues. Of course, for newest developments, such scholarly guidance is not always given (though potentially by NGOs or journalist publications).[90] *Relevance* is here evaluated as rights issues that are widespread or rather severe and that appear often in the literature and the mentioned documents. I will thus scrutinize anti-terrorism policies such as data retention policies, surveillance measures of various kinds, policies on (indefinite) detention, stop-and-search measures of police forces, anti-radicalization programs or the construction of biometric databases.

Another relevant delimitation in regard to this study pertains to the analyzed rights issues. In theory, the range of rights that can be affected by terrorism policies spans over the whole spectrum of rights outlined in the most important human rights documents (the UDHR, the ICCPR, the ICESCR, and the ECHR).[91] In other words, not only infringements of civil and political rights but also of economic, social and cultural rights are possible. For instance, the security measure of the barrier wall between Israel and the Occupied Palestinian Territory has not only effects on civil and political rights but also ESCRs, such as the right to health, education, and water.[92] To give another example, the freezing of assets of terror suspects might affect the economic rights of many more individuals than only the suspect's).[93] Still,

[89] However, unique cases might under very severe circumstances still be relevant and will therefore not be ultimately excluded; an example will be my analysis of the German Air Security Law.

[90] States and the EU provide overviews of their anti-terrorism activity as well, and whereas some of this data is usable, e.g. the original text of anti-terrorism acts, or original strategy papers, one has to consider states' interpretations of their own policy line to be necessarily biased.

[91] UDHR stands for the Universal Declaration of Human Rights, ICCPR stands for International Covenant on Civil and Political Rights, and ICESCR stands for the International Covenant on Economic, Social and Cultural Rights.

[92] Since many Palestinians are cut off from access to hospitals, schools or wells. Scheinin, "Terrorism," 561-562.

[93] On this see e.g., Joe Stevens, "UN Targeted Terrorist Sanctions and the Rule of Law: The UKs Response", *Journal of Terrorism Research*, Vol. No. 2 (2012). Christina Eckes, "EU

most anti-terrorism policies that include the potential for rights problems do affect civil and political. Economic, social, and cultural rights (ESC rights) are affected to a much lesser degree by anti-terrorism policies. Yes, there may be infringements of ESC rights in the context of terrorism policies as well as knock-on effects from civil rights violations. However, not only has the discourse regarding terrorism policies rights 'performance' largely been spinning around civil and political rights issues, e.g. at UN level but also in the literature.[94] It is additionally, as mentioned, the case that the most frequent negative effects of rights infringing terrorism policies are not to be found in the area of ESC rights, but civil and political rights.[95] An individual's senses of personhood and its recognition as a social actor with relatively liberal possibilities for thought, expression, association, assembly, movement, and prospects within a political system is really what's at issue – the recognized terrain of civil and political rights. My thesis will thus operate in this sphere: rights that have to do with one's relation to civic polities, people's relation to the state, their possibility of realizing and unfolding themselves as humans and political actors versus that state. ESC rights will not be addressed in my thesis. My decision to focus on civil and political rights is furthermore supported by the practical necessity to delimitate the focus of my research. Since the range of human rights potentially affected by terrorism policies is, as mentioned, very broad, it would not be possible to cover all rights norms that are potentially infringed (and again, the large majority of affected rights - at a widespread or severe level - *are* civil and political rights).

Therein, and based on my selection of terrorism policies explained above, the civil and political rights that will be at center stage in my human rights analysis of the mentioned cases are freedom from discrimination (art. 2 UDHR), the right to privacy (art. 12 UDHR), freedom of expression (art. 19 UDHR), freedom of assembly and association (art. 20 UDHR), freedom of movement (art. 13 UDHR), and the right to life, liberty and security (art. 3

Counter-Terrorist Sanctions against Individuals: Problems and Perils," *European Foreign Affairs Review*, Vol. 17 No. 1 (2012).

[94] Unsurprisingly, different scholars have different perceptions as to which rights are the most relevant ones in regard to terrorism policies. However, a general tendency to focus on civil and political rights is prevalent. For instance, Eric Posner and Adrian Vermeule, reflecting post 9/11 policies in the US and UK, point to the right to a fair trial, the right to privacy, freedom from discrimination or freedom of expression. Alison Brysk implies that a vast range of rights can be relevant concerning terrorism policies, e.g. the right to life, liberty and security, freedom from torture, the right to privacy, freedom from arbitrary detention and the freedom from discrimination, as well as the freedoms of movement, association, and expression. Other authors focus on a narrower set of rights in their writings on the subject, e.g., Michael Ignatieff talks mostly about detention without trial and torture in his almost infamous book *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton: Princeton University Press, 2004). Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (New York: Oxford University Press, 2007), 39-41. Brysk, "Human Rights and National Insecurity," 1.

[95] Scheinin, "Terrorism," 561.

UDHR). Other rights, such as the right to equal protection of the law or the freedom from arbitrary detention (art. 9 UDHR), the right to a fair trial (art. 10 UDHR) and the right to be treated with presumed innocence (art. 11 UDHR) will appear occasionally, but the rights mentioned above will be at the center of my investigation.

Another delimitation of focus is the result of my fixed timeframe, which I have set from 9/11 to current years. Naturally, this timeframe constitutes a certain limitation in regard to the policy focus of the study. It could have benefitted the understanding of the results of my post 9/11 analysis to be able to compare those results to a full-fledged analysis of the terrorism policies of the exact same cases from, say, the end of WWII to 2001. However, such a vast timeframe is utopic for a study of this size. Therefore, I have chosen to 'only' provide some historical detours when relevant in my analysis, which will provide a sense of terrorism policies in the UK and Germany in earlier decades (foremost the 1970s). Thus, the historical legacy of current terrorism policies does not feature as a major issue in my study; it is, however, not fully omitted.

- **Identifying Rights Problems**

After having delimitated the rights focus, the question arises as how to identify potential cases of rights curtailments and violations, in other words, how this study will go about operationalizing such restrictions of rights.[96] In this thesis, a human rights violation in the course of an anti-terrorism policy is operationalized via a double-edged human rights framework.

First, I operationalize a violation by referring to the legal human rights framework to which the EU, the UK, and Germany institutionally connect, which is legally binding human rights documents. The ECHR and the Charter of Fundamental Rights of the European Union (CFREU) in a European context and the ICCPR in a wider, global context will, due to their importance and international regard, be the benchmark in this regard (for the country cases).[97] The legal benchmark for the EU is, however, the CFREU, since the EU is not itself a party to the ICCPR or the ECHR (although the objective to join the ECHR as a party has existed since the implementation of the Lisbon Treaty). A violation of human rights in the legal framework is operationalized

[96] 'Operationalization' concerns the transformation of theoretical concepts or processes into variables, which can measure such concepts, or processes. See e.g., Blaikie, *Designing Social Research*, 115-119. Bryman, *Social Research Methods*, 696. The term operationalization pertains mostly to quantitative research; however, by interpreting the term 'measurement' as the interpretation of data in qualitative research, it becomes usable for my purposes as well.

[97] Clearly, the UN documents have been the foundations of the European documents. Whereas the UDHR is not a legal document, it is internationally recognized as maybe the most important human rights document and it has been the stepping-stone for the legally binding human rights documents.

The term 'benchmark' connects to the more orthodox policy analysis literature, see e.g., Peter Knoepfel et al., *Public Policy Analysis* (Bristol: Policy Press, 2007).

as a breach of legally binding human rights obligations emanating from the mentioned documents (taking legally eligible options for rights limitations and derogation into regard).[98] I foremost operationalize this legal benchmark by referring to court rulings (by a relevant human rights court or high court) which have declared a policy as being in violation (or not) of human rights. If no ruling has been issued on a concrete policy or if a ruling is still forthcoming, I will, if possible, utilize other rulings, which might be seen as precedents and can thus provide indications concerning the question whether a policy might be legally challengeable. In such instances, one will, again, have to take legal possibilities for rights derogations and limitations into account. If discrepancies between rights norms in the legal documents or between the demands for eligible rights derogations or limitations are detectable, I will rest on the most demanding set of norms.[99] If several rulings on a terrorism policy are to be found, I will rest on the most actual one.

However, human rights are not only legal terms enshrined in certain documents. Human rights reflect a certain understanding of the human being; general personhood, a potential maximal realization of human development and capabilities, and the relation between individual and state. In this sense, they not only represent 'letters of the law', but also certain intentions and aims (e.g., human dignity, freedom, and justice), constituting the spirit of rights.[100] My thesis will thus employ a quasi-idealistic approach and will evaluate a violation of rights not only in legal terms but in essence, in terms of a breach of the overall aims and intentions of rights, the spirit of rights. This perspective of human rights is necessary, as it is, from my perspective, insufficient to conduct a rights analysis of terrorism policies exclusively from a legal perspective. A narrow legal perspective does not always reflect the wider aims and the basic idea (or *ideals*) of human rights (although, one might, as mentioned, understand human rights law as an expression or legal translation of the wider intentions of human rights, or as the embodiment of human rights ideals). Whereas such a perspective is necessary for the analysis of all terrorism policies, its importance shines through the clearest under certain circumstances. For instance, not all policies that appear critical from a rights perspective have been evaluated by a human rights court (or constitutional court) or a ruling is still pending, or two courts have different opinions on the same policy. And, of course, legal frameworks can change over time, and might thus change their relation to certain rights. Furthermore, and this is a major point here, it is sometimes possible that a certain policy has been

[98] The mentioned rights documents leave space for a legal derogation of rights under certain circumstances.

[99] Logically, if a policy is eligible according to the most demanding human rights document, it is eligible in regard to the others as well.

[100] Dorfman, *13 Acts of Academic Journalism and Historical Commentary on Human Rights*. An understanding of human rights existing in a wider context and entailing a certain spirit springs also from a document such as the UDHR.

declared legal and justified by a court, however, the policy might despite its legal status still undermine the wider aims, spirit, and culture of human rights. In these cases, one can only rely on argumentation that connects to the wider meaning and aims of rights, and the consequences of their potential curtailment. Thus, I will evaluate the terrorism policies in focus against their compatibility with the overall aims of human rights norms (freedom, justice, and peace in the world, the protection of human dignity and the unfolding of individual capabilities).

- **Validity**

A few points are due regarding the validity of this study. The idea of validity is interested in the integrity of the results and processes of research.[101] In the traditional social science understanding, there are several categories for evaluating validity, measurement validity, internal validity, ecological validity, and external validity.[102] The latter category will not be taken up here since I have provided an account of the external validity of this study in my points on generalizability further above. Now, ecological validity – the question whether a research really reflects everyday life and natural settings, instead of producing artificial results possibly influenced by unnatural research conditions such as a laboratory - is given for this study, since my data on potential human rights violations are drawn directly from people's life world, or from legislation or policies that exist in the real world.

Whereas the categories of external and ecological validity fit with my qualitative study, this is not the case with the categories of internal and measurement validity. Internal validity concerns the relation between the major variables in a study, in other words, the issue of whether the independent variables really cause the dependent variables. In the case of this study, the dependent variable would be the existence of *violations* of human rights in my three cases in the course of terrorism policies. The independent variables could then in the context of my study be understood as the rights standards, which allow us to interpret human rights as being violated. However, the last rather reflects my operationalization of rights violations, rather than a check on causality. Normally the category of internal validity points towards more explanatory causation, e.g. rise of terror incidents (dependent variable) based on an increase of right-wing extremism (independent variable), and thus the category of internal validity does not

[101] The concept of reliability is concerned with the question of whether the results of a study are repeatable. Bryman, *Social Research Methods*, 32. However, the concept of reliability is foremost in focus in quantitative studies and since there is by definition no possibility that a study which owns a sufficient level of validity does not fulfill the requirements of reliability as well, I will concentrate on an explanation of validity. Lincoln and Guba claimed in their influential scholarly writing on reliability and validity in qualitative studies that "since there can be no validity without reliability, a demonstration of the former [validity] is sufficient to establish the latter [reliability]." Lincoln and Guba, *Naturalistic inquiry*, 316.

[102] The term 'traditional' is here referring to a research approach based on quantitative methods.

seem to fit fully to my kind of study. The same is valid for the category of measurement validity.[103] The emphasis on measurement shows that the idea of measurement validity foremost points to quantitative studies. In the context of my thesis, it would be concerned with the question of whether concepts such as terrorism, human rights, or human rights violation are really reflected by the data I use. However, since my study does not conduct any real measurements, but rather interprets social actions (see my point on interpretivism above) a certain misfit between the orthodox categories of validity and the nature of my qualitative study becomes apparent. A range of scholars (e.g., Lincoln and Gupta or Leung) has recognized this problem of a misfit. Therein, Lawrence Leung suggests that in qualitative studies one should rather check for the "appropriateness" of a study in order to establish if it reflects validity. This standard of appropriateness pertains to the research question or hypothesis in face of the aim of the study, the tools and the data of the research, the choice of research design and sample for reaching results, as well as the mode of data analysis.[104] Applying this standard of appropriateness, I would argue that the validity of my study is given according to these standards. First, the thesis statement (the hypothesis) presented above points directly to the analysis conducted in the study and drives towards a comparative analysis as carried out in this thesis. Second, the data and tools of the study (non-reactive research) fit the nature of the research, as argued above.[105] Third, the research design of a comparative study is, as argued, appropriate, a single case study design would give less telling results, and a broad scale quantitative research would not be able to produce a detailed analysis and grasp the important contexts and rights-based considerations. The choice of the sample was explained and defended as appropriate earlier. Last, the mode of analysis, a critical and interpretive analysis of terrorism policies based on a double-edged and interrelated framework, was explained as well and is likewise regarded as appropriate. Thus, my research does not only fulfill the classic validity categories (as far as possible), but also the alternative take on validity based on the specifics of qualitative work.

[103] This concept is concerned with the question whether measurements in a study really reflect the concepts that they are supposed to measure. Bryman, *Social Research Methods*, 32-33.
[104] Lawrence Leung," Validity, reliability, and generalizability in qualitative research," *Journal of Family Medicine and Primary Care*, Vol. 4 (2015): 324-327. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4535087/
[105] Maybe, one could have added interviews with members of the security apparatus or victims of rights infringements; however, such a design would have exceeded the resources of this study, without necessarily adding it essential value.

Literature Review

Of course, in the face of the ambitions of my thesis, there is a question as to what the major existing works are on the topic, and where this thesis might differentiate from the same. In the following, I will present such similar academic accounts. This will entail a reflection on the research gap that this thesis tries to reduce. I will additionally highlight some works that provided valuable inspiration for this thesis.

Before presenting those studies that are most directly related to my research, it is worthwhile to note the striking recent development in the overall field of terrorism studies. Until 9/11, terrorism was not considered a first-order security problem and terrorism studies consequentially "occupied a marginal position within mainstream academic circles."[106] Tellingly, Walter Laqueur pointed out, "books on terrorism published before September 2001 did not become bestsellers."[107] However, since 9/11, the literature on terrorism and anti-terrorism has without a doubt seen exceptional growth.[108] Accordingly, Michael Boyle even spoke of an "explosion of literature on terrorism since the September 11th attacks."[109] A statistic by *CSA Worldwide Political Science Abstracts* illustrates this point. Between 1960 and 2000, one could find 3.802 publications with the keyword 'terrorism', however, for the much shorter period from 2001 to 2006, one could find 6.564 publications.[110] Thus, it is evident that the attention terrorism as a social and political phenomenon attracted among scholars rose rapidly after 9/11.[111] Therein, 9/11 not only provided a 'high moment' for international relations, politics, and history, but

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[106] Ranstorp, "Mapping terrorism studies after 9/11," 13. Additionally, Peter Katzenstein explains that "international terrorism had not been considered part of conventional scholarship on national or international security before September 11." Peter Katzenstein, "Same War—Different Views: Germany, Japan, and Counterterrorism," *International Organization,* Vol. 57 No. 4 (2003): 734.

[107] Walter Laqueur, "*What to Read (and not to Read) about Terrorism*," *Partisan Review*, Summer 2002.

[108] 9/11 clearly triggered an increase of terrorism research especially in the US, thus 9/11 in a way "Americanized the study of terrorism," as Richard English holds. Richard English, "Why does terrorism occur?" Lecture at the Olympia Summer Academy, Nafplio, July 17, 2016. https://www.blod.gr/lectures/why-does-terrorism-occur/

[109] Michael J. Boyle, "Progress and Pitfalls in the Study of Political Violence," *Terrorism and Political Violence,* Vol. 24 No. 4 (2012): 529.

[110] Jennifer S. Holmes, "Terrorism," in *The SAGE Handbook of Comparative Politics,* ed. by Todd Landman and Neil Robinson (London: Sage, 2009), 463. Ranstorp points out that in the twelve months after 9/11 one could count just as many articles on terrorism as in the previous thirty years. Ranstorp, "Mapping terrorism studies after 9/11," 22.

[111] Richard English, "21st-Century Terrorism: How Should we Respond?" *Political Insight*, Vol. 1 No. 3 (2010): 76-78. Several other authors have made the same argument. For example, Martha Crenshaw explained, "that what was once a marginal subject for social science has developed into a full-fledged program of 'terrorism studies'." Martha Crenshaw, "Terrorism Research: The Record," *International Interactions,* Vol. 40 No. 4 (2014): 556. Alex Schmid notes the publication of "thousands of articles, especially since 9/11." Alex Schmid, *The Routledge Handbook of Terrorism Research* (London: Routledge, 2013), 460.

also for the field of terrorism studies.[112] Still, one will find that there is less research on state reactions to terrorism than on terrorism itself. For example, Campbell found in a 2005 study that only around twenty percent of research focused on responses to terrorism.[113] Still, this means that one will find hundreds of publications on state responses to terrorism. Especially after 9/11 (and Bush's proclamation of the 'War on Terror') a vast amount of literature has been published on anti-terrorism and counter-terrorism.

Many takes in the literature on terrorism policies (including comparative ones) do, however, not include human rights effects of such policies as a major focal point. For instance, Yonah Alexander's anthology *Combating Terrorism*, looks at the strategy ten countries employ towards terrorism, or Peter Katzenstein compared the German and Japanese terrorism policies before and after 9/11, however, without including a human rights scrutiny of terrorism measures.[114] Other studies *do* include human rights

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[112] However, the surge of research in terrorism has isolated it from the overall research in political violence. Boyle, "Progress and Pitfalls in the Study of Political Violence," 528. This can pose a problem, given the natural overlaps between the overall research field and the more specialized terrorism studies.

[113] Campbell as cited in Schmid, *The Routledge Handbook of Terrorism Research*, 461.

[114] Yonah Alexander, *Combating Terrorism: Strategies of Ten Countries* (Ann Arbor: University of Michigan Press, 2002). Katzenstein, "*Same War—Different Views*." Other examples of valuable or regarded publications on terrorism policies – without applying a central focus on human rights effects – are: Dorle Hellmuth, *Counterterrorism and the State: Western Responses to 9/11* (Philadelphia: University of Pennsylvania Press, 2016). Frank Foley, *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past* (Cambridge: Cambridge University Press, 2013). Mary Buckley and Rick Fawn, *Global Responses to Terrorism: 9/11, Afghanistan and Beyond* (London: Routledge, 2003). Javier Argomaniz, Oldrich Bures and Christian Kaunert, "A Decade of EU Counter-Terrorism and Intelligence: A Critical Assessment," *Intelligence and National Security*, Vol. 30 No. 2-3 (2015). Argomaniz, *The EU and Counter-Terrorism: Politics, polity and policies after 9/11*. Oldrich Bures, *EU Counterterrorism Policy: A Paper Tiger?* (Farnham: Ashgate, 2011). Marianne van Leeuwen, *Confronting Terrorism: European Experiences, Threat Perceptions and Policies* (The Hague: Kluwer Law International, 2003). Raphael Bossong, *The Evolution of EU Counter-Terrorism: European security policy after 9/11* (London and New York: Routledge, 2013). Karin von Hippel, *Europe Confronts Terrorism* (Houndsmill: Palgrave MacMillan, 2005). Dieter Mahncke and Jörg Mornar, *International Terrorism: A European Response to a Global Threat?* (Brussels: Peter Lang, 2006). Elies van Sliedregt, "European Approaches to Fighting Terrorism," *Duke Journal of Comparative & International Law*, Vol. 20 (2010). Michael Bauer and Cornelia Beyer, *Effectively Countering Terrorism* (Brighton: Sussex Academic Press, 2009). David Cortright and George A. Lopez, *Uniting against terror: cooperative nonmilitary responses to the global terrorist threat* (Cambridge, Massachusetts: MIT Press, 2007). Lee Jarvis and Michael Lister, *Critical Perspectives on Counter-Terrorism* (London and New York: Routledge, 2015). Staniforth, *The Routledge Companion to UK Counter-Terrorism*. Scott Poynting and David White, *Counter-Terrorism and State Political Violence: The 'war on terror' as terror* (London and New York: Routledge, 2013). Samuel Peleg and Wilhelm Kempf, *Fighting Terrorism in the Liberal State* (Amsterdam: IOS Press, 2006). Boaz Ganor, *The Counter-Terrorism Puzzle* (New Brunswick: Transaction Publishers, 2005).

effects in their empirical research on terrorism policies, however, they restrict themselves to single case study designs. For instance, Jeanne Bonnici's article on the effects of EU legislation on data protection and privacy rights, or Christina Pantazis' and Simon Pemberton's study on the implicit effects of UK anti-terrorism on non-discrimination.[115] Yet other studies employ rather a

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And of course, a plethora of academic works foremost covering terrorism do contain some chapters or contributions on state reactions to terrorism. A few examples are the following: English, *Terrorism: How to Respond*. Richard English, *Illusions of Terrorism and Counter-Terrorism* (Oxford University Press: Oxford, 2015). Brigitte L. Nacos, *Terrorism and Counterterrorism: Understanding threats and Responses in the Post-9/11 World*, 3rd ed., (Boston: Longman, 2010). Tore Bjørgo, *Root Causes of Terrorism: Myths, Reality and Ways Forward* (London and New York: Routledge, 2005). Richard Jackson et al., *Terrorism: A Critical Introduction* (Basingstoke: Palgrave Macmillan, 2011). Andrew Silke, *The Psychology of Counter-Terrorism* (London and New York: Routledge, 2011). Paul Wilkinson, *Terrorism versus Democracy: The liberal state response.* 3rd ed. (London and New York: Routledge, 2011). David Whittaker, *Terrorism: Understanding the Global Threat* (London: Longman Pearson, 2002). Gus Martin, *Essentials of Terrorism* (Los Angeles: Sage Publications, 2008). Gus Martin, *The New Era of Terrorism* (Thousand Oakes: Sage Publications, 2004). Cindy Combs, *Terrorism in the Twenty-First Century* (New York: Pearson Longman, 2009). Walter Enders and Todd Sandler, *The Political Economy of Terrorism* (Cambridge: Cambridge University Press, 2012). Stuart Gottlieb, *Debating Terrorism and Counterterrorism: Conflicting Perspectives on Causes, Contexts, and Responses*, (Washington D.C.: CQ Press, 2010). Bock, *Terrorismus*. Mikkel Thorup and Morten Brænder, *Antiterrorismens idehistorie – stater og vold i 500 år* (Aarhus: Aarhus Universitetsforlag, 2007).

[115] Jeanne Pia Mifsud Bonnici, "Recent European Union developments on data protection … in the name of Islam or 'Combating Terrorism'" *Information & Communication Technology Law,* Vol. 16 No. 2 (2007). Pantazis and Pemberton, "From the Old to the New Suspect Community." Other examples in terms of the UK are: Conor Gearty, "11 September 2001, Counter-terrorism, and the Human Rights Act," *Journal of Law and Society*, Vol. 32 No. 1 (2005). Rehman, "Islam, "War on Terror" and the Future of Muslim Minorities in the United Kingdom. Emmanouela Mylonaki and Tim Burton, "An Assessment of UK Anti-Terrorism Strategy and the Human Rights Implications Associated with its Implementation," *Journal on Terrorism and Security Analysis*, Vol. 6 (2011). Benedetta Berti, "Escaping the Prisoner's Dilemma: Securing a Role for Human Rights in Counter-Terrorism," In *Effectively Countering Terrorism*, ed. by Cornelia Beyer and Michael Bauer (Brighton: Sussex Academic Press, 2009). David Bonner, "Checking the Executive? Detention Without Trial, Control Orders, Due Process and Human Right," *European Public Law*, Vol. 12 No. 1 (2006). Studies that implicitly cover the right to non-discrimination in the UK case are: Tufyal Choudhury and Helen Fenwick. "The impact of counter-terrorism measures on Muslim communities," *International Review of Law, Computers & Technology*, Vol. 25 No. 3 (2011). Marie Breen-Smyth, "Theorising the "suspect community": counterterrorism, security practices and the public imagination," *Critical Studies on Terrorism*, Vol. 7 No. 2 (2014). Paul Thomas "Failed and Friendless: The UK's 'Preventing Violent Extremism' Programme," *British Journal of Politics and International Relations*, Vol. 12 No. 3 (2010). Greer, "Anti-Terrorist Laws and the United Kingdom's 'Suspect Muslim Community'."

In regard to the German case, not too many publications can be detected in the English language. Examples are: Berthold Meyer, "Fighting Terrorism by Tightening Laws," In *Fighting Terrorism in the Liberal State*. Verena Zöller, "Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights," *German Law Journal*, Vol. 5 No. 5 (2004).

theoretical approach on the relationship between terrorism policies and rights. For instance, Jeremy Waldron dealt with the implications of the idea of a balance between security and freedoms in the course of terrorism policies in a 2003 article. Another example is Sondre Lindahl's proposal for a different approach to terrorism policies.[116]

Therefore, the studies that come closest to my own are the ones that apply a comparative approach and include a human-rights-based analysis of terrorism policies. I will elucidate some examples. A piece of research that appears similar to mine was delivered by David Whittaker with his monograph *Counter-Terrorism and Human Rights* in 2009. Whittaker approaches the anti-terrorism policies of the US, the UK, and the EU from a human rights angle. The monograph constitutes a rare example of a comparative study that includes the EU in the case selection (although Whittaker's coverage of the EU is slightly thin). Whittaker elucidates some of the issues that have shaped the discussion around terrorism policies in the first years after 9/11 (focusing foremost on the US and the UK). The study, however, differs from my own in the lacking extended human rights framework (Whittaker stays close to legal evaluations), a lacking critical approach and a lacking genuine European focus (due to the prominent role of the US).[117]

Heinz, "Germany: State Responses to Terrorist Challenges and Human Rights." Lepsius, "Human Dignity and the Downing of Aircraft.

For the EU case one might e.g., mention: Hillebrand, *Counter-Terrorism Networks in the European Union*. Lindstrom, "The EU's approach to Homeland Security: Balancing Safety and European Ideals." Frank Gregory, "The EU's Response to 9/11: A Case Study of Institutional Roles and Policy Processes with Special Reference to Issues of Accountability and Human Rights," In *Terrorism and Human Rights*, ed. by Magnus Ranstorp and Paul Wilkinson, *Terrorism and Human Rights* (London and New York: Routledge, 2008). Brown and Korff, "Terrorism and the Proportionality of Internet Surveillance" Christina Eckes, EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual (Oxford: Oxford University Press, 2009). Vassilios Grammatikas, "EU Counter-terrorist Policies: Security vs. Human Rights?" Conference Paper, First Annual Conference on Human Security, Terrorism and Organized Crime in the Western Balkan Region, Ljubljana, Slovenia, November 2006.

[116] Jeremy Waldron, "Security and Liberty: The image of balance" *The Journal of Political Philosophy*, Vol. 11 No. 2 (2003). Lindahl, "A CTS model of counterterrorism." Other examples are: Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (New York: Oxford University Press, 2007). George Clifford, "Just counterterrorism," *Critical Studies on Terrorism*, Vol. 10 No. 1 (2017). Mahmood Monshipouri, *Terrorism, Security, and Human Rights* (Boulder and London: Lynne Rienner Publishers, 2012). Richard Ashby Wilson, *Human Rights in the 'War on Terror'* (Cambridge: Cambridge University Press, 2005). James Nickel, *Making Sense of Human Rights*, 2nd ed. (Malden: Blackwell Publishing, 2007). Stuart Taylor Jr., "Rights, Liberties and Security: Recalibrating the Balance after September 11," In *The New Era of Terrorism*, ed. By Gus Martin (Thousand Oakes: Sage Publications, 2004). Eric Stoddart, "Challenging 'Just Surveillance Theory'," *Surveillance&Society*, Vol. 12 No. 1 (2014). Scott MacDonald, "The Lawful Use of Targeted Killing in Contemporary International Humanitarian Law," *St Andrews Journal of International Relations*, Vol. 2 No. 3 (2011).

[117] David Whittaker, *Counter-Terrorism and Human Rights* (Harlow: Longman, 2009).

Kent Roach's book *The 9/11 Effect: Comparative Counter-Terrorism* from 2011 is another example of a study that has similar traits to my thesis. Roach compares the cases of foremost four countries; the US, the UK, Australia, and Canada, (Egypt, Syria, Israel, Singapore, and Indonesia are added as additional examples in one chapter) and the UN. He scrutinizes the terrorism policies of all cases from a human rights perspective. Especially his analysis of the UK is relevant from the perspective of this study. Here he e.g. points out that the policy of indefinite detention violated valid rights norms. He further emphasizes the historical legacies of current UK anti-terrorism. Roach's detailed study differentiates from mine in the circumstance that it restricts itself to a legal analysis of rights eligibility. His research does additionally not deliver insights on the EU, and the case selection does not reflect a European focus.[118]

Alex Conte's extensive study *Human Rights in the Prevention and Punishment of Terrorism* from 2010, covers the terrorism policies of four countries (the US, the UK, Australia, and Canada) from a legal angle. Conte e.g. scrutinizes pre-charge detention legislation, covers the rights problems triggered by the UK's indefinite detention regime established in 2001, the detrimental effects of British control order measures on the rights to liberty and emphasizes imprecisions in legal definitions of the criminal offense of inciting terrorism as established in the UK's 2006 Terrorism Act. Therein, Conte's study elucidates some of the same policies and rights issues as my thesis. Although Conte's study has some overlaps with my own, it restricts itself firmly to a purely legal take on rights issues, it does only include states in its case selection, and the cases do not reflect a European focus.[119]

Todd Landman conducted comparative research on the effects of anti-terrorism for the cases of the UK and the US in his 2007 article "Imminence and Proportionality: The U.S. and U.K. Responses to Global Terrorism." He covered anti-terrorism policies such as stop-and-search practices and indefinite detention and control orders (for the UK case) and concluded that in both cases civil liberties indeed have been curbed in the course of efforts to tackle terrorism.[120] Landman's study shows similarities to my research, however, it does not include the EU, it does not cover developments of the last decade and its case selection does not reflect a European approach.

James Piazza and James Walsh conducted a comparative study on the human rights consequences of governments' responses to terrorism as well. However, their study evaluating rights violations after a series of terror attacks

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[118] Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge: Cambridge University Press, 2011).

[119] Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand* (Heidelberg: Springer, 2010).

[120] Todd Landman, "Imminence and Proportionality: The U.S. and U.K. Responses to Global Terrorism," *California Western International Law Journal*, Vol. 38 No. 1 (2007).

in a range of countries (often non-Western), in the timeframe 1981-2003, used a quantitative approach. They reached, as mentioned earlier, the conclusion, that the rights to free speech and freedom of assembly and freedom of movement would generally not be curtailed by such policies, only extrajudicial killings and disappearances would see an increase in times of heightened terrorism.[121] My study, which does focus on a different timeframe and a narrower case selection and which goes in more depth with the specific cases, as well as the meaning of the idea of human rights, will contest this claim.

A pre-9/11 example of a study that resembles the research undertaken in this thesis is provided by Michael Freeman, who covered the relation between security and freedom and human rights for the cases of Canada, Northern Ireland, Uruguay and Peru from the 1960s to the 1990s, in his 2003 book *Freedom or Security: The Consequences for Democracies using Emergency Powers to Fight Terrorism.* He concluded that the usage of emergency powers of these countries in answering terrorist threats (respectively by the FLQ, the IRA, the Tupamaros, and the Shining Path) did produce mixed results. In Peru and Uruguay, emergency powers were abused by the state, but not in the UK and Canada. He additionally emphasized that the existence of a free press and a separation of powers would make a serious restriction of human rights unlikely.[122] Freeman's study does deviate from mine not only in its conclusion but also in terms of its case selection and timeframe.

Some researchers do likewise utilize a comparative approach and include several cases; however, they restrict themselves to research on only one rights issue instead of a multitude (as this thesis does). An example is a publication by Quirine Eijkman and Bart Schuurman from 2011 (*Preventive Counter-terrorism and Non-Discrimination in the European Union*). Eijkman and Schuurman scrutinize the effects of current preventive anti-terrorism policies on the right to non-discrimination in three cases (the Netherlands, the UK, and the EU). They come to the conclusion that problems are detectable for all cases regarding non-discrimination, pointing to e.g., stop-and-search practices in the UK or the construction of databases at the EU level.[123] Although the study 'only' covers one rights issue, it comes rather close to my own research in its general approach.

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[121] Piazza and Walsh argue that only 'rights to physical integrity' are affected by terrorism policies, claiming that governments which "experience many terrorist attacks subsequently engage in more extrajudicial killings and disappearances." Piazza and Walsh, "Transnational Terror and Human Rights."

[122] Freeman, *Freedom or Security.* Based on the cases of Canada and Uruguay, he additionally pointed out that emergency powers can bring effective results in fighting terrorism.

[123] Eijkman and Schuurman, *Preventive Counter-Terrorism and Non-Discrimination in the European Union*.

Another example of research in my topic frame restricting itself to one rights issue, is a study conducted by Konrad Lachmayer and Normann Witzleb, which scrutinizes the effects of (some) recent surveillance measures on the rights to privacy and data protection in the EU, the US and Australia (in their 2014 article "The Challenge to Privacy from Ever Increasing State Surveillance"). They, e.g., analyze the EU's data retention scheme or the American Patriot Act, and concluded that surveillance measures have reached "unprecedented intensity and intrude deeply into the personal sphere of millions." They additionally point to the permanent character of newly implemented surveillance, a point I will return to later.[124] Although the study is restricting itself to only one anti-terrorism and rights issue, its focus resembles one of the major points of inquiry in this thesis, surveillance.[125]

In the literature, one additionally finds anthologies that comprise contributions on the human rights effects of terrorism policies of a range of countries (or entities), thus opening up for an indirect comparative approach. An anthology with the title *Terrorism and Human Rights* from 2008, edited by Paul Wilkinson and Magnus Ranstorp constitutes a valuable example. It includes contributions on several countries (e.g. the UK, Australia, India, Spain or Israel), as well as the UN and the EU. It additionally contains a general discussion on the relationship between rights and terrorism policies. For instance, Laura Donohue provides a convincing argumentation against the often-used analogy of a balance that is to be struck between security and freedom.[126] The publication shows its value as a major reference point in the field. It differentiates from my thesis, as it does not reflect a systematic or genuine comparison of several cases in one piece of research (due to being an anthology).

Another anthology taking up the relationship between terrorism policies and human rights is edited by Alison Brysk and Gershon Shafir, *National Insecurity and Human Rights* from 2007, inter alia containing chapters on human rights consequences of terrorism policies in the US, the UK, Spain, Israel, Germany, and Canada. The anthology presents useful insights into human rights problems in the different cases, and the chapters provided by the editors deliver strong points for omitting or restricting measures that endanger rights in scenarios of terror threats. They end by

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[124] Konrad Lachmayer and Normann Witzleb, "The Challenge to Privacy from Ever Increasing State Surveillance: A Comparative Perspective," *University of New South Wales Law Journal*, Vol. 37 No. 2 (2014).

[125] Another example of such a 'single issue' comparative approach is Fiona de Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (Cambridge: Cambridge University Press, 2011), a study that scrutinized the detention schemes in face of the right to be free from arbitrary detention for the cases of the US and the UK.

[126] Magnus Ranstorp and Paul Wilkinson, *Terrorism and Human Rights* (London and New York: Routledge, 2008).

suggesting that upholding rights standards might be a way of curtailing terrorism in the first place, a point I will return to in this thesis.[127]

Mary Volcansek and John Stack edited the anthology, *Courts and Terrorism: Nine Nations Balance Rights and Security* from 2011. The contributions include both pre- and post-9/11 cases. The volume does apply a judicial perspective on the case studies and extends its focus on the concept of democracy, as well as the more broad relation between security and liberty.[128] The editors emphasize that courts play a decisive role (potentially the most important role) in trying to establish or at least protect a balance between rights and security.

A pre-9/11 anthology in the topic framework is *European democracies against terrorism: governmental policies and intergovernmental cooperation*, from 2000, edited by Fernando Reinares. The anthology provides case studies on four countries (the UK, France, Spain, and Italy), as well as the EU. However, other than my study, Reinares' publication does not restrict itself to a specific focus on human rights effects of anti-terrorism, but rather employs the broader framework of democracy *and* rights (although the chapter on the UK does utilize a narrower legal rights framework and points to legal rights problems in the UK's efforts to tackle terrorism in Northern Ireland).[129] And of course, the publication does not reflect a comparative effort by a single author.[130]

Based on this overview, I would like to claim that my thesis does indeed answer on a research gap. The gap that my thesis addresses is a consequence of the following seven points. First, a comparative approach,

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[127] Alison Brysk and Gershon Shafir, *National Insecurity and Human Rights: Democracies Debate Counterterrorism* (Berkeley: University of California Press, 2007).

[128] Mary Volcansek and John Stack, *Courts and Terrorism: Nine Nations Balance Rights and Security* (Cambridge: Cambridge University Press, 2011).

[129] Fernando Reinares, *European democracies against terrorism: governmental policies and intergovernmental cooperation* (Aldershot: Ashgate, 2000).

[130] As further examples one can mention: *Democracy and Counterterrorism: Lessons from the Past*, ed. by Art and Richardson. The contributors analyze the reaction of thirteen states on terror threats, spanning over a wide geographical distribution, albeit foremost focusing on the pre-9/11 timeframe. Most contributors do furthermore not focus on rights issues, but rather the relation of democracy and state reaction. Robert J. Art and Louise Richardson, *Democracy and Counterterrorism: Lessons from the Past* (Washington D.C.: US Institute of Peace Press, 2007). Already in 1994, David Charters edited the anthology *The Deadly Sin of Terrorism: Its Effect on Democracy and Civil Liberty in Six Countries.* It evaluates the effects of pre-9/11 terrorism policies on democracies and civil liberties in the UK, Germany, Israel, Italy, France, and the US. The volume (in most parts) delivers the conclusion that fears of democracy being eroded by terrorism policies have been exaggerated. David Charters, *The Deadly Sin of Terrorism: Its Effect on Democracy and Civil Liberty in Six Countries* (Westport: Greenwood Press, 1994). The anthology *Counterterrorism: Democracy's Challenge* (Portland: Hart Publishing, 2008) by Andrea Bianchi and Alexis Keller can be seen as another example of a publication fitting in this topic frame, however, it deals foremost with effects of terrorism policies on democracy instead of rights and it does not reflect a comparison of specific cases.

combining research on multiple cases from a human rights angle is not a common phenomenon in the literature; many scholars restrict themselves to single case studies. Furthermore, many comparative works are a selection of single case studies in anthologies. Second, although a vast amount of literature exists on anti-terrorism, this is not the case for the academic coverage of German anti-terrorism (at least in the English language), even less so in terms of coverage of the German case from a human rights angle. Third, a comparative approach spanning over (almost) the complete timeframe since 9/11 is not the rule in the literature. Fourth, comparative approaches including the EU are rather rare in the field. Fifth, some comparative studies do restrict themselves to a narrow set of rights issues, sometimes only a single affected right (e.g., the study by Eijkman and Schuurman). This is not the case with my study since I try to elucidate the effects on a range of civil and political rights. Sixth and this is perhaps the decisive category, a comparative approach of anti-terrorism analysis from a human rights angle, operating with a wider human rights framework (that is including the analytical category of wider human rights aims, or 'spirit of rights') is rare. Seventh, my thesis does close some gaps on the most recent developments in the three cases that have not yet (or almost not) been accounted for in the academic literature (e.g. developments towards facial recognition or biometric databases have foremost been covered at the NGO level). Combining these points my research does indeed constitute a unique piece, given the combination of a long-term comparative approach with a double-edged human rights angle, including the EU and Germany, covering a range of rights issues and adding to the understanding of the newest developments in the specific cases.

In my efforts to reduce this research gap and in conducting my research I have taken important inspiration from a wide range of works. It is worthwhile to mention a few. Works which provided this thesis with inspiration regarding the theoretical framework are e.g., Martha Nussbaum's *Creating Capabilities*, providing the concept of human capabilities, which plays an important role in understanding the aims of the human rights idea and which is reflected prominently in my conceptualization of the spirit of rights idea. Likewise, Francis Fukuyama's recent book *Identity* presented insights into the importance of the recognition of equal worth. Ben Dorfman's *13 Acts of Academic Journalism and Historical Commentary on Human Rights* provided invaluable inspiration for my double-edged rights framework (the letter of the law and the spirit of rights). Jeremy Waldron's article "Security and Liberty: The image of balance" presented valuable points on the mentioned balance analogy and its policy implications. Additionally, Conor Gearty's book *Liberty and Security* delivered important theoretical points on the relation between terrorism policies and human rights, and additionally insights on the British case, e.g. in regard to the effects of anti-terrorism on minorities as well as the majority in the country. Another scholar who presented valuable input for this thesis is Laura Donohue (e.g. via her

contribution "Security and Freedom on the Fulcrum"), for instance by providing a theoretical take on different understandings of the relation between terrorism policies and rights, by heightening the understanding of the importance of privacy, by delivering empirical input on surveillance matters, as well as evaluations on long-term consequences of rights curtailments and rights support. Moreover, Richard English takes a prominent role in the literature base of this thesis. Several of his publications (but especially his books *Terrorism: How to Respond* and *Illusions of Terrorism and Counter-Terrorism*) provided inspiration, e.g., on the definitional fault-lines of the term terrorism, or how to evaluate responses to the phenomenon.[131]

[131] A range of additional examples of works that inspired my thesis could be mentioned, I will restrict myself to these: Timothy Garton Ash's *Free Speech: Ten Principles for a Connected World*, Lilian Mitrou's "The impact of communications data retention on fundamental rights and democracy," and Andreas Bock's *Terrorismus* have delivered valuable input; for instance for the understanding of freedom of expression, data retention surveillance and its rights implications, and long term strategies to tackle terrorism, respectively.

Chapter I
Human Rights: History, Concepts, and Issues

In order to conduct a human rights-based analysis, an elaboration of the concept of human rights is a necessity. In this chapter, I will first deliver a short introduction to the history of the concept in order to deliver the relevant conceptual context. Some historical understanding of the concept is needed in order to grasp (some of) the theoretical discussions around human rights that will follow subsequently. I will thus provide an explanation of the double-edged understanding of human rights that this thesis will utilize. It begins by delivering an account of a legal understanding of what human rights are, how they are justified and how rights can be derogated. Thereafter, I will elucidate a wider perspective on human rights. I will go in-depth with the wider aims of human rights (what I call the 'spirit of right') and explain the ideas behind such a concept-based understanding of rights. In the last section of the chapter, I will introduce those specific rights that are overwhelmingly in focus in this thesis one by one in more detail. This is a necessity since I will in the analysis delve into the specific rights implications of specific anti-terrorism policies. In order to be able to conduct such an analysis, the affected rights need to be elucidated. I will, thus, introduce the relevant rights, locate their legal source, clarify potential legal limitations of such rights and explain both their general importance, as well as their relevance in the context of this thesis.

A Brief History of Human Rights

Human rights are reflected as a concept that does not exist in a historical vacuum but is dependent on the context of its central ideas. The historical roots of the concept of human rights will be relevant for locating the source of my double-edged human rights framework. In other words, the legal and the spirit understanding rest on slightly different understandings of the roots of human rights.[1]

One of the most fiercely debated issues in the historical writing on human rights is the question when the concept of human rights first appeared, in other words where to start in the timeline of the history of humankind with tracing human rights.[2] The one extreme of the explanations on the issue is to trace human rights back to the roots of civilized mankind itself, e.g., the Code of Hammurabi (ancient Babylon); whereas the other extreme is to trace them back no longer than the 1970s. Micheline Ishay is a proponent of the former,

[1] Furthermore, some theoretical justifications of rights lean more on certain historical explanations regarding the sources of rights than others.

[2] Ed Bates, "History," In *International Human Rights Law*, 2nd ed., ed. by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 16.

whereas Samuel Moyn tried to renew the historical picture of the concept of human rights by claiming the latter.[3]

Ishay claims that many ancient religions and values had an influence on the development of modern rights. Most religions would contain a claim of universality (a claim to be valid for all human beings) and would provide altruistic guidelines. For instance, Ishay speaks of portrayals of 'brotherly love' to be found in some of these religious texts. She finds these roots of human rights in all three big monotheist religions, as well as ancient Buddhism and writings of Confucius. She moreover points to the fact that some drafters of the UDHR claimed that some of the ancient roots are connected to modern human rights; e.g., Rene Cassin claimed that "human rights comes from the Bible, from the Old Testament, from the Ten Commandments."[4] Ishay herself holds that the Jewish precepts can be traced back to the code of Hammurabi, which in her opinion narrates "the moral principles of a people, sanctioning punishments for those who transgress the law."[5] Ishay additionally traces human rights back to ancient philosophers, e.g., Socrates and Plato (in regard to their view of universal human goodness).[6]

Critics (e.g. Lynn Hunt) remarked that Ishay's history of human rights, due to its broad approach, would simply become the history of human civilization - in other words, a history of everything.[7] I would agree with this criticism since the differences between current human rights ideas and the postulated ancient roots simply appear too vast. Surely, ideas of universality and empathy for all human beings are reflected in some of the ancient roots Ishay refers to, however, they differ considerably from modern ideas about human dignity, the unfolding of the potential of individuals versus the state, the importance of rights for the establishment of democratic states and societies and the picture of humans being endowed with reason (e.g. as spelled out in the UDHR).[8]

In contrast to Ishay, Moyn holds that human rights are a very recent idea. He holds that human rights ideas only became widespread in the 1970s. First during this decade would we have seen a movement spreading the concept of human rights. Moyn opposes the claim that ancient religions or philosophies should be regarded as precursors of modern human rights. For example in case of Christianity, "the cultural and political implications of

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[3] Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004). Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard Bellknap, 2010).

[4] Cassin as cited in Ishay, *The History of Human Rights*, 19.

[5] Ishay, *The History of Human Rights*, 19.

[6] Ibid., 23.

[7] Lynn Hunt, *Inventing Human Rights: A History* (New York: W.W. Norton and Company, 2007), 20.

[8] I will come back to these points in the next section of this thesis.

Christianity from age to age and place to place were simply too different, in need of too much drastic transformation, to approach modern conceptions on their own."[9] The same could then be claimed for all other ancient religions and philosophies that Ishay presents as roots of human rights. Furthermore, according to Moyn, the rights declared during the Enlightenment would not resemble modern human rights either. The rights evolving during that period would have aimed at the construction of nation and state through revolution, the scope of these rights would not have included humankind as a whole. I.e., the "rights of man" (from The French Declaration of the Rights of Man and of the Citizen, from 1789), Moyn argues, were about "a whole people incorporating itself in a state," revolutionary rights were about the creation or renovation of citizenship space, not the protection of humanity. According to Moyn, these rights were subordinate features of the creation of state and nation. Moreover, the creation of the UDHR after the end of World War II could not be evaluated as the moment human rights gained importance in international politics and policymaking either, Moyn claims. In the 1940s, when the UDHR was under composition, wartime hopes of a world shaped by human rights were soon disappointed. "The world looked up," Moyn holds, and then went on with Cold War politics. Human rights policy would quickly not have been in focus anymore and even the horrors of the Holocaust soon came out of focus. Human rights would have been marginal until the 1970s.[10]

According to Moyn, human rights evolved in the 1970s as a new utopia. They evolved as the image of another and better world. This was only possible because other utopias had died before. What Moyn has in mind here is foremost the utopia of the 'new left' as it was called at the time, including student revolts in many Western countries during the end of the 1960s. The idea of reaching a better world by way of a political revolution had lost its momentum, Moyn argues, it made space for a less politicized rights movement that also tried to achieve a better world. In consequence, human rights saw their social breakthrough and were taken up by a variety of social movements and governments alike (e.g., the US administration under Carter).[11]

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[9] Moyn, *The Last Utopia*, 16.

[10] Moyn, *The Last Utopia*. Kenneth Cmiel – one of the big names in human rights scholarship – in a certain sense seems to agree with Moyn when he explained that several rights were not understood as human rights before the 1970s, but are now a central part of human rights discourse, e.g., children's rights or rights of indigenous people. Kenneth Cmiel, "The Recent History of Human Rights," *The American Historical Review*, Vol. 109 No. 1 (2004): 118.

[11] An example for the unpolitical drive of the human rights movement would be the fact that Amnesty International denied naming the structural reasons for human rights violations, while still blaming the responsible authorities for the emergence of such violations. Moyn, *The Last Utopia*.

The two other major approaches regarding the starting point of human rights history, which one finds in scholarly literature surfaced already in the paragraph on Moyn's ideas on the topic. These approaches point to the Enlightenment and the creation of the UDHR after the Second World War respectively. These strands are the most popular in the literature and the common understanding of the origin of human rights. In comparison to tracing the roots of human rights in the texts of ancient religions or philosophies, it appears easy to detect roots of modern human rights in Enlightenment texts. For instance, one can trace human rights in the English Bill of Rights (1689) or in the writings of philosophers such as John Locke when reflecting his demands for rights to life, liberty, and property, or in Immanuel Kant's notion of cosmopolitanism.[12] A prime example of an Enlightenment text reflecting human rights ideas, according to this strand of the literature, is the mentioned French Declaration of the Rights of Man and of the Citizen.[13] Various rights detectable in the French Declaration surface in the 1948 UDHR as well, e.g., freedom of expression and the rights to property or security (articles 2 and 10 of the French Declaration). Furthermore, one is bound to notice the similar wording of the first article of these two documents. Both speak of humans ("men" in the French Declaration) being born "free and equal" in rights. Some drafters of the UDHR fittingly declared the French Declaration to have been a source of inspiration (e.g., Eleanore Roosevelt).[14] Lynn Hunt is a writer in the camp of those academics identifying the 'human rights moment' during the Enlightenment. She established an innovative hypothesis when she argued that the reason for human rights evolving during the Enlightenment was the advancement of a sense of empathy during the period. The ability of ordinary people to assign importance to individuals and their wellbeing would have received a boost. The Enlightenment would have been based on a change of the notion of selfhood and the individual in general. People started (with the help of accounts of torture, novels, plays, music, etc.) to identify with other individuals more than earlier. Hunt uses the term "imagined empathy" to underline this process.[15] However, critics (e.g. Ishay) hold that given the inequality of rights distribution during Enlightenment (e.g., non-nationals, women, and citizens without property were discriminated), the "Enlightenment human rights legacy represents little more than an

[12] One could add a vast array of names of Enlightenment thinkers, e.g., Voltaire, Rousseau, or Mill, to mention but a few.
[13] Together with the American Delcaration of Independence and the American Bill of Rights, which came into being only a few years earlier, 1776 and 1787 respectively.
[14] In her address to the UN at the ratification of the UDHR on December 9, 1948.
[15] Hunt, *Inventing Human Rights*, 26-34. Hunt's term of imagined empathy is a development of Benedict Anderson's famous 'imagined communities'.

imperialist masquerade aimed at subdoing the rest of the world under the pretense of promoting universality."[16]

As the fourth strand, other researchers rather see the creation of the UDHR as the decisive moment in human rights history (mostly with acknowledging the Enlightenment roots of the UDHR). Elisabeth Reichert is representative of this group. She describes the UDHR as "nothing short of a revolution in thought" and additionally points to the fact that no prior document could match the UDHR in scope and participation, which would make it to ''one of the most esteemed accomplishments in political, social, economic and cultural history."[17] The UDHR would for the first time have implemented "minimum standards of conduct for governments all over the world". For the first time, universal rules had appeared.[18] The UDHR manifested universally applicable rights and aims of rights (freedom, justice, and peace in the world). The declaration developed out of contemporary precursors such as Roosevelt's Four Freedoms from 1941 (freedom of speech and expression, freedom of worship, freedom from [economic] want and freedom from fear) or Roosevelt's proposal for an American economic bill of rights (or 'Second Bill of Rights') from 1944 guaranteeing social rights, as well as the pledge of the UN Charter to "reaffirm faith in human rights."[19] A Commission on human rights was thus founded which, produced the draft of the UDHR under the influence of delegates from various countries, reflecting what Reichert called a revolution in thought.[20] In an extension of the push for human rights norms at the UN level, human rights

[16] Ishay, *The History of Human Rights*, 8. Of course, one might point out, that many of those societies that Ishay herself pointed to in her attempt to trace ancient roots of human rights, were existing in similar or worse structures of inequality. Another point of criticism towards Hunt's explanation is, as mentioned, the argument by Moyn, claiming that the rights documents created during Enlightenment would rather have aimed at the construction of nation and state, rather than a rights framework accessible to all mankind.

[17] Elisabeth Reichert, "The Universal Declaration of Human Rights: Only a Foundation," *The Journal of Intergroup Relations*, Vol. 39 No. 1 (2002): 34.

[18] Reichert, "The Universal Declaration of Human Rights," 34. Still and this is an interesting feature of Reichert's account, she extents the contextual basis of her UDHR-based human rights account to more than just the immediate post-war years and initiatives, holds that the UDHR was built on earlier ideas as well. Here she includes not only Enlightenment roots but also earlier ancient roots. She mentions, e.g. Greek philosophers such as Socrates and Aristotle, Roman legislation, but also ancient religions such as Judaism, Christianity, Confucianism and Buddhism. Reichert thereby connects with Ishay's approach. Reichert, "The Universal Declaration of Human Rights," 36

[19] Johannes Morsink, *The Universal Declaration of Human Rights* (Philadelphia: University of Pennsylvania Press, 1999). Reichert, "The Universal Declaration of Human Rights," 40. UN Charter from 1945.

[20] Influential delegates were not exclusively from Western countries, but also Latin American States, China (the Republic), Lebanon or the Soviet Union.

received a legally binding basis in the European context with the adoption of the ECHR in 1950.[21]

Now, although the processes towards the production of global rights ideas and regimes were "revolutionary" after the Second World War, as Reichert claims, the realities of the Cold War would soon catch up with the idealism enshrined by the UDHR. Moyn rightly holds that human rights were moved to "the edge of the stage," and the big powers were much rather caught up in Cold War power struggles, than a struggle to advance the idea of human rights.[22] Still, human rights did evolve during the Cold War period. For instance, via the adoption and implementation of legally binding human rights covenants at the UN level (the ICCPR and the ICESCR). Still, the Cold War led to a "bifurcation" of the concept of human rights. As Conor Gearty explains, the concept split into "two apparently separate and conflicting zones, the civil and political (the US version) and the social and economic (the Soviet version)." He moreover argues that the US succeeded in making the world believe that the concept of human rights was "well exclusively concerned with the civil and political" [rights].[23]

With the end of the Cold War, the concept of human rights gained ever more ground. Fittingly, Gearty argued, "with the fall of the Berlin Wall the idea of human rights has achieved a near-total dominance as the ethical idea of the contemporary global age."[24] Tim Dunne agreed to this evaluation by claiming that the end of communist regimes triggered a "re-empowerment of the human rights regime."[25] Indeed, events such as the 1993 World Conference on Human rights, China's signing of the ICCPR in 1998 and the usage of human rights vocabulary in numerous UNSC resolutions were

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[21] The ECHR, in contrast to the UDHR, does contain almost exclusively civil and political rights. This restriction to one of the two main categories of rights was a conscious move of differentiation aimed at pointing out contrasts to the Soviet Union. The ECHR was additionally supposed to provide a statement of common values and identity of the signatory states. Steven Greer, "Europe," In *International Human Rights Law*, 2nd ed., ed. by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 418.

[22] Moyn, *The Last Utopia*, 46.

[23] Conor Gearty, "Terrorism and Human Rights," *Government and Opposition*, Vol. 42 No. 3 (2007): 345.

Michael Freeman is another scholar critically remarking the "common view" that "only civil and political rights are genuine human rights", which would be without basis since neglecting basic economic and social rights would "render civil and political rights worthless." Michael Freeman, *Human Rights: An Interdisciplinary Approach*, 2nd ed. (Cambridge: Polity Press, 2011), 76. Although my study stays in the realm of civil and political rights as well, it acknowledges the importance of both parts of the human rights framework. However, as argued in the methodology section, an analysis of civil and political rights is most relevant in the nexus of European anti-terrorism.

[24] Gearty, "Terrorism and Human Rights," 345.

[25] Tim Dunne, "The Rules of the Game are Changing: Fundamental Human Rights in Crisis After 9/11," *International Politics*, Vol. 44 (2007): 272.

landmarks in that regard. The idea that human rights are "a means to realize human dignity" found supporters around the globe.[26] Writers such as Kenneth Cmiel and Michael Ignatieff even argued that human rights after the end of the Cold War had become one of the most important - if not *the* dominant – moral vocabulary in foreign affairs and that human rights were shaping security measures as well.[27] Christian Reus-Smit concluded that human rights had become a standard for the conduct of the sovereign, not only inside their own borders but even in regard to external affairs.[28] Fittingly, Mary Robinson, former UN High Commissioner for Human Rights remarked in 2002 that, "human rights are now firmly on the agenda of the international community. […] There is now much greater recognition of the centrality of human rights and of the immense benefits a rights-based approach brings."[29]

However, with the attacks of 9/11 and the subsequent policies established by many Western states, the concept of human rights again lost ground. Fittingly, Michael Ignatieff claimed that the dominance of the human rights vocabulary in international politics – which he evaluated to have been status quo during the 1990s – came under pressure after 9/11.[30] Accordingly, Jack Donnelly evaluated that "since September 11 we have indeed seen democracy and human rights partly eclipsed."[31]

However, although the period after 2001 saw the idea of human rights generally to come under pressure, the EU still moved forward with adopting the CFREU at treaty level in 2009. It is thus this tension between an increased importance of human rights norms since the end of the Cold War – one might speak of a 'breakthrough' of human rights – and the tendency of security interests to override this human rights trend since 9/11 that reflects the context of my study.

This thesis, generally, follows the two traditional explanations of the roots of human rights, the Enlightenment roots and the push for the human rights idea around the construction of the UDHR. This circumstance is based on the argument that disregarding the importance of the Enlightenment roots, as well as the UDHR for modern human rights regimes and responsibilities

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[26] Dunne, "The Rules of the Game are Changing," 272.

[27] Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton: Princeton University Press, 2004). Cmiel, "The Recent History of Human Rights."

[28] Reus-Smit, as quoted in Dunne, "The Rules of the Game are Changing," 273.

[29] Robinson, as cited in David Whittaker, *Counter-Terrorism and Human Rights* (Harlow: Longman, 2009), 33.

[30] Michael Ignatieff, "Is the Human Rights Era Ending?" *The New York Times*, February 5, 2002. https://www.nytimes.com/2002/02/05/opinion/is-the-human-rights-era-ending.html David Rieff argued in a similar fashion when he claimed, "the global balance of power has tilted away from governments committed to human rights norms and toward those indifferent or actively hostile to them." David Rieff, "The End of Human Rights," *Foreign Policy*, April 9, 2018.

[31] Jack Donnelly, *International Human Rights*, 4th ed. (Boulder: Westview Press, 2013), 237.

(as Moyn does) would be a considerable mistake. Both have clearly shaped the current understanding, context, and form of rights regimes and the wider aims of rights. Still, I acknowledge Moyn's point concerning the importance of a bottom-up process of human rights since the 1970s. It would, likewise, be a mistake to reduce human rights to an elitist top-down process. The 'breakthrough' of rights in the latest decades would not have been possible without broader civil society support for human rights ideas. Therefore, instead of determining one of the presented approaches as the absolute answer, this study argues that two of them should be regarded as the major roots of human rights, without disregarding the relevance of the push human rights on the empirical level experienced since the 1970s. Thus, (some of) these alleged exclusive sources of human rights rater build on each other, granting more than one of them importance for the understanding of modern rights concepts.

A Double-Edged Concept of Human Rights

- **Letter of the Law**

In terms of what human rights actually are, one might, as mentioned, point to both a legal understanding of human rights, as well as a more broad understanding of rights, connecting to the overall 'spirit' of the idea integrated into a specific political culture. Let me start with elucidating the legal understanding first.

Here, many point to the most relevant recognized human rights documents that have been established over the last seven decades as a reference point. The first major document and arguably still the most known and most important one is the Universal Declaration of Human Rights (UDHR). The UN General Assembly adopted the UDHR on December 10, 1948. The declaration was the result of a two-year-long drafting process involving numerous consultations, as well as controversies between delegates of the Commission of Human Rights. This committee consisted of representatives from various countries, in an attempt to broadly represent the UN as a whole. The UDHR contains a long list of rights guaranteeing all individuals the enjoyment of these rights, based on their common dignity and the principle of equality. Individual rights that the UDHR outlines are for example the right to life, equal protection by the law, property, work, social security, marriage, nationality, presumption of innocence, asylum, social security, privacy, freedom of religion, freedom of expression, freedom of assembly and association, freedom of movement or protections from slavery, torture, arbitrary arrest or discrimination. The document consists of thirty articles and just as many rights stem from these articles. Although the list of rights in the UDHR seems extensive, not all 'good' or even necessary

features of human life are part of human rights documents, e.g., to be loved is not a human right.[32]

It is an important detail that the UDHR has no legal status, but is 'only' a non-binding declaration. However, almost all rights outlined in the UDHR gained legal status by the 1966 adoption of two international covenants, the ICCPR and the ICESCR (plus adding additional rights, such as the protection of minority cultures). The ICCPR, the ICESCR, and the UDHR together constitute the so-called International Bill of Human Rights.[33] A majority of the world's states are a party to all these documents. The UDHR delivered important inspiration for the drafting of the most important European human rights document, the 1950 ECHR by the Council of Europe. In fact, the ECHR is explicitly supposed to further the goals of the UDHR. Several decades later, the EU's drafting of the CFREU was oriented towards the goals of the UDHR as well (the CFREU gained legal status at the EU level in 2009).

Whereas the UDHR, the ICCPR, and the ECHR define a range of specific human rights, they also provide some general provisions on rights (especially the UDHR and the ICCPR). The concept of human rights as manifested in the mentioned documents emphasizes that all humans equally hold the same rights and that all human rights are inalienable. In other words, *all* humans possess human rights (citizens and non-nationals alike), human rights are consequently universal. This claim regarding the universality of human rights aims at the circumstance that they should by definition be valid for everyone and everywhere. Human rights are held by all humans to an equal amount; no one enjoys a larger or smaller degree of rights. Furthermore, the inalienability of human rights aims at the idea that humans cannot lose their rights, even if they commit crimes or act morally wrong.[34] Additionally, the UN's 1993 Vienna Declaration on human rights, a declaration adopted by 177 states, determined that "human rights are universal, indivisible and interdependent and interrelated."[35] Therefore, states or other authorities cannot choose to only follow a few rights, they are one indivisible, interdependent and interrelated concept.[36]

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[32] Freeman, *Human Rights: An Interdisciplinary Approach*, 73.

[33] Christine Chinkin, "Sources," In *International Human Rights Law*, 2nd ed., ed. by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 78.

[34] Sarah Joseph and Adam Fletcher, "Scope of Application," In *International Human Rights Law*, 2nd ed., ed. by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 120. "Even the cruelest torturer and the most debased victim are still human beings," Jack Donnelly writes. Donnelly, *International Human Rights*, 19.

[35] Vienna Declaration and Programme of Action.
https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx

[36] Donnelly, *International Human Rights*, 19-24.

However, the rights framework established by the UDHR, understood as indivisible, interdependent and interrelated, did – somewhat ironically - witness the establishment of a split between these rights into two different categories of rights governed by two different legal documents with the adoption of the ICCPR (civil and political rights, CPRs) and the ICESCR (economic, social and cultural rights, ESCRs). This differentiation occurred during the Cold War and was driven by the logic of this global conflict. During the ideological struggle of the two superpowers, either side put emphasis on a different kind of rights, the Western powers on CPRs and the Communist bloc on ESCRs.[37] CPRs are, for instance, the right to life and liberty, freedom of expression, the right to privacy, the right to vote or the right to be free from discrimination. CPRs are often referred to as 'first-generation-rights,' and are supposed to protect one's freedom from state interference (which is why they are also called negative rights).[38] They are, moreover closely linked to the democratic nature of a state.[39] The ICCPR is the major UN rights document encompassing specifically CPRs. ESCRs, are, e.g., covering rights such the right to health care, housing, education, work or food. They are often considered 'second-generation-rights,' and are supposed to support social and economic development and individual flourishing.[40] ESCRs are covered in the UN's ICESCR and are at times omitted in other rights documents, e.g., the ECHR does not contain many ECSRs, but mostly CPRs (the UDHR includes both 'generations' of rights).[41] A distinction between CPRs and ESCRs may be based on the fact that most CPRs, other than ESCRs, do not require the provision of resources to individuals, which might be a reason why governments (especially of economically liberal states) are more reluctant to guarantee for ESCRs.[42] Still, distinctions between CPRs and ESCRs are not always clear-cut, e.g. the right to property is often considered a civil right, whereas it might just as well be regarded as an economic right.[43] As mentioned, this thesis will carry

[37] Ruth Costigan and Richard Stone, *Civil Liberties & Human Rights,* 11th ed. (Oxford: Oxford University Press, 2017), 7.

[38] Todd Landman, *Studying Human Rights* (London and New York: Routledge, 2006), 9. Many civil rights, thus, connect to Isaiah Berlin's notion of negative liberty. Isaiah Berlin, *Liberty*, 2nd ed. (Oxford, Oxford University Press, 2002).

[39] Laura Donohue, "Security and Freedom on the Fulcrum," In *Terrorism and Human Rights*, ed. by Magnus Ranstorp and Paul Wilkinson (London and New York: Routledge, 2008), 69.

[40] Landman, *Studying Human Rights*, 9.

[41] Besides these two generations of rights, scholars often refer to a third generation of rights, which entails collective rights or group rights such as the right to self-determination or the right to economic and social development. However, few third generation rights are manifested in the world's most important rights documents, with some exceptions (e.g. the right to self-determination is guaranteed in article 12 of the ICESCR). Costigan and Stone, *Civil Liberties & Human Rights,* 7-8.

[42] Costigan and Stone, *Civil Liberties & Human Rights,* 7.

[43] Freeman, *Human Rights: An Interdisciplinary Approach*, 76.

out an analysis of terrorism policies with a focus on CPRs. This might trigger the impression that this thesis contributes to the often mentioned tendency to regard CPRs as more important than ESCRs.[44] However, this is not the case. In the context of terrorism policies, CPRs are a justified and somewhat logical first choice, however, ESCR-based research in terrorism policies does have its relevancy (see methodology) and this thesis indeed regards all human rights as indivisible.

As mentioned, human rights are determined in several legally binding treaties, all largely or directly based on the UDHR. The most important of these treaties are, from a European perspective anyway, the ICCPR or the ICESCR at UN level, the ECHR at Council of Europe (CoE) level and the CFREU at the EU level. These treaties clearly define specific rights, spell out what these rights include and provide standards for when certain rights obligations might be derogated or limited. They manifest the most tangible basis for evaluating policies regarding their rights compatibility. In case of the ECHR the European Court of Human Rights (ECtHR) and in case of the CFREU the European Court of Justice (ECJ) dispense justice and act as judicial watchdogs of the affected treaties. Member states of the Council of Europe and the EU are legally bound to convert decision of these courts in national legislation (if demanded by the courts). Together with the treaties, the rulings of these courts constitute the legal basis of human rights evaluation. This level of evaluation might also be referred to as the 'letter of the law'. A legal evaluation of anti-terrorism policies is indispensable, given the well-established legal framework surrounding human rights in the European context (especially at treaty level), as well as the notable recognition legal evaluations of rights issues enjoy.[45] Legal evaluations will thus be one part of my double-edged mode of human rights evaluation (see my 'operationalization' of this in the methodology).

The evaluation of rights based on 'the letter of the law' connects with a plain legal justification of the concept of human rights. Here it is claimed that rights are justified simply since states have commonly agreed on them; often based on a consensus of international law. The argument is simply, that since conventions such as the ICCPR and the ICESCR were commonly agreed on, it is justified to demand all parties to uphold the commonly agreed-upon standards.

Of course, this position does not answer to why this consensus is right, good or just in itself.[46] However, the human rights documents presented above claim to deliver this answer. The documents emphasize that human rights norms derive from an inherent dignity that humans simply possess (thereby connecting to a naturalist understanding of rights). This

[44] Costigan and Stone, *Civil Liberties & Human Rights*, 7.
[45] Chinkin, "Sources," 79.
[46] Freeman, *Human Rights: An Interdisciplinary Approach*, 68.

argumentation tries to justify for the existence of human rights, and arguably for the documents itself. Human rights norms would, at the same time, constitute the basis for the protection of human dignity. For instance, the UDHR refers to the inherent dignity […] of all members of the human family," and "the dignity and worth of the human person" in the preamble and states in article 1 that "all human beings are born free and equal in dignity and rights."[47] The ICCPR and the ICESCR point to the inherent dignity of humans as well. Newer human rights documents, such as the 1993 Vienna Declaration and the EU's CFREU, likewise refer to human dignity as justification for human rights. The Vienna Declaration holds that "all human rights derive from the dignity and worth inherent in the human person."[48] The CFREU speaks in its preamble of the indivisible, universal value of human dignity and its first article reads, "human dignity is inviolable. It must be respected and protected."[49] Again, the notion of human rights is here based on the idea that every human being does possess dignity. Therefore, every human being is entitled to be treated in a way that mirrors this dignity. In this understanding, "human rights rest on an account of a life of dignity to which human beings are by nature suited."[50] Although my thesis regards the *idea* of human dignity as the cornerstone of the modern concept of human rights, it will not follow the idea that humans possess an inherent dignity from which human rights naturally emit. Such a conception would not be congruent with the overall constructionist perspective of this thesis. Rather, I will, in the next section, covering the idea of a spirit and wider aims of rights offer a constructivist take on the justification of rights.

I have already introduced the notion of an eligible derogation from legally binding human rights norms. I will now shed more light on the intricacies of such legal options for restricting rights. Derogation options underline the legal character of rights as opposed to the spirit of rights and they will, furthermore, become essential in the analysis of this thesis. The option of derogation of rights emanates from two general paradoxes of the concept of human rights. First, human rights allegedly can prevent for measures that can mitigate public emergencies and establish national security or might come in the way of other beneficial developments for society as a whole, e.g. public order, public health or economic well-being (see ICCPR and ECHR). Therefore, rights can in such situations, under certain conditions, be derogated. This circumstance constitutes a paradox since the

[47] Such claims are often deriving from the ideas of naturalist thinkers of rights, such as Locke or Kant.

[48] See, Vienna Declaration from 1993. States and state leaders have picked up on the idea of dignity as a cornerstone for the concept of human rights as well.

[49] This first article of the CFREU reflects not only the UDHR and the ICCPR, but is in tone and formulation very close to the first article of the German Grundgesetz ("Die Würde des Menschen ist unantastbar").

[50] Donnelly, *International Human Rights*, 21.

aim of collective security might clash with the human right to individual security, which is guaranteed in all mentioned legally binding rights documents. Second, rights can be derogated if certain rights come in conflict with each other (constituting the second paradox). This is a paradox since the different rights springing from the different articles in the UDHR are declared inalienable and equal. However, certain rights are at times (or in a certain sense by definition) conflicting. The UDHR, for instance, acknowledges this problem in article 29. An example in the context of this thesis is the potential clash between those rights that are violated by terror acts and those rights that are curtailed by policies supposed to tackle terror threats. Terror acts violate, e.g. individuals' right to life and security of person (art. 3 UDHR, art. 6 and 9 ICCPR, art. 2 and 5 ECHR). A state in its attempts to secure this right might, however, undermine a range of other rights and thus trigger a clash of rights interests. For instance, the UK government officially derogated from the right to liberty of person as enshrined in the ECHR (art. 5) when it implemented a legislation on indefinite detention for foreign terror suspects in 2001 (thereby implicitly derogating from the right to non-discrimination as well), in order to preserve the rights to life and security of person.

In general, two different strategies are thinkable when having to deal with conflicting rights. The first would be to resolve the issue by assigning certain rights more importance than others. This would, however, clash with a central trait of the concept of human rights itself since all rights were defined as equal. Furthermore, any such hierarchy of rights would face legitimate criticism of being arbitrary. The second idea is that rights can only be curtailed when absolutely necessary, which would demand a context-specific evaluation of necessity.[51] This idea has been implemented in the mentioned rights treaties. Thus, the general idea of derogation is to downscale the extent of rights, away from a maximalist approach, in order to preserve or restore a situation of stability, in which the preservation of a smaller amount of rights is much more likely.[52] In other words, some human rights can be restricted (for a certain timeframe) in order to secure the enjoyment of other rights, which are evaluated as more important at that specific point in time.

Three of the human rights documents used in this thesis contain general provisions for such human rights derogations. These are the ECHR, the ICCPR, and the CFREU (the UDHR does not include such a derogation

[51] This evaluation should involve all affected parties into the debate as Freeman argues. Freeman, *Human Rights: An Interdisciplinary Approach*, 82-84.

[52] A maximalist understanding of human rights reflects the aim to establish, consolidate and preserve as much of the potential freedom of humans as possible, and to realize as much of human potential as possible, or in Nussbaum's understanding to secure the full enjoyment of human capabilities. See, e.g., Ben Dorfman, *Rights under Trial, Rights Reflections: 13 Further Acts of Academic Journalism and Historical Commentary on Human Rights* (forthcoming, Frankfurt: Peter Lang, 2019), 12-16.

clause since it is not a legally binding document). I will shortly present the main points of the similar but not identical derogation schemes in the three documents.

In terms of the ECHR, the option to deviate from rights norms under certain circumstances is (mainly) established by article 15. Here, the ECHR points out that the rights in the document can be derogated in situations that threaten "the life of the nation", such as war or public emergencies.[53] A specific definition as to what constitutes such a situation of emergency threatening the life of the nation is missing in the text, however, relevant legal interpretations have subsequently been delivered by the ECtHR. The court held that the formulation "time of emergency" is to be understood as reflecting an "exceptional situation or crisis […] which afflicts the whole population and constitutes a threat to the organized life of the community […]." Later, the ECtHR added that an emergency situation must reflect an actual or imminent situation. The term exceptional crisis was further refined by declaring that such a situation is given when the normal measures are not sufficient anymore in order to uphold public safety, order or health.[54] Besides the condition of an emergency situation, the ECHR additionally points out that a derogation is only allowed "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with […] other obligations under international law."[55] The formulation "to the extent strictly required" means that measures must be strictly proportional. Proportionality is here connected to the categories of severity, duration, and scope. According to the ECtHR's case law, measures derogating from the ECHR's rights obligations must be necessary, in order to be proportional (in the sense that 'ordinary measures' are not sufficient to alleviate the crisis). Furthermore, measures must at least potentially be able to reduce the threat, measures must only be used as long as necessary, the severity of the measures must be in proportion to the threat, and safeguards against the abuse of emergency measures must be implemented. In applying

[53] Indeed, the derogation from certain rights is at times executed in the course of the implementation of an official 'state of emergency'. This is also valid for Western countries, for example, France continuously renewed its state of emergency after attacks by followers of IS in 2015 (until emergency provisions were made to permanent law in late 2017). The UK issued a derogation from article 5 of the ECHR via implementing the measure of indefinite detention for foreign terror suspects in 2001. In consequence, a sap of rights and civil liberties became a widespread phenomenon in Europe, as this thesis argues. Nicholas Vinocur, "New French anti-terror law to replace 2-year state of emergency," *Politico*, October 31, 2017.

[54] Christopher Michaelsen, "Derogating from International Human Rights Obligations in the 'War Against Terrorism'? – A British Australian Perspective, In *Terrorism and Human Rights*, ed. by Magnus Ranstorp and Paul Wilkinson (London and New York: Routledge, 2008), 125-126. Frederic Megret, "Nature of Obligations," In *International Human Rights Law*, 2nd ed., ed. by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 113.

[55] ECHR, article 15.

this principle of proportionality the ECtHR is providing the state authorities with a certain 'margin of error,' which means that not every small extension of proportionality might be the basis for the abolishment of a measure.[56] Moreover, countries executing rights derogations are supposed to define the territorial reach of such measures and they are required to inform the Secretary-General of the Council of Europe on the concrete derogation and its reasons. However, following the principle of *jus cogens*, not all human rights articles in the ECHR are derogatable, articles 2, 3, 4 (paragraph 1) and 7 cannot be restricted.[57] These articles guarantee the right to life, the prohibition of torture, the prohibition of slavery and servitude, as well as the prohibition of punishment outside of the law.[58] Such non-derogatable rights reflect Jeremy Waldron's suggestion that certain rights might not be supposed to be sensitive to changes on the scale of social costs.[59] It can be argued that defining a core of rights that are not to be derogated while allowing other rights to be restricted, conflicts with one of the core principle of the human rights concept: the indivisibility of rights.[60] Ironically, human rights treaties themselves would, therefore, provide for the subversion of a central cornerstone of the concept of human rights.

Besides the general provision on derogation in article 15, the ECHR does contain specific limitation clauses in several individual rights articles, arguably setting less demanding provisions for limiting the maximal enjoyment of rights (articles 8, 9, 10 and 11, as well as article 2 of protocol 4). I will come back to those special provisions when covering these specific articles in more depth later.

The ICCPR provides general conditions for a potential derogation from human rights obligations as well. Similar but not identical conditions (to the ECHR) have to be met in order to be allowed to derogate from rights obligations. According to the ICCPR, derogation can only be executed in situations "of public emergency which threatens the life of the nation," (the ICCPR does not mention a state of war scenario as the basis for derogation). Although the advanced interpretation of the term 'emergency', provided above has been delivered by the ECtHR in a European context and is therefore in theory not applicable to the ICCPR, it can be argued that the ECtHR's specifications are anyhow applicable to the ICCPR's provisions, since the provisions on derogation in ECHR and ICCPR are, as mentioned,

[56] Michaelsen, "Derogating from International Human Rights Obligations in the 'War Against Terrorism'?" 127.
[57] Ibid., 125. Megret, "Nature of Obligations," 113.
[58] ECHR, article 15. The ban of derogations of the right to life (article 2) is not valid in cases of "lawful acts of war."
[59] Jeremy Waldron, "Security and Liberty: The image of balance," *The Journal of Political Philosophy*, Vol. 11 No. 2, (2003): 196.
[60] Freeman, *Human Rights: An Interdisciplinary Approach*, 82.

very similar.[61] Thus, one can use the same specifications of an emergency situation when dealing with the ICCPR as when analyzing based on the ECHR. Nevertheless, the UN's Human Rights Committee (HRC) provided a set of comments on the situation of emergencies that provide relevant additions to the understanding of such emergency situations. For instance, the HRC pointed out that not "every disturbance or catastrophe" can be understood to constitute a situation which legitimizes the recognition of a state of emergency (not even instances of armed conflict would automatically trigger a situation of emergency the HRC held, thus establishing a high threshold). The same committee pointed out that it must be the predominant objective of a state derogating from rights obligations to return to a state of normalcy.[62] The ICCPR moreover contains the demand that derogation measures can only be carried out "to the extent strictly required by the exigencies of the situation," provided that they do not interfere with other obligations under international law. Also on this condition, one can follow the ECtHR's specification on this formulation in order to gain a more in-depth interpretation of this condition.[63] Other than the ECHR, the ICCPR explicitly demands that derogation measures cannot be discriminatory. However, although this condition is missing in the ECHR, discriminatory derogation measures would still violate article 14 of the ECHR. As in the ECHR, certain specific articles of the ICCPR can never be object to derogation. This pertains to articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18. These articles cover the right to life, the prohibition of torture, the prohibition of slavery and servitude, the prohibition of imprisonment merely based on inability to fulfil a contractual obligation, the prohibition of punishment outside of the law, the right to be recognized everywhere as a person before the law, as well as the right to freedom of thought, conscience and religion.[64] Just as the ECHR, the ICCPR does provide specifications on the options to limit the maximal enjoyment of specific rights (in articles 12, 17, 18, 19, 21, 22), providing less demanding conditions for a limitation of the enjoyment of these rights as constituted by the explained derogation

[61] Michaelsen, "Derogating from International Human Rights Obligations in the 'War Against Terrorism'?" 125.

[62] Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).
http://hrlibrary.umn.edu/gencomm/hrc29.html#_edn3

[63] When the HRC pointed to the principle of proportionality in derogations, its comments were very much in line with the ECtHR's take on the derogation conditions. Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), http://hrlibrary.umn.edu/gencomm/hrc29.html#_edn3

[64] ICCPR, article 4. Thus, the ICCPR adds three more articles to the list of rights that cannot be derogated, compared to the ECHR. Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford: Oxford University Press, 2011), 80.

clause. Again, I will come back to these specifics in connection with individual rights.

The conditions for derogation formulated in the CFREU are at first glance arguably somewhat less strict than in the ECHR and the ICCPR. The general provision on the option to derogate from rights in article 52 of the CFREU states that derogations must be provided for by law and must respect the essence of the CFREU's rights and freedoms. Furthermore, derogations must be proportional, which means that they can only be applied if they are necessary and if they reflect objectives that answer to general interests of the EU or protect the rights of others.[65] Therein, the CFREU does not demand an emergency situation threatening the life of the nation, as the ECHR and the ICCPR do. The CFREU does additionally not explicitly demand the upholding of the principle of non-discrimination in derogation practices, and it does not define a 'core' of rights that is never to be derogated. However, the options for a restriction of rights are in fact quite limited based on the CFREU, the rights lined out in the CFREU do not enjoy a lower level of protection against derogation as provided for in the other two treaties. This evaluation is based on the circumstance that important additional safeguards have been implemented in the CFREU's derogation provision. For instance, the CFREU establishes not only that rights derogations must be provided for by the law and must be necessary, but they must also respect the essence of the CFREU's rights and freedoms. Furthermore, derogations must be subject to the principle of proportionality.[66] The first of these demands is not, or at least not explicitly, supplied in the ECHR or ICCPR.[67] The demand for preserving the essence of rights and freedoms while derogating makes it hard to move too far away from the rights framework in terms of the degree of derogation. The demand on proportionality (very similar to the demand on that in the ECHR and ICCPR) makes it difficult to issue a derogation measure that undermines the rights of a big majority of individuals in society (potentially apart from the most serious emergency situations). Moreover, paragraph 3 of article 52 states that all those rights in the CFREU which overlap with corresponding rights established in the ECHR (which is valid for most CPRs in the CFREU) are protected at least to the same degree as in the ECHR, whereas a more extensive protection (e.g. via the provision on proportionality) is not prevented. The CFREU does not install additional limitations to rights provisions (as ECHR and ICCPR do), the exact same provisions are valid for all articles. Reflecting those points, it becomes clear

[65] Thereby this provision is rather close to provisions on rights limitation in the ICCPR and ECHR, e.g. art 8, par. 2 in the ECHR.

[66] CFREU, article 52.

[67] Not explicitly in any provision of the ICCPR or ECHR, but implicitly in connection with the limitation of the scope of some individual rights, as pointed out by the UN's Human Rights Committee. See Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, 76. I will come to the limitation of individual rights in the next section.

that the CFREU raises the bar rather high in terms of opportunities for legal rights derogation.

The derogation of rights does not necessarily equal an immoral or unjustified act, there can be a virtue in the attempt to preserve a minimum amount of rights in an exceptional situation. In such a situation, it might be justifiable to limit certain rights in order to protect the overall democratic order.[68] Furthermore, as derogation provisions are manifested in the most important rights documents, they themselves, in a certain sense, constitute rights as well. Thus, various human rights advocates have pointed to the possibility of derogating rights in line with the above-mentioned preconditions, as a sufficient 'margin of flexibility' in order to tackle terrorism, without violating human rights obligations.[69] However, as this thesis will argue, at times rights derogations are implemented without absolute necessity, or they are crossing red lines that they should not cross or derogations are ever extended, in terms of their reach, their severity, and their validity period.

- **Spirit of Rights**

Despite my detailed coverage of the legal status of human rights, it is essential to recall, that human rights are not only to be understood in a legal framework. Human rights must be regarded with a wider context in mind. In fact, human rights exist "prior to legal structures."[70] One might here speak of the general importance of or sense of human rights. Human rights aim at or exist via moral claims and a certain culture and spirit of rights and the realization of the same.[71] They pertain the general relationship between state and individual. Thus, this understanding of rights opens up for an extended level of rights evaluation. This extended understanding of rights will here be denoted as 'the spirit of rights'. So, rather than arguing solely on basis of

[68] Clive Walker, "Policy Options and Priorities: British Perspectives", In *Confronting Terrorism: European Experiences, Threat Perceptions and Policies*, ed. by Marianne van Leeuwen (The Hague: Kluwer Law International, 2003), 18.

[69] Mary Robinson the former UN High Commissioner for Human Rights is one of them. Robinson as cited in Whittaker, *Counter-Terrorism and Human Rights*, 33. The question of justifiable derogation has not only been covered by states or intergovernmental institutions such as the UN, but also by NGO's. The so-called Johannesburg Principles laid out on the initiative of the Article 19 organization appear especially relevant. The Johannesburg Principles hold that a derogation of freedom of expression on grounds of national security is only legitimate in face of a threat to a country's existence, its territorial integrity, or towards its ability to respond to force or threats. The measure of derogation in such cases is further bound to the condition of a demonstrable effect. Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World* (London: Atlantic Books, 2016), 333.

[70] Donohue, "Security and Freedom on the Fulcrum," 69.

[71] On the idea of a spirit of right see e.g., Ben Dorfman, *13 Acts of Academic Journalism and Historical Commentary on Human Rights: Opinions, Interventions and the Torsions of Politics* (Frankfurt: Peter Lang, 2017).

legal arguments, one should include reflections on the central and wider aims of the human rights idea - what one might call a spirit of rights - into evaluations concerning the eligibility of anti-terrorism policies. In a sense, the wider understanding of rights or the spirit of rights is the basis for the legal entrenchment of rights. The legal rights norms, in this sense, function as the instrument of the spirit of rights. The letter of the law and the spirit of rights framework are, therefore, to be regarded as interrelated and interdependent entities. Disregarding the wider spirit framework would diminish one's understanding of rights, as well as one's options for a critical analysis of potential rights problems in European anti-terrorism.

As mentioned, the idea of the spirit of rights points to a wider understanding of rights. This understanding reflects the 'the big picture' of the *idea* of rights, behind the specific rights provided in rights documents; or in other words, the bigger meaning and aims of human rights (what rights are all about), on which the legal documents are built. One might use Samuel Moyn's notion of human rights as the "highest moral precepts and political ideals," and rights as "principles of social protection," and "an agenda for improving the world," aiming at securing every individual's dignity, in order to emphasize this idea.[72]

As shown above, claims circling around human dignity are often used as a justification for the legal entrenchment of human rights. However, enabling a life in dignity signifies the first core aim of the general idea of human rights. Establishing and consolidating a functioning human rights framework in a society is the condition for a life in dignity. Human rights, thus, can enable all human beings to be treated with dignified respect.[73] Therein, the idea of human rights arguably composes what Donnelly called "a comprehensive vision of a set of goods, services, opportunities, and protections that are necessary in the contemporary world to provide the preconditions for a life of dignity."[74] Thus, human rights are not supposed to provide what humans need for survival but to what is needed "for a life of dignity."[75] Human rights are according to this thought a legitimate concept

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[72] Moyn, *The Last Utopia, Prologue.*

[73] Samantha Besson, "Justifications," In *International Human Rights Law*, 2nd ed., ed. by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 47. Fittingly, Laura Donohue pointed out that rights "confer dignity and respect upon individuals […]." Donohue, "Security and Freedom on the Fulcrum," 74.

[74] Donnelly, *International Human Rights,* 24. Alison Brysk points at dignity in her definition of human rights as well. She defines human rights as "a set of universal norms that limit the use of legitimate force in order to preserve human dignity: the physical security and freedom from fear that are our birthright." Alison Brysk, "Human Rights and National Insecurity," In *National Insecurity and Human Rights: Democracies Debate Counterterrorism,* ed. by Alison Brysk and Gershon Shafir (Berkeley: University of California Press, 2007), 8.

[75] Donnelly, *International Human Rights,* 21. Article 22 of the UDHR holds that rights are indispensable for human dignity. Although article 22 points explicitly to ESCRs, the undertone can be interpreted to signify the importance of the rights framework as a whole for

since they potentially ensure a life in dignity for all human beings if all established rights are upheld.[76] The significance of the provision of dignity, as well as a recognition of dignity, for all humans can be traced in the variety of cases in which protest movements (e.g. fighting for minority rights such as LGBTQ movements or the Black Lives Matter movement) have demanded just that; to be provided with rights that secure certain groups of individuals to be regarded as dignified individuals.[77] Perceptions of indignity can easily trigger severe grievances.[78] The provision of rights can prevent the initiation of such processes. This point emphasizes that dignity (and its perception) does not only come via the provision of resources. It demands the provision and recognition of rights at a just and equal level. Therein, dignity, in its content, is reflected by the rights aims of equal justice and freedom, as well as equal recognition of personhood and the individual's opportunity to free and full development.[79] I will elucidate these rights aims in the following.

The wider rights aim to provide universal justice emanates from documents such as the UDHR.[80] Justice can be constructed by rights protecting against discrimination or by rights establishing rule of law. Thus, human rights are often understood to constitute the basis for a just system.[81] Accordingly, John Rawls pointed out that "the basic standards of justice" include human rights standards.[82] A crucial point is though, that in order to reflect justice such rights must be distributed equally. Rights and liberties can only support the aim of justice if they are built on a principle of *equal*

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the consolidation and construction of human dignity.

[76] As can be expected, attempts of justifying the concept of human rights do meet criticism. A realist strand of such criticism holds that the concept bears no relevance since power politics or 'hard politics' would still be the decisive factor in global policymaking, not 'soft' concepts such as human rights. Furthermore, the introduction of political ethics such as human rights in international relations would be an intellectual mistake, since states would pursue their survival, not ethics. Marie-Benedicte Dembour, "Critiques," In *International Human Rights Law*, 2nd ed., ed. by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 57. However, concerning the realist argument, I hope that it will become clear to the reader in the course of this thesis why human rights are not only a relevant concept in global politics but also a concept that is essential for the wellbeing of individuals and societies.

[77] Francis Fukuyama, *Identity: Contemporary Identity Politics and the Struggle for Recognition* (London: Profile Books, 2018), 7-8, 19.

[78] Fukuyama, *Identity*, 11, 21.

[79] The latter is aimed at in art. 29 of the UDHR.

[80] The UDHR argues that human rights are the foundation of justice.

[81] At the same time, human rights can be understood as a consequence of justice. Freeman, *Human Rights: An Interdisciplinary Approach*, 80.

[82] John Rawls, "The Law of Peoples," In *On Human Rights: The Oxford Amnesty Lectures*, ed. by S. Shute and S. Hurley (New York: Basic Books, 1993), 46.

liberties for all.[83] Therefore, the aim of justice is entangled with the principle of equality (and constitutes, in a way, a precondition for dignity as well).

The idea of equality here foremost pertains to the notion of equal worth. This understanding of equal worth, not only holds that all human beings carry the same worth but points to a perceived inherent value of personhood. According to this understanding, no one is supposed to be treated inferior based on this inherent value. Denial of equal status would disqualify individuals from participating "as an equal in important social practices or roles."[84] Human rights can now contribute to establishing a status of equal worth for all human beings, by creating entitlements to equal treatment and respect, by setting conditions for equal participation in society and politics and by contributing with a "fundamental public recognition of equality."[85] In other words, human rights help in constructing an equal status of individuals and in consolidating this status. Via human rights "individuals become actors of their own equality and members of their political community," as Samantha Besson fittingly formulated.[86] These ideas about equal human worth clearly reflect notions by Immanuel Kant, who perceived humans as ends in themselves (based on humans' reason and rationality). Kant too held that justice requires the upholding of the rights of all human beings (since all human beings according to Kant are worthy of respect).[87]

The points on equal respect and equal worth connect with a general human demand for recognition. Humans have historically shown a desire for (positive) recognition by their social environment (what Socrates identified as *thymos*).[88] This (often) affects the initiation of demands for recognition of one's equal worth. The idea of such a demand goes back on the ancient concept of *isothymia*, the human desire to be regarded "as just as good as everyone else."[89] What is requested here is the mutual recognition of the

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[83] Jerome Shestack, "The Philosophic Foundations of Human Rights," *Human Rights Quarterly*, Vol. 20 No. 2 (1998): 220. Michael Sandel, *Justice: What's The Right Thing To Do?* (New York: Farrar, Straus and Giroux, 2009), 151. Shestack and Sandel are here reflecting upon ideas of John Rawls.

[84] Allen Buchanan, "The Egalitarianism of Human Rights," *Ethics,* Vol. 120 No. 4 (2010): 679.

[85] Samantha Besson, "Justifications," 45. Fukuyama, *Identity*, 47.

[86] Samantha Besson, "Justifications," 46.

[87] Kant identifies the human capability to use reason and to act morally as the central component of his argument for why all humans are worthy of respect. Fukuyama, *Identity*, 39. Sandel, *Justice*, 107. Shestack, "The Philosophic Foundations of Human Rights," 216. Samantha Besson's take on equal worth and equality strongly reflects parts of Kant's worldview, since she labels the understanding of equality as equal *moral* status, thereby borrowing Kant's viewpoint that it is humans' capacity for morality that distinguishes them and provides them with an equal worth (besides their capacity for rationality and autonomy).

[88] G.W.F. Hegel too claimed that humans - and human history for that matter - are driven by a struggle for recognition. Fukuyama, *Identity*, 23, 39.

[89] Fukuyama, *Identity*, 10, 18-22.

basic equal worth of all humans. Again, the denial of such recognition can spark severe social and political conflicts, by creating impressions of indignity, whereas the supply of such recognition via the help of human rights can provide the demanded dignity and equality (and can thus provide the basis for another wider aim of human rights, which is 'peace in the world'). Societal recognition of the potential of each individual is a promising way of pursuing and achieving both the perception of equal worth and general human dignity.[90]

Another wider aim of the human rights framework is freedom.[91] Human rights establish the groundwork for the enjoyment of individual freedom. This is valid in terms of negative freedoms, pointing to protection from the interference of authorities in an individual's life, and positive freedoms, pointing to the provision of opportunities and services for individuals by the same authorities.[92] Human rights thus reflect a general understanding of the relation between individual and state. On the one hand, it sets the necessary limits of state power. Fittingly, Laura Donohue emphasized, "rights create a shield within which individuals can maximize their freedom."[93] This is a crucial function, since state power is "always and endemically liable to abuse," as Jeremy Waldron explains.[94] On the other hand, it demands states to provide a sufficient level of opportunities.[95] The establishment of rights frameworks thus supports the aim of enabling a human life including as much freedom - and as much freedom from state interference - as possible. By establishing the necessary conditions for the other discussed aims of the human rights framework, dignity, justice, and equal worth, sound conditions for a high level of individual freedom are established as well.

Notions of dignity, the wider rights aims and the potential full enjoyment of rights are interrelated with the theoretical notion of human capabilities as developed by Martha Nussbaum. Nussbaum holds that humans would possess capabilities that reflect the innate faculties of persons.[96] These capabilities would promote the full human functioning of

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[90] Ibid., 23, 92.

[91] See the Preamble of the UDHR.

[92] John Stuart Mill argued that the state should interfere with the liberty of the individual as little as possible, since freedom would constitute the ability to pursue one's desires without constraint. Deborah Stone, *The Art of Political Decision Making* (New York: W. W. Norton, 2002), 109. Fukuyama, *Identity*, 52.

[93] Donohue, "Security and Freedom on the Fulcrum," 74.

[94] Waldron, "Security and Liberty," 205.

[95] Fukuyama, *Identity*, 46-47.

[96] Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge: Belknap Press, 2011). It is important to emphasize that my thesis, based on its constructionist take on human rights, does only share claims on innate faculties of humans as far as these concern natural functions of human physis, e.g., the ability to good health or to think. The rights following from these innate faculties are not regarded as innate.

every individual, making life fully human. The concept thus puts its focus on human flourishing.[97] Capabilities try to cover such components or abilities of human life that are so crucial that their abolishment would make a life in dignity (or justice) impossible. However, humans would be entitled to the fulfillment of these capabilities.[98] In other words, certain capabilities could be identified which mark the lowest threshold of what life in dignity requires. Thus, Nussbaum's concept aims at the potential full enjoyment of such human capabilities, and it would be the task of governments to enable this enjoyment.[99] According to Nussbaum, such capabilities are: being able to live to the end of life, being able to have good health, being able to move freely from place to place and to be secure against violent assault, being able to use one's senses and to imagine, think and to reason, being able to use the mind in ways protected by freedom of expression, being able to have attachments to things and people (including forming human associations), being able to form a conception of 'the good' (pertaining to liberty of conscience and religion), being able to live with and towards others, including social interaction (this includes the protection of freedom of assembly and free speech), being able to be treated in a dignified and non-discriminatory fashion (including non-humiliation) based on humans' equal worth, and being able to participate in political decision-making (pointing to the right to political participation, freedom of expression and association).[100] Nussbaum's approach considers every individual worthy of equal respect and regard, it, therefore, connects not only to notions of dignity but also to notions of the universal equality of human worth (explained above).

The capabilities approach does entail connection points to the ideas of other thinkers.[101] For instance, since it emphasizes to see each person as an end in itself, it connects to a famous notion by Kant.[102] The idea of capabilities additionally reflects John Stuart Mill's notion of the highest end in human life, which is in his opinion free and full development of human faculties (Mill thus connects to the ideal of human flourishing as well).[103]

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[97] Nussbaum, *Creating Capabilities*, 24. Martha C. Nussbaum, "Capabilities and Human Rights," In *Fordham Law Review*, Vol. 66 No. 2 (1997).

[98] Nussbaum, *Creating Capabilities*, 31, 62, 73.

[99] Ibid., 109.

[100] Nussbaum, *Creating Capabilities*, 33-35. Additional capabilities listed by Nussbaum are: being able to relate to nature and animals, being able to laugh, play and enjoy recreation activities and being able to hold property. Nussbaum's approach does thus not limit itself to either first or second-generation rights.

[101] One could here already start with Aristotle, who at times referred to the concept of *dunamis*, roughly reflecting the idea of human capabilities. And, already Stoicism connected the idea of dignity to human capability. Nussbaum, *Creating Capabilities*, 126-131.

[102] Nussbaum, *Creating Capabilities*, 35. Sandel, *Justice*, 105.

[103] Mill clearly connected the concepts of liberty and self-development. Sandel, *Justice*, 51. Nussbaum, *Creating Capabilities*, 141. Although Mill is counted to the founding fathers of

The ability to utilize all available capabilities or faculties is essential for humans in order to fulfill their role of 'progressive beings' (the capabilities reflect this progressivity).[104] The concept of capabilities can, arguably, be connected to ideas by John Rawls as well. Rawls deemed rights and freedoms important; not important for their own sake, but based on their potential to enable humans to fulfill their individual intentions and ends.[105] These intentions and ends can easily be interpreted to reflect individual capabilities as well. At least, without the option to act on one's capabilities, one will not be able to fulfill one's intentions and ends.[106]

What the notion of the spirit of rights, in the context of dignity, freedom, justice, equality, and capabilities points to is the idea of a potential maximal realization of human personhood and the free and full development of human personality. This inevitably relates to possibilities of self-expression for human beings, and in a larger sense, the full enjoyment of rights by all human beings. Liberal democracies, if they want to be *really* free and liberal societies, must thus base themselves on individual human rights, aiming towards the fulfillment of dignified lives, reflecting justice and equal human worth and setting conditions for the enjoyment of one's capabilities.[107] These aims must be regarded in everyday political culture, but must additionally be enshrined on a legal basis. And indeed, important notions of this wider human rights framework, have been manifested in important rights documents, e.g., the Preamble of the Vienna Declaration reflects upon the: "global task of promoting and protecting all human rights and fundamental freedoms so as to secure full and universal enjoyment of these rights."[108] Demand for the potential full realization of personality, via a connection with the concept of dignity, is included in the UDHR as well (art. 22).[109] These demands in human rights documents emphasize the

utilitarianism, he developed a perspective on human dignity (entangled with the idea of capabilities) which sees dignity to be independent from utility itself. Sandel, *Justice,* 56.

[104] For instance, Mill labelled humans as progressive beings. Kirsten Hastrup, "To Follow a Rule: Rights and Responsibilities Revisited," In *Human Rights on Common Grounds: The Quest for Universality*, ed. by Kirsten Hastrup (The Hague: Kluwer Law International, 2001), 61.

[105] John Rawls as cited in Stone, *Policy Paradox,* 93.

[106] In theory, one could connect the capabilities approach to ideas by Karl Marx as well, since Marx claimed that a person's essence is rooted in its "potential to use's one abilities to the fullest […]." However, since Marx perceived the idea of human rights as ahistorical and too idealistic one might contest that he would have supported Nussbaum's concept. Shestack, "The Philosophic Foundations of Human Rights," 210.

[107] Kant had already pointed to the responsibility of the state to provide for conditions favoring the free unfolding of individuality. Shestack, "The Philosophic Foundations of Human Rights," 216.

[108] See Vienna Declaration from 1993.

[109] Although this specific article is about ECSRs it is nonetheless usable in the context of my discussion, since it indicates some notion of personal freedom (the aim of "free development

connection between a wider spirit of rights understanding of human rights and their legal manifestation. Furthermore, the concept of capabilities does entail a not insignificant overlap with the norms enshrined in the UDHR as well. Since the list of capabilities would consist of rather abstract issues, Nussbaum herself proposes that capabilities might be enshrined in more specified fashions in constitutional law.[110] Again, the spirit of rights, in this sense, constitutes the groundwork for the manifestation of concrete rights claims in rights treaties or documents, the spirit of rights thus becomes the 'spirit of the law.'

In pursuing the aims of dignity, justice, and equality, human rights can play a special role for the disadvantaged groups in society, since human rights are often seen as the language of the weak, the disposed or generally victims of oppression. Tim Dunne, for example, defines human rights as "a language of moral legitimacy to the weaker members of the human race, the stateless people, prisoners of conscience, and ethnic minorities who are hounded for being different."[111] Timothy Garton Ash holds that human rights at its best give "power to the powerless," and Donohue claims that human rights "confer dignity and respect upon individuals that do not have access to power."[112] This emphasizes the importance of the rights framework, for disadvantaged or discriminated groups in democracies. By pursuing the aims of dignity, justice, and equality a difference can be achieved for those groups. Moreover, democracies can come closer to the *ideal* democracy. However, the rights framework and its mentioned components are not only of crucial importance in democracies - far from - but in autocratic regimes as well. It is (often) in such regimes that requests for dignity, justice, and equality can bring sweeping transformations.[113]

In general, the concept of human rights reflects a certain understanding of how individuals should treat each other, a treatment based on mutual *ethical* treatment reflecting senses of sympathy, empathy, and

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of personality," is a feature clearly reflecting CPRs and the spirit of rights framework in general).

[110] This suggestion rests on her observation that "abstract principles are always realized in concrete contexts." Nussbaum, *Creating Capabilities*, 40, 62, 176.

[111] Dunne, "The Rules of the Game are Changing," 282.

[112] Garton Ash, *Free Speech*, 292. Donohue, "Security and Freedom on the Fulcrum," 74. However, human rights are – at least at times and in their origin – also perceived as an elite project. One can, for instance, find the claim that the establishment of the UDHR reflects somewhat an elite project, given that the initiative to the UDHR and the implementation of human rights into the framework of the UN was steered by state leaders, e.g., the American leadership. Mark Philip Bradley calls this "state dominated norm construction." Mark Philip Bradley, "Approaching the Universal Declaration of Human Rights," in *The Human Rights Revolution – An International History*, ed. by Akira Iriye, Petra Goedde and William Hitchcock (Oxford: Oxford University Press, 2012), 335.

[113] One might here think about calls for rights in the context of the (largely unsuccessful) Arab Spring, the Anti-Apartheid movement in South Africa or the protest of the Prague Spring.

compassion for each other.[114] One might go as far as speaking of a certain 'spirit of brotherhood' in this regard. Clearly, humans do not and cannot be expected to act along these lines at all times, however, ethical treatment and a sense of responsibility and compassion for all humans and humanity are core elements of the general *atmosphere* that the idea of human rights tries to construct. This general atmosphere of rights is, again, built on an understanding that all humans own inherent potential for a life in dignity and justice, that they should be treated along the ideal of equal worth and that they should be supported in enjoying the maximum of their human capabilities.[115]

The ideas and understandings of dignity, equality and human capabilities presented above can additionally all be used as justification for having human rights in the first place. Because humans are *imagined* to have the capacity to a dignified life and for a life in the enjoyment of their capabilities and because they are *imagined* to own inherent equal worth, the idea of human rights is justified. Justified in order to support the consolidation and establishment of the aims of human rights, which again are the fulfillment of a life in dignity, justice, and freedom.

This justification of human rights underlines that human rights are a mutual construction along the lines of social constructionism. Thus, human rights ideas are mutually agreed upon by human interaction. Different ideas about rights develop in different social and historical contexts.[116] The demand for a dignified life, the demand for a life in fulfilled capabilities, for a recognition of equal worth, in a context of justice, is likewise reflecting demands that have been socially constructed in the last centuries and decades. One might here refer back to the historical starting points of the human rights idea, which I laid out at the beginning of this chapter. For instance, the initiation of rights during the Enlightenment (at least partly based on a construction of empathy as Hunt argued), the turn towards rights norms after the end of World War II, and the push for the idea of human rights via a human rights movement since the 1970s. It was at such moments in time that the social construction of rights ideas received an additional push. Today, and (as indicated) at least since the 1990s, human rights have become an integrated part of the everyday culture for many people around the globe, and for sure in most Western societies. Human rights have become a 'way of life' for many. The concept appears as something legitimate on a

[114] Nussbaum e.g., held that in order for her capabilities approach to gain support, values of compassion (empathy) and solidarity would have to be present. Nussbaum, *Creating Capabilities*, 180.
[115] Dorfman, *13 Acts of Academic Journalism and Historical Commentary on Human Rights*, 176, 193-195.
[116] George Ulrich, "Universal Human Rights: An Unfinished Project," In In *Human Rights on Common Grounds: The Quest for Universality*, ed. by Kirsten Hastrup (The Hague: Kluwer Law International, 2001), 214-215.

regular basis in the news, but also in books, movies, advertisement or music. Human rights have become a part, not only of our political thinking and culture but also our commercial culture and pop culture. Human rights have entered our 'life-world', they are by many (in the Western part of the world at least) simply taken for granted and regarded as something that is simply part of our lives. This has established the widespread *feeling* that human rights are *right*.[117] This circumstance, that human rights have become an integral part of our life-world, reflects the mentioned common imagination that humans own capacity for a life in dignity, justice, and freedom, in addition, it is an indication of the socially constructed justification of rights explained above.[118]

To the end of this section, two points which pertain to both the legal and the spirits' side of my human rights framework are noteworthy. First, as mentioned, when evaluating anti-terrorism policies in this thesis, the 'spirit of rights' framework constitutes, an indispensable level of evaluation. On a conceptual note, it very much reflects, the basis for (the construction of) legally binding rights norms.[119] Now, considering the point that the spirit of rights and the wider aims of rights provide the cornerstone for legally binding rights documents and that these documents are built on this spirit and these aims, one might argue that the utilization of such documents must include a teleological process or approach. A teleological judicial interpretation takes the aim of the legislator and the intention of the stipulated legal norms (the *ratio legis* of the articles in the documents) into regard.[120] And indeed, claims on the aims of the idea of human rights are the starting point of the most important legally binding rights documents. When evaluating policies against human rights norms one should thus not only consider a narrow legal take, a wider take of human rights invoking the *telos* (the purpose or end of such legal claims) must be considered as well.[121] The spirit of rights framework reflects this telos. An interpretation of anti-terrorism eligibility

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[117] Ben Dorfman, "Human Rights Life World," *Akademisk Kvarter*, Vol. 5 (2012): 136.
Still, as I have tried to point out above, it is often at moments of perceived indignity, of a treatment that is regarded as not reflecting justice or a conception of equal human worth, when demands for rights frameworks are the strongest.

[118] This does, however, not negate the observation, delivered in the Introduction, stating that lately the concept and idea of human rights has come under pressure, both on a global scale, but also in the context of the 'Western World.'

[119] For instance, Mitrou points out that dignity and freedom constitute the "basic parameters" of constitutional order in Europe. Lilian Mitrou, "The impact of communications data retention on fundamental rights and democracy – the case of the EU Data Retention Directive," In *Surveillance and Democracy*, ed. by Kevin Haggerty and Minas Samatas (London: Routledge, 2010).

[120] Peter Josef Tettinger, *Einführung in die juristische Arbeitstechnik* (München: C.H. Beck, 1982), 108-109.

[121] Sandel, *Justice*, 186.

based on the spirit of rights thus points to dignity, justice, equality, freedom, and capabilities as the telos of legal rights norms.

Second, coming back to the issue of derogation, introduced in the last section, one might argue that derogated human rights are not *really* human rights at all, although states might not leave the space of legal permissibility by derogating on certain rights.[122] Clearly, human rights norms and ideas were developed to provide for the maximum possible enjoyment of rights, not their derogation. In other words, human rights provisions should liberate – not serve as an excuse to deviate from them. If a state implements a wide range of anti-terrorism measures that can only be set in motion by derogating human rights, the essence of the spirit of human rights will be violated, even if all implemented derogations could be legally defended in terms of legal derogation conditionality. Additionally, *all* rights are – as mentioned – to be provided simultaneously, therefore, it can be argued that derogating some rights undermines the human rights concept as a whole. This becomes ever more relevant in a situation in which it becomes a trend to derogate from rights in order to tackle a perceived threat (such as terrorism). In such a situation, the idea of human rights as the basic principle ruling the relation of individual and state is diminished. Thereby, the individual sees some of its rights versus the state perish and its relation with the state is changed; away from a sense of rights being respected by the state to the reflection that rights are a luxury good that the state does not want to or cannot afford anymore. Knowing the enjoyment of rights to be restricted by continuous derogations, the perception of being treated in a dignified way is prevented as well. In this sense, derogation simply does not reflect the *spirit* of human rights. Therefore, I would like to argue that in such a situation derogated rights are not *really* human rights. From a spirit of rights perspective, human rights are really aiming for our best effort in relation to each other; not those moments at which we have to reduce each other's existence.[123] Therein, from a spirit of rights perspective, the derogation of rights should be an absolute exception and only be applied in extreme situations. When a situation is 'extreme' can be evaluated by utilizing the standards set by the ECtHR (explained above). In that way (some) part of the legal framework permeates the spirit framework, however, the court's standards do not only seem reasonable and are the most tangible definition of emergency available, but underline the interrelation between a spirit and a legal take on human rights.[124]

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[122] Dorfman, *13 Acts of Academic Journalism and Historical Commentary on Human Rights*, 26-27.

[123] The standards were, again, the existence of an exceptional situation or crisis, afflicting the whole population, reflecting a threat to organized life reflecting an actual or imminent situation. Such a situation is given when the normal measures are not sufficient anymore in order to uphold public safety, order or health.

[124] The discussion about rights derogation and limitation, in a certain sense, also pertains to

- **Relevant Individual Human Rights vis-à-vis Anti-Terrorism**

In this section, I will, as mentioned, introduce those specific rights that are overwhelmingly in focus in this thesis one by one in more detail.

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the question as to who is responsible for high rights standards. One might, in any case, wonder about this responsibility after being introduced to my double-edged rights framework. So, is it simply states, or is it all kinds of organizations, including IGOs, NGOs, corporations, and maybe even individuals that are responsible for human rights? One might, first of all, point to the different obligations that emanate from rights frameworks. Here, Freeman identifies the obligations of not violating rights, to protect others from violations and to aid victims of violations. Freeman, *Human Rights: An Interdisciplinary Approach,* 81. Tim Dunne represents the orthodox view on the above-mentioned question (common in international human rights law), when he argues, that human rights can only be properly claimed against a state. Dunne, "The Rules of the Game are Changing," 271. George Ulrich argues in a similar fashion when he remarks that only in the context of strong state formations human rights would be able to prosper. Ulrich, "Universal Human Rights," 216. The idea of the state as the responsible institution for the implementation of rights is, furthermore, held by Nussbaum, who claims that it is the task of governments to guarantee that all capabilities are fulfilled to the least necessary degree. Nussbaum, *Creating Capabilities*, 109. Already Contractarians, such as e.g., John Locke, emphasized that the rights one holds by being human cannot be enjoyed in a state of nature, institutions provided by the state would be essential for the enjoyment of rights. Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca and London: Cornell University Press, 2003), 36. Thus, in a traditional understanding, it is the states that bear responsibility for the defense and advancement of rights. This can be seen as a paradox, since states, historically the biggest violators of human rights, are supposed to be the biggest human rights protectors. Still, not only states (and federations or associations of states) are responsible for high rights standards, or at least the acknowledgment of rights in societies. Civil society actors such as NGOs and social movements, as well as every individual and social actor play a role as well. Although the human rights duties of protection from rights deprivation, the provision of human rights enjoyment and aiding those being deprived of human rights are almost exclusively allocated to states, other social actors can tackle some parts of these duties. Donnelly, *International Human Rights,* 24. Fittingly, Hunt declares that human rights are only really meaningful when one understands them in the context of human societies. Therefore, she defines human rights as "the rights of humans vis-à-vis each other […], they are rights that require active participation from those who hold them." Hunt, *Inventing Human Rights,* 21. It is, of course, thinkable that different rights need different actors to ensure rights or aiding victims of rights abuses. Still, the idea that all members of society do hold a certain amount of responsibility for high rights standards does only appear logical, especially in the context of rights reflecting a mutually constructed norm. The activity of social actors can, and often does, contribute to a political culture that is beneficial to the concept of human rights. Without the acknowledgment of the importance of rights in political culture, it is hard to imagine how a 'spirit of rights' would be created. Thus, by pointing to the importance of rights issues and pushing rights issues on the political agenda civil society actors contribute to the construction and preservation of a spirit of rights. Thereby civil societies arguably bear responsibility for the idea of human rights as a whole. Of course, this study focuses on policies of states and the EU, and thereby overwhelmingly on their responsibility to provide and uphold rights. Still, the perspective of NGO's and individuals on policies and affected rights does at times surface.

The first right that is of major importance in this thesis is the right to privacy, as established in the UDHR, ICCPR, ECHR, and CFREU (art. 12 UDHR, art. 17 ICCPR, art. 8 ECHR, art. 7 [and arguably 8] CFREU)**.**
Article 12 of the UDHR reads as follows:

> "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence […]. Everyone has the right to the protection of the law against such interference or attacks."

Article 8, par. 1 of the ECHR reads: "Everyone has the right to respect for his private and family life, his home and his correspondence." The right to privacy is enshrined in a very similar fashion in all four documents. However, in the newest of the four documents, the CFREU, an article on data protection is added. It specifically spells out the right to have one's data protected, arguably another provision of privacy rights.

Privacy rights are, however, subject to potential legal limitations. These limitations emanate from some specific formulations in the articles on privacy rights themselves (so-called limitation clauses). For instance, the ECHR, as the only of the four documents, adds a detailed paragraph on explicit conditions for possible limitations from the right to privacy. This paragraph (ECHR art. 8, par. 2) goes as follows:

> "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The paragraph thus establishes three conditions for the limitation of privacy rights. First, limitation of privacy must always be in accordance with the law, which means it must be based on a valid piece of legislation adopted by the legislative.[125] Second, the limitation must have a legitimate aim, e.g. national security. The formulation is quite broad in this regard, as it includes the economic well-being of a country as a legitimate reason to interfere with individuals' privacy rights. Third, limitations are conditioned towards "necessity for a democratic society." This means taking the principle of proportionality (explained above) into regard.[126] The ECtHR clarified already in 1988 that derogations (and limitations) of rights must be proportionate to the legitimate aim pursued, in order to be eligible.[127] Based on these three conditions, (including proportionality) for a limitation of

[125] Megret, "Nature of Obligations," 111-112. At least at times, in a European context, a common law basis is sufficient.
[126] Megret, "Nature of Obligations," 112-113.
[127] Council of Europe Guideline, 31. The UN's Human Rights Committee reaffirmed this legal opinion in 2004.

privacy rights, the threshold for a reduction of rights is lower than constituted by the general conditions for derogation articulated in article 15 of the ECHR.[128]

The ICCPR points out that no interference with privacy, which is "arbitrary or unlawful", is eligible. This does determine a limitation of privacy as well. The conditions for rights limitation constituted by this formulation in the ICCPR are in fact very similar to the ones constituted by the clause in the ECHR. For example, a limitation not based on necessity, and without legitimate aim would be arbitrary, such a limitation would not be eligible. The UN's HRC additionally pointed out that limitations cannot counter-act the essence of the affected right in the ICCPR.[129] The CFREU, as mentioned earlier, does not provide any specific limitation clauses on any rights, but only works with its general provision on derogation as established in art. 52 of the CFREU. Therefore, I will not come back to the CFREU in terms of limitation clauses in this section.

Privacy constitutes an essential right to every human being and privacy is clearly an important element of every human life. Privacy contributes to the protection of human dignity and is central to the development of every individual.[130] The importance of privacy derives from its protective function for individual autonomy and freedom, as well as the protection of everybody's individual social space.[131] Privacy constitutes "a condition for making autonomous decisions, freely communicating with other persons, and participating in a democratic society."[132] Privacy additionally protects our ability to establish and develop relationships with others (this has been acknowledged by the ECtHR as well).[133] The perception to be free from unnecessary control and limitation in terms of thought and action is essential; for individuals' abilities to define themselves, as well as their personal, moral and intellectual development. The same is valid for an individual's political engagement. Individuals have to have the possibility to think of their own in a democracy, without being obstructed by worries of a breach of their privacy. In that sense, privacy is as well a precondition for a

[128] Accordingly, the UN Human Rights Committee pointed out that clauses for rights limitations in rights treaties (when provided on specific rights) should be sufficient in order to deal with emergency situations, a utilization of the general derogation clause would not be necessary unless triggered by inadequate national legal regimes. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, 101.

[129] Ibid., 69-71, 76-77.

[130] The German Constitutional Court in a verdict on the German BKA law acknowledged this in 2016. Bundesstelle für politische Bildung, "Urteilsverkündung: BKA-Gesetz," April 2016.

[131] Mitrou, "The impact of communications data retention on fundamental rights and democracy." Constanze Kurz, *Die Datenfresser* (Frankfurt: S. Fischer, 2011), 250-251.

[132] Mitrou, "The impact of communications data retention on fundamental rights and democracy."

[133] Ibid., 132.

democratic order.[134] In essence, privacy is a precondition for a life in dignity, an erosion of privacy interferes not only with an individual's freedom and self-determination but also its dignity.[135] Many writers and thinkers have emphasized this high importance of privacy for the individual in modern civilization, e.g. Louis Brandeis called the right to privacy "the right most valued by civilized man," and Isaiah Berlin claimed that a decline of privacy "would mark the death of a civilization, of an entire moral outlook."[136] Alexander Solzhenitsyn coined the famous words "our freedom is built on what others do not know of our existences."[137]

However, an important development has taken place in connection with privacy in the last decades and especially the last years. Originally, the right to privacy protected individuals from searches of themselves, their belongings and their homes, as well as their correspondence. The last was once almost exclusively letters. Later this was extended to protection from having one's phone wiretapped. However, the technological development of the last years has let the options for security organs to interfere with people's private data and communications grow to unprecedented levels. The digitalization of communication and work-life has, in essence, digitalized people's lives. What can be stored and analyzed by security organs is no longer just communication, but the private relationships and in affect lives of millions of people; and this data is never to be lost or forgotten again. Data from different sources can be combined leading to a comprehensive picture of an individual's life. Laura Donohue vividly emphasized this development, when she argued, "technology can be used to build a comprehensive view of formal and informal networks to which we belong, power relationships within and between groups, and levels of intimacy between us and others."[138] Already existing and implemented, as well as newly developed systems of surveillance (e.g. facial recognition in public areas), are a severe threat to the right to privacy.

Under such conditions, and when aware of lacking privacy, humans both act and develop differently.[139] For instance, people might start to refrain from voicing their opinion freely in public or on the Internet when they are under the impression of continuous surveillance, equaling the initiation of processes of self-censoring, and undermining the empowering potential of

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[134] Donohue emphasized that "protecting private affairs from the state allows individuals to evolve." Laura Donohue, *The Future of Foreign Intelligence: Privacy and Surveillance in a Digital Age* (New York: Oxford University Press, 2016), 100-101.

[135] Mitrou, "The impact of communications data retention on fundamental rights and democracy," 132.

[136] Cited in Garton Ash, *Free Speech*, 287.

[137] Rapport by the Council of Europe, "Mass surveillance - Who is watching the watchers?"

[138] Donohue, *The Future of Foreign Intelligence*, 3.

[139] Ibid., 101. Markus Beckedahl and Falk Lüke, *Die digitale Gesellschaft: Netzpolitik, Bürgerrechte und die Machtfrage* (München: dtv, 2012), 53.

the right to privacy.[140] A severely diminished level of privacy, additionally, constitutes a different relationship between state and individual to the clear advantage of the state. If the state knows everything, or *potentially* knows everything about its population, while the state's system of acquiring such knowledge and its security processes, in general, are lying in the dark - including the criminalization of individual attempts to shed light on the security apparatus, as e.g. in the case of Snowden - an extreme imbalance of power between state and citizen is created.[141] This opens up for a potential shriveling of the general level of freedom, as well as democratic standards.[142] Furthermore, such interference with privacy rights clearly clashes with established notions of human dignity and the human rights aim of a provision of a maximal amount of freedom.[143] When citizens are chiefly regarded as a potential threat or information sources, it becomes tough to imagine how such an attitude could be combined with any notion of respect for the aim of human dignity.[144]

As the last paragraph already indicates, the right to privacy and private life (and data protection as enshrined in the CFREU) is of utmost relevance in this thesis. Many of the anti-terrorism measures and policies that I will analyze restrict privacy rights of large parts, if not the overwhelming

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[140] Quentin Skinner pointed out the likelihood of such processes in a 2013 interview: "there is a danger that we may start to self-censor in the face of the known fact that we may be being scrutinized by powerful and potentially hostile forces. […] We don't know what may happen to us. Perhaps nothing will happen. But we don't know, and are therefore all too likely to keep quiet, or to self-censor. […] Surely, […] if the structures of power are such that I feel obliged to limit my own freedom of expression, then my liberty has to that degree been undermined." Skinner continued: "my liberty is also being violated, and not merely by the fact that someone is reading my emails but also by the fact that someone has the power to do so should they choose. We have to insist that this in itself takes away liberty because it leaves us at the mercy of arbitrary power." Quentin Skinner, "Liberty, Liberalism and Surveillance: a historic overview," *openDemocracy*, July 26, 2013.
A recent French study showed that a certain share of the population indeed acted different on the internet due to anti-terrorism measures (ten percent of the Muslim population and five percent of the control group). Francesco Ragazzi et al., "The Effects of Counter-Terrorism and Counter-Radicalisation Policies on Muslim Populations in France," *Centre d'etude sur les Conflicts, Liberte et Securite (CCLS)*, 2018.

[141] Some of my points in this paragraph are somewhat loosely inspired by Garton Ash's plea for free speech, Garton Ash, *Free Speech*, 330.

[142] Mitrou's evaluation supports my point by emphasizing that "there is a serious concern that data-retention policies [a form of mass surveillance that will be analyzed later] may endanger open communication and affect democratic participation with further and considerable impacts on democracy." Mitrou, "The impact of communications data retention on fundamental rights and democracy."

[143] Jacob Appelbaum, "Es geht um unsere Würde!" *Der Freitag*, September 9, 2013.

[144] Sandro Nickel, "The Double-Edged Effects of Social Media Terror Communication: Interconnection and Independence vs. Surveillance and Human Rights Calamities," In *New Opportunities and Impasses: Theorizing and Experiencing Politics*, POLITSCI '13 Political Science Conference, Conference Proceedings.

majority of populations. Examples for such restrictions emanate from a variety of surveillance measures, such as: data retention (conducted or supported by all three analyzed entities), mass surveillance by intelligence agencies (by both German and British agencies), the implementation of facial recognition systems in public (both in Germany and the UK), the implementation of the Passenger Name Record (PNR) directive at the EU level, or the increase of CCTV. The relevance of the right to privacy can be deduced from the essential role it played in the discourse around terrorism policies in the last few years, especially since the leaks of NSA material by Edward Snowden (a range of scholars, journalists, and NGOs have pointed out the vulnerability of that right in the course of terrorism policies).[145]

Another human right that will be at the focus in this thesis is freedom of expression (art. 19 UDHR, art. 19 ICCPR, art. 10 ECHR, art. 11 CFREU). This right is formulated in a similar fashion in all human rights documents used in this thesis. For instance, article 10, par. 1 of the ECHR reads:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

However, two of the documents, the ECHR and the ICCPR, deliver specific conditions for the limitation of this right. According to art. 10 of the ECHR, freedom of expression can be limited if restrictions are prescribed by law, are necessary in a democratic society and if certain acts of expression would endanger national security, public safety or order, territorial integrity, the protection of health or morals or the reputation or rights of others. The conditions are thus similar to the specific conditions for the curtailment of privacy in art 8. ECHR. Therein, the special provisions on the options to limit freedom of expression are less strict than the general provisions on rights derogation, formulated in art. 15 of the ECHR, which demanded a situation of war or national emergency threatening "the life of the nation" as a precondition for derogation and additionally demanded the derogations being limited to what is absolutely necessary. The ICCPR holds a specific provision for the limitation of freedom of expression as well (art. 19, par. 3). However, the ICCPR's provision is very similar to the special provision in art. 10 of the ECHR.

The importance of freedom of expression is manifested in its importance for every individual and society as a whole. Freedom of

[145] For example, Brysk, "Human Rights and National Insecurity," as well as Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (New York: Oxford University Press, 2007), or Skinner, "Liberty, Liberalism and Surveillance," the journalist Glenn Greenwald, *No Place to Hide: Edward Snowden, The NSA and the Surveillance State* (London: Hamish Hamilton, 2014), or the NGO Privacy International, "Privacy International et al. v. Secretary of State for Foreign & Commonwealth Affairs et al. (UK Government Hacking)" May 9, 2016, to mention but a few.

expression protects one of the most basic human traits, the human need for communication and self-expression. Without the establishment and consolidation of opportunities to satisfy this need, humans cannot fully realize or fulfill their humanity and cannot pursue a life in dignity and freedom.[146]

Furthermore, every functioning free and democratic society needs to offer the option to publicly voice dissent, to include a wide scope of opinions.[147] This has been defined as a central component of every society interested in being a 'rights society.' For instance, John Rawls pointed out that any such society has to accept the "diversity of opposing and irreconcilable religious, philosophical and moral views."[148] Furthermore, Nussbaum rightly pointed out that assigning different degrees of freedom of speech to different groups constitutes a failure of any pursuit of providing full enjoyment of human capabilities (which were defined as preconditions for a life in dignity).[149] Silencing dissent by a majority can be considered the antithesis of democracy and will make human societies worse off in the long run.[150] However, dissenting opinions will provide a sound contest of ideas and will prevent societies from falling into conformity (as e.g. John Stuart Mill argued).[151] The free exchange of opinions and ideas is the cornerstone of every functioning democracy.[152]

The importance of freedom of expression can, again, be clarified by pointing to some of the negative consequences when this freedom comes under pressure, e.g. by measures of mass surveillance. Several state organs have argued in their anti-terrorism campaigns that an effective way of preventing terrorism would be to crack down on extremist sentiments being spread on the internet (by the help of surveillance), in effect resulting in an interference with freedom of expression. Widespread surveillance, however, undermines critical public debate and participation in the democratic political process. Under the impression of being surveyed, some people will

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[146] Costigan and Stone, *Civil Liberties & Human Rights,* 301.

[147] Ibid. This is also established by guaranteeing the right to inform oneself, pointing to the importance of media. Kevin Boyle and Sangeeta Shah, "Thought, Expression, Association and Assembly," In *International Human Rights Law*, 2nd ed., ed. by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 226.

[148] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 3-4. Any rights based society would have to accept that some of its members would hold attitudes that maybe conflict with universal rights (e.g. people with racist convictions). Still, societies would have to accept such attitudes, and would have to allow such persons to speak their mind freely, as long as they are not initiating the violation of rights of others. Nussbaum, *Creating Capabilities,* 91.

[149] Nussbaum, *Creating Capabilities,* 109.

[150] Costigan and Stone, *Civil Liberties & Human Rights,* 302.

[151] Sandel, *Justice,* 50. Majorities have no right to silence minorities Mill held. Costigan and Stone, *Civil Liberties & Human Rights,* 301.

[152] Boyle and Shah, "Thought, Expression, Association and Assembly," 225.

be more cautious in terms of what they utter in public forums (including online). A certain share of people will start to apply self-censorship. For instance, individuals might stop posting critical comments on state policies or might refrain from getting involved in political debates in general. Individuals might rather try to stay inside the perceived boundaries of normality, in order to prevent making oneself suspicious to intelligence services.[153] This hypothesis gains support from different sources of research. First, psychological research states that surveillance can bring individuals to tailor behavior. Individuals might become more conformist and might stop to express themselves in the same fashion as without knowledge of surveillance. This is already valid for scenarios in which individuals cannot be sure if they are surveyed or not. Simply the idea or perception that a high probability of surveillance exists can trigger the mentioned effects.[154] Second, a recent quantitative study conducted in France indeed showed self-censoring effects because of anti-terrorism. For instance, more than a quarter of respondents claimed that they avoid providing opinions in public on topics such as foreign policy and 'controversial social issues.'[155] Such processes undermine peoples' ability to debate politics or exchange ideas (the essence of freedom of expression). However, the strength of democracy depends on people's ability to do just that.[156] Processes of self-censoring can, in accumulation and over time, "change citizens' relationship to one another and to the government."[157] They undermine the individuals' capability to freely express oneself, as well as one's pursuit for a life in dignity (as arguably, a life in which one has to self-censor does not reflect a dignified existence). This is not to claim that an overwhelming part of individuals in Western societies will start to employ mentioned self-censoring behavior. Still, even when only a minority of individuals in societies starts to censor themselves, this still constitutes a serious development; especially for societies aiming at being 'the shining city on the hill' in regard to democracy

[153] Donohue, *The Future of Foreign Intelligence*, 101. Such behavior would constitute what Sascha Lobo called for 'airport behavior', the adjustment of behavior in order to avoid attention. Sascha Lobo, Die Welt wird zum Flughafen." *Spiegel Online*, January 21, 2014. http://www.spiegel.de/netzwelt/web/sascha-lobo-das-smartphone-ist-eine-premiumwanze-a-944644.html

[154] Neil Richards, "The Dangers of Surveillance", *Havard Law Review*, Vol. 126 (2013): 1935. Skinner, "Liberty, Liberalism and Surveillance." Glenn Greenwald supports this claim as well. Greenwald, *No Place to Hide*.

[155] Ragazzi et al., "The Effects of Counter-Terrorism and Counter-Radicalisation Policies on Muslim Populations in France."

[156] Laura Donohue, "International Cooperation & Intelligence Sharing" (presentation, The Future of Terrorism: Georgetown & St. Andrews University Conference, Washington, April 28-29, 2016).

[157] Charlie Savage, "NSA Said to Search Content of Messages to and From US," *The New York Times*, August 8, 2013.

standards.[158] Furthermore, the share of individuals employing self-censoring behavior can be expected to be bigger with regard to certain more specific or vulnerable segments of society. Examples are likely to be people in certain occupations (for instance journalists), people who pursue a certain kind of activism, or people belonging to certain (ethnic) minorities (Muslims or refugees).[159] It is specifically members of vulnerable societal groups (such as minority groups) that are in dire need of empowering via actively using their right and capability to free expression. However, by not taking part in public debate to the fullest amount possible the political vigor of such groups is undermined.[160]

As the upper paragraphs already indicate, freedom of expression is a human right that becomes relevant for this thesis since it is endangered by a range of anti-terrorism policies. For example, it is reasonable to claim that via mass surveillance (online, via CCTV and facial recognition, etc.) tendencies for self-censoring might be triggered.[161] Such a tendency would clearly undermine freedom of expression. Moreover, programs aimed at preventing terrorism and radicalization, such as the British Channel program (establishing a legal duty to refer radicalized individuals to the authorities) contain the risk of diminishing freedom of expression, both by denouncing certain kinds of public utterances and by potentially causing a trend of self-censoring as well. The same is valid for the EU's planned upload-filters and British legislation prohibiting 'glorification of terrorism'. Furthermore, journalists' options of working independently from interference from any kind of state authority are at times endangered by anti-terrorism provisions (e.g. in case of the crackdown on *The Guardian* after its revelations on British mass surveillance practices).

Effects on freedom of assembly (art. 20 UDHR, art. 21 ICCPR, art. 11 ECHR, art. 12 CFREU) in the course of anti-terrorism measures

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[158] Nickel, "The Double-Edged Effects of Social Media Terror Communication," 264

[159] Not many journalists can be expected to be willing to receive the same aggressive treatment, as the staff of *The Guardian* after the publication of Snowden's material (by UK authorities). Zeit, "Geheimdienst zwang Guardian zur Löschung von Snowden-Daten," August 20, 2013. http://www.zeit.de/politik/ausland/2013-08/guardian-greenwald-miranda.
Indeed, a recent study has shown that members of the Muslim minority in France show an increased tendency to self-censoring compared to a control group. Ragazzi et al., "The Effects of Counter-Terrorism and Counter-Radicalisation Policies on Muslim Populations in France."
Still, in order to constitute a counter-action to state measures, some individuals might express themselves even more on critical topics. Journalists-Activists such as Glenn Greenwald constitute examples of this. This does, however, not abate the risk of a process of self-censorship for a certain part of the populace, as explained.
Some of the remarks in this section were provided in a conference article of mine. See, Nickel, "The Double-Edged Effects of Social Media Terror Communication," 264

[160] Beckedahl and Lüke, *Die digitale Gesellschaft*, 63.

[161] Skinner, "Liberty, Liberalism and Surveillance." Donohue, *The Future of Foreign Intelligence*, 101. Beckedahl and Lüke, *Die digitale Gesellschaft*, 53.

implemented by Germany, the UK, and the EU will be at scrutiny as well in this thesis. This freedom thus constitutes the third individual-rights focal point of my thesis. The UDHR states in article 20 that "everyone has the right to freedom of peaceful assembly and association." This right is enshrined in a very similar form in the relevant rights documents as well. For instance, the ICCPR holds: "The right of peaceful assembly shall be recognized."

Still, the ICCPR and the ECHR deliver the provision that freedom of assembly may be restricted. According to the ICCPR, art. 21, such restrictions can be granted if they "are imposed in conformity with the law, necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others." The same clause in connection with freedom of assembly is enshrined in the ECHR (art. 11). The limitation clauses are thus very similar to the ones relevant for freedom of expression.

The right to assembly is of general importance for societies that pursue to raise or consolidate freedom, justice or the enjoyment of human capabilities. The right to assembly limits the power of authorities to interfere with the free assembly of individuals in public or private (indoors and outdoors). It additionally demands authorities to protect peaceful assemblies of various kinds. The right to assembly supports in this sense individual autonomy and in general, constitutes a crucial component for every free and democratic society.[162] Such societies are dependent on the participation of its members. The right to assembly, now, offers - via the assembly and display of public protest - a vital tool for political participation and the expression of political dissent.[163] It constitutes an instrument of making political elites aware of their accountability to the population. Democratic and free societies depend on the possibility to freely scrutinize power-holders. Ruth Costigan and Richard Stone fittingly observe, "protests have shaped history and achieved change."[164] Undermining processes of scrutiny and accountability will "paralyze the political life" of entities that are dependent on that life for their "own existence and evolution."[165] The right to assembly, however, aspires to provide for the potential recognition of demands of various groups in society, and therein, supports the human rights aims of dignity, freedom, and justice.

The importance of the right to assembly can be clarified by delivering some assertions in the context of surveillance measures. Via new

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[162] Boyle and Shah, "Thought, Expression, Association and Assembly," 234-236. Costigan and Stone, *Civil Liberties & Human Rights,* 392.

[163] Sangeeta Shah, "Detention and Trial," In *International Human Rights Law*, 2nd ed., ed. by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 234-236.

[164] Costigan and Stone, *Civil Liberties & Human Rights*, 391.

[165] Donohue, Security and Freedom on the Fulcrum," 70.

mass-surveillance practices, state organs have not only a very good chance of reconstructing who is interested in or participating in demonstrations (e.g. via calls on Facebook or Twitter), but also who is organizing or supporting protests, or who is supporting the ideology standing behind protests. Certainly, one might always expect to have one's personal data noted down by a police officer at a demonstration, however, via online surveillance interest in a demonstration might be recorded already before one even participates in the event itself. Furthermore, via the newest facial recognition technology, all participants would have to calculate with being personally recognized at a demonstration.[166] In effect, fewer people might be eager to participate in demonstrations if their anonymity is not guaranteed anymore.[167] Clearly, such a process would undermine the execution of a crucial human right and human capability and would diminish the functioning of democratic processes and democratic culture. This evaluation, that surveillance has repercussions on freedom of assembly, and that curtailment of freedom of assembly has, in turn, negative effects on freedom of expression, has e.g., been emphasized by Martin Scheinin.[168]

The right to freedom of assembly is relevant in the framework of this thesis as it is undermined by far-reaching state surveillance. This is especially valid in a situation where freedom of assembly is effected in interplay with other rights being undermined as well. An additional anti-terrorism measure that pertains to freedom of assembly is the stop-and-search practice of British police forces.

Freedom of association constitutes the fourth individual-rights focal point in my thesis. This freedom is enshrined in art. 20 UDHR, art. 22 ICCPR, art. 11 ECHR, and art. 12 CFREU. The ECHR holds in article 11: "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests." The right is enshrined in an almost identical fashion in the ICCPR and the CFREU. The clauses on the limitation of the right to association are congruent with the clauses presented above on the rights to assembly.

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[166] Such data can be shared with a range of other security organs and might be stored indefinitely.

[167] A decline of participation in demonstrations, and thereby a reduction of the right to assembly can moreover be triggered by surveillance providing surveyed assemblies with an appearance of illegitimacy. Valerie Aston, "State surveillance of protest and the rights to privacy and freedom of assembly: a comparison of judicial and protester perspectives," *European Journal of Law and Technology*, Vol. 8 No. 1 (2017). http://ejlt.org/article/view/548/730

[168] Martin Scheinin, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," Human Rights Council, Thirteenth Session, Agenda item 3, December 28, 2009, 21.

Freedom of association is a vital right for individuals and societies since it provides for opportunities to come together for collective action, in an independent fashion in order to promote common interests. It sets limitations for authorities to mingle with this opportunity of individuals. Freedom of association is linked with the possibility to establish trade unions and parties, crucial components of democratic systems. Freedom of association additionally constitutes the groundwork for individual participation at the civil society level, in other words, the opportunity to join and establish civil society groups (the right additionally provides the freedom to *not* be compelled to belong to a group). Via supporting the participation of the individual in society and the political system, freedom of association reflects a cornerstone of every free and democratic society.[169] It likewise supports the human rights aim of freedom, supports the human capability of living with and towards others, and strengthens the pursuit for a life in dignity.

As in case of freedom of assembly, delving into the example of mass surveillance will provide for further clarification of the importance of the right to association. Under surveillance, the possibility to form groups and associations without the oversight of state organs is heavily limited. However, if citizens are not able to establish or join associations, without being surveyed by the state, freedom of association is substantially restricted. This is especially relevant in connection with groups challenging viewpoints and policies of the government (what one might call counter-hegemonic groups). People might start to refrain from establishing or joining such critical groups based on their perception of being surveyed. This would constitute another form of (self-) mutilation in connection with human rights, mirroring the example on self-censorship in regard to the right to freedom of expression.[170] Again, the argument that people change behavior when under surveillance becomes relevant. Clearly, freedom of expression and freedom of association are linked. Individuals not only want to express their own opinion, but they also want to connect to other individuals who hold the same opinion (freedom of assembly, covered above, is another extension of this interest to connect with others with the same worldview).[171]

The right to freedom of association gains its relevancy in the context of this thesis overwhelmingly by being restricted via different surveillance measures. Surveillance is e.g., affecting the right to freedom of association via bulk interception by intelligence services. Due to such interception,

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[169] Boyle and Shah, "Thought, Expression, Association and Assembly," 231-236.

[170] Nickel, "The Double-Edged Effects of Social Media Terror Communication." Scheinin, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," 21.

[171] Jilian York, "The harms of surveillance to privacy, expression and association," In *Global Information Society Watch 2014: Communications surveillance in the digital age*. https://www.giswatch.org/sites/default/files/the_harms_of_surveillance.pdf

services such as the GCHQ are able to map the entire social network of a person. Intelligence services thereby gain oversight over all connections individuals make online, as well as offline since today's 'offline' relations are almost always followed up by online connections, mostly via social media. Data retention measures (conducted or backed by all three analyzed entities) can undermine freedom of association as well. The right to free association has further been compromised by British control orders.

Potential discrimination of individuals based on anti-terrorism measures and policies is another focal point of this thesis. The right to be free from discrimination is implemented in all four human rights documents covered in this thesis (art. 1, 2 and 7 of the UDHR, art. 26 ICCPR, art. 14 ECHR, art. 21 CFREU).

The UDHR states in article 1 that "all human beings are born free and equal in dignity and rights." Article 2 holds that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind." Article 7, additionally states that "all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

The ECHR holds in article 14:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The formulations on discrimination in the ICCPR and the CFREU are very close to the formulation in the ECHR. Other than with most other rights covered in this section, the right to non-discrimination cannot be subject to limitations.

The right to non-discrimination is a basic right. Not only for every individual, but also for every society and, in fact, every rights treaty. The right to non-discrimination pursues to protect every individual from unjust treatment based on arbitrary grounds such as ethnicity or religion, by state authorities, as well as other societal actors (intended or not). It pursues to prevent unjust limitations of access to political, social and economic opportunities, to remove obstacles of the advancement of certain groups, and to constitute a tool for a transformation towards tolerant and progressive societies.[172] The right to non-discrimination thus sets boundaries for how

[172] Jack Donnelly, "Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime," In *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights,* ed. by Peter Baehr, Cees Flinterman and Mignon Senders (Amsterdam: Royal Netherlands Academy of Arts and Sciences, 1999). Daniel Moeckli, "Equality and Non-Discrimination," In *International Human Rights Law*, 2nd ed., ed. by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 157.

members of society can be treated (and how differently they can be treated) based on certain characteristics and identities (the characteristics listed in the ECHR article above have all been sources of historical discrimination).[173] Even if a large majority decides on certain measures or policies, these might still be illegal, if they unjustly discriminate a minority. Therefore, liberal democracies are not plain systems of majoritarianism, but societies that protect minorities against the will of the majority (under certain circumstances).[174] The right to non-discrimination thus reflects the idea that a societal majority is not supposed to impose its ideas about the right way to life on a minority (this pertains to both the right to non-discrimination and freedom of expression, as acts of suppression of minority opinions are often part of such processes).[175]

The right additionally sets the groundwork for many of the other individual rights enshrined in the framework of legal and wider rights norms. It prevents the state or the public from diminishing the enjoyment of these other rights by certain groups.[176] It pursues to establish an equal amount of freedom, justice, dignity, and capabilities for all members of society and pursues to establish the recognition of the basic equal worth of all humans.[177]

A disregard of the right to non-discrimination (or the perception of discrimination) undermines the level of trust of affected societal groups towards state organs.[178] However, a sound level of trust in the institutions of a democratic state is a precondition for a healthy political culture and a functioning democratic system.[179] Additionally, as shown in a recent study, individuals who perceive themselves to be discriminated, have a higher likelihood of changing behavior (self-censoring behavior), especially in terms of refraining from engaging in public debate. Thus, discrimination erodes the enjoyment of other rights as well.[180] Furthermore, if the right to non-discrimination is not upheld or not established in a society, not only are

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[173] The right to non-discrimination can thus be seen as an instrument to fight longstanding discrimination in history.

[174] One might think about the example of Nazi Germany –the majority at least passively assented to the marginalization of ranges of minorities; most today, though, would hardly see that majority as right.
In an affirmative note, Nussbaum held that healthy democracies cannot merely reflect majoritarianism, where a majority can arbitrarily rule over minorities. Nussbaum, *Creating Capabilities*, 179.

[175] Mill already laid out this viewpoint in his book *On Liberty*. John Stuart Mill as cited in Sandel, *Justice*, 49.

[176] Jack Donnelly, "Non-Discrimination and Sexual Orientation".

[177] Daniel Moeckli, "Equality and Non-Discrimination," 159.

[178] Liz Fekete, "Which way forward on racial profiling." *Institute of Race Relations*, December 6, 2012. http://www.irr.org.uk/news/which-way-forward-on-racial-profiling/

[179] Beckedahl and Lüke, *Die digitale Gesellschaft*, 63.

[180] Ragazzi et al., "The Effects of Counter-Terrorism and Counter-Radicalisation Policies on Muslim Populations in France."

the rights aims of freedom, dignity, and justice, as well as human capabilities, threatened, the human rights aim of peace is threatened as well. In other words, discrimination, as well as the perception of discrimination can easily divide societies and transform into violent conflict. To provide a historical example, the civil rights movement that stood at the beginning of the Troubles in Northern Ireland led a campaign against discrimination (i.a. the discrimination experienced in police practices). The aim was not to take up violence but to mitigate effects and perceptions of discrimination, injustice, and non-recognition. However, the perceived resentment provided the trigger for a range of individuals to move towards taking up violent measures of resistance.[181]

Non-discrimination is a relevant focus for this study since it has on several occasions be claimed that anti-terrorism policies often entail the risk of discriminatory practices and tendencies.[182] Waldron claimed that in case of a restriction of rights in the course of anti-terrorism (or in his words a balancing of rights in favor of security) not all groups in society would be hit equally. Some (minority) groups (e.g., ethnic groups or religious groups) would see their rights curtailed in a more intense fashion by anti-terrorism legislation than the majority of society.[183] Practices that are critical in this regard are manifold, dragnet investigations, racial profiling (e.g. at airports or other public places), special legislation targeting foreigners, a ban on certain kinds of political expressions, or an overwhelming focus on members of a certain minority in anti-radicalization efforts (e.g. the British Channel program) are valid examples of policies that can trigger a process of discrimination. Thus, protection from discrimination aspired by the mentioned human rights documents can be eroded by a range of anti-terrorism measures. Such practices can divide societies and constitute the groundwork for new episodes of violence. Critics have started to worry about the alienation of communities that are targeted more than others by anti-terrorism measures of the British government, police and intelligence organs. In 2012, an alliance of sixteen NGOs claimed that discriminating tendencies

[181] For a comprehensive take on the conflict in Northern Ireland see e.g., Richard English, *Armed Struggle: The History of the IRA* (London: Pan Books, 2012).

[182] The relevance of freedom from discrimination is suggested by both scholarly work and NGO reports. Posner and Vermeule, as well as Brysk, mentioned discrimination as a possible consequence of terrorism policies (see above). See, furthermore, e.g., Conor Gearty, *Liberty and Security* (Cambridge: Polity Press, 2013) and Adrian Guelke, "Secrets and Lies: Misinformation and Counter-Terrorism." In *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English (Oxford: Oxford University Press, 2015) or Christina Pantazis and Simon Pemberton, "From the Old to the New Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation," *British* Journal of *Criminology,* Vol. 49, No. 5 (2009).

[183] Waldron, "Security and Liberty." Human rights lawyer Paul Hoffman argued in the same direction. Paul Hoffman, "Human Rights and Terrorism," *Human Rights Quarterly,* Vol. 26 (2004).

in connection with the English police's stop-and-search practices destroyed trust and triggered resentment and negative relations between the targeted groups (mostly non-whites) and the police, thus heightening tension between certain groups and the state.[184] Christina Pantazis and Simon Pemberton claimed already in a 2009 study that Muslims would experience discriminative tendencies and would thus constitute the new 'suspect community' in the UK (replacing the Irish).[185] Due to these voices from both NGOs and researchers arguing on a theoretical as well as empiric level in terms of potential discrimination towards non-whites/Muslims in the course of anti-terrorism policies in the UK (and potentially elsewhere), my thesis will take these hypotheses up for investigation in the analysis.

A sixth individual right at the focus in this thesis is the right to freedom of movement (art. 13 UDHR, art. 12 ICCPR, art. 2 Protocol 4 ECHR, art. 45 CFREU). The UDHR reads in art. 13, par. 1: "Everyone has the right to freedom of movement and residence within the borders of each state." Freedom of movement is enshrined in a very similar fashion in all four documents. For instance, the ECHR holds in Protocol 4, art. 2: "everyone lawfully within a state's territory may move freely within that territory and choose their residence there."

However, both the ECHR and the ICCPR contain conditions for a limitation of freedom of movement, following the specific conditions that are valid for the rights mentioned above (limitations must be in accordance with the law, necessary in a democratic society, and in the interests of national security, public safety, and public order, etc.). Furthermore, article 45 in the CFREU does, explicitly, only protect the freedom of movement of EU citizens.

Freedom of movement is an essential right for all individuals. It guarantees all humans to be able to make use of their bodily freedom inside a state and thereby fulfill their human capability to move freely from place to place (see above). The ability to do this *freely*, that is without interference and oversight by authorities, is a part of freedom of movement and relates to human dignity as well. Constraints on free movement in the sense of having one's movement restricted and tracked do not support a fully dignified everyday life and do not live up to the human rights aim of maximizing freedom (indeed, a relevant piece of case law by the ECtHR, pointed out that secret tracking of movement undermines the freedom in one's movement).[186]

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[184] Fekete, "Which way forward on racial profiling." Eijkman and Schuurman, as well as English claimed the same. Qurine Eijkman and Baart Schuurman, *Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation* (The Hague: ICCT, 2011), 18. Richard English, "Protect: Keynote Panel, Are Our Current Counter Terror and Security Tactics Working?," World Counter Terror Congress, London, April 19-20, 2016.

[185] Pantazis and Pemberton, "From the Old to the New Suspect Community."

[186] European Court of Human Rights, "Case of Uzun v. Germany (Application no. 35623/05)

Surveillance measures do have a negative effect on freedom of movement, and thereby on the rights aims of dignity and freedom, as well as capabilities.[187] It is therefore of importance that human rights norms protect a free, unrestrained and non-documented movement of individuals.

The relevance of this right in the context of this thesis e.g. pertains to anti-terrorism measures such as the UK's implementation of control orders, the EU's Passenger Name Record directive, the tracking of movement via data retention measures (involving all three cases) and via intelligence services, and the newly developed measure of public facial recognition systems (involving all three entities as well).

The last individual right that is part of the core of those individual rights that are predominantly discussed in this thesis is the right to life, liberty and security of person. This right is provided as *one* right in the UDHR (art. 3) but is split up in two articles in the other three rights documents. ICCPR art. 6 (life) and art. 9 (liberty and security of person), ECHR art. 2 (life) and art. 5 (liberty and security of person), CFREU art. 2 (life) and art. 6 (liberty and security of person).

The UDHR reads in article 3: "Everyone has the right to life, liberty and security of person." Whereas the CFREU is very close to the definition of the UDHR, rights to life, liberty and security of person do deviate somewhat in the ECHR and the ICCPR.[188] The ECHR reads in art. 2: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." The protection of life does thus not rule out the death penalty in certain circumstances. This does however not constitute a relevant issue in this thesis. The formulation used on the right to life in the ICCPR is very similar.[189] As a reminder, the right to life is in both treaties a right that cannot be derogated (other than in cases of the death penalty or acts of combat).

Article 6 of the ECHR manifests that "everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."

Judgment Strasbourg," September 2, 2010. https://hudoc.echr.coe.int/eng#{"itemid":["001-100293"]}

European Court of Human Rights, Guide on Article 8 of the European Convention on Human Rights https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf

[187] Scheinin, Human Rights Council, "Report of the Special Rapporteur on the promotion and protection of human rights…," 21. http://www2.ohchr.org/english/issues/terrorism/rapporteur/docs/A_HRC_13_37_AEV.pdf

[188] CFREU art. 2: "Everyone has the right to life. No one shall be condemned to the death penalty, or executed." CFREU art. 6: "Everyone has the right to liberty and security of person."

[189] ICCPR art. 6: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The option of the death penalty is held open in the ICCPR as well.

These following cases include: detention of a person after conviction by a court, other forms of lawful arrest (bringing a person in front of a court), detention to prevent a person to enter a country illegally, and detention in order to prevent the spread of diseases (etc.). The scope of the protection of the right does thus exclude the mentioned cases, however, an exclusion from the scope of protection based on particular security evaluations is not enshrined here. This is an important point in the context of my thesis.

Other than the relevant article of the ECHR, the ICCPR does not provide a specific list of cases in which the protection of a person's liberty is not guaranteed. However, article 9 of the ICCPR holds:

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

The last sentence, thus, diminishes the protection of the right to liberty to a significant degree. Detention is here regarded as lawful, as long as a legal basis exists (of course, other rights, such as the right to non-discrimination would still have to be upheld, thus e.g. preventing the detention of all members of a national or ethnic minority).

The general importance of the right to life lies in its protective functions, its ability to contribute to perceptions of dignity and to the fulfillment of a central human capability. The right essentially sets a limit to state power on matters of life and death, while it at the same time demands the state to protect one's life, e.g., against terror attacks. Moreover, it prevents that the lives of individuals might become a means to other ends and that human lives are degraded to mere objects that states can decide upon. By preventing states from calculating the lives of one group of people against the lives of another group of people the right to life further prevents violations of the ideal of equal human worth and the occurrence of grave injustices. Moreover, the compliance to right with life has to be regarded as a precondition for the fulfillment and enjoyment of all other human rights and for a central human capability. Furthermore, to enforce state authorities to regard the life of *every* human with equal worth and respect provides for an advancement of the perception of equal human dignity in society (see above).

The importance of the right to liberty and security of person springs from its protective effect as well, pursuing the human rights aims of freedom, justice, and dignity. The right to liberty and security of person emphasizes the importance of the physical dimension of freedom, again establishing limits of state power. It pursues to protect individuals from bodily harm or capture. Such interferences convert individuals to their most vulnerable state and dismantle the core of individuality. Therefore, the guarantee of said rights is of significant importance for every free society. It is, likewise, one of the crucial characteristics of every free society that its individuals do not

have to fear to be arbitrarily arrested at any time.[190] Therefore, the right to liberty and security additionally pursues to prevent state authorities to repress and subdue (legitimate) opponents and dissidents. It is important for the perceptions of freedom, justice, and dignity that restrictions of the right to liberty are only issued under absolute necessity, steered by a strict application of the principles of rule of law.

The relevance of the right to life, liberty and security of person in the context of this thesis is e.g. reflected in the public discourse circling around the question how to treat (arrested) terror suspect and surfaces in anti-terrorism policies such as the German Air Security Law, policies of indefinite detention (in the UK in terms of foreign terror suspects and in Germany on the state level), as well as in case of British control orders.

Although each right presented here is distinct, many (if not all) of the rights in question are interrelated. It is a logical function of the rights framework that changes and curtailments of one right can have negative effects on other rights as well. Donohue fittingly points out that "changes to one right may have a snowball effect on the ability of citizens to claim – and to act upon – other rights."[191] More specifically, privacy is a pre-condition for freedom of expression and the "infringement of privacy in the name of security also carries a cost to speech."[192] Privacy is additionally an important component of guaranteeing the right to assembly since privacy is vital for mobilization processes resulting in assemblies of e.g., protesters.[193] Freedom of expression, in the sense of political expression, and the right to assembly, in the sense of a political protest, are logically related as well. Freedom of association and freedom of expression are related as well, as the right to express oneself freely is vital when coming together with others in associations to pursue certain interests, in turn, the opportunity of forming associations supports the exchange of opinions, a vital aim of freedom of expression.[194] Furthermore, privacy is inter-related with freedom of movement. As explained above, if one's movement is tracked it does not really reflect *free* movement anymore. The right to privacy, freedom of expression, freedom of assembly and association all contribute to the

[190] Costigan and Stone, *Civil Liberties & Human Rights*, 85. Shah, "Detention and Trial," 259-260.

[191] Donohue, Security and Freedom on the Fulcrum," 66.

[192] Garton Ash, *Free Speech*, 285, 322.Human Rights Watch points to a connection between privacy rights and freedom of expression and association as well. Human Rights Watch, "US: Urgent Need for Surveillance Reforms," June 2013. http://www.hrw.org/news/2013/06/11/us-urgent-need-surveillance-reforms. Neil Richards, Lilian Mitrou and Quentin Skinner see a connection between privacy rights and freedom of expression as well. Richards, "The Dangers of Surveillance." Mitrou, "The impact of communications data retention on fundamental rights and democracy," 133. Skinner, "Liberty, Liberalism and Surveillance."

[193] Aston, "State surveillance of protest and the rights to privacy and freedom of assembly".

[194] Boyle and Shah, "Thought, Expression, Association and Assembly," 217.

construction of a sufficient level of political participation and a sound 'public sphere'. Without the provision of these rights, no functioning debate or exchange of ideas, understandings, and knowledge is possible. Indeed, "the health of the political community depends upon" this possibility, as Donohue holds.[195] As discrimination undermines the likelihood that those who are affected by such discrimination will make use of rights such as freedom of expression or association, negative effects of rights curtailment are further amplified.[196]

All seven rights elucidated in this section are vital rights in a functioning democracy. They are important for every society oriented towards freedom and liberty and are equally essential rights for every individual. All societies pursuing the spirit of rights and every liberal democracy depend on these rights.[197] Protecting such rights is a part of enabling individuals a life in dignity, freedom, and justice, enjoying a maximum of capabilities towards a free and full development of the self.

[195] Donohue, *The Future of Foreign Intelligence*, 101.
[196] Ragazzi et al., "The Effects of Counter-Terrorism and Counter-Radicalisation Policies on Muslim Populations in France."
[197] Donohue, "Security and Freedom on the Fulcrum," 70.

Chapter II
Terrorism and Anti-Terrorism

In order to analyze anti-terrorism policies, a close look at the concept of *terrorism* is inescapable. Therefore, I will now try to clarify this concept. It is simply a necessity to look at the concept of terrorism itself, in order to understand what it is that states seek to tackle and what they are willing to curtail human rights for. Definitions and perception of terrorism clearly influence the definition, perception, understanding, and policymaking of anti-terrorism.[1] For instance, if one does not have a clear idea of what terrorism is one will not be able to assess the degree of threat it constitutes and the proportionality of authorities' reactions. Hence, the first section will offer an introduction to terrorism as a historical phenomenon and concept, as well as shed light on the definitional conundrums surrounding the term and will produce a working definition of terrorism for this thesis. It is likewise a necessity for this thesis to deliver a clear definition of the concept of anti-terrorism. This will be accomplished in the second section of this chapter.

Terrorism: History and Definitions

- **A Brief History of Terrorism**

David Rapoport and his metaphor of four waves of modern terrorism (an anarchist wave, an anti-colonialist wave, a new leftist wave, and a religious wave) have influenced much academic writing on terrorism history.[2] My (short) history of terrorism will rely on Rapoport's work. Although Rapoport's 'wave model' has its weaknesses, it provides a broad historical oversight over the development of modern terrorism and the understanding and prioritization of the threat of the same. The metaphor of the four waves is, in general, a useful organization device for an illustration of the modern history of terrorism. Furthermore, since anti-terrorism must be understood as a reaction of states to these perceived waves, Rapoport's model delivers a starting point for the understanding of the development of anti-terrorism as well.[3] So due to its influence and comprehensibility, I will initially follow Rapoport's wave model.[4]

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[1] David Omand, "What Should be the Limits of Western Counter-Terrorism Policy?" In *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English (Oxford: Oxford University Press, 2015), 61.

[2] The importance of Rapoport's concept for the field has been pointed out by many, see e.g. Tom Parker and Nick Sitter, "The Four Horsemen of Terrorism: It's Not Waves, It's Strains," *Terrorism and Political Violence*, Vol. 28 No. 2 (2016).
Modern terrorism is here understood as terrorism carried out from the late nineteenth century to the present.

[3] Adrian Guelke, "Secrets and Lies: Misinformation and Counter-Terrorism," in *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English (Oxford: Oxford University Press, 2015), 97.

[4] Weaknesses and potential editions of Rapoport's waves are discussed later.

However, before delving into modern terrorism, I would like to give a short account of the ancient history of terrorism, as well as the origin of the term itself. The first will be delivered in order to emphasize the fact that terrorism has existed for more than only 150 years (thus longer than the 150 years that are covered by Rapoport's waves). An understanding of the origin of the term underlines these historical roots and emphasizes the importance of one of terrorism's most important features, the generation of fear in societies. This additional historical context will help in gaining another perspective on modern terrorism.

The literature on terrorism is full of examples of early episodes of terrorism, going back to ancient terror groups. A starting point in many histories of terrorism is the example of the Sicarii, an anti-Roman group active in the first century AD in Judea. The Sicarii typically stabbed their victims (Roman military or civilians, or Jews collaborating with the Romans), during public assemblies. Another popular example of early terrorism is the Thugs, a group of religious criminals active in India between the thirteenth and nineteenth century. The Thugs carried out sacrificial strangulations to the Goddess Kali ('the destroyer') and killed on average 20.000 thousand people a year.[5] The Assassins are another often-used example of early terrorism. The Shi'ite Order active in Syria, Palestine, and Persia during the time of the crusades sometimes applied public suicide attacks. The members of the order typically murdered Sunni Muslims or Christians in Mosques or public squares.[6] Especially the Sicarii and the Assassins with their actions carried out in public resemble our modern understanding of a terrorist group. Furthermore, since most Sicarii or Assassin terrorists were killed during their attacks, the groups can also be seen as precursors of modern suicide terrorism.

As concerns the word, the term 'terror' has its linguistic roots in the Latin term *terrere*, which means to frighten someone.[7] However, the term was first used in connection with the reign of terror of the French Revolution, *la Grande Terreur*. Our understanding of the term terrorism stems from this

[5] Scott Atran, "Genesis of Suicide Terrorism," *Science*, Vol. 299 No. 5612 (2003): 1534. The Thugs, who did not follow a clear political aim with their deeds, are in regard to the definition of terrorism employed in this thesis, rather resembling a murderous religious sect, instead of a terrorist group, since most modern definitions of terrorism demand a political motivation in order to label an act of political violence for terrorism.

[6] Walter Laqueur, David Whittaker, Erik Case, Andrew Heywood, Andreas Bock, Jonathan Matusitz and Scott Atran are examples of authors including these historical examples in their histories of terrorism. See: Walter Laqueur, *The Age of Terrorism* (Boston: Little Brown, 1987), 12-15. Whittaker, *Terrorism: Understanding the Global Threat,* 13-16. Erik Case, "Terrorism," In *21st Century Political Science: A Reference Handbook*, ed. John T. Ishiyama and Marijke Breuning (Thousand Oaks: SAGE Publications, 2011), 4-6. Andrew Heywood, *Global Politics* (New York: Palgrave MacMillan, 2011). Andreas Bock, *Terrorismus* (Paderborn: UTB, 2009), 28-31. Jonathan Matusitz, *Terrorism &Communication* (Los Angeles: SAGE, 2013), 7-9. Atran, "Genesis of Suicide Terrorism," 1534.

[7] Bock, *Terrorismus*.

period of the French Revolution.[8] In the later stages of the French Revolution, the Jacobins (among their leaders the notorious Maximilien Robespierre), executed a strategy of spreading fear. What Robespierre had in mind, during the revolution's most radical phase in 1793-94, was a state-directed system of terror, composing a 'reign of fear.' This was perceived necessary in order to "enable a fragile revolutionary council to order its new-found unity by terrorizing opponents."[9] A 'reign of fear', would contain dissent by the most rigorous means, in order to uphold the new order and the power of the revolutionary council.[10] Robespierre explained the strategy of the new republic as follows: "We must smother the internal and external enemies of the Republic or perish with it; now in this situation, the first maxim of your policy ought to be to lead the people by reason and the people's enemies by terror."[11] Robespierre believed that terror was necessary in order to help virtue and democracy to its victory. He appealed to "virtue, without which terror is evil; terror, without which virtue is helpless" and declared that: "Terror is nothing else than immediate justice, severe, inflexible; it is, therefore, an outflow of virtue, it is […] a consequence of the general principle of democracy applied to the most pressing needs of the motherland."[12] Robespierre wanted to utilize fear in order to re-educate the population to uphold the new idea of virtues, consisting roughly of devotion to family, work and the ideals of the revolution.[13] The characteristics of this demanded virtuous life were however rather vague, citizens could not prove to fulfill these demands, should they be accused of the opposite; a dilemma with fatal results for many.[14] The consequence was thus a wave of mass executions, taking the lives of up to 40.000 real or alleged 'enemies of the revolution'.[15] Ironically, Robespierre himself was among the last victims of his own campaign. The terror of the French revolution (*la regime de la terreur*) was carried out by state authorities, thus differing from the former early examples

[8] It is an interesting fact that the French Revolution plays an important role for the development of both main concepts in this thesis, terrorism and human rights.
[9] Whittaker, *Terrorism: Understanding the Global Threat*, 14.
[10] Mikkel Thorup and Morten Brænder, "Staten og dens Udfordrere – Vold som Terror eller Krig," In *Antiterrorismens idehistorie – stater og vold i 500 år*, ed. by Thorup and Brænder (Aarhus: Aarhus Universitetsforlag, 2007), 42-45. Walter Laqueur, *Terrorism* (Boston: Little, Brown, 1977).
[11] Robespierre, Speech to the National Convention, February 5, 1794 cited in Alex Schmid, *The Routledge Handbook of Terrorism Research* (London: Routledge, 2013), 99.
[12] Ibid.
[13] Francis Leary, "Robespierre: The Meaning of Virtue," *VQR – A National Journal of Literature & Discussion*, Vol. 72, No. 1 (1996) http://www.vqronline.org/essay/robespierre-meaning-virtue
[14] Bock, *Terrorismus*, 24-25.
[15] Heywood, *Global Politics*, 283.

of terrorism, which were all committed by non-state actors (and also this thesis will differentiate between terrorism and state terrorism, see next section).[16]

Returning to Rapoport's waves, he posits that the first wave of modern terrorism was an anarchist wave. This anarchist wave emanated from Russia to other countries between 1880 and 1920. The primary strategy of anarchist terrorism was the assassination of prominent political personnel. This form of 'propaganda by deed' accused modern society of being generally hostile to the individual and governments of being exploitative and unjust.[17] The 1881 Anarchist Congress in London called for the "annihilation of all rulers, ministers of state, nobility, the clergy, the most prominent capitalists and other exploiters."[18] The list of victims of anarchist terrorism includes prominent names, for instance, Alexander II of Russia, George I King of Greece, Umberto I King of Italy and US President William McKinley. However, anarchist violence or terrorism did not only kill prominent figures but also regular state representatives. For example, in May 1886 an anarchist bomb killed seven policemen at a labor agitation meeting at Haymarket Square in Chicago.[19] Due to its spread, the wave of anarchist terror represented the first global terrorism experience.[20] The first prominent group in this wave of terrorism was Narodnaja Volja ('the will of the people'), operating in Czarist Russia between 1878 and 1881, who, for example, managed to kill Alexander II Czar of Russia with a bomb attack in March 1881.[21] The group declared the aims of its terrorist campaign to be "the destruction of the most harmful persons in the government […], to break the prestige of the government, [and to] raise in that way the revolutionary spirit of the people."[22] Over the years, anarchist violence contributed to a change of the common perception of the

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[16] In this thesis, the term terrorism is confined to non-state violence; terrorist violence against civilians committed by states is classified as state terrorism, and thus constitutes another category of political violence.

[17] Case, "Terrorism," 8. David Rapoport, "The Four Waves of Rebel Terror and September 11," *Anthropoetics*, Vol. 8 No. 1 (2002). David Rapoport, "The four waves of modern terror: international dimensions and consequences," In *An International History of Terrorism: Western and non-Western experiences*, ed. by Jussi Hanhimaeki and Bernhard Blumenau (London, New York: Routledge, 2013). Laqueur, *Terrorism*.

[18] Cited in Richard English, *Does Terrorism Work?* (Oxford: Oxford University Press, 2016), 241.

[19] English, *Does Terrorism Work?*, 228.

[20] Rapoport, "The four waves of modern terror," 282.

[21] Bock, *Terrorismus*, 36-37.

[22] "The People's Will," program of the executive committee of Narodnaja Volja, 1879, cited in Schmid, *The Routledge Handbook of Terrorism Research*, 99. However, not all scholars would agree that the assassination of these prominent figures fall into the category of terrorism, which reveals the contested nature of the concept already with its first modern wave. Tamar Meisels, e.g., argues that these murders simply constitute political assassinations and not terrorism due to the lacking aim of killing civilians and inducing fear among the population. Tamar Meisels, "The Trouble With Terror – The Apologetics of Terrorism: a Refutation," *The Journal of Terrorism and Political Violence*, Vol. 18 (2006).

term terrorism. Whereas the term might be seen to have originated from acts of state violence during the French Revolution, it was mostly applied to acts of political violence committed by non-state actors (sub-state groups or individuals) from the late 19th century onwards.[23]

The second wave of terrorism was identified by Rapoport as anti-colonialist terrorism - a wave aiming at the liberation of peoples from suppression by colonial empires (consequently these groups did not refer to themselves as terrorists, but were interpreted as such by many, including Rapoport). After WWII, such groups formed in various colonies of all empires and a range of them contributed to the foundation of new states.[24] An example of this was the Algerian FLN (*Front de libération nationale*). This case provides an example of a violent movement actually achieving its ultimate goal, as political violence employed by the FLN, including terrorism, contributed to and accelerated the French departure.[25] Another example falling into this category is the fight of the Viet Minh for independence from the French after the Second World War.[26] Disaffected groups in developed countries, as e.g., Northern Ireland can be counted in this category as well. The anti-colonial wave receded as almost all colonial empires dissolved in the second half of the ¨twentieth century.[27]

Terrorism of 'the new left wave', as Rapoport calls it, represents his third wave.[28] Examples of groups connected to this wave are the Rote Armee Fraktion (RAF) in West Germany and the Red Brigades in Italy. However, new left groups formed not only in European countries but also on a global scale. A non-European example is the Maoist Sendero Luminoso (Shining Path) in Peru. Most of these groups were driven by Marxist-Leninist ideology. Some of them received support or help from communist states (e.g., the GDR sheltered former RAF members and furnished them with new identities).[29] However, most groups of the third wave dissolved or at least decreased their activity level with the end of the Cold War. Latest with some of the groups of this third wave, it becomes clear that Rapoport's waves are not always fully

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[23] Andrew Silke delivers another nineteenth century example for this shift of understanding by pointing out that many newspaper commentators in the US denoted violence of the KKK as terrorism, as early as 1868. Andrew Silke, *The Psychology of Counter-Terrorism* (London and New York: Routledge, 2011), 2.

[24] Rapoport, "The four waves of modern terror," 288.

[25] English, *Does Terrorism Work?*, 222.

[26] The Vieth Minh was the leading organization in Vietnam's struggle for independence from France.

[27] Rapoport, "The four waves of modern terror." Laqueur, *Terrorism*, 173.

[28] Rapoport, "The four waves of modern terror."

[29] This pertains to members of the second generation of RAF terrorists. Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik (BStU), "Informationen zur Stasi."
https://www.bstu.bund.de/DE/Wissen/Aktenfunde/RAF/raf_node.html
Der Spiegel, "Der Staat hat überreagiert," January 20, 2014

distinguishable. For instance, the RAF, identified as a third wave group, used an anti-colonial discourse, was in parts motivated by the struggle of the Viet Minh, and kept relations with second wave groups such as the PLO (RAF members e.g., received training in PLO camps in Lebanon).[30] In addition, large parts of the members of the second-wave Provisional IRA identified as socialist, anti-capitalist or Marxist, thus resembling groups of the third wave.[31]

Rapoport's fourth wave is a religious one, emerging in the late 1970s and early 1980s.[32] Also here, some groups show overlap with earlier waves. Still, during this fourth wave religion gained according to Rapoport "a vastly different significance", for example concerning "supplying justifications and organizing principles."[33] Although Islam often comes into focus in this wave, Christian, Jewish, and Sikh terrorism is part of it as well. The US saw e.g., terror attacks of Christian extremists on abortion clinics, gay clubs, and the 1996 Atlanta Olympic Games. The attack of the Aum Sect on the Tokyo subway can be connected with this wave as well. The attacks of 9/11 followed by attacks in other Western metropolises, such as in Madrid, Paris, London, and Brussels, form the most well-known examples of terrorism of the new religious wave. The so-called Islamic State, committing attacks both, inside of Western countries, and in the periphery of the European continent, is the newest prominent or infamous group of this fourth wave.

Reflecting on this last wave, it is important to point out, that this thesis uses the label 'Islamist terrorism' for acts of terrorism carried out by its perpetrators ostensibly in the name of Allah and the religion of Islam. However, this violence does not reflect the religion as such, but rather an errant interpretation of the same; an interpretation that seemingly allows for the murder of perceived 'infidels' or political opponents (actually, all terrorist acts carried out in the name of a religion carry political goals and motives as well, e.g. influencing foreign policy). Therefore, the widespread usage of the label Islamist terrorism is not unproblematic, as it fabricates a connotation between a potentially peaceful religion and violent perpetrators. Islamist terrorism is therefore in this thesis to be understood as terrorism that is committed under this errand perception of Islam.

As mentioned, Rapoport's waves are in connection with specific groups not always clearly distinguishable. Rapoport concedes this when he explains that the PLO "primarily a nationalist group" became an important "body of the New Left Wave", and that recently, "PLO elements became active in the Fourth Wave."[34] Problems in locating certain groups in certain

[30] Peter Katzenstein, "Same War—Different Views: Germany, Japan, and Counterterrorism," *International Organization*, Vol. 57 No. 4 (2003): 742.
[31] Rapoport, "The four waves of modern terror." Richard English, *Terrorism: How to Respond* (Oxford: Oxford University Press, 2009), 130-131.
[32] Rapoport, "The four waves of modern terror," 283. Heywood, *Global Politics*, 283.
[33] Rapoport, "The Four Waves of Rebel Terror and September 11."
[34] Rapoport, "The four waves of modern terror," 283-284. Furthermore, Rapoport counts the

waves spring from three factors: first, theoretical categories are always only ideally distinct, in reality, they often show overlaps with other categories. Second, certain groups might survive their original wave and change orientation in a changed context. Third, especially groups which, at least in part, are motivated by anti-imperialist sentiments, are hard to distinguish by the wave model, as many of the different terrorist movements across Rapoport's waves had anti-imperial motivations aiming at the (at least perceived) imperial powers of the UK, the US and their allies.[35]

Besides the blurred boundaries of the waves, Rapoport's model has arguably another weakness: There is no distinction between xenophobic and nationalist/separatist terrorism. This is a weakness since, using Rapoport's four waves, one is not able to fittingly categorize acts of terrorism committed by individuals motivated by purely racist or xenophobic ideologies. Terror attacks such as the one committed by the NSU (Nationalsozialistischer Untergrund) group in Germany, Anders Breivik in Norway in 2011 or the attack on the Oktoberfest in Munich in 1980 constitute cases of xenophobic terrorism. The nationalist and separatist terrorism of ETA and the PIRA ran under an essentially different ideology than terrorism by the mentioned xenophobic individuals and groups. Whereas groups such as ETA and the PIRA acted out of a minority position against hegemonic state agencies, xenophobic groups mostly act against civilians of minorities with foreign roots. From the perspective of this study, it makes, therefore, sense to distinguish between xenophobic and nationalist/separatist terrorism.[36] A categorization of modern terrorism would thus, in my view, consist of five categories: anarchist terrorism, anti-colonial/separatist terrorism, left-wing terrorism, xenophobic terrorism, and religious terrorism. Of course, as with Rapoport's model, potential overlaps between categories can never be ruled out. In addition, the genesis or spread of other forms of terrorism, besides the given five categories, is possible as well. In recent decades, the possibility of a spread of so-called ecology terrorism has been considered as another potential category of terrorism (e.g. attacks against facilities conducting animal experiments).[37] This shows that terrorism is an ever-changing and

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fight of the ETA to the third wave and finds the beginnings of PIRA terrorism belonging to the second wave; whereas he points out that the PIRA also resembled traits of the third and fourth wave. However, it seems that ETA and the PIRA have much more in common than, e.g., ETA and the RAF, or the PIRA and the FLN.

[35] English, *Terrorism: How to Respond*, 51.

[36] Audrey Cronin already took regard of that distinction in a 2002 publication. She spoke of both right-wing and ethnonationalist/separatist terrorism (besides left-wing and religious terrorism). Audrey Cronin, "Behind the Curve: Globalization and International Terrorism," *International Security*, Vol. 27 No. 3 (2002), 39.

[37] Examples of animal rights groups using methods that can be seen as terrorist are the Animal Rights Militia or the Revolutionary Cells – Animal Liberation Brigade. Armin Pfahl-Traughber, "Terrorismus: Merkmale, Formen und Abgrenzungsprobleme," *Aus Politik und Zeitgeschichte*, Vol. 24-25 (2016): 17.

developing phenomenon and that new waves or categories of terrorism can arise, just as old waves might return. Furthermore, changes in the nature of terrorism will unquestionably have consequences on the way states react to terrorism. Different kinds of terrorism will trigger different reactions and different kinds of policies.

- **The Contested Nature of 'Terrorism' Definitions**

Having shed some light on *histories* of terrorism, I will now proceed to define the concept. I will present the major debates and fault lines in the scholarly literature on the issue, as well as carve out a position of my own.[38] The construction of a working definition is intended to help provide an understanding of what it is that states and federations or international organizations try to tackle with their anti-terrorism policies, as well as reveal differences between states' (and the EU's) definitions and scholarly definitions. Definitional differences gain their importance from the effects they have on actual policies. By defining terrorism, one defines the groundwork for how to tackle the problem of terrorism. Thus, definitions do have an influence on actual terrorism policies, so that different definitions of terrorism will likely lead to different policies.[39] Sometimes, as will be seen later, faulty or too wide or arbitrary definitions can cause problems from a rights perspective.

However, before coming to the fault lines in the literature and my own working definition some remarks on the relationship between terrorism and the term political violence are necessary. Instead of understanding terrorism as a completely isolated concept, it must be seen as one particular form of political violence among a range of different forms of political violence. Other forms of political violence that differ from terrorism are for example warfare, guerilla war, civil war, genocide, ethnic cleansing, political assassinations, sabotage or rioting.[40]

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[38] Obviously, I could have chosen many more or different definitions, however I tried to include (for the most part) definitions that both reflect the different viewpoints in the debate and represent renowned scholars.

[39] Following the literature of policy analysis scholarship, one might understand the act of defining terrorism as an act of defining a 'problem'. Each particular definition of a policy problem tries to install a certain "hypothesis of causality." Acts of defining terrorism, as all acts of problem definition, are dependent on the political and social context and represent "a collective construction directly linked to the perceptions, representations, interests, and values of the actors concerned," […] as well as an "ongoing, non-linear and open process." Peter Knoepfel et al., *Public Policy Analysis* (Bristol: Policy Press, 2007), 126-127.

[40] Edward Crenshaw and Kristopher Robison, "Political Violence as an Object of Study: The Need for Taxonomic Clarity," in *Handbook of Politics*, ed. by J. Craig Jenkins and Kevin T. Leicht (New York, London: Springer, 2010). Michael J. Boyle, "Progress and Pitfalls in the Study of Political Violence," *Terrorism and Political Violence*, Vol. 24 No. 4 (2012). Richard Jackson, "The Study of Terrorism 10 Years after 9/11: Successes, Issues, Challenges," *Uluslararası İlişkiler / International Relations*, Vol. 8 No. 32 (2012). Jackson provocatively defines counter-terrorism as a form of political violence as well.

One might approach the issue of defining terrorism with a thought problem, which will emphasize the relevance of seeking a specific definition: was the murder of Archduke Franz Ferdinand in Sarajevo in 1914 an act of terrorism or a case of a political assassination? Are ISAF troops killed by a Taliban roadside-bombing in Afghanistan victims of terrorism or guerilla warfare? What about the American and French troops killed in the 1983 Beirut barracks bombings? Furthermore, are acts of violence by states, committed against civilians, to be categorized as terrorism as well? Such questions, and attempts to find an answer, take us to the heart of the matter.

Thus, in the course of shedding light on the definitional fault lines in the literature, I will distinguish terrorism from other forms of political violence. Without such a differentiation, the concept of terrorism would encompass all sorts of violence and would become unrecognizable. However, the precise description and analysis of anti-terrorism demand a conceptualization of terrorism that is differentiated from other kinds of political violence. Certainly, distinctions between the different categories of political violence are not always easy, "given the amorphous and ambiguous properties of political violence."[41] Still, the construction of differentiations is possible as will be seen.

Terrorism is an extremely contested term. In fact, it is one of the terms with the highest quantity of different definitions in all of social science. Alex Schmid listed more than two hundred different definitions of terrorism in his 2013 *Routledge Handbook of Terrorism Research*; a number which clearly underlines the vast amount of different understandings among scholars in the field.[42] Still, most definitions of the term terrorism in the literature include

[41] Crenshaw and Robison, "Political Violence as an Object of Study," 237. In fact, some violent groups apply terrorism, while applying other forms of political violence, as well. Boyle, "Progress and Pitfalls in the Study of Political Violence," 529. For example, the Taliban use both terrorism and other forms of political violence (guerilla warfare) in their struggle in Afghanistan. Rashmi Singh, "Counter-Terrorism in the Post 9/11 Era: successes, Failures and Lessons Learned," In *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English (Oxford: Oxford University Press, 2015), 44.

[42] Even governments themselves are divided over definitions of terrorism. An often-cited example concerns the American Department of Defense (DoD) and Department of State (DoS). The DoS defines terrorism as "premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents, usually intended to influence an audience." According to the DoD terrorism is "the unlawful use or threatened use of force or violence against individuals or property to coerce or intimidate governments or societies, often to achieve political, religious, or ideological objectives." Alex Schmid and Albert Jongman, *Political terrorism: a new guide to actors, authors, concepts, data bases, theories, and literature* (Amsterdam: Transaction Books, 1988), 33. Thus, whereas the DoS defines non-combatants as victims, the DoD speaks more broadly of individuals or property as victims of terrorism. The DoS only refers to politics as a possible motivation, whereas the DoD extends the range of possible motivations to religious or ideological objectives. The definition of the DoS furthermore focuses on the audience as the real aim of attacks, whereas the DoD

several or all of the following categories or ingredients: a specification of acts of violence falling under terrorism, claims on the motivation of terrorism, remarks on possible perpetrators of terrorism, information on possible victims and claims on the aims of terrorism.[43]

However, no agreed-upon common definition of terrorism exists. The literature on terrorism is characterized by major disagreements, such as what kinds of violence should be described as terrorist violence, whether only political motivations should be named as motivation of terrorism (instead of including other motivations), whether state violence should be included in definitions of terrorism, whether an act is a terrorist act only when the victims are civilians, whether one should differentiate between terrorism, assassinations and guerrilla warfare, or whether one should include a moral component in defining terrorism. It is, moreover, debated if terrorists have to have the aim to spread fear in society.[44] My study both presents and acknowledges these debates. I will use these major debates in the literature as an orientation for advancing towards my own definition of terrorism. Therefore, the rest of this section will be structured around these major fault lines in the literature.

A central component of terrorism is violence. All functions of terrorism follow from a successful or failed attempt at committing violence. Without violence, terrorism would not be terrorism. The committed violence is the bargaining instrument of every terrorist group or individual (in the sense of 'give attention to our political grievances, otherwise…').[45] However, there is disagreement around the term violence in the literature. This is the first fault line I want to touch upon. Scholars disagree on what kind of violence suffices to define a terrorist attack, and what acts of violence would have to be excluded from a definition. We could, for instance, ask if a terror attack is only a terror attack if it involves violence against human beings, or if the destruction of things cannot be terrorism as well. Are threats of violence terrorism as well? Furthermore, how severe do attacks have to be before we can call them terrorist? And what about failed attacks?

Whereas the majority of scholars confine terrorism to violence against humans, some scholars include both violence against human beings *and* things (mostly mentioned as 'property' or 'infrastructure') in their definitions. Examples of scholars belonging to the latter category are Angelo Corlett, Jeff Lewis, Gabriel Palmer-Fernandez or Danica Gianola.[46] For instance, Corlett

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sees governments or societies as the focus. Moreover, whereas the DoS definition excludes states as perpetrators of terrorism, the definition by the DoD leaves this possibility open.

[43] For an extensive overview on scholarly definitions of terrorism, see e.g. Schmid, *The Routledge Handbook of Terrorism Research*, 99-157.

[44] Schmid and Jongman conducted an in depth analysis on disputed elements of the term terrorism in the literature. Schmid and Jongman, *Political terrorism.*

[45] Schmid, *The Routledge Handbook of Terrorism Research*, 78.

[46] Angelo Corlett, *Terrorism: A Philosophical Analysis* (Dordrecht: Kluwer Academic Publishers, 2003). Jeff Lewis, *Language Wars: The Role of Media and Culture in Global Terror*

speaks of "the actual or threatened use of violence against persons or property" in his definition and Palmer-Fernandez holds that terrorism is "the organized use of violence against civilians or their property."[47] Many other scholars, however, exclude violence against things, for example by defining terrorism as violence against civilians, non-combatants, 'innocent people', or simply humans. For instance, Schmid and Jongman define that terrorist violence causes "immediate human victims," and Erik Case holds that terrorism is "violence against civilians."[48] Whereas scholars including violence against things are in the minority position in the scholarly field, many (if not most) terrorism definitions by states, IOs or federations *do* include such violence in their definitions of terrorism, see e.g. the definitions by NATO, the US Department of Defense (see above), the UK, and the EU (see Chapters 4 and 5).[49]

In regard to this issue, I take the position that politically motivated acts that are decidedly supposed to damage things only (e.g. a left-wing motivated wave of arson on luxury cars) are excluded from my understanding of terrorism and should rather be classified as rioting or sabotage, since otherwise, the concept of terrorism would become too broad and the label of terrorism could be used on a vast amount of acts.[50] Furthermore, only severe violence, which is violence that tries to kill or heavily injure its victims, is to be seen as terrorist violence. However, failed attacks need to be classified as terrorism, or at least attempted terrorism, given that all other criteria of terrorism – which I will extract in the following - are fulfilled. An exclusion of failed attacks would be arbitrary.

The second fault line that I want to explore is the one concerning terrorism's motivation. Three scholarly factions can here be identified. Few authors do not go into defining motivations for terrorism at all. A considerable amount of scholars point to a political motivation for terrorism, and a third group adds other possible motivations.

Brian Jenkins, one of the pioneers in the field, is one of the few authors not including any possible motivation for terrorism in his definition of the term. Walter Laqueur, another pioneer of terrorism studies, can be counted to the group of scholars who see the motivation for terrorism as deriving from politics. For instance, he defines terrorism as "the use of covert violence by a

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and Political Violence (London: Pluto Press, 2005). Gabriel Palmer-Fernandez, "Terrorism, Innocence and Justice," *Philosophy and Public Quarterly*, Vol. 25, No. 3 (2005): 22-27. Danica Gianola, *Il volto del terrorismo* (Florence: Firenze Atheneum, 2009).

[47] Corlett, *Terrorism*, 119. Palmer-Fernandez, "Terrorism, Innocence and Justice," 24.

[48] Schmid and Jongman, *Political terrorism*. Erik Case, "Terrorism," 6. Still, a range of scholars does not deliver a position on the issue, by omitting a clear formulation. For instance, Richard English holds that terrorist violence involves "heterogeneous violence […] it can involve a variety of acts, of targets, and of actors […]." English, *Terrorism: How to Respond*, 24.

[49] Schmid, *The Routledge Handbook of Terrorism Research*, 142.

[50] Schmid argued in a similar fashion. Schmid, *The Routledge Handbook of Terrorism Research*, 71.

group for political ends."[51] As members of the third group, Alex Schmid and Albert Jongman include other motivations than political ones in their definition. They speak of "idiosyncratic, criminal or political reasons" of terrorism."[52] Steven Best and Anthony Nocella add two more potential motives for terrorism in their 2004 definition, which is religious or economic ones.[53]

By far the biggest majority of scholars see political motivation as a necessary ingredient of terrorism. This evaluation is shared by this thesis, all terrorist action contain political goals. A political motivation will thus form part of my definition of terrorism. Without defining terrorism as a political phenomenon, the violence committed could not be distinguished from acts generally understood as acts of crime.[54] The inclusion of additional motivations besides political ones is, however, unnecessary. First, the term criminal should not be used as a possible motivation for a terrorist act, since it would undermine the possibility of differentiating between terrorism and crime. Second, the term idiosyncratic is a too vague term to be used in a definition and should, therefore, be dismissed. Third, the addition of possible religious motives seems initially to make sense, however, virtually all terrorist attacks carried out in the name of religion also include a political component in their motivation.[55] For example, the attacks of Al-Qaeda are maybe aimed at killing perceived infidels, but they also aim at driving Western troops out of the Muslim lands such as Saudi Arabia. The last is clearly a geopolitical (and thereby political) aim. Fourth, economic aims, as included in Best and Nocella, are merely a means of achieving either political change or criminal aims and do therefore not need to be mentioned independently.

The third fault line in the definitional debate to be highlighted is the inclusion or exclusion of state actors as possible perpetrators of terrorism, in other words, the question if political violence committed by states should receive the label 'terrorism' as well. Schmid and Jongman, as well as Best and Nocella, do include states as possible perpetrators of terrorism.[56] The same is valid for Paul Wilkinson, another prominent name in terrorism research, who

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[51] Laqueur, *The Age of Terrorism*, 72.

[52] Schmid and Jongman, *Political terrorism*. Many of those researchers active in the field for many years, such as Laqueur, Jenkins and Schmid have not only delivered more than one definition, but also changed their definitions. Therefore, the definitions used by these authors are not always 'the last word' in regard to their position.

[53] Steven Best and Anthony Nocella, *Terrorists or Freedom Fighters: Reflections on the Liberation of Animals* (Oxford: Oxford University Press, 2004), 370.

[54] Walter Enders and Todd Sandler, *The Political Economy of Terrorism* (Cambridge: Cambridge University Press, 2012), 4.

[55] Boaz Ganor, "Defining Terrorism – Is One Man's Terrorist Another Man's Freedom Fighter?" *International Institute for Counter-Terrorism.* https://www.ict.org.il/Article/1123/Defining-Terrorism-Is-One-Mans-Terrorist-Another-Mans-Freedom-Fighter.

[56] Schmid and Jongman, *Political terrorism*. Best and Nocella, *Terrorists or Freedom Fighters.*

argued in 1974 "political terrorism […] is a sustained policy involving the waging of organized terror either on the part of the state, a movement or faction or by a small group of individuals."[57] However, the majority of scholars in the field exclude violence committed by states from their definition. Walter Laqueur is a member of this group, just as Walter Enders, Todd Sandler, Erik Case, and Mark Allen Peterson. They all define terrorism as acts of 'sub-national' groups or 'non-state' actors. Enders and Sandler write, e.g., that terrorism is "the premeditated use or threat to use violence by individuals or subnational groups […]."[58] Most states likewise identify terrorism as violence perpetrated by non-state actors (see e.g. the definitions delivered in Chapters 4 and 5). The exclusion of states as perpetrators of terrorism by so many authors is an interesting fact, especially since the term terrorism, as mentioned, was first used to describe state actions; measures of French authorities during the reign of terror at the time of the French Revolution. Furthermore, endless acts of violence against civilians have been and are carried out by states. Clive Ponting estimates that during the twentieth century, "on a conservative estimate, governments killed about 100 million of their own people."[59] Richard English argues that "the largest-scale terrorizing violence with a political goal has been carried out by state, rather than non-state, actors."[60] Why then, do most terrorism researchers exclude state terrorism from their definitions? Some scholars see terrorism as a 'weapon of the weak' instead of an instrument of (strong) states, pointing to the centrality of non-governmental, sub-state actors in this regard.[61] Others refrain from including state violence, simply in order to uphold conceptual clarity. For instance, English holds "the dynamics of states and of non-state groups respectively are so different from one another that it makes sense to analyze them separately rather than synoptically."[62] Edward Crenshaw and Kristopher Robison argue in a similar fashion when they explain that state terrorism would be impossible to combine with non-state terrorism in one single definition, such attempts would necessarily result in too vague definitions. Thus, state terrorism should rather be specified with other terms from the vocabulary of political violence, e.g., repression, politicide or genocide.[63]

In accordance with the majority of scholars in the field, I subscribe to perspectives placing state terrorism in a separate category. This does not mean that I evaluate non-state terrorism as more devastating, 'more evil' or more pressing problem. However, as pointed out by English and

[57] Paul Wilkinson, *Political Terrorism* (New York: MacMillan, 1974), 11.
[58] Enders and Sandler, *The Political Economy of Terrorism*, 4.
[59] Clive Ponting, *The Pimlico history of the Twentieth Century* (London: Pimlico, 1998), 466.
[60] English, *Terrorism: How to Respond*, 8.
[61] Mikkel Thorup and Morten Brænder, "Staten og dens Udfordrere – Vold som Terror eller Krig," In *Antiterrorismens idehistorie – stater og vold i 500 år*, ed. by Thorup and Brænder (Aarhus: Aarhus Universitetsforlag, 2007), 36. Meisels, "The Trouble With Terror."
[62] English, *Terrorism: How to Respond*, 9.
[63] Crenshaw and Robison, "Political Violence as an Object of Study," 237.

Crenshaw/Robison, differentiating allows for a clearer definition of terrorism. Differentiating rules out all acts of state repression and state violence, which would muddle a definition of terrorism due to the different characteristics these acts reflect in comparison with sub-state violence. Gaining definitional clarity by excluding state violence seems fruitful in face of the main research object of this thesis, which is the reaction of European state authorities (and the EU) on sub-state terrorism. In other words, as this study has its focus on state reactions on sub-state terrorism, it makes sense to delimit the concept of terrorism to attacks of sub-state actors (individuals or groups).

Here, some remarks regarding the issue which sub-state groups and individuals should be regarded as terrorist are in order.[64] At times, one sees attempts to include or exclude certain perpetrators of violence from definitions of terrorism according to the 'morality' or the ends of the individual or group. Some would thus, for example, exclude the French Resistance during World War II from a potential list of terrorist groups while including groups such as Al-Qaeda. However, a differentiation based on morality or the ends is a dangerous undertaking. Whether the aims of a terror attack might be thought of as 'ethical' is often in the eyes of the beholder; especially since the term terrorism is often used for a wide range of different acts and is furthermore used to discredit the political or military opponent. Indeed, the term often functions as a political weapon, used with the aim to undermine the legitimacy and morality of the opponent.[65] Jenkins had a point when he held back in 1974 that for most people 'terrorism seems to mean simply whatever the 'bad guys' are doing.[66] However, who the 'bad guys' are, differs with perception. Thus, one should refrain from including any moral components in a definition of terrorism. One has to rely on as neutral characteristics as possible, such as the character of the acts, the nature of the perpetrators, the nature of the motive and the wider aim of the attack.

Another debate in the literature, constituting another fault line, circles around a possible differentiation between terrorism and warfare. Also here two overall camps can be found in the literature. Richard English holds that terrorism "represents a subspecies of warfare, and as such, it can form part of a wider campaign of violent and non-violent attempts at political leverage."[67] Andrew Heywood claims that all acts of warfare to some extent aim to instill

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[64] Sub-state groups are here defined as groups not representing a state, not directed by state authorities or directly affiliated to the same. Still, sub-state groups sometimes receive support by state authorities.

[65] Case, "Terrorism," 4. Heywood, *Global Politics,* 286. Thorup and Brænder, "Staten og dens udfordrere," 41. This function of terrorism as a rhetoric weapon became very clear in several current conflicts. For instance, Syria's president Assad dubbed all opposition as terrorist, regardless of their mode of action. Further, Turkey's president Erdogan labelled many dissidents as terrorists after the attempted coup in 2016.

[66] Jenkins as cited in Case, "Terrorism," 2.

[67] English, *Terrorism: How to Respond*, 24.

fear into the wider population.[68] English and Heywood thus do not clearly separate war, guerrilla war, and terrorism. This idea clashes with perceptions and definitions of scholars who do see a clear demarcation line between acts of war and terrorism. Waldron argues that he does not want "to confuse terrorist action with the use of terrorizing coercion as an act of war." Philip Heymann argues that the difference between (guerilla) warfare and terrorism rests on the characteristic of guerrilla warfare orientating itself towards gaining control over areas and defeating a military opponent, opposed to the major aim of terrorism, which is to communicate a political message and to instill fear in a society. In other words, whereas guerilla warfare may be understood as oriented around military goals, terrorism might be understood as a communication strategy.[69] One would have to make an evaluation for each case of violence applied, and evaluate if the major aim was rather the creation of fear and the transmitting of a political message, or if the major focus was to cause military damage and potentially gain control over certain areas. In the case of the former, one would then speak of terrorism, and in case of the latter one would speak of warfare or guerilla tactics. It remains that such distinctions are, at least at times, a complicated matter and not easy to establish.[70] For instance, reflecting the examples of the second wave of modern terrorism described by Rapoport, many groups of this wave reflect tricky cases in regard to a distinction between guerrilla fighters and terrorists, e.g., the Viet Minh, the PLO or the FLN. Many of these groups used both guerrilla tactics and terrorist measures. Still, a differentiation running along the lines of Heymann's argument is possible. Therefore, this thesis will take up Heymann's argument regarding the differentiation between terrorism and guerrilla warfare. However, grey areas can – naturally - not be avoided.

The next definitional fault line pertains to a central and often-mentioned function of terrorism, the creation of fear and anxiety in target populations or societies. It is emphasized by a wide range of scholars and omitted only in the minority of definitions.[71] The fault line goes between those scholars who do include this major function of terrorism in their definitions and those who do not. The definitions of Jenkins, Schmid/Jongman, and

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[68] Heywood, *Global Politics,* 286.

[69] Philip Heymann, *Terrorism and America: A Commonsense Strategy for a Democratic Society* (Cambridge: First MIT Press, 2000), 8. Heymann is a former Deputy Attorney General of the Clinton Administration. Walter Laqueur argued in a similar fashion in his landmark publication *The Age of Terrorism*.

[70] This can be demonstrated with the example of the Taliban; a group which is applying a strategy of political violence against military personnel, as well as police units; and which is further attacking many civilians, trying to instill fear in the population. In this sense, Yehoshafat Harkabi rightly pointed out that terrorism often appears in guerilla wars. Yehoshafat Harkabi, *On Guerilla Warfare* (Tel Aviv: Ma'arakot, 1983), 27.

[71] My observation is shared by Cindy Combs, who held that the aim to instill fear in the audience would be reflected in most definitions. Cindy Combs, *Terrorism in the Twenty-First Century* (New York: Pearson Longman, 2009), 5.

Peterson all mention the creation of fear as an important aim or function of terrorism. Other authors underlining this function are e.g., Paul Wilkinson, Richard English, James and Brenda Lutz, Tamar Meisels and Bruce Hoffman. Paul Wilkinson argues that terrorism is "designed to create a climate of extreme fear."[72] English writes that terrorism "possesses an important psychological dimension, producing terror or fear among a directly threatened group and also a wider implied audience in the hope of maximizing political communication and achievement."[73] James and Brenda Lutz hold that terrorism "is designed to generate fear in a target audience that extends beyond the immediate victims of the violence."[74] Tamar Meisels holds that terrorism owns "the intent of instilling fear of mortal danger amidst a civilian population."[75] Bruce Hoffman emphasizes the creation of fear as an essential function of terrorism as well. He argued that terrorism constitutes "the deliberate creation and exploitation of fear through violence [having…] far-reaching psychological effects beyond the immediate victim(s)."[76] A scholar who does *not* mention the creation of fear as a function or aim of terrorism is Walter Laqueur.[77]

I share the perception of the majority of scholars in the field, that the objective of creating fear is a central feature of terrorism and an important characteristic that differentiates terrorism from e.g., regular warfare or murder. For sure, regular warfare creates fear among populations as well. However, the main focus of warfare is the military action itself, not the creation of fear in an audience.[78] The focus on generating fear is thus an essential characteristic of differentiating terrorism from other forms of political violence and will, therefore, be included in my definition of the concept.

The identification of terrorism as an act of political communication is a logical consequence of the recognition of terrorism's focus on the creation of fear. What is implied here is that terrorism is a form of threat-based communication, connecting the perpetrators via the immediate targets (the immediate victims) with a wider target or wider audience, which is the government and or the population of a political community, as well as potential followers. In other words, violence is carried out in order to transmit messages, to communicate with a wider audience.[79] Terrorism is political

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[72] Paul Wilkinson, "The Media and Terrorism: A Reassessment," *Terrorism and Political Violence*, Vol. 9 No.2 (1997): 51.
[73] English, *Terrorism: How to Respond*, 24.
[74] James Lutz and Brenda Lutz, *Global Terrorism* (London: Routledge, 2008), 9.
[75] Meisels, "The Trouble With Terror."
[76] Bruce Hoffman, *Inside Terrorism* (New York: Columbia University Press, 2006), 41.
[77] Laqueur, *The Age of Terrorism*, 72
[78] Kiran Krishan rightly claims that the deliberate induction of dread is what sets terrorism apart from simple murder or assault. Cited in Schmid, *The Routledge Handbook of Terrorism Research*, 67.
[79] For instance, Schmid and Jongman claim that in terrorism, "in contrast to assassination - the

violence that 'talks.'[80] The military purposes of a terrorist act are negligible compared to its communicative purpose. It can, therefore, be argued that terrorism is not only a sub-category of political violence but also a form of political communication. Fittingly, terrorism was described as 'propaganda by the deed', by its anarchist perpetrators during the first wave of modern terrorism. Communication scholars emphasize this function of terrorism. For example, Brian McNair holds that terrorism "is a form of political communication, pursued outside the realm of constitutional procedures. […] Terror […] includes bombings, assassination, kidnappings, and hostage-taking – actions which will in most cases be of minor military value, being designed rather to communicate messages of various kinds."[81] The communicative function of terrorism is an important characteristic of terrorism that differentiates this form of political violence from other forms. Guerilla warfare or political assassinations often gain a high degree of publicity as well. However, the major aim of these forms of political violence is rather to overthrow a government, to gain control over an area or to eliminate a specific political opponent, instead of merely having a communicative function, as is the aim of terrorists via their attacks (e.g., genocide or ethnic cleansing is often attempted to be hidden from the public).

The communicative act of terrorism then contains several potential aims. A major aim, the creation of fear and intimidation, was already introduced. This essential aim of terrorism often comes together with the aim to influence politics. So, by the communicative act of a terror attack, terrorists aim at creating enormous amounts of publicity and reaching an audience as wide as possible, often in order to influence political decisions of the target government and society. An example would here be the beheading of James Foley, an American journalist, by IS. The murder had the objective to terrorize (in the sense of frightening) the American or rather Western public, and to intensify the conflict with 'the West' (since IS, at least during those years, utilized a strategy of escalation and division).[82] Thus, terrorism owns the aim of pushing the target society or its government to implement change, be it political or social change.[83] The pressure for change is constructed or at least co-constructed by the feelings of fear and intimidation spread in the target society. In other words, the terrorist strategy is "to coerce the government by terrorizing the population."[84] The creation of fear is therefore often a

direct targets of violence are not the main targets." Schmid and Jongman, *Political terrorism*.

[80] Thorup and Brænder, "Staten og dens udfordrere."

[81] Brian McNair, *An Introduction to Political Communication* (London: Routledge, 2003), 181.

[82] Owen Jones, "James Foley's murder will see calls for military action – just what Isis wants," *The Guardian*, August 20, 2014.

[83] Hoffman, *Inside Terrorism,* 41. Gershon Shafir, Alison Brysk and Daniel Wehrenfennig, "Conclusion," In *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, ed. by Brysk and Shafir (Berkeley: University of California Press, 2007), 178.

[84] Jeremy Waldron, "Terrorism and the Uses of Terror," *Journal of Ethics*, Vol. 8 No. 1 (2004):

prerequisite for generating the potential for change. This aim of pushing the wider target of the terrorist action to political change is another major characteristic of terrorism that differentiates it from other kinds of political violence.

The creation of fear in a target society is furthermore an important trigger for another aim of terrorism, which is particularly important for this thesis. I refer here to the idea that terror attacks might be committed with the aim to tempt state authorities into *over*reaction.[85] It is often due to the fear created among the population that states (over)-react to terror acts. Politicians will often be eager to calm populations by showing strength in their terrorism policies, independent from considerations of effectiveness or (rights) legitimacy. Waldron hypothesizes that terrorist groups might carry out terror acts in order to make "the targeted state […] engage in acts of political repression that will discredit it in the eyes of its subjects or the international community, and undercut its reputation as a paragon of freedom and a respecter of rights."[86] Grievances triggered by such overreaction can contribute to additional recruitment of terrorist groups.[87] An overreaction might furthermore provide impetus to another potential aim of terrorists, which is a polarization of the target society (this is e.g. an aim of IS). Both terrorist violence and harsh state reaction towards potential 'suspect communities' can trigger such a process of polarization.[88] A polarization process can then lead to an increasing number of supporters of terrorist violence, leading to ever hardening fronts.[89]

Still, the function of creating fear is a necessary aim of terrorism, whereas the aim to entrap governments into overreactions is merely an additional aim. In other words, if political violence is not aimed at instilling fear or intimidation in a wider audience it is not classifiable as terrorism. For example, if an individual or a group kills without a motive to instill fear, this might rather be an act of political murder or assassination or a guerilla act. If a group simply retaliates on actions of state authorities via targeting state units such as soldiers, without using the act as a means of communication to a wider audience, and without the aim to intimidate that wider audience, the act might be closer to an act of guerrilla warfare than terrorism. Therefore, it is important to point out that the creation of fear or intimidation – from the perspective of

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[85] Shafir, Brysk and Wehrenfennig, "Conclusion," 178.

[86] Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010), 76.

[87] Laura Donohue, "Security and Freedom on the Fulcrum," In *Terrorism and Human Rights*, ed. by Magnus Ranstorp and Paul Wilkinson (London and New York: Routledge, 2008), 63.

[88] McNair, *An Introduction to Political Communication*, 183.

[89] Another aim of terrorism, e.g. mentioned by Jeremy Waldron, is the idea that terror acts might simply be a retaliation or punishment "for some real or imagined offense, and not calculated to achieve anything beyond that." Waldron, *Torture, Terror, and Trade-Offs*, 69.

this thesis – is *always* a major aim of terrorist acts. The same is valid for the aim to trigger political change.

The last important fault line I want to elucidate in the context of defining terrorism revolves around the identification of potential victims of terrorism, or in other words, the nature of the victim as a characteristic of defining terrorism. The fault line circles largely around the question if only civilians are to be defined as victims of terrorism, or if other categories of individuals have to be included, e.g., soldiers, police officers or high stake politicians. This fault line is one of the most controversial issues in defining terrorism.[90] Many scholars engage in deliberations on differences between potential groups of victims and the resulting consequences triggered by the inclusion or exclusion of such groups for the concept of terrorism (such consequences are e.g., different understandings of the concepts of terrorism and anti-terrorism).[91]

Some scholars speak of terrorism as violence against 'the innocent', thereby implementing a rather vague (and almost metaphysical) term into their definitions. For example, Cindy Combs limits terrorism to acts of violence against 'the innocent', when she writes that terrorism is "perpetrated against innocent persons."[92] Definitions identifying 'the innocent' as victims of terrorism raise the question of who could be identified as such. Surely, the term aims broadly in the direction of civilians. However, the term is too vague to be included in a definition. For instance, the victims of 9/11 were from the perspective of al-Qaeda not innocent, since they were perceived to be entangled with an oppressive and exploitative culture (besides being 'non-believers'). Thus, by including the term 'innocent' one opens up for discussions in the direction of the general responsibility of citizens for the doing of their governments. The construction of a neutral perspective on that question seems hard to achieve, therefore the term innocent seems unfit for a definition of terrorism.

Many scholars define terrorism exclusively as acts of violence against civilians, e.g., Tamar Meisels speaks of "defenseless non-combatants" as targets of terrorism and Erik Case defines terrorist violence as "violence against civilians."[93] Via a definition excluding all other groups than civilians as possible victims of terrorism, one would e.g., exclude the bombings of

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[90] Case, "Terrorism," 5. Enders and Sandler, *The Political Economy of Terrorism*, 4.

[91] Still, some scholars do not invest much effort on defining potential victims of terrorism. As soon as a person is severely hurt by an act of violence, otherwise qualifying for terrorism, they would argue that those killed or injured were victims of terrorism, regardless if they were civilians, politicians or military staff. H.H.A. Cooper, an advocate of this approach, holds that: "From a definitional perspective, it ought not matter who does what to whom. Terrorism should be defined solely by the nature and quality of what is done." H.H.A. Cooper, "Terrorism: The Problem of Definition Revisited," In *The New Era of Terrorism – Selected Readings*, ed. by Gus Martin (Thousand Oaks: SAGE, 2004), 57.

[92] Combs, *Terrorism in the Twenty-First Century*, 11.

[93] Meisels, "The Trouble With Terror," 465. Erik Case, "Terrorism," 6.

Hezbollah on French and US military barracks in Lebanon in 1983 from constituting a terror attack. And indeed, Tamar Meisels, actually explicitly excludes the victims of this attack from being victims of terrorism.[94] Therein, scholars who argue terrorism to exclusively be violence against civilians raise the question of how one is supposed to treat attacks on military personnel and police officers (and are state leaders really civilians?). Meisels would classify these bombings rather as part of guerrilla warfare, and attacks on politicians as political assassinations instead of terror attacks.[95] Initially, Meisels seems to have a point when she holds that only when civilians are victims one can speak of a terror attack given the function of terrorism to indulge fear and intimidation among populations. This implies that assassinations of politicians and attacks on military personnel would not have such an effect. However, here the camp of scholars delimitating terrorism to attacks on civilians only runs into a problem. Is it really the case that only attacks on civilians spread fear and intimidation? This appears unlikely; the killing of e.g., a number of police forces can clearly create a climate of intimidation among a population. Furthermore, by imposing differentiations that e.g., exclude military forces and police officers as potential victims of terrorism one creates arbitrary categories as can be illustrated with a short example resting on the tragic events of 9/11. If one would only define attacks that mainly aim at civilian casualties as terrorism, then the victims caused by planes one, two and four, were victims of terror attacks, whereas the explosion caused in the Pentagon by the third plane would have to be categorized as another kind of political violence, since here almost as many military staff members were among the victims as civilians. Essentially, the exclusion of certain groups as potential victims of terrorism cannot solve the definitional problem of the term terrorism since problems will arise regardless of the chosen delimitation.

In order to avoid such arbitrariness, my thesis will include all human beings as potential victims of terrorism. Admittedly, by taking this step, differentiation from other forms of political violence, for example, guerrilla warfare or political assassination becomes more difficult. Still, a differentiation towards these categories of political violence is possible in the framework of my other elaborations in this section, e.g., via utilizing the demand that terrorism reflects a mode of political communication and contains the aim to spread fear.

The crucial categories for defining terrorism are the execution of serious violence against humans, the political motive of the act, the perpetrators being non-state actors, the communicative function of the act and its aim to spread fear, not the victims. Simply all kinds of groups or individuals can become victims of terrorism; it depends on the context in which the act is carried out, not the victims themselves. For example, the killing of soldier Lee Rigby in the streets of London in May 2013 would be excluded from being a

[94] Meisels, "The Trouble With Terror."
[95] Ibid.

case of terrorism by many definitions since the victim was not a civilian. Other scholars would argue that the case would qualify since Rigby was off-duty (however, he was still wearing his uniform). I would claim that the murder of Rigby was clearly a case of terrorism, since the attackers' foremost aim was to create publicity for their cause, since the context of the attack was not at all resembling an act of guerrilla warfare (it involved no immediate attempt to control territory) and since Rigby was chosen in his function as a symbol of the British forces rather than himself personally (ruling out a targeted political assassination). Furthermore, it was not Rigby who was the major target of the attack (although it would tragically cost him his life), but the wider British and Western audience.[96] It was due to that aim of creating as much publicity as possible that the attackers stroke at daylight in the center of London, not using long-range weapons and fleeing their victim, but waiting for security forces to show up, and shouting messages to bystanders. Had the major aim been the assassination itself and not the act of communication entangled with it, the attackers would most likely have chosen a different venue and strategy of attack.[97]

After having presented some of the central debates in the literature in regard to defining terrorism, as well as, taking a position on these debates, I can now summarize my positions and deliver a definition of my own. For this study, the necessary ingredients of terrorism are: a symbolic act of severe violence against humans, the perpetrator being a sub-state group, the involvement of political motives, the usage of violence as a means of communication, the existence of the aim to instill fear and the aim to trigger political change. Combining my positions in regard to the presented debates, I thus define terrorism as: *an act of severe violence against human beings (attempted or succeeded), functioning as a means of communication, committed by a sub-state group or individual, based on a political motive, aimed at instilling fear in the target society and triggering political change.*

[96] The other characteristics of terrorism that I have outlined so far were also given (political motive and non-state perpetrators).

[97] A further example for an attack on military forces that clearly resembles a terror attack rather than acts of guerilla warfare is delivered by an atrocity committed by the RAF in West Germany. The RAF's bombings of US Army facilities in Heidelberg in May 1972 leaving three army members dead and wounding five, were clearly aimed at transmitting a message to the American and German governments and publics, instead of aiming at achieving territorial or military gains (as would be the case with guerilla attacks), therefore clearly resembling a terror attack.

Anti-Terrorism and Counter-Terrorism: Defining Two Often Confused Concepts

When reviewing scholarly publications, as well as official documents, it becomes clear that no standard definition of 'anti-terrorism' and 'counter-terrorism' exists. As I will analyze anti-terrorism policies of the UK, Germany and the EU regarding their effects on human rights, it is necessary to offer at least an operational definition of anti-terrorism for use in this thesis. This involves gaining an overview of the concrete measures that are described by scholars as potential parts of the terrorism policy toolbox.

Now, when delving into the scholarly literature on reactions on terrorism with the aim to find a definition of anti-terrorism, one will undoubtedly soon discover a great confusion of terminology for terrorism policy in both academia and actual policy documents. In both official institutional and state documents, as well as the scholarly literature on terrorism policies, two different labels are used for policies trying to tackle the phenomenon of terrorism; that is 'anti-terrorism' and 'counter-terrorism'. The confusion of terminology consists of the fact that some policymakers and authors label all terrorism policies for 'counter-terrorism,' whereas some label all policies 'anti-terrorism'. Moreover, others use the terms as synonyms, whereas yet another group of scholars tries to differentiate between the two.[98]

For instance, Andrew Silke, a major voice in the field, only uses the label 'counter-terrorism', when approaching states' attempts to deal with terrorism. He uses this label both for highly repressive measures such as military interventions and for softer measures such as legislative acts and negotiations.[99] In terms of policy actors, the EU represents an example of an institution exclusively using the term counter-terrorism in its official strategy to tackle terrorism.[100] Few scholars exclusively use the label 'anti-terrorism'

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[98] Charles Townshend acknowledges this confusion in his work. See e.g., Charles Townshend, *Terrorismus: eine kurze Einführung* (Stuttgart: Philipp Reclam jun., 2005), 156-157. Mylonaki and Burton point to a prevalent synonymous use of the two terms as well. Emmanouela Mylonaki and Tim Burton, "An Assessment of UK Anti-Terrorism Strategy and the Human Rights Implications Associated with its Implementation," *Journal on Terrorism and Security Analysis*, Vol. 6 (2011).

[99] Silke, *The Psychology of Counter-Terrorism*, 3. Other scholars, who exclusively use the label counter-terrorism when referring to acts of states facing terrorism, are: Robert J. Art and Louise Richardson, *Democracy and Counterterrorism: Lessons from the Past* (Washington D.C.: US Institute of Peace Press, 2007). English, *Terrorism: How to Respond*. Whittaker, *Terrorism: Understanding the Global Threat*. Laqueur, *The Age of Terrorism*. Enders and Sandler, *The Political Economy of Terrorism*. Cornelia Beyer and Michael Bauer, "Introduction," In *Effectively Countering Terrorism*, ed. by Beyer and Bauer (Brighton: Sussex Academic Press, 2009), 1-3. Claudia Hillebrand, *Counter-Terrorism Networks in the European Union: Maintaining Democratic Legitimacy after 9/11* (Oxford: Oxford University Press, 2012), 2-3.

[100] The European Union Counter Terrorism Strategy.
https://www.consilium.europa.eu/en/policies/fight-against-terrorism/eu-strategy/

for descriptions of responses to terrorism.[101] Still, some examples can be found. For instance, Fernando Reinares called all efforts to tackle the problem of terrorism 'anti-terrorism' in a 1998 article on the subject.[102] Anne Sørensen followed Reinares' terminology in a 2007 publication and constitutes another example of a scholar exclusively using this term for all measures of terrorism policy.[103] Sometimes policymakers or scholars treat the labels of anti-terrorism and counter-terrorism synonymously. The British state is an example, as it's legislation and strategy papers on measures tackling terrorism sometimes use the term 'anti-terrorism' and sometimes 'counter-terrorism' in the title. For instance, the UK saw the 2001 Anti-Terrorism Crime and Security Act (ATCSA), as well as the 2006 UK Counter-terrorism strategy CONTEST. However, the ATCSA included measures similar to several of the categories introduced in CONTEST (e.g. prevent and protect measures such as data retention, the freezing of assets, detention regulations, etc.). Clearly, the labels were in between these documents used as synonyms. Finally, some authors do distinguish between anti-terrorism and counter-terrorism as labels. Examples of such authors are Brigitte Nacos and Gus Martin.[104]

This confusion of labels creates an additional challenge when reviewing the literature on terrorism policies. In doing so, one needs to look beyond titles of publications and policy papers to find out if a certain scholar or paper refers to all possible actions on terrorism with a certain label or only some of them. Otherwise, one might misunderstand a scholarly account or policy paper. Furthermore, the different usages of the two labels demand this thesis to take a stand regarding this usage.

Therein, this thesis will follow the last camp of defining and understanding anti- and counter-terrorism and will deliver a definition of the terms that establishes a differentiation of anti- and counter-terrorism. Without a working definition of both terms, this thesis would have to ignore the

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[101] This appears to be a consequence of the fact that the term counter-terrorism is more common in the English language, which is the dominant language of the literature. The picture looks different in other languages, e.g., in German (and thus German literature on the topic) the term anti-terrorism ('*Anti-Terrorismus'*) is dominant, since no equivalent term exists in the German language for counter-terrorism (one could arguably point to the term '*Terrorismusbekämpfung*' as an equivalent to counter-terrorism, however, there is no clear differentiation of measures in regard to these terms in the literature). In Danish terminology, one sometimes finds the usage of the word '*kontraterrorisme*' (signifying counter-terrorism), however, the term '*antiterrorisme*' (anti-terrorism) is the dominantly used term.

[102] Fernando Reinares, "Democratic Regimes, Internal Security Policy and the Threat of Terrorism," *Australian Journal of Politics and History*, Vol. 44 No.3 (1998).

[103] Anne Sørensen, "I krig mod 'statfjende nr. 1' – vesttysk terrorbekæmpelse I 1970'erne," In *Antiterrorismens idehistorie – stater og vold i 500 år*, ed. by Mikkel Thorup and Morten Brænder (Aarhus: Aarhus Universitetsforlag, 2007), 169.

[104] Gus Martin, *Understanding Terrorism: Challenges, Perspectives and Issues* (Thousand Oakes: Sage Publications, 2013). Brigitte L. Nacos, *Mass-Mediated Terrorism: The Central Role of the Media in Terrorism and Counterterrorism* (Oxford: Rowman & Littlefield Publishers, 2002).

confusing situation regarding the labels in the literature and only speak of terrorism policy, although a qualitative difference between the two categories exists. Furthermore, by having two specific terms at disposal for different kinds of terrorism policies it becomes possible to be more specific in pointing out which kind of policies have an effect on the overall level of rights in the three cases. Although the stance to aim for differentiating between both terms reflects a minority position in the field, it makes good sense according to the above argumentation, and furthermore, reflects an innovative approach.

Unsurprisingly, one finds disagreement inside of the camp of those trying to distinguish between anti-terrorism and counter-terrorism. This is especially valid regarding the question of which measures are to be connected to counter-terrorism and which to anti-terrorism. Some measures, which some authors count in under counter-terrorism, are interpreted as anti-terrorism by others. For instance, whereas Gus Martin identifies policies that are supposed to deter terrorists as anti-terrorism, Brigitte Nacos evaluates such measures as counter-terrorist (taken for granted that such measures are of "offensive" character).[105] It is in the course of finding a definition for this thesis thus necessary to gain an overview of the typical individual measures that different scholars point to as potential tools for anti- or counter-terrorism. Without an understanding of the content of terrorism policies, the mentioned decision on terminology would not be possible.

Thus, a list of the typical measures of the wider toolbox of both anti-terrorism and counter-terrorism, based on elaborations by scholars such as Paul Wilkinson, Robert Art and Louise Richardson, Andrew Silke, Gus Martin and Andreas Bock as well as police practitioners such as Barrie Sheldon, could look like the following: the usage of specifically trained police or military units to directly tackle terrorists (e.g. via commando actions), military intervention in areas controlled by terrorist groups or countries harboring terrorists, forceful campaigns of repression of terrorist groups, violent (sometimes lethal) retaliatory or pre-emptive strikes against terrorists or terror suspects (e.g., via drone-strikes), the surveillance of terrorists and terror suspects via intelligence measures, enhanced cybersecurity, the extension of police and intelligence powers, the introduction of various legal measures (up to the adoption of emergency powers), the increase of security measures around potential targets (e.g. airports or tourist areas), the introduction of more severe penalties for alleged deterrence purposes, the prevention of funding of terrorism, the introduction of tougher detention regimes (e.g. detention without trial), the curbing of extremist online propaganda, the initiation of negotiations with terror groups, the distribution of non-extremist counter-narratives (to win the "hearts and minds"), simple discursive reassurances of the public by political elites, the implementation of social reforms aiming at tackling root causes such as economic deprivation

[105] Martin, *Understanding Terrorism*, 431. Nacos, *Mass-Mediated Terrorism,* 138.

and discrimination, as well as the general tackling of underlying grievances.[106] Many of these measures can be carried out by states in cooperation with other states or international institutions such as the UN or EU. Whereas this list resembles measures that are mentioned regularly in the literature, it is only one list of typical potential measures to tackle terrorism. Other lists might contain other measures and I could have included further measures, less often mentioned in the literature (e.g. intensified control regimes concerning firearms or the establishment of crisis management strategies). No list of terrorism policies will ever be exhaustive since new measures are continually developed as terror threats change.[107]

Yet, the major point here (and the mentioned scholars point to this as well) is that terrorism policies of states consist of very different tools and measures. They reflect a variety of potential measures consisting of political, legislative, judicial and more straightforward security measures, such as military or intelligence action.[108] Some measures are highly repressive; others aim at tackling root causes and the elevation of resilience (e.g., by target hardening). Indeed, both the EU and the UK have developed broad general strategies to tackle terrorism, including many of the mentioned approaches outlined above. For instance, the EU implemented in 2005 its Counter-Terrorism Strategy resting on the four pillars of prevention, protection, pursuing and responding. The British CONTEST strategy rests on similar pillars, called prevent, protect, pursue and prepare (I will provide more details on these strategies later on).[109]

Now, in terms of finding a working definition of anti-terrorism and counter-terrorism, Barrie Sheldon and Gus Martin introduce some helpful differentiators in their accounts of terrorism policies. Sheldon, e.g., distinguishes between measures requiring the use of force and measures that do not require force. He mentions suppression campaigns, pre-emptive strikes,

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[106] Silke, "The Psychology of Counter-Terrorism: Critical Issues and Challenges," 3. Barrie Sheldon, "Countering the terrorist threat," In *Policing Terrorism*, ed. by Christopher Blake et al. (London: SAGE, 2012), 69-82. Martin, *Understanding Terrorism*, 432-462. Paul Wilkinson, *Terrorism versus Democracy: The liberal state response.* 3rd ed. (London and New York: Routledge, 2011). Sørensen, "I krig mod 'statfjende nr. 1'," 169. Art and Richardson, *Democracy and Counterterrorism*, 16-17. Bock, *Terrorismus*.

[107] I further refrained from including torture as a potential terrorism policy, although it is suggested as such by a minority of scholars, e.g. Alan Dershowitz claims that torture potentially can reveal or solve imminent terrorist threats. Alan Dershowitz, *Why Terrorism Works* (New Haven: Yale University Press, 2002).

[108] Art and Richardson, *Democracy and Counterterrorism*, 16-17.

[109] States' terrorism policies are not only diverse, but often include self-contradictious traits and might even counter-act each other. For instance, a state might run a campaign to prevent radicalization, but might at the same time implement discriminating measures. This can potentially undermine de-radicalization processes by creating an elevated impression of discrimination amongst a certain minority. In other words, different terrorism policies are not always compatible. However, the usage of clashing approaches is a widespread phenomenon as will be seen later.

punitive strikes, and covert operations, as measures requiring force and intelligence, diplomacy, social reform, concessionary options, economic sanctions and enhanced security (e.g. at airports) as measures not requiring the use of force.[110] Martin describes counter-terrorism as "proactive policies that specifically seek to eliminate terrorist environments and groups," and anti-terrorism as "defensive measures seeking to deter or prevent terrorist attacks."[111] The American Department of Defense claims likewise that anti-terrorism resembles rather "defensive measures", whereas counter-terrorism rather signifies activities that are aiming at neutralizing terrorists.[112] I will use these variables of forceful versus non-forceful and offensive versus defensive actions in order to find a differentiating definition of anti-terrorism and counter-terrorism.

Moving towards my own definition of anti-terrorism and counter-terrorism, I maintain that counter-terrorism measures are simply more aggressive, violent and offensive and thus of a different character as anti-terrorism measures. Therefore, a distinction in different categories of terrorism policies makes sense and provides for a more refined terminological toolbox, preventing misinterpretations and misunderstandings based on confusing labels. Thus, my working definition of anti-terrorism and counter-terrorism looks as follows: counter-terrorist measures are measures that are highly offensive and aggressive; they include the use of force and aim at directly eliminating terrorist environments or terrorists themselves. This is valid whether this is carried out in 'the homeland' or abroad (although most Western counter-terrorism measures are currently carried out abroad).[113] In contrast, anti-terrorism measures are defensive, less-aggressive measures, (largely) not including force, aiming at prevention, protection, deterrence, and resilience. Whereas counter-terrorism measures often hit a potentially small

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[110] Barrie Sheldon, *Policing Terrorism*, ed. by Christopher Blake et al. (London: SAGE, 2012), 68.

[111] Martin, *Understanding Terrorism*, 431. Martin constructs the following four categories of approaches facing terrorism: military and paramilitary repressive options, nonmilitary repressive options, conciliatory options and legalistic options. Military and paramilitary repressive options include suppression campaigns, punitive or preemptive strikes or covert operations by special-forces. Nonmilitary repressive options include cyberwar, intelligence, enhanced security of potential targets and economic sanctions. Conciliatory options include diplomacy, referring to negotiations with terrorists. Other conciliatory options are incident specific concessions and social reforms. Finally, legalistic options include law enforcement actions, in other words terrorism responses in the criminal justice system. Martin, *Understanding Terrorism*, 432-462. Nacos constructs a differentiation between offensive and defensive terrorism policies as well, however, her understanding does not directly accord with Martin's, when she defines anti-terrorism as defensive measures taken to reduce vulnerability to terrorist acts and counter-terrorism as "offensive action to prevent, deter, and respond to terrorist acts." Nacos, *Mass-Mediated Terrorism*, 138.

[112] US Department of Defense, DoD Dictionary of Military and Associated Terms. http://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf

[113] For instance, in terms of military action, as recently seen in Afghanistan, Syria or Mali.

amount of people (at least inside of Western states), vast amounts of people are prone to the effects of many anti-terrorism measures. Counter-terrorism and anti-terrorism are here understood as actions of state organs or institutions built on state organs (e.g., the EU). Security measures by sub-state actors fall outside of this definition.[114] My differentiation should not lead to the conclusion that anti-terrorism measures are exclusively 'good' or legitimate measures. Many defensive measures conflict with a range of human rights, as is argued in this thesis.[115]

Having established a definition of anti-terrorism and counter-terrorism, the question persists, as to which of the concrete measures listed can be placed under which category. Some measures with which authorities try to tackle terrorism are rather easily connected to one of the categories. The following are examples of measures falling in the category of counter-terrorism: military interventions and suppression campaigns (e.g. in the style of Operation Enduring Freedom), retaliatory attacks on state-sponsors of terrorists, targeted killings of terrorists or terror suspects by either pre-emptive or punitive strikes (e.g. by drone strikes), and kidnapping of terror suspects, as e.g. carried out under the 'extraordinary rendition' program run by the CIA.[116] Commando actions, e.g., covert operations by special forces would fall under counter-terrorism as well.

A large range of other measures will be collected under the category of anti-terrorism in this study. The collection of intelligence (on terrorists or suspects), online or not, is a first such measure. Based on such intelligence or other sources of information, the construction of databases, aiming at filtering out potential terror threats, constitutes another anti-terrorism measure.[117] Furthermore, all legal measures and their enforcement are here defined as anti-terrorism (from the introduction of more severe penalties, over the extension of police and intelligence powers, up to the adoption of emergency powers). All efforts to enhance the protection of potential targets (public areas, tourist spots, transport facilities, etc.) constitute anti-terrorism as well. The same is

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[114] Non-state counter- or anti-terrorism measures are not inconceivable. They are for instance carried out by so-called 'gated-communities' in Latin America. Thorup and Brænder, "Staten og dens Udfordrere," 20.

[115] My definition of anti-terrorism and counter-terrorism thus comes closer to Martin's differentiation of the two labels, than Nacos', however it is not fully in accord with Martin's understanding either.

[116] Andrew Tyrie, Roger Gough and Stuart McCracken, *Account Rendered: Extraordinary Rendition and Britain's Role* (London: Biteback Publishing, 2011). Claudia Hillebrand, *The CIA's extraordinary rendition and secret detention programme: European reactions and the challenges of future international intelligence cooperation* (The Hague: Netherlands Institute of International Relations Clingendael, 2009). Rebecca Cordell, "Measuring extraordinary rendition and international cooperation," *International Area Studies Review*, Vol. 20 No. 2 (2017).

[117] For instance, the German Anti-Terrorism File (*Antiterrorismusdatei*) or the application of dragnet investigations.

valid for efforts to establish enhanced cybersecurity, e.g., enhanced security efforts in digital control or banking systems. The curbing of extremist internet content is here interpreted as anti-terrorism as well. Furthermore, efforts to undermine the funding of terrorism, for instance, the freezing of assets of terror groups or suspects, belong under anti-terrorism; this also goes for negotiations with or offering concessions to perpetrators of terrorism. Policies aiming at tackling the root causes of terrorism or undermining incentives for terrorism are likewise included under anti-terrorism. This encompasses, for instance, de-radicalization programs or social reform programs in order to tackle economic deprivation or discrimination. Symbol politics (e.g. the installment of cameras to prevent terrorism) or acts of discursive reassurance appear to fit into under the label of anti-terrorism too. Some law enforcement actions might not always be seen as defensive measures and might, therefore, be hard to identify as anti-terrorism at first. Examples of such measures are enhanced stop-and-search practices by domestic security authorities, the arrest, and detention of suspects under the law, or interrogation of suspects. All these could arguably be interpreted as rather offensive measures aiming at directly stopping terrorists and thus be categorized as counter-terrorism. However, such measures appear considerably less violent and aggressive as those measures listed under counter-terrorism. Moreover, they own a protective character and are included in the criminal justice system. Therefore, these measures will here be categorized as anti-terrorism measures as well.[118]

Thus, anti-terrorism in the definition of my project confines all terrorism policies and actions besides the counter-terrorism measures of military intervention, suppression campaigns, retaliatory or pre-emptive violent strikes (including targeted killings), kidnappings of suspects or commando actions. Domestic police work and intelligence work are included under anti-terrorism, so is all legal action as well as various preventive measures. To that extent, my definition of anti-terrorism is rather broad, whereas counter-terrorism is defined in a rather narrow manner. However, such a broad and narrow definition fits nicely with the delimitations chosen regarding the analytical focus of my thesis, which is a geographical delimitation on the domestic or European arena, and delimitation on widespread (or severe) measures. Indeed, most terrorism policies that are

[118] It is, however, important to remember, that certain rather defensive anti-terrorism measures build the basis for aggressive and violent counter-terrorism measures. For instance, intelligence gathered by one institution (anti-terrorism) can lead to cases of 'extraordinary rendition', the use of special forces or targeted killings (counter-terrorism) by other institutions.
Not only public institutions build up on each other's measures, populations (increasingly) contribute to counter-terrorism as well. An example of this was delivered in April 2013 in relation to the bombings of the Boston Marathon, when people were actively contributing to the 'manhunt' on the terrorists. Sandro Nickel, "The Double-Edged Effects of Social Media Terror Communication: Interconnection and Independence vs. Surveillance and Human Rights Calamities," In *New Opportunities and Impasses: Theorizing and Experiencing Politics*, POLITSCI '13 Political Science Conference, Conference Proceedings.

carried out inside of the three entities that are up for analysis rather resemble anti-terrorism than counter-terrorism policies. Most European counter-terrorism measures have been carried out abroad.[119] In the face of the confusion around the labels, all terrorism policies of the three entities that will be analyzed in this thesis have been evaluated regarding their compatibility with my definition of anti-terrorism. Therefore when policy documents, strategy papers, and academic sources use the label 'counter-terrorism', they might still be taken into regard and cannot be disregarded offhand simply based on the label used.

It is important to note, that whereas scholars have tried to produce definitions of the term anti-terrorism, states, IO's or federations of states do normally not deliver fixed definitions of the term (other as in case of terrorism). Rather, they adopt anti-terrorism strategies. In other words, authorities do often not own fixed definitions of anti-terrorism, but rather normative strategies of what anti-terrorism should be in terms of concrete measures. These strategies are mostly under constant revision, as anti-terrorism (also from the perspective of authorities) forms a fluent, ever-changing concept. This change is contingent on several variables, e.g. the perception of what terrorism is, which kind of terrorism constitutes the biggest threat (for instance in terms of ideological background or transnational vs. domestic terrorism), and how big this threat is. The lack of a fixed definition additionally allows states more room for maneuver. Thus, the three actors at the center of this thesis do not possess such fixed definitions either but act based on changing anti-terrorism strategies (I will elucidate these strategies when I will present the recent anti-terrorism context of these policy actors).

Before moving to the empirical analysis of this thesis in the next chapter, I would like to (shortly) elucidate another confusion regarding the label anti-terrorism, which becomes apparent when reflecting on some of the measures that are presented to the public as terrorism policies. This is confusion between 'real' and 'false' or 'side-effect' anti-terrorism policies. A clarification of this issue will contribute to a better understanding of the term anti-terrorism and its at times misplaced usage in the public discourse. At times, states or other political institutions adopt policies supposedly due to

[119] Whereas both of my two country cases have in the last two decades directly been involved in counter-terrorism policies carried out abroad, no large-scale counter-terrorism measures are currently carried out inside of the EU. Although this might arguably be the case inside the boundaries of Europe, or at least at Europe's periphery, reflecting recent events in Turkey and the Ukraine.
Of course, counter-terrorism measures can (and do) infringe human rights as well. Counter-terrorism policies are therefore not per se irrelevant for this study, far from it. Relevant and widespread counter-terrorism policies that jeopardize the maintenance of a high rights level would thus have to be integrated into this study as well. Still, most terrorism policies that are carried out inside of the EU, including Germany and the UK, are anti-terrorism measures (compare e.g. the spread of online surveillance vs. the usage of special forces).

terrorism concerns; however, they rather satisfy other political objectives. It might be easier to push through a certain policy if it is labeled as a terrorism policy instead of something else, especially during a time shaped by a high threat perception.[120] Thus, politicians might choose to sell a certain policy as an efficient or necessary anti-terrorism measure to the public, whereas the policy might be established in order to achieve other objectives and have no of anti-terrorism effects at all. This would constitute an instance of 'false' anti-terrorism. Other policies might be established with the main objective outside of the field of anti-terrorism, but have a (minor) anti-terrorism effect anyway.[121] Such policies often constitute a hybrid, e.g. between immigration and anti-terrorism or criminal justice legislation and anti-terrorism. However, as the major focus does not lie on anti-terrorism, such instances can be described as side-effect anti-terrorism. Thus, amongst the multitude of policies that are described as anti-terrorism policies in public discourse, one might find policies that rather resemble 'false' or 'side-effect' anti-terrorism policies and one will have to differentiate these policies from (the described) 'real' anti-terrorism. These false or side-effect anti-terrorism policies are clearly problematic. They provide for a false picture as to the nature of the specific policies that are sold to the public in the name of anti-terrorism. Thereby, active processes of holding authorities' for their policymaking are impeded and such processes thereby constitute tendencies that are threatening the quality of democratic control and democracy as such.

Some examples of such false or side-effect anti-terrorism policies will clarify my point. The EU (in 2004) implemented the European Arrest Warrant (EAW) by emphasizing its relevance in terms of anti-terrorism. However, it has mostly been used for covering 'regular' inter-state crime (only six hundred of the 130.000 issued warrants were connected to terror suspects).[122] Another example of such a side effect anti-terrorism policy is the re-institutionalization

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[120] Lachmayer and Witzleb argue that the usage of an "anti-terrorism narrative" can make policy proposals "politically immune." Konrad Lachmayer and Normann Witzleb, "The Challenge to Privacy from Ever Increasing State Surveillance: A Comparative Perspective," *University of New South Wales Law Journal*, Vol. 37 No. 2 (2014): 775.

[121] Richard Jackson et al., *Terrorism: A Critical Introduction* (Basingstoke: Palgrave Macmillan, 2011), 235. TTSR (Transnational Terrorism, Security and the Rule of Law) Research Project. *Mapping Counterterrorism: A categorization of policies and the promise of empirically-based, systematic comparisons* (2008), 12. https://www.transnationalterrorism.eu/.

[122] Jan Wouters and Frederik Naert, "Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures against Terrorism after '11 September'", *Institute for International Law Working Paper* No. 56 (2004). https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP56e.pdf
Wolfgang Kaleck, Der Europäische Haftbefehl – ein problematisches Instrument." *Zeit Online,* October 30, 2014. Europa.eu, "European Arrest Warrant." https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do, Europol, European Union Terrorism and Trend Report 2017 https://www.europol.europa.eu/tesat/2017/trends.html
Europol, European Union Terrorism and Trend Report 2010 https://www.europol.europa.eu/sites/default/files/.../tesat2010.pdf

of EU-internal border controls. The EU and some member states justified this measure by pointing to terror threats, using the argument that current terrorism often involves interstate travel.[123] However, the amount of terrorists originating from other member states or third states has been rather small in recent years and the border controls had as its biggest effect (and major intention) a reduction of the influx of refugees, as well as stopping crime, and not terrorism. Another example would be the many uses of surveillance measures (justified by terror threats) that saw its biggest effect on pursuing regular crime.[124]

Symbolic anti-terrorism policies constitute another kind of false or side effect anti-terrorism. Symbolic policies (or measures) are here understood as anti-terrorism issues which foremost aim at reassuring the public or to portray activity and decisiveness of the policymakers (to show that 'something is being done'), without the measure having any considerable effect on reducing or pursuing the terror threat. Symbolic acts are not confined to speeches but can encompass legislation or practical anti-terrorism measures as well. Wilkinson supports this point when he holds that even emergency powers are at times only adopted in order to deliver on the public revulsion terrorism triggers and on the psychological demand of seeing politics act against it.[125] The installation of additional cameras in public areas is arguably another example of such symbolic anti-terrorism, based on its lacking efficiency in preventing attacks or diminishing their extent.[126] Although some alleged anti-terrorism policies merely include anti-terrorism as a side effect (e.g. video surveillance), some remain relevant when analyzing terrorism policies from a human rights perspective.

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[123] For instance, the European Council lists intensified controls of the EU's external borders as a measure to protect its citizens from terrorism on its own website. European Council, "EU fight against terrorism." http://www.consilium.europa.eu/da/policies/fight-against-terrorism/. The then Danish Minister for Integration argued for the prolonging of EU internal border controls based on an alleged high terror threat in October 2017. Jyllands-Posten, "Støjberg begrunder forlænget grænsekontrol med terrortrussel," October 11, 2017. https://jyllands-posten.dk/politik/ECE9942969/stoejberg-begrunder-forlaenget-graensekontrol-med-terrortrussel/. France established controls after the Islamist terror attacks in Paris in November 2015. Euractive.com, "France to extend internal EU border checks," April 5, 2018. https://www.euractiv.com/section/justice-home-affairs/news/france-to-extend-internal-eu-border-checks/

[124] Donohue pointed out that surveillance measures have often been used for other purposes, e.g. pursuing regular crime. Laura Donohue, "International Cooperation & Intelligence Sharing," Presentation, The Future of Terrorism: Georgetown & St. Andrews University Conference, Washington, April 28-29, 2016.

[125] Wilkinson, *Terrorism versus Democracy*, 93. TTSR Research Project. *Mapping Counterterrorism* 12. https://www.transnationalterrorism.eu/.

[126] Allowedly, in rare cases the installation of cameras might help in pursuing terrorists that are still on the run, however, the overall main purpose of the installment is to deliver a symbolic act after an attack, as well as reassuring the public. Therefore, additional video surveillance is (at most) a side effect anti-terrorism policy as well.

Chapter III
Germany as an Anti-Terrorism Actor

In this chapter, I will shed light on the German case of anti-terrorism policies following 9/11. The first section focuses on the most important terrorist events and perceptions of terrorism in Germany since 9/11. The context I create in this first section will help in understanding the initializing of rights-endangering terrorism policies. As it will become clear, the attacks of 9/11, as well as other terror attacks abroad and in Germany itself, raised awareness of terrorism as a threat and political problem. These attacks moreover delivered the political impetus for a widely increased policy activity regarding terrorism. Furthermore, the context section will provide some of the necessary background information for evaluating derogation and limitation conditions of human rights norms, since it will deliver some clues on the threat level that Germany has faced since 2001, and will thereby help in evaluating the proportionality of anti-terrorism measures. The second section will analyze some of the most important anti-terrorism policies that German authorities launched in the aftermath of 9/11. I will scrutinize these policies regarding their compatibility with the human rights framework defined earlier in this thesis. Thus, this second section will focus on the following German anti-terrorism laws and policies: the German Security Packages, dragnet investigations, the German Air Security Law, German data retention, the BKA law, surveillance practices of German intelligence, facial recognition system, and preventive detention.

German Reactions to 9/11 and Post 9/11 Terrorism

The attacks of 9/11 changed the perspective on terrorism in Germany. Suddenly terrorism was not only back on the political agenda and back in the collective awareness, but terrorism also posed a threat again.[1] Although terrorism had been a prominent issue in West-Germany during the 1970s and 1980s, it did not feature high on the political agenda of the country since the end of RAF activity at the beginning of the 1990s.[2] This changed with 9/11.

[1] Dorle Hellmuth, *Counterterrorism and the State: Western Responses to 9/11* (Philadelphia: University of Pennsylvania Press, 2016), 89.

[2] The RAF, initially known as Baader-Meinhof Group, was active between the late 1960s and the early 1990s. It was founded by Andreas Baader, Gudrun Ensslin, Ulrike Meinhof and Jan-Carl Raspe who also constituted the leadership of the first RAF generation. A second and third generation held the group alive and carried on with violent attacks until 1993. The RAF justified its violence "as reactive violence to capitalism and especially American imperialism and its collaborators in the German government." Wolfgang Heinz, "Germany: State Responses to Terrorist Challenges and Human Rights," in *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, ed. by Alison Brysk and Gershon Shafir (Berkeley: University of California Press, 2007). The RAF additionally saw itself as 'agents of the Third World'; references to conflicts in developing countries were numerous. Especially the war in Vietnam played a big role for the group's motivation. Walter Laqueur, *Terrorism* (Boston: Little, Brown, 1977), 207. The group furthermore aligned itself with Mao

It added to the public jolt in Germany, that four of the nineteen terrorists of the 9/11 attacks were members of an al-Qaeda cell situated in Hamburg.[3]

Tse-Tung's manifestos and Marxist-Leninist ideology. See, RAF, *Konzept Stadtguerilla*. Terror attacks of the RAF included bombings of American military bases and the killings of prominent public figures that were interpreted to be agents of the 'oppressing' or 'capitalist-imperialist system.' Between 1970 and 1977, the organization was responsible for forty-seven deaths (including seventeen dead RAF members). This number grew to slightly over seventy until the end of the operative phase of the organization in 1993. The German state authorities reacted by adopting new anti-terrorism laws and sharpening judicial and police measures e.g. by implementing road blocks and identity checks at the peak of RAF terrorism in the fall of 1977, as well as dragnet investigations). Stefan Aust, *Der Baader Meinhof Komplex* (Hamburg: Hoffmann und Campe Verlag, 1997), 658-659. In sum, RAF terrorism initialized German terrorism policymaking after WWII like no other terror campaign. Additional German left wing groups that committed or were involved in terrorist attacks were the Revolutionary Cells and the June 2 Movement. Laqueur, *Terrorism*, 206. Bernhard Blumenau, "The United Nations and West Germany's efforts against international terrorism in the 1970s," In *An International History of Terrorism: Western and non-Western experiences*, ed. by Jussi Hanhimäki and Bernhard Blumenau (London, New York: Routledge, 2013), 67. Anne Sørensen, "I krig mod 'statfjende nr. 1' – vesttysk terrorbekæmpelse I 1970'erne," In *Antiterrorismens idehistorie – stater og vold i 500 år*, ed. by Mikkel Thorup and Morten Brænder (Aarhus: Aarhus Universitetsforlag, 2007), 170. Heinz, "Germany," 210.

Besides the foundation and activity of the RAF, it was the attack on the Israeli team during the 1972 Olympics in Munich that pushed terrorism to the top of German public consciousness. In the early morning of September 5, 1972, a group of Palestinians, calling themselves 'Black September' entered the Israeli dormitory, killed two members of the Israeli team, and took nine more athletes as hostages. These hostages were tragically killed as West German security forces tried to overpower the Palestinians at an airport close to Munich (five terrorists and a police officer were killed as well during this failed operation). Richard English, *Terrorism: How to Respond* (Oxford: Oxford University Press, 2009), 114. Another prominent incident of terrorism in Germany before 9/11 was the bombing of the Oktoberfest in Munich in 1980, killing thirteen and injuring around two-hundred, committed by a right-wing extremist (and at least supported by others). However, although this attack raised considerable attention in media and public, it did not trigger the same kind of reaction from the side of state authorities or the public as the longstanding RAF campaign. Other than RAF terrorism, the bombing of the Oktoberfest was quickly deleted from public consciousness. Terrorism was in the aftermath not connected to right-wing extremism, the attack was rather seen as an isolated case. Ulrich Chaussy, *Oktoberfest. Das Attentat: Wie die Verdrängung des Rechtsterrors begann* (Berlin: Christoph Links Verlag, 2014).

Although Islamist terrorism is the strand of terrorism currently leaving the biggest trace in the consciousness of citizens and politicians, it constitutes only a small share of terrorism in post-WW-II Germany. The MIPT Terrorism Knowledge Base counted 486 terrorist incidents in Germany between 1968 and 2005, leading to ninety-nine fatalities. The fewest of these attacks were motivated by religion or Islamist ideologies. Cited in Edwin Bakker, "Differences in Terrorist Threat Perceptions in Europe," In *International Terrorism: A European Response to a Global Threat*, ed. by Jörg Monar and Dieter Mahncke (Brussels: Peter Lang, 2006), 50.

[3] Mohammad Atta, Ramzi Binalshibh, Marwan el Shehhi and Ziad Jarrah. Later, it became clear that the Hamburg cell was not the only Al-Qaeda cell in Germany at the time, a logistic and financial base had been established near Frankfurt. Adrian Hyde-Price, "Germany: Redefining its security role," In *Global Responses to Terrorism: 9/11, Afghanistan and*

Three of the four 9/11 pilots had studied in Hamburg and were radicalized in Germany.[4] A rally aiming to show solidarity with the US in Berlin on September 14, 2001 collected around two-hundred-thousand people.[5] In the aftermath of 9/11, Chancellor Gerhard Schröder emphasized the feelings of shock and consternation that the attacks had triggered. He spoke of the attacks as a "declaration of war on the civilized world as a whole".[6] Schröder hastened to secure the US Germany's "unconditional solidarity".[7] Germany's government lived up to this promise in connection with the invasion of Afghanistan, although opposition amongst the government parties existed and a majority of the German population disapproved of German involvement in the war.[8] Whereas counter-terrorist actions carried out on another continent was not a complete novelty in German terrorism policy, (e.g., taking in regard the German usage of a GSG 9 unit in order to free hostages in a Lufthansa airplane on the Mogadishu airport in 1977) supporting an invasion of a country hosting terrorists and subsequently occupying and restructuring such a country, was clearly a novelty and inconceivable in 1970s counter-terrorism policy.[9] The expression that 'Germany's security is defended at the Hindu Kush' became a dictum.[10] However, Germany's solidarity with the US rapidly faded with Bush's intention to invade Iraq. As a result, the German government not only decisively denied joining the US-led 'coalition of the willing' for the Iraq War in 2003, but also openly criticized the US for its detention practices at Guantanamo Bay or Abu Ghraib.

In general, the collective awareness of terrorism and specifically Islamist terrorism increased in Germany in the first decade of the twenty-

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Beyond, ed. by Mary Buckley and Rick Fawn (London and New York: Routledge, 2003).

[4] Ulrich Schneckener, "Germany," In *Counterterrorism Strategies: Successes and Failures of Six Nations*, ed. by Yonah Alexander (Washington: Potomac Books, 2006), 72. Although the attacks were an enormous shock to almost all Germans, voices welcoming the attacks could also be found. Horst Mahler, a former pillar of the RAF, who later turned to the extreme right, is an example. However, such voices constituted only a small minority. Walter Laqueur, "What to Read (and not to Read) about Terrorism," *Partisan Review*, 2002.

[5] Peter Katzenstein, "Same War—Different Views: Germany, Japan, and Counterterrorism," *International Organization*, Vol. 57 No. 4 (2003): 748.

[6] Deutscher Bundestag, 14. Wahlperiode, 186. Sitzung vom 12.09.2001, Stenographischer Bericht (Plenarprotokoll 14/186).

[7] Ibid.

[8] Katzenstein, "Same War—Different Views," 748.
One might further note that Germany was (in the widest sense) involved in the US' extraordinary rendition scheme by providing access to Frankfurt Airport for a range of rendition flights. The Rendition Project, "Flight Database," https://www.therenditionproject.org.uk/flights/renditions/index.html

[9] Aust, *Der Baader Meinhof Komplex.* Schneckener, "Germany".

[10] The claim was voiced first by Peter Struck, German Defense Minister at the time. Der Spiegel, "Struck verteidigt Reform: "Bundeswehr ist die größte Friedensbewegung Deutschlands"", March 11, 2004.

first century due to big terror attacks such as the ones in Djerba 2002, Madrid 2004 and London 2005. Although the bombing in Djerba was smaller in magnitude, it had a shocking effect on the German public, since fourteen of the nineteen victims of the bomb attack in the synagogue on the Tunisian island Djerba were German tourists. Awareness of terrorism was additionally nourished by several failed attempts of Islamist terrorism in Germany. Examples are here a failed attempt of bombing a couple of trains in 2006 and the 2007 arrest of the Sauerland Group, a group of Islamist extremist who planned terror attacks on American facilities in Germany.[11] Another failed attack occurred in Bonn in 2012. A bomb was placed in the main railroad station, by an Islamist group, but did not go off.[12]

Consequentially, a range of polls conducted over a number of years found that the German population regarded terrorism as a relevant threat. A poll by the Konrad Adenauer Foundation, conducted in 2003, showed that sixty-nine percent of the population identified 'international terrorism' as a security threat.[13] A 2007 poll showed that seventy-nine percent of the population feared terror attacks in Germany.[14] Research by the European Values Survey in 2008 confirmed these numbers, finding that seventy-nine percent of Germans feared a terror attack 'somewhere in Europe' in the course of twelve months.[15] Clearly, the evaluation of terrorism as a highly relevant security threat evolved since 9/11.

After a few more 'calm' years in terms of Islamist terrorism in Europe (roughly during the last years of the 00 decade and the first years of the 2010s), Islamist terrorism in Europe saw an increase in effect and victims with a series of attacks carried out by or in the name of the so-called Islamic State. Examples are the attack on staff of the French *Charlie Hebdo*

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[11] Guido Steinberg, *German Jihad: On the Internationalization of Islamist Terrorism* (New York: Columbia University Press, 2013). Ilija Trojanow and Juli Zeh, *Angriff auf die Freiheit: Sicherheitswahn, Überwachungsstaat und der Abbau bürgerlicher Rechte* (München: Carl Hanser Verlag, 2009), 156. Peter Schaar, *Das Ende der Privatsphäre:* (München: Goldmann, 2009), 63. German authorities had already arrested a cell of Al-Qaeda situated in Frankfurt who had developed plans to explode a bomb at the Strasbourg Christmas Market in December 2000. Schneckener, "Germany." Stefan Malthaner and Peter Waldmann, "Terrorism in Germany: Old and New Problems," In *Confronting Terrorism: European Experiences, Threat Perceptions and Policies*, ed. by Marianne van Leeuwen (The Hague: Kluwer Law International, 2003), 115.

[12] Reuters, "German Islamist charged over failed Bonn station attack in 2012," March 14, 2014. http://www.reuters.com/article/us-germany-islamist-idUSBREA2D1BA20140314

[13] Alexander Siedschlag, "Germany: from a reluctant power to a constructive power?" In *Global Security Governance: Competing perceptions of security in the 21st century*, ed. by Emil Kirchner and James Sperling (London: Routledge, 2007), 51.

[14] Der Tagesspiegel, "Terrorangst erreicht neuen Höchststand," July 6, 2007. https://www.tagesspiegel.de/umfrage-terrorangst-erreicht-neuen-hoechststand/979760.html

[15] Petra Guasti and Zdenka Mansfeldova, "Perception of Terrorism and Security and the Role of Media," Paper prepared for the 7th ECPR General Conference (2013): 10.

magazine, in January 2015, a new, bigger series of attacks in Paris in November 2015, killing more than 130, an attack on a group of German travelers in Istanbul in January 2016, killing eight, an attack on a subway station and the airport in Brussels in March 2016, killing thirty and injuring nearly three hundred, and a truck attack in Nice in July 2016 killing eighty-four. In the spring of 2017 Islamist attackers struck three times in the UK, in March a car drove into pedestrians on Westminster Bridge in London (killing five and injuring around fifty), in May a bombing of a concert in Manchester killed twenty-two people, and in June a group of attackers killed seven people on London Bridge via driving into pedestrians and subsequently stabbing passersby.[16] In the summer of 2017, a series of Islamist attacks shook Spain, when a group of attackers killed in total sixteen people and injured more than 120 by driving vehicles into pedestrians in Barcelona and Cambrils.[17] Although these attacks took place outside of Germany, they stirred awareness towards terrorism among the country's population and policymakers. They thus contributed to an increasing demand or policy pressure for implementing additional measures to tackle the threat of terrorism in general and especially Islamist terrorism.

In 2016 and 2017, several cases of Islamist terrorism played out in Germany itself. Until then, the only Islamist terrorist attack that led to casualties in Germany in that century was an attack on American soldiers at Frankfurt Airport in March 2011, when a German citizen of Kosovo-Albanian descent shot four American soldiers, killing two of them.[18] Now, in April 2016 three German-born teenagers committed a bomb attack on a Sikh temple in the city of Essen (with homemade explosives). Three people were injured in the attack. The motives were a mixture of Islamist

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[16] Zeit Online, "Drei Tage Terror in Paris," January 15, 2015. http://www.zeit.de/feature/attentat-charlie-hebdo-rekonstruktion. Zeit Online, "Paris - Was wir über die Anschläge wissen," November 14, 2015. http://www.zeit.de/gesellschaft/zeitgeschehen/2015-11/paris-ueberblick-anschlaege. Zeit Online, "Anschlag in Istanbul: Acht Deutsche in Istanbul getötet," January 12, 2016. http://www.zeit.de/politik/ausland/2016-01/istanbul-explosion-sultan-ahmet-moschee-tuerkei. Thomas Lauritzen, "Bruxelles mellem afmagt og trods," *Politiken*, March 24, 2016. Katharina Peters, " Nizza-Attentäter: Vor dem Lkw-Anschlag machte er ein Selfie," *Spiegel Online*, July 18, 2016. http://www.spiegel.de/politik/ausland/nizza-anschlag-was-wir-ueber-den-attentaeter-wissen-a-1103507.html. BBC, "Westminster attack: What happened," April 7, 2017. http://www.bbc.com/news/uk-39355108. The Guardian, "Manchester attack: UK threat level reduced from critical to severe – as it happened," September 21, 2017 https://www.theguardian.com/uk-news/live/2017/may/26/manchester-attack-arrest-police-search-accomplices-live. Caroline Davies, "London Bridge attack: last of eight victims identified as Xavier Thomas," *The Guardian*, June 7, 2017. https://www.theguardian.com/uk-news/2017/jun/07/london-bridge-attack-last-of-eight-victims-identified-as-xavier-thomas

[17] Stephen Burgen, "Spanish attacks death toll rises to 16 after woman dies in hospital," *The Guardian*, August 27, 2017. https://www.theguardian.com/world/2017/aug/27/death-toll-spain-terror-attacks-rises-barcelona

[18] Steinberg, *German Jihad*, 4.

convictions and ethnic nationalism (perceptions of mistreatment of Muslims by Sikhs in Northern India).[19] Whereas this incident did not receive much public attention, an attack by a young asylum seeker from Afghanistan raised considerable media focus in July 2016. The refugee attacked travelers on a train near Würzburg, causing several heavy injuries. Only a few days later an asylum seeker from Syria detonated a bomb at a music festival in the provincial town Ansbach in Bavaria, killing himself and injuring more than a dozen people. In the latter two cases, the perpetrators had aligned themselves with the pseudo-state IS.[20] A year later, in July 2017, a Palestinian asylum-seeker randomly attacked people in a Hamburg supermarket with a kitchen knife, killing one and injuring six. However, in all three cases, it remains unclear to which degree the attacks were committed due to ingrained political motives since in all cases the perpetrators were mentally very unstable and seemed to have mental health issues. For example, Ahmad A, who stabbed people in a supermarket in Hamburg, was on the one hand under investigation for constituting a potential terrorist threat since 2016 and shouted 'All ahu Akbar' during his attack, however, he was on the other hand in January 2017 diagnosed to be suffering from mental illness.[21] The attacks might thus lie somewhere in the grey area between amok runs or public suicide and a terror attack. Nonetheless, the attacks were in the public discourse overwhelmingly regarded as terror attacks, and Chancellor Merkel categorized these attacks as instances of Islamist terrorism in her 2016 New Year's address.[22]

On December 19, 2016, Germany saw the most destructive Islamist terror attack in the country so far. Anis Amri, an Islamist, who pledged

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[19] Deutsche Welle, "German teens sentenced for Sikh temple bombing in Essen," March 21, 2017. http://www.dw.com/en/german-teens-sentenced-for-sikh-temple-bombing-in-essen/a-38043937

[20] Spiegel Online, "Attacke in Ansbach: 27-Jähriger tötet sich in Menschenmenge mit Sprengsatz, July 25, 2016. http://www.spiegel.de/panorama/bayern-explosion-in-ansbacher-innenstadt-ein-toter-a-1104496.html

Angelika Finkenwirth, "Attacke im Zug: Was wir über den Angriff in Würzburg wissen," *Zeit Online*, July 19, 2016. http://www.zeit.de/gesellschaft/zeitgeschehen/2016-07/attacke-zug-wuerzburg-axt-faq

[21] Justin Huggler, "Hamburg knife attacker had 'Islamist motive'," *The Telegraph*, July 31, 2017. http://www.telegraph.co.uk/news/2017/07/31/hamburg-knife-attacker-had-islamist-motive/amp/

Andrea Backhaus, Astrid Geisler und Philip Faigle, "Anschlag in Bayern: Das Phantom von Ansbach," *Zeit Online*, August 5, 2016. http://www.zeit.de/gesellschaft/zeitgeschehen/2016-08/anschlag-bayern-taeter-ansbach-terror/komplettansicht. Zeit Online, "Attentäter von Würzburg: De Maizière sieht keinen direkten IS-Befehl," July 20, 2016. http://www.zeit.de/gesellschaft/zeitgeschehen/2016-07/attentaeter-wuerzburg-thomas-de-maiziere-is-propaganda-angestachelt

[22] Zeit Online, "Die Neujahrsansprache von Angela Merkel," December 31, 2016. http://www.zeit.de/politik/deutschland/2016-12/neujahrsansprache-angela-merkel-dokumentation/komplettansicht

allegiance to IS, drove a truck into the crowd at the Christmas market at Breitscheidplatz in Berlin. Twelve people were killed and at least forty injured. The attack constituted the deadliest terror attack in Germany since the attack on the Oktoberfest in 1980. The perpetrator fled the crime scene and the country but was killed by Italian police units in a shootout a few days after the attack.[23]

In her immediate reaction to the attack, Merkel warned of "the paralyzing fear of evil" and declared that Germans would not be willing to give up a "free, jointly and open life."[24] Later, in her New Year's address, she endeavored in a similar pathos when she called on the population to decisively confront the "world of hate" with "humanity and solidarity." She continued by denoting Islamist terrorism as the "most difficult test", and promised the German public to have "the state do everything to ensure security in freedom." In connection with this, she declared the necessity to implement new political and legislative measures to support security organs.[25] Already after the attacks in the summer of 2016, Merkel summarized the official perception of Islamist terrorism, and the German state's course of action, as follows: "Terrorists want to undermine our cohesion and solidarity. They want to undermine our way of living, or openness and our willingness to harbor people struck by an emergency. They implant hate and fear amongst cultures and religions." However, the reaction of the German state would be oriented towards achieving security while bringing security and freedom "into balance."[26] Merkel thus emphasized the common interpretation of Western state leaders, which holds that Islamist terrorism aims at and threatens a particular set of Western values. She furthermore marked Islamist terrorism as the most dangerous kind of terrorism currently facing German society and legitimized counter-reactions by the state, albeit underlining the importance of freedom in the execution of protective measures.

This tendency of leading politicians to define a shining and benevolent values system as a reason for becoming the target of Islamist terrorism appears unconvincing. Such a discourse around the reasons for terrorism avoids real self-reflection, of both domestic and foreign policy and thereby mutes the potential 'hard answers', but rather sticks with the 'easy'

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[23] Kai Biermann et al., "Weihnachtsmarkt: Was wir über den Anschlag in Berlin wissen," *Zeit Online*, December 19, 2016. http://www.zeit.de/gesellschaft/zeitgeschehen/2016-12/berlin-breitscheidplatz-gedaechtniskirche-weihnachtsmarkt. Mattias Leese, "Prevention, knowledge, justice: Robert Nozick and counterterrorism," *Critical Studies on Terrorism*, Vol. 10 No. 2 (2017).

[24] Biermann et al., "Weihnachtsmarkt."

[25] Zeit Online, "Die Neujahrsansprache von Angela Merkel."

[26] Zacharias Zacharakis, "Angela Merkel: Keine Angst," *Zeit Online*, July 28, 2016. http://www.zeit.de/politik/deutschland/2016-07/angela-merkel-fluechtlingspolitik-terrorismus-innere-sicherheit-pressekonferenz

explanations. Several critical authors in the field share this evaluation. For instance, Adrian Guelke points to the lack of self-criticism of Western politicians in regard to the occurrence of terror attacks.[27] Richard English emphasizes that such explanations would constitute a "dead end" and would rather provide easy answers. Other, harder answers would include issues such as revenge and poverty and would thus be embarrassing but more fruitful in terms of analyzing motivations.[28] However, due to this embarrassing nature of an alternative discourse on terrorism, most leaders, however, stick to the 'easy answers'.

In any case, the attacks in 2015 and 2016 brought the perceived terror threat to a high level again, after the perceived threat potential of Islamist terrorism had previously decreased. Several representative surveys show this. A survey from summer 2015 (after the attacks on Charlie Hebdo, but before the events in Paris in November 2015) found that fifty-two percent of Germans were afraid of terrorism, which meant that this fear had risen by thirteen percent points since 2014. Terrorism thus came in on rank three of the twenty possible issues people could be afraid of in this survey.[29] Another survey conducted in 2016 found that at the beginning of 2015 only forty-five percent feared terror attacks in Germany, whereas this number had increased to sixty-nine percent by early 2016.[30] A survey conducted in between the two attacks in Germany in July 2016, found that seventy-seven percent of Germans feared an imminent terror attack in Germany.[31] Thus, the issue of terrorism has not only become an everyday notion in Germany but also ranks

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[27] Adrian Guelke, "Secrets and Lies: Misinformation and Counter-Terrorism," in *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English (Oxford: Oxford University Press, 2015), 104. Ibrahim Seaga Shaw even spoke of a superior Western self-perception in connection with such statements of politicians, contributing to a marginalization of Islam and Muslims in society. Ibrahim Seaga Shaw, "Stereotypical representations of Muslims and Islam following the 7/7 London terror attacks: Implications for intercultural communication and terrorism prevention," *International Communication Gazette*, Vol. 74 No. 6 (2012): 520.

[28] Richard English, "Protect: Keynote Panel, Are Our Current Counter Terror and Security Tactics Working?" World Counter Terror Congress, London, April 19-20, 2016. Conor Gearty is another author criticizing the generalization of violence against states "into a global challenge to the liberal democratic order itself." Conor Gearty, "No Golden Age: The Deep Origins and Current Utility of Western Counter-Terrorism Policy," In *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English (Oxford: Oxford University Press, 2015), 87.

[29] Infocenter der R+V Versicherung, "Die Ängste der Deutschen," 2015 https://www.ruv.de/static-files/ruvde/downloads/presse/aengste-der-deutschen-2015/grafiken-bundesweit.pdf

[30] Infratest dimap 2016. "ARD-Deutschlandtrend," January 2016. http://www.infratest-dimap.de/umfragen-analysen/bundesweit/ard-deutschlandtrend/2016/januar/
However, terrorism only comes in on rank seven of the perceived most important political issues in the beginning of 2016.

[31] Forschungsgruppe Wahlen, "Politbarometer Juli II, 2016.
http://www.forschungsgruppe.de/Umfragen-/Politbarometer/Archiv/Politbarometer_2016/Juli_II_2016/

among the political issues that worry the population the most.

Still, the German public reacted with comparative composure to the attacks; this is especially valid for the attack in Berlin (despite the headline of Germany's biggest tabloid paper *Bild* screaming "Angst" the morning after the attack at Breitscheidplatz).[32] The Christmas market at Breitscheidplatz re-opened just a few days after the attack, arguably in an act of defiance. In a poll conducted shortly after the attack only eleven percent declared that they would increasingly avoid public places, five percent even declared an intention to seek public places more.[33]

That especially Islamist terrorism had gained prominent status in German public perception and consciousness with the rise of Islamist terrorism since 9/11, and again in 2015 and 2016 became very clear in regard to a shooting in Munich on July 22, 2016. During the evening, the news of a shooting in a mall in Munich resulting in the death of nine people shocked the German public. Commentators and wide parts of the public (via social media) directly assumed another Islamist attack in connection with the latest wave of IS-inspired terrorism. This can be regarded as an understandable impulse since the Islamist attack of Nice and the Islamist inspired attacks of Würzburg and Ansbach were just a few days old. The public perception that gross public violence is most likely an event connected to Islamist terrorism became very clear during these hours of uncertainty. Due to this uncertainty, larger parts of the population of Munich – especially those active in social media – fell in a state of public collective hysteria. Later it would show that the perpetrator took his inspiration from amok shootings, as well as right-wing terror attacks, and carried xenophobic motives.[34]

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[32] Stefanie Michels and Michael Hanfeld, "Die Medien und der Anschlag: Wer sät die Furcht?" *Frankfurter Allgemeine*, December 21, 2016. http://www.faz.net/aktuell/feuilleton/medien/so-reagieren-zeitungen-und-leser-auf-den-anschlag-in-berlin-14586161.html

[33] Die Welt, "AfD klettert – Mehrheit für Seehofers Forderungen," December 25, 2016. https://www.welt.de/politik/deutschland/article160587352/AfD-klettert-Mehrheit-fuer-Seehofers-Forderungen.html

[34] This was e.g., signaled by the date of the attack – the fifth anniversary of the xenophobic terror attack committed by Anders Breivik – as well as the ethnic origin of the victims, since almost all victims held a migration background. Zeit Online, "Amokläufer soll Rechtsextremist gewesen sein," July 27, 2016. http://www.zeit.de/gesellschaft/zeitgeschehen/2016-07/amoklauf-muenchen-taeter-rechtsextremist.
Markus Wehner, "Amokläufer von München war Rechtsextremist," *Frankfurter Allgemeine*, July 27, 2016. http://www.faz.net/aktuell/politik/inland/f-a-z-exklusiv-amoklaeufer-von-muenchen-war-rechtsextremist-14359855.html. Thierry Backes, Wolfgang Jaschensky, Katrin Langhans et al., "Timeline der Panik," *Süddeutsche Zeitung Online*. http://gfx.sueddeutsche.de-/apps/57eba578910a46f716ca829d/www/. The German Federal Justice Office officially evaluated the incident as motivated by political extremism. Zeit Online, "Bundesbehörde wertet Münchner Amoklauf als extremistische Tat," March 14,

This incident underpins the important point that in the current German context other strands of terrorism exist besides Islamist terrorism, although public consciousness often seemed to neglect this fact after 9/11. Albeit with one famous exception. In 2011, the country was unsettled about learning that a radical right-wing group (the 'Nationalsozialistischer Untergrund', NSU) had committed acts of terrorist political violence in the country between 2000 and 2007, without being identified by authorities. The group was responsible for the killings of nine shop-owners of Turkish or Greek descent, a German police officer and two bombings in Cologne, injuring over twenty people.[35] The investigations of German security institutions were misled and ineffective, as the deeds of the NSU were categorized as part of a gang war in the German migrant milieu. Both during and after the NSU campaign, German authorities lacked determination and effectiveness, first in terms of preventing NSU violence and then in terms of illuminating their own shortcomings.[36] Still, terrorism was in the aftermath of the revelation of NSU terror not perceived as a systematic problem connected with right-wing extremism, the attack was rather seen as an isolated case.[37]

2018. https://www.zeit.de/gesellschaft/zeitgeschehen/2018-03/olympia-einkaufszentrum-muenchener-amoklauf-extremismus-einstufung-bundesbehoerde

[35] Although the NSU is publicly labeled as a terror group, one could argue that they might not fulfill the definition of terrorism as laid out before. This argument would be grounded in the fact that terrorism was defined as an act of communication, an act aiming at causing fear in society. Now, the NSU did never publicly declare responsibility for any of their deeds. A video claiming responsibility had been produced but was never published. Most of the killings of migrant shop owners were publicly categorized as murders in the framework of organized crime, thereby not creating a public threat perception. However, amongst the direct environment of the victims, a perception of threat and of terror was created. Many relatives *did* perceive a threat, also because all victims were killed with the same gun. This can arguably be interpreted as a form of communication of the perpetrators since they easily could have switched weapons during their seven-year-long campaign. Matthias Quent, "Selbstjustiz im Namen des Volkes: Vigilantistischer Terrorismus," *Aus Politik und Zeitgeschichte*, No. 24-25 (2016): 24. Pfahl-Traughber, "Terrorismus: Merkmale, Formen und Abgrenzungsprobleme," 18. Olaf Sundermeyer, *Rechter Terror in Deutschland: Eine Geschichte der Gewalt* (München: C.H.Beck, 2012).

[36] Spiegel Online, "Bilanz nach Beweisaufnahme: NSU-Ausschuss rügt Totalversagen der Behörden," May 16, 2013. http://www.spiegel.de/politik/ausland/nsu-ausschuss-ruegt-totalversagen-der-behoerden-a-900388.html.

Tanjev Schulz, "Reaktion der Sicherheitsbehörden auf die NSU-Morde: Wenn der Aufstand der Anständigen ausbleibt," *Süddeutsche Zeitung Online*, November 4, 2012. https://www.sueddeutsche.de/politik/reaktion-der-sicherheitsbehoerden-auf-die-nsu-morde-wenn-der-aufstand-der-anstaendigen-ausbleibt-1.1513038.

[37] Tagesschau.de, "Chronik zum NSU-Terror: Rassistische Mordserie, staatliches Versagen," August 27, 2013. https://www.tagesschau.de/inland/rechtsextrememordserie104~_page-3.html. Zeit Online, "Es gibt keine Ausreden mehr," November 1, 2012. http://www.zeit.de/gesellschaft/zeitgeschehen/2012-10/nsu-nazi-terror-auslaenderhass/komplettansicht.

Not only in case of the NSU the danger of terrorism from the right of the political spectrum has been underestimated in Germany, despite the fact that increased potential for right-wing terrorism has existed for a number of years.[38] For example, Wilhelm Heitmeyer noted a rise of pro-violence right-wing extremists in Germany between 1995 and 2000, from around 6.200 individuals to 9.700 individuals. Still, Heitmeyer himself evaluated in 2005 that there were no indications for developments of terrorist right-wing groups.[39] The revelation of NSU terror should prove Heitmeyer wrong; the group was already carrying out its acts at the time of Heitmeyer's claim. Furthermore, several other right-wing groups were established in the latest years that are classified as a terrorist group by German state authorities. Two of such groups were the Gruppe Freital (Group Freital) and the Oldschool Society. The former aimed to instill a climate of fear amongst asylum seekers and supporters of the same via bombing attacks. The group managed to carry out two such attacks before security agencies managed to dissolve the group in the spring of 2016. Luckily, only one person was injured.[40] The Oldschool Society was a similar group of right-wing individuals planning to commit bombing attacks and to induce "a war against asylum seekers and supporters." The group had, moreover, planned to blame attacks on schools and kindergartens on "foreigners and Salafists." However, the group was dissolved by security agencies in May 2015.[41] The foundation of such groups shows that the phenomenon of right-wing terrorism has been on the rise in Germany in the last years.[42] Thus, it is not only Islamist terrorism that is on the increase.

However, despite this development, only few specific anti-terrorism policies were put in place concerning right-wing terrorism. Terrorism policies focused overwhelmingly on Islamist terrorism, whereas right-wing terrorism was underestimated in Germany for many years.[43] A telling example is here the re-construction of the institutional framework around the

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[38] Spiegel Online, "Bilanz nach Beweisaufnahme," May 16, 2013.

[39] Wilhelm Heitmeyer, "Right-Wing Terrorism," In *Root Causes of Terrorism: Myths, Reality and Ways Forward*, ed. by Tore Bjørgo (London and New York: Routledge, 2005), 142.

[40] Zeit Online, "Gruppe Freital: Jüngster Angeklagter vor Gericht geständig," March 14, 2017. http://www.zeit.de/gesellschaft/zeitgeschehen/2017-03/gruppe-freital-rechtsterror-gestaendnis-gericht-justin-sch-angeklagter#info-gruppe-freital-11-tab.

[41] Sebastian Lipp, "Oldschool Society: Nach außen Terror, nach innen banal," *Zeit Online*, March 15, 2017. http://www.zeit.de/gesellschaft/zeitgeschehen/2017-03/oldschool-society-terrorismus-rechtsextremismus-prozess-haftstrafen.

[42] Germany witnessed another right-wing terror attack in the New Year's Night 2018/2019, when a man steered a car into a crowd in the city of Bottrop with the aim "to kill foreigner." Luckily, he failed to kill anyone, but eight people were injured. Spiegel Online, "Auto-Attacke im Ruhrgebiet: Zahl der Verletzten steigt auf acht," January 2, 2019. http://www.spiegel.de/panorama/justiz/bottrop-und-essen-auto-attacke-zahl-der-verletzten-steigt-a-1246076.html.

[43] Malthaner and Waldmann, "Terrorism in Germany: Old and New Problems," 121-127.

issue of terrorism after 9/11. In 2004, a Common Terrorism Defense Center (Gemeinsames Terrorismusabwehrzentrum, GTAZ) was established. The Center is supposed to coordinate the work of security authorities at both federal and state-level and collect information on terrorist threats. Employees of the federal police, state police, and secret service are supposed to establish this coordination. Telling - concerning the new understanding of terrorism and its roots - is that the GTAZ is only working on Islamist terrorism or terror threats.[44] First in 2012, with the establishment of the Extremism and Terrorism Defense Center, a similar institution was formed in order to face right-wing terrorism (besides left-wing extremism, as well as extremism of foreigners and espionage). Similar to the GTAZ on Islamist terrorism, the center is supposed to improve the information exchange between police and intelligence services.[45] Still, the big majority of implemented policies are – also after the revelation of the NSU group – aiming at Islamist terrorism.

That right-wing political violence, including terrorist acts, constitute an increasing problem in Germany entered public consciousness in 2015 and 2016, when Germany saw a steep rise in cases of violence against refugees and asylum seekers (or asylum facilities), carried out by right-wing groups or sympathizers. This kind of political violence had already been virulent in Germany in the early 1990s when seventeen people were killed by arson attacks and other assaults by right-wing groups.[46] In 2015, the number of violent acts against asylum seekers and asylum seeker homes increased drastically. The official police statistic counted 177 cases of arson, assault or attacks with explosives.[47] The German TV-channel ARD reported 163 acts of violence against asylum seeker homes in 2015, compared to twenty-eight in 2014, including seventy-six cases of arson compared to only six in 2014.[48]

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[44] Hellmuth, *Counterterrorism and the State,* 99-101. Tagesschau.de "Sicherheitsmaßnahmen in Deutschland: Im Namen der Sicherheit," August 11, 2016. https://www.tagesschau.de/inland/sicherheitsgesetze108.html. Critics argued that the center undermined the separation between police work and intelligence work, as demanded by German law.

[45] Another example of a measure aiming at right-wing terrorism is the 'joint file right-wing extremism', implemented in 2012, likewise launched as a reaction to the failure of authorities concerning the acts of the NSU. However, also this file is a 'special file'. The Central Anti-Terrorism File of German authorities deals exclusively with international terrorism, thus Islamist terrorism, another indication of Islamist terrorism being perceived as the major threat (I will come back to that file later).

[46] The death toll from right-wing terrorism in 1992 actually exceeded that of left wing terrorism during the RAF's most active year, 1977. Sundermeyer, *Rechter Terror in Deutschland*. Malthaner and Waldmann, "Terrorism in Germany: Old and New Problems," 113.

[47] Spiegel Online, "Gewalt gegen Ausländer: Amnesty rügt mangelhaften Schutz der Flüchtlingsheime," June 9, 2016. http://www.spiegel.de/politik/deutschland/amnesty-ruegt-deutschland-fuer-zu-wenig-schutz-fuer-fluechtlinge-a-1096685.html

[48] Tagesschau.de, "Gewalt gegen Flüchtlinge: Deutlich mehr Anschläge auf Asylbewerberheime," January 13, 2016. https://www.tagesschau.de/inland/anschlaege-

In 2015 nobody was killed by these attacks, the number of injured was unclear. In September 2016, the magazine *Der Spiegel* reported that according to police statistics the number of incidents of xenophobic violence against asylum seekers and refugees had again doubled in the first eight months of 2016. Seventy-eight cases of arson had been counted until September 2016.[49] *The Zeit* reported in November 2016 of four attempted homicides in 2015 and six in 2016.[50] Often it was pure luck that prevented people from being killed, taking the many instances of attacks by arson, explosives and attempted homicide into consideration. Clearly, such attacks constitute cases of political violence, and many of them qualify for acts of terrorism according to my definition.[51]

As mentioned, the circumstance that a range of these attacks on asylum seekers constitutes terrorist acts entered the understanding of the German public in the course of 2015 and 2016. Angela Merkel warned against a new wave of right-wing terrorism already in 2015.[52] Several commentators specifically labeled attacks against asylum seekers for right-wing terrorism, e.g., Sascha Lobo in an article for the *Spiegel* magazine.[53] The deeds of the Gruppe Freital and the Oldschool Society were often denoted as terrorism as well by commentators (e.g., on *Spiegel Online* or by the *Welt*).[54] A growing awareness of right-wing violence amongst the

asylunterkuenfte-bka-101.html. A report of the *Zeit* magazine even spoke of ninety-three cases of arson in the first eleven months of 2015. Zeit Online, "Wenn Hass eskaliert," January 29, 2016. http://www.zeit.de/gesellschaft/zeitgeschehen/2016-01/anschlag-fluechtlingsheim-villingen-schwenningen-hintergrund

[49] Der Spiegel, "Rechtsextremismus: 78 Mal Feuer," September 24, 2016.

[50] Kai Biermann and Astrid Geisler, "Rechte Gewalt: BKA fürchtet Tote durch Angriffe von rechts," *Zeit Online*, November 13, 2016. http://www.zeit.de/politik/deutschland/2016-11/bka-statistik-rechte-gewalt-politiker

[51] For instance, all cases involving attacks with explosives or arson would qualify for terror attacks, provided that the attackers were aware that people were inside the attacked building (and provided that the other criteria for terrorism, e.g., a political motive and communicative function were fulfilled). One would, however, have to look into every individual case in order to determine if a case was a terrorist act or another form of (political) violence (e.g., an assassination attempt or sabotage). Such a far-reaching analysis is not possible here, but one can assume that at least a considerable amount of the mentioned attacks would qualify for terrorist attacks.

[52] FAZ, "Merkel warnt vor neuem Rechtsterrorismus," September 5, 2015.

[53] Sascha Lobo, "Nennt sie endlich Terroristen!" *Spiegel Online*, July 29, 2015 http://www.spiegel.de/netzwelt/web/hetze-gegen-auslaender-im-internet-nennt-sie-terroristen-a-1045831.html

[54] Spiegel Online, "Gruppe Freital" Prozess gegen mutmaßliche Terrorzelle beginnt unter strengen Sicherheitsvorkehrungen," March 7, 2017. http://www.spiegel.de/panorama/justiz/gruppe-freital-prozess-gegen-mutmassliche-terrorzelle-beginnt-a-1137660.html. Sven Eichstädt, "Mitglied der Gruppe Freital nennt Anschläge scheiße"," *Welt Online*, March 14, 2017. https://www.welt.de/politik/deutschland/article162850091/Mitglied-der-Gruppe-Freital-nennt-Anschlaege-scheisse.html.

German public surfaced in an October 2016 survey, in which a broad majority of Germans identified the danger of right-wing assaults as big or very big (eighty-four percent). Interestingly this number surpassed the perceived danger of Islamist (sixty-eight percent) or left-wing (fifty-two percent) assaults.[55] This survey might, on the one hand, signify a potential turning point in terms of public awareness of right-wing violence in Germany; however, on the other hand, it lacks a clear connection between this right-wing violence and the term terrorism.[56] And both, policymakers and security organs have continued to focus mostly on the danger spinning from Islamist terrorism. For instance, despite the steep increase of incidents of right-wing political violence in Germany in 2015 and 2016, only twenty right-wing extremists were categorized as a potential terrorist threat by the authorities in 2016. In comparison, 520 Islamist extremists were declared to constitute such a potential threat.[57] In addition, as mentioned, most policy initiatives by the German government in the field of terrorism policy focus on Islamist terrorism, not right-wing terrorism. This clearly constitutes a difference in focus and prioritization between different kinds of political violence and terrorism from the side of German authorities.

Until latest years, right-wing terrorism was not only underestimated in Germany but also rather regarded as being roughly as dangerous or non-dangerous as left-wing terrorism. Although Germany indeed owns a past of very active left-wing terrorist groups (see e.g. the history of the RAF from the 1970s to 1990s), the relevance of such violent leftist groups declined during the last twenty-five years. The same is, as demonstrated, not valid for rights wing groups. Still, German authorities tried to crack down hard on violent leftist groups when they appeared, as can be seen with the example of the group Das Komitee. In general, the group, which existed only for a short period, is not of overwhelming importance in regard to German left-wing terrorism; however, its example shows the amount of effort and determination German authorities invested in order to dismantle such groups in the last twenty years. In 1995, Das Komitee, consisting of only three members, tried to blow up a building that was designated to function as a

[55] ARD-DeutschlandTREND: Oktober 2016, 20.
https://www.tagesschau.de/inland/deutschlandtrend-637.pdf

[56] Furthermore, the general debate concerning refugees and asylum seekers in Germany focused mostly on the capacity of the state to deal with a large amount of people coming to the country, as well as perceived risks stemming from asylum seekers (crime, sexual harassment, cultural clashes and influences), instead of acts of (terrorist) violence committed against asylum seekers.

[57] Der Spiegel, "Rechtsextremismus: 78 Mal Feuer." In 2018, the number of potential right-wing terrorists increased to thirty-three, according to a report by Germany's Federal Police (BKA). However, the number is still considerably lower than that for potential Islamist terrorists. Spiegel Online, "Terrorismus: BKA zählt immer mehr rechtsextreme Gefährder," February 15, 2019. http://www.spiegel.de/politik/deutschland/bundeskriminalamt-zaehlt-immer-mehr-rechtsextreme-gefaehrder-in-deutschland-a-1253413.html.

deportation prison for rejected asylum seekers. However, their cover blew before the bomb was detonated and the three men went underground. Subsequently, police forces launched heavy measures in order to capture the group, e.g., the search of the editorial office of a newspaper, the wire-tapping of the phones and emails of the lawyers and acquaintances of the group's members, as well as cooperation with Egyptian police forces. Such activities were upheld up until the 2000s (the members have by now all fled to Venezuela).[58] Such effort and determination was and still is, often lacking concerning right-wing terrorism, as the example of the NSU terror campaign demonstrated. This is not to say that left-wing terrorism is an impossibility in Germany. Still, the threat potential of left-wing terrorism appears currently considerably lower in Germany than that of right-wing or Islamist inspired terrorism.[59]

When talking about threats and threat perception, I miss to make an important point on the significance of terror threats as compared to other threats of human life. Thus, the incongruence between the threat perception that terrorism causes and the factual threat that terrorism actually constitutes is another important feature of the terrorism context in Germany (and other Western European countries). It is evident that the importance we assign to the phenomenon of terrorism does not reflect its actual danger for individuals in Western societies. In most Western societies, terrorism and terrorist threats construct a higher threat perception than other social or global risks, although the latter is responsible for far more casualties and affects individuals in Western societies with a far greater probability (many examples could be provided here, e.g., accidents in traffic, at work, or in the household, sickness due to obesity, or smoking). The threat of terrorism is

[58] Der Spiegel, "Knapp daneben ist auch vorbei," No. 15, 2017.

[59] Furthermore, the term terrorism is at times very willingly used against different forms of left-wing political activism or political violence, even if the circumstances do not fit. Examples can easily be found. For instance, when Berlin witnessed a campaign of damaged and burned cars in protest against gentrification in the latest years, the conservative Senator of the Interior of Berlin connected these acts to the concept of terrorism, by labeling the incidents as "street-terror." Another conservative member of Berlin's Senate declared that the leftist groups standing behind would "terrorize the citizens." Zeit Online, "Wir werden dem linken Mob nicht die Straßen überlassen," February 9, 2016. http://www.zeit.de/politik/deutschland/2016-02/linksextreme-gewalt-berlin-gefahr. Some of the riots playing out around the G8 summit in Hamburg in the summer of 2017 were by some observers evaluated as left-wing terrorism. This evaluation appears doubtful. Not all acts of violence were aimed at human beings, and those that were cannot necessarily be interpreted to have represented a political agenda or functioned as a way of communication (to use some of the criteria of defining terrorism as elaborated in this thesis). The incidents rather seem to reflect another form of political violence, rioting. This evaluation does not negate the illegal or illegitimate character of the riots, however, a characterization of the events as terrorism, as e.g., to be found in the newspaper *Die Welt* or insinuated by the chief of the German Chancellery, Peter Altmaier, is not accurate. Ulrike Baureithel, "Das Feindphantom," *Der Freitag*, July 20, 2017. https://www.freitag.de/autoren/ulrike-baureithel/das-feindphantom.

for most people in the Western World merely a *perceived* threat, rather than an acute one: Donnelly outlines that around three hundred Americans died from terrorism between 9/11 and 2013, which is – as he remarks laconically – "roughly the same number of people who die annually from drowning in a bathtub. […] Thirty times as many are killed by drunk drivers. Two hundred times as many people die each year from air pollution."[60] Surely, the number of victims of terrorism in several Western states has increased since the start of the latest IS terror campaign (and thereby since Donnelly's calculation), however, e.g., in Germany it is still more likely to be killed by lightning than by a terror attack.[61] In 2016, the risk to die from a terror attack was estimated to amount to only 0.0000028 percent for an average European citizen.[62] Besides the potentially arbitrary nature of such calculations, it is a fact that the number of victims caused by terrorism is small when compared to casualties caused by crime, not to mention other social problems such as alcohol abuse or smoking. These phenomena do, however, not trigger a comparably intense perception of threat, insecurity or even fear among populations, and we certainly see no government 'wars' on the same. In essence, the overrated perception of terrorist threats reflects a widespread inability to calculate risks.[63] Many people overestimate the probability of rare events such as terror attacks, based on the strong emotions such an event triggers and the continuous reminders about such events in the media, as Daniel Kahneman explains.[64] Cass Sunstein argues in a very similar fashion and coined the term 'probability neglect' for instances of an overestimation of risks.[65] Generally, people tend to fear spectacular risks more than abstract or unimposing risks, and 'fast' risks more than 'slow' risks.[66] Based on these

[60] Jack Donnelly, *International Human Rights*, 4th ed. (Boulder: Westview Press, 2013), 247.
[61] Gerd Gigerenzer, Interview in *Politiken*, March 4, 2018.
[62] Anja Dalgaard-Nielsen, Interview in *Politiken*, January 26, 2019.
[63] As Gerd Gigerenzer researcher in 'risk literacy' explains, understanding the difference between absolute and relative risks can be a human weakness. If, for instance, the number of victims from terror attacks increases from ten to twenty people in absolute terms, this means a relative increase of a hundred percent. Now, many establish an exaggerated threat perception if faced with the information that a certain risk just increased by a hundred percent, despite the fact that twenty victims per year are still an extremely low number compared to an overall population of millions. Gigerenzer, however, holds that people are able to learn to differentiate between relative and absolute risks. Gigerenzer, Interview in *Politiken*.
[64] Daniel Kahneman, *Thinking, Fast and Slow* (London: Penguin Books, 2011), 137-145 and 322-333. Kahneman claims that our brains do have a hard time coping with rare events; the risks triggered by them would either be overestimated or neglected. When risks of rare events are overestimated, it is often due to the confirmatory bias of human memory.
[65] Cass Sunstein, *Laws of Fear – Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005), 36-43.
[66] A terror attack mostly makes for a spectacular and 'fast' risk, whereas smoking makes for an unimposing and 'slow' risk (whereas one can die from only one terror attack one will not die from smoking a single cigarette, however, death caused by the latter is still much more likely for all smokers in Western societies).

points it must be stressed that terrorism, besides being real and besides causing, unfortunately, victims, does not constitute a threat for the existence of Western states per se or a situation comparable to war (at least currently). However, as will be seen in the following chapters, and as Gerd Gigerenzer holds, certain politicians try to take advantage of exaggerated risk perceptions in terms of having tougher security policies adopted.[67]

Indeed, terrorism (and here foremost Islamist terrorism), has been met by German authorities with a significantly increased level of anti-terrorism policymaking activity. Examples of anti-terrorism policies are the two Security Packages the German parliament adopted shortly after 9/11, dragnet investigations, an Air Security Law, data retention laws, extended options of detaining terror suspects or surveillance measures (these policies will be scrutinized in the next section). A basis for this anti-terrorism policymaking was the establishment of a legal definition of terrorism in Germany. After 9/11, in reflection of terrorism being increasingly perceived as a global issue by the German government (or at least a problem spanning over the Western world), which demanded international cooperation, the German government contributed to efforts for a European definition, instead of establishing a specific German definition.[68] The result of these efforts for a European definition is the EU definition mentioned below (which is, however, still rather broad, see Chapter 5). Accordingly, the German government draws on the common EU definition from 2002 in terms of defining terrorism. To that extent, the German definition and the vague EU definition are identical. Some general aims concerning terrorism policymaking have been developed as well in Germany. Although Germany does not own an independent full-fledged anti-terrorism strategy at the highest level (other than e.g., the UK with its CONTEST strategy), German authorities do have developed a set of major objectives of policymaking. The German Ministry of the Interior has provided the most straightforward concept. The ministry claims to possess a ”comprehensive strategy” about terrorism, containing five main aims (as of 2015). These are: First, the destruction of terrorist structures, which is claimed to succeed with the highest probability by obtaining a high level of information (intelligence) and a high level of information exchange between the different domestic and international authorities. The second aim is defined as “fighting the causes of terrorism.” The main focus here is the prevention of radicalization. It is telling that radicalization is here explained exclusively in the context of Muslims and Islam, which, again, reveals that anti-terrorism in Germany, is mostly perceived as anti-*Islamist* terrorism. The third aim is a “reduction of vulnerability” in regard to potential attacks, which equals an emphasis on

[67] Gigerenzer, Interview in *Politiken*.
[68] See, Gesetz zur Bekämpfung des internationalen Terrorismus (*Terrorismusbekämpfungsgesetz*), January 2002.

measures of 'enhanced security', also called 'target hardening'. The fourth aim is to tackle the consequences of possible attacks as good as possible, by improving the status of crisis management and support for victims. The last main objective is to increase cooperation on terrorism policies via international organizations, including the EU, the UN, and NATO, as well as increased bilateral cooperation.[69] In fact, these five aims of the German Interior Ministry reflect to a high degree the four major points of the UK's anti-terrorism strategy CONTEST, which has the four focal points of Prevent, Pursue, Protect, and Prepare. This is already an indication for the inter-related nature of European anti-terrorism.

Several major points are to be taken from this section on the German terrorism context. First, terrorism indeed constitutes a threat in Germany, both right-wing terrorism and Islamist inspired terrorism. This threat has increased since the 1990s. Second, the threat perception on the side of the German population and the German authorities has increased as well. The former was demonstrated by various polls on the matter, and the latter can be concluded based on the considerably increased policymaking activity in the field of anti-terrorism. Policy activity typically increased in the direct aftermath of prominent international attacks (9/11, Madrid 2004, London 2005 or the attacks in France in 2015), or after attacks or attempted attacks in Germany itself, constituting a cycle in which a new big attack is followed by new anti-terrorism measures.[70] Still, and this is my third point, the threat of terrorism does not constitute a threat that equals an emergency situation as defined earlier. Fourth, the threat by terrorism is mostly perceived as a threat by Islamist terrorism.[71] Right-wing terrorism has for many years been underestimated in Germany, although it has been increasingly acknowledged as a threat in latest years. , policy activity towards terrorism is continuing to focus on Islamist terrorism. The German population has likewise perceived terrorist threats as stemming overwhelmingly from Islamist terrorism for many years. In the course of Germany's policy activity towards terrorism, and especially in efforts to prevent radicalization and track down radicalized individuals, German authorities fittingly focus mostly on the country's Muslim minority, which has led to a non-proportional pressure on the civil

[69] A further specific aim (however not mentioned as one of the five 'main aims') is the prevention of terror financing.
Bundesministerium des Inneren, "Terrorismus," 2015.
http://www.bmi.bund.de/DE/Themen/Sicherheit/Terrorismusbekaempfung/Terrorismus/terrorismus_node.html. Besides aim number four, all of these aims were already present from the side of German authorities in 2006. See e.g. Schneckener, "Germany." This proves a high consistency of the general aims of German terrorism policy.
[70] Heinrich Wefing, "BKA-Gesetz: Ein Sieg der Verhältnismäßigkeit," *Zeit Online*, April 20, 2016. https://www.zeit.de/politik/deutschland/2016-04/bundesverfassungsgericht-bka-gesetz
[71] Hellmuth, *Counterterrorism and the State*, 89.

and political rights of this group. This problem, as well as other rights issues, will be under scrutiny in the next section.

Anti-Terrorism in Germany since 2001: A Human Rights Perspective

The attacks of 9/11 triggered an almost immediate response by German authorities, both in terms of investigation measures and policymaking. For instance, the German Federal Criminal Police (BKA) reacted by launching an extensive investigation, involving the assignment of around six hundred staff members with the task to investigate on Al-Qaeda networks in Germany.[72] In terms of policymaking, Germany's parliament quickly adopted a range of new laws in order to meet the newly perceived threat of Islamist terror. Otto Schily, the Minister of the Interior at the time, pledged that the government would show "absolute toughness" against Islamists in Germany.[73]

- **The Security Packages**

The first of these new laws were Security Package I and Security Package II. Package II was also denoted as the 'Prevention of Terrorism Act' (*Terrorismusbekämpfungsgesetz*, TBEG). Both laws were drafted and sponsored by the German Interior Ministry.[74] The two packages were drafted already in late 2001 and adopted in early 2002. The hasty adoption was supposed to signal determination to the population, given the 9/11 attacks. However, parts of the content of the packages had been prepared (and publicly debated) already before the fall of 2001.[75] Describing the security packages is relevant at this point since they provided the legal and political basis for several subsequent German anti-terrorism measures. At the same time, they included components that are questionable from a spirit of rights perspective.

The two security packages included a range of measures. As a first step, Security Package I declared the mere support of or membership in a foreign terrorist organization a criminal offense; being a member of a terrorist group not active in Germany itself had until then not been illegal. This provision exemplifies the importance of the definition of terrorism. Security Package I, furthermore, enabled the ban of religious associations, if their goals are directed at committing criminal acts or if they oppose the German constitutional order. This was possible by abolishing the special legal protection of such associations.[76] The approval of the first security

[72] Schneckener, "Germany," 72.
[73] Hyde-Price, "Germany: Redefining its security role."
[74] Former RAF defense lawyer Otto Schily interestingly led the ministry.
[75] Katzenstein, "Same War—Different Views," 749. Schneckener, "Germany," 86. Hellmuth, *Counterterrorism and the State,* 90.
[76] Schneckener, "Germany," 86. Brigitte L. Nacos, *Terrorism and Counterterrorism: Understanding threats and Responses in the Post-9/11 World,* 3rd ed. (Boston: Longman,

package resulted in almost immediate crackdowns on Islamist groups in Germany. More than twenty such groups were banned in December 2001.[77]

The interesting and questionable point with the last two measures is, that, at the time of the adoption of the security packages, Germany did actually not possess a legal definition of terrorism (a legally binding and modern definition of the issue was lacking until the country aligned itself to the newly established common EU definition in 2002).[78] This means that – for some months at least - individuals could be charged for supporting terrorism and religious associations could be banned e.g., for supporting terrorist goals, without a legal definition of the term terrorism at hand. Under such circumstances, it is not a given that the label 'terrorism' is not used in a too broad manner, in which case it would undermine the rights to association and expression of groups and individuals. Furthermore, since the clear focus of the ban of religious associations was on Muslim associations, one could detect a sign for a tendentious approach early on in German post-9/11 anti-terrorism. Thus, a problematic issue could already be detected for the first German attempts to answer on the events of 9/11.

Security Package I additionally enabled an enhancement of data exchange between authorities and set the legal basis for integrating biometric data of citizens into passports and ID-cards.[79] Biometric passports were subsequently implemented in Germany in 2005, demanding a biometric photograph. In 2007, this was extended by including digitalized fingerprints in the document. These new measures are supposed to alleviate tracing processes (e.g. of international terror suspects) as well as increase fraud-resistance of passports (although fraud of passports had been a very rare offense at the time).[80] Although the implementation of biometric passports

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2010), 207. Heinz, "Germany," 168. Hyde-Price, "Germany: Redefining its security role." Tagesschau.de, "Sicherheitsmaßnahmen in Deutschland."

[77] Hyde-Price, "Germany: Redefining its security role."

[78] The German government has, in terms of constructing a clear-cut definition of terrorism, traditionally been very cautious. Only one specific definition of terrorism by German federal authorities can be detected since WW II. This definition dates back to 1984 and stems from the German Office for the Protection of the Constitution (*Verfassungsschutz*). The definition was published in an official report of the institution, and taken up by the German Ministry of the Interior. Here the mentioned German state organs defined terrorism as: "the enduringly conducted struggle for political goals, which are intended to be achieved by means of assault on the life and property of other persons, especially by means of severe crimes […] (above all: murder, homicide, extortionist kidnapping, arson, setting off a blast by explosives) or by means of other acts of violence, which serve as preparation of such criminal acts." Verfassungsschutzbericht, 1984, 17, cited in Alex Schmid, *The Routledge Handbook of Terrorism Research* (London: Routledge, 2013), 125. Since this definition omitted comments on the potential perpetrators and victims of terrorism, it is similar to most state definitions of terrorism. By including violence against things, it is in line with the majority of state definitions as well.

[79] Heinz, "Germany," 167.

[80] Constanze Kurz, *Die Datenfresser* (Frankfurt: S. Fischer, 2011), 120. Tagesschau.de,

had been enabled via the German security packages from 2001, the implementation of biometric passports in Germany was eventually rather the product of international anti-terrorism trends. The EU had adopted a directive in 2004 obligating its member states (with the exception of the UK, Ireland, and Denmark), to implement biometric data in passports (providing another example of the relevance of the EU in European anti-terrorism). The EU's directive was itself (at least in part) a product of political pressure from the US, who threatened the European states to abolish visa-free travel to the US if biometric data would not be included in European passports in the future.[81] In 2013, the ECJ declared in a ruling that the inclusion of fingerprints in electronic passports is admissible. The court pointed out that the right to privacy and the right to data protection (enshrined in the CFREU) would indeed be interfered with, but that the storage of biometric data would be eligible since the measure would contribute to enhanced security and since the storage of fingerprints would not be a sensitive issue. The court did, however, emphasize that storage of biometric data is only eligible in the passport document itself, the construction of biometric databases would not be eligible.[82] Although the implementation of biometric data in passports is legally permissible, it appears still somewhat questionable from a spirit of rights perspective. Thereby, the issue serves as an example of a measure that might be legally defendable but questionable when scrutinized by including the wider aims of human rights. The collection of biometric pictures and especially fingerprints leaves a perception of regarding every citizen as potential suspect from the side of the state. Many who have tried to leave their fingerprints on an official form will recognize this feeling. The procedure might thus affect general notions of dignity and freedom (the EU's Agency for Fundamental Rights acknowledges this perception).[83] The measure, furthermore, increases the power of the states versus its citizens (due to the improved control and the increase of data and knowledge). Additionally, risks for the misuse of such data are created. And indeed, in 2017, the German legislator gave all German security authorities (all police and intelligence agencies) consent to access the biometric data collected for

"Sicherheitsmaßnahmen in Deutschland."

[81] Kurz, *Die Datenfresser*, 122. Deutsche Welle, "Germany Introduces Biometric Passports," November 1, 2005. https://www.dw.com/en/germany-introduces-biometric-passports/a-1762338

[82] European Digital Rights, "European Court Of Justice: Fingerprints in Electronic Passport Are OK," October 23, 2013. https://edri.org/european-court-of-justice-fingerprints-in-electronic-passport-are-ok/. A construction of such a centralized database is furthermore prohibited by relevant German legislation. See, Gesetz über Personalausweise und den elektronischen Identitätsnachweis. https://www.gesetze-im-internet.de/pauswg/__26.html

[83] European Union Agency for Fundamental Rights, "Under watchful eyes: biometrics, EU IT systems and fundamental rights," 2018, 41.
https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-biometrics-fundamental-rights-eu_en.pdf

passports. This opens the possibility for such data to be transferred to intelligence databases for further use, contrary to the original intended purpose of biometric ID.[84]

Security Package II span over a broad range of issues. The package, for instance, increased the options of German authorities to limit the activities of extremist associations of foreigners (e.g., the religious organizations mentioned under Security Package I).[85] The major aim was, however, an increase in the capabilities of state security organs. For instance, the legislation clearly extended the powers of German intelligence services in terms of surveillance. The German Federal Office for the Protection of the Constitution (*Verfassungsschutz*) and the sixteen state intelligence agencies gained competences to collect information from telecommunication companies, banks, airlines and mail services (not at a mass level, but on individual request and under tight scrutiny and observation). The law furthermore gave the federal police access to additional databases, e.g. social security data, which could then be used for dragnet investigations.[86] Security Package II was thus the first in a range of post 9/11 steps in Germany that increased the capacity of security organs to collect information on individuals and the start of a general trend of ever-growing data collection at the expense of privacy rights (and connected rights).[87]

Security Package II was initially only valid for five years, thus erecting what is also called a "sunset provision."[88] Such sunset provisions can be evaluated as a sign of a somewhat cautious approach from the side of the legislators concerning anti-terrorism legislation. It can be interpreted as a sign that German authorities are aware that the increase of power on the

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[84] One might, furthermore, point out that creating a legislative base for the implementation of biometric passports shortly after a terror attack with the argument that this would support the prevention of new terror attacks seems futile, when the implementation period would take a decade (since passports are valid for ten years in Germany). Matthias Monroy, "Im Bundestag: Automatisierter Zugriff auf biometrische Passbilder für alle Geheimdienste," *Netzpolitik.org*, May 17, 2017. https://netzpolitik.org/2017/morgen-im-bundestag-automatisierter-zugriff-auf-biometrische-passbilder-fuer-alle-geheimdienste/. Malthaner and Waldmann, "Terrorism in Germany: Old and New Problems," 125.

[85] Heinz, "Germany," 168.

[86] Schneckener, "Germany," 87. Hellmuth, *Counterterrorism and the State*, 90. Tagesschau.de, "Sicherheitsmaßnahmen in Deutschland."

[87] This is not say that Germany did not possess any surveillance legislation before 9/11. For instance, the year 1998 saw the implementation of legislation that allowed for the acustic surveillance of accommodation in cases of suspicion for serious crime (also called *Grosser Lauschangriff*). Verena Zöller, "Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights," *German Law Journal*, Vol. 5 No. 5 (2004): 473. Bundesverfassungsgericht, "Verfassungsbeschwerden gegen akustische Wohnraumüberwachung (so genannter Großer Lauschangriff) teilweise erfolgreich," Pressemitteilung Nr. 22/2004.

[88] Schneckener, "Germany," 223. The sunset provision was implemented on initiative of the Green party. Hellmuth, *Counterterrorism and the State*, 92.

side of security organs due to a terrorist threat should not be permanent, but rather dependent on the development of the contextual threat. It might thus be an expression of an awareness of the often-cited balance between security and liberty, or anti-terrorism and human rights.[89] However, since the adoptions of the security package under a sunset provision; the package has been renewed ever since. This might not be surprising taking the current wave of IS terrorism into regard. However, one might make the argument that the threat of Islamist terrorism had been on the decline for a number of years in the second half of the zero years; still, security provisions in the security package were not rolled back.[90] In the course of prolonging the security package (and the same is valid for other prolonged anti-terrorism legislation), competencies were added instead of rolled back. For instance, in 2006 preconditions for security authorities to access communication data, banking data and flight data were eased.[91] In 2015, authorities gained the option to withdraw passports and ID-cards from so-called 'violence-prone' Islamists.[92]

- **Dragnet Investigation**

A questionable tool of anti-terrorism policy in post-9/11 Germany, which I would like to scrutinize by the help of my human rights framework, is the tool of dragnet investigation (*Rasterfahndung*). Dragnet investigations are a way of searching for suspects by aiming at the population at large to begin with, in order to step-by-step filter out individuals via certain characteristics. This investigation tool was already applied in Germany in the 1970s in the wake of the terror campaign of the RAF.[93] After 9/11, it was applied again in Germany in order to detect so-called terrorist 'sleepers'. In the course of dragnet investigations, German authorities collected data from both public and private databases.[94] Consequentially, the data of approximately 8.3

[89] Indeed, Chancellor Merkel speaks often about fighting terrorism while upholding this balance. Zacharakis, "Angela Merkel: Keine Angst."

[90] With the exception of the 2011 cancellation of the provisions on data inquiries on postal traffic and the surveillance of residences for the protection of field agents, which had never been used and were deemed outdated. Hellmuth, *Counterterrorism and the State*, 118.

[91] Ibid., 108-109.

[92] Tagesschau.de, "Sicherheitsmaßnahmen in Deutschland."

[93] Dragnet investigation was used for the first time in Germany in the 1970s. The investigation method was invented during the state's anti-terrorism campaign against left-wing terrorism, perpetrated by e.g. the RAF. As a result, around five percent of the German population was subject to some form of surveillance. Blumenau, "The United Nations and West Germany's efforts against international terrorism in the 1970s," 67. Katzenstein, "Same War—Different Views," 741-42. When reflecting developments such as the post-9/11 usage of dragnet investigations, it becomes clear that certain terrorism policies set in motion in the 1970s did survive and are now used in a new terrorism context. Such measures are probably the biggest legacy of RAF terror. Sørensen, "I krig mod 'statfjende nr. 1'," 178.

[94] Martin Scheinin, "Terrorism," In *International Human Rights Law*, ed. by Daniel Moeckli,

million people, ten percent of the German population, were processed.[95] Search criteria were e.g.: being male, being under forty years old, being a Muslim, having links to countries with predominantly Muslim populations, being a current or former student (especially in engineering schools).[96] As a result, around thirty-two thousand individuals were identified as potential 'sleepers' and became the object of further investigation (and at least some several hundred individuals had their houses searched). However, the program was clearly a failure: not a single 'sleeper' could be identified by this dragnet investigation, not a single terrorism-related charge was issued.[97] However, the German Minister of the Interior at the time, Otto Schily, pronounced plans to make the tool of dragnet investigation an EU-wide measure in European anti-terrorism.[98]

Unrelated to its investigative success, such dragnet investigations trigger the creation of a problematic discriminatory tendency on the side of investigators. While in the 1970s it was more likely to become a suspect of terrorism for being a young left-wing activist, it is now more likely to come in focus of intense investigation when falling in the above-described category of men with Middle-Eastern descent. Such tendencies are clearly quite problematic concerning the right to non-discrimination guaranteed by various human rights documents that Germany is a party to (e.g., art. 2 and 7 of the UDHR, art. 26 ICCPR, art. 14 ECHR). The German Constitutional Court ruled in 2006 that the concrete usage of dragnet investigation by German authorities in the aftermath of 9/11 was unconstitutional. The judges held that the measure was only to be used in the face of a concrete threat, not in case of a general threat perception. A practice of using dragnet investigations as a preventive measure would not be compatible with the German constitution and the general presumption of innocence of every individual. Consequently, the practice of dragnet investigations was restricted considerably by the German constitutional court.[99] Furthermore, one can argue that dragnet investigation involving millions of individuals does not fulfill the demands of limiting human rights (or derogating from

Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 560. Nacos, *Terrorism and Counterterrorism,* 207.

[95] Heinz, "Germany: State Responses to Terrorist Challenges and Human Rights," 169.

[96] Scheinin, "Terrorism," 560. Katzenstein, "Same War—Different Views," 751. Markus Beckedahl and Falk Lüke, *Die digitale Gesellschaft: Netzpolitik, Bürgerrechte und die Machtfrage* (München: dtv, 2012), 56.

[97] Scheinin, "Terrorism," 560. Zöller, "Liberty Dies by Inches," 487.

[98] Boris Bischof, "Europäische Rasterfahndung: grenzenlose Sicherheit oder gläserne Europäer?," *Kritische Justiz,* Vol. 37 No. 4 (2004).

[99] Scheinin, "Terrorism," 560. Nacos, *Terrorism and Counterterrorism,* 207. Hellmuth, *Counterterrorism and the State,* 111. Tagesschau.de, "Sicherheitsmaßnahmen in Deutschland." FAZ, "Bundesverfassungsgericht: Rasterfahndung nur noch bei konkreter Gefahr," May 23, 2006. http://www.faz.net/aktuell/politik/bundesverfassungsgericht-rasterfahndung-nur-noch-bei-konkreter-gefahr-1329725.html.

rights), in terms of the conditions of necessity and proportionality. Since the investigation was a preventive action, there was no acute emergency and therein no absolute necessity to carry out the dragnet investigation. Additionally, since the investigation hit millions of individuals and led to intense check-ups on thousands the measure appears everything else but proportional, especially when reflecting upon the number of resulting criminal charges (zero!).

The measure was not only illegitimate on a legal basis, but also in terms of the general spirit of human rights. The inherent discriminatory tendency counter-acts the crucial aim of the concept of human rights, which is the establishment of a life in dignity for all humans. Instead, dragnet profiling undermines the perception to be treated as a dignified individual for those affected by the measure. Profiling undermines equal (legal) protection for all individuals, which is a necessary precondition for a life in dignity. Thereby, dragnet profiling additionally undermines one of the human capabilities mentioned by Nussbaum, the capability of being treated in a non-discriminatory fashion. The discriminatory tendency, moreover, collides with the wider human rights aim of equal justice, as rights are not distributed equally anymore between all members of society. It undermines the perception of equal worth, recognition, and respect for every individual in society, as well as the acknowledgment of an equal value of personhood. It violates the general desire to be regarded 'as good as everyone else'. Furthermore, it undermines a general presumption of innocence valid for all members of society. Consequentially, humans and especially certain groups of individuals are not regarded as ends in themselves anymore, but as potential threats.[100] Measures which (potentially) trigger the perception that some groups in society are withheld an equal recognition might undermine trust in state institutions and stir resentment, which might turn out to be counter-productive from a security perspective (see Chapter 1). Therefore, the measure of profiling, as employed in dragnet investigation, might be counter-productive in the long run, as it might alienate targeted minorities and lead to increased social tension, which in the end might lead to increased recruitment of individuals for terrorist purposes. Fittingly, a study conducted in Germany in 2007 showed a link between radicalization and "experiences of marginalization and discrimination."[101]

The German government reacted on the abolishment of the option of preventive dragnet investigation by establishing a new vehicle for collecting information on Islamist suspects that could be used for investigations, the Central Anti-Terrorism File (*Antiterrordatei*).[102] Implemented in 2007,

[100] Zöller, "Liberty Dies by Inches," 488.

[101] Ibrahim Seaga Shaw, "Stereotypical representations of Muslims and Islam following the 7/7 London terror attacks."

[102] The failed bombings of German railway stations in the summer of 2006 arguably played a

based on the Joint Database Act, the Central Anti-Terrorism File is a file combining information on suspects of international terrorism, as well as contact persons of terror suspects (including family and neighbors). The file combines input from police and intelligence services and allowed for common access for security services (thirty-eight services to be exact). Specific information on individuals listed in the file can include: information on individuals contacts, membership in terrorist groups, stays in terror camps, gun ownership, telecommunication and internet metadata, bank connections, family status, religious affiliation, lost ID documents, travel activity or employment status. The file additionally consists of information on associations, foundations or companies who are presumed to be connected to terrorist activity. The law providing for the anti-terrorism database received a sunset clause of ten years.[103] As a result, the file included 13.000 individuals already at the start of its operation.[104] The file includes almost exclusively individuals that were connected to networks of Islamist terrorism and is thus a telling example of the overall focus of German security policy after 9/11. Considering this focus, it is clear that most individuals listed in the file belong to the Muslim minority in Germany. First in 2012, after the revelation of NSU terrorism, a special file on right-wing extremists was established.[105] The Central Anti-Terrorism File continued its former focus. This is, as explained before, one of many indications that Islamist terrorism is still receiving the overwhelming attention of security agencies and legislators in Germany.

The establishment of a central anti-terror file was met with criticism by civil rights activists and challenged in front of the Constitutional Court. In 2013, the German Federal Constitutional Court declared the file and the connected accumulation of data as legal and justified, however, improvements to the current law were demanded since certain practices concerning the anti-terror-file were evaluated as too far-going. For instance, contacts of suspects were only allowed to be integrated into the file if they knowingly supported radical activities, not simply based on their relation to the suspect. Furthermore, the mere approval of political violence would not

role for the initiation of the anti-terror file.

[103] Hellmuth, *Counterterrorism and the State,* 105-106. Schaar, *Das Ende der Privatsphäre,* 153.

[104] Schaar, *Das Ende der Privatsphäre,* 153. However, intelligence services were reluctant to embrace the new common file out of concerns to share confidential information with other services.

[105] The so-called 'Joint File Right-Wing Extremism' was implemented in 2012. Police authorities at both federal and state level, as well as offices for the protection of the constitution (existent at both state and federal level) and the Military Counterintelligence Service, were demanded to share information regarding 'violence-prone' right-wing extremists in this file. This practice has its context in the massive failure of state authorities concerning the right-wing terror group NSU (described above). Tagesschau.de, "Sicherheitsmaßnahmen in Deutschland."

be enough for an individual to be included in the file. Lastly, more independent and public control of the accumulated data was demanded. The BKA was demanded to report regularly to both parliament and the public on the data stock. The German Data Protection Commissioner was additionally given the right to regular insight into the data.[106] One might add from a spirit of rights perspective, that the exclusive focus on Islamist terrorism and thereby the Muslim minority, constitutes a problem. This limited focus provides for an unequal focus of security institutions and accordingly an unequal treatment of different groups in society. This might thus, again, lead to perceptions of discriminatory tendencies on the side of the Muslim community and perceptions of violation of individual dignity and justice (following the same arguments as above in connection with dragnet investigations). Again, accumulated perceptions of discrimination can lead to further grievances, potentially initializing a counter-productive effect in the long run and undermining the wider human rights aim of peace in the world.

- **Air Security Law**

Another hotly debated terrorism policy that was implemented by the German government after 9/11 was the so-called Air Security Law (*Luftsicherheitsgesetz*), adopted by the German parliament in June 2004. This is the third example of German post-9/11 anti-terrorism that I would like to analyze here. The Air Security Law gave - in last consequence - the Minister of Defense the competence to order the Federal Armed Forces (*Bundeswehr*) to shoot down civilian airplanes, including civilian passengers. This competency was valid in case a plane was abducted and threats of using such a plane as a weapon or the suspicion of the same were given.[107] The law rested obviously on worries that a 9/11 scenario could be repeated in Germany. This concern was reinforced when in January 2003 a sports airplane with a confused pilot crossed Frankfurt's airspace for a couple of hours (the pilot had actually threatened to steer the plane into one of Frankfurt's skyscrapers).[108]

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[106] Spiegel Online, "Bundesverfassungsgericht: Gesetzgeber muss Anti-Terror-Datei nachbessern," April 24, 2013.
http://www.spiegel.de/politik/deutschland/bundesverfassungsgericht-richter-billigen-anti-terror-datei-a-896175.html

[107] Oliver Lepsius, "Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act," *German Law Journal*, Vol. 7 (2006). Schneckener, "Germany," 88. A policy such as the Air Security Law clearly shows how important the context of terrorism is for specific anti-terrorism measures to become reality. Without civil airplanes being used for the most devastating and best-known terror attack of the last decades (9/11), it would be inconceivable that German legislators would have adopted a law allowing for the shooting of civilian airplanes.

[108] Schneckener, "Germany," 89. Spiegel Online, "Entführtes Flugzeug versetzte Frankfurt in

Also in case of the Air Security Law, the German Constitutional Court stepped in and declared the part of the Air Security Law enabling for the shooting of civilian airplanes, containing passengers, for unconstitutional (in 2006).[109] The court evaluated that the law infringed on the right to life of the passengers, which is manifested in article 2 of the German constitution, and in several human rights documents (art. 3 UDHR, art. 6 ICCPR, art. 2 ECHR and art. 2 CFREU). A derogation from the right to life is prohibited by the ICCPR and the ECHR, even in times of emergency. The legal interpretation of the Air Security Law was therefore rather straightforward, and the law proved to be legally unsustainable. According to the German Constitutional Court, the law degraded the passengers to mere objects (e.g., via seeing them as part of the aircraft), thus violating the protection of human dignity as manifested in article one of the German constitution.[110]

Since the aim of pursuing towards a maximum level of human dignity is the cornerstone of modern concepts of human rights, the law undermined the basic feature of the modern understanding of human rights and the cornerstone of the spirit of human rights perspective that I apply in this thesis. The law diminished the perception that the state is setting value on human dignity and did not value every individual's personhood. It rather equaled the introduction of traditional utilitarian thinking in the tradition of e.g., Jeremy Bentham.[111] To set the interest in a common good (e.g., security) over the rights of the individual is, however, ineligible from a modern rights understanding.[112] To try and calculate the lives of some against the lives of others, even a much larger group, furthermore, violates understandings of the equal worth and the equal recognition of and respect for every individual and therein violates the wider rights aim of justice. It additionally undermines a central human capability (to live to the end of life). Furthermore, since the right to life can logically be regarded as the precondition for the enjoyment of all other rights, these rights were compromised as well. The law was ineligible since it appears deeply unjustified to sacrifice the lives of innocent

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Angst," January 5, 2003. http://www.spiegel.de/panorama/luftfahrt-entfuehrtes-flugzeug-versetzte-frankfurt-in-angst-a-229487.html

[109] Lepsius, "Human Dignity and the Downing of Aircraft." Schneckener, "Germany," 89. Heinz, "Germany," 168.

[110] Schneckener, "Germany." Tagesschau.de, "Sicherheitsmaßnahmen in Deutschland." According to the court, the law furthermore violated the ban of domestic usage of the military.

[111] A utilitarian approach according to Bentham strictly looks at the greatest benefit for the greatest amount of people and disregards the rights of the individual. See e.g., Michael Sandel, *Justice: What's The Right Thing To Do?* (New York: Farrar, Straus and Giroux, 2009). Utilitarian approaches have thus received the criticism of not taking rights seriously. Jerome Shestack, "The Philosophic Foundations of Human Rights," *Human Rights Quarterly*, Vol. 20 No. 2 (1998): 214.

[112] Lilian Mitrou, "The impact of communications data retention on fundamental rights and democracy – the case of the EU Data Retention Directive," In *Surveillance and Democracy*, ed.by Kevin Haggerty and Minas Samatas (London: Routledge, 2010), 139.

civilians from the side of the state, even in an emergency situation. This circumstance is further in conflict with the human rights objective to set necessary limits to state power (in order to pursue the wider aim of freedom).

One might argue that downing an airplane in such a situation would still be justified, given that the passengers in the plane would, in any case, be losing their life, either by being used as a human bomb in a terror attack or by being shot down by e.g. a fighter jet. However, this argument is flawed. It is not sure the hijackers would, in the end, succeed with their plan of using the airplane as a weapon; e.g. they might miss the target building, or they might even be overpowered by crew or passengers in the plane (passengers of Flight 93 – 'the fourth plane' high jacked under the 9/11 attack - managed to do so). In such situations, some or all of the passengers might survive. In any case, the argument that the passengers on board will die either way (or with a high probability) does not negate the state's obligation to protect instead of killing its citizens. Reflecting on the provisions of the law and taking the evaluations of the court, as well as the idea of the spirit of rights into regard, the Air Security Law clearly constitutes an example of a terrorism-related policy that compromised human rights in the German case.[113]

- **Data Retention**

The next issue that I would like to scrutinize is the German data retention law (*Vorratsdatenspeicherung*). Around this law, a struggle evolved between the Christian Democrats (CDU), the Social Democrats (SPD), the German Constitutional Court, the ECJ as well as NGOs. The (first) German data retention law was adopted based on an EU directive from 2006 that obliged all member states to implement a data retention scheme. The data retention law is thus a good example of an anti-terrorism policy which was initiated at the EU level and quickly spread to all member states.[114] This data retention law provided for the saving of telecommunication metadata for six months.[115] These data were saved by the communication providers and could

[113] A law such as the Air Security Law might rather seem to be a counter-terrorist measure than an anti-terrorism policy (as defined previously), and thereby be interpreted to be placed outside the analytical focus of this thesis. Although I would argue that the law is placed somewhere in the definitional grey area between the concepts anti-terrorism and counter-terrorism, I see it as justified to include the law in this analysis out of the following reasons: the fact that the law is in theory relevant for all citizens (although only some hundred individuals would be directly affected by it in the extreme case of a civil airplane being downed by state authorities), and the circumstance that the focus of my scrutiny is rather the legal basis (giving the option to kill a comparatively small fraction of the overall population in an emergency situation), rather than the act of the killing itself, which luckily never played out in the German case.

[114] Hellmuth, *Counterterrorism and the State*, 115-116.

[115] Heinz, "Germany," 168. Trojanow and Zeh, *Angriff auf die Freiheit*, 13. Katja de Vries et al., "The German Constitutional Court Judgment on Data Retention: Proportionality

then be used by German police authorities. Metadata do not deliver the precise content of an act of communication but deliver e.g. precise details on who is in contact with whom, at what time, for how long and the location of the cell phones involved. In aggregate, such data provide a great amount of insight into an individual's life.[116] Stewart Baker, former General Counsel of the American NSA pointed out that "metadata absolutely tell you everything about somebody's life. If you have enough metadata, you don't really need content."[117] The detailed insights metadata produce have eroded the boundary between such data and content data in terms of the information level they provide on an individual.[118] The purpose of storing these data was the prevention of terrorism as well as improved possibilities concerning criminal prosecution.

However, thousands of German citizens took legal action against the data retention law. Both, Justice Minister Sabine Leutheusser-Schnarrenberger and the Federal Commissioner for Data Protection, joined the camp of critics. The Commissioner bemoaned the acquisitiveness of state agencies in collecting telecommunication metadata.[119] In 2010, the German Constitutional court declared the data retention law for unconstitutional, since it would violate article 10 of the German constitution (guaranteeing the privacy of postal and telecommunication services) and due to inadequate data security and missing safeguards and transparency of the law in practice, and ordered the deletion of all saved data. The court held that the data retention law would create a "feeling of surveillance."[120] Furthermore, in

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Overrides Unlimited Surveillance (Doesn't It?)," In *Computers, Privacy and Data Protection: an Element of Choice*, ed. by S. Gutwirth et al. (Dordrecht: Springer, 2011). The then Minister of the Interior Otto Schily had suggested data retention measures already in the first years after 9/11. Beckedahl and Lüke, *Die digitale Gesellschaft,* 34. Interestingly, the German government advocated at the EU level for a shorter timeframe of saving data, since the first EU draft intended a saving period for thirty-six months. Hellmuth, *Counterterrorism and the State,* 115-116.

[116] Laura Donohue, *The Future of Foreign Intelligence: Privacy and Surveillance in a Digital Age* (New York: Oxford University Press, 2016), 39. Fabio Fabbrini, "Human Rights in the Digital Age: The European Court of Justice Ruling in the Data Retention Case and Its Lessons for Privacy and Surveillance in the United States," *Havard Human Rights Journal*, Vol. 28 (2015). Kurz, *Die Datenfresser*. Christian DeSimone, "Pitting Karlsruhe Against Luxembourg? German Data Protection and the Contested Implementation of the EU Data Retention Directive," *German Law Journal*, Vol. 11 No. 3 (2010). Beckedahl and Lüke, *Die digitale Gesellschaft*, 35.

[117] Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World* (London: Atlantic Books, 2016), 327.

[118] Nick Hopkins, "Huge swath of GCHQ mass surveillance is illegal, says top lawyer," *The Guardian*, January 28, 2014. https://www.theguardian.com/uk-news/2014/jan/28/gchq-mass-surveillance-spying-law-lawyer

[119] Schaar, *Das Ende der Privatsphäre,* 150. Hellmuth, *Counterterrorism and the State,* 117.

[120] Fabbrini, "Human Rights in the Digital Age." Hellmuth, *Counterterrorism and the State,* 116. DeSimone, "Pitting Karlsruhe Against Luxembourg?" de Vries et al., "The German

2014 the European Court of Justice (ECJ) declared that the directive allowed security authorities too far-going data access. The ECJ ruled that the EU data retention directive was invalid as it interfered with the rights to privacy and protection of personal data in a non-proportionate manner, exceeding what is strictly necessary in a democracy (in other words not upholding the conditions for a derogation from the relevant rights according to the CFREU standards), due to the indiscriminate nature of data collection. Therefore, the directive would be incompatible with the CFREU.

However, after the January 2015 terror attacks in Paris, the German government coalition between Christian Democrats and Social Democrats started a new attempt for adopting a reformed version of the data retention law.[121] The new version of the law passed the German parliament in October 2015 and obligated internet providers to save user data for either four or ten weeks, depending on the nature of data from mid-2017 onwards. Critics subsequently declared to once more appeal to the German Constitutional Court.[122] In December 2016, the ECJ decided in relation to data retention in Sweden and the UK that "general and indiscriminate retention" of electronic communication is not legal, it would be in violation of the right to privacy and the right to data protection guaranteed in the CFREU. Exclusively data interception with the purpose to combat serious crime (including terrorism) would be legal and only if the interception was targeted at specific individuals. Data retention would provide for a serious interference, it would allow for "very precise conclusions to be drawn concerning […] private lifes." Non-transparent and indiscriminate data retention would potentially leave the impression of "constant surveillance." The court, moreover, acknowledged that such an impression of constant surveillance might lead to a preventive change of behavior of members of society (self-censoring online or change of behavior in public). Therefore, general and indiscriminate retention of the data of all members of society (since virtually all citizens in European societies use electronic communication) would exceed "the limits

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Constitutional Court Judgment on Data Retention." Beckedahl and Lüke, *Die digitale Gesellschaft*, 35.

[121] Court of Justice of the European Union "Press Release No 54/14: Judgment in Joined Cases C-293/12 and C-594/12 Digital Rights Ireland and Seitlinger and Others." April 8, 2014. https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140054en.pdf. Hellmuth, *Counterterrorism and the State*, 117.
Spiegel Online, "Vorratsdatenspeicherung: Minister wollen Daten bis zu zehn Wochen speichern." April 15, 2015. http://www.spiegel.de/netzwelt/netzpolitik/vorratsdatenspeicherung-regierung-stellt-verkehrsdatenerfassung-vor-a-1028714.html. Tagesschau.de, "Sicherheitsmaßnahmen in Deutschland."

[122] Zeit Online, "CDU will Vorratsdatenspeicherung jetzt schon ausweiten." January 13, 2016. http://www.zeit.de/digital/datenschutz/2016-01/verfassungsschutz-vorratsdatenspeicherung-cdu.

of what is strictly necessary."[123] The court thus argues based on the condition of necessity in regard to the derogation of CFREU rights. The court, additionally, held that an unnecessarily excessive practice of data retention would be at odds with what is justified in a democracy (another condition for justifiably derogating from privacy rights under the CFREU).[124] Therefore, it can be argued, that the newest German data retention law is more than questionable from a legal perspective since it likewise aims at collecting bulk data, a procedure that has been declared ineligible by several relevant courts in the past. The fact that the timeframe of the storage of the data has been reduced does not make up for this fact since it does not fix the crucial proportionality problem of the collection of data of virtually all members of society. In consequence, the current German data retention scheme might meet the same legal fate as its predecessor.

Data retention is not only questionable from a legal perspective but also a wider, spirit of rights perspective. Data retention undermines the cornerstone of the spirit of rights, human dignity since privacy is an integral part of what it means to be human and of every human life. Privacy protects individuals' freedom and social space and is central to the development of every individual. The perception to be free from unnecessary control and limitation in terms of thought and action is essential; for individuals' abilities to define themselves, to build relationships, to move freely in one's surroundings, to make autonomous decision, as well as their moral, intellectual, and personal development (the latter is e.g., covered by article 29 of the UDHR). The same is valid for an individual's political engagement. Individuals have to have the possibility to think of their own in a democracy, without being obstructed by worries of a breach of their privacy. The perception of being treated in a dignified way and of enjoying the respect of one's personhood must be affected in a negative fashion by mass surveillance measures. Such surveillance also undermines several human capabilities (e.g. for political engagement, to think and reason freely and to move freely).[125] Since mass surveillance via data retention might create the perception of being under constant control, the wider rights aim of freedom

[123] Owen Bowcott, "EU's highest court delivers blow to UK's snooper's charter," *The Guardian*, December 21, 2016. Martha Spurrier, "Investigatory Powers Act: You're not being paranoid. UK gov really is watching you," *The Register*, December 5, 2017. https://www.theregister.co.uk/2017/12/05/liberty_ipa/. Lorna Woods, "Data retention and national law: the ECJ ruling in Joined Cases C-203/15 and C-698/15 Tele2 and Watson (Grand Chamber)," *EU Law Analysis*, December 21 (2016).

[124] Bowcott, "EU's highest court delivers blow to UK's snooper's charter."

[125] Freedom of movement is undermined by data retention as well, since the tracking of location data interferes with a genuinely free mode of moving. The ECtHR acknowledged the detrimental effect of location tracking on freedom of movement in a recent case. European Court of Human Rights, "Case of Uzun v. Germany (Application no. 35623/05) Judgment Strasbourg."

is undermined and perceptions of living in a panoptic society might be triggered. Consequently, humans might start to act and develop differently when they are aware of lacking privacy.[126] I would further like to argue that applying the measure of mass data retention intervenes negatively in the relationship between individual and state. First, the general presumption of innocence, one of the cornerstones of rule of law (and therein a crucial component for the human rights aim of justice), is undermined, everyone, in theory, becomes a suspect.[127] Second, via the collection of data and knowledge about millions of individuals in society, the power balance is significantly changed towards the advantage of the state (already previously the stronger of the two).[128] The state starts to exert control by applying a precautionary principle of data collection. Rapidly increasing state power, however, has the potential to undermine the "social, political and legal fabric" of Western societies, in other words to damage the core of such societies.[129] Data retention, furthermore, endangers important preconditions of functioning democratic societies. For instance, via the mentioned potential creation of processes of self-censoring. Self-censoring blocks for vital components of every democratic society, such as holding power accountable and securing the human capability of free expression.[130] This hypothesis, that a certain proportion of the population might begin to be increasingly careful when communicating over the Internet, triggering processes of self-censoring, was strengthened by the results of a survey conducted in Germany in November 2013. Ten percent stated that they became increasingly cautious when communicating via the internet (e.g., writing emails) based on Snowden's revelations of surveillance practices.[131] Already months before the Snowden revelations, a group of self-identified 'internet-savvy individuals' was well aware of the risks concerning privacy online. Many claimed to be highly cautious online and requested enhanced anonymity.[132]

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[126] Donohue, *The Future of Foreign Intelligence*, 101.

[127] Beckedahl and Lüke, *Die digitale Gesellschaft*, 35. Mitrou, "The impact of communications data retention on fundamental rights and democracy," 135-137.

[128] Kurz, *Die Datenfresser*, 193.

[129] Laura Donohue, "Security and Freedom on the Fulcrum," In *Terrorism and Human Rights*, ed. by Magnus Ranstorp and Paul Wilkinson (London and New York: Routledge, 2008), 60.

[130] Fabbrini "Human Rights in the Digital Age," 68. Mitrou, "The impact of communications data retention on fundamental rights and democracy," 140. The ECJ, in its 2016 ruling, pointed out that data retention is exceeding what is strictly necessary in a democracy (see above). This point connects to the wider argument that data retention's negative impact on privacy rights undermines the necessary groundwork of democracy and the wider aims of human rights.

[131] Infratest dimap 2013, "ARD Deutschlandtrend," November 2013. http://www.infratest-dimap.de/umfragen-analysen/bundesweit/ard-deutschlandtrend/2013/november/

[132] Eighty-eight per cent of 'internet experts' expressed caution regarding the online

Via applying intense surveillance, the populace' notion of and behavior towards privacy rights, as well as freedoms of expression, association and assembly might develop in highly undesirable directions: a certain amount of careful users will perceive their rights and liberties to be in decline and potentially undertake the described self-censorship. Such individuals would in effect sacrifice some share of the mentioned freedoms in order to retain privacy. Those who have already been desensitized in terms of privacy rights would not undertake such behavior, but simply accept the situation, potentially unconscious of lost freedoms.[133] The latter group appears to make for a considerable share of the populace already, as a study by Bernhard Debatin et al. suggested.[134] These processes of desensitization are, at times, used (somewhat ironically) to defend far-reaching surveillance measures of Western states.[135]

Still, unimpressed by such reasoning, the German government, in the spring of 2017, decided to use the data obtained by data retention for tracking down offenders in cases of housebreaking. However, the data retention practice had been justified to the public by the threat of terrorism (and some

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distribution of private data. ibi research center, "Digitalisierung der Gesellschaft: Aktuelle Einschätzungen und Trends," 2013.
http://www.ibi.de/files/Studie_Digitalisierung-der-Gesellschaft.pdf. That this is a general tendency and not a specifically German trend could be seen in a 2013 PEN report published in the US, which revealed that twenty-four percent of the inquired authors claimed to "have deliberately avoided certain topics in phone and email conversations." Additional nine per cent "seriously considered" such behavior. PEN America, "Chilling Effects: NSA Surveillance Drives U.S. Writers to Self Censor," November 12, 2013, 3.
http://www.pen.org/sites/default/files/Chilling%20Effects_PEN%20American.pdf.

[133] One can detect a desensitization of large chunks of Westerners concerning privacy rights. This development has been co-constituted (at least) by the very digital experience of the last decade(s). This is claimed in publications by Sascha Lobo, Shoshana Zuboff, Ilija Trojanow and Juli Zeh and a study by Bernhard Debatin et al. Debatin et al. show, that for many individuals, perceived rewards by the usage of social media outweigh privacy concerns, even if they have experienced invasion of their privacy in the past. The Internet has in the last decade desensitized many, particularly through the intense usage of social media (e.g., Facebook). Many have become conditioned to disclose highly intimate data and information for all kinds of supposed rewards and benefits. Trojanow and Zeh spoke in connection with this of "a perfect synthesis of voyeurism and exhibitionism." Shoshana Zuboff, "Be the friction – our response to the New Lords of the Ring," *Frankfurter Allgemeine Zeitung,* June 25, 2013. Sascha Lobo, "Angriff auf die Meinungsfreiheit," *Spiegel Online,* August 20, 2013. Trojanow and Zeh, *Angriff auf die Freiheit,* 75-77. David von Drehle, "The Surveillance Society," *TIME,* August 1, 2013. Bernhard Debatin et al., "Facebook and Online Privacy: Attitudes, Behaviors, and Unintended Consequences," *Journal of Computer-Mediated Communication,* Vol. 15 (2009).

[134] Debatin et al., Debatin et al., "Facebook and Online Privacy."

[135] For instance, Lord Carlile defended the British mass surveillance measures by claiming that citizens of modern societies would freely give away their private lifes on social media such as Facebook. Lord Alex Carlile, "The Investigatory Powers Bill and the Public Interest," Keynote Address, World Counter Terror Congress, London, April 19-20, 2016.

severe crimes such as homicide, high treason, and distribution of child pornography).Thereby, the government violated its own pledges to only use data retention on terrorism and the most severe forms of crime.[136] This move of the government further emphasized that governments will continuously find ways to use and re-use data once they are collected, no matter what the original purpose of the collection of the data was.

- **BKA Law**

In 2008, the German parliament adopted (by the help of the votes of Christian Democrats and Social Democrats) a law that gave the Federal Criminal Police Office (BKA) new competencies.[137] For the first time the BKA was allowed to take preventive measures in anti-terrorism (this had until then exclusively been a task of Germany's sixteen state police institutions).[138] A proposal to provide the BKA with preventive investigation competencies had already been drafted around the time Security Package II was drafted but had, back then, been abandoned. After the failed bombing at German railroad stations in 2006, these plans were activated again.[139] Under the 2008 law, the BKA could now, for instance, intercept the communication data of terror suspects, as well as survey a suspect outside and inside of his accommodation (or the accommodation of a relative or acquaintance of a suspect). The BKA was now also allowed to use metadata of communication providers in its investigations. Furthermore, the BKA gained the competence to secretly infiltrate computers, e.g. by the use of trojans. The secret infiltration of computers, other than the previously mentioned measures, demanded the evaluation of a concrete danger and infiltrations could only be ordered with judicial approval. The BKA law additionally contained the option to apply the tool of dragnet investigations (however, since dragnet investigations as purely preventive measure had been declared to be in breach of civil rights in 2006 by the German Constitutional Court, the use of such investigations was now connected to the demand of concrete preparations of terror acts).[140]

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[136] Friedhelm Greis, "Gesetzentwurf : Vorratsdatenspeicherung wird jetzt schon ausgeweitet," *Zeit Online*, May 10, 2017. http://www.zeit.de/digital/internet/2017-05/gesetzentwurf-vorratsdatenspeicherung-ausweitung-einbruch

[137] Interestingly, the BKA law was the first anti-terrorism law to be vetoed in the Bundesrat since 9/11. However, the opposition had less to do with concerns for civil and political rights, but more with a power struggle around the distribution of competencies between the federal state and the sixteen states (Bundesländer). This is valid as well for almost all other opposition of the sixteen states against anti-terrorism legislation in Germany since 2001. Hellmuth, *Counterterrorism and the State,* 114.

[138] Hyde-Price, "Germany: Redefining its security role." Hellmuth, *Counterterrorism and the State,* 94.

[139] Hellmuth, *Counterterrorism and the State,* 111.

[140] Bundeskriminalamtgesetz, § 20j, "Rasterfahndung."
https://dejure.org/gesetze/BKAG/20j.html
Bundesstelle für politische Bildung, "BKA-Gesetz," September 2008.

The federal German police thus gained a range of competencies that are usually lying in the portfolio of domestic intelligence services.[141]

The law rather immediately faced a challenge at the German Constitutional Court. The claimants (amongst others the former German Minister of the Interior Gerhart Baum) held that the new competencies of infiltrating computers and surveying accommodation were too extensive, privacy rights would not be protected sufficiently. The secret search of hard drives was the most debated new measure. Representatives of the German state claimed that the extended investigation measures enabled by the law would be proportional, given an increase of terrorist threats. The law would furthermore have helped in preventing several terror attacks. It took until 2016 for the case to see a verdict.[142]

The court held that, the mentioned provisions of the BKA law indeed constituted an interference with privacy rights, but that the law, in principle, was permissible. Still, the court decided that the law was in violation of the demanded principle of proportionality on several points (since laws that constitute interferences with constitutional rights, such as civil and political rights have to be proportional to the threat that this interference is supposed to tackle). For instance, the court ruled that surveillance of accommodation of a suspect's relatives or acquaintances is in violation of the privacy right of 'sanctity of accommodation' as stipulated in the German constitution (similar to the right of privacy in art. 12 UDHR, art. 8 ECHR, art. 17 ICCPR, which all contain protection of the privacy of one's home). Since the surveillance of one's home would be an especially deep interference with the right to privacy, such surveillance cannot be extended to third persons, the court held. Second, the court declared it for insufficient, that long-term surveillance measures would according to the law not have to be sanctioned beforehand by a court. Third, the court ruled that the BKA law in terms of the option of surveying suspects outside of their accommodation, did not contain any provision that would restrict the use of this measure to only such cases in which a person with its individual behavior justifies a 'concrete probability' that this person in the near future will commit a terrorist crime. Therefore, this measure could be applied excessively. The court demanded that the BKA has to justify its evaluation of an individual with concrete facts,

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http://www.bpb.de/politik/hintergrund-aktuell/69588/bka-gesetz-15-09-2008. Hellmuth, *Counterterrorism and the State,* 113. Joerg Diehl and Dietmar Hipp, "Urteil zum BKA-Gesetz: Polizisten murren über Verfassungsgericht," *Spiegel Online*, April 20, 2016. http://www.spiegel.de/politik/deutschland/bundesverfassungsgericht-karlsruhe-bremst-bka-gesetz-a-1088298.html.

[141] Wefing, "BKA-Gesetz: Ein Sieg der Verhältnismäßigkeit."

[142] Bundesstelle für politische Bildung, "Urteilsverkündung: BKA-Gesetz," April 2016. Tagesschau.de, "Sicherheitsmaßnahmen in Deutschland." Hellmuth, *Counterterrorism and the State,* 111.

vague suspicions would not be enough.[143] Fourth, the BKA law's provisions on interference with communication data would be too vague and disproportionate, thus a misuse would be possible. Fifth, the court held that the possibility of data exchange with EU-external services, as provided in the BKA law, would not be sufficiently limited, e.g. to only severe cases of crime, such as terrorism. It would, furthermore, not be guaranteed that German rules on data protection are upheld in such data exchanges. Thus, this provision would be unproportional as well. In general, the court bemoaned a range of vague formulations in the law, opening the door for exploitation or excessive use of measures. Moreover, the court held that a competency like a secret search of hard-drives can only be used in connection with the protection of very important 'rights issues' [*Rechtsgüter*], e.g., to prevent a threat to life or freedom, or at moments when a concrete danger can be foreseen. The court thus demanded the German legislator to renew the BKA law by 2018, and therein to solve the problems, which the court had pointed out in its verdict.[144]

Although the verdict of the court on the BKA law did not declare the law as a whole to be invalid based on rights issues, as with other post-9/11 German anti-terrorism laws, but rather ruled that the law in principle was permissible, the court's verdict still demonstrates human rights problems of the 2008 BKA law. First, the court declared one part of the law invalid (the part on surveying the home of third persons, see above), and second, the court pointed to a number of criticizable issues from a rights perspective, e.g., the vagueness and unproportionality of many of the provisions, or the lack of external control and general transparency. Thus, although the law was not as directly rebuffed by the court as other German anti-terrorism laws after 9/11 (e.g., the Air Security Law), the verdict still shows that the 2008 BKA law did run into legal problems in terms of civil rights, especially concerning its breach of proportionality demands for eligibly limiting the right to privacy

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[143] The court gave some examples of this procedure. A surveillance measure could e.g., not be justified based on the mere visit of a suspicious mosque, whereas it can be justified if there is proof that an individual has visited a terror training camp. Ronen Steinke, "Wie ein neues Gesetz das BKA mächtiger macht," *Süddeutsche.de*, May 25, 2018. https://www.sueddeutsche.de/politik/bundeskriminalamt-wie-ein-neues-gesetz-das-bka-maechtiger-macht-1.3991246

[144] The court additionally criticized missing transparency and control mechanism of many of the competencies on a general level (e.g., regulations concerning the documentation of investigation measures, the notification of surveyed individuals, or regulations on the erasure of data).

Bundesverfassungsgericht, "Verfassungsbeschwerden gegen die Ermittlungsbefugnisse des BKA zur Terrorismusbekämpfung teilweise erfolgreich," Pressemitteilung Nr. 19/2016, April 20, 2016.

Bundesstelle für politische Bildung, "Urteilsverkündung: BKA-Gesetz." Wefing, "BKA-Gesetz: Ein Sieg der Verhältnismäßigkeit." Diehl and Hipp, "Urteil zum BKA-Gesetz: Polizisten murren über Verfassungsgericht."

(as demanded in the ECHR, ICCPR). Now, since proportionality is crucial in order for rights limitations (or derogations) to stay in the realm of legality, the court's verdict reflects serious shortcomings of the German legislators. Therefore, the law can be evaluated as undermining binding rights standards.

Apart from the legal evaluation, the BKA law is clearly questionable from a spirit of rights perspective. First, since the law provides for the use of metadata, the same points are valid as already delivered further above in relation to data retention of metadata. As mentioned, the saving and usage of metadata essentially interfere with human dignity, humans' potential for political engagement and development and the relation between individual and state. Second, since the 2008 BKA law does not contain any notification procedure for secret searches of hard drives, it provides for the potential development of uncertainty on side of the population (and especially among specific groups) as to whether one might be surveyed by state authorities or not.[145] One can never for sure know if one is the target of surveillance or not (e.g. since surveillance is used as a preventive measure, one does not have to have been in contact with authorities in order to be surveyed). This, again, reflects the metaphor of the Panopticon. Such uncertainty processes could also be triggered by the law's provision allowing for the surveillance of (homes of) acquaintances of suspects under which such acquaintances might themselves become targets of surveillance. The general unproportionality and vagueness of almost all provisions of the law increase the potential of this uncertainty process. When individuals cannot be certain anymore to be free from surveillance and have no way of finding an answer to the question of whether they are surveyed, a perception of an interference with their dignity (e.g. the perception of being recognized in one's personhood) as well as their general freedom (a wider rights aim) might be provided.[146] This potential development of surveillance uncertainty is especially valid for certain specific groups in society. In the current terrorism context, this group is the Muslim minority, and especially its share of young, male adults (reflecting a 'suspect community' or suspect group). Therein, perceptions of not being regarded as equal in front of the security apparatus and in terms of one's rights in society can be triggered, leading to perceptions of

[145] The secret search of hard drives via the utilization of security gaps in software constitutes another problem as several observers pointed out. By detecting security gaps, but leaving them open in order to use them for the own surveillance, the BKA itself provides for potential security problems of the digital infrastructure, since it is a realistic possibility that sooner or later others, potentially criminals will detect and use the same security gaps. Hakan Tanriverdi, "IT-Sicherheit: Netzpolitiker warnen vor Einsatz des Staatstrojaners," *süddeutsche.de*, January 28, 2018. https://www.sueddeutsche.de/digital/it-sicherheit-netzpolitiker-warnen-vor-einsatz-des-staatstrojaners-1.3844670

[146] The court evaluated that the protection of privacy in one's home (e.g., from surveillance of state authorities) is of special importance for providing a life of dignity. Bundesverfassungsgericht, "Pressemitteilung Nr. 19/2016."

discrimination, disrespect, and injustice based on ethnicity. This must reinforce the perception of interference with one's dignity and personhood, with the mentioned potential consequences for the political climate and security situation. Third, since dragnet investigations can be used again with the 2008 BKA law, discriminatory tendencies in investigations can be expected to not only be rough perceptions but a tangible reality. Although dragnet investigations are supposed to be non-discriminatory, it appears highly doubtful if this ideal can be upheld. If one tries to preventively find so-called 'endangerers' in a mass of people, one will naturally need to use search criteria that point to a specific group in society, and in a terrorism context, in which terror threats are localized to come mostly from the domestic Muslim minority, it must be expected that members of this group have a much higher probability to be filtered as potential threats by the system than other members of society.[147] The measure of dragnet investigation can thus reinforce inequality in terms of rights standards for certain groups in the population. Clearly, unequal standards are detrimental to the human rights ideal of equal rights, dignity, and justice for all humans. Dragnet investigations (with the reformed version of such investigations) deliver another example of a measure that is legally permissible, but still criticizable from a spirit of rights perspective. And again, dragnet investigations change the power relation between individual and state to the disadvantage of the individual in a similar fashion as described above in the section on data retention. Furthermore, the option to exchange data with the American NSA, as established in the BKA law, does interfere with the perception that the preservation of privacy rights (and, maybe, all parts of the human rights framework) is an important issue on the agenda of the German legislator.

Although the court – once again - tried to limit excessive German anti-terrorism policymaking, its verdict turned out to have the contrary effect. First, the renewed BKA law from 2018 included once again extended competencies, including subjecting suspects to imperative powers such as wearing electronic tags, contact bans or residence restrictions (measures that resemble those included in the UK's control orders, which were declared to breach human rights norms (see below).[148] Thus, the BKA became in effect more powerful by the reform of the excessive 2008 BKA law, not less.[149]

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[147] The term 'endangerer' roughly pertains to individuals "likely to threaten public security," and is mostly used in connection with suspects of Islamist terrorism. The term is supposed to signify that an individual is willing to commit politically motivated violence. Leese, "Prevention, knowledge, justice: Robert Nozick and counterterrorism."

[148] Such measures might trigger the trend of police forces trying to control a larger group of suspects instead of issuing in-depth investigations. It might be cheaper and more time effective to supply five suspects with electronic tags rather than carrying out five in-depth investigations. Steinke, "Wie ein neues Gesetz das BKA mächtiger macht."

[149] The BKA is furthermore pooling several databases on individuals regarded as a threat in

Second, the fact that the highest German court with its verdict in theory approved preventive police measures in order to meet the threat of terrorism instigated several German state governments to extend the competencies of their police forces in new police task laws (see below).

- **Mass Intelligence Surveillance**

Mass surveillance measures of German intelligence agencies constitute another problematic issue of German post 9/11 anti-terrorism. As shown above, options for surveillance by German intelligence were extended already via the security packages adopted in the fall of 2001. Surveillance competencies and practices have been on the increase ever since. I would like to provide two problematic examples of secret service surveillance, the first pertaining to surveillance of journalists, and the second pertaining to mass surveillance of the broad public. In February 2017, it was revealed that the BND-law (BND-Gesetz) formed the basis for surveillance of foreign journalists, conducted by the German secret service (BND). After gaining insight into files of the German parliament's commission of inquiry on the NSA scandal, the *Spiegel* magazine revealed at least fifty cases of BND surveillance conducted against journalists and editorial offices in the UK, Afghanistan, Pakistan, and Nigeria since 1999. The list of editorial boards spied on (e.g. via surveying phones and emails) included high-ranked institutions such as the BBC, the *New York Times* and Reuters. The BND defended this practice with its alleged relevance in terms of a stable security situation in Germany. The BND law formed the basis for these measures as it allows for the surveillance of foreign journalists outside of Germany without reasonable suspicion of any offenses.[150]

However, the argument of security agencies that surveillance of journalists is necessary in a security context seems far-fetched. It appears rather unlikely that the editorial boards of the BBC or the *New York Times* were regarded as threats; the objective of the surveillance must rather have been to gain access to sensitive information transmitted by the journalists' informants. However, even if the surveillance of these informants would have provided valuable information to the BND, e.g. about terror networks abroad or in Germany, spying on journalists and editorial boards constitutes a clear interference with freedom of expression and privacy rights. This interference seems to lie in the legal grey area. One might make the argument that the measure is legally eligible since the conditions for limiting the rights to freedom of expression and privacy as manifested in the ECHR and ICCPR

different fields (e.g., football hooligans or Islamists) into one big database, thus removing restrictions on search possibilities for the different departments of the police institution. Steinke, "Wie ein neues Gesetz das BKA mächtiger macht."

[150] Zeit Online, "Ausländische Reporter klagen gegen BND-Gesetz," January 30, 2018. Maik Baumgärtner, Martin Knobbe and Jörg Schindler, "BND bespitzelte offenbar ausländische Journalisten," *Spiegel Online*, February 24, 2017.

are upheld. Since the surveillance of journalists appears to be resting on a legal basis (the BND law), is arguably undertaken in the interest of national security and does not constitute a mass surveillance measure, and could thus be interpreted to not be unproportional, it could potentially be defended in face of existing limitation demands. However, one might make the point that the limitation demand of necessity is not met anyway when individuals who do clearly not pose a security threat (the journalists) are surveyed. Furthermore, since journalists increasingly work in global networks (e.g. in case of the Paradise Papers) not only the press freedom and freedom of expression of foreign journalists but also domestic ones who are collaborating with surveyed foreign journalists are endangered. Surveillance of domestic journalists is, however, not covered by the legal basis of the measure. Moreover, the ECtHR decided in September 2018 that a British practice of surveying journalists violated the right to freedom of expression, thus a precedent for the BND's practice might just recently have been created.[151] Therefore, the measure of surveying foreign journalists seems to be placed in a legal grey area in terms of both restricting freedom of expression and privacy rights.[152] Several international investigative reporters have as a consequence of the revelations initiated an act of appeal against the BND law at the German Constitutional Court.[153] The legal evaluation is currently pending.

However, even if the court would declare such surveillance practices as legal, I would still argue that the use of surveillance on journalists is unjustified. Because of such surveillance, informants cannot trust in their anonymity anymore, thus, the work of journalists is undermined and press freedom (covered by the human right of freedom of expression) is eroded. By surveying journalists and alienating them from their sources, a crucial component of democratic societies is undermined, which is the opportunity to present a multitude of opinions, to voice dissent and the potential to publicly scrutinize those in power. The potential of human rights (here: the right to freedom of expression) to make a difference on behalf of the 'weak' towards more powerful actors (e.g. government actors) would be undermined, threatening the functioning of a free democratic society (which is a necessity for the full enjoyment of rights). Indeed, the ECtHR acknowledged in 2018 that surveillance of journalists can have a chilling effect on press freedom (meaning that processes of self-censoring among journalists might be launched).[154] Therein, the measure furthermore undermines a general sense of freedom and dignity in societies. Since one

[151] EDRi, "ECtHR gives a half-hearted victory against UK mass surveillance," September 26, 2018. https://edri.org/ecthr-gives-a-half-hearted-victory-against-uk-mass-surveillance/.
[152] Additionally, journalists are provided with special protection according to German legislation, since they are regarded as so-called 'secret carriers'.
[153] Zeit Online, "Ausländische Reporter klagen gegen BND-Gesetz."
[154] EDRi, "ECtHR gives a half-hearted victory against UK mass surveillance."

might furthermore argue that the law in allowing the practice of surveying foreign journalists only, includes a discriminatory tendency, the wider human rights aim of (equal) justice, or recognition of equal worth for all individuals, is undermined as well (and likewise the capability for leading a life in a non-discriminatory fashion).[155]

Besides surveillance of specific groups such as journalists, the German intelligence agency BND is, similar to the British GCHQ, involved in direct mass surveillance measures of online communication. For instance, the BND directly scans data transmitted through the world's biggest data junction point, the De-Cix, located in Frankfurt. The junction point has data traffic of up to six terabytes per second and encompasses data flows from big parts of Europe, but also Africa, the Middle East, and Asia. Data is here scanned in order to filter for suspicious content, using specific search terms. The BND has in the process of such scanning used the NSA's XKeyscore program, a program that enables the filtering, sorting and analyzing of large amounts of content and metadata. Therein, XKeyscore functions as a 'super-Google'.

Entering a legal reflection on the BND's scanning practice, it is noteworthy that the German Federal Administrative Court ruled in May 2018 that the BND's scan practice is legally justifiable given that a domestic legal framework provides for this possibility.[156] However, two reservations need to be made here. First, the court merely decided upon the legal basis of the scanning practice but did not deliver an evaluation of its human rights implications. Second, the BND is legally only allowed to scan foreign communication or communication between a German and a foreign source, not domestic communication. However, a clear differentiation between the exact locations of communicators appears technically extremely hard to achieve, given the vast amount of data and the complex ways online communication travels. From a universalist human rights standpoint, it is irrelevant if surveillance affects citizens or non-citizens, residents or non-residents. Thus, one might doubt the justifiability of this scanning practice. Privacy rights enshrined in several important rights documents (art. 12

[155] Whereas the surveillance might hit German journalists as well, given an increasingly internationalized journalist network structure, as mentioned above.

[156] Stefan Heumann and Ben Scott, "Law and Policy in Internet Surveillance Programs: United States, Great Britain and Germany," *Impulse*, September 2013. Patrick Beuth, "Die weltgrösste Überwachungsmaschine," *Die Zeit*, September 25, 2015. Eike Kuehl, "Weiterhin frohes Datenfischen," *Zeit Online*, May 31, 2018. https://www.zeit.de/digital/datenschutz/2018-05/bnd-ueberwachung-de-cix-internetknoten-klage.
Spiegel Online, "BND darf am Internet-Knoten weiter Daten abzapfen," May 31, 2018. http://www.spiegel.de/netzwelt/netzpolitik/de-cix-betreiber-von-internet-knoten-verliert-klage-gegen-bnd-a-1210243.html. Troels Heeger, "Tysk efterretningstjeneste udleverede data til NSA," *Information*, August 7, 2013 https://www.information.dk/udland/2013/08/tysk-efterretningstjeneste-udleverede-data-nsa

UDHR, art. 17 ICCPR, art. 8 ECHR) are interfered with by the BND's surveillance practices. From a legal perspective, one might argue that large-scale scanning of communication data appears to be ineligible since such practices are similar (or equal) to measures that were earlier declared illegal by relevant court decisions. For instance, the decision of the ECJ to declare large-scale data retention illegal based on the arguments that they would be non-proportional when covering millions of individuals could be used as a clear indication for the potential legal trouble the BND's measure might face. The ECJ additionally included in its negative evaluation of data retention, the possibility that individuals would be unaware of surveillance practices and therefore be left with a constant perception of being surveyed, which would be a worrying circumstance. The same is, however, the case with the BND's scan of data. Furthermore, the ECtHR in a case against Hungary in January 2016 and the ECJ in a case on data retention later in 2016 clarified that only selected individuals can be subject to electronic surveillance and not the broad public.[157] In September 2018, the ECtHR declared the British GCHQ's practice of scanning fiber-optic cables for being in violation of articles 8 and 10 of the ECHR. The ECtHR held that this kind of mass surveillance (equaling the method used by the BND at the De-Cix) is "incapable of keeping the 'interference' to what is necessary in a democratic society."[158] Thus, legal justification of the BND's measure in the framework of the ECHR (or CFREU) is thus not easy to imagine. If the criteria for justifiably restricting privacy rights have not been met in the comparable cases above, it appears questionable that they have been met in the BND case. Therefore, I would regard the BND's surveillance as questionable from a legal standpoint.

The measure is, in any case, to be criticized from a spirit of rights perspective. Mass surveillance infringes the wider aims of rights and the spirit of human rights in the same fashion as the already described measure of data retention (since it does here not make a difference if data are directly scanned by government agencies, or first stored by private providers and then accessed by state authorities). Mass surveillance undermines notions of human dignity, personal human development and unfolding, as well as

[157] European Court of Human Rights, "Judgment Szabó and Vissy v. Hungary - legislation on anti-terrorist secret surveillance," January 12, 2016, http://hudoc.echr.coe.int/eng-press?i=003-5268616-6546444.

[158] EDRi, "ECtHR gives a half-hearted victory against UK mass surveillance," September 26, 2018. Privacy International, "UK mass interception law violates human rights - but the fight against mass surveillance continues," September 13, 2018. https://privacyinternational.org/feature/2267/uk-mass-interception-law-violates-human-rights-fight-against-mass-surveillance. Owen Bowcott, "GCHQ data collection regime violated human rights, court rules," *The Guardian*, September 2018. https://www.theguardian.com/uk-news/2018/sep/13/gchq-data-collection-violated-human-rights-strasbourg-court-rules.

human capabilities (to associate and engage with others, to think and reason freely and to move freely).[159] It undermines humans' social space and human freedom and autonomy, as well as political engagement, and effects the general relation between individual and state towards a perception of being under constant control (see my argumentation on that above). Again, processes of self-censoring, with all their detrimental effects for society might be launched.[160]

One could now try to defend such surveillance measures by the help of two arguments: one, that surveillance measures would only concern suspicious or dangerous individuals, and two, that such measures would be a necessary, because effective, tool against terrorism. However, both arguments are false. First, everyone's data is scanned in order to filter out suspicious content. Second, a range of instances in which individuals ended in unfortunate situations due to being mixed up with other terror suspects based on falsely interpreted surveillance data was reported in the last years (e.g. the case Khaled El-Masri from Germany). Third, surveillance of whole societies does not solve the problem of terrorism. The newest wave of terror attacks, taking place while surveillance practices are intensified, shows this. The collection of more and more data has actually made it trickier for security institutions to keep an overview. This was exemplified by the attack on a Christmas market in Berlin in 2016. The authorities had many data on the attacker (from traditional sources, not mass surveillance). However, they were not able to process them in an effective way. Therefore, to simply throw more hay and the haystack will not solve the problem. The effective accumulation and processing of data on individuals constituting a threat would be a better course of action.[161]

Surveillance measures by intelligence services contain another risk. This pertains to intelligence cooperation. If intelligence services aim at surveying foreigners, in order to be in accordance with domestic laws, and subsequently cooperate with foreign services, including data exchange, it

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[159] The ECtHR held in a 2010 judgment that tracking movement undermines one's freedom of movement. European Court of Human Rights, "Case of Uzun v. Germany (Application no. 35623/05) Judgment Strasbourg."

[160] As mentioned, the ECJ acknowledged a risk of self-censoring under circumstances of continuous surveillance in its 2016 ruling on data retention. Spurrier, "Investigatory Powers Act: You're not being paranoid."
Moreover, a recent study conducted in France did indeed show self-censoring (online) behavior of a certain share of the population triggered by awareness of anti-terrorism measures. Francesco Ragazzi et al., "The Effects of Counter-Terrorism and Counter-Radicalisation Policies on Muslim Populations in France," *Centre d'etude sur les Conflits, Liberte et Securite (CCLS)*, 2018.

[161] Already the 9/11 Commission Report pointed out that one of the failures of authorities before 9/11 was an overreliance on SIGINT, disregarding HUMINT (in other words prioritizing the interception of communication signals over collecting intelligence through interpersonal contact). Schmid, *The Routledge Handbook of Terrorism Research*, 29.

becomes a realistic scenario that data are traded. In other words, via such collaboration intelligence services receive data on their own citizens from friendly services, data that they otherwise would not be allowed to collect themselves, constituting a circular swap of data. This practice has already taken place as the Snowden revelations showed.[162] In 2016, a legal basis for this exchange of data was established with a new anti-terrorism package, adopted with the votes of Christian-Democrats and Social Democrats. The package opened up for the automated exchange of information between German and foreign databases (e.g., other EU member states and NATO partners). Such databases contain information from surveillance measures.[163] Such policy moves clearly constitute the attempt of legalizing formerly illegal activities.[164] The package received criticism from other political factions, e.g., the Green party and the Left (Die Linke), who claimed that the measures were legalizing questionable international data-transfer without a solid constitutional base. Indeed, especially the constitutional right to informational self-determination could clash with the 2016 package. Critics emphasized the potentially enhanced collaboration of the BND with intelligence agencies such as the American NSA, whose practices were by many justifiably evaluated as rights-abusing in the course of the Snowden revelations.[165] A circular swap of data would for sure increase interference with the rights to privacy. Privacy rights are undermined in a similar fashion as in the other examples of surveillance and data retention presented above. Collaborations on data exchange are furthermore non-transparent to the public, making it virtually impossible to challenge such practices.[166] Even

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[162] Eric Toepfer, "Mass surveillance, technologies of control and unaccountable states" (presentation, statewatch conference, London, June 25, 2016). The ECtHR recognized the risk for such practices in a recent verdict on UK mass surveillance practices. Lorna Woods, "Analysis of the ECtHR judgment in Big Brother Watch: part 1," *EU Law Analysis*, September 16 (2018).

[163] Deutscher Bundestag, "Bundestag verabschiedet Antiterrorpaket," June 24, 2016. https://www.bundestag.de/dokumente/textarchiv/2016/kw25-de-terrorismus-428780

Ingo Dachwitz, "Überwachung: Große Koalition winkt Anti-Terror-Gesetz durch," netzpolitik.org, June 24, 2016. https://netzpolitik.org/2016/grosse-koalition-winkt-anti-terror-gesetz-durch/.

[164] Toepfer, "Mass surveillance, technologies of control and unaccountable states."

[165] Ibid.

The relationship between the NSA and the BND, Germany's foreign intelligence agency, has been "intimate" for the past fifteen years. Revelations that the NSA spied on Angela Merkel's mobile phone may have strained relations for a little while, but Germany still hosts several major NSA sites, including the NSA's European headquarters in Stuttgart. Furthermore, the BND sends large amounts of metadata to the NSA. Heumann and Scott, "Law and Policy in Internet Surveillance Programs." Luke Harding, "Mass surveillance is fundamental threat to human rights, says European report," *The Guardian*, January 26, 2015. https://www.theguardian.com/world/2015/jan/26/mass-surveillance-threat-human-rights-council-europe.

[166] Konrad Lachmayer and Normann Witzleb, "The Challenge to Privacy from Ever

the German parliament is not sufficiently informed about such cooperation.[167] This violates a demand by the German Constitutional Court from 2016, who had in the verdict on the BKA law called for full accountability concerning intelligence cooperation, a demand that is ignored by the 2016 anti-terror package.[168] This in-transparency interferes with one of the preconditions for every healthy democratic system, which is the opportunity to be able to hold authorities accountable (as explained above). Critics additionally pointed out that German institutions would potentially end up collaborating with states whose security authorities practice torture to gain information.[169] Therein, cooperation on data exchange might in the long run not 'only' undermine privacy rights, but might have consequences in the form of harsh counter-terrorism actions such as renditions, torture, or drone strikes since information delivered to the US might be used as the basis for such actions. Such cooperation would thus add to the violation of wider rights aims via mass surveillance as explained above, and complicity in processes that might lead to acts of torture would certainly aggravate such spirit of rights problems. Thus, the exchange of information by intelligence services constitutes another risk for civil rights.[170]

- **Facial Recognition Systems**

The issue of surveillance will also be at the center of my next example of questionable German anti-terrorism. After the attack on the Christmas market in Berlin in December 2016, the German government implemented a set of extending measures to tackle Islamist terrorism. For instance, the German Minister of the Interior demanded an extension of video surveillance of public space. The German parliament adopted a law enabling such enhanced video surveillance (especially by companies) in March 2017.[171]

Increasing State Surveillance: A Comparative Perspective," *University of New South Wales Law Journal*, Vol. 37 No. 2 (2014): 778.

[167] Toepfer, "Mass surveillance, technologies of control and unaccountable states."

[168] The package from June 2016 further ignored a ruling of the German Constitutional Court from 2013, which demanded a separation of police and intelligence information. Integration of police and intelligence information systems and tasks was indeed intensified in the first decade of the twenty-first century, as Peter Schaar, former Federal Commissioner for Data Protection evaluates. Schaar, *Das Ende der Privatsphäre*, 153.

[169] Spiegel Online, "Schutz vor Anschlägen: Bundestag beschließt neues Anti-Terror-Paket," June 24, 2016 http://www.spiegel.de/politik/deutschland/bundestag-beschliesst-neues-anti-terror-paket-a-1099675.html

Deutscher Bundestag, "Bundestag verabschiedet Antiterrorpaket," June 24, 2016. Dachwitz, "Überwachung: Große Koalition winkt Anti-Terror-Gesetz durch."

[170] Donohue, for instance, holds that intelligence sharing can constitute a threat for the "very values we seek to protect." Laura Donohue, "International Cooperation & Intelligence Sharing" (presentation, The Future of Terrorism: Georgetown & St. Andrews University Conference, Washington, April 28-29, 2016).

[171] Björn Hengst et al., "Sicherheitsgipfel nach Berlin-Anschlag: Merkels Minister müssen

The German public seems to show support for CCTV surveillance according to several polls.[172] However, video surveillance or CCTV is a technology that has started to include other features than simply taking a live picture of public places; it is increasingly combinable with automatic scans of number plates or biometric data.[173] Consequently, a measure, which has been developed recently and is promoted as an anti-terrorism measure is facial recognition technology in connection with CCTV surveillance. Such systems will be my next example of debatable German anti-terrorism.

Security authorities such as the Ministry of the Interior and the federal police (BKA) argue that such technologies might make it possible to spot so-called endangeres before committing a terror attack, which could thus prevent the attack. Experiments with such technologies have taken place in European societies, including Germany, for a number of years.[174] An early experiment with facial recognition was conducted in Germany already in 2006 when a camera system was tested at the main railroad station in the city of Mainz. Already back then, the German government pushed for expanded use of CCTV in railroad stations and other public places, following a failed

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liefern," *Spiegel Online*, January 9, 2017.
http://www.spiegel.de/politik/deutschland/anschlag-in-berlin-thomas-de-maiziere-und-heiko-maas-sprechen-ueber-konsequenzen-a-1129196.html Erik Jensen, "Tyskland vil øge sin overvågning mod terror," *Politiken*, March 11, 2017.

[172] Several surveys found widespread agreement to the demand for surveillance of public places by CCTV cameras (between sixty and eighty-three percent in surveys by YouGov [sixty per cent], infratest dimap [seventy-nine per cent] and Emnid [eighty-three per cent]). Moritz Wichmann, "Mehrheit der Bürger spricht sich nach Anschlag von Berlin für mehr Polizei und Videoüberwachung aus," *YouGov*, December 28, 2016. https://yougov.de/news/2016/12/28/mehrheit-der-burger-spricht-sich-nach-dem-anschlag/
Die Welt, "AfD klettert – Mehrheit für Seehofers Forderungen." Infratest dimap, "ARD-Deutschlandtrend," January 2017. http://www.infratest-dimap.de/umfragen-analysen/bundesweit/ard-deutschlandtrend/2017/januar/

[173] Germany does not own a number plate recognition policy (regulations allowing for the automatic scanning and recognition of vehicles on public streets) at the federal level. However, nine states have implemented the measure for either continuous or occasional use, e.g., Bavaria, Hesse and Baden-Württemberg. In these states, the measure constitutes another interference with the right to privacy and free movement. Indeed, the German Constitutional Court declared the measure in its current practice for ineligible in a very recent ruling from February 2019, based on its unproportional interference with informational self-determination (a right guaranteed in the German constitution). The court demanded amendments in order to uphold the practice.
Spiegel Online, "Was bedeutet das Autokennzeichen-Urteil?," February 5, 2019. https://www.spiegel.de/panorama/justiz/bundesverfassungsgericht-was-bedeutet-das-kennzeichen-urteil-a-1251652.html.

[174] The BKA is entangled in international cooperation on facial recognition in the Facial Recognition Working Group with co-members such as Israel, France and the US. The BKA furthermore cooperates with Interpol on facial recognition. Matthias Monroy, "Interpol und Europol bauen Gesichtserkennung aus," *netzpolitik.org*, March 26, 2019. https://netzpolitik.org/2019/interpol-und-europol-bauen-gesichtserkennung-aus/

Islamist bombing attack at two railway stations in the summer of 2006.[175] However, the test was not successful at the time due to a very high failure rate in terms of actual recognition.[176] Still, plans of using such systems were not dropped but rather set on hold. Recently, between the summer of 2017 and the summer of 2018, ten years after the first attempt, another, improved, 3-D based system was tested at a railroad station in Berlin, since the newest developments of recognition technology promised to be more accurate.[177] And indeed, the German Ministry of the Interior declared the experiment in Berlin as successful in October 2018 and held that such systems provided a beneficial new measure of police work, recognition systems would now be ready for "widespread usage." Authorities held that the system now worked with a success rate of "more than 80 percent." In other words, whenever one of the searched individuals (simulated by volunteers) crossed the cameras, the system recognized the searched individual in more than eighty percent of the cases.[178] The probability of false alarm, that is the recognition of an innocent individual, would according to German authorities only be at 0.1 percent of all cases. This means that one out of a thousand individuals trigger a false alarm. Although this seems, at first sight, to be a very low share, one should bear in mind that such systems are supposed to be used at spots that

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[175] Nacos, *Terrorism and Counterterrorism*, 207. Matthias Monroy, "Bitte lächeln: Interpol startet neue Datenbank zur Gesichtserkennung," *netzpolitik.org*, December 14, 2016. https://netzpolitik.org/2016/bitte-laecheln-interpol-startet-neue-datenbank-zur-gesichtserkennung/.

[176] Juri Sonnenholzner, "Vom Flop der Foto-Fahndung", *tagesschau.de*, August 24, 2017. https://www.tagesschau.de/inland/gesichtserkennung-127.html.

[177] Spiegel Online, "Berliner Südkreuz: De Maizière verlängert umstrittene Tests zur Gesichtserkennung," December 15, 2017.
http://www.spiegel.de/netzwelt/netzpolitik/bahnhof-berlin-suedkreuz-testlauf-zur-gesichtserkennung-wird-verlaengert-a-1183528.html Matthias Monroy, "BKA schliesst Probelauf zur Gesichtserkennung ab," *netzpolitik.org*, August 10, 2017.
https://netzpolitik.org/2017/bka-schliesst-probelauf-zur-gesichtserkennung-ab/
Facial recognition software is not only used by state authorities, the development is also taking place in the private sector. For example, the Russian app 'FindFace' is able to identify a random person via facial recognition by comparing the face of the individual against a database of millions of other individuals. However, a connection to the Russian state apparatus and its surveillance is given, since the Russian police already started to use the technology to survey public places in Moscow (the app is then used by scanning the face of passersby by cameras). Companies from Western countries are working on similar apps and programs as well. Nadine Zeller, "Lauter bekannte Gesichter: Boom der biometrischen Erkennung," *Hannoversche Allgemeine Zeitung*, July 29, 2016. http://www.haz.de/Sonntag/Technik-Apps/Lauter-bekannte-Gesichter-Boom-der-biometrischen-Erkennung

[178] Angela Gruber, "Überwachung in Deutschland: Umstrittene Gesichtserkennung soll ausgeweitet werden," *Spiegel Online*, October 12, 2018. The Chaos Computer Club, however, claimed that the positive results of the tests would have been sugarcoated since an eighty percent success rate would only have been achieved by combining all three test systems. Ingo Dachwitz, "Überwachungstest am Südkreuz: Geschönte Ergebnisse und vage Zukunftspläne," *Netzpolitik.org*, October 16, 2018.

are frequented by thousands, if not tens of thousands of people every day, which would mean a range of false alarms on a daily basis. If one million people would be scanned by the system every day, the system would currently produce at least one thousand false alarms on a daily basis. Despite being aware of this circumstance, the ministry regards this risk as being acceptable and points to future improvements of the system. An extended and continuous usage of recognition systems has thus been recommended by the relevant police authorities and is met with approval by the ministry of interior. The ministry has dropped the general question, if the system should be used at all, it is now rather to be evaluated, under which circumstances and to which extent the recognition system should be introduced (e.g. at all big railway stations and airports).[179] That facial recognition technologies will be used in the future became ever more likely with the formation of the new German government in the spring of 2018 who established in its coalition agreement that, "intelligent video surveillance can be an enhancement," and that IT structures should ensure that so-called 'endangerers', "can be identified all over Europe."[180]

Although recognition software has evolved, the problems, which such facial recognition systems constitute from a rights perspective, are still the same as in 2006. When the faces of thousands (and maybe soon millions) of individuals are scanned and analyzed, a range of human rights might be undermined by such measures. First of all, by being publically surveyed, anonymity in public place is counter-acted, which constitutes a reduction of privacy. Moreover, freedom of movement is undermined if one cannot move in public without being recognized (or without the worry to be recognized). Additionally, in cases of such technologies being used in areas that are venues of demonstrations or assemblies, the rights to freedom of expression, freedom of association and freedom of assembly are diminished.[181] Indeed, the Bavarian CSU is already working on implementing legal options for the usage of facial recognition at demonstrations in the south German federal state.[182]

Such limitations of guaranteed rights could only be justified from a legal position if it could be convincingly argued that they fulfill the demands

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[179] Angela Gruber, "Überwachung in Deutschland."

[180] Koalitionsvertrag zwischen CDU, CSU und SPD, 19. Legislaturperiode, 126.

[181] The German Bar Association criticized the plans for constituting grave encroachments on civil rights. Spiegel Online, "Berliner Südkreuz: De Maizière verlängert umstrittene Tests zur Gesichtserkennung," December 15, 2017. And, Berlin's Data Protection Commissioner pointed to such risks in connection with the usage of facial recognition as well, see Sonnenholzner, "Vom Flop der Foto-Fahndung."

[182] Sascha Lobo, "Supersicher im Superüberwachungsstaat: CSU-geführtes Innenministerium," *Spiegel Online*, February 28, 2018. http://www.spiegel.de/netzwelt/web/horst-seehofer-und-das-super-innenministerium-ueberwachung-im-grossen-stil-a-1195814-druck.html.

for a limitation of the affected rights, as defined in the relevant legally binding rights treaties (ECHR and ICCPR). However, it appears questionable if that is the case. One of these demands is that limitations should not go further than what is necessary (in other words, they need to be proportionate). As the ECtHR clarified in 1988, limitations of privacy rights must be proportionate to the legitimate aim pursued, in order to be eligible. And again, it deems unlikely that this demand for proportionality is upheld, given the high number of people that will potentially be covered by the tested systems. Thousands if not hundreds of thousands or millions of people would be scanned by recognition technology on an everyday basis. For sure, the threat of terrorism is real, Germany witnessed some terror attacks in recent years, the worst at Breitscheidplatz in Berlin, and trying to tackle the threat of terrorism is a legitimate aim. However, it has in the past been evaluated to be non-proportionate by relevant courts to scan information of millions of people, even in the face of a general terror threat, in order to find information on a few dangerous individuals, as e.g. the case law on data retention laws shows (see above). Furthermore, the usage of facial recognition systems might be in collision with the EU's new General Data Protection Regulation, since the regulation demands that citizens must give consent in order for their personal data to be used and processed. Furthermore, individuals are demanded to be able to control the usage of their personal data, have an insight into how data is used and be able to withdraw consent of data usage in an easy way.[183] All this appears not to be given for currently planned usage of facial recognition. Thus, facial recognition systems might not only clash with valid European legal standards of human rights but also the latest EU legislation on data protection. Based on these points, it would appear questionable to claim that the widespread usage of facial recognition technology, covering thousands or millions of people, would not run into legal problems.[184]

The measure of facial recognition technology is, in any case, highly questionable from a spirit of rights position. To not be able to move in public space without being recognized and thereby being under a certain amount of control by state organs clearly collides with the wider human rights aim of freedom. The state does not live up to its obligation to protect individuals' social space and to provide a maximum of freedom and opportunities. Rather, not only will thousands of innocent passers-by be covered by the system, due to a still existent error margin of at least 0.1 percent, many will

[183] Eden Gillespie, "Are you being scanned? How facial recognition technology follows you, even as you shop," *The Guardian*, February 24, 2019. https://www.theguardian.com/technology/2019/feb/24/are-you-being-scanned-how-facial-recognition-technology-follows-you-even-as-you-shop.

[184] Several NGOs have announced to charge the practice of facial recognition in front of relevant courts, especially if German authorities will go through with using them on a regular and continuous basis.

see themselves be falsely marked as a threat by the system. The consequences of such errors for innocent individuals cannot be foreseen, but would with all probability lead to a high number of additional police searches and questionings of innocent individuals at surveyed spots, possibly additional covered surveillance of such individuals and potentially unjustified detentions. Therein, the measure threatens to erode various individual rights (rights to privacy, freedom of expression, association, assembly or movement) and rule of law standards. Furthermore, the measure collects, again, more power in the hands of the state (and big companies) enhancing the state's control over its population and moving power away from the individual.[185] However, it is an objective of the idea of human rights to enable and empower individuals, not institutions of power such as state authorities (the spirit of rights ideal is rather for the state to set sufficient limits to its own power). This equals a decrease of democratic quality (in the sense of the word). And again, rapidly increasing state power is a threat to the structures of all democratic societies.[186] The wider aim of establishing equal justice in human societies is undermined as well, taking the still high amount of individuals into regard that will trigger false alarms by the system and will be faced with unjustified scrutiny. Facial recognition additionally undermines the possibility of individuals to freely enjoy their capabilities (e.g. in regard to social interaction and association, movement, or political engagement) to the fullest. For instance, free participation in democratic processes, a vital opportunity in every functioning democracy, might be endangered by such systems if used at demonstrations. A certain share of populations might as a result switch to more adaptive behavior. The general level of scrutiny towards authorities might thus start to decline. Effects on the freedom of association, which is a precondition for collective action and participation in civil society, follow with. The pursuit of (equal) dignity of every individual is arguably degraded as well by erecting large-scale public Panopticons in the form of recognition systems. Humans are not regarded as such (as ends in themselves), but rather as potential threats (or suspects) that need to be controlled. Again, it is not really possible to reach a self-perception of being free and of exercising one's right and one's capability to make use of one's bodily freedom if one owns the feeling of being under constant surveillance. Since the ability to move freely without being tracked add to a perception of dignity, tracking processes in effect undermine the general notion of dignity, the cornerstone aim of the modern idea of human rights.[187] In essence, facial recognition systems appear to constitute another

[185] Mitrou, "The impact of communications data retention on fundamental rights and democracy," 140. Torin Monahan, "Surveillance as governance: Social inequality and the pursuit of democratic surveillance," In *Surveillance and Democracy*, ed. by Kevin D. Haggerty and Minas Samatas (Oxon: Routledge, 2010), 91.

[186] Donohue, "Security and Freedom on the Fulcrum," 60.

[187] The ECtHR evaluated the tracking of movement as an interference in freedom of

exemption from the rights framework; however, unraveling this framework piece by piece is the essence of undermining the spirit of rights.

The same is valid for another potential future anti-terrorism measure, similar to facial recognition. Authorities have started to test systems that evaluate movements and behavior in real-time. For instance, the police in the German city of Mannheim currently conducts an experiment with seventy-two cameras installed in public areas that are supposed to trigger an automatic alarm (calculated by an algorithm) if an individual is behaving in a suspicious manner; this could be simple movements such as running or falling (or any behavior deviating from 'normal behavior'.[188] Facial recognition was not used here, but could in the future easily be integrated, at least from a technological standpoint. Moreover, effective facial and behavior recognition software could in the future be combined with other databases. For instance, in 2017, German police and intelligence authorities have gained automatic access to biometric pictures from passports (via new legislation).[189] It is not to be excluded that German intelligence units will start constructing their own biometric picture database based on such access rights.[190] The usage of the same in connection with facial recognition and behavior recognition would allow a direct, potentially real-time, connection of face, location, behavior, and name.[191] This would again have grave effects on privacy rights, the right to free movement, assembly, and expression, as well on general notions of dignity.

- **Police Laws**

Whereas a wide range of laws and policies that are relevant in regard to anti-terrorism have been adopted at the federal level, the specifics of the German political system provide for some relevant policies to be adopted at the state level as well. One example of an anti-terrorism law at the state level that

movement. See European Court of Human Rights, "Case of Uzun v. Germany (Application no. 35623/05) Judgment Strasbourg."

[188] Spiegel Online, "Rennen und Fallen sind in Mannheim bald verdächtig: Projekt mit intelligenten Kameras," February 15, 2018. http://www.spiegel.de/netzwelt/netzpolitik/mannheimer-weg-2-0-pilotprojekt-mit-intelligenten-kameras-startet-bald-a-1193622-druck.html. Kurz, *Die Datenfresser*, 135.

[189] Gesetzes zur Förderung des elektronischen Identitätsnachweises, Bundesgesetzblatt Jahrgang 2017 Teil I Nr. 46.

[190] Such a collection of millions of biometric data provides additionally for the danger of misuse of such data. On the one hand, state authorities might use these data more excessively than originally announced, and on the other hand, the danger exists that databases with biometric data might be hacked and used by third parties. Additional rights infringements could be initiated by such misuse. It is e.g. not to be excluded that biometric data collected by German intelligence would be swapped with intelligence organizations from other NATO states, the legal basis for this was in any case established with the BND law discussed above.

[191] Germany's Federal Data Protection Commissioner Peter Schaar voiced such concern in 2017, see Sonnenholzner, "Vom Flop der Foto-Fahndung."

deserves scrutiny from a human rights perspective is the recent Bavarian reforms of its police law, opening up for preventive detention. This will be my last example of questionable German anti-terrorism policies. Police laws have been revised in order to give police forces more competencies in other German states as well (e.g. Lower Saxony, Saxony, Hesse, Baden-Württemberg, and North-Rhine Westphalia). Although these laws naturally do not apply to all German citizens, they do apply to a considerable amount of people (thirteen million people in Bavaria alone). Therefore, and since some of these laws constitute considerable threats to human rights, the inclusion of an example of such a law in this analysis is necessary.

The recent wave of reforms of police laws in several German states, covering the majority of the German population, is a direct reaction to the BKA law verdict from 2016. Since the court decided that preventive policing measures are not per se invalid, the states reacted by establishing extended preventive policing competencies for the state police forces as well (which covers the vast majority of police forces in Germany, since all regular police forces are administered by the sixteen German states).[192]

With the adaption of recent laws by the Bavarian conservatives (CSU), such as the *Polizeiaufgabengesetz* (PAG, police task law), the Bavarian state opened up for new far-going competences in terms of search and surveillance measures.[193] Whenever the police evaluate a 'looming' danger to be existent, individuals can be searched, their phones wired or their online activity analyzed. Police forces are furthermore allowed to open letters and packages and to conduct extended DNA analysis. Such data can then be handed over to intelligence services as well. The police are allowed to use all these new competencies without the necessity of a concrete suspicion against individuals, e.g. in terms of concrete plans for a violent act. Rather, in order to use the new competencies, a judge must evaluate that the situation of a 'looming' danger (*drohende Gefahr*) is given.[194] The scenario of looming danger is a newly defined category of threat. It first appeared in the verdict of the German Constitutional Court on the BKA law in 2016. Looming danger ranks under the threat situation of a 'concrete' danger, thus falling short of the category of 'concrete' danger, which involves concrete plans of violence. Looming danger rather covers situations in which certain individuals are evaluated as a dangerous threat and willing to commit serious violent crimes and where a probability for such acts in the foreseeable future is evaluated to be given, but without that any concrete plans are known or can be sufficiently predicted (let alone proven). Again, these measures are to

[192] Wolfgang Janisch, "Wenn schon die Gefahr einer Gefahr ausreicht," *Süddeutsche.de*, February 18, 2019. https://www.sueddeutsche.de/politik/2.220/polizei-polizeigesetze-sicherheit-1.4333604.

[193] The Bavarian PAG (*Polizeiaufgabengesetz*) determines the competencies of the Bavarian police in terms of its task to actively diminish security risks.

[194] Janisch, "Wenn schon die Gefahr einer Gefahr ausreicht."

be seen as a mode of preventive policing, since individuals do not concretely have to be involved with violent plans in order to trigger mentioned measures, but simply be evaluated as potentially dangerous somewhere in the future.[195]

Earlier, in 2017, the Bavarian government had already opened up for another preventive measure, the option of preventive detention. Suspects and endangerers could then be imprisoned if they were evaluated to constitute a 'concrete' danger, in other words, if there is a good reason to believe that they are planning a concrete act of serious violence (they are evaluated to commit a crime soon, but have not yet committed one). This preventive detention can, in theory, run indefinitely (a judge is, however, re-evaluating the detention every three months).[196] The new police task law from 2018 now adds the possibility to carry out preventive and potentially indefinite detention in cases of looming danger as well (thus lowering the threshold from the previously demanded concrete danger), e.g. in cases when an individual violates demands to wear an electronic tag.[197] A report from August 2018 showed that the measure of preventive detention without charges had until then been used in eleven cases.[198] The measure of indefinite detention had already been proposed in the German context after the attacks in Madrid and London in 2004 and 2005. The Interior Minister at the time, Otto Schily, demanded "preventive detention for suspected foreign terrorists without charge or trial" (in other words: indefinite detention). His suggestion did, however, not receive sufficient support in the German parliament.[199]

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[195] Bundesverfassungsgericht, "Leitsätze zum Urteil des Ersten Senats vom 20. April 2016 - 1 BvR 966/09." Frida Thurm, "In Bayern droht bald überall Gefahr," *Zeit Online*, March 28, 2018. Lisa Schnell, "Die wichtigsten Fragen und Antworten zum Polizeiaufgabengesetz," *Süddeutsche.de*, May 15, 2018. Süddeutsche.de, "Bayern als Vorbild," May 24, 2018. https://www.sueddeutsche.de/politik/polizeiaufgabengesetz-bundeslaender-polizeigesetz-1.3989943.

[196] Frida Thurm, "In Bayern droht bald überall Gefahr." Lisa Schnell, "Die wichtigsten Fragen und Antworten zum Polizeiaufgabengesetz." Janisch, "Wenn schon die Gefahr einer Gefahr ausreicht."

[197] Anna-Elisa Jakob, "Polizeiaufgabengesetz in Bayern: Das steht wirklich drin," *Merkur.de*, May 21, 2018. https://www.merkur.de/politik/polizeiaufgabengesetz-in-bayern-steht-wirklich-drin-inhhalt-9887440.html.

[198] Lisa Schnell, "Präventivhaft: Elf Personen in Bayern ohne Anklage im Gefängnis," *Süddeutsche.de*, August 16, 2018.

[199] Heinz, "Germany," 169.

However, another way of dealing with the problem of endangerers was established in 2004 via a German Immigration Law (*Zuwanderungsgesetz*). The law established the opportunity to deport foreigners who are evaluated as posing a threat to German society. In order to deport such a person no imminent danger must be given, it is enough if the person receives a prognosis of constituting a danger "based on facts." The German Constitutional Court approved the practice in a 2017 judgement. However, the law is still questionable out of two reasons. First, it reinforces the German anti-terrorism focus on Islamist terrorism and feeds thereby into the tendentious focus of German authorities discussed earlier. Second, since

Years later, the measure has now been implemented in German anti-terrorism legislation (at the state level). That this is happening at a time when IS terror is in the decrease shows, once again, that the implementation of new anti-terror legislation is not necessarily contingent on the actual development of threat potentials, and underlines the development of an ever-growing arsenal of anti-terrorism measures.

I would like to argue that the category of looming danger is an odd category. It is a rather vague concept or category since it is logically somewhere in between a concrete danger and no suspicion at all. Whereas the category of concrete danger points to current or imminent danger, operating with concrete indications for plans of serious violence (coming close to certainty), the concept of looming danger operates based on probability evaluations about the future behavior of individuals, without clear indications for future plans. Looming danger accordingly rests on non-concrete suspicions and triggers rights invasive measures. It points to individuals who are evaluated as radicals and as likely to commit violence in the foreseeable future, however, how far this future is away is not clearly defined (e.g., hours or months?).[200] The broad nature of the concept of looming danger further opens up for the potential usage of the concept in connection with many different individual cases, especially since the Bavarian authorities seem to interpret the concept of looming danger much wider than the German Constitutional Court initially indicated when it delivered the concept in its 2016 BKA law verdict. For instance, whereas the court clearly confined the concept to be used only in instances of terror threats, the Bavarian law opens up for other areas of usage as well (e.g. the protection of 'considerable property' or sexual self-determination).[201] The Court furthermore delivered some concrete examples for the usage of the concept, which should demonstrate its applicability. One example was the return of IS fighters from Syria. However, the Bavarian authorities open up for the usage of the concept on all individuals that are evaluated as violence-

individuals can be deported, without having committed a crime yet, the practice intensifies trends towards preventive policing. William Hiscott, "New German Migration Regime. An Analysis," Multicultural Center Prague, February 2004. Zeit Online, "Abschiebung islamistischer Gefährder rechtmäßig," August 22, 2017. https://www.zeit.de/gesellschaft/zeitgeschehen/2017-08/gefaehrder-bundesverwaltunggsericht-islamisten-abschiebung-bestaetigung.

[200] Thus, one might ask when a danger is not looming? Janisch, "Wenn schon die Gefahr einer Gefahr ausreicht."

[201] Bayerische Staatskanzlei, "Gesetz über die Aufgaben und Befugnisse der Bayerischen Staatlichen Polizei (Polizeiaufgabengesetz – PAG): Artikel 11." Neue Richtervereinigung, "Die drohende Gefahr im Polizeirecht," June 2018. https://cdn.netzpolitik.org/wp-upload/2018/08/2018_06_NRV_FG_VerwR.pdf. The police law can thus be evaluated as a side-effect anti-terrorism law as well, as it not only extends the options of police forces in cases of terror threats, but also in several other areas of crime.

prone extremists.[202] Thus, all individuals who might be evaluated as in some way dangerous, but who cannot be connected to any concrete plans of violence would face the risk of being pertained by measures of preventive detention. There is, furthermore, no guarantee that the participation in a demonstration or utterances in social media are exempted from being included in such evaluation of looming danger.[203] As mentioned, some other German states have sharpened police laws as well. No state has produced a law that is as far-going as the Bavarian one.[204]

From a legal perspective, the vagueness of the concept of looming danger makes it tricky to evaluate the concept against preconditions for derogating from the right to liberty as established in relevant human rights documents. If one does not really know how dangerous a 'looming danger' is, how can one evaluate if it justifies a rights derogation in order to prevent a situation of public emergency "threatening the life of the nation" (one of the central demands for derogating from rights according to the ICCPR and the ECHR).[205] Since the measure of preventive detention is extremely far-reaching, it could only be justifiable if a concrete emergency situation is given, including knowledge about concrete plans of violence by specific individuals. This is, however, not the case with preventive detention based on a vague concept such as 'looming danger'. This vagueness and the fact that the concept of looming danger rests largely on the discretion of police forces can lead to misuse.[206] Additionally, in those cases when suspects are released after a few months, the question is how those cases shall be handled.

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[202] Constanze Kurz, "Vorverlagerung von Eingriffsbefugnissen: Die "drohende Gefahr" in Polizeigesetzen," *Netzpolitik.org*, August 8, 2018. https://netzpolitik.org/2018/vorverlagerung-von-eingriffsbefugnissen-die-drohende-gefahr-in-polizeigesetzen/.

[203] Amnesty, "Amnesty über Polizeigesetz-Reformen: Das ist ein langsamer Abschied von der Rechtssicherheit," https://kattascha.de/amnesty-ueber-polizeigesetz-reformen-das-ist-ein-langsamer-abschied-von-der-rechtssicherheit/.

[204] Nevertheless, some questionable measures have been implemented in other states as well. For instance, Lower Saxony introduced the possibility to preventively detain endangerers for up to seventy-four days (the detention is first limited to thirty days and can then be extended by a judge). The measure is specifically aimed at potential acts of Islamist terrorism by Islamist endangerers. North-Rhine Westphalia likewise increased preventive detention of endangerers from forty-eight hours to thirty days and additionally allowed for the surveillance of mobile phones and computers in situations of individual behavior establishing a 'concrete probability' of a threat. Süddeutsche.de, "Bayern als Vorbild," May 24, 2018.

[205] Furthermore, additional legislation is in case of concrete plans for violence unnecessary, since the preparation of a terrorist act is already a felony according to German law. German Criminal Code (*Strafgesetzbuch*), Article 89a. https://dejure.org/gesetze/StGB/89a.html.

[206] For instance, in June 2018 a leftist protester was detained in the run up to protest against an AfD party convention, based on the argument that the person had "committed crimes in the past." Amnesty, "Amnesty über Polizeigesetz-Reformen."

Will such individuals be detained again after a while? And if not, what would the purpose of detaining them have been in the first place?[207]

Furthermore, the measure of indefinite detention existed in the UK as well for a few of years after 9/11 and was ruled to be in violation of the rights to liberty guaranteed by the ECHR (art. 5) in 2004. Back then, the British House of Lords Judicial Committee decided that the right to liberty was breached and that this breach could not be defended as a proportional derogation from rights obligations since the Committee evaluated that a state of emergency allowing for a derogation of this right was not observable in the UK at the time. Now, if one takes into regard that the threat level in the UK in 2004 was at a similar level or arguably higher than currently in Bavaria (or the whole of Germany for that matter), a court using the same conditionality would potentially come to the same verdict on the Bavarian version of indefinite detention. Thus, the law might be declared as being in violation of legally binding human rights obligations (in this case provided by the ECHR). Indeed, several groups and parties have announced to challenge the Bavarian law in front of the German Constitutional Court. This legal process is, however, still in the beginning. Still, as the British and the Bavarian measures of indefinite detention are rather similar, and as both relate to the ECHR, it can be claimed that they might meet the same legal fate. Indeed, German law professor Matthias Baecker expects the Constitutional Court to declare the provision of preventive and indefinite detention for invalid, based on a breach of the right to liberty.[208]

From a spirit of rights perspective, the measure of preventive detention is problematic. Preventive detention interferes with one's right to liberty and the (physical dimension) of the rights aim of freedom. It stands, furthermore, in opposition to the wider rights aim of justice, since it appears unlikely that the practice of detaining individuals *before* they have committed a felony reflects this wider aim of human rights. The detention measure additionally collides with the idea of pursuing a maximal amount of dignity for all humans. If individuals in a society have to wonder whether they might be detained, although they are innocent from a legal perspective, the idea of a dignified life in a free and democratic society must be regarded as damaged (since it is a crucial characteristic of every free society that its members do not have to live with such worries). Since detention brings individuals to their most vulnerable status (severely interfering with one's notion of being regarded as a dignified person), it is essential that detention

[207] One could moreover point out that a detention of radicals might be proving counter-productive since research has shown that prisons are one of the most effective places of recruitment, especially in terms of Islamist extremism. Nadine Zeller, "Radikalisierung statt Resozialisierung: In Jugendgefängnissen verbreitet sich der Salafismus." *Allgemeine Zeitung*, February 25, 2018 http://www.allgemeine-zeitung.de/lokales/rhein-main/radikalisierung-statt-resozialisierung-in-jugendgefaengnissen-verbreitet-sich-der-salafismus_18542353.htm.
[208] Janisch, "Wenn schon die Gefahr einer Gefahr ausreicht."

is only triggered under absolute necessity and under the principles of rule of law. If this is not provided, (as is arguably the case here) the wider rights aim of justice is undermined. Furthermore, the detention practice undermines the capabilities of social interaction, of moving freely and of being treated in a dignified way. Again, similar to some of the other cases presented above, the power of the state versus the individual is enhanced instead of viable boundaries of state power being defined. Via preventive detention, the state does not provide a notion of individual protection that emanates from rights frameworks, but rather the opposite. If the measure of preventive detention would be predominantly used against members of a certain suspect group (as could arguably be feared), the measures' conflict with the spirit of rights would naturally be aggravated. In essence, preventive detention constitutes another exception to enshrined rights norms.

- **Summarizing observations**

Some general observations of German terrorism policies post 9/11 can be made based on the previous analysis.

First, a trend towards more extensive security measures is observable in Germany since 9/11, a considerable amount of new anti-terrorism legislation and measures has been adopted. This is noteworthy, since Germany already possessed a range of anti-terrorism policies beforehand, due to its past with RAF terrorism.[209] Germany has seen a general trend towards more data collection and data sharing, more surveillance, extended preventive policing and increased centralization of information and competencies (e.g., via the GTAZ or the central anti-terrorism file or competencies being located at the BKA instead of the sixteen state police forces).[210] Several of these new policies and measures are in conflict with human rights standards (often legally, but especially in terms of the spirit of rights). Thus, German policymakers were, and still are, willing to go quite far. This trend is consistent, independent of the exact constellation of the German government. All German governments holding office since 9/11, be it the red-green coalition (sitting until 2005), the Christian Democrat-Liberal coalition lasting from 2009 until 2013, or the Christian Democrat-Social Democrat coalitions (from 2005-2009 and again since 2013), were implementing laws and measures that aimed at strengthening security by taking a loss of liberties into account.

Especially noteworthy is the tendency of German legislators to undermine the rights of data protection and privacy (which often has repercussions on the rights to freedom of expression, assembly, association, movement and the right to be free from discrimination). The German

[209] Hellmuth, *Counterterrorism and the State*, 123.
[210] Ibid., 123-124. Such centralization might provide for some additional effectiveness of anti-terrorism, but it decreases the level of checks and balances in terms of security policy.

government implemented a range of anti-terrorism policies that conflict with legal privacy rights norms and data protection standards (e.g. set forth in the country's constitution and the CFREU). Examples are legislation and measures such as the implementation of biometric data in ID cards and passports, dragnet investigations, data retention laws, facial recognition, and surveillance measures of German intelligence. This circumstance is not very surprising when reflecting on some remarks of leading members of German governments in the course of the years after 2001. For instance, Otto Schily, the German Minister of the Interior in the years after 9/11, declared that the "principle of protecting the people's personal data must not stand in the way of fighting against crimes and terrorism."[211] In 2006, Merkel produced a remarkable bloomer when she claimed, "actually everything is going fine, still we need more surveillance."[212]

A range of these new security measures in Germany seems to be supported by a majority of the population, at least partly or at times of crisis. For instance, confronted with the scenario that a terror attack was about to happen, in a 2006 ISSP survey, seventy percent agreed with the authorities being allowed to tap telephone conversations (thirty percent stated that authorities definitely should have this option, forty percent answered 'probably').[213] After the attacks in Paris in November 2015 and on a German tourist group in Istanbul in 2016, a survey by infratest dimap found that seventy percent of Germans were in favor of a general intensification of surveillance measures. Eighty-two percent were in favor of intensified surveillance of public areas.[214] However, not all polls reflected a supportive

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[211] Cited in Lee Dembart, "the end user / A voice for the consumer: Privacy undone," *New York Times*, June 10, 2002.

[212] Trojanow and Zeh, *Angriff auf die Freiheit,* 98 [translation]. The impression that data protection is not a priority for the German government was strengthened in connection with the ECJ's ruling on the so-called 'Safe Harbour' agreement between the EU and the US. The ECJ ruled that European data cannot be evaluated as safe with American companies, due to American security organs forcing such companies to give out European data. However, other than the ECJ the German government did not show any concern in this direction in the years up to the ruling of the ECJ. Furthermore, whereas the ECJ did make use of information leaked by Edward Snowden in the process, the German government, as well as the German Federal Public Prosecutor did not act on the allegations made against the NSA. As justification the mentioned German authorities argued that the leaked documents would not be original documents and that the NSA had not confirmed the authenticity of the documents (the Federal Public Prosecutor thus evaluated that there would be no basis to suspect the NSA of breaching the rights of German citizens in first place). Court of Justice of the European Union, "Press Release No 117/15," October 6, 2015.
Thus, the German authorities were very reluctant to act on foreign surveillance. However, in theory, the government has the duty to prevent the German citizenry from all potential harms; this includes surveillance by foreign agencies.

[213] Guasti and Mansfeldova, "Perception of Terrorism and Security and the Role of Media," 13-14.

[214] Infratest dimap 2016, "ARD-Deutschlandtrend," January 2016.

attitude on harsh anti-terrorism among the German population. For example, when asked about the potential measure to detain terror suspects indefinitely without trial 'only' forty-six percent agreed.[215] Moreover, the German population does show concern about surveillance at times, especially foreign surveillance. When the surveillance practices of NSA and GCHQ were revealed in 2013, many Germans showed concern over the issue. A survey from August 2013 showed that many Germans were critical of the revealed mass surveillance, fifty-six percent of the population were very concerned or somewhat concerned about NSA surveillance, and fifty-one percent stated that they did not want 'somebody to be able to check what I am doing on the internet.'[216] Thus, whereas Germans often seem to support the government's course in anti-terrorism in various surveys, it is important to emphasize that surveys on anti-terrorism do not always deliver a clear picture in Germany. And, even if majorities of the population (especially at times of intensified threat perception) would agree with far-reaching and even rights-breaching anti-terrorism policies, such a majority opinion would not legitimize rights invasive policies. A democratic government is, in general, supposed to defend a certain minimum standard of rights, irrespective of the actual public majority opinion. Thus, human rights obligations are not to be negated, even if a majority should be in agreement with, or demand, a diminishing of rights standards.

Second, in the course of the development of German anti-terrorism, the focus has shifted from international terrorist networks to home-grown (glocal) terrorism.[217] In reflection of this, the focus shifted from pursuing potential members of international networks (as e.g. via the dragnet investigations in the first years after 9/11) to preventive policing and preventing radicalization.[218] Preventive policing here refers to measures that are supposed to track down and control radicalized and violence-prone individuals (also called 'endangerers'). Thus, police forces are not supposed to wait for concrete dangers to occur anymore but are expected to actively search for dangers (concrete or looming).[219] Examples of an enhanced focus on preventing radicalization are easily found in the newest policymaking,

[215] Guasti and Mansfeldova, "Perception of Terrorism and Security and the Role of Media," 13-14.
[216] Allensbach.de, "Wirkungslose Aufregung," 2013. http://www.ifd-allensbach.de/uploads/tx_reportsndocs/August21_Aufregung.pdf.
[217] As Jytte Klausen explains, the term 'home-grown terrorism' is somewhat misleading, since many Islamist terrorists adapt a local narrative to a global ideology or movement. The term 'global' is thus more fitting. Jytte Klausen, "Panel 2 - What the New Administration needs to Know About Terrorism & Counterterrorism," (presentation, 2017 Georgetown & St. Andrews Conference, Washington, January 26-27, 2017).
[218] This shift of focus follows an international trend and could be detected as well for the UK.
[219] Control measures applied to endangerers include restrictions on residence, electronic tags or even preventive detention. Janisch, "Wenn schon die Gefahr einer Gefahr ausreicht."

e.g. the explained measures of facial recognition, preventive detention or BKA surveillance. Additionally, in 2016, following the Islamist terror attacks in Germany that year, Chancellor Merkel presented a new nine-point plan on terrorism, including plans for an 'early-warning-system' in relation to the radicalization of asylum seekers.[220] Furthermore, in March 2017, the German government, again, published plans to intensify efforts to prevent radicalization or to de-radicalize individuals. 180 million Euros were budgeted for this purpose. One of the focal points of these efforts was the de-radicalization or prevention of radicalization of individuals in German prisons.[221] This trend is a reaction to the context of terror attacks and failed terror attacks being overwhelmingly planned by individuals who are residents of the country, instead of entering the country with violent purposes, as well as terrorists being often only loosely attached, or not attached at all to international terror networks (e.g. individuals who commit terror attacks inspired by IS terrorism).[222] The focus of German authorities has in this overwhelmingly been on Islamist terrorism and therein the Muslim minority in the country, reflecting a tendentious threat perception and policy approach, setting the groundwork for discriminatory tendencies.[223] However, this reflects a breach of the state's obligation to uphold a rights standard as high as possible for *all* citizens or residents. All individuals are supposed to enjoy the same amount of rights, and often it is especially minorities that deserve protection rather than heightened scrutiny.

Third, although terror threats change over time, extended competencies of police and intelligence institutions are not rolled back, even if threats decrease. As mentioned, when Germany entered a quieter phase in terms of terrorism during the zero-years, extended provisions were not rolled back. Rather, provisions were kept alive by renewing existing sunset clauses. Furthermore, even such policies that once have been abolished on the order of courts (the Constitutional Court or the ECJ) tend to surface again, in slightly remodified fashion, after some time. One example is here the German legislation on data retention, which had been ruled invalid twice and

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[220] Die Welt, "Das ist Merkels Neun-Punkte-Plan zur Terrorbekämpfung," July 28, 2016. https://www.welt.de/politik/deutschland/article157361576/Das-ist-Merkels-Neun-Punkte-Plan-zur-Terrorbekaempfung.html.

[221] Nadine Zeller, "Radikalisierung statt Resozialisierung." However, coordination of such de-radicalization programs is often not given at the federal level, as all sixteen states run independent de-radicalization programs (this is also the case concerning de-radicalization in prisons).

[222] Janisch, "Wenn schon die Gefahr einer Gefahr ausreicht."

[223] Therein, the German authorities' approach reflects the negative perception that a big share of the German population holds via Muslims and Islam. Up to fifty percent of the German population are susceptible for Islamophobic tendencies. Özlem Topçu, "Über 50 Prozent der Deutschen sind anfällig für Islamfeindlichkeit," *Zeit Online*, March 22, 2019. https://www.zeit.de/gesellschaft/zeitgeschehen/2019-03/diskriminierung-muslime-islamfeindlichkeit-deutsche-kai-hafez.

enjoyed a comeback nonetheless. Another example is the dragnet investigation which was declared unconstitutional in 2006 and re-implemented via the BKA law (although in a different form) in 2008. Another example of a policy enjoying a comeback is a provision in the new Bavarian police law that, e.g., allows police forces to stop a vehicle by use of heavy weapons or explosives in order to prevent an immediate terror attack (for instance in a scenario when a truck would try to drive into a crowd as seen during the terror attack in Nice in 2016). This would according to the law still be possible even if the death of passersby would be a probable outcome.[224] This provision reflects the Air Security Law discussed above (and creates human rights problems in the same fashion).[225]

Fourth, the Constitutional Court and the ECJ have in general been quite critical of implemented anti-terrorism legislation in Germany. The courts often sought to halt a loss of liberty and have therein functioned as a guardian of individual rights. Several times after 9/11, the highest German court declared anti-terrorism laws and measures for invalid, in part or in whole. It has thus taken its role as a judicial watchdog of potentially extensive anti-terrorism policymaking serious.[226] The often rigid approach of the German judiciary in terms of rights problems in the course of anti-terrorism rests in part in the country's special history of National Socialist state crimes, which triggered an emphasis on upholding rule of law in the following decades.[227] One might now claim that when the courts have curtailed rights invasive policies and measures, the political system as a whole is working, reflecting a separation of powers in which the executive would, at times, push for excessive laws, the legislature would adopt them and the judicative would roll entire laws or individual provisions back and set boundaries for reformed or new laws. However, I would argue that this does in essence not reflect a working system (or at best only partly). First, courts can only become active after laws have been adopted, and normally years pass between the adoption of a rights invasive law and a verdict by a court that might declare such a law for invalid. Thus, during those years rights-invasive measures are carried out, although they are violating valid rights norms (in both a legal and spirit of rights sense). Second, courts do not always act on rights invasive measures, some policies or measures might never be challenged by claimants in front of a court and thus the judiciary can in such cases not perform its watchdog role. Third, both in the German case and the British case, legislators have often tried to circumvent negative court verdicts by adopting new legislation that is very close, yet not identical

[224] Janisch, "Wenn schon die Gefahr einer Gefahr ausreicht."
[225] Because these policies return after they had been legally or politically dead before, one might dub them 'zombie policies'.
[226] Beckedahl and Lüke, *Die digitale Gesellschaft*, 36.
[227] Heinz, "Germany," 174.

with previous abolished legislation. For instance, the German government has twice implemented new data retention laws after old laws had been declared to be in breach of civil rights by the Constitutional Court and the ECJ. Thus, although courts might fulfill their role, governments might simply adopt new slightly changed and slightly less invasive laws, opening up for a new long-lasting phase of judicial scrutiny before a new verdict might take down the new legislation as well. Fourth, the argument that the system is working when the judiciary is scrutinizing rights invasive laws, that the executive and the legislature have adopted, while (at least at times) being aware that such laws probably are unsustainable from a rights perspective, does not hold water. It is not only the responsibility of the judiciary to find orientation in rights norms, but of all political actors in a democratic system, including the government and the members of parliament. Thus, in a working system, it would be the exception rather than the rule, to see legislation being abolished based on court rulings declaring them in breach of basic civil and political rights. And lastly, as I have argued above in connection with my points on the spirit of rights, not every piece of legislation or every measure of anti-terrorism, that is legally permissible and that has not been declared illegal by a court can be regarded to be congruent with the aims and ideals of a human rights framework. It is indeed possible that legislation that is legally defendable still violates the bigger aims of what human rights are all about.

The fifth overall point on German anti-terrorism is that it clearly comprises important international connections. Germany has actively been pushing for enhanced European cooperation on anti-terrorism and Germany has continuously emphasized the special importance of anti-terrorism cooperation on a European level (mostly through the EU).[228] For example, already Joschka Fischer in his time as German Foreign Minister pushed for a common European response on terrorist threats, including a push for a European Arrest Warrant. Lately, the German Social Democrats demanded the creation of a common European anti-terrorism center in order to increase the coordination of European security institutions.[229] Furthermore, Germany itself has been influenced by European policymaking on anti-terrorism, as well as wider international trends on anti-terrorism. In effect, both European and American influences have been manifested. This is valid for both the institutional structure surrounding terrorism policies and the content of policies. For instance, the establishment of both the Central Anti-Terrorism File (*Antiterrordatei*) and the Common Terrorism Defense Center (*GTAZ*) was following a trend of implementing anti-terrorism structures inspired by

[228] Heinz, "Germany," 174-175.
[229] Hyde-Price, "Germany: Redefining its security role." Deutscher Bundestag, "Bundestag verabschiedet Antiterrorpaket," June 24, 2016, https://www.bundestag.de/dokumente/textarchiv/2016/kw25-de-terrorismus-428780.

examples established earlier in the United States. In terms of the content of terrorism policies, the enhanced focus on digital surveillance, data retention, and facial recognition systems, the use of biometric data, the increased intelligence cooperation, and extended possibilities of detaining terror suspects reflect international trends as well. Still, whereas international trends have clearly left a footprint on German anti-terrorism, Germany has developed measures and policies that are connected less with international trends but more with its own anti-terrorism tradition as well. An example is e.g., the resumption of dragnet investigations, that was invented in the 1970s.

Sixth, German policymaking after 9/11 provided for several examples of 'false' anti-terrorism policies. For instance, the Prevention of Terrorism Act (Security Package II) has been used by the German secret service organization BND as the judicial basis for collecting information among asylum seekers.[230] Furthermore, as described above, data obtained via data retention has been used in order to investigate in cases of housebreaking.[231] Again, data that have once been obtained will be used, sometimes for other purposes than originally intended.

To summarize, human rights have been undermined by anti-terrorism policies and practices of German authorities since 2001, endangering a range of rights of regular citizens, residents, and visitors, e.g. the right to privacy, freedom of expression, the right to life, the right to non-discrimination or the right to liberty. Both, the rights we find guaranteed in legally binding rights documents, and the wider aims of the idea of human rights were undermined (or were at least placed in a grey area in legal terms). I tried to show the first e.g. by pointing to recent court rulings detecting rights violations in anti-terrorism. I additionally argued that infringements of the aims and spirit of rights can be detected since a range of anti-terrorism policies undermine human dignity, equality, justice, senses of individual freedom (e.g. versus the state), as well as human capabilities. All of these are essential parts of the wider concept of human rights, which provides the groundwork for the more narrow legally binding rights norms. It is such policies that let criticism on German terrorism policies rise after 9/11. For example, Adrian Hyde-Price held already in 2003 that Germany headed towards a "'transparent citizenry", and Verena Zöller claimed that after 9/11 the "balance between liberty and security in Germany tipped towards the latter."[232] Certainly, far from all anti-terrorism policies collide with human rights standards, but, as seen above, German policymakers joined the trend of establishing an increasing amount of rights infringing measures, rather

[230] Christian Fuchs and John Goetz, *Geheimer Krieg: Wie von Deutschland aus der Kampf gegen den Terror gesteuert wird* (Reinbek: Rowohlt, 2013), 125.
[231] Friedhelm Greis, "Gesetzentwurf: Vorratsdatenspeicherung wird jetzt schon ausgeweitet," *Zeit Online*, May 10, 2017. http://www.zeit.de/digital/internet/2017-05/gesetzentwurf-vorratsdatenspeicherung-ausweitung-einbruch
[232] Hyde-Price, "Germany." Zöller, "Liberty Dies by Inches," 473.

than trying to tackle terrorism by non-infringing (and potentially more effective) means.

Chapter IV
The UK as an Anti-Terrorism Actor

This chapter will elucidate the British case of post 9/11 anti-terrorism. In the first section, I will present the context, focusing on the most important terror attacks from a British perspective, their perception, and the UK's overall anti-terrorism strategy. This context delivers some insight into the impetus for the initialization of a range of anti-terrorism measures and policies. It will furthermore give some indications for the threat level in the UK since 2001, an important point in terms of evaluating the justifiability of rights limitation and derogation. In the second section, I will elucidate human rights problems, which played out in the UK since 2001 in the course of anti-terrorism. Again, I will evaluate these policies towards their compatibility with the rights framework established earlier. Therein, this section will focus on policies of indefinite detention, a ban of the glorification of terrorism, mandatory surveillance in public institutions, data retention, intelligence surveillance, the Investigatory Powers Act and facial recognition systems. Some of these policy categories answer on categories discussed in the previous chapter, some are different. The differences are rooted in the different focal points and legacies of anti-terrorism in Germany and the UK (e.g., the German legacy of dragnet investigation vs. the British legacy of internment policies). Still, all categories are in alignment with the criteria set earlier (see the methodology section), pointing to policies that potentially affect a considerable amount of individuals or are of potentially severe character in terms of rights curtailment.[1]

UK Reactions to 9/11 and Post 9/11 Terrorism

In the UK, other than in Germany, terrorism was not a forgotten phenomenon before the attacks of 9/11. The perception in the UK was different, given the continuing PIRA terror.[2] After the Good Friday Agreement of 1998, the

[1] I will come back to differences and similarities between my three cases later on (see Chapter 6).

[2] The Provisional Irish Republican Army (PIRA) was the major terror threat to the UK for several decades, from the start of the Troubles in Northern Ireland in the 1960s until the end of the 1990s. In Northern Ireland, violence reemerged in the late 1960s. A civil rights movement (the Northern Ireland Civil Rights Alliance, NICRA) had campaigned against discrimination of the nationalist Catholic minority. Protests turned violent and subsequently wide-scale violent conflict broke. However, without including the unionist/loyalist community in the equation, the conflict cannot be properly explained, since the loyalist and the republican communities were "mutually antagonistic political communities." Violence and counter-violence of the two communities turned into a "self-fuelling dynamic of violence". The rationale of the PIRA was that by carrying out terrorist violence, the British could be brought to withdraw if they would feel that the costs of withdrawal were smaller in comparison to the losses the PIRA would inflict on them. The PIRA targeted British troops, members of the Royal Ulster Constabulary and politicians, mainly in Northern Ireland, but also on the British mainland. Civilian victims were taken into account. PIRA followed a strategy of escalation, especially between 1971 and 1975. This aggressive strategy included shootings and bombing campaigns, the most infamous example being Bloody Friday (July 21, 1972), when twenty-six PIRA bombs killed nine and

perception of being faced with an imminent terror threat faded in the UK as well. However, only for a short while. After the terror attacks in the US on 9/11 (killing 67 British nationals), a perception of being threatened by terrorism spread yet again, this time by Islamist terrorism instead of nationalist terrorism. This represented a clear change of threat perception since no Islamist terror attacks had been committed in the UK between 1995 and 2001.[3] Politicians and officials emphasized the threat of Islamist terrorism and

injured 130 civilians in Belfast in the course of just over an hour. The British government started deploying regular troops in 1969. Whereas the British troops were initially seen as neutral, they did get involved rather quickly into the daily violence and started to primarily fight the republican paramilitaries. The nationalist movement was, in general, met with harsh policies by British and Ulster authorities, the prime example being Bloody Sunday, when British Army forces killed fourteen civil rights activists in in Derry in 1972. This harshness can with hindsight be evaluated as counter-productive. According to an ex-IRA man, this response led to the British Army being "the best recruiting agent" of the PIRA. Richard English, *Terrorism: How to Respond* (Oxford: Oxford University Press, 2009). Despite fierce violence being committed, the British government upheld a secret strategy of engaging in negotiations with PIRA terrorists. Peter Williams, "Irish terrorism: the UK experience," In *Policing Terrorism*, ed. by Christopher Blake et al. (London: SAGE, 2012), 65. Andreas Bock, *Terrorismus* (Paderborn: UTB, 2009), 77. It was the willingness to break the rule of 'no negotiation with terrorists', that led to serious dialogue and consequently to the 1998 Good Friday Agreement. Andrew Heywood, *Global Politics* (New York: Palgrave MacMillan, 2011), 300. Statistics on the number of victims of the conflict naturally diverge. For example, English counts 3665 victims, whereas Todd Landman refers to 3,297 deaths (as well as more than 10,000 injuries, 15,000 bombs, and 35,000 shootings). These numbers do not include acts of terrorism on the British mainland, including assassinations and bombings. Disregarding these differences, these numbers give a clear picture of the widespread nature of violence during the Troubles. Todd Landman, "The United Kingdom: The Continuity of Terror and Counterterror," In *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, ed. by Alison Brysk and Gershon Shafir (Berkeley: University of California Press, 2007), 79. Richard English, *Armed Struggle: The History of the IRA* (London: Pan Books, 2012), 379.

Although PIRA constitutes the most commonly known and discussed 'source' of terrorism in the British context, Britain also dealt with other campaigns of terrorism in its empire after WWII. Examples are terror campaigns in Palestine (committed by the Irgun, LEHI, or Haganah), Cyprus (committed by the nationalist group EOKA) or Kenia (committed by members of the Mau-Mau uprising). J.A.S. Grenville, *A History of the World: From the 20th to the 21st Century* (London: Routledge, 2005). Randall D. Law, *Terrorism: A History* (Cambridge, UK: Polity Press 2009), 186. The New York Times, "Irgun's Hand Seen in Alps Rail Blast," August 16, 1947. The New York Times, "Irgun Bomb Kills 11 Arabs, 2 Britons," December 30, 1947. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001). Charles Foley and W.I. Scobie, *The Struggle for Cyprus* (Stanford: Hoover Institution Press, 1975). Toyin Falola, *Key Events in African History: A Reference Guide* (Westport: Greenwood Press, 2002). Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya (*New York: Henry Holt, 2005).

[3] Frank Foley, *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past* (Cambridge: Cambridge University Press, 2013), 28. David Omand, "What Should be the Limits of Western Counter-Terrorism Policy?" In *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English (Oxford: Oxford University Press, 2015), 64.

evaluated that an attack was very likely to occur. For instance, the then Director of the MI5, Eliza Manningham-Buller, claimed in a 2004 speech, that a serious and sustained terror threat existed. Ian Blair, Commissioner of the Metropolitan Police, agreed with this view in a statement in April 2005.[4]

The first post 9/11 UK experiences with Islamist terrorism killing British citizens were delivered by a couple of attacks taking place outside of the country. In 2002 bombings on the Indonesian island Bali killed 202 people and injured another two hundred. The attack was aimed at Westerners in nightclubs. Twenty-three British citizens were killed by the attack, carried out by members of Jemaah Islamiyah, allegedly in cooperation with Al-Qaeda.[5] In November 2003, bombings of the British consulate and an HSBC bank branch in Istanbul killed thirty and injured several hundred (the British consul-general was among the victims). The attack was committed by Turkish Islamists, albeit financially supported by Al-Qaeda.[6]

The feared attack by Islamist extremists on the British mainland occurred on July 7, 2005. Four suicide bombers exploded bombs in London's transport system, hitting three trains and a bus. All four terrorists were British residents and three of them British citizens. The bombs killed fifty-six people (including the bombers) and injured hundreds.[7] Although the attackers were inspired by al-Qaeda, they were not directly connected to the Islamist terror network.[8] Despite the previous public perception of being a potential target society of Islamist terrorism, the attack came as a shock to the British population. The attack "bloodily announced the true arrival of the post-9/11 era in England," as Richard English explains.[9] The fact that all attackers were British residents or citizens added to the shocking effect of the attack.[10]

Tony Blair, British Prime Minister at the time tried to reassure the population that "terror will not win", and that "we [the British] will hold true to the British way of life".[11] Blair thus insinuated that the attacks aimed at changing British culture and society. The then leader of the Conservative Party, Michael Howard, declared, "this country is completely united in our determination to defeat terrorism and to deal with those who are responsible for the appalling acts that we have seen today."[12] As a G8 summit took place

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[4] Barrie Sheldon, "9/11 and the UK response." In *Policing Terrorism*, ed. by Christopher Blake et al., (London: SAGE, 2012), 89-90.

[5] BBC, "Bali death toll set at 202," February 19, 2003. http://news.bbc.co.uk/2/hi/asia-pacific/2778923.stm

Tony Parkinson, "Bin Laden voices new threat to Australia," *The Age*, November 14, 2002.

[6] Foley, *Countering Terrorism in Britain and France*, 31.

[7] Sheldon, "9/11 and the UK response," 90.

[8] Ibid., 91.

[9] English, *Terrorism: How to Respond*, 56.

[10] Omand, "What Should be the Limits of Western Counter-Terrorism Policy?," 68.

[11] BBC, "Blair says 'terror will not win'," July 7, 2005
http://news.bbc.co.uk/2/hi/uk_news/politics/4659933.stm

[12] Ibid.

at the time of the attack, the G8 leaders delivered a common statement just hours after the bombings. The G8 leaders emphasized solidarity with the British by declaring that the blasts were "an attack not on one nation but on all nations and civilised people everywhere".[13] Thus, similar to reactions on 9/11, a wave of solidarity expressions was uttered. Blair further declared on behalf of the G8 leaders, that the "bombings will not weaken in any way our resolve to […] defeat those who would impose their fanaticism and extremism on all of us."[14] Thereby Blair delivered the official reasoning for additional counter-terrorism and anti-terrorism measures.[15]

Indeed, during a press conference on August 5, 2005, Tony Blair declared that "the rules of the game are changing", and argued for new thinking in face of terror threats, signifying a harsher policy line in order to prevent terrorism. The tone of British authorities and policymakers became more resolute in the aftermath of the attack in London. John Reid, then Home Secretary, held that [we] "may have to modify some of our freedoms in the short-run in order to prevent their abuse by those who oppose our fundamental values and would destroy our freedoms and values in the long-term."[16] The Head of the MI5, Eliza Manningham-Buller agreed: "The world has changed and there needs to be a debate on whether some erosion of what we all value may be necessary to improve the chances of our citizens not being blown apart as they go about their daily lives."[17]

As can be seen from the quotations above the proclamation of a game change included the UK government's understanding of human rights as a norm in this fight against terrorism. Human rights protection and effective terrorism policies were rather seen as policy options that exclude each other.[18] Indeed, human rights lost their status of importance in general policymaking

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[13] The Guardian, "Full text: G8 leaders' statement," July 7, 2005. http://www.theguardian.com/world/2005/jul/07/g8.july7

[14] Ibid.

[15] As mentioned earlier, scholars such as Conor Gearty, Adrian Guelke and Richard English have criticized Western politicians for generalizing violence against states as challenges "to the liberal democratic order itself," and for their lack of self-criticism in regard to the occurrence of terror attacks.

[16] John Reid, August 9, 2006, quoted in Landman, "The United Kingdom: The Continuity of Terror and Counterterror," 75.

[17] Manningham-Buller, September 1, 2005, quoted in Landman, "The United Kingdom: The Continuity of Terror and Counterterror," 75. However, to be fair, government voices demanding the importance of rule of law and freedom rights could be heard as well. For instance, when Jack Straw, Home Secretary at the time pointed out that: "we will have handed the terrorists the victory that they seek, if in combating their threats and violence, we descend to their level and undermine the essential freedoms and rule of law that are the bedrock of our democracy." Clive Walker, "Policy Options and Priorities: British Perspectives", In *Confronting Terrorism: European Experiences, Threat Perceptions and Policies*, ed. by Marianne van Leeuwen (The Hague: Kluwer Law International, 2003), 17.

[18] I will come back to the relationship between those two concepts in the discussion chapter of this thesis.

in the UK after 2001. The Labour government held the view that Islamist extremism could only be defeated by passing a series of harsh anti-terrorism laws, and often, the government bought into a discourse of danger. This allowed for measures such as indefinite detention to be adopted, or for the UK to construct a dense network of surveillance, undermining privacy rights and other human rights obligations (see below).[19]

The attacks of July 2005 clearly increased the threat perception in the UK. In a 2006 European Values Survey, the overwhelming majority of UK citizens (ninety-one percent) expressed that they feared a terror attack to occur in the course of twelve months 'somewhere in Europe' (forty-eight percent deemed this very likely, another forty-three percent likely). The ninety-one percent of UK citizens who feared such an attack constituted the highest value among the twenty-three European countries included in the survey. In the following years, the number of citizens fearing an immediately forthcoming terror attack slightly decreased, but still represented a big majority of UK citizens. In 2008, eighty-five percent deemed an attack for either very likely (thirty-one percent) or likely (fifty-four percent), which still constituted the highest number of the original twenty-three countries included in the survey.[20]

The UK has since 2005 witnessed a range other acts of terrorism on the British mainland, including some failed attacks. Already two weeks after the bombings on July 7, 2005, another suicide-bombing attempt took place in London. Arguably inspired by the 7/7 attacks, several suicide bombers planned to detonate bombs in London's public transport system. Luckily, only the detonators exploded and nobody was harmed.[21] Another failed attack, which gained prominence, played out in August 2006. Al-Qaeda affiliates had planned to explode several transatlantic planes - departing from the UK - mid-air (by use of liquid explosives). The British police disrupted the plan, which could have led to hundreds or more than a thousand victims.[22] London saw another failed bombing attempt in June 2007. Two car bombs were placed in the Haymarket area but were discovered before detonation.[23] A further example of a failed attack was an attempt to drive a car with explosives into Glasgow Airport on June 30, 2007 (the attempt was linked to the Haymarket plot). However, security-bollards stopped the vehicle before the building so

[19] Tim Dunne, "The Rules of the Game are Changing: Fundamental Human Rights in Crisis After 9/11," *International Politics*, Vol. 44 (2007): 280-281.

[20] Petra Guasti and Zdenka Mansfeldova, "Perception of Terrorism and Security and the Role of Media," Paper prepared for the 7th ECPR General Conference (2013): 9-10. In 2008, the threat perception was according to this survey slightly higher in Israel and Turkey, however, these countries had not been included in the 2006 survey.

[21] However, an innocent Brazilian citizen was shot and killed a day later by the police, as he was confounded with one of the perpetrators. BBC, "Attacks, escapes and arrests," July 11, 2007. http://news.bbc.co.uk/2/hi/uk_news/6752991.stm.

[22] Foley, *Countering Terrorism in Britain and France*, 30.

[23] Vikram Dodd et al., "Two car bombs found in London," *The Guardian*, June 29, 2007. http://www.theguardian.com/uk/2007/jun/29/terrorism.uksecurity

that nobody was seriously harmed (besides the driver of the car). All of these attempted attacks were afterward classified as attempts of Islamist terrorism.[24] Further attacks, still in the planning stage, were prevented by the authorities (the exact number is unclear, as well as many details on prevented attacks, a consequence of the secretive nature of anti/counter-terrorism bodies).[25]

After several years with an increased occurrence of Islamist terror attacks in Western states at the beginning of the twenty-first century (roughly between 2001-2006), the frequency of Islamist attacks in Western countries decreased for a number of years (roughly 2006-2011). Al-Qaeda, the organization responsible for the majority of big attacks in the first half of the zero years had lost momentum, both in terms of organizational structure and support. Still, the occasional Islamist attack took place in Western countries, without being coordinated by an overall organization. This picture changed once again with the start of an IS terror campaign, which to begin with stroke in the European periphery (e.g. Tunisia and Egypt), but finally started to target European capitals as well. Both, coordinated attacks and 'lone wolf' attacks are part of IS terrorism. Consequently, the threat perception of governments and the public in European countries rose again. For instance, the British authorities raised the official threat level triggered by Islamist terrorism in the UK from 'substantial' to 'severe' (the latter indicating that a terror attack is highly likely).[26] Accordingly, Theresa May, then the UK's Home Secretary, evaluated in 2015, that "a terrorist attack in this country [the UK] is now highly likely."[27]

An act of Islamist terrorism had already taken place in 2013 with the beheading of British soldier Lee Rigby in broad daylight in the streets of the inner city of London on May 22, 2013.[28] Rigby, who was off-duty, was attacked and killed with knives and a cleaver by two British men of Nigerian descent. The attackers remained with the body until police arrived, stating revenge for Muslims killed by British troops in Iraq and Afghanistan as their motive to passers-by. The perpetrators charged at the police as well, before

[24] Mark Townsend, Jo Revill and Paul Kelbie, "Terror threat 'critical' as Glasgow attacked," *The Guardian*, July 1, 2007. http://www.theguardian.com/uk/2007/jul/01/terrorism.world2

[25] In March 2017, UK authorities, however, reported that thirteen terror attacks would have been prevented in the UK since 2013, often based on information and hints form the public. BBC, "Security services 'prevented 13 UK terror attacks since 2013'," March 6, 2017. http://www.bbc.com/news/uk-39176110.

[26] 'CONTEST – The United Kingdom's Strategy for Countering Terrorism: Annual Report for 2015, 7.

[27] Foreword to 'CONTEST – The United Kingdom's Strategy for Countering Terrorism: Annual Report for 2014.

[28] According to the definition of terrorism used in this thesis this case qualifies for being labeled terrorism, whereas other definitions would refrain from categorizing this act as terrorism, since the target was not civilians but a soldier and police officers.

being shot and wounded.[29] Another terror attack that increased the threat perception in the UK played out in Tunisia. During a shooting at a tourist resort near Sousse in June 2015, thirty-eight people were killed and thirty-nine injured. Although this attack did not take place in the UK, the targeting of British nationals makes it relevant for the perception of threat in the UK (thirty of the thirty-eight killed and twenty-six of the thirty-nine wounded held UK passports). A single gunman with contacts to the organization Ansar-al-Sharia carried out the attack.[30] In 2017, the British public was struck by three IS-related attacks in the UK. During the first, in March 2017, the first bigger terror attack in the UK since 2005, an attacker drove a car into pedestrians on Westminster Bridge in London and subsequently stabbed a police officer at the parliament building. The attack killed five and injured nearly fifty. In May 2017, a bomb attack on a concert in Manchester killed twenty-two people, including many children and teenagers. Moreover, in June 2017, seven people were killed by terrorists on and around London Bridge, when the attackers drove into pedestrians and subsequently stabbed passersby.[31]

Although Islamist terrorism shaped the understanding and perception of terrorism in the UK after 9/11, non-Islamist terror attacks (or attempted attacks) took place as well in the UK. One example is a letter bomb campaign conducted by Miles Cooper a former caretaker, playing out in 2007. He sent letter bombs to institutions and companies, which in his opinion were taking part in building a surveillance state. The explosives were luckily only of minor magnitude and the victims suffered only minor injuries.[32] A series of incidents

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[29] Rashmi Singh, "Counter-Terrorism in the Post 9/11 Era: successes, Failures and Lessons Learned," In *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English (Oxford: Oxford University Press, 2015), 39. The Telegraph. "Lee Rigby murder timeline, by prosecution," November 29, 2013.
http://www.telegraph.co.uk/news/uknews/law-and-order/10483853/Lee-Rigby-murder-timeline-by-prosecution.html.

[30] Robert Mendick et al., "'Why weren't we told of Sousse suicide bomber?'," *The Telegraph*, July 4, 2015. http://www.telegraph.co.uk/news/worldnews/islamic-state/11718614/Why-werent-we-told-of-Sousse-suicide-bomber.html.

[31] Spiegel Online, "Westminster-Anschlag: Die Ereignisse in London im Überblick," March 23, 2017. http://www.spiegel.de/politik/ausland/london-die-ereignisse-des-anschlags-im-ueberblick-a-1140102.html
BBC, "Westminster attack: What happened," April 7, 2017. http://www.bbc.com/news/uk-39355108
The Guardian, "Manchester attack: UK threat level reduced from critical to severe – as it happened," September 21, 2017. https://www.theguardian.com/uk-news/live/2017/may/26/manchester-attack-arrest-police-search-accomplices-live. Caroline Davies, "London Bridge attack: last of eight victims identified as Xavier Thomas," *The Guardian*, June 7, 2017. https://www.theguardian.com/uk-news/2017/jun/07/london-bridge-attack-last-of-eight-victims-identified-as-xavier-thomas.

[32] This example is especially interesting, since it in its motive directly answered to increased anti-terrorism measures (surveillance). "BBC, Man convicted over letter bombs," September 27, 2007.

that can be categorized as xenophobic terrorism took place in 2013. Pavlo Lapshyn, a Ukrainian Ph.D. student, stabbed and killed an elderly Muslim and placed in the following months three bombs around Mosques in order to 'trigger a race war' as he confessed in court. The bombs did only by chance not injure anybody.[33] The UK public and the broader European public was shocked in June 2016 by a political murder, which must be categorized as right-wing terrorism. On June 16, 2016, Joe Cox, a British Labour MP, was stabbed and shot to death on open-street after a constituency meeting. The perpetrator had right-wing motives for committing the atrocity.[34] The death of Joe Cox shook the British public (albeit it was caught in an intense debate regarding the upcoming Brexit referendum). In June 2017, a right-wing extremist drove a van into the crowd outside of a mosque, killing one and injuring twelve.[35] Prevented right-wing attacks included e.g., an attack on a gay pride event in a pub in June 2017.[36]

Many of the mentioned cases triggered a vast echo in mainstream media, as well as social media and emphasized - together with cases of terrorism from other parts of the Western World - the threat of terrorism in the eyes of the British public. This is especially valid for the Islamist attacks. Clearly, Islamist terrorism is currently defined as the main terrorist threat in the UK, especially IS and individuals declaring allegiance to IS are seen as a severe threat (defined e.g. in the annual CONTEST reports). Terrorism by (Northern-) Irish dissidents is considered the second biggest terror threat, although it is perceived as being confined to Northern Ireland and by far not as severe as the threat by Islamists. The threat from right-wing extremists was for many years after 9/11 evaluated as relatively low.[37] This perception is potentially slowly starting to change in the UK, given the right-wing terror incidents mentioned above. Signs for such a change of perception can be

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[33] The Guardian, "Student gets 40 years for terror campaign against Muslims," October 25, 2013.
http://www.theguardian.com/uk-news/2013/oct/25/student-40-years-terror-campaign-muslims.

[34] Claire Phipps, Andrew Sparrow and Chris Johnston, "Jo Cox MP killed in West Yorkshire - how the day unfolded," *The Guardian*, March 13, 2018.
http://www.theguardian.com/politics/live/2016/jun/16/eu-referendum-live-osborne-brexit-budget-leave-tories. Dave Higgens and Amy Murphy, "Thomas Mair: The far-right extremist who murdered MP Jo Cox," *The Independent*, November 23, 2016.
https://www.independent.co.uk/news/uk/crime/thomas-mair-guilty-tommy-verdict-jo-cox-mp-murder-trial-court-latest-quiet-neighbour-a7434011.html.

[35] Kevin Rawlinson, "Darren Osborne jailed for life for Finsbury Park terrorist attack," The Guardian, February 2, 2018. https://www.theguardian.com/uk-news/2018/feb/02/finsbury-park-attack-darren-osborne-jailed

[36] Lizzie Dearden, "Ethan Stables trial: Neo-Nazi convicted of planning terror attack at gay pride event," The Independent, February 5, 2018.
https://www.independent.co.uk/news/uk/crime/ethan-stables-trial-latest-convicted-terror-offence-neo-nazi-far-right-gay-pride-cumbria-leeds-court-a8194996.html.

[37] CONTEST Annual Report for 2015, 7-8.

deduced from statements of high stake security officials, e.g., Mark Rowley Assistant Commissioner at the Metropolitan Police remarked in 2018 that "the right-wing terrorist threat is more significant and more challenging than perhaps the public debate gives it credit for," and pointed to a "growth of right-wing terrorism."[38] Additionally, the UK is planning to issue threat-level warnings for right-wing terrorism in the future as was reported in March 2019.[39]

Despite the described series of terror attacks, it is important to mention that the number of terror victims in the UK since 2001 has been rather low when compared to the number of victims counted during the Troubles. 2005 and 2017 were the outlier years, due to the attack in London in 2005 and several attacks in 2017. Otherwise, there were less than ten victims for each year between 2001 and 2015 according to data by the Global Terrorism Database (these data exclude British victims abroad, as e.g. caused by the attacks on Bali and Indonesia). The number of victims varied between sixty and 370 for all years between 1971 and 1992, most of them caused in Northern Ireland.[40] Nevertheless, the threat perception has been high regarding attacks on mainland UK. In the same context, the policies of the British state to tackle terrorism were both extended in scope and severity.

One of the cornerstones for British anti-terrorism since 2003 has been the British 'Counter-Terrorism Strategy' CONTEST (COuNter TErrorism STrategy).[41] I will shortly elucidate its major features. The UK developed a counter-terrorism strategy in the years after 9/11, in order to gain groundwork for its terrorism policy. The strategy was first drafted in 2003 by the British Home Office (e.g., under the collaboration of former GCHQ Director David Omand). It aimed at reducing the risk of international terrorism. It was made publicly available – in a revised version - only in 2006. Since then the strategy has been revised three times, the latest version stems from 2018; the main principles, however, remained the same. The CONTEST strategy contains four different categories or streams of action, called the 'four P's', these are, 'Prevent', 'Protect' 'Pursue' and 'Prepare'.[42] Prevent and Pursue are broadly

[38] Lizzie Dearden, "Four far-right UK terrorist plots foiled since Westminster attack, police reveal," *The Independent*, February 26, 2018. https://www.independent.co.uk/news/uk/crime/terror-attacks-uk-threat-far-right-national-action-isis-nazis-westminster-finsbury-park-a8229876.html

[39] Vikram Dodd, "UK to start issuing far-right terrorism alerts," *The Guardian*, March 19, 2019. https://www.theguardian.com/world/2019/mar/19/uk-to-start-issuing-far-right-terrorism-alerts

[40] Numbers retrieved from the Global Terrorism Database.

[41] Despite being labelled Counter-Terrorism Strategy, the strategy mainly contains anti-terrorism measures in the understanding of this thesis.

[42] CONTEST, The United Kingdom's Strategy for Countering Terrorism, July 2011. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97995/strategy-contest.pdf
Omand, "What Should be the Limits of Western Counter-Terrorism Policy?" 65.

speaking supposed to reduce the likelihood of terror attacks, whereas Protect and Prepare are supposed to reduce the vulnerability of the country to terror attacks.[43]

'Prevent' measures are supposed "to stop people becoming terrorists or supporting terrorism." Measures under this stream of CONTEST include the tackling of radicalization and the confrontation of ideologies that justify violence. Richard Chalk (from the British Home Office) denoted such efforts as trying to create a "counter-narrative space."[44] This includes e.g., the removal of radical online content. But also programs that attempt to reduce the likelihood of people turning to violence have been created.[45] In connection with radicalization, factors such as discrimination and disadvantage are taken into regard as well, pointing to underlying social issues. Andrew Silke evaluated that Prevent is the stream "most keenly aimed at winning the battle for hearts and minds."[46] Therein, Prevent is in part aiming at tackling root causes, with a clear focus on Islamist radicalism. However, control methods, such as detection and referral of individuals, carried out by state authorities are a large part of the stream as well.[47] For instance, in the latest years, UK authorities have started to demand public institutions such as universities or schools to report instances of seemingly radicalized individuals. This new approach non-surprisingly caused a wave of heated debate concerning the right of freedom of expression (see below).[48]

'Pursue' applies to methods aimed at "identifying and disrupting existing terrorist networks and operations."[49] Measures collected under Pursue are broadly aimed at curbing or stopping terrorist activity as early as possible. Intelligence is a vital instrument for this purpose, especially in order to identify and understand threats in the first place.[50] Thus, increased cooperation of intelligence services in order to strengthen the capabilities of identifying threats is a focal point of Pursue. Other focal points of Pursue are e.g., the

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[43] Despite the implementation of CONTEST, the UK saw further anti-terrorism legislation in the following years, as pointed out above.

[44] Richard Chalk, "Radicalisation, De-Radicalisation and Preventing Radicalisation," World Counter Terror Congress, London, April 19-20, 2016.

[45] Chalk, "Radicalisation, De-Radicalisation and Preventing Radicalisation."

[46] Andrew Silke gives the example of the Muslim Contact Unit, which was supposed to create positive links between the police and Muslim communities. Despite this important aim, the unit only consisted of eight officers (out of a staff of two thousand at the Counter-Terrorism Command of the UK). Andrew Silke, "The Psychology of Counter-Terrorism: Critical Issues and Challenges," In *The Psychology of Counter-Terrorism*, ed. by Andrew Silke (London and New York: Routledge, 2011), 12-14.

[47] Qurine Eijkman and Baart Schuurman, *Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation* (The Hague: ICCT, 2011). David Whittaker, *Counter-Terrorism and Human Rights* (Harlow: Longman, 2009), 95.

[48] Chalk, "Radicalisation, De-Radicalisation and Preventing Radicalisation."

[49] Silke, "The Psychology of Counter-Terrorism," 12.

[50] Whittaker, *Counter-Terrorism and Human Rights*, 95.

disruption of terror sponsors, or the collection of evidence in order to secure a conviction.[51]

'Protect' methods are, put simply, supposed to strengthen the UK's protection against terrorism by reducing the country's vulnerability. One measure for this purpose is enhanced border security. Another central objective is 'target hardening', the process of making it harder for terrorists to hit specific potential sites of terrorism. Especially critical infrastructure (facilities that would cause high disruption of public life if attacked), has received such 'target hardening' measures. Examples of relevant sites are the UK's transport system or energy supply system. The ever-increasing trend of surveillance of public places in the UK is related to Protect as well.

'Prepare' aims at mitigating the impact of terror attacks. 'Prepare' measures are resting on the assumption that not all terror attacks can be prevented. The creation of capacities to react to such attacks is thus the aim of the last stream. The focus is first of all on risk and impact assessment and the development of scenarios for attacks. Based on such assessment and scenarios, the construction of fitting response capabilities, as well as the provision of effective training to respond to potential terror attacks are the central aim of Prepare.[52]

The CONTEST strategy was met by criticism from both civil rights groups and parts of the media. Criticism aimed e.g., at the question whether non-violent protesting and dissenting could be criminalized, how far human rights restrictions should go in the course of anti-terrorism policymaking and whether the CONTEST strategy is simply a forerunner for further restrictions.[53] Since 2011 annual CONTEST reports have been implemented which follow up on recent developments in UK terrorism policy (in the framework of the CONTEST strategy).

Although the CONTEST strategy connects to specific measures that are proposed under each category, the overall framework of the strategy is rather broad. Thus, it appears that the strategies on terrorism are consciously constructed in broad categories by policymakers, so as to leave a high amount of leeway for adapting to specific situations and threats, narrowly defined strategies would limit the options of reacting on terrorism. However, too broad and vague strategies might lead to confusion among public security organs and administrations and are thus potentially counter-productive.

Several points can be taken from this section on British terrorism context since 9/11. First, the threat by Islamist terrorism has indeed been on the rise in the UK since 2001, especially during the years 2001-2006 and again since 2013. However, right-wing political violence and terrorism have

[51] Whittaker, *Counter-Terrorism and Human Rights*, 95. CONTEST, The United Kingdom's Strategy for Countering Terrorism, July 2011.
[52] Whittaker, *Counter-Terrorism and Human Rights*, 95. Silke, "The Psychology of Counter-Terrorism," 12.
[53] Whittaker, *Counter-Terrorism and Human Rights*, 96.

featured as a threat as well. Second, the perception of terrorism as a threat has mostly been circling around Islamist terrorism. It is thus not a surprise, that most efforts to tackle the problem of terrorism focused on Islamists as potential perpetrators, which is valid for the major legislative acts adopted by the British parliament as well as the overall anti-terrorism strategy of the UK, CONTEST.[54] The threat perception of terrorism did increase to rather high levels after 9/11 and the London attack of 2005, both among the public and government officials. Governments have perceived terrorism as a threat to British values and civilization and have tried to tackle the phenomenon by adopting harsher measures on a range of issues. Security was often seen as a priority, human rights lost their 'momentum' during the zero years. Still, the security situation in the UK during any of the years since 2001 cannot be regarded as resembling an emergency situation.[55] In fact, the number of victims by terrorism were higher for almost all years of the Troubles in Northern Ireland. Nevertheless, new anti-terrorism policies were adopted continuously over the last eighteen years, many of them including rights evasive measures as will be seen below.

UK Anti-Terrorism since 2001: A Human Rights Perspective

As the UK has a long history of experience with terrorism, accordingly the country has a long history of anti-terrorism (and had already before 9/11 accumulated more anti-terrorism legislation than almost any other developed democracy).[56] Especially the anti-terrorism legislation and anti-terrorism measures concerning the conflict in Northern Ireland have shaped the British context. Todd Landman lists not less than twenty acts of counter-/anti-terrorism legislation entering into force between 1967 and 2006.[57] This legacy of British anti-terrorism has at times surfaced in the British response to the terror of 9/11 and the bombings of July 2005 in London (e.g., in relation to internment policies).[58]

Still, the event of 9/11, gave anti-terrorism policymaking unprecedented momentum. David Omand explains, "after 9/11, measures were rushed through in the Anti-Terrorism Crime and Security Act 2001 and

[54] Paul Thomas, "Britain's prevent pogramme: An end in sight?" In Lee Jarvis and Michael Lister, *Critical Perspectives on Counter-Terrorism* (London and New York: Routledge, 2015), 174.

[55] Todd Landman, "Imminence and Proportionality: The U.S. and U.K. Responses to Global Terrorism," *California Western International Law Journal*, Vol. 38 No. 1 (2007): 103.

[56] Dorle Hellmuth, *Counterterrorism and the State: Western Responses to 9/11* (Philadelphia: University of Pennsylvania Press, 2016), 139.

[57] Landman, "The United Kingdom: The Continuity of Terror and Counterterror," 81.

[58] Landman holds that "legislation passed just before 9/11 and since 9/11 has made the temporary […] measures adopted in the context of Northern Ireland permanent, deeper, and broader in scope." Landman, "The United Kingdom: The Continuity of Terror and Counterterror," 78.

further counter-terrorist Acts then passed every year […]."[59] Indeed, several new acts of anti-terrorism legislation were implemented in the UK after 9/11, including the 2001 Anti-Terrorism, Crime and Security Act, the Prevention of Terrorism Act of 2005, the Terrorism Act of 2006, the Counter-Terrorism Act 2008, the Counter-Terrorism and Security Act 2015, and the 2016 Investigatory Powers Act.[60] I will present some of the major provisions of this legislation and will point to the human rights problems which some of these measures caused and still cause.

Already before the events of 9/11, Britain saw with the Terrorism Act of 2000 new legislation on terrorism, which was not only an 'update' of the anti-terrorism legislation from the 1970s but also an attempt at constructing permanent anti-terrorism legislation. In other words, it replaced the 'preliminary' anti-terrorism acts which had been implemented in the 1970s and 80s in the course of the conflict in Northern Ireland (although this legislation had been thought of as preliminary, it had existed for twenty-six years). It was the Labour Government under Tony Blair that established such permanent legislation. The major provisions of the act were the establishment of a new definition of terrorism, the creation of a list of proscribed international terror organizations, an extension of stop-and-search powers, including the ability to hold terror suspects without charge for up to seven days, and the introduction of new offenses related to terrorism. One of these newly implemented offenses was the incitement of terrorist acts overseas; another was the provision of training for a terrorist purpose, a third the collection of information, likely to be useful for anyone preparing a terror attack. [61] That these measures were based on the simultaneously established definition of terrorism shows how important institutionalized definitions of terrorism are for concrete anti-terrorism measures.

In general, the new legislation provided a distinctive change of policy focus, away from legislation supposed to cover a very specific conflict in a specific area (Northern Ireland), to legislation that was supposed to cover all instances of terrorism.[62] This legislative move was a reaction to the Good Friday Agreement from 1998.

As mentioned, via the Terrorism Act 2000 (TA 2000), the UK

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[59] David Omand, "What Should be the Limits of Western Counter-Terrorism Policy?" 65.

[60] All these acts and strategies and the subsequently implemented policies have led British security experts, such as David Omand, to deem the British anti-terrorism legislation as well as British intelligence as leading in Europe. David Omand, "Pursue and Prevent: Keynote Panel Discussion, Security – Judicial Oversight – Secure Communications – Cost Civil Liberties: Can we strike a balance between these competing priorities?" World Counter Terror Congress, London, April 19-20, 2016.

[61] Conor Gearty, "Terrorism and Human Rights," *Government and Opposition*, Vol. 42 No. 3 (2007): 341, 356. Whittaker, *Counter-Terrorism and Human Rights,* 63.

[62] Conor Gearty, "No Golden Age: The Deep Origins and Current Utility of Western Counter-Terrorism Policy," In *Illusions of Terrorism and Counter-Terrorism,* ed. by Richard English (Oxford: Oxford University Press, 2015), 81.

established a new definition of terrorism. Again, terrorism policies can be expected to stand in relation to the understanding and definition of terrorism. In other words, in order to understand the reaction of authorities to terrorism, one needs to gain a picture of how these authorities see terrorism; I will, therefore, provide the relevant definition used in the UK.

Thus, terrorism is, according to the TA 2000, constituted by action that,

"(a) involves serious violence against a person,
(b) involves serious damage to property,
(c) endangers a person's life, other than that of the person committing the action,
(d) creates a serious risk to the health or safety of the public or a section of the public, or
(e) is designed seriously to interfere with or seriously to disrupt an electronic system."[63]

However, such actions (or the threat of such action) are only defined as terrorism, if they are designed to influence the government or to intimidate the public *and* be undertaken for the purpose of advancing a political, religious or ideological cause. The definition includes terrorist activities outside of the UK and includes influence on governments and publics other than the British.[64] It is a peculiarity of this definition that it points out that the use of firearms or explosives constitutes terrorism even without the aim to influence the government or intimidate the public. What is the difference between attacks with guns and attacks committed by knives or by the use of vehicles, one may ask?[65]

Later, with the Terrorism Act 2006, the UK introduced an amendment to its definition of terrorism from the Terrorism Act 2000. Now the definition not only included that terrorists might try to influence *governments* but also "an international governmental organisation," the last would e.g., cover the EU as an intergovernmental and supranational organization.[66] The Counter-Terrorism Act 2008 widened the definition of terrorism to also include acts of violence based on racial causes, besides political, religious or ideological ones (although such violence arguably was already covered by the political or ideological causes mentioned in the TA 2000).[67]

Reflecting on differences between scholarly definitions of terrorism provided earlier (Chapter 2) and state definitions, the UK definition omits two of the mentioned five typical categories of terrorism since there is no talk of

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[63] Terrorism Act 2000,
http://www.legislation.gov.uk/ukpga/2000/11/pdfs/ukpga_20000011_en.pdf
[64] Ibid.
[65] Still a political, religious or ideological cause is demanded in case of attacks with explosives and firearms.
[66] Terrorism Act 2006, paragraph 34.
[67] The Counter-Terrorism Act 2008, paragraph 75.

potential perpetrators or victims of terrorism. By omitting comments on some of the fault lines discussed earlier, the UK follows a trend of state definitions of terrorism, as most of them deliver intentionally rather broad and vague definitions (this can be seen for the definitions of all the three entities at the focus in this thesis).[68]

By invoking the mentioned broad formulations, the definition spans over a large volume of potential acts of violence, including actions that are not only aiming at humans but things or objects as well (the inclusion of things as potential targets of terrorism is a trait of many state definitions). This broadness brings the problem that certain acts, which are normally not regarded as terrorism, could, in theory, be evaluated as such based on this definition. For instance, a riot damaging facilities of shops and banks, as seen in Europe in the course of the financial crises or during G8 and G20 summits, would qualify for terrorism according to this definition. The hacking of databases would under certain circumstances fall under the definition as well.[69] Furthermore, the UK definition declared incitement to terrorism abroad illegal. However, the definition does not distinguish between foreign targets of terrorism, for example between groups applying violence against brutal, dictatorial regimes or extremist groups trying to topple established democracies.[70] This circumstance created a problem. It was, in consequence, left unclear who in practice would be charged for such a fallacy and on what grounds. Practices of double standards were opened up for.[71] The definition became highly important in subsequent years. It, basically, functioned as "lynchpin" of a range of further anti-terrorism measures (e.g., the ban of glorification of terrorism, see below).[72]

The broadness of the UK's terrorism definition was not only criticized by scholars in the field, e.g., Costigan and Stone (arguing that it sets a low threshold for the use of extended powers in course of terrorism policies), but even the UK's Supreme Court. The court expressed concern regarding the fact

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[68] Clive Walker, "Policy Options and Priorities: British Perspectives", In *Confronting Terrorism: European Experiences, Threat Perceptions and Policies*, ed. by Marianne van Leeuwen (The Hague: Kluwer Law International, 2003) 15. Gearty, "No Golden Age," 91-92.

[69] Scholars who share this assumption are for instance Costigan and Stone. Ruth Costigan and Richard Stone, *Civil Liberties & Human Rights,* 11th ed. (Oxford: Oxford University Press, 2017).

[70] Gearty, "Terrorism and Human Rights," 356.

[71] It seems realistic to presume that not all individuals calling for a dictatorial regime to be removed by violent means will face the same consequences as individuals calling for violently toppling democratic regimes. However, the established law, in theory, would oblige authorities to do so. Of course, it stays unclear what constitutes a moral or an immoral toppling of a government. This problem clearly reflects discussions concerning justified or moral usage of violence and the potential inclusion of a moral component into the definition of terrorism (resulting in potential distinctions between 'terrorists' and 'freedom fighters'). I oppose the inclusion of such moral components in definitions of terrorism in Chapter 2 of this thesis.

[72] Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge: Cambridge University Press, 2011) 255.

that extensive and intrusive police powers are based on such a wide definition and welcomed any narrowing of the definition. However, British legislators have delivered no such narrowing so far.[73]

Although the TA 2000 passed before 9/11, it had some consequences after 2001 that are relevant for this thesis. Besides the newly established definition, the major relevant point for the purposes of this thesis is that the TA 2000 extended the police's stop-and-search powers (under section 44 of the Act). The section allowed police officers to stop and search individuals for evidence of terrorism. In specifically designated areas, such searches could be conducted even without the presence of reasonable suspicion.[74] In the following years, thousands of random searches of individuals in public places were conducted by the British police based on section 44. Todd Landman reports that the number of searches quadruplicated in the period 2001-05 compared to the previous four years (from roughly 27.000 to 112.000). Human Rights Watch even reported 450.000 searches between 2007 and 2009. Several institutions and researchers claimed that members of minority groups and especially 'Asian' men (often of Pakistani or Bangladeshi ethnic origin) were strongly over-represented amongst those searched by the police.[75] Numbers by the Metropolitan Police showed that the increase of searches of black or Asian people was considerably higher in comparison to Whites in the years between 2001 and 2003.[76] Newer numbers provided by a study published by the Police Foundation confirmed this trend, especially the increase of searches of members of the Asian community.[77] Researchers Christina Pantazis and Simon Pemberton concluded in a 2009 publication that stop-and-search-practices provided day-to-day harassment of Muslims.[78] A

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[73] The Guardian, "Terrorism Act 2006," January 19, 2009. https://www.theguardian.com/commentisfree/libertycentral/2009/jan/19/terrorism-act-2006.

[74] Roach, *The 9/11 Effect*, 260.

[75] Landman, "Imminence and Proportionality," 97-98. Stefano Bonino, "Visible Muslimness in Scotland: between discrimination and integration." *Patterns of Prejudice*, Vol. 49 No. 4 (2015). Whittaker, *Counter-Terrorism and Human Rights*, 63.

[76] In terms of stop and search practices numbers from the Metropolitan Police showed that searches of 'Asians' had risen by forty-one percent and searches of 'Blacks' by thirty percent between 2001 and 2003, whereas searches by 'Whites' had only increased by eight percent. Most of those described as Asians in the report were Muslims with ethical origin in Pakistan or Bangladesh. Metropolitan Police Authority, "Report of the MPA Scrutiny on MPS Stop and Search Practice," 2004. http://policeauthority.org/metropolitan/downloads/stop-search/stop-search-report-2004.pdf.

[77] The policefoundation, "Policing Terrorism A Review of the Evidence," http://www.police-foundation.org.uk/uploads/catalogerfiles/policing-terrorism-a-review-of-the-evidence/terrorism_review.pdf

[78] Christina Pantazis and Simon Pemberton, "From the Old to the New Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation," *British* Journal of *Criminology*, Vol. 49 No. 5 (2009). In addition, Peter Lehr held in a 2016 conference talk that stop-and-search-practices by the police entail discriminatory tendencies. Peter Lehr, "PURSUE and PROTECT: Looking Ahead – How Can We Expect Terror, and Counter Terror,

study by Stefano Bonino from 2015 reported discriminatory tendencies in UK police practices.[79] A study by the UN Special Rapporteur on human rights and counter-terrorism confirmed such trends.[80] In the summer of 2012, sixteen NGOs officially complained to the Home Secretary over such tendentious profiling practices. They claimed that such practices destroyed trust and triggered resentment and negative relations between the targeted groups and the police.[81] Clearly, although the practice was in theory aimed at terror suspects, in practice it was (mis-)used, also for other purposes than the practice of apparent racial profiling described above. For instance, in 2003 protesters against the Iraq war were stopped under section 44 during a protest march to an RAF base (thereby arguably undermining freedom of expression and assembly).[82] In the face of these problems of the TA 2000, the Act triggered "plenty of public controversy", as Whittaker explains. The Act was also in the public debate criticized for contributing to further alienation of the Muslim community in the country.[83]

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to Develop over the Medium-Term?," World Counter Terror Congress, London, April 19-20, 2016.

[79] Bonino, "Visible Muslimness in Scotland." Stefano Bonino, "How discrimination against Muslims at airports actually hurts the fight against terrorism," *The Washington Post*, August 26, 2016.

The same problem can be found for check-ups in airports. Stefan Bonino explains that most of the (Scottish) Muslims he interviewed reported about negative experiences at airports. A *Guardian* article from 2016 described examples of racial (or religious) profiling at British airports. Another study, conducted by Laura Blackwood, Nick Hopkins, and Steve Reicher reported discrimination at airports as well. Bonino furthermore holds that such negative experiences could endanger efforts for better integration of Muslims, pointing at another anti-terrorism measure that could eventually backfire. Laura Blackwood, Nick Hopkins and Steve Reicher, "I know who I am, but who do they think I am? Muslim perspectives on encounters with airport authorities," Ethnic *and Racial Studies*, Vol. 36 No. 6 (2013). The Guardian, "This is how it feels to be racially profiled while travelling." April 12, 2016. https://www.theguardian.com/commentisfree/2016/apr/12/racially-profiled-while-travelling-discrimination-passengers-security.

[80] Report of the Special Rapporteur on human rights and counter-terrorism. A/HRC/4/26, January 29, 2007. Liz Fekete, an activist, claimed in a 2012 publication in connection with police practices that Muslims would be the prime target for religious profiling in connection with stop-and-search practices of police units as well. Liz Fekete, "Which way forward on racial profiling," *Institute of Race Relations,* December 6, 2012. http://www.irr.org.uk/news/which-way-forward-on-racial-profiling/.

[81] Fekete, "Which way forward on racial profiling." In general, discriminatory practices tend to decrease police cooperation of minorities. Gershon Shafir, Alison Brysk and Daniel Wehrenfennig, "Conclusion," In *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, ed. by Alison Brysk and Gershon Shafir (Berkeley: University of California Press, 2007), 180.

[82] Many similar instances of abuse of section 44 have been documented. Philip Johnston, "The police must end their abuse of anti-terror legislation," *The Telegraph*, October 3, 2005. http://www.telegraph.co.uk/comment/personal-view/3620110/The-police-must-end-their-abuse-of-anti-terror-legislation.html.

[83] Whittaker, *Counter-Terrorism and Human Rights*, 63.

Later in 2010, the ECtHR ruled that section 44 of the TA 2000 violated article 8 of the ECHR, the right to private and family life. The ruling was based on stop-and-search powers not being "sufficiently circumscribed" and in lack of "adequate legal safeguards against abuse." The court furthermore criticized the fact that searches could be carried out without any tangible suspicion. Therefore, it actually concluded that stop-and-search powers were not 'in accordance with the law,' as demanded for eligibly limiting rights obligations under the ECHR. The ECtHR moreover held that "the risks of the discriminatory use of the [stop and search] powers" were "a very real consideration". The ECtHR thus overruled a verdict by the British High Court from 2003, which had held that potential rights violations via stop-and-search powers were proportionate in light of the threat of terrorism.[84] Section 44 was thus repealed and replaced by a similar section (47A), which can only be used under stricter provisions (e.g., a search can only be authorized by a *senior* officer if there is 'reasonable suspicion' that a terror attack *will take place*).[85]

From a spirit of rights perspective, it can be claimed that discriminatory tendencies in stop-and-search practices undermine the wider human rights aims of equal justice and freedom and inflict with a general notion of equal human dignity. Clearly, the mentioned statistics document extensive and precautionary use of the practice, and furthermore usage which reflects an unequal practice of security organs and an unequal treatment of certain groups in society. This inflicts with the wider human rights idea of equal protection by the law for all individuals, in other words, equal justice. A situation in which some parts of society have to give up more of their rights in order to reach an alleged increase of security (as mentioned Jeremy Waldron warned against such trends) does not reflect such notions of equal justice (or equal recognition and respect) and undermines the perception of being 'as good as everyone else'. Now, if certain individuals lose more rights than others, and are treated differently than others only based on their ethnicity, their general human dignity is under attack as well since feelings of unjustified unequal recognition from the side of the state might be triggered. This can lead to the creation of grievances, which might heighten tensions in society and turn out counter-productive from a security perspective. The notion of dignity is additionally undermined as search practices furthermore interfere with one's right to privacy (privacy was defined as being of essential importance for the notion of dignity). Stop-and-search practices furthermore limit the overall level of freedom individuals enjoy instead of limiting the power of the state versus individuals' freedom and autonomy (but rather extend state power). The practice moreover undermines the human capability

[84] Costigan and Stone, *Civil Liberties & Human Rights,* 465. Hellmuth, *Counterterrorism and the State,* 166. Roach, *The 9/11 Effect,* 253. BBC, "Stop-and-search powers ruled illegal by European court," January 12, 2010. http://news.bbc.co.uk/2/hi/uk_news/8453878.stm

[85] The Terrorism Act 2000 (Remedial) Order 2011.

of moving freely from place to place (and of being treated in a dignified fashion). Reflecting the stop-and-search practice, already a piece of anti-terrorism legislation that was implemented before 9/11 (but continued after) came into trouble in terms of human rights obligations, due to lacking safeguards and skewed everyday usage of the measure. These issues should become recurring problems.

- **Indefinite Detention and Control Orders**

The 2001 Anti-Terrorism, Crime and Security Act (ATCSA) was adopted in the direct context of the 9/11 attacks. For example, Britain's Defence Secretary Geoff Hoon saw the country after 9/11 as a "prime target" and in a state of emergency.[86] ATCSA was thus formed as an attempt to eradicate loopholes of earlier legislation and to implement "a rigorous system of protection and deterrence."[87] The Act formed a quite comprehensive and detailed document, including fourteen sections and twenty-seven schedules. Based on the dramatic events of 9/11, the act "was rushed through Parliament."[88] Some of the major provisions involved: the interception of "communications data […] for the purpose of safeguarding national security" (the providers were asked to volunteer to cooperate), the regularization of certain police powers (e.g., in regard to stop-and-search-arrests and examinations of persons and vehicles), the freezing of terrorist cash and property, the establishment of "incitement to racial or religious hatred" as a penal offence and stricter control of air transport and nuclear facilities. The most far-reaching and questionable part of the 2001 Act was, however, the provision enabling indefinite detention of foreign terror suspects, without charge or trial.[89] Such indefinite detention could be based on vague claims of "national security grounds." The British government thus excluded noncitizens from the same degree of legal protection in case of being suspected of terrorism.[90] With the measure of indefinite detention, the UK derogated from article 5 of the ECHR (the right to liberty of person). The British government issued a notice of derogation to the Council of Europe and argued for such derogation from the standpoint of a perceived public emergency "threatening the life of the nation."[91] Therein, the UK was at that

[86] Cited in David Whittaker, *Terrorism: Understanding the Global Threat* (London: Longman Pearson, 2002), 176. Hoon added – in a lower key – that terrorism would require "integrated political, economic, legal and military actions."
[87] Whittaker, *Terrorism: Understanding the Global Threat*, 175.
[88] Whittaker, *Counter-Terrorism and Human Rights*, 49. Indeed the act was adopted just three months after 9/11.
[89] Whittaker, *Terrorism: Understanding the Global Threat*, 175. Landman, "The United Kingdom: The Continuity of Terror and Counterterror," 83.
[90] Paul Hoffman, "Human Rights and Terrorism," *Human Rights Quarterly*, Vol. 26 (2004): 947.
[91] Foley, *Countering Terrorism in Britain and France*, 212.
Liberty, "Liberty Briefing on Derogations and the Human Rights Act," September 2016.

time the only EU member state to have declared a state of emergency after 9/11.[92] During indefinite detention, evidence could be kept secret and no communication with supplied lawyers was allowed. With this, the British government denied such detainees the right to an effective defense. The British government thereby further interfered with article 6 of the ECHR and article 14 of the ICCPR, which emphasize the right to a fair trial.[93]

However, the Act did not pass without scrutiny by the House of Lords or civil liberties/human rights organizations.[94] Members of the British upper chamber uttered concern about the conventional presumption of innocence before any conviction of guilt as being in danger." There was also worry about "the prospect of the authorities trawling through confidential emails and Internet browsing."[95] Human rights lawyer and Amnesty International activist Paul Hoffman criticized the UK for applying discriminatory tendencies by excluding noncitizens from the same legal protections in case of being suspected of terrorism.[96] The Lords thus provided for certain concessions, so that full legal representation of the suspects had to be provided.[97] Still, the overwhelming core of the ATCSA stayed intact and the provisions mentioned above entered into law, including indefinite detention for foreign terrorism suspects.[98] Consequently, eight foreign terror suspects were picked up in the week following the adoption of the ATCSA, more followed in the years after.[99]

However, in December 2004, the Law Lords (then the UK's highest judicial authority) deemed indefinite detention of foreign terror suspects incompatible with Britain's own Human Rights Act of 1998 and the ECHR. It was thus eventually abolished in March 2005. The Lord's evaluation was

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https://www.libertyhumanrights.org.uk/sites/default/files/campaigns/resources/Liberty%20Briefing%20on%20Derogations%20and%20the%20Human%20Rights%20Act.pdf

[92] Hellmuth, *Counterterrorism and the State*, 140.

[93] The measure also stands in opposition to articles 3, 10 and 11 of the UDHR, which spell out the right to liberty, and the rights to a fair trial and a trial which includes all guarantees necessary for defense (arguably knowledge of the evidence).
Whittaker, *Counter-Terrorism and Human Rights*, 49. Conor Gearty, *Liberty and Security* (Cambridge: Polity Press, 2013), 88. Walker, "Policy Options and Priorities: British Perspectives," 20. Landman, "The United Kingdom: The Continuity of Terror and Counterterror," 83.

[94] Gearty, *Liberty and Security*, 88.

[95] However, the general public did not engage in a very detailed debate about the ATCSA. Whittaker, *Terrorism: Understanding the Global Threat*, 177.

[96] Hoffman, "Human Rights and Terrorism," 947.

[97] In connection with the criminalization of incitement, clearer guidelines as to how exactly incitement to racial or religious hatred should be understood were demanded.

[98] Whittaker, *Terrorism: Understanding the Global Threat*, 177.

[99] Gearty, *Liberty and Security*, 88. Conor Gearty holds that the differentiation between foreigners and UK citizens concerning the practice of indefinite detention was also a consequence of the "foolish" assumption "that only the former could be terrorist[s]." Gearty, "Terrorism and Human Rights," 358.

based on a breach of the right to liberty (art. 5 ECHR), as well as the discriminatory policy of indefinitely detaining foreign nationals only; providing a violation of the right to non-discrimination (art. 14 ECHR). The Lords deemed that a state of emergency allowing for a derogation of these rights was not observable; hence, indefinite detention was evaluated as unproportional.[100] Law Lord Hoffman defended the ruling by claiming, "the real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these."[101] The ruling constituted a debacle for the British government. Reflecting on ATCSA – with the fate of its major provision in mind - David Whittaker concluded that the ATCSA was a "tentative flexing of government muscle" and that "the balance between security and liberty in the context of threats from international terrorism was never got quite right."[102] Thus, already the first major anti-terrorism legislation, implemented in the UK after 9/11 violated legal human rights obligations of the country.

The legal fate of indefinite detention in the early 2000s does not constitute a surprise when reflecting upon an earlier piece of British legislation enabling for the detention of terror suspects. In 1974, the Prevention of Terrorism Act enabled for the detention of terror suspects without charge for up to seven days (initially forty-eight hours, however, another five days could be added).[103] The UK government argued that its policy was defendable under article 15 of the ECHR, which allows for derogation from most human rights norms in times of emergency. However, the European Court of Human Rights ruled later that the 1974 Act violated article 5 of the ECHR, which demands authorities to bring suspects 'promptly' before a judge.[104] Thus, if seven days of internment without charge were not eligible according to article 5 in the 1970s, the non-eligibility of indefinite detention in the 2000s was rather predetermined (especially since the threat level was not lower during the Troubles in the 1970s than three decades later).

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[100] Whittaker, *Counter-Terrorism and Human Rights,* 49+65. Hellmuth, *Counterterrorism and the State,* 149. Foley, *Countering Terrorism in Britain and France,* 214. Gearty, *Liberty and Security,* 90. Landman, "The United Kingdom: The Continuity of Terror and Counterterror," 84. Human Rights Watch, "U.K.: Law Lords Rule Indefinite Detention Breaches Human Rights," December 15, 2004. http://www.hrw.org/news/2004/12/15/uk-law-lords-rule-indefinite-detention-breaches-human-rights. The UK's Parliamentary Joint Committee on Human Rights had already voiced such concerns in 2001-2002. Walker, "Policy Options and Priorities: British Perspectives," 21.

[101] Cited in Hellmuth, *Counterterrorism and the State,* 150.

[102] Whittaker, *Counter-Terrorism and Human Rights,* 66.

[103] UK Prevention of Terrorism Act 1974
http://www.legislation.gov.uk/ukpga/1974/56/pdfs/ukpga_19740056_en.pdf.

[104] Robert Verkaik, "Guilford Four Pardon: Tough anti-terror laws echo Labour's response to attacks 30 years ago," *The Independent,* February 10, 2005.
http://www.independent.co.uk/news/guildford-four-pardon-tough-anti-terror-laws-echo-labours-response-to-attacks-30-years-ago-1529817.html.

From a spirit of rights perspective, the measure of indefinite detention, established via the ATCSA undermined the wider human rights aim of equal justice for all individuals since it was only aimed at foreigners. Clearly, a detention measure that aims only at a specific minority does not reflect the rights ideal of equal worth and recognition of all individuals in society. The state did furthermore not live up to its obligation to deliver an equal amount of rights protection to all individuals in society, rather the opposite; again a certain group had to concede more rights than the rest of society. The measure additionally undermined the notion of universal human dignity, since the restriction of justice pertaining to only a certain group, exclusively based on their nationality, does not reflect the idea that every individual earns an equal amount of respect and recognition and possesses an equal amount of worth; or in Kantian terms, is to an equal degree an end in itself (from the perspective of authorities). Furthermore, by detaining certain individuals indefinitely, without charge or trial, in other words, not setting a clear limitation and definition of punishment, and not providing the opportunity for defense or acquittal in a regular trial, the measure attacked the general notion of rule of law. This in itself, disregarding the discriminatory component, undermines the wider aim of justice, as it erodes one of the major principles of establishing justice in free societies. However, as mentioned earlier, since detention brings humans into a most vulnerable condition, detention schemes must seek to uphold the concept of rule of law to a maximal degree. Furthermore, indefinite detention undermined the human capabilities of moving freely, social interaction, and of being treated in a dignified way.

However, despite the fact that the UK undermined valid human rights law and the general idea of human rights, already in its first bigger piece of anti-terrorism legislation after 9/11, the government continued with a course of anti-terrorism policymaking that went to the boundaries of what is permissible in terms of human rights obligations; and not infrequently these boundaries were crossed (instead of trying to avoid further human rights violations). A historical comparison shows that rights infringing detention and internment measures were not a novelty in a British anti-terrorism context. Wide-scale internment campaigns had been carried out before by British authorities, however, rather abroad than in the homeland. Examples are (as mentioned) internment campaigns during the Troubles in Northern Ireland or while trying to face anti-colonial movements during the last decades of the British Empire. For instance, British forces had detained around two thousand individuals when facing a violent and terrorist campaign by the Cypriot nationalist group EOKA in 1958.[105] Furthermore, from 1954 onwards the UK

[105] Simpson, *Human Rights and the End of Empire*. Roach, *The 9/11 Effect*, 271. In connection with detention and interrogation practices, the UK has lately been faced with severe accusations. In 2011, Britain faced allegations of torture of civilians supposedly carried out by the British military during investigations in relation to the EOKA campaign, leading to the death of at least fourteen persons. Michael Theodoulou, "Greek Cypriots intend to sue Britain over

launched a detention campaign against members of the Kikuyu tribe in Kenia. The exact number of people interned in the detention and work camps is a highly debated issue, the estimated range spans from 80.000 to 320.000.[106] In Northern Ireland, the British and Ulster authorities, implemented, as mentioned, harsh counter-measures against PIRA activity. One of them was the internment-without-trial initiative from 1971 to 1975 (Operation Demetrius).[107] During the internment initiative, more than one thousand people were interned, under the alleged suspicion of being members of paramilitary units. However, most of the interned persons were neither members of PIRA nor its rival the Official IRA.[108] Operation Demetrius and the detention campaigns in former colonies thus clearly reflect the critical nature of historical British terrorism policies and emphasize the legacy of rights-infringing measures in UK politics when trying to face terrorist threats. To the UK's credit, one could, however, point out that the recent indefinite detention scheme did not lead to usage of internment as broad as during the Troubles.[109]

After indefinite detention was declared to be in violation of binding human rights law, the British government initiated new policy measures on terror suspects. Thus, the government introduced the Prevention of Terrorism

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torture in 1950s uprising," *The Times*, April 13, 2011.

[106] Caroline Elkins, "Alchemy of Evidence: Mau Mau, the British Empire, and the High Court of Justice," *The Journal of Imperial and Commonwealth History*, Vol. 39 No. 5 (2011): 737. A former officer in one of these camps, reporting on the conditions of the same, spoke of "brutality, humiliating and disgusting treatment and flogging – all in violation of the United Nation's Universal Declaration of Human Rights." Mark Curtis, *Web of Deceit: Britain's Real Role in the World (*London: Vintage, 2003), 327. In 2009, five Kenyans filed a case against the British government at the High Court of Justice in London, based on allegations of mistreatment and torture in the mentioned detention camps. In 2011 the Court issued that the claimants had "arguable cases, fit for trial," and noted that the "materials evidencing the continuing abuses in detention camps […] are substantial." Elkins, "Alchemy of Evidence," 732, 743.

[107] English, *Terrorism: How to Respond*. Walker, "Policy Options and Priorities: British Perspectives," 12. Hellmuth, *Counterterrorism and the State,* 142.

[108] The internments and the conditions under which they were carried out led to mass protests. Not only were people arrested without trial, but at times received 'inhuman and degrading treatment' as a verdict of the ECtHR from 1978 emphasized. Coercive interrogation techniques included wall-standing, hooding and sleep-deprivation and at times physical abuse. Whereas most internees were held at the Long Kesh prison, fourteen men were brought to a secret compound in Ballykelly, "a purpose-built torture center." Recently (in 2015) families of these fourteen men have tried to revoke the ECtHR ruling from 1978, which held that the internees were treated 'inhuman and degrading' but not tortured, based on documents which show that the UK withheld evidence from the ECtHR during the original court case. Susan McKay, "The Torture Center: Northern Ireland's 'hooded men'," *Irish Times*, July 25, 2015. The internment campaign undermined rather than boosted the position of the British in Northern Ireland. The operation undermined sympathy for the British in the "hearts and minds" of the Catholic minority. Richard English, *Does Terrorism Work?* (Oxford: Oxford University Press, 2016), 137.

[109] Roach, *The 9/11 Effect*, 307.

Act 2005, which as its core provision included the measure of so-called control orders. The major aim of the new Act was to reach a new procedure for detention and deportation of terror suspects while ensuring the public that the government did not violate civil and human rights.[110]

The control orders were supposed to function as a kind of substitute for the abolished detention practice. They gave the British Home Secretary the possibility to impose a range of restrictions on the liberty of terror suspects. They could be imposed on anyone inside the British jurisdiction.[111] Control orders essentially regulated and restricted movement and communication options of terror suspects. Control orders, for example, included restrictions on the usage of mobile phones or the internet, restrictions concerning movement or residence, including the imposition of curfews and house arrest, forced relocations, restrictions of communication or association with other individuals, electronic tagging and in general constant monitoring. Furthermore, suspects were required to cooperate with surveillance of their communication or movements, as well as surrender their passports. Control orders could be imposed for up to twelve months at a time, with renewals possible; a breach of the orders could be punished with a prison sentence of up to five years.[112] Conor Gearty evaluated that at their extreme the control

[110] But not only control orders were implemented as a reaction to the abolishment of indefinite detention, a reform of detention of 'regular' terror suspects was implemented as well. In 2005, the government drafted an amendment to the upcoming Terrorism Act 2006 by which it should be made possible to hold terror suspects for ninety days, resting on the argument that ninety days granted police units more time for investigation. The legal timeframe for such arrests at the time was just fourteen days, stemming from the Terrorism Act 2000. Whittaker described opposition to the ninety days as "relentless," and described these plans of the government as a "head-on challenge to traditional liberties." The draft could not be upheld in face of fierce criticism and instead, the detention period was extended to twenty-eight days. Whittaker, *Counter-Terrorism and Human Rights*, 70. Anthony Richards, "Countering the psychological impact of terrorism: Challenges for homeland security," In *The Psychology of Counter-Terrorism*, ed. by Andrew Silke (London and New York: Routledge, 2011), 194. Later (in 2008) the UK government proposed an extension to forty-two days of detention without charge. However, the proposal was defeated in the House of Lords and the government was eventually unsuccessful with the proposal. Liberty, "Extended Pre-Charge Detention," https://www.liberty-human-rights.org.uk/human-rights/countering-terrorism/extended-pre-charge-detention. Richards, "Countering the psychological impact of terrorism," 195. Hellmuth, *Counterterrorism and the State*. Public debate on this proposal was once again fierce, demonstrating, that human rights norms were not absent from public discourse on anti-terrorism measures in the UK; however, arguably in the minority position. Whittaker, *Counter-Terrorism and Human Rights*, 9. In 2011, under the coalition government, including the Liberal Democrats (2010-2015), the maximum amount of days of pre-charge detention was reduced to fourteen days. Nonetheless, this was still double the number of days than before 2003, more than three times the limit in comparison with someone suspected of murder, and more than in any other Western country (Ireland grants seven days of pre-charge detention, the US two and Canada just one). Liberty, "Extended Pre-Charge Detention."

[111] Gearty, *Liberty and Security*, 91.

[112] Whittaker, *Counter-Terrorism and Human Rights*, 50+68. Landman, "The United

orders could "imposition what is effectively house arrest."[113] A range of individuals thus became subject to a daily curfew of up to eighteen hours, without ever being faced with criminal charges. Secret evidence was used in the process. Control order thus operated outside of the regular law. Precedents of the control order regime can be traced in the British colonial emergency rule.[114] In order to implement all control orders the British legislator, once again had to derogate from article 5 of the ECHR (for some of the most far-going orders).[115]

The establishment of the control orders triggered much controversy. David Whittaker reports of a "gale that blew in Parliament's two Houses and in the press."[116] The House of Lords e.g. demanded an automatic expiry of the Act and claimed that judges rather than politicians should decide on the orders (this did however not become reality). Whittaker criticized that the Act enabled politicians to deprive citizens of their liberty, "under a thin veneer of legality".[117] Conor Gearty claimed that control orders might be used against others than terror suspects, for instance, civil libertarian protests and that they consequentially could have a negative influence on the political freedom in the UK.[118] However, the British government claimed in 2007 that control orders would only be used against a limited number of persons, that each order would receive a mandatory review by the High Court and that strong safeguards would protect human rights of the affected individuals. The orders were evaluated to be a "necessary and proportionate response" to terror threats.[119] In total fifty-two individuals (all suspected of connections to Islamist terrorism) were subject to control orders during their existence, a low number, given the potential of the legislation and the wider debate surrounding it. Some were living under the orders for only a few months, some for years.[120]

The UK judiciary challenged the practice of control orders in several instances. In April 2006, High Court Judge Justice Sullivan branded the control orders as "an affront to justice."[121] In June 2006, Sullivan quashed

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Kingdom: The Continuity of Terror and Counterterror," 84. Foley, *Countering Terrorism in Britain and France,* 215. Matthew Ryder, "Control orders have been rebranded. Big problems remain," *The Guardian*, January 28, 2011 https://www.theguardian.com/commentisfree/libertycentral/2011/jan/28/control-orders-protection-of-freedoms-bill

[113] Gearty, "Terrorism and Human Rights," 359.

[114] Gearty, *Liberty and Security,* 91. Roach, *The 9/11 Effect,* 240-243.

[115] Hellmuth, *Counterterrorism and the State,* 150-152.

[116] Whittaker, *Counter-Terrorism and Human Rights,* 68.

[117] Ibid., 68-69.

[118] Gearty, "Terrorism and Human Rights," 359.

[119] Whittaker, *Counter-Terrorism and Human Rights,* 67.

[120] Gearty, *Liberty and Security,* 92. Some suspects absconded while being the subject of control orders. Peter Walker, "Control orders breach human rights, law lords say," *The Guardian*, October 31, 2007. https://www.theguardian.com/uk/2007/oct/31/terrorism.politics

[121] Vikram Dodd and Carlene Bailey, "Terror law an affront to justice - judge: Control orders breach human rights," *The Guardian*, April 13, 2006.

control orders against six terror suspects, based on his evaluation that they breached article 5 of the ECHR (the right to liberty of person) in an unproportional manner. Sullivan claimed that he had taken the importance of protecting the public into account, but that "human rights or international law must not be infringed or compromised".[122] In 2007, the Law Lords demanded changes to the control order process. They declared that the practice of not giving the suspects insight into the evidence against them was ineligible. They additionally ruled that eighteen hour long curfews were indeed a breach of the human right to liberty of person. However, they ruled that shorter curfews were acceptable (possibly up to sixteen hours) and that the system as a whole could be upheld.[123] Still, the successor regime to the indefinite detention scheme ran into legal problems as well, including a ruling acknowledging breaches of human rights obligations.

Besides these legal issues, it is to be emphasized that the control orders arguably breached the spirit of rights. The rights ideas of justice (by imposing orders on individuals who did not face charges and based on secret evidence) and freedom (by imposing house arrests, etc.) were undermined.[124] The rights aim of equal justice was undermined since control orders were exclusively used against Islamist terror suspects. Therein, one might claim that control orders reinforced the mainstream perception of terror threats, and thereby contributed to a discriminatory tendency of UK anti-terrorism.[125] Again, the perception of discriminatory tendencies or the disregard of all humans' equal worth can increase social tension and create security backlashes. The rights aim of freedom was negatively affected as well, since the orders undermined the physical dimension of freedom of those affected, since the orders lacked to set a sufficient limit to state control and power, and since control orders undermined freedoms of association and movement (again, of individuals who had not been charged according to ordinary judicial procedures, let alone convicted).[126] Moreover, control orders interfered with the affected individuals' human capabilities to move freely (to use one's bodily freedom) or to social interaction. The negative interference with these rights aims and capabilities can be expected to have a detrimental effect on the perception of being recognized in one's dignity and personhood by those affected. Being limited in a significant way in one's abilities by control orders

https://www.theguardian.com/politics/2006/apr/13/humanrights.terrorism

[122] Alan Travis and Audrey Gillan, "New blow for Home Office as judge quashes six terror orders," *The Guardian*, June 29, 2006.
https://www.theguardian.com/politics/2006/jun/29/humanrights.terrorism

[123] Walker, "Control orders breach human rights, law lords say."

[124] Based on the missing charges in the process, Laraine Hanlon holds that control orders breached the principle of rule of law, a cornerstone for the achievement of the rights aim of justice. Laraine Hanlon, "UK Anti-Terrorism Legislation: Still Disproportionate?" *The International Journal of Human Rights*, Vol. 11 No. 4 (2007): 507.

[125] Gearty, *Liberty and Security*, 92.

[126] Landman, "Imminence and Proportionality," 96.

must likely trigger a perception of not being regarded as a dignified individual by the state. The same effect might be spread among the minority that is reflecting those targeted by control orders (foremost Muslims).

In light of the control orders' legal troubles, the instrument was repealed in 2011 by the implementation of the Terrorism Prevention and Investigation Measures Act (TPIM Act).[127] The TPIM was, however, a 're-branding' (as claimed in the headline of a *Guardian* article on the matter) of a reduced version of the control orders, in other words leaving a good range of original control order instruments intact under a different name. Still, the TPIMs did not necessitate a derogation under article 5 of the ECHR any more. Control order measures that were abolished were the possibilities of forced relocation, total bans of internet or phone use, as well as the total prohibition of association with other individuals (restrictions of the last issues were, however, still possible). All the other measures (enumerated above) stayed in place under a different label (TPIMs).[128] The TPIM thus provided a kind of 'control order light'.[129] Therein, many of the spirit of rights problems that were elucidated for the control orders stayed intact as well (e.g., in relation to human capabilities, and the rights aims of freedom, justice, and dignity). The reform of control order measures into TPIMs was a compromise between the British Conservatives and the Liberal Democrats who were the minor part of the coalition government at the time. The latter had promised during their election campaign to "scrap control orders." However, legislative reality played out slightly different.[130] This shows that also parties, who are in principle strongly favoring civil liberties over an ever-expanding security apparatus, are ready to make concessions once in government.[131]

- **Terrorism Act 2006 - Banning the Glorification of Terrorism**

In 2006, the Terrorism Act 2006 was adopted. The Act was a reaction to the July 2005 bombings in London; it thus tried to close some perceived gaps in British legislation.[132] An important legislative move of the 2006 Act was that

[127] See section 1 of the TPIM Act, http://www.legislation.gov.uk/ukpga/2011/23.

[128] Foley, *Countering Terrorism in Britain and France,* 218. Hellmuth, *Counterterrorism and the State,* 170. Ryder, "Control orders have been rebranded."

[129] Hellmuth, *Counterterrorism and the State,* 173.

[130] Ryder, "Control orders have been rebranded."

[131] However, to be fair, the Liberal Democrats achieved at least a reform of control orders and pushed through a reduction of the maximal detention without charge period for terror suspects from twenty-eight to fourteen days. Hellmuth, *Counterterrorism and the State,* 165.
In the years after its introduction, the TPIM measure was (ironically) not used a lot. In 2013, the BBC reported that only nine individuals were under TPIM provisions at the time (in 2012 the number was ten). BBC, "Q&A: TPims explained," November 4, 2013. http://www.bbc.com/news/uk-24803069.

[132] It included, as mentioned, the extension of the period a terror suspect could be held without charge (from fourteen to twenty-eight days). The government further introduced an amendment to the definition of terrorism from the Terrorism Act 2000. Now the definition not only included

it made 'glorification' of terrorism a criminal offense since this could in the understanding of British legislators incite people to terrorism. The provision of or training in terrorist techniques was defined as a criminal offense as well, together with the distribution of material that might induce others to terrorism or that could be useful in terms of preparing terror acts (e.g. manuals for producing explosives).[133] The Act defined that glorification was "a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism."[134] In other words, the speech act is not required to incite to imminent violence, or to directly incite to violence, in order to be banned (other than e.g., in the US).[135] The ban was not only valid for speech acts but could furthermore be utilized by police authorities to request internet providers to remove content that is evaluated (by the police) as "unlawfully terrorism-related."[136] The ban of glorification of terrorism built on another historical anti-terrorism legacy of the UK. During the Troubles, the UK had proscribed various kinds of expression in Northern Ireland associated with the IRA (or republicanism as such).[137] The criminalization of 'glorification' of terrorism in 2006 caused fierce debate. It was claimed that the definition of glorification was too broad. Concern was that the provision would undermine freedom of expression and might be used in unintended cases (e.g. against groups trying to topple a foreign repressive regime).[138] Jeremy Corbyn claimed that the ban of glorification would prevent legitimate debate.[139]

The criminalization of glorification of terrorism led to twenty-three convictions per year (on average) in the years following its implementation. An example is the conviction of a student under section 2 of the Act (dissemination of terrorist publications). He had uploaded videos that showed attacks on forces of the international coalition in Iraq and Afghanistan. This upload resulted in a five-year jail sentence.[140] The criminalization of terror glorification was clearly aimed at Islamist extremism, support for right-wing extremism, political violence or terrorism was not subject to charges under the

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that terrorists might try to influence governments but also 'international governmental organization'; the last would e.g., cover the EU.

[133] Hellmuth, *Counterterrorism and the State,* 156. Roach, *The 9/11 Effect*, 243. UK Terrorism Act 2006, http://www.legislation.gov.uk/ukpga/2006/11/pdfs/ukpga_20060011_en.pdf.

[134] UK Terrorism Act 2006.

[135] Roach, *The 9/11 Effect*, 299. Costigan and Stone, *Civil Liberties & Human Rights*, 483.

[136] Roach, *The 9/11 Effect*, 300.

[137] Ibid., 251.

[138] Simon Jeffery, "Q&A: the glorification of terrorism," *The Guardian*, February 15, 2006. https://www.theguardian.com/world/2006/feb/15/qanda.terrorism.

[139] The Guardian, "Terrorism Act 2006," January 19, 2009. https://www.theguardian.com/commentisfree/libertycentral/2009/jan/19/terrorism-act-2006

[140] Gearty, *Liberty and Security*, 100.

new legislation.[141] Therein, the policy added to a tendentious trend in UK anti-terrorism.[142]

Entering a legal reflection on the ban of terror glorification, it has to be pointed out that no in-depth court ruling has been issued which declares the legislation for either eligible or ineligible.[143] However, based on some of the specifics of the legislation one might argue that the legislation is placed in a legal grey area. First, the very wide definition used in the legislation makes it necessarily difficult to produce tangible handling of the legislation on an everyday basis and makes it difficult for all members of society to detect the legal boundaries of freedom of expression. Therein, individuals might not be able to predict which expression is permissible and which not. However, to be able to predict the consequences of one's speech with a "reasonable certainty" is a legal demand. The vagueness of the provision on glorification can thus constitute a relevant legal problem for the legislation in the long run, as courts might demand a more narrow and clear definition which allows individuals to predict the consequences of speech acts.[144] Second, the clear one-sided focus of the legislation on only one kind of terrorism and therein only one kind of social group might additionally be regarded as a problem with potential legal relevance. Since this might contribute to a discriminatory tendency, courts might evaluate such tendencies as a substantial enough reason to declare the legislation for ineligible. The fact that the discriminatory practice of the stop-and-search scheme was one of the reasons for the ECtHR to declare the stop-and-search legislation for rights invasive and ineligible supports this argument.[145] Third, a valid piece of case law from the ECtHR indicates that the British glorification ban's provision to also cover *indirect* "encouragement" might be ineligible. In 1999 the ECtHR ruled that Turkey had violated the right to freedom of expression via cracking down on cases of glorification of terrorism (in connection with PKK-related cases at the time), which did not directly incite to violence.[146] Based on these points the UK's glorification ban appears to exist in a legal grey area.

From a spirit of rights perspective, the ban is very questionable. The very vague definition of glorification ('likely to be understood by some members of the public') opens up for a range of possible convictions under this law.[147] In other words, it can be used in a disproportionate and extensive

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[141] Ibid., 102.

[142] Eijkman and Schuurman, *Preventive Counter-Terrorism and Non-Discrimination in the European Union*, 15.

[143] The British Court of Appeal merely ruled that the Terrorism Act 2006 is "capable of being consistent" with obligations concerning freedom of expression. Costigan and Stone, *Civil Liberties & Human Rights*, 483.

[144] Ibid.

[145] BBC, "Stop-and-search powers ruled illegal by European court," January 12, 2010. http://news.bbc.co.uk/2/hi/uk_news/8453878.stm

[146] Costigan and Stone, *Civil Liberties & Human Rights*, 483.

[147] Stuart Macdonald held that based on the broad formulation one might be 'caught' for

manner. Such unclear provisions can, as mentioned, cause doubt amongst the public concerning the legality of certain public statements. A chilling effect on public debate is thus a possibility when very broad definitions of both 'glorification' and 'terrorism' are used (as mentioned earlier *both* terms are defined broadly in the UK, amplifying the effect).[148] The measure of criminalizing glorification of terrorism or dissemination of terrorist publications opens up for a grey area in which it is hard to draw the line between permissible dissent in the spirit of freedom of expression and ineligible cases of hate speech and incitement to violence.[149] This grey area can potentially be used for banning controversial viewpoints or minority positions. However, freedom of expression should only be curtailed if public utterances or images are clearly supposed to lead to violence.[150] When the glorification of a concept that is so fiercely debated and that does rest on a rather broad definition is criminalized, elements of arbitrariness will necessarily be created. Not to be misunderstood, the criminalization of certain speech acts that clearly try to incite (terrorist) violence or even call for concrete acts of (terrorist) violence can and should be punishable, however, there must be concrete evidence that a speech act or dissemination of material is doing just that (concretely inciting violence). A provision in the fashion of 'likely to be understood as such by somebody' does not fulfill this demand.

Moreover, the inherent discriminatory tendency of the ban on 'glorifying' terrorism undermines the cornerstone concept of human rights which is a pursuit towards a dignified life for all humans, as well as the wider human rights aim of equal justice for all (based on the idea of equal human worth and equal recognition of one's personhood). The almost exclusive focus on Islamist terrorism and therein the Muslim minority, in terms of items of expression that are to be banned, reflects a one-sided focus of security organs and provides thereby for unequal treatment of different groups in society. Again, one specific group appears to lose more of their right to free expression than the rest of society.[151] Such an unequal treatment can stir further notions of injustice and discrimination among members of the Muslim community, as well as perceptions of interference with one's dignity. As explained earlier, practices, as well as perceptions of discrimination, can construct grievances and alienation on the side of targeted minorities, in effect increasing the number of individuals who might be willing to use violent acts instead of peaceful measures of political protest. This is an especially valid point in a

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celebrating the actions of Nelson Mandela in the 1960s. Stuart Macdonald, "Prosecuting suspected terrorists," In *Critical Perspectives on Counter-Terrorism*, ed. by Lee Jarvis and Michael Lister (London and New York: Routledge, 2015), 137.

[148] Costigan and Stone, *Civil Liberties & Human Rights*, 482-483.

[149] Art. 20 of the ICCPR states that: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

[150] Therein this thesis shares a viewpoint by Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World* (London: Atlantic Books, 2016), 331.

[151] Gearty, *Liberty and Security*, 102.

scenario in which options for free expression in the public sphere are actively curtailed.[152] A one-sided focus on banning Islamist content might, therefore, proof counter-productive and additionally undermine another wider human rights aim, peace in the world. Therein, the ban on acts of glorifying terrorism (in its vague form), furthermore undermines individuals' potential to enjoy their capabilities (such as free expression or leading a life not affected by discrimination). Furthermore, by interfering with freedom of expression, the ban inflicts with one of the central components of every functioning democracy. Restrictions on expression undermine the human need for communication and self-expression and restrict the possibilities for voicing public dissent and the inclusion of a multitude of opinion in public debate. Therein, a characteristic of every rights society, the acceptance of a diversity of opposing views (as e.g., emphasized by Rawls, see Chapter 1) is not fulfilled. In essence, the ban damages a general sense of freedom in society and enhances state power (again, significantly increased state power is a threat to democratic societies).[153] Hence, by endangering freedom of expression, processes of self-censoring are potentially set in motion, which endanger an essential part of citizens' individuality and societal influence.[154] Therein, it is vital for anti-terrorism policymakers and practitioners, to remember that carrying a non-mainstream political opinion does not equal a willingness to commit political violence. In fact, most political viewpoints that are perceived as extremist are covered by the human right to freedom of expression; they are in other words not only legal but also a natural function of every functioning democracy.[155] Their acceptance must be part of a sound democratic culture. Adrian Guelke rightly underlined that a sole focus on extremist viewpoints in efforts to prevent terrorism is illogic, given that these viewpoints are shared by hundreds of thousands "who have never broken the law."[156]

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[152] Chantal Mouffe, *On The Political* (London and New York: Routledge, 2005). Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge: Cambridge University Press, 2012). Marie Breen-Smyth, "Theorising the "suspect community": counterterrorism, security practices and the public imagination," *Critical Studies on Terrorism,* Vol. 7 No. 2 (2014).

[153] Laura Donohue, "Security and Freedom on the Fulcrum," In *Terrorism and Human Rights*, ed. by Magnus Ranstorp and Paul Wilkinson (London and New York: Routledge, 2008), 60.

[154] Again, the ECJ acknowledged this risk of self-censoring under surveillance in 2016 verdict and a recent study conducted in France did indeed find self-censoring processes triggered by anti-terrorism. Martha Spurrier, "Investigatory Powers Act: You're not being paranoid." Ragazzi et al., "The Effects of Counter-Terrorism and Counter-Radicalisation Policies on Muslim Populations in France," *Centre d'etude sur les Conflits, Liberte et Securite (CCLS)*, 2018.

[155] This interpretation was emphasized by Thomas Wuchte, Head on Anti-Terrorism Issues (OSCE), at the 2016 World-Counter Terrorism Congress. "Protect: Keynote Panel, Are Our Current Counter Terror and Security Tactics Working?," World Counter Terror Congress, London, April 19-20, 2016.

[156] Adrian Guelke, "Secrets and Lies: Misinformation and Counter-Terrorism," In *Illusions of*

Recently (in 2018), the UK government introduced plans to intensify its fight against incenting speech and material via a tool that can allegedly automatically recognize terrorist content, which can then be blocked manually. The tool is to focus on Jihadist content by IS (and sympathizers). This tool thus continues the tendentious focus of anti-radicalization efforts in the UK. Further, although the company standing for the tool claims that the software will only produce a false alarm in 0.005 percent of cases, this would still mean hundreds of false alarms a day given the number of uploads.[157] Again, issues of self-censoring might be created. The EU is currently working on a regulation that is trying to do something similar, however, the EU's approach would block the upload in the first place (I will come back to the EU's scheme in the next chapter).

- **Extension of Prevent Strategy to Mandatory Surveillance in Public Institutions**

In 2015, the Counter-Terrorism and Security Act 2015 was approved by the British parliament and entered into force in July that year.[158] The Act received cross-party support and entailed a much-debated reform of the so-called Channel program under the Prevent stream of CONTEST. This reform made it mandatory for employees in all public authorities to refer individuals (including youths and children) to anti-radicalization authorities whom they deemed as radicalized or vulnerable for radicalization. Such institutions are e.g., schools, universities, prisons, or NHS trusts.[159] An official formulation

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Terrorism and Counter-Terrorism, ed. by Richard English (Oxford: Oxford University Press, 2015), 104.

[157] Dave Lee, "UK unveils extremism blocking tool," *BBC*, February 13, 2018. https://www.bbc.com/news/technology-43037899.

[158] The Act furthermore enabled for the possibility of a temporary passport seizure of individuals "intending to travel to engage in terrorist-related activity" and a temporary exclusion order, allowing for British citizens "suspected of involvement in terrorist activity abroad" to be temporarily denied return to the UK. CONTEST – Annual Report for 2014, 13. Clearly, these measures were implemented due to the threat IS fighters currently constitute for several European states, including the UK. However, exclusion orders are not unproblematic in connection with human rights obligations. Protocol 4 of the ECHR clearly spells out that "no one shall be deprived of the right to enter the territory of the State of which he is a national." ECHR Protocol 4, article 3, paragraph 2. Now, the exclusion orders provide for just such a deprivation. This means that the UK would – again – have to derogate from valid human rights obligations in the course of anti-terrorism policies. The actual threat posed by IS members or sympathizers amongst Western citizens, in combination with the provision in the exclusionary orders that a denial of entering the country would be 'temporary', might legally justify the orders (a legal decision on them is to be awaited). However, by implementing derogation the UK is taking another step out of legal normality and towards exceptions becoming the rule. BBC, "Internet data plan back on political agenda," November 23, 2014. http://www.bbc.com/news/uk-politics-30166477. Counter-Terrorism and Security Act 2015, Chapter 6. http://www.legislation.gov.uk/ukpga/2015/6/pdfs/ukpga_20150006_en.pdf.

[159] Section 26 of the Counter-Terrorism and Security Act points to the duty to "have due regard to the need to prevent people from being drawn into terrorism." Counter-Terrorism and

by the British authorities reads that the program wants to ensure that vulnerable individuals "receive support before their vulnerabilities are exploited."[160] The definition of extremism, which provides the groundwork for the procedure of referring 'extremist' individuals, is as follows: "vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty, mutual respect and tolerance of different faiths and beliefs."[161] In practice, individuals are to be referred to the Channel program, which will then make an effort to de-radicalize the referred individual.[162] However, if an individual refuses to engage with the Channel program, it cannot be forced.[163] Before 2015 such referrals were possible as well, but not mandatory.[164] This demand is a new trait of the British Prevent strategy, which is – as mentioned above – one of the four components of the country's overall counter-terrorism strategy CONTEST.

Based on making the practice of referring people to the Channel program mandatory, the amount of individuals referred has seen quite an increase in the latest years. The steep increase in referrals moreover suggests that awareness around the issue of radicalization has substantially grown in the UK.[165] In 2014, when referring was not mandatory yet; only 1.681 individuals had been referred t. In 2015, 3.955 individuals had been referred to, more than twice as many.[166] In 2018, the number had risen to more than seven thousand individuals.[167] Individuals reported to Channel included children "aged nine and under." In England and Wales 415 children aged ten or under had been referred in 2015, 1.424 of the referred had been between

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Security Act, November 2014. https://www.gov.uk/government/collections/counter-terrorism-and-security-bill. Charlotte Heath-Kelly, "Counterterrorism in the NHS: Evaluating Prevent Duty Safeguarding by Midlands Healthcare Providers." https://warwick.ac.uk/fac/soc/pais/research/researchcentres/irs/counterterrorisminthenhs/. Josh Halliday, "Almost 4,000 people referred to UK deradicalisation scheme last year," *The Guardian*, March 20, 2016. https://www.theguardian.com/uk-news/2016/mar/20/almost-4000-people-were-referred-to-uk-deradicalisation-scheme-channel-last-year.

[160] Channel Guidance, October 2012. https://www.gov.uk/government/publications/channel-guidance.

[161] Prevent Duty Guidance of the CONTEST strategy.

[162] Channel Guidance, October 2012.

[163] Homa Khaleeli, "You worry they could take your kids': is the Prevent strategy demonising Muslim schoolchildren?," *The Guardian*, September 23, 2015.

[164] Revised Prevent Duty Guidance: for England and Wales. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445977/3799_Revised_Prevent_Duty_Guidance__England_Wales_V2-Interactive.pdf.

[165] This might be a consequence of the civil war in Syria and the connected concern of a growing base of IS supporters in the UK. Halliday, "Almost 4,000 people referred to UK deradicalisation scheme last year."

[166] Ibid.

[167] Home Office, "Individuals referred to and supported through the Prevent Programme," April 2017 to March 2018," December 13, 2018.

eleven and fifteen years old.[168] In the West Midlands, the only region delivering detailed data, sixty-eight children aged nine or under were referred in 2015, 183 were between ten and fourteen years old (out of a total of 788 referred individuals). Almost half of the referrals were made by educational institutions. Muslims constituted the biggest share of referred individuals. In 2013, only fourteen percent of the referrals were based on right-wing extremism, while fifty-seven percent of the referred were Muslims, in 2018 it was forty-four percent referrals for Islamist extremism and eighteen percent for right-wing extremism).[169] Although the program, in theory, is aimed at all forms of terrorism, including right-wing terrorism, such numbers suggest that Muslims are overrepresented amongst referred individuals. The overrepresentation becomes even clearer when reflecting that although three times more individuals were referred to based on suspicion of Islamist extremism as compared to right-wing extremism, the number of individuals deemed in need of support programs (the next stage of the process after being referred to) was roughly the same for both camps of extremists in 2018.[170] Based on Channel's tendentious focus, many Muslim organizations, which are funded by the Prevent program, are due to their connection with Prevent vilified by their communities.[171] In this way, Channel can undermine the connection between the state's anti-terrorism institutions and the British Muslim community. The overrepresentation of Muslims in the process can be evaluated to be a consequence of the focus on Islamist terrorism in the context of terrorist threats.

Even before referring individuals became mandatory, only twenty percent of those referred were evaluated as being in actual need of an intervention, as *The Guardian* reported in September 2015 (meaning that four out of five were referred to without reason).[172] After referring became a duty, this percentage dropped further. Since 2016, only five percent of those referred were evaluated to be in need of support programs (forty-five percent are instead offered welfare support such as housing or mental health care.[173] The very broad nature of the referral approach must be seen as one of the reasons for this very low percentage. Thus, critics have rightly claimed that

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[168] Halliday, "Almost 4,000 people referred to UK deradicalisation scheme last year."

[169] Home Office, "Individuals referred to and supported through the Prevent Programme." Khaleeli, "You worry they could take your kids."

[170] Home Office, "Individuals referred to and supported through the Prevent Programme."

[171] Khaleeli, "You worry they could take your kids."

[172] Ibid.

[173] In light of these numbers, it might not be so surprising that the British government does not allow any independent scrutiny of the program's success. Khaleeli, "You worry they could take your kids." Furthermore, one might argue that the Channel program constitutes a side-affect anti-terrorism measure. Heath-Kelly argues that the program is less about preventing terrorism but rather about reorganizing welfare. Charlotte Heath-Kelly, "Rights in Counterterrorism as Blinders and Fantasies: Reflections on 'Human Rights Compliant Counterterrorism'," BISA 43rd Annual Conference, June 13, 2018, Bath, UK.

the referral measure is arranged on a too broad basis. For instance, Rizwaad Sabir held that the definition of extremism (see above) would be too broad, especially when some values have never been clearly defined.[174] Already strong disagreement with e.g., the UK's foreign policy in the Middle East or British authorities in general, could lead to becoming a target of this measure, without any plans of carrying out violence. Research by Charlotte Heath-Kelly has documented that employees in the British NHS system have referred individuals based on demonstrated "anger at foreign policy."[175] One might, therefore, claim that public employees receive too little guidance and training in order to separate regular behavior and legitimate forms of criticism from signifiers of radicalization.[176] Still, one should remember that making such an evaluation is not actually the work task of such employees.

No court verdicts have declared the reporting duty under the Channel program for directly ineligible yet. However, in March 2019 the Court of Appeal ruled that the Prevent Duty Guidance (the legal guidance document to the law) did not put enough weight on the importance of the preservation of freedom of expression. This gives an indication that the Channel duty is in a legal grey area concerning the rights norm of freedom of expression (art. 19 ICCPR, art. 10 ECHR). Indeed, both relevant legally binding human rights documents (in case of domestic British legislation), the ICCPR, and the ECHR allow for a limitation of freedom of expression in the course of measures establishing national security. However, the Channel program might run into legal problems in regard to the demands for rights limitation. The measure might uphold two out of three limitation criteria in the ICCPR and the ECHR since the Channel program is prescribed by law and is supposed to serve the aim of national security. However, the ICCPR and the ECHR add the condition of necessity in a democratic society (and therein proportionality). However, with its widespread approach, spanning over the whole of British society, Channel appears to be in conflict with the condition of proportionality (emanating from the provision of the ECHR that limitations must be based on what is necessary in a democracy). Furthermore, the tendentious focus of the referral duty in practice (see above) could constitute a legal problem as well. As seen, the stop-and-search practice was criticized by the ECtHR also based on its tendentious application in terms of ethnicity.

Besides potential legal shortcomings, the Channel program clearly undermines the general spirit of rights and wider aims of human rights - in several ways. First, by effectively undermining the freedom of expression of regular individuals in democratic societies, one of the cornerstones for such democracies is weakened. As mentioned before and as argued by political

[174] Khaleeli, "You worry they could take your kids."
[175] Heath-Kelly, "Counterterrorism in the NHS." Fittingly, Guelke pointed out that hundreds of thousands would e.g., disagree with Western foreign policy without ever committing a crime, let alone political violence. Guelke, "Secrets and Lies," 104.
[176] Halliday, "Almost 4,000 people referred to UK deradicalisation scheme last year."

theorists such as Chantal Mouffe, or Adam Przeworski, the opportunity for political debate is vital for every functioning democracy.[177] However, due to Channel, e.g. classrooms are no longer a free space for debate. Students might feel under constant scrutiny towards potential accusations of carrying extremist thoughts and teachers are transformed from educators to members of the "security-apparatus."[178] By cracking down on the option for free debate in classrooms, and by constituting the impression that simple criticism of foreign policy might lead to referrals, a process of self-censoring can be launched. Indeed, the ECJ acknowledged a risk of self-censoring under circumstances of continuous surveillance in its 2016 ruling on data retention and a recent study conducted in France found that twenty-nine percent of Muslim parents advise their children to be careful regarding "what they say at school."[179] Such processes of self-censoring are a clear sign of damage to a sound political atmosphere and the public sphere, undermining free debate in a democratic society. Reports from different sources suggest that the concern regarding self-censorship in public institutions and especially education institutions in the UK is justified. *The Guardian* reported that some educators had observed that "Muslim pupils had become more careful about what they talk about for fear of being referred."[180] Rob Faure Walker, both a school teacher and a Ph.D. student on the issue, reports of students (especially Muslim students) stopping to engage in political and social debate in classrooms due to fears of being reported in the course of the Channel program.[181] Other reports pointed to a noticeable change of atmosphere at British universities, constituting a chilling effect on free debate (again, especially on the side of Muslim students) and preventing the invitation of controversial speakers.[182] Thereby, the Channel program rather supports

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[177] Mouffe, *On The Political*. Przeworski, *Democracy and the Market.*

[178] James Fitzgerald, "Frontline perspectives on preventing violent extremism: an interview with Alyas Karmani (Street UK)," *Critical Studies on Terrorism*, Vol. 9 No. 1 (2016).

[179] Self-censoring behavior of Muslims could be detected in the study towards social workers and employees of the health systems (doctors and nurses) as well. Ragazzi et al., "The Effects of Counter-Terrorism and Counter-Radicalisation Policies on Muslim Populations in France," *Centre d'etude sur les Conflits, Liberte et Securite (CCLS)*, 2018. Martha Spurrier, "Investigatory Powers Act: You're not being paranoid. UK gov really is watching you," *The Register*, December 5, 2017. https://www.theregister.co.uk/2017/12/05/liberty_ipa/. Arun Kundnani likewise argues in a UK context, that the duty to refer individuals will lead to a process of self-censorship, "where young people don't feel free to express themselves in schools, or youth clubs or at the mosque." Khaleeli, "You worry they could take your kids."

[180] Ibid.

[181] Rob Faure Walker, "How preventing terror is promoting violence," *discoverysociety.org*, February 1, 2017. https://discoversociety.org/2017/02/01/how-preventing-terror-is-promoting-violence/.

[182] Bindmans, "R on the application of Dr Salman Butt - v - Secretary of State for the Home Department," March 8, 2019. https://www.bindmans.com/news/r-on-the-application-of-dr-salman-butt-v-secretary-of-state-for-the-ho2?fbclid=IwAR2jLVz_SyTltjl4cefydz4xf6_3LBlZOykPEr3m3WwT6fnspWaFkxPpF94.

conformist attitudes and behavior. However, democracy and a general sense of freedom in society thrive under conditions that support controversy, not conformism.[183] Peter Neumann rightly points out that non-violent extremism should be faced with "a healthy debate, not a punitive response."[184] The Channel program thus undermines a general sense of freedom as one of the wider aims of human rights. A process of self-censoring could even be counter-productive in terms of anti-terrorism. If options for free controversy and debate are abolished or undermined and the impression of discrimination is reinforced, the probability that more individuals will take up violent measures of political action (including terrorism) increases rather than decreases.[185] Kundnani agrees to this evaluation when he argues that an atmosphere of self-censorship might create even more potential terrorists, as angry youths had "nowhere to engage in a democratic process and in a peaceful way, […] that's the worst climate to create for terrorist recruitment."[186] The measure of referring individuals via the Channel program might thus indirectly contribute to undermining another wider human rights aim, 'peace in the world'. With its clear focus on Muslims minorities, the Channel program contributes to the discriminatory tendency of UK anti-terrorism that was visible in other measures and policies as well (stop-and-search practices or indefinite detention for foreign suspects).[187] Thus, the program undermines the rights norm of non-discrimination.[188] In the course of such discriminatory tendencies, perceptions of injustice and ill-treatment amongst the relevant community must be nourished and perceptions of equal worth and recognition undermined. Such a process is in conflict with the central concept of human dignity and the wider human rights aim of justice for all. Perceptions of dignity and justice must be expected to be in decline in a policy system that nourishes discriminatory tendencies (as an equal rights protection and equal protection of personhood are preconditions for the

[183] Faure Walker, "How preventing terror is promoting violence."
[184] Khaleeli, "You worry they could take your kids."
[185] Mouffe, *On The Political*. Przeworski, *Democracy and the Market*. Breen-Smyth, "Theorising the "suspect community."
[186] Khaleeli, "You worry they could take your kids."
[187] The impression of discriminatory tendencies can be expected to be further reinforced when reflecting on some especially crude referral examples (e.g. provided by the Midlands NHS): e.g., a child watching Arabic TV, an 'Asian' man with plans to visit Saudi Arabia, or an 'Asian' man with burns he refused to explain. Katy Sian delivers a few additional examples, e.g. a Muslim schoolboy being referred based on wearing a "Free Palestine" badge, or a Muslim pupil being questioned for using the term 'eco-terrorist' in class, and a student being questioned for reading a textbook on terrorism (for his MA programme on terrorism). Katy Sian, "Born radicals? Prevent, positivism, and 'race-thinking'," *Palgrave Communications*, Vol. 3 (2017). Heath-Kelly, "Rights in Counterterrorism as Blinders and Fantasies.
[188] Earlier programs engaging in the prevention of extremism (such as the Prevention of Violent Extremism program) were evaluated as having an exclusive focus on Muslims as well. Paul Thomas, "Failed and Friendless: The UK's 'Preventing Violent Extremism' Programme," *British Journal of Politics and International Relations*, Vol. 12 No. 3 (2010).

perception of dignity and justice).[189] The Channel program moreover undermines the capabilities of being able to use one's mind in ways protected by freedom of expression and to participate in political processes. In sum, the Channel program sets in motion a process that mutes legitimate dissent, initiates processes of self-censoring, divides communities and stigmatizes children, and violates the spirit of rights, including the general notion of equal human dignity. Non-surprisingly, protest evolved against the Channel program. In July 2015, almost three hundred academics, lawyers, and public figures criticized the new duty to refer individuals in a public letter. They argued that the practice would "divide communities, clamp down on legitimate dissent and have a chilling effect on freedom of speech."[190]

- **Data Retention**

Similar to many other European governments (e.g. Germany as seen above), the UK government supports the practice of retaining the communication data of UK citizens and residents. Again, the term data retention describes the practices of saving certain metadata of internet users, usually for a particularly defined timeframe. The EU had via a 2006 directive established an obligation for all member states to implement a data retention legislation (agreed upon during the 2005 British European Council Presidency). Telecommunication data (phone calls, emails, and text messages) had to be stored by service providers for a minimum of six and a maximum of twenty-four months, with the aim to provide security services access to such data.[191]

It is to be mentioned that the UK already owned a legal regime covering (some) data retention prior to the EU's directive via the Regulation of Investigatory Powers Act (RIPA) from 2000, since RIPA allowed for the gathering and storage of metadata (but demanded ministerial consent to access any content).[192] However, in 2009 the UK adopted a new regulation on data retention and therein tied its data retention practices to the EU directive.[193] It was, therefore, a legal blow to the UK when in 2014, the ECJ ruled the 2006 EU directive allowing for data retention to be in breach of CFREU (see Chapter 5).

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[189] Gareth Peirce, a human rights solicitor (e.g., former defense lawyer of the Guilford Four), evaluated that measures such as referring individuals would undermine the rights basis of British society (Opening Plenary, statewatch conference, London, June 25, 2016).

[190] Khaleeli, "You worry they could take your kids."

[191] Directive 2006/24/EC of the European Parliament and of the Council, March 15, 2006. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0054:0063:EN:PDF. Thereby, the directive, just as the German version, "conscripted the power of the private sector in state security strategies." Roach, *The 9/11 Effect*, 267.

[192] Nick Hopkins, "Huge swath of GCHQ mass surveillance is illegal, says top lawyer," *The Guardian*, January 28, 2014. Stefan Heumann and Ben Scott, "Law and Policy in Internet Surveillance Programs: United States, Great Britain and Germany," *Impulse*, September 2013.

[193] The Data Retention (EC Directive) Regulations 2009. www.legislation.gov.uk/uksi/2009/859/contents/made

Subsequently, in order to enable security services continued access to telecommunication data, the British parliament adopted national data retention legislation in 2014, the Data Retention and Investigatory Powers Act (DRIPA).[194] The Act was with the support of the three main parties (Conservatives, Labour and Liberal Democrats) rushed through parliament as 'emergency legislation' leaving only a single day for debate. It received criticism for infringing the right to privacy by NGOs in the field, such as Liberty, Privacy International, and the Open Rights Group, but also by discordant MPs. On the initiative of two such MPs (Labour deputy leader Tom Watson and the conservative David Davis), supported by the mentioned NGOs, the legislation was taken up by the British High Court. The High Court ruled in July 2015 that the DRIPA was unlawful, as it would not respect a previous ruling by the ECJ from 2014 and would, therefore, be incompatible with EU law. The High Court underlined in particular, that there was no independent review of the usage of retained data from a court or other independent bodies.[195] The ruling was in 2018 confirmed by the UK's Court of Appeal.[196] Although DRIPA was declared unlawful, it had already paved the way for another piece of legislation the Investigatory Powers Act (IP Act), which should replace the DRIPA in 2016 (I will cover the IP Act separately below).

After the High Court had declared DRIPA unlawful, the UK government appealed and the case was referred to the ECJ. The ECJ decided in December 2016 that the DRIPA was not legal. It would be in conflict with the rights to privacy and data protection, since "general and indiscriminate retention of electronic communication" cannot be justified in a democratic system. Indiscriminate retention would provide for a serious interference in people's private life and would allow for accurate conclusions on the same, potentially triggering the perception of constant surveillance and a change of people's behavior in face of such surveillance. General and indiscriminate retention of the data of all members of society (since virtually all citizens in

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[194] The measure of data retention surfaced in the 2015 Counter-Terrorism and Security Act as well. Provisions on data retention in the DRIPA were refined in the 2015 Act by an amendment to DRIPA. This amendment was supposed to provide for more effective identification of individuals behind IP addresses. Counter-Terrorism and Security Act 2015, Chapter 6.

[195] Carly Nyst, "Finally, the high court puts a brake on snooping on ordinary Britons," *The Guardian*, July 17, 2015. https://www.theguardian.com/commentisfree/2015/jul/17/high-court-brake-snooping-european-law.
BBC, "Commons passes emergency data laws despite criticism," July 15, 2014. http://www.bbc.com/news/uk-28305309, UK Data Retention and Investigatory Powers Act 2014 http://www.legislation.gov.uk/ukpga/2014/27/pdfs/ukpga_20140027_en.pdf. Owen Bowcott, "EU's highest court delivers blow to UK's snooper's charter," *The Guardian*, December 21, 2016.

[196] Ian Cobain, "UK has six months to rewrite snooper's charter, high court rules," *The Guardian*, April 27, 2018. https://www.theguardian.com/technology/2018/apr/27/snoopers-charter-investigatory-powers-act-rewrite-high-court-rules.

European societies use electronic communication) would exceed "the limits of what is strictly necessary" (one of the major conditions for a legal limitation of the right to privacy).[197] The court thus argued based on the condition of necessity in regard to the derogation of rights as explained earlier. The court furthermore held that an unnecessarily excessive practice of data retention would be at odds with what is justified in a democracy.[198] This argument connects to my argumentation that data retention's negative impact on privacy rights undermines the necessary groundwork of democracy and the wider aims of human rights (or the 'spirit of rights'). The court held that only targeted interception with the purpose to combat serious crime (including terrorism) would be legal. In addition, each act of targeted retention would demand a prior authorization by a court or independent body. Furthermore, individuals affected by surveillance would have to be notified as soon as such notification would not endanger investigations anymore.[199] These conditions were the 'safeguards' that the ECJ demanded in order for data retention to be combinable with EU law. In January 2018, the British Court of Appeal confirmed the earlier rulings by the High Court and the ECJ by declaring the DRIPA for unlawful. It followed the argumentation lines of the earlier rulings, pointing to a non-sufficient judicial oversight of data access, lacking safeguards such as restriction of data access to cases of serious crime and declared the DRIPA due to this lack of safeguards to be "inconsistent with EU law."[200] Although the DRIPA was anyway replaced by the IP Act only a few days after the ECJ's ruling, the position of the ECJ on DRIPA is still highly important, since the ruling bears great relevance for the legality of the IP Act as well (see below).[201] Rulings like the ones described above are highly relevant legal blows for surveillance schemes and underline the violation of rights as evaluated from a legal perspective.

From a spirit of rights perspective, the UK's data retention scheme is criticizable as well. The argumentation is here similar to my points on German

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[197] Owen Bowcott, "EU's highest court delivers blow to UK's snooper's charter." Martha Spurrier, "Investigatory Powers Act: You're not being paranoid." Lorna Woods, "Data retention and national law: the ECJ ruling in Joined Cases C-203/15 and C-698/15 Tele2 and Watson (Grand Chamber)," *EU Law Analysis*, December 21 (2016).

[198] Bowcott, "EU's highest court delivers blow to UK's snooper's charter."

[199] ECJ, "Judgment of the Court (Grand Chamber)," December 21, 2016. http://curia.europa.eu/juris/document/document.jsf?docid=186492&doclang=EN. Owen Bowcott, December 21, 2016.

[200] Alan Travis, "UK mass digital surveillance regime ruled unlawful," *The Guardian*, January 30, 2018. Ryan Gallagher, "UK Court finds Government's Surveillance Powers Unlawful," *The Intercept*, January 30, 2018. https://theintercept.com/2018/01/30/u-k-court-finds-governments-surveillance-law-unlawful/

[201] However, the UK's security minister Ben Wallace dismissed the ruling by the Court of Appeal as unimportant, as it would concern an abolished legislation and as additional safeguards added to the IP Act in November 2017 would prevent the IP Act to receive the same legal evaluation as the DRIPA. Gallagher, "UK Court finds Government's Surveillance Powers Unlawful."

data retention. The level of individual privacy is clearly restricted by such measures. Privacy is a precondition for individuals' ability to define themselves, for preserving personal autonomy and protecting the individuals' social space, as well as for avoiding the feeling of being under constant control. When individuals perceive to be under constant surveillance (or at least cannot be sure to *not* live in such a condition) their capacity for development is limited. This is valid for all moral, personal, intellectual and political development, including shaping relations with others or freely expressing opinions. Thus, the perception of general freedom and in consequence political engagement might actually be reduced, (especially among vulnerable minority groups in society). Individuals might refrain from trying to organize protest online or even from criticizing the government online and might rather choose more conformational behavior (self-censoring).[202] Such trends would threaten a vital function of every open democratic society, the ability of populations to hold those in power publicly accountable. This would feed into the development of the state extending its power versus its citizens and residents.[203] Therein, the human capabilities for political engagement, thinking and reasoning freely, as well as moving freely would be undermined as well. The latter pertains to the fact that metadata retention collects location data as well. However, as mentioned before, tracked movement does not reflect a genuinely free movement any longer (the ECtHR supported this view in 2010).[204] Furthermore, by collecting information on all members of society in order to subsequently utilize these data in terror or crime investigations, the state is indirectly defining all citizens as potential suspects (and undermines the general presumption of innocence). The last, together with the possible perception of constant control and processes of self-censoring, negatively affects individual dignity. Since privacy constitutes an important component of human life, the overall dignity of citizens (and non-citizens) is undermined by data retention. Since equal human dignity is the center of modern human rights understandings, including its wider aims, the concept as a whole is under pressure.

- **Mass Intelligence Surveillance**

Apart from the implementation of new legislation, the British authorities also extended their practice of attaining information via intelligence services after 9/11. Not only were the capabilities of the country's own intelligence service

[202] Laura Donohue, *The Future of Foreign Intelligence: Privacy and Surveillance in a Digital Age* (New York: Oxford University Press, 2016), 101. Lilian Mitrou, "The impact of communications data retention on fundamental rights and democracy – the case of the EU Data Retention Directive," In *Surveillance and Democracy*, ed.by Kevin Haggerty and Minas Samatas (London: Routledge, 2010), 129-138.
[203] Fabbrini, "Human Rights in the Digital Age," 68. Mitrou, "The impact of communications data retention on fundamental rights and democracy," 140.
[204] European Court of Human Rights, "Uzun v. Germany (Application no. 35623/05) Judgment Strasbourg," September 2, 2010.

enhanced (e.g., via the RIPA from 2000 and subsequent amendments to the same), but also cooperation with 'friendly' foreign services was intensified. These practices were revealed with the help of information provided by Edward Snowden and later other whistleblowers, and have by now been published widely in venues such as *The Guardian, The Washington Post*, or *The Intercept*. Thus, the British intelligence service GCHQ has become notorious, not only for its connections to the American NSA but also for its own surveillance measures. As the public learned in 2013 due to leaks by Snowden, the GCHQ tapped via programs such as TEMPORA intercontinental fiber optic cables and internet junction points and copied large amounts of data of internet users from all over the globe. The tapped raw data were thus transferred to a databank (the 'Black Hole'). In 2012, this databank captured fifty billion events (metadata units) per day; the aim was to reach one hundred billion as quickly as possible. Captured were for instance metadata of emails or messenger services, the browser history, data on social media usage, as well as search terms.[205]

Another aim was the creation of profiles of website users. The programs enabling the collecting of such vast amounts of data are called KARMA POLICE and MUTANT BROTH. The first program reveals which IP-address accesses which web page, whereas the latter searches cookies of web pages and services for user data or email addresses. The GCHQ therein gained the ability to construct profiles of all IP-addresses and thereby users (individuals). Another program used by the GCHQ, called SAMUEL PEPYS, can analyze content data almost in real-time, allowing to project trends and political developments. The GCHQ is additionally using the NSA's notorious program XKeyscore (just as the German BND and the German Federal Office for the Protection of the Constitution).[206] XKeyscore makes it possible to filter, sort or analyze large amounts of content and metadata. The program can categorize data in connection with over eight hundred different services and applications. It can, therefore, be considered a gigantic sorting tool. It further allows for keyword searches in the saved data. For the intelligence services using this program, XKeyscore functions as a 'super-Google'. However, the program is capable of more than that: In addition, it can analyze full content, as well as create profiles of users based on metadata. The program can show unknown connections between different user accounts (e.g., an email address and a Facebook account). The program is e.g., additionally capable of filtering all users sending an email with a certain header or including certain keywords, as well as showing all activities of specific users. The program can thus make the online activity of individuals fully transparent.[207] In 2014, the British government furthermore had to admit that its services use widespread hacking

[205] Patrick Beuth, "Die weltgrösste Überwachungsmaschine," *Die Zeit*, September 25, 2015. Heumann and Scott, "Law and Policy in Internet Surveillance Programs."
[206] Beuth, "Die weltgrösste Überwachungsmaschine."
[207] Kai Biermann, "Diese Spähsoftware findet jedes Passwort," *Die Zeit*, August 27, 2015.

methods. The GCHQ was hacking both computers and mobile phones, e.g. enabling access to stored information and log keystrokes, to corrupt, plant or delete files and data, to send fake communication from the device, as well as covertly turn on webcams and microphones.[208] Such hacking practices, in other words, enable all-around surveillance of individuals.

In connection with mass surveillance, it is important to recall that the information obtained can lead to severe extra-legal consequences for terror suspects, including extraordinary rendition and drone strikes. Due to British cooperation with American services, British surveillance can in effect contribute to such consequences (or could, in case of the abolished 'extraordinary rendition' scheme).[209] Under the program of 'extraordinary rendition,' the CIA kidnapped individuals suspected of being terrorists and transported them across international borders in order to deliver them to security services of 'friendly' nations who regularly practiced torture. For Jack Donnelly, this program reflects "a cynical evasion of even the most rudimentary principles of the rule of law."[210] The UK got involved with the American rendition program, by e.g. providing airbases to CIA flights on their rendition circuits (e.g. in Prestwick Scotland or the Island of Diego Garcia in the Indian Ocean).[211] Via drone strikes, the US has conducted extrajudicial executions of terrorists and terror suspects. US military infrastructure in both the UK and Germany has been used for the preparation and coordination of drone strikes.[212] The information gained via mass surveillance has played a not unimportant role in the preparation of such strikes. Michael Hayden (a former NSA chief) is infamously quoted with the statement that the US "kill based on metadata."[213]

Regardless of the magnitude of 'bulk interception' or mass surveillance, as well as the dubious practices mentioned in the last paragraphs, surveillance has many advocates in the British security community. For example, David Omand held in 2016 that public fear of mass surveillance would be unjustified. A moral panic would have been created around the issue. Omand explained that the threats of terrorism would again have become very

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[208] Privacy International, "Press Statement on the Second Reading of the Investigatory Powers Bill," March 15, 2016 https://privacyinternational.org/node/806

[209] Hopkins, "Huge swath of GCHQ mass surveillance is illegal, says top lawyer."

[210] Jack Donnelly, *International Human Rights*, 4th ed. (Boulder: Westview Press, 2013), 243.

[211] Andrew Tyrie, Roger Gough and Stuart McCracken, *Account Rendered: Extraordinary Rendition and Britain's Role* (London: Biteback Publishing, 2011), 161. As mentioned, also Germany provided landing rights for rendition flights. The Rendition Project, "Flight Database," https://www.therenditionproject.org.uk/flights/flight-database.html

[212] Christian Fuchs and John Goetz, *Geheimer Krieg: Wie von Deutschland aus der Kampf gegen den Terror gesteuert wird* (Reinbek: Rowohlt, 2013). Ryan Gallagher, "Inside Menwith Hill: The NSA's British Base at the Heart of U.S. Targeted Killing," *The Intercept*, September 6, 2016.

[213] David Cole, "We Kill People Based on Metadata," *The New York Review of Books*, May 10, 2014. https://www.nybooks.com/daily/2014/05/10/we-kill-people-based-metadata/

clear in 2015, and would have underlined the necessity of gaining information via bulk interception. Several attacks would have been stopped by British intelligence services in 2015, for which the bulk interception would have been vital. He added that there would be no right to absolute privacy.[214] Sir Malcolm Rifkind (i.a. former Foreign Secretary and former Chairman of the British Intelligence and Security Committee), likewise evaluated the mentioned surveillance practices as defendable, based on the argument that they would have helped to prevent terror attacks.[215] However, the effectiveness of mass surveillance in terms of preventing terrorist threats is questionable. Many observers have pointed out that the positive effect of bulk surveillance in the course of anti-terrorism is at best doubtful. For instance, when General Keith Alexander, head of the NSA claimed that collection of communication data had prevented more than fifty terror plots in the US, his deputy had to reveal subsequently that in fact only one of the plots was possibly prevented due to mass surveillance.[216]

Regardless of its effectiveness, mass surveillance does have a negative effect on human rights. In opposition to proponents of mass surveillance, the Parliamentary Assembly of the Council of Europe declared in 2015 that it evaluates mass surveillance as fundamental threat to human rights, and showed "deep concern" over mass surveillance applied by the UK, which would endanger article 8 (right to privacy) and 10 (freedom of expression) of the ECHR.[217] Indeed, the right to privacy is the human rights norm that is most obviously affected by bulk interception. However, other human rights are affected as well, e.g. the right to freedom of expression, the right to freedom of assembly and association, or the freedom of movement. The interference with these rights will be described in the following paragraphs.

For years after the Snowden revelations, no court directly took up British intelligence mass surveillance (in terms of international human rights law, the ECtHR is the relevant court on the UK's intelligence surveillance practices). Still, some court verdicts pointed clearly in the direction of this mass surveillance being conducted in a legally ineligible fashion.

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[214] Omand, "Pursue and Prevent: Keynote Panel Discussion."

[215] Malcolm Rifkind, "How Far is it Possible for the UK and its Security Services to Protect the Country from Terror?," World Counter Terror Congress, London, April 19-20, 2016.

[216] Garton Ash, *Free Speech*, 327. Lord Carlile claimed that it would not be possible to hold an opinion on bulk interception without having studied the documents, reports, and explanations of the GCHQ on the issue. Lord Alex Carlile, "The Investigatory Powers Bill and the Public Interest," Keynote Address, World Counter Terror Congress, London, April 19-20, 2016.

[217] Luke Harding, "Mass surveillance is fundamental threat to human rights, says European report," *The Guardian*, January 26, 2015. https://www.theguardian.com/world/2015/jan/26/mass-surveillance-threat-human-rights-council-europe. Pieter Omtzigt "Mass Surveillance," Council of Europe, Committee on Legal Affairs and Human Rights, 2015. https://www.scribd.com/document/253848295/Mass-Surveillance-Report#download&from_embed

First, the character of (part of) the data scanned and the scale of the operation is very similar to that of data retention regulated by the relevant policy acts (e.g. German or British data retention schemes). As explained, data retention schemes were declared ineligible by the ECJ in both 2014 and 2016 and the British data retention scheme DRIPA was declared ineligible by the UK High Court in 2015. All these rulings based their argumentation on the fact that data retention would be non-proportionate and lacked judicial oversight. Non-proportionality and lacking oversight are, however, clearly given for secret mass surveillance as well. In fact, secret mass surveillance by the GCHQ goes further than data retention in terms of the subsequent processing and analysis of the collected data (see e.g. the data analysis via programs such as XKeyscore explained above). Reflecting this circumstance, it appears that practices that go further than the one that was several times declared to infringe rights in an unacceptable manner, infringe rights obligations as well. A different evaluation of the standards set by the ECJ could only be thinkable if the context of threat and emergency would be different. However, this scenario can be dismissed since the ECJ's rulings are very recent. Therefore, the threat level must logically be roughly the same. And in fact, mass surveillance by the GCHQ in cooperation with the NSA was already carried out before the new wave of big Islamist attacks inspired by IS hit Europe.[218] The fact that the ECJ ruling rested on the legal demands of the CFREU, whereas secret surveillance by UK services would have to be evaluated on basis of the ECHR does not change this argumentation (the ECHR is the relevant legal human rights document covering secret surveillance, whereas the CFREU covers the data retention schemes emanating from the EU's data retention directive). The formulation of the right to privacy is virtually identical in the ECHR and the CFREU, and the demands for a limitation of the right to privacy in the ECHR (art. 8 par. 2) and a derogation from rights in the CFREU (art. 52) are virtually identical as well. Both articles point to the conditions of a legal basis, a legitimate aim, and necessity (proportionality). By applying these conditions, mass surveillance measures used in the UK appear to provide an ineligible interference with the right to privacy since practices by the GCHQ were not proportionate and not (fully) covered by a legal basis (since the RIP Act from 2000 on which GCHQ activities rested did not fully relate to the intelligence agencies activities any longer). As the ECtHR decided already in 2006, the demand for necessity is related to the characteristic of proportionality; therefore, non-proportionate surveillance is ineligible.[219] Since the scanning of online data of hundreds of

[218] For instance, the GCHQ provided the NSA full data access in 2011. Heumann and Scott, "Law and Policy in Internet Surveillance Programs."

[219] European Court of Human Rights, "Case of Segerstedt-Wiberg and Others v. Sweden (Application no. 62332/00) Judgment Strasbourg," June 6, 2006 https://hudoc.echr.coe.int/eng#{"itemid":["001-75591"]}.
In terms of the relation between mass surveillance and the RIPA it can be pointed out that RIPA

millions of people cannot be deemed proportionate in order to gain information on a small number of terror suspects (remember e.g. the ruling of the ECJ on this point in 2014 and 2016 in relation to data retention) the proportionality demand for derogation appears not to be upheld.

A second precedent pointing to likely ineligibility of the UK intelligence services' mass surveillance was delivered by a recent ruling from the ECtHR. In an ECtHR ruling against Hungary from January 2016, the Court found that Hungary's secret surveillance program constituted a breach of article 8 of the ECHR since the surveillance was violating the demand of proportionality. This demand would have been violated since surveillance could have captured potentially every citizen of the country and not only suspicious individuals.[220] The ECtHR emphasized that any measure of secret surveillance, which does "not correspond to the criteria of being strictly necessary for the safeguarding of democratic institutions or for the obtaining of vital intelligence in an individual operation would be prone to abuse by authorities."[221] The court thus clarified that only selected individuals can be subject to surveillance and not the broad public (as the ECJ did in its 2016 ruling on data retention). Based on this judgment broad surveillance measures applied by the UK appears to reflect an illegal infringement of article 8 of the ECHR.[222]

And third, since secret surveillance measures track location and thereby movement as well, the British practice is related to a relevant piece of case law by the ECtHR, ruling that secret tracking of movement violates one's rights to privacy.[223]

After years of insecurity, the ECtHR finally delivered a verdict on GCHQ data collection in September 2018 (the case had been brought to the ECtHR by NGOs such as EDRi and Privacy International). It held that the UK's services had violated articles 8 (privacy) and 10 (freedom of expression) of the ECHR with their bulk interception of communication data, e.g., via their scanning of data passing through fiber-optic cables (as well as the obtainment of data from service providers). The court held that the GCHQ's surveillance

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never intended to permit untargeted data-fishing practices (as e.g., via Tempora) and that it does not permit mass surveillance of communication content inside of the UK. Hopkins, "Huge swath of GCHQ mass surveillance is illegal, says top lawyer."

[220] Catherine Stupp, "European court's blow to Hungary could draw similar privacy complaints," *Euractiv.com*, January 14, 2016. https://www.euractiv.com/section/digital/news/european-court-s-blow-to-hungary-could-draw-similar-privacy-complaints/.

[221] European Court of Human Rights, "Judgment Szabó and Vissy v. Hungary - legislation on anti-terrorist secret surveillance," January 12, 2016, http://hudoc.echr.coe.int/eng-press?i=003-5268616-6546444

[222] Ibid.

[223] European Court of Human Rights, "Uzun v. Germany (Application no. 35623/05) Judgment Strasbourg," European Court of Human Rights, Guide on Article 8 of the European Convention on Human Rights https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf.

was "incapable of keeping the 'interference' to what is necessary in a democratic society." In other words, the court followed earlier legal evaluations (by the ECJ) and declared that such measures were not proportional, even when taking the threat of terrorism into regard (which the court did).[224] The ECtHR furthermore held that metadata collection is not less intrusive than the collection of content. Due to this unproportional surveillance, the right to privacy as guaranteed in the ECHR was ruled to be violated. Moreover, the court held that also freedom of expression had been violated since surveillance measures had covered journalists as well and thus interfered with freedom of the press. The court additionally acknowledged that interference with journalists' communication can trigger a "chilling effect" on press freedom.[225]

Based on the precedent verdicts and the ECtHR's recent verdict it must be evaluated that the British intelligence services' mass surveillance is ineligible in its current fashion. Just as the data retention schemes, such surveillance does not uphold the legal demand for a limitation of privacy rights, since it does not uphold the demands of proportionality and necessity. In consequence, the British government hurried to base mass surveillance on a new legal footing with the IP Act (see further below).

From a spirit of rights perspective, secret mass surveillance clearly violates the general idea of human rights. Mass surveillance undermines the spirit of rights and the wider aims of the human rights framework in the same way as the measure of data retention (as mentioned before, it does not make a difference from a spirit of rights perspective, if data are directly scanned by government agencies, or first stored by private providers and then accessed by public authorities). Since privacy is an important component of what it means to be human, the attack on privacy rights equals an attack on the idea of human dignity, the cornerstone idea of the concept of human rights. Control and limitation via surveillance undermine individuals' perception of freedom, their autonomy, their ability to define themselves, to enjoy their full range of capabilities (e.g. in regard to thinking and moving freely), and to develop their moral, intellectual, and personal components.[226] Surveillance additionally

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[224] As decided by the ECtHR in 2006 the demand for necessity is related to the characteristic of proportionality. European Court of Human Rights, Case of Segerstedt-Wiberg and others v. Sweden (Application no. 62332/00) Judgment Strasbourg, June 6, 2006 https://hudoc.echr.coe.int/eng#{"itemid":["001-75591"]}.

[225] However, the court approved the UK's data sharing regime with services of other countries, e.g., the NSA. EDRi, "ECtHR gives a half-hearted victory against UK mass surveillance," September 26, 2018. Privacy International, "UK mass interception law violates human rights - but the fight against mass surveillance continues," September 13, 2018. Owen Bowcott, "GCHQ data collection regime violated human rights, court rules," *The Guardian*, September 2018.

[226] A pursuit towards full and free personal development is guaranteed in art. 29 of the UDHR. Free movement is undermined by the detrimental effect of location tracking, as explained earlier.

inflicts with individuals' abilities for unobstructed political engagement. Secret mass surveillance additionally undermines the presumption of innocence, a central feature for every system resting on the principle of rule of law.[227] Surveillance moreover tips the power balance between individual and state to the advantage of the latter and counteracts the rights aim of maximizing freedom for every individual while setting boundaries to state power.[228] Individuals might, in consequence, start to act differently, potentially culminating in self-censoring behavior.[229] Such self-censoring behavior can mean to refrain from publicly stating one's opinion, or from participating in public protests or joining a protest group, which equals a reduction of one's freedoms of expression, assembly, and association. Besides its effects on rule of law, mass surveillance further inflicts with the wider human rights aim of justice since it does not leave affected individuals (accumulating to millions) the option to seek for legal remedy. Based on these points, it must be evaluated, that secret surveillance of whole societies threatens the cornerstones and functioning of free democratic societies; which, again, are a precondition for individuals' full enjoyment of rights and capabilities.

- **Investigatory Powers Act**

When in 2013 some of the surveillance practices described in the paragraphs above, were revealed to the public the British administration reacted. However, not by rolling back the critical measures, but by simply erecting an allegedly fitting legislative base for them.[230] This was the aim of the 2016 Investigatory Powers Act (IP Act). The IP Act was proposed in 2015 by the then Home Secretary Theresa May in the aftermath of Snowden's revelations on intelligence activities by the NSA and the GCHQ. The Act was proposed and backed by the Conservatives. It sought to formalize access of British security authorities to personal data and install a legal basis for bulk data collection.[231] The act processed through British institutions, and was in the

[227] Mitrou, "The impact of communications data retention on fundamental rights and democracy," 135-137.
[228] Fabbrini, "Human Rights in the Digital Age, 68.
[229] Again, the ECJ acknowledged the likelihood of a change of behavior of individuals under surveillance and a recent French study showed such trends. Martha Spurrier, "Investigatory Powers Act: You're not being paranoid." Ragazzi et al., "The Effects of Counter-Terrorism and Counter-Radicalisation Policies on Muslim Populations in France," *Centre d'etude sur les Conflits, Liberte et Securite (CCLS)*, 2018. Donohue, *The Future of Foreign Intelligence*, 101. Markus Beckedahl and Falk Lüke, *Die digitale Gesellschaft: Netzpolitik, Bürgerrechte und die Machtfrage* (München: dtv, 2012), 53.
[230] Liberty, "Liberty wins first battle in landmark challenge to mass surveillance powers in the Investigatory Powers Act," April 27, 2018.
https://www.libertyhumanrights.org.uk/news/press-releases-and-statements/liberty-wins-first-battle-landmark-challenge-mass-surveillance.
[231] Financial Times, "Human rights concerns spur review of investigatory powers bill," June

course of that object of heavy debate, both in parliament and public. Originally, Labour had threatened to vote the IP Act down.[232] However, Labour eventually voted in favor of the Act in the House of Commons in June 2016, resulting in an overall vote of the House of Commons of 444-69 in favor of the IP Act. The Labour party based its support on a few concessions by the Conservative government; for example, the implementation of a so-called 'double-lock system', which gives Judicial Commissioners the competence to scrutinize the issuing of a warrant by the Home Secretary.[233] However, the core of the IP Act – including some of the heavily criticized parts - stayed intact and the act was finally adopted in November 2016.[234]

The IP Act contains a range of renewed, new or extended measures. The act extends the data retention requirements, as it demands phone companies and internet providers not only to store records of phone calls, emails, and text messages but also to store records of websites visited and apps used for everyone in the UK for twelve months. Police, security services, and dozens of other public institutions are granted access to such data (without independent oversight). The law expatiated the authorities' powers concerning

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7, 2016. http://www.ft.com/cms/s/0/85d862e2-2cc0-11e6-bf8d-26294ad519fc.html#axzz4KM0vGamL

[232] In March 2016, Labour and SNP signaled support for the Act but demanded substantial changes. Labour's Andy Burnham e.g., demanded to ensure "the right balance between collective security and individual privacy in the digital age." Burnham called for more transparency in relation to surveillance powers (e.g., in connection with the question who would be allowed to use them), a reduction of the list of agencies who would receive such powers, as well as a limitation of surveillance powers to serious investigations. He also demanded a more specific definition of the terms 'national security' and 'economic wellbeing' that constitute conditions for the usage of the new powers. Burnham further demanded an independent review of bulk surveillance powers, guarantees that activists for justice and trade unionists will not be spied on, as well as better protection of the communication of MPs, lawyers or journalists. The Liberal Democrats opposed the new legislation, based on the potential for misuse of powers and data, as Nick Clegg pointed out. The party called on Labour to prevent the new surveillance laws. This call, however, showed to be unsuccessful. BBC, "Investigatory Powers Bill: May defends surveillance powers", March 15, 2016. The Guardian, "'Snooper's charter': Theresa May faces calls to improve bill to protect privacy," March 15, 2016.

[233] Financial Times, "Human rights concerns spur review of investigatory powers bill." Privacy International deemed that the mentioned 'double-lock system' of the IP Act is insufficient; the group speaks instead of a 'single broken lock'. The NGO pointed out that a lack of clarity remains on how big the possibilities of the Judicial Commissioners are in scrutinizing the Secretary of State's decision to grant warrants for surveillance or hacking. Privacy International underlined, that thereby the UK is an 'outlier' amongst democratic states, and the only country of the Five Eyes Coalition to "not vest the full power to approve surveillance activities in the judiciary." Privacy International, "Bulk Powers in the Investigatory Powers Bill: The Question of Trust Remains Unanswered," September 2016. http://www.politico.eu/wp-content/uploads/2016/09/PI_Lords.pdf

[234] BBC, "Surveillance law: Revised bill adds privacy safeguards," March 2, 2016. The IP Act replaced large parts of RIPA in the process. Bowcott, "GCHQ data collection regime violated human rights, court rules."

the bulk collection of data (mass surveillance) worldwide (including the inside of the UK). Bulk collection of data here refers to the collection of large quantities of internet data, as well as the collection of personal information from digital databases by the security organs.[235] The IP Act also created a statutory footing for mass hacking practices of networks and devices (called 'equipment interference'). Companies were demanded to support authorities in this regard, e.g., by bypassing encryption.[236] Thereby, the UK became the first liberal democratic country to create a statutory footing for such hacking practices.[237] The IP Act, furthermore, gave the opportunity for issuing 'thematic warrants', which were not aiming at specific individuals but a certain group of individuals fitting to certain characteristics (e.g., all individuals who traveled to a specific country in the last three months).[238]

The introduction of the IP Act is to be regarded as legalizing practices that were already taking place without any legal base. In effect, Snowden's revelations did not lead the British authorities to stop illegal intelligence activities, but rather to legalize the questionable activities. A critical point of the IP Act is additionally that it enabled law enforcement agencies to access data in cases not related to terrorism or serious crime. The act, for example, enabled data access in order to protect public health, "in the interests of the economic well-being" of the UK, or "for the purpose of assessing or collecting any tax."[239]

Proponents of the IP Act perceive the conducted surveillance to be proportionate. Lord Carlile (amongst other functions a Deputy High Court Judge) for example argued that all irrelevant information would be filtered out of the gathered data before human eyes would look at the content. It would additionally not be possible to listen to everything and look at everything. Furthermore, such programs would not be able to steal the population's privacy since an overwhelmingly big share of information (Carlile speaks of around ninety-nine percent) on a modern society's citizen would already be

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[235] BBC," Investigatory Powers Bill: May defends surveillance powers."

[236] Ira Ryk-Lakhman, "The Investigatory Powers Act and International Law: Part I," UCL Journal of Law and jurisprudence Blog, December 26, 2016. https://blogs.ucl.ac.uk/law-journal/2016/12/26/the-investigatory-powers-act-and-international-law-part-i/. Alan Travis," Investigatory powers bill: the key points," *The Guardian*, November 4, 2015. Owen Bowcott, "Investigatory powers bill not fit for purpose say 200 senior lawyers," *The Guardian*, March 14, 2016.

[237] Scarlet Kim, "The snooper's charter is flying through parliament. Don't think it's irrelevant to you," *The Guardian*, March 14, 2016.

[238] Camilla Graham Wood, "Thematic warrants: 'Destroying democracy under the cloak of defending it'," *Solicitors Journal*, February 8, 2016.
https://www.solicitorsjournal.com/comment/thematic-warrants-destroying-democracy-under-cloak-defending-it. Ryk-Lakhman, "The Investigatory Powers Act and International Law."

[239] Gallagher, "UK Court finds Government's Surveillance Powers Unlawful." With this wide-scale access to data collected under the IP Act, the government opened up for a diversified usage of such data, away from only strict anti-terrorism purposes.

on the Internet. People would freely give away this information via social media such as Facebook and Twitter. Proponents such as Lord Carlile additionally hold that terror attacks such as the one in Brussels in March 2016 could have been prevented with more international information sharing based on such measures as included in the IP Act. On this basis, Carlile evaluated the IP Act as a proportionate response for the protection against terror threats.[240] In a similar tone, Theresa May claimed that "the Bill ensures that the security and intelligence agencies and law enforcement continue to have the powers they need to keep us safe against a backdrop of an increasingly complex, serious and unpredictable threat."[241] May furthermore held that bulk surveillance had already played an important role in preventing several terror attacks in 2015 and 2016.[242] In addition, David Omand deemed the IP Act to be the "new gold standard" for keeping the country save while protecting liberty and the rule of law.[243] The British Human Rights Committee (BHRC, a parliamentary committee of the House of Commons and the House of Lords) evaluated in June 2016 that the IP Act was "capable of being justified" from a human rights perspective, and, resting on the general conditions for rights limitation discussed earlier, bulk surveillance would not be "inherently incompatible with the right to respect for private life."[244] The BHRC altogether welcomed the efforts for the IP Act, that would constitute an "a significant step forward", in regard to human rights, provided that mentioned conditions were met and sufficient legal safeguards enshrined (the Committee e.g., demanded safeguards in connection with the communication of parliamentarians and journalists).[245]

However, several human rights and civil rights groups, as well as academics and lawyers, and even the association of internet providers voiced concern and criticism. Critics created the pejorative label 'Snoopers' Charter' for the IP Act.[246] Eric King argued that an invasion of privacy is already given when data is gathered, not first when human eyes are going through the collected data, as for example, IP Act proponent Lord Carlile argued.[247] Campaigners of civil liberties groups claimed that the Act cleared "the way

[240] Lord Carlile, "The Investigatory Powers Bill and the Public Interest."
[241] BBC, "Surveillance law: Revised bill adds privacy safeguards." May additionally held that authorities would be able to separate the connection records from the particular content that has been looked at; security authorities would only be able to look at the former. The Guardian, "'Snooper's charter': Theresa May faces calls to improve bill to protect privacy."
[242] BBC, "Investigatory Powers Bill: May defends surveillance powers."
[243] Omand, "Pursue and Prevent: Keynote Panel Discussion." Kim," The snooper's charter is flying through parliament."
[244] BBC, "Investigatory Powers Bill: Privacy concerns 'could be met'," June 2, 2016.
[245] Ibid.
[246] Lord Carlile evaluated this label as "unfitting for any intelligent debate" around the topic. Lord Carlile, "The Investigatory Powers Bill and the Public Interest."
[247] Eric King, "Pursue and Prevent: Keynote Panel Discussion," World Counter Terror Congress, London, April 19-20, 2016.

for mass surveillance of UK citizens".[248] Amnesty International warned that "wide-ranging snooping powers" were installed at "break-neck-speed.[249] The Internet Services Providers Association agreed to such criticism when they showed concern about "the ambitious timetable of the bill."[250] The Open Rights Group claimed that the act would install "one of the most draconian surveillance laws of any democracy […]."Martha Spurrier, Director of the NGO Liberty, held that the Act created "the most intrusive surveillance regime of any democracy in the world," and a group of senior lawyers (including the chair of the Bar Human Rights Committee) and representatives of forty British law schools claimed in a letter to *The Guardian* that the new law threatened to destroy privacy.[251] And, David Anderson, appointed as 'independent reviewer of terrorism legislation' uttered in June 2016 concern that the bulk collection of data enabled by the IP Act would not be compatible with the ECHR.[252] Thus, the IP Act caused a heavy debate in the UK. Lord Carlile evaluated that the IP Act triggered more debate and discussion than "any other Bill in history."[253]

The civil rights NGO Liberty, challenged the IP Act at the British High Court, arguing that the act would violate the right to privacy in an unjustified manner. In April 2018, the court decided that the part of the IP Act demanding the retention of communication data by service providers is indeed unlawful (no rulings have been issued on the other parts yet, e.g. covering the competence for hacking into phones, laptops, and tablets), since it would be incompatible with privacy rights demands in the CFREU (art. 7). The judges ruled that this part of the IP Act is unlawful since it opens up for data retention for other purposes than serious crime and without independent review. The fact that a quarter-million requests for warrants to access personal telecommunication data were issued in 2017 based on the IP Act (revealed by a Home Office report), indeed shows that IP Act surveillance is with a high

[248] BBC, "Surveillance law: Revised bill adds privacy safeguards."
[249] BBC, "Investigatory Powers Bill: May defends surveillance powers." And also the civil liberties group Big Brother Watch remarked that the pace of implementing the law was all "too fast". The Guardian, "'Snooper's charter': Theresa May faces calls to improve bill to protect privacy."
[250] The Guardian, "'Snooper's charter': Theresa May faces calls to improve bill to protect privacy."
[251] BBC, "Surveillance law: Revised bill adds privacy safeguards." The Guardian, "'Snooper's charter': Theresa May faces calls to improve bill to protect privacy." Liberty, "Liberty wins first battle in landmark challenge to mass surveillance powers in the Investigatory Powers Act." Already in the drafting phase criticism led to revisions and amendments of the Act. For example, the draft bill received heavy criticism by three parliamentary committees in 2015. The criticism aimed at the vagueness of the draft bill and insufficient protection of privacy. The draft bill was thus revised, e.g. by adding the demand for security services to obtain a senior judge's permission before identifying a journalists' source via communications data. BBC, "Surveillance law: Revised bill adds privacy safeguards."
[252] Financial Times, "Human rights concerns spur review of investigatory powers bill."
[253] Lord Carlile, "The Investigatory Powers Bill and the Public Interest."

likelihood not about surveillance on cases of serious crime or terrorism only (under RIPA only 3.400 warrants were issued in 2012) and that the system of surveillance is based on the issuing of general (or thematic) warrants (which signifies a scrutiny). The court demanded the British legislative to amend the IP Act so that a breach of rights can be omitted in the future.[254] If the British government will follow up on the demand in a sufficient way is to be awaited. However, on the evaluation that data is ineligibly collected for cases of non-serious crime, the government's course of action was to simply change the definition of 'serious crime', by including all crime from a twelve months prison sentence onwards into the definition. Formerly, the threshold for defining serious crime was a sentence of three years. It appears questionable if the limitations to cases that could spur a prison sentence of twelve months or more fulfill the requirement of 'serious crime'.[255] The government reaction, in any case, demonstrates that legal jugglery indeed can be part of anti-terrorism policymaking.

Although the judgment by the High Court declared one part of the IP Act to be unlawful, it did not cover all parts of the IP Act and did not go as far as some earlier judgments on data retention by other courts, especially the ECJ. However, legal action in front of other relevant international courts is pending. For instance, Privacy International, together with five other activist groups (e.g., the German Chaos Computer Club), decided in 2016 to challenge the use of hacking measures by British security authorities at the ECtHR. The NGO argued that the practice of hacking violates articles 8 and 10 of the ECHR (respectively protecting the rights to privacy and freedom of speech). The group argues that the government would allow the hacking of large groups of people, without individual suspicion and judicial authorization, which "fails to protect against arbitrary interference and abuse."[256]

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[254] Liberty v. Home Office, Courts and Tribunals Judiciary, April 27, 2018. https://www.judiciary.uk/judgments/liberty-v-home-office/. Liberty, "Liberty wins first battle in landmark challenge to mass surveillance powers in the Investigatory Powers Act." Rebecca Hill, "High Court gives UK gov six months to make the Snooper's Charter lawful," *The Register*, April 27, 2018. https://www.theregister.co.uk/2018/04/27/high_court_ip_act_unlawful_november_deadline/ Ian Cobain, "UK has six months to rewrite snooper's charter, high court rules." Alan Travis, "UK police to lose phone and web data search authorization powers," *The Guardian*, November 30, 2017. Macdonald, "Prosecuting suspected terrorists," 138.
In fact, English courts rejected the concept of general warrants for centuries. However, current mass surveillance measures are based on such warrants. Laura Donohue, "International Cooperation & Intelligence Sharing" (presentation, The Future of Terrorism: Georgetown & St. Andrews University Conference, Washington, April 28-29, 2016).

[255] The Data Retention and Acquisition Regulations 2018. https://www.legislation.gov.uk/uksi/2018/1123/pdfs/uksi_20181123_en.pdf.

[256] Privacy International, "Press Release: Privacy International And Five Internet And Communications Providers Challenge British Government's Bulk Hacking Abroad Before The European Court Of Human Rights," August 5, 2016. https://www.privacyinternational.org/press-release/1233/press-release-privacy-international-

There is justified reason to assume that the ECtHR might rule the IP Act to be ineligible and in breach of the ECHR. First, the ECHR hinted already that it might evaluate the British IP Act as ineligible, or in other words, limiting human rights standards without a justified base, with a ruling against Hungary from January 2016.[257] As explained in the last section, the Court evaluated that Hungary's secret surveillance program constituted a breach of article 8 of the ECHR since the surveillance was violating the demand of proportionality. The court saw this demand to be in violation since surveillance could potentially have captured every citizen of the country and not only suspicious individuals.[258] However, since the same is provided in case of British data collection under the IP Act, a similar evaluation of the ECtHR does not appears unlikely. Moreover, in its recent verdict on British surveillance measures from September 2018 (which did not cover the IP Act), the ECtHR declared that mass surveillance via optic cables and mass data retention would be ineligible due to not meeting the criteria of proportionality (see above). These parts of the ruling deliver strong indication that the ECtHR will decide likewise on similar provisions in the IP Act.[259]

Second, the rulings of the ECJ on data retention can be taken as a useful reference point as well.[260] When comparing the conditions for limitation of privacy rights in art. 8 ECHR and derogation from rights in art. 52 CFREU, one will find that conditions are quite comparable. This includes the norm of proportionality, which is demanded directly in article 52 of the CFREU but was also emphasized by the ECtHR in a 1988 ruling. The ECJ, as mentioned, decided in 2014 that the EU's directive on data retention from 2006 was incompatible with the CFREU. The Court ruled that the directive inferred with the rights to private life and the protection of personal data. The directive did in the eyes of the court not comply with the principle of proportionality. The rights interference was not evaluated to be "limited to what is strictly necessary." This was based on the circumstance of the directive covering "in a generalized manner, all individuals, all means of electronic communication and all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime." In other words, data retention was ineligible since indiscriminate data retention would not be a proportionate means of surveillance. Furthermore, the fact that the data would be used without informing the affected individuals would be "likely to generate in the persons concerned a feeling that their

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and-five-internet-and-communications. Nichols, Shaun. "Privacy warriors drag GCHQ into Euro human rights court over blanket spying, hacking," *The Register,* August 6, 2016.

[257] Stupp, "European court's blow to Hungary could draw similar privacy complaints."

[258] European Court of Human Rights, "Judgment Szabó and Vissy v. Hungary - legislation on anti-terrorist secret surveillance."

[259] Privacy International, "UK mass interception law violates human rights."

[260] However, only hypothetically, since the CFREU is only directly applicable on EU bodies or state's implementation of EU law, thus not applicable to the British IP Act.

private lives are the subject of constant surveillance."[261] After this ruling, some European countries took new efforts for national data retention legislation (e.g., the UK in 2014 with the DRIPA and Germany in 2015). Therefore, the ECJ was once more called upon to decide on data retention. In December 2016, the ECJ ruled that the bulk collection and retention of traffic and location data (a collection without concrete reason and specific target), as practiced in the UK and Sweden, is ineligible. The ECJ argued that the storing of such data would allow for "very precise conclusions to be drawn concerning […] private lives." Again, bulk collection of metadata would be exceeding the limits of what can be evaluated as strictly necessary (and therein proportionate) and could not be justified in a democratic society. Only targeted data retention would be allowed if such targeted retention were subject to prior review by a court or an independent body.[262] Taking the ECJ's case law on data retention into regard, it appears likely that the UK is running into legal problems with the ECHR via its surveillance measures under the IP Act. The surveillance practices enabled by the act are even more invasive than those enabled by the sanctioned data retention directive (e.g. due to the added hacking measures), while conditions for rights restrictions are similar.

Furthermore, the UK is as mentioned not only bound to the ECHR, but also the human rights obligations provided for by the ICCPR. As mentioned, the conditions for the limitation of privacy rights in the ICCPR are very similar to the conditions defined in the ECHR. The IP Act, thus, appears to be in conflict with the legal obligations of privacy right protection emanating from the ICCPR as well. However, other than the ECHR, the ICCPR is not enforced by binding rulings of an international court (but only scrutiny of the UN Human Rights Committee).[263]

Indeed, based on these observations of relevant rulings, it can be claimed that the UK appears to be, also after the implementation of the IP Act, in conflict with legally binding human rights obligations by executing mass surveillance. 'Bulk interception' or mass surveillance appears to ineligibly interfere with several basic human rights enshrined in the mentioned documents.[264]

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[261] Court of Justice of the European Union "Press Release No 54/14: Judgment in Joined Cases C-293/12 and C-594/12 Digital Rights Ireland and Seitlinger and Others," April 8, 2014.

[262] Ibid.

[263] However, since the UK has not signed the first optional protocol to the ICCPR individuals cannot complain to the HRC.

[264] Right to privacy, freedom of expression, movement, assembly and association as enshrined in all the above-mentioned documents (art. 8 ECHR, art. 17 ICCPR, art. 7 and 8 CFREU). When evaluating the IP Act against a non-state baseline for the legitimacy of limitation or derogation of rights, e.g. the Johannesburg Principles (concerned with the possible derogation of freedom of expression, see Chapter 1), the IP Act would not be eligible as well, since no imminent danger for the UK's existence, its territorial integrity, or its ability to respond to force or threats exist. Garton Ash, *Free Speech*, 333.

Entering the evaluation of the IP Act from a spirit of rights angle, I would like to iterate that human rights (also) reflect a general understanding of the relation between individual and state and the necessary limits of state power. I argued before that both the relation between individual and state, as well as the general culture of human rights, or importance of human rights, can be damaged by policies based on human rights derogations or limitations, also if they are formally eligible. Thus, by implementing a system of surveillance that covers all individuals in society, encompasses large parts of every individual's life and is constructed to be a continuous tool without a limitation concerning its duration, the UK interferes with human rights, notwithstanding the potential legal quarrels. By establishing and applying the measure of continuous mass surveillance, the British state clearly intervenes in the relationship between citizen and state. The power balance is significantly changed towards the advantage of the state (already previously the stronger), thereby endangering the social and political structure of democratic society. Via such surveillance measures the state implements a precautionary logic and opens up for regarding every individual as a potential threat rather than displaying support for every individuals' rights, freedom and personhood. The fact that affected individuals have no realistic option for legal remedy available underlines this skewed power balance and emphasizes problems in terms of the rights aim of justice. Detrimental effects on democracy can additionally be triggered by potential processes of self-censoring, which can be created by surveillance measures.[265] Furthermore, surveillance undermines the personal dignity of all affected individuals, since privacy is an essential and integral part of what it means to be human and since privacy is central to the development of every individual. The perception to be free from unnecessary control and limitation in terms of thought and action is essential; for individuals' abilities to define themselves, as well as an individual's political engagement. Individuals have to have the possibility to think of their own in a democracy, without being obstructed by worries of a breach of their privacy. Consequently, humans both act and develop differently when they are aware of lacking privacy.[266] However, the mentioned surveillance measures result in just such arbitrary interference with privacy, including the potential inducement of self-censoring processes. Therein, one might claim that IP Act measures undermine the human capabilities for political engagement, social interaction, thinking freely and moving freely (since tracking location undermines free movement). In essence, via measures as applied under the IP Act, the general spirit of human rights, its everyday importance, or in other words the entrenchment of the concept as a major pillar of British life is undermined.

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[265] As explained earlier in this thesis, self-censoring endangers important preconditions for a functioning democratic society. Fabbrini, "Human Rights in the Digital Age."

[266] Donohue, *The Future of Foreign Intelligence*, 101. Glenn Greenwald, *No Place to Hide: Edward Snowden, The NSA and the Surveillance State* (London: Hamish Hamilton, 2014), 172.

- **CCTV and Recognition Systems**

The surveillance of online activity via measures such as data retention or mass surveillance by intelligence agencies is supplemented by other forms of surveillance, e.g. surveillance in public institutions via the Channel program. I will, in the following, elucidate one more relevant example of surveillance in the UK, which is surveillance via CCTV, in combination with facial recognition technology (FRT).[267] However, before I will discuss CCTV in combination with facial recognition, I will shortly introduce the usage of CCTV in the UK in order to contextualize the roots and basis of the current recognition system.

Today, Britain is home to the most extensive CCTV system worldwide and London is one of the most complete surveyed cities in the world.[268] The rapid growth of CCTV systems in the UK reaches, in fact, further back than 9/11. Already in the 1990s, CCTV was expanded in order to prevent crime. However, after 9/11 CCTV surveillance was expanded again, this time using the argument of terror threats. Thus, already in 2003, a British citizen was on average filmed three hundred times a day.[269] The number of public cameras in the UK was estimated at around 4.2 million in 2009, one for every fourteen people.[270] Until 2013, the number had grown to almost six million.[271] In 2007, media reports found that thirty surveillance cameras were to be found within two hundred yards of the apartment in which George Orwell wrote *1984*.[272]

Whereas systems of CCTV were implemented in order to prevent serious crime and terrorism (or to enlighten the backgrounds of already committed terror attacks), CCTV cameras are non-surprisingly not primarily

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[267] The mandatory referral scheme in public institutions (the Channel program) is arguably a form of mass surveillance (non-virtual surveillance). However, CCTV systems still capture more individuals on an everyday basis.
UK authorities additionally hold a large database of DNA and fingerprints, the National DNA Database. Around 5.2 million individuals (as of December 2016) have data on their DNA or fingerprints stored in that database. Individuals are added after being charged or convicted of a crime. Data are then retained indefinitely, but are supposed to be deleted in case of a drop of charges or an acquittal, however only in England and Wales (not the rest of the UK).
Gov.uk, "Official Statistics: National DNA Database statistics," https://www.gov.uk/government/statistics/national-dna-database-statistics.

[268] Peter Schaar, *Das Ende der Privatsphäre* (München: Goldmann, 2009), 30.

[269] Already in 2003 CCTV in the UK was dubbed as ubiquitous. Jeffrey Rosen, "A Cautionary Tale for A New Age of Surveillance," In *Terrorism in Perspective*, ed. by Pamala L. Griset and Sue Mahan (Thousand Oaks: SAGE Publications, 2003). Ilija Trojanow and Juli Zeh, *Angriff auf die Freiheit: Sicherheitswahn, Überwachungsstaat und der Abbau bürgerlicher Rechte* (München: Carl Hanser Verlag, 2009), 155. Constanze Kurz, *Die Datenfresser* (Frankfurt: S. Fischer, 2011), 202-203.

[270] Whittaker, *Counter-Terrorism and Human Rights*, 97.

[271] Garton Ash, *Free Speech*, 287.

[272] Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data: A Revolution That Will Transform How We Live Work and Think* (London: John Murray Publishers, 2013), 150.

used for these purposes. Mostly they serve purposes of regular criminal prosecution, as e.g., following car thieves or traffic offenders, or in general zooming in on unconventional public behavior or enforcing conformity in public.[273] Jeffrey Rosen evaluated after conducting fieldwork into CCTV monitoring rooms in the UK that CCTV is not used to prevent terrorism but "to keep punks out of shopping malls." Accordingly, CCTV constitutes an example of a side-effect anti-terrorism measure. In addition, Rosen could not find an operative who had prevented an act of terrorism by using CCTV.[274]

Moreover, CCTV systems do tend to amplify discriminative tendencies in societies, although the systems are technically passive systems (not directly interfering). The reason is the prioritization of CCTV monitoring staff in relation to the individuals in the pictures. As Rosen documented, (mostly male) monitoring staff concentrates their surveillance actively on (young) women and male members of ethnic minorities. Thus, CCTV does entail both gender and racial bias.[275] From a spirit of rights perspective, CCTV collides with a general idea of free public space, in the original sense of freedom. Moving, assembling, associating and expressing opinions in public space become surveyed activities, reducing the amount of anonymity and privacy of every affected individual. In effect, awareness of surveillance potentially triggers a change of behavior. Thus, (some) people will change to more adaptive behavior, based on their ideas about social conformity. Such trends potentially undermine the level of public political engagement that is critical for all democracies, as well as collide with norms and values that are essential for all open societies, e.g. the importance of privacy as integral part of human life, the general spirit of freedom in society, and the general notion of human dignity. The latter can be evaluated as being damaged when certain shares of a population are scrutinized disproportionately, when almost all individuals in metropolitan areas are under constant surveillance when moving in public space, and when such technologies are in general used in order to increase a sense of control over the population. Reflecting upon CCTV systems, one might draw parallels between the construction of a dense net of surveillance in the name of anti-terrorism, and Jeremy Bentham's concept of the Panopticon prison. Michel Foucault's description of the Panopticon as a state method to assert less visible forms of control which

[273] Rosen, "A Cautionary Tale for A New Age of Surveillance." However, in case of the attack on Lee Rigby (see above), they proved useful as the cameras recorded the attack and could thus be used in court. Still, the attackers had already admitted the murder to passers-by) Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004), 352.

[274] Fittingly, Rosen denoted CCTV systems in connection with anti-terrorism as "feel-good technology." Rosen, "A Cautionary Tale for A New Age of Surveillance."

[275] Ibid. Eijkman and Schuurman report the same. *Preventive Counter-Terrorism and Non-Discrimination in the European Union*, 14.

trigger a constant awareness of state power appears to be a fitting metaphor in the face of ever-expanding surveillance of public space.[276]

In latest years, the potential of CCTV has been merged with the idea to establish facial recognition systems. The idea of recognizing individuals in public by the help of biometric characteristics and CCTV has been prevalent in the UK since the first years after 9/11. However, in the early 2000s, systems, which tried to recognize faces via live pictures, were very unreliable. Therefore, the UK authorities opted to install a system that is able to recognize number plates instead.[277] Still today, the British police are running a system of cameras that can automatically recognize number plates of vehicles. The system automatically compares numbers plates scanned on British streets against a databank of (suspect) number plates. The declared aim of the measure is – non-surprisingly – the prevention of crime and terrorism.[278] However, due to an improvement of facial recognition technology in recent years, British security services and politicians have rediscovered the idea of live facial recognition systems based on biometric data and CCTV and embraced them as a part of future security strategies, including the fight against terrorism.[279] Such systems conduct an automatic scan of the physical characteristics of faces of passers-by and compare these biometric data to data on suspects or persons of interest stored in a database. If a match occurs, the system will produce a notification and security personnel (e.g. police units) will take action.[280] UK plans for establishing facial recognition via CCTV are following a global trend. Similar systems are e.g. developed in Germany, the US, and Australia. China is already using such systems on a widespread scale.[281] Thus, it has become a likely scenario, that in the near future such

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[276] Michel Foucault, *Discipline and Punish: the birth of the prison* (New York: Pantheon Books, 1977). Ishay, *The History of Human Rights*, 352. Rosen, "A Cautionary Tale for A New Age of Surveillance."

[277] Rosen, "A Cautionary Tale for A New Age of Surveillance."

[278] Police.uk, "Automatic Number Plate Recognition: How police forces and other law enforcement agencies use Automatic Number Plate Recognition (ANPR)," https://www.police.uk/information-and-advice/automatic-number-plate-recognition/. Rosen, "A Cautionary Tale for A New Age of Surveillance." Systems that track the movement of individuals, such as the automatic recognition of cars, arguably conflict with the right to privacy and the nature of freedom of movement (UDHR art. 13, ICCPR art. 12, art. 2 protocol 4 to the ECHR, CFREU art. 45).

[279] Vikram Dodd, "UK police use of facial recognition technology a failure, says report," *The Guardian*, May 15, 2018. https://www.theguardian.com/uk-news/2018/may/15/uk-police-use-of-facial-recognition-technology-failure.

Facial recognition is in the UK based on a slightly wider approach compared to the German case, at least in terms of the legitimizing discourse around the measure. Whereas in Germany facial recognition was overwhelmingly sold to the public by pointing to the potential threat of terrorism, in the UK politicians have pointed to both, terrorism and crime.

[280] Systems might also be calibrated to give alarm if an individual shows certain forms of abnormal behavior in a public area.

[281] Cynthia Wong, "We underestimate the threat of facial recognition technology at our peril,"

systems will see widespread usage in the UK, especially at points of public interest in metropolitan areas. The likelihood of this scenario is amplified by the positive evaluation of such systems by police authorities, who believe in great benefits of the system. This likelihood is additionally amplified by the fact that earlier 'test systems' on other measures have eventually been implemented as the new normal.[282] Accordingly, public space will see a transformation. Surveillance and the potential to monitor each individual will become an inevitable component of such space.[283] However, some test runs of facial recognition systems have not gone according to the expectations by law enforcement institutions. For instance, the NGO Big Brother Watch held that facial recognition systems used at the 2017 Notting Hill carnival produced false results in more than ninety percent of cases, and the results were equally bad at the 2017 Remembrance Sunday event in London.[284] Thus, rights might be interfered with for a system that appears not very effective in terms of anti-terrorism benefits. Furthermore, recognition systems own a racial and gender bias, since the failure rate is higher for people of color, as well as women (not only in British systems, as US and Australian systems showed the same effect).[285] Still, security and police authorities continue preparations for usage of such systems on a wider scale.

The Guardian, August 17, 2018.
https://www.theguardian.com/commentisfree/2018/aug/17/we-underestimate-the-threat-of-facial-recognition-technology-at-our-peril. The technology can be expected to be used in the nearest future for a variety of purposes, e.g. in order to speed up security procedures at airports, or, more significantly, for commercial reasons, for instance, allegedly more secure methods of payment. Again, China is a frontrunner for such usages of this technology. Eden Gillespie, "Are you being scanned? How facial recognition technology follows you, even as you shop," *The Guardian*, February 24, 2019.

[282] Dodd, "UK police use of facial recognition technology a failure, says report." Martha Spurrier, "Facial recognition Facial recognition is not just useless. In police hands, it is dangerous," *The Guardian*, May 16, 2018.
https://www.theguardian.com/commentisfree/2018/may/16/facial-recognition-useless-police-dangerous-met-inaccurate.

[283] Paul Karp, "Facial matching system risks racial bias, Human Rights Law Centre warns," *The Guardian*, May 29, 2018. https://www.theguardian.com/technology/2018/may/30/facial-matching-system-is-racist-human-rights-law-centre-warns. David Paris, Director of Digital Rights Watch accordingly warned that states, who implement facial recognition, might eliminate "any place where people aren't surveilled." Gillespie, "Are you being scanned?"

[284] Dodd, "UK police use of facial recognition technology a failure, says report." Spurrier, "Facial recognition is not just useless. In police hands, it is dangerous."

[285] Dodd, "UK police use of facial recognition technology a failure, says report." Spurrier, "Facial recognition is not just useless. In police hands, it is dangerous." Wong, "We underestimate the threat of facial recognition technology at our peril." Karp, "Facial matching system risks racial bias, Human Rights Law Centre warns." Amazon's system, currently one of the front-runners, commits the same kind of mistakes as a study by the MIT revealed in early 2019. James Vincent, "Gender and racial bias found in Amazon's facial recognition technology (again)," *The Verge*, January 25, 2019.
https://www.theverge.com/2019/1/25/18197137/amazon-rekognition-facial-recognition-bias-

Although no relevant court has delivered a ruling on the matter, the establishment of a system of facial recognition via CCTV does appear at least questionable from a legal perspective. Facial recognition systems in public places operated via live CCTV pictures collide with the right to privacy, assembly, association and freedom of expression. Individuals' privacy is limited when one cannot move freely in public (or at least in big parts of major cities) without being surveyed by having one's face or movement scanned and analyzed. Freedom of assembly, association, and freedom of expression are arguably reduced via recognition systems as well, e.g. in a scenario of such technology being used at venues of assemblies, demonstrations or other forms of political protest. In effect, some people might refrain from using their right to assembly and to express their political views at such events.[286] Limitations and derogations of human rights can only be justified when certain conditions are upheld. However, the widespread use of facial recognition systems via CCTV in public areas all over the UK appears not to be in accordance with these conditions. First, limitations must be in accordance with the law. However, until further there is no clear legal basis for the usage of facial recognition via CCTV in the UK, the test runs of the measure have been carried out in a legal grey zone.[287] Accordingly, until further, this demand for limitation is not fulfilled. Second, the demand for proportionality appears not to be upheld either.[288] If facial recognition systems were used by thousands of CCTV cameras over the whole country hundreds of thousands, if not millions of passers-by would have their faces scanned every day. This appears non-proportionate in order to detect a comparatively tiny group of suspects.[289] The ECJ decided in 2016 that indiscriminate scanning of online data is illegal based on its indiscriminate style of surveillance. As the same indiscriminate style is used by facial recognition, one can assume that a relevant court (at least the ECJ) would with a certain likelihood come to the same conclusion in terms of recognition systems.[290] Based on these points legal eligibility of facial

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race-gender.

[286] The Australian Human Rights Law Centre came to the same conclusion in a 2018 research report. Spurrier, "Facial recognition is not just useless. In police hands, it is dangerous." Wong, "We underestimate the threat of facial recognition technology at our peril." Karp, "Facial matching system risks racial bias, Human Rights Law Centre warns."
The connection between the infringement of privacy rights and other rights was explained earlier. Thus, the described infringement on privacy in the course of surveillance potentially leads to processes of self-censoring, especially among target groups such as Muslim the minority (this was e.g., described in my section on the Channel program).

[287] Spurrier, "Facial recognition is not just useless. In police hands, it is dangerous."

[288] As mentioned above, the ECtHR evaluated in 2006 that the condition of proportionality follows with the condition of 'what is necessary in a democratic society'.

[289] The civil rights NGO Big Brother Watch shares this evaluation. Dodd, "UK police use of facial recognition technology a failure, says report."

[290] Moreover, the usage of facial recognition systems might be in collision with the EU's new General Data Protection Regulation (explained in Chapter 3), at least as long the UK is a member of the EU.

widespread indiscriminate facial recognition via CCTV appears to lie at least in a grey area.

From a spirit of rights perspective, widespread facial recognition technology is highly problematic. The possibility of constantly being recognized by state authorities in public (whereas being uncertain about if one is really surveyed at the moment) greatly extents state power over its individuals. Martha Spurrier, therefore, denominated facial recognition measures as "policing without constraint."[291] This power relation is additionally reflected in the fact that facial recognition systems are erected in a way, which makes it impossible to collect the consent of affected individuals. Sometimes, not even a notification is if systems are in use.[292] Under such circumstances, options for legal remedy are sparse. Collecting more power in the hands of state authorities, while actively interfering with individuals' rights, equals a decline of the democratic quality of the political system since democracies are supposed to empower the individual versus the state, not vice-versa. Thereby, such systems have the potential to become tools of "injustice or suppression," as e.g. Joy Buolamwini of the MIT points out.[293] Again, rapidly increasing state power is a threat to all democratic societies.[294] Via such processes of extending state power, instead of protecting individuals' freedom, autonomy, and social space, facial recognition also undermines the wider human rights idea of freedom. Such circumstances of continuous potential state control are additionally in conflict with the idea of human dignity since the pursuit of dignity for every member of society is arguably threatened by constructing public panoptic facial recognition systems. Human beings are no longer perceived as potential possessors of dignity and rights (or 'ends in themselves' as Kant formulated), but rather as subjects that might pose threats and therefore need to be under control. Therein, the wider aim of equal justice in societies is inflicted as well, as recognition systems still produce a significant amount of false positives (false alarms). This leads to innocent individuals coming under heightened scrutiny and having to prove their innocence, effectively returning the burden of proof, and undermining the presumption of innocence, a central element of rule of law.[295] Furthermore,

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However, as this thesis has illustrated, anti-terrorism measures infringing on valid rights might be implemented anyways, e.g. in case of perceived threat, or simply because the technology is cheap, ready for use, demanded by security organs and promising apparent security.

[291] Spurrier, "Facial recognition is not just useless. In police hands, it is dangerous."

[292] Brad Smith, "Facial recognition: It's time for action," December 6, 2018. https://blogs.microsoft.com/on-the-issues/2018/12/06/facial-recognition-its-time-for-action/.

[293] Vincent, "Gender and racial bias found in Amazon's facial recognition technology (again)."

[294] Donohue, "Security and Freedom on the Fulcrum," 60.

[295] Martha Spurrier, Director of the NGO Liberty and Silkie Carlo, Director of Big Brother Watch, agree with this evaluation. Spurrier, "Facial recognition is not just useless. In police hands, it is dangerous."
Dodd, "UK police use of facial recognition technology a failure, says report." Wong, "We underestimate the threat of facial recognition technology at our peril."

the number of mistakes in the systems is even higher for certain minority groups (black people, and especially women of ethnic minorities). Thus, such systems interfere with the rights of members of such groups to an even greater extent. Again, Waldron's hypothesis that certain groups will experience a bigger loss of rights in scenarios of increased security measures appears to hold true. As explained, the perception of injustice and of a lack of equal worth and equal recognition of personhood triggered by discriminatory practices can heighten social tensions and produce a security backlash, by creating more violence-prone individuals. Moreover, surveillance via facial recognition might lead to a so-called chilling effect. In other words, part of the population might adapt their public behavior - e.g. refrain from participating in a protest or refrain from visiting critical locations (e.g. abortion clinics or a drug treatment center).[296] Such adaptive behavior cannot come as a surprise when reflecting that individuals would be under the perception of being under constant control. In such a situation, individuals will not perceive themselves to be fully free and to be able to exercise one's rights and enjoy one's capabilities to the fullest any longer. Thus, systems of facial recognition own the potential to collide with the enjoyment of the capability for political engagement as defined by Nussbaum (besides the capabilities to move freely, to socially interact freely, and to lead a life without discrimination). In other words, by refraining from e.g. public protest, the level of the democratic quality of society as a whole can be expected to decrease. Without the guarantee and full enjoyment of the rights to privacy, freedom of expression, assembly, and association, no functioning debate or exchange of ideas, understandings, and knowledge is possible. By undermining these rights, the independent role of the citizen in an ideally free and democratic society is endangered, undermining the cornerstones of democracy that anti-terrorism measures claim to protect.

In general, facial recognition systems provide another exemption from the framework of guaranteed and universal human rights. However, undermining this framework bit by bit is, as mentioned, threatening the general relevance of the idea of universal human rights. Since such apprehensions were lately voiced by high-stake members of the tech industry itself, e.g. Microsoft President Brad Smith warned against negative effects of facial recognition such as discrimination, a loss of privacy and encroachment on democratic freedoms, it seems that the problem has at least come to the awareness of powerful actors. If such awareness will be enough to overcome such problems is to be seen.[297]

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[296] Wong, "We underestimate the threat of facial recognition technology at our peril." Spurrier, "Facial recognition is not just useless. In police hands, it is dangerous." Mitrou, "The impact of communications data retention on fundamental rights and democracy," 133.

[297] Brad Smith pointed to the potential for abuse the technology brings and called for government regulation of facial recognition. Brad Smith, "Facial recognition: It's time for action."

- **Summarizing Observations**

The first major point emanating from this analysis section is that several human rights have indeed been curtailed by British anti-terrorism measures and legislation of the last seventeen years, from a legal perspective but especially from the perspective of a wider understanding of human rights (in the sense of the spirit of rights). Examples could be produced for policies such as stop-and-search practices, indefinite detention, control orders, legislation on the glorification of terrorism, the Channel program of the Prevent stream, data rendition legislation, online mass surveillance and surveillance in the public space. Such policies were evaluated as either breaches of legal human rights obligations by relevant judicial institutions (or were placed in the legal grey area) and/or curtailed the spirit of rights. The mentioned measures are (or were) curtailing rights such as the right to privacy, the right to freedom of expression, the right to a fair trial, freedom of assembly, freedom of association, freedom of movement, the right to liberty and the right to be free from discrimination. The number of rights problems in British anti-terrorism has increased significantly since the attacks of 9/11 and the country has seen the trend of an ever-growing amount of policies and measures that endanger rights standards. Similar to the German case did British anti-terrorism see a shift of focus in the years after 9/11, away from a focus on potential members of international terror networks, towards terror suspects (or individuals who are evaluated as possibly becoming terrorists somewhere in the future) among the own population. A first major legislative reaction to 9/11 was the adoption of the ATCSA, including the possibility to indefinitely detain *foreign* terror suspects, clearly reflecting a focus on potential foreign perpetrators (as was the case with the 9/11 attacks). However, after the attacks in London in 2005, committed by members of British society, the focus shifted towards detecting radicalized individuals amongst the British population. This shift triggered a policy line that has broad surveillance of the population as a whole, but especially of the Muslim community (as the new 'suspect community') as a shaping trend of British anti-terrorism.[298] A range of measures that are criticizable from a human rights perspective is the outcome of this changed focus, examples that were discussed above are the ban of 'glorification' of terrorism, referral practices in the public sector, data retention legislation or mass surveillance by British intelligence services. Many of these measures are, as explained, supposed to detect radicalized individuals in society.[299] This trend towards more surveillance in particular, but also towards a generally

[298] A similar focus of prevention measures on right-wing terrorism was not observable. Thomas, "Britain's prevent pogramme: An end in sight?" 174. Breen-Smyth, among others, speaks of the Muslim community in the UK as a suspect community, see "Theorising the 'suspect community'."

[299] In a point of general criticism, Adrian Guelke questioned the increasing focus on radicalization, since it would not be followed up by a process of self-criticism from the side of Western leaders. Guelke, "Secrets and Lies," 104.

more rights-infringing anti-terrorism has been (similar to the German case) largely independent of which party constituted the government. At times certain parties (especially the Liberal Democrats) tried to slow down the speed of rights evasive policies, but the overall trend prevailed nonetheless. Furthermore, another similarity to the German case, measures of anti-terrorism have not been rolled back in the UK, even when the threat of terrorism decreased for a number of years (roughly from 2006 to 2013, when the UK did not see any major attacks and the IS wave had not started yet).[300] The only exception from this would be the decrease of the length of potential pre-charge detention of terror suspects, which was set back to fourteen instead of twenty-eight days. This trend of a growing net of anti-terrorism legislation seems to receive the support of large parts of the British population.[301]

Second, it appears to be a general trend of British anti-terrorism that many policies own a discriminatory tendency. Clearly, as demonstrated above, certain groups, foremost the British Muslim community, have been targeted more by certain measures than other parts of the population. Especially the whole Prevent stream of the British CONTEST strategy aims foremost at preventing Islamist terrorism (this was e.g., acknowledged in an impact assessment report issued by the House of Commons in 2011) and contributes in constituting the Muslim population as a 'suspect community'.[302] In other words, what came to attention with many of the described policies is

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[300] To see additional security measures not being rolled back in times of decreased threat is not a new phenomenon. Already in 1991 former UK Home Secretary Baron Jenkins of Hillhead, declared concerning the UK Terrorism Act from 1974, "I would have been horrified to have been told at the time [1974] that it would still be law nearly two decades later. [...] It should teach one to be careful about justifying something on the ground that it is only for a short time." Hillhead as quoted in Laura Donohue, *The Cost of Counterterrorism: Power, Politics, and Liberty* (Cambridge: Cambridge University Press, 2008), 1.

[301] For instance, the central measures introduced by the 2015 CTSA, received in general support by the British public, as a couple of YouGov polls reveal. Further, fifty-three percent supported data retention for a period of twelve months in a 2015 YouGov poll (thirty-one percent opposed). Will Dahlgreen, "Broad support for increased surveillance powers," YouGov, January 18, 2015. https://yougov.co.uk/topics/politics/articles-reports/2015/01/18/more-surveillance-please-were-british. Further, the measure of indefinite detention found approval by the majority of the British public. In 2004, sixty-two percent of respondents supported the measure in a BBC poll. Sixty-three percent supported extending the measure to British nationals as well, and fifty-eight percent even supported detaining mere *associates* of terror suspects! In 2005, seventy-three percent of respondents in an ICM poll agreed to the claim that it was right to lose civil rights in order to increase security levels. Landman, "The United Kingdom: The Continuity of Terror and Counterterror," 89.

[302] Eijkman and Schuurman, *Preventive Counter-Terrorism and Non-Discrimination in the European Union*, 13. Sandra Ivanov, "New Zealand's terrorist attack and the scars of the Global War on Terror," *offiziere.ch*, March 17, 2019. https://www.offiziere.ch/?p=35553. Pantazis and Pemberton, "From the Old to the New Suspect Community." David Miller and Rizwaan Sabir, "Counter-terrorism as counterinsurgency in the UK 'war on terror'," In *Counter-Terrorism and State Political Violence: The 'war on terror' as terror*, ed. by Scott Poynting and David Whyte (London and New York: Routledge, 2012), 28.

that they entail a discriminatory core. Although most anti-terrorism policies appear to potentially affect all members of society, they are often aimed at people who are 'different', e.g., Muslim and non-Western minorities.[303] Discriminatory tendencies become most clear in measures such as stop-and-search practices, indefinite detention for foreign suspects, control orders, the ban on the glorification of terrorism, or referral practices under the Channel program (the latter added a real-life, institutionalized surveillance measure on the top of electronic bulk surveillance practices).[304] To that extent, Waldron was right with his hypotheses that in case of a limitation or derogation of rights not all groups in society are hit equally. Some groups have seen their rights more undermined by anti-terrorism legislation than the majority of society.[305] Indeed, despite the discriminatory tendencies laid bare in this analysis, British authorities have also taken steps against Islamophobia in society, for instance, via the Prevent stream under the presented CONTEST strategy.[306] This does, however, not negate the discriminatory effects of a range of processes and policies of British anti-terrorism. It does, additionally, not negate the perception of discrimination via anti-terrorism policies in the British Muslim community. A 2004 poll conducted by ICM found that only eighteen percent of British Muslims felt that British anti-terrorism laws were used in a fair manner in regard to the Muslim community, whereas sixty-four percent thought that anti-terrorism laws were used unfairly.[307] Two years later, another survey revealed that the vast majority (seventy-four percent) of British Muslims felt that fellow citizens treated them with suspicion. In the same poll, seventy-nine percent voiced the opinion that abuse and hostility towards Muslims had increased since the July 2005 bombings in London.[308] The

[303] Gearty, *Liberty and Security,* 93. Christina Pantazis and Simon Pemberton held in a 2009 study that Muslims were the new suspect community of the UK (replacing the Irish). Pantazis and Pemberton, "From the Old to the New Suspect Community." Adrian Guelke agreed to these evaluations in a 2015 publication, noting that Muslims have become a suspect community and that "those principally affected by surveillance and other measures […] have been members of ethnic minorities." Guelke, "Secrets and Lies," 105, 109.

[304] Ivanov, "New Zealand's terrorist attack and the scars of the Global War on Terror."

[305] Roach, *The 9/11 Effect*, 277. Whittaker, *Counter-Terrorism and Human Rights,* 9.

[306] Richard Chalk, "PURSUE and PREVENT: The Prevent Strategy – Countering the Extremist Narrative," Talk at World Counter Terror Congress, London, April 19, 2016.

[307] Richards, "Countering the psychological impact of terrorism," 196.

[308] Ibid. Todd Landman reported a perception of discrimination among the Muslim minority as well. Landman, "Imminence and Proportionality," 89. Andrew Silke argued that a trend to a declining perception of unfair treatment and discrimination in the British Muslim community could be detected. He compared two numbers: Sixty-four percent of Muslims evaluated that anti-terrorism laws were used unfairly in 2004, and 'only' a third of Muslims evaluated British society and authorities as 'anti-Muslim' in a 2009 BBC poll. Silke, "The Psychology of Counter-Terrorism," 15. However, the questions in the two polls are far from identical. The first one merely asks about unfair *use* of policy, whereas the second goes to more extremes, asking about the whole of police, government, and society *per se* being anti-Muslim. The lower degree of agreement in 2009 might thus simply be based on the fact that the second claim is

widespread perception of unfair treatment or discrimination in the course of anti-terrorism policies among the Muslim community in Britain, opposed to a majority of society that supports harsh anti-terrorism measures, including such that might bear a discriminatory tendency, shows how split the British society is in regard to anti-terrorism. A split between the Muslim community and the rest of society and the creation of binary worldviews, is, however, a declared aim of Islamist groups such as IS.[309] By delivering the context to make such a split more likely, the British authorities thus contribute to preconditions of IS fulfilling one of its strategic goals. Furthermore, the widespread impression of discrimination increases the potential of radicalization of individuals inside of the Muslim community.[310] Increased radicalization in this community can, in turn, be expected to lead to an increased threat perception amongst the British majority society. An increased threat perception can – as explained above - arguably lead to the adoption of even harsher anti-terrorism policies by the political elite, potentially including policies that infringe human rights in general and those of the Muslim community in particular. The last would then again lead to an even stronger perception of discrimination. Thus, a vicious circle of perceptions of discrimination and threat, accompanied by harsh policies might be set in motion.[311] An antidote could here be a generally improved integration policy. Reflecting on this issue Laura Donohue rightly points to the "integration of the minority community" as the "most important issue facing the United Kingdom."[312]

Third, British anti-terrorism legislation has at times been exploited by British authorities for other purposes than attempting to increase security against terrorism or has been misused in attempts to cover up for questionable policy measures. This echoes certain elements of the German case. Some of these actions are in themselves critical in terms of human rights obligations. One example of how British security authorities exploited terrorism legislation was - as mentioned – section 44 of the TA 2000, which provided the possibility to search people in public places, officially in order to prevent terrorism. However, very often this section was used in order to search all

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much bolder.

[309] Adam Deen, "PREVENT: Understanding the Jihadi/Terrorist Mindset," Talk at World Counter Terror Congress, London, April 19, 2016. Yassin Musharbash, "Angriff auf Europa", *Zeit Online*, March 22, 2016.

[310] The UN Security Council's Counter-Terrorism Committee has acknowledged this risk of increased alienation of communities due to discrimination. Gearty, *Liberty and Security*, 105.

[311] Fittingly Brian Jenkins noted already in 1977, "perhaps the biggest danger posed by terrorists lies not in the physical damage they do, but in the atmosphere of alarm they create, which corrodes democracy and breeds repression." Brian Jenkins, "Upgrading the Fight Against Terrorism," *The Washington Pos*t, March 27, 1977.

[312] She adds, "the ability to obtain intelligence, information about potential attacks and understanding the issues faced by the state depends upon a good relationship with this community. Donohue, quoted in Andrew Staniforth, *The Routledge Companion to UK Counter-Terrorism* (London: Routledge, 2013), 342.

different kinds of groups (e.g. war protestors). Thus, the stop-and-search measure rather constitutes a side-effect anti-terrorism measure than a genuine anti-terrorism policy. The Channel program, explained above, arguably constitutes another case of side-effect anti-terrorism, in face of the low numbers of affected individuals that see an anti-radicalization 'intervention', compared to the larger amount of people who receive other policy offers (such as social housing programs). Martin Scheinin argues that sometimes a 'function creep' develops so that some powers that were meant to be used for anti-terrorism purposes are used for other purposes.[313]

Examples of 'false' anti-terrorism can be found by looking at some recent examples of interference with journalists' work. The reporting on surveillance measures was, after Snowden's revelations, often undermined and suppressed, including by British authorities. Freedom of expression was thus further undermined, this time the freedom of journalists instead of the broad public. I will give a few short examples of such criminalization of reporting on surveillance. For instance, the British intelligence service GCHQ demanded *The Guardian* to hand over all copies of the archive on Snowden and his files. In order to not have the government learn what exactly Snowden had passed on, the journalists declined this demand but agreed on destroying all relevant hard-drives with GCHQ officials overseeing the process.[314] Another attempt at undermining the reporting on the practices of the GCHQ was delivered with the arrest of David Miranda, the partner of Glenn Greenwald, the journalist working with Edward Snowden. Miranda, carrying encrypted information that Greenwald had received by Snowden, was detained at Heathrow airport in 2013, for the then maximum nine hours, under schedule 7 of the Terrorism Act of 2000, enabling the stop and search of persons under the suspicion of preparing an act of terrorism. The British authorities (here the MI5) utilized the broadness of the UK's definition of terrorism. They claimed that Miranda was carrying information that, if released, might endanger lives. Since they additionally claimed that such a

[313] Martin Scheinin, Human Rights Council, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," Thirteenth Session, Agenda item 3, December 28, 2009, 21.

[314] Greenwald, *No Place to Hide*, 238. Another example of a 'false' anti-terrorism measure could be witnessed in the fall of 2015. The SECTU, a British counter-terrorism unit, confiscated the laptop of BBC journalist Secunder Kermani, who had just published a story on British IS fighters, including insider information on the terror group. In other words, the British anti-terrorism legislation was used in order to access the communication between a journalist and his sources. Clearly, this process cannot be brought in line with regular standards of press freedom. Such a policy discourages journalists from working with delicate approaches (such as attempting to gain inside information on IS fighters), as well as it discourages potential sources (including whistleblowers) to work with journalists since the last cannot guarantee the safety of their sources anymore. Clearly, the British authorities, in this case, violated the privacy rights of journalist and source as well as violated the freedom of the press. Lone Theils, "Terrorloven trumfede pressefriheden," *Politiken*, October 31, 2015.

release would aim at influencing the government, under the pursuit of advancing a political or ideological goal, they saw the definition of a potential act of terrorism fulfilled and thus issued the arrest under the Terrorism Act of 2000.[315] This case illustrates how broad terrorism definitions can be arbitrarily used for real or alleged anti-terrorism measures. Both, in case of the arrest of Miranda and in case of forcing *The Guardian* to destroy their hard-drives, the British government undermined the right to freedom of expression as guaranteed in various central human rights documents (see Chapter 1). Arguably, the arrest of Miranda additionally violated his right to freedom from arbitrary detention, as defined in art. 9 of the UDHR, art. 9 of the ICCPR and art. 5 ECHR. Since the British Court of Appeal declared the arrest of Miranda as justifiable, this case provides a good example for the importance of extending the human rights evaluation of terrorism policy, away from exclusively legal standards, to the wider category of the spirit of rights. It might be that the authorities can defend the arrest on a legal basis, given the broad definition of terrorism and the connected schedule 7 of the Terrorism Act 2000. However, one might argue that the British authorities used the broad definition of terrorism and the connected possibility of a stop and search procedure as a pretense. It is not plausible that Miranda would have released the documents with the purpose to cause any harm to anybody, thus a connection of his case to the crime of terrorism is far-fetched, to say the least. Indeed, several high stake legal and political figures criticized the arrest, e.g. Lord Dyson (a former Justice of the UK Supreme Court) argued that a publication of material should not be interpreted as potentially falling under terrorism, if not a motive of intent or recklessness for endangering others could be proven.[316] It appears that the UK authorities, in this case, launched a case of a 'false' anti-terrorism measure in order to achieve other purposes, namely to collect information about Snowden and the journalists working with him and possibly to discourage others from similar actions. Again, the case shows how extensively broad definitions of terrorism can be utilized.

Fourth, British anti-terrorism maintained an international dimension as well. The UK oriented itself towards the European level of anti-terrorism, but also followed wider, mostly American, trends. For instance, the UK played an active role at the EU level in terms of anti-terrorism and tried to shape the overall strategy of the EU on the issue. The British CONTEST strategy, as mentioned, clearly shaped the EU's overall anti-terrorism strategy. British policies such as the extension of CCTV or indefinite detention of suspects later surfaced in other European countries as well (e.g. Germany). The UK furthermore upholds cooperation in smaller fora (the Prüm Convention) or at

[315] Ruth Costigan and Richard Stone, *Civil Liberties & Human Rights*, 11th ed. (Oxford: Oxford University Press, 2017), 458. Greenwald, *No Place to Hide*, 186.

[316] Costigan and Stone, *Civil Liberties & Human Rights*, 458-459. The arrest was further criticized by former Lord Chancellor, Lord Falconer and David Anderson (the Independent Reviewer of Terrorism Legislation in the UK between 2011 and 2017).

the bilateral level (e.g. with France).[317] However, the UK did not align itself as closely with EU anti-terrorism as for example Germany, e.g. since the UK did maintain its own definition of the concept of terrorism, independent of the EU's definition and since the UK put emphasis on its anti-terrorism cooperation with the US. For instance, the UK became part of the US-led Five Eyes surveillance network.[318]

Fifth, in the UK, similar to the German case, one can see a rights-protective function of the judiciary.[319] For instance, in 2007 the Law Lords challenged the measure of the control orders. In 2015, the British High Court declared the British data retention legislation under the DRIPA for unlawful, the ECJ ruled the same way in 2016 and the UK Court of Appeal confirmed the High Court ruling in 2018. In 2018, the High Court decided that the data retention part of the newly established IP Act was ineligible. Furthermore, in 2019 the British Court of Appeal ruled that the Prevent Duty Guidance did not put enough weight on the importance of the preservation of rights standards, such as freedom of expression, thereby placing the whole referral duty in a legal grey zone. Tim Dunne pointed out that the actions of the involved courts signify that "a necessity claim cannot override norms that are legally binding".[320] Tony Blair agreed to this evaluation of the government's course, at times, being counteracted by courts when he declared: "We, of course, wanted far tougher laws against terrorism. We were prevented by opposition and then by the courts in ensuring that was done."[321] However, judicial defeats have not changed the overall trend of British anti-terrorism. Rather, whenever a certain policy was declared ineligible by either a British or European court, British policymakers have tried to search for an option to uphold the maximum degree of such measures using a new legislative base, see e.g. the history of indefinite detention transforming to control orders and then TPIMs or the ever returning practice of data retention. Thus, the judiciary has a hard time to stop the trend of rights evasive anti-terrorism. The process rather resembles a continuous race between infringing legislation and corrective rulings. It remains doubtful if a democratic system can be regarded as 'working correctly' in a situation in which evasive legislation is consciously renewed in new fashions, knowing that a rights infringing measure will be valid for at least some years until a court might (again) demand changes or an abolition (see my points on that in Chapter 3). So - in Tim Dunne's words - necessity

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[317] Foley, *Countering Terrorism in Britain and France*, 322-323.

[318] Greenwald, *No Place to Hide.* In addition, the UK's GCHQ cooperated closely with American agencies and the UK additionally cooperated with the US in terms of the American 'extraordinary rendition' program. On a global note, UK anti-terrorism policies have been emulated in various countries, e.g., Australia, Canada, South Africa or Singapore. Roach, *The 9/11 Effect*, 238.

[319] Roach, *The 9/11 Effect, 239.*

[320] Dunne, "The Rules of the Game are Changing," 283.

[321] Tony Blair, October 1, 2006, quoted in Landman, "The United Kingdom: The Continuity of Terror and Counterterror," 75.

claims did actually (continue to) override rights norms on numerous occasions.[322]

To summarize, the UK has seen a growing amount of rights infringing anti-terrorism measures and policies since 2001. A range of examples could be found by using both a legal and spirit of rights framework. Some pieces of British anti-terrorism legislation were later declared ineligible based on legally binding rights norms, and a range of anti-terrorism measures and policies could be evaluated to be in conflict with essential parts of the wider ideals of human rights (the spirit of rights), such as human dignity, equality, justice and senses of individual freedom. This is not supposed to imply that all UK anti-terrorism is curtailing human rights. Some measures that were taken after 9/11 are defendable, also from a human rights perspective. However, just as in the German case, a trend towards a growing amount of rights infringing policies is showing. This trend threatens to undermine the very civilizational values and pillars of a free society that policymakers often claim they are protecting.

[322] The House of Lords has at times scrutinized rights invasive policies as well. For instance, the Lords scrutinized the ATCSA measure of indefinite detention and were critical of the follow-up measure of control orders as well. However, it could neither stop nor decisively limit the overall trend of a more rights evasive anti-terrorism course.

Chapter V
The EU as an Anti-Terrorism Actor

Similar to the two previous chapters, I will, in this chapter provide a contextualization of terrorism and anti-terrorism for the case in focus (the EU), and will, in a second section scrutinize relevant anti-terrorism policies by utilizing the established human rights framework. I will, in the course of the latter, elucidate the issues of data retention, the EU's Passenger-Name-Record Directive, the implementation of biometric passports and ID cards, the push for the construction of biometric databases and the implementation of facial recognition, and newest policies on the prevention of radicalization.

The EU's Anti-Terrorism Context

Other than the states that were in focus in the previous chapters, the EU does not possess a distinct history of terrorism (other than the terrorism history of its member states). No terror organization in the last decades did per se aim at hitting EU institutions (arguably with the exception of the IS attack on Brussels in 2016). Therein, the section will not deliver details allowing for an evaluation of the emergency level at EU level. Such an evaluation would be unfeasible anyway, as the EU is here understood as the EU institutions themselves (the Council, Commission, EP, and ECJ), it simply does not possess a territory that could be evaluated to be at a state of emergency (other than that of its member states). Therefore, this section will not contain an enumeration of specific terror attacks, but will rather point to the overall development of anti-terrorism at the EU level. The section will thus rather emphasize the development of the EU to become an important focal point and actor in European policymaking on terrorism. It will emphasize the increased institutionalization of anti-terrorism at the EU level, give some insights on the Europeanization of anti-terrorism, provide some remarks on the general perception of terrorism at EU level and shed light on the EU's overall strategy paper for facing terrorism. This will, however, not exclude remarks on those terror attacks that foremost functioned as a catalyst for the EU's development in anti-terrorism. Overall, the section will underline the importance of the EU as a player in European anti-terrorism, by pointing to the rapidly increased policymaking activity at EU level after 2001 and the entanglement of EU and member states in anti-terrorism efforts. Therein, the section will additionally underline my argumentation for why the EU constitutes a relevant case of analysis for this thesis.

A first major point is that it took the attacks of 9/11 to give real impetus to terrorism policies at EU level.[1] Before '9/11', the EU was rather

[1] Mirjam Dittrich, "Facing the global terrorist threat: a European response," *EPC Working Paper* No. 14, January 2015, 12. Daniel Keohane "Implementing the EU's Counter-Terrorism Strategy: Intelligence, Emergencies and Foreign Policy," In *International Terrorism: A*

inactive in the field of anti-terrorism. By then, only a handful of the then fifteen EU member states had dedicated terrorism legislation. Many EU member states did at that point not even own a specific definition of terrorism.[2] Many states rather focused on certain international conventions on terrorism, dealing with specific terrorist actions and the suppression of terrorist financing. As Claudia Hillebrand: "It was only in the beginning of this century that there emerged an EU CT policy [meant is anti-terrorism policy] worthy of the name."[3] That this policy activity after 9/11 signified a real change of EU policymaking on the issue becomes most clear by having a look at the activity or rather lacking activity of the EU on the issue before 9/11, that is during the 1970s to 1990s.

During the 1970s, the EC showed in general not a high level of activity in terms of anti-terrorism. The most important – and maybe only important - cooperation on anti-terrorism at the time was established by the formation of the TREVI (*Terrorisme, Radicalisme et Violence*) group. The TREVI group was set up by the European Council Summit in Rome in 1975. TREVI was established against the backdrop of several terror incidents, e.g., the attack on the 1972 Olympics. It was a forum for international security cooperation, operating from 1975 to 1993. TREVI was, however, rather a loose network than a fixed institution. Via TREVI authorities were intended to increase cooperation on anti-terrorism, e.g. by information exchange, the exchange of anti-terror tactics of police forces or cooperation around air traffic and the protection of nuclear facilities. Practical improvements, such as the standardization of ID cards and passports in the EC were at focus at TREVI as well. This reflected a practical track of anti-terrorism cooperation at the time, away from solely legal cooperation.[4] However, since meetings often concluded in non-binding consultations, results were – from an overall perspective - relatively meager over the decades. The TREVI cooperation

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European Response to a Global Threat, ed. by Jörg Monar and Dieter Mahncke (Brussels: Peter Lang, 2006), 63.

[2] Keohane, "Implementing the EU's Counter-Terrorism Strategy," 68.

[3] Claudia Hillebrand, *Counter-Terrorism Networks in the European Union: Maintaining Democratic Legitimacy after 9/11* (Oxford: Oxford University Press, 2012), 186.

[4] Oldrich Bures and Stephanie Ahern, "The European Model of Building Regional Cooperation Against Terrorism," In *Uniting against terror: cooperative nonmilitary responses to the global terrorist threat*, ed. by David Cortright and George A. Lopez (Cambridge, Massachusetts: MIT Press, 2007). Bernhard Blumenau, "International Cooperation & Intelligence Sharing" (presentation, The Future of Terrorism: Georgetown & St. Andrews University Conference, Washington, April 28-29, 2016). Monica den Boer, "The EU Counter-Terrorism Wave: Window of Opportunity or Profound Policy Transformation," in *Confronting Terrorism: European Experiences, Threat Perceptions and Policies*, ed. by Marianne van Leeuwen (The Hague: Kluwer Law International, 2003), 187. Raphael Bossong, *The Evolution of EU Counter-Terrorism: European security policy after 9/11* (London and New York: Routledge, 2013), 27-29.

was in 1993 included under the third pillar (the Justice and Home Affairs Pillar) of the newly restructured EU.[5]

In terms of legal cooperation, results at EC level were even sparser. In 1979, an EC convention to suppress terrorism was drafted, however, it never entered into force. This was related to the Convention on the Suppression of Terrorism previously adopted at the Council of Europe (CoE) in 1977. After the CoE convention had been adopted, there was not much interest in another convention amongst EC member states (with the exception of France).[6]

Overall, the cooperation of EC member states on the issue of terrorism remained at a quite low level, despite the mentioned startling terror attacks of the 1970s. A lack of institutionalized cooperation on the issue of internationalizing terrorism is a major characteristic of the period. At the time, "norms and obligations regarding the cooperation of states against terrorism hardly existed", Bernhard Blumenau evaluates.[7] For instance, the EC member states did not produce any common position at UN negotiations on terrorism conventions. It additionally took a number of years to fix problems of extradition of terror suspects between Western European countries. For most of the 1970s, terror suspects hiding away in another Western European country would not be extradited from their 'host' country to the country in which they had committed their deeds. Extradition did not even work between Germany and France. This problem was one of the focal points of the 1977 CoE Convention on the Suppression of Terrorism (so some results were achieved on this point, albeit in the framework of the CoE, not the EC). Additional steps in anti-terrorism cooperation were often blocked by dominating national interests. These interests often trumped the willingness for cooperation. Therefore, no comprehensive instrument of anti-terrorism cooperation was implemented at EC level in the 1970s and 80s, the policy area continued to deliver results "in a piecemeal fashion."[8] So even for like-minded countries, anti-terrorism cooperation was not a matter of course, no "united Western front" existed on the matter during the Cold War period.[9] Of course, the EC had a different form than today's EU, and accordingly, the EC did not perceive anti-terrorism to be one of its main tasks.

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[5] Emek Ucarer, "The Area of Freedom, Security and Justice," In *European Union Politics*, ed. by Michelle Cini and Nieves Perez-Solorzano Borragan (Oxford: Oxford University Press, 2016).

[6] Blumenau, "International Cooperation & Intelligence Sharing."

[7] Bernhard Blumenau, "The United Nations and West Germany's efforts against international terrorism in the 1970s," in *An International History of Terrorism: Western and non-Western experiences*, ed. by Jussi Hanhimäki and Bernhard Blumenau (London, New York: Routledge, 2013), 70.

[8] Blumenau, "International Cooperation & Intelligence Sharing."

[9] Ibid.

Although anti-terrorism cooperation at EC level during the 1970s - and at the international level in general for that matter – was thin compared to current levels, it is important to note, that it was in this very decade that the foundation for international cooperation on terrorism was created, both at European (at the EC and the CoE) and the global (UN) level. Later, policymaking could draw on this groundwork, however thin it was.

Incremental development of pre-9/11 anti-terrorism cooperation followed in the 1990s. For instance via the 1998 Vienna Action Plan or the 1999 Tampere Council Conclusions, or the Convention on Mutual Assistance in Criminal Matters from 2000; the last e.g., obligated member states to provide information on bank accounts and banking transfers. Eurojust – an institution set up in 2001 in order to improve cooperation on investigations and extradition requests – is to be considered a signifying pre-9/11 measure. Although these efforts were useful and sent a signal for enhanced anti-terrorism cooperation, cooperation was during those years still rather limited.[10] A self-confident articulation of an active role in anti-terrorism efforts and a common strategy towards terrorism at the EU level was first initiated after 9/11.[11]

Indeed, the events of 9/11 delivered the necessary push for policy cooperation on terrorism at the EU level and can be considered the turning point of EU policymaking on the issue.[12] Already in the immediate aftermath to 9/11, the European Council stated, "the fight against terrorism will […] be a priority objective of the EU".[13] This statement was followed up by an indeed strongly increasing policy cooperation. Only weeks after the attacks on the Pentagon and the World Trade Center, the EU member states agreed on a first Action Plan to address the issue of terrorism, including new policy efforts on police and judicial cooperation, air transport, economic and financial measures, emergency preparedness, diplomatic efforts, and

[10] Paul Wilkinson, "International terrorism: the changing threat and the EU's response," *Chaillot Paper* Vol. 84 (2005): 30. Dittrich, "Facing the global terrorist threat: a European response," 12. Bures and Ahern, "The European Model of Building Regional Cooperation Against Terrorism," 190-191. David Brown, *European Union, counter-terrorism and police co-operation, 1992-2007: Unsteady foundations* (Manchester: Manchester University Press, 2010), 121-126.

[11] Bures and Ahern, "The European Model of Building Regional Cooperation Against Terrorism," 191.

[12] Tessa Szyszkowitz, "The European Union," In *Europe Confronts Terrorism*, ed. by Karin von Hippel (Houndsmill: Palgrave MacMillan, 2005) 171. Javier Argomaniz, Oldrich Bures and Christian Kaunert, "A Decade of EU Counter-Terrorism and Intelligence: A Critical Assessment," *Intelligence and National Security*, Vol. 30 No. 2-3 (2015).

[13] Conclusions and Plan of Action of the Extraordinary European Council Meeting on September 21, 2001.

humanitarian aid.[14] The European Arrest Warrant – easing the transfer of terror suspects between member states – is another example of an early EU anti-terror measure after 9/11 (introduced in 2002). A common definition of terrorism and a common list of terror groups were swiftly implemented as well. Especially the implementation of a common definition was an important development since it set the cornerstone for a common understanding of the phenomenon and, thereby, common policy action (however broad the definition ended to be). Without the attacks of 9/11, it is unlikely that the EU would have agreed on such a definition.[15]

Until after 9/11, no detailed definition of terrorism existed at the EU level. Until then the established terrorism definition by the European Ministers of the Interior was that terrorism is "the use, or threatened use, by a cohesive group of persons of violence (short of warfare) to effect political aims".[16] This definition (based on the UK's definition from 1974) had actually already been used by the TREVI group, thus no evolution in terms of defining terrorism had taken place at European level since the days of TREVI.[17] Only in the context of 9/11, the EU Council decided on a more detailed common definition. In other words, the terrorism definition of the EU (as well as its anti-terrorism policies) is constructed in the context of terrorism committed against its member states and the states the EU identifies with (especially the US).

The EU's new post 9/11 definition was delivered by a Council Framework Decision on terrorism in 2002. The result was a very long and detailed list of offenses that could qualify for terrorism under certain conditions. These offenses are:

"(a) attacks upon a person's life which may cause death;
(b) attacks upon the physical integrity of a person;
(c) kidnapping or hostage taking;
(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
(e) seizure of aircraft, ships or other means of public or goods transport;

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[14] David Whittaker, *Terrorism: Understanding the Global Threat* (London: Longman Pearson, 2002), 195. Oldrich Bures, *EU Counterterrorism Policy: A Paper Tiger?* (Farnham: Ashgate, 2011), 64.

[15] Brown, *European Union, counter-terrorism and police co-operation, 1992-2007,* 130-138.

[16] Cited in Philip Heymann, *Terrorism and America: A Commonsense Strategy for a Democratic Society* (Cambridge: First MIT Press, 2000), 3.

[17] Alex Schmid, "The response problem as a definition problem," In *Terrorism – A Reader*, ed. by John Horgan and Kurt Braddock (New York: Routledge, 2012), 92. The TREVI definition is based on a definition of terrorism from the UK's Prevention of Terrorism Act 1974. This shows again the interlinkage of anti-terrorism policies, understandings, and definitions across European countries and institutions.

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
(i) threatening to commit any of the acts listed in (a) to (h)."[18]

The conditions under which such actions are considered terrorist, provided that they have been carried out deliberately, are:
(1) the attempt to serious intimidation of a population, or
(2) the attempt to unduly compel "a Government or international organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization," or
(3) the attempt to seriously destabilize or destroy "the fundamental political, constitutional, economic or social structures of a country or an international organization."[19]

As mentioned, the definition is very detailed on the specific acts of violence; however, it refrains from including several typical ingredients of terrorism definitions. The definition does not reflect three of the five typical ingredients mentioned earlier (see Chapter 2).[20] First, it is noteworthy that the EU's definition does not connect the mentioned actions to their potential motivations. The EU's definition does not include terms such as 'political', 'religious' or 'ideological' as reasons for the violence committed, terms present e.g., in the British definition and most other state or scholarly definitions (as presented earlier). The EU's definition only speaks of a possible terrorist aim to destabilize the political system of a country. However, this is not the same as identifying a specific motivation for terrorism itself. Furthermore, the definition does not mention potential perpetrators or victims of terrorism. Whereas the formerly used TREVI definition contained a short (albeit vague) note on potential perpetrators ("a

[18] EU Council Framework Decision on combating terrorism, June 13, 2002, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0475&from=EN.
[19] Ibid.
Just as the UK, the EU's definition does not only include populations and state governments as audiences of terrorism, but also international organizations.
[20] These are, again, acts of violence falling under terrorism, claims on the motivation of terrorism, remarks on possible perpetrators of terrorism, information on possible victims and claims on the aims of terrorism.

cohesive group of persons"), such formulations were omitted from the 2002 EU definition.[21]

In essence, the EU definition constitutes a very broad and vague definition.[22] For example, research into nuclear weapons with the intent to intimidate a population would qualify as terrorism according to this definition; to that extent, the EU could be able to call nuclear scientists of antagonistic regimes for terrorists (e.g. those in North Korea, and one could easily fabricate other questionable examples).[23] One can only speculate why the EU adopted such a broad definition. It might be a consequence of the need to find a compromise between the then fifteen EU members, in combination with leaving a lot of leeway for attaching the label terrorism to various groups or individuals (and potentially state actors). It might simply reflect the fact that most state definitions are rather broad.[24]

Additional impetus for anti-terrorism policymaking at the EU level was delivered by two big Al-Qaeda attacks in Europe in the following years, the March 2004 Madrid bombings and the bombings in London in 2005.[25]

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[21] Whereas the TREVI definition was short on the concrete acts of terrorism, the EU definition went into great detail with such acts.

[22] Ben Saul, *Defining Terrorism in International Law* (Oxford, Oxford University Press, 2006), 163.

[23] Saul points out that riots as taken place in suburbs in Paris and London could very well be stretched to fit under this definition. Saul, *Defining Terrorism in International Law*, 165. Actions by armed forces, which are governed by international humanitarian law, are, however, excluded from being defined as terrorism (according to the preamble of the relevant Framework Decision). Bures and Ahern, "The European Model of Building Regional Cooperation Against Terrorism," 205.

[24] In all definitions used by the three entities in focus, certain typical categories of terrorism definitions are omitted. This pertains especially to the definition of potential perpetrators and victims. The trend to omit clear definitions of victims of terrorism, which could, for instance, be a definition of terrorism as acts that are exclusively affecting civilians, rests potentially in the fact that states would thereby cross out the option to identify attacks on their own military or police forces as terrorism. A narrow definition of perpetrators would likewise take away options of state organs, this time concerning the usage of the accusatory label 'terrorism', which can be applied on a wide range of actors when it rests on a vague definition. Still, some state definitions are less vague and include all the mentioned categories of terrorism definitions, e.g. the presented definition by the US DoS, which therefore almost sounds like a scholarly definition. This shows that the concept of terrorism is not only contested among scholars, states cannot agree on a common definition of terrorism either (or if they do, like in the framework of the EU, the definition becomes very vague).

[25] Hillebrand, *Counter-Terrorism Networks in the European Union*, 186. Wilkinson, "International terrorism," 31. Keohane, "Implementing the EU's Counter-Terrorism Strategy," 63. Peter Katzenstein, "Same War—Different Views: Germany, Japan, and Counterterrorism," *International Organization*, Vol. 57 No. 4 (2003): 739. Jeanne Pia Mifsud Bonnici, "Recent European Union developments on data protection … in the name of Islam or 'Combating Terrorism'" *Information & Communication Technology Law* Vol, Vol. 16 No. 2 (2007): 161. Gustav Lindstrom, "The EU's approach to Homeland Security: Balancing Safety and European Ideals," In *Transforming Homeland Security: U.S. and European*

Raphael Bossong labeled the attack in Madrid "the second formative moment" of EU anti-terrorism.[26] Furthermore, Javier Argomaniz held that Madrid provided anti-terrorism as a policy field at the EU level with additional importance.[27] After the attacks in Madrid, EU internal reports stated that the EU's anti-terrorism measures had until then been "slow, poor and inadequate."[28] Thus, policy-activity was increased and a new Plan of Action to Combat Terrorism was agreed on, including measures as e.g., maximizing capabilities within EU bodies and member states to detect terrorists, to prevent attacks and to deal with the consequences of possible attacks, to address factors leading to support and recruitment for terrorism, to protect international transport and to make border controls more effective (e.g. via mandatory fingerprints in passports).[29] It was also after the attack in Madrid that the position of the EU Counter-Terrorism Coordinator was created.[30] The bombing attacks in London in July 2005 delivered another push for EU anti-terrorism policies (albeit to a somewhat lesser degree), especially in the dimensions of surveillance and prevention. The Justice and Home Affairs (JHA) Council agreed on a directive on data retention, intensified information exchange between law enforcement authorities, as well as further efforts to prevent radicalization.[31] Thus, it can be evaluated that the EU's anti-terrorism course has largely been incident driven, policy reactions were often triggered due to the impetus provided by recent attacks.[32]

Approaches, ed. by Esther Brimmer (Washington: Center for Transatlantic Relations, 2006), 117.

[26] Bossong, *The Evolution of EU Counter-Terrorism,* 90.

[27] Javier Argomaniz, *The EU and Counter-Terrorism: Politics, polity and policies after 9/11* (London and New York: Routledge, 2011), 138.

[28] Bures and Ahern, "The European Model of Building Regional Cooperation Against Terrorism," 216.

[29] Plan of Action to Combat Terrorism cited in Wilkinson, "International terrorism," 31. Bures and Ahern, "The European Model of Building Regional Cooperation Against Terrorism," 217-219. The EU's Action Plan, however, included the vow to combat terrorism while respecting human rights. Akiva Lorenz, "The European Union's Response to Terrorism," *International Institute for Counter-Terrorism*, May 1, 2006. https://www.ict.org.il/Article/942/Registration.aspx#gsc.tab=0.

[30] Keohane, "Implementing the EU's Counter-Terrorism Strategy," 63. Gijs de Vries was the first EU CTC, now the post is held by Gilles de Kerchove.

[31] Paul Wilkinson, *Terrorism Versus Democracy: The Liberal State Response*, 3rd ed. (London and New York: Routledge, 2011), 176. Fabio Fabbrini, "Human Rights in the Digital Age: The European Court of Justice Ruling in the Data Retention Case and Its Lessons for Privacy and Surveillance in the United States," *Havard Human Rights Journal* Vol. 28 (2015). Lindstrom, "The EU's approach to Homeland Security," 119. Wilkinson, "International terrorism," 32. Bossong, *The Evolution of EU Counter-Terrorism,* 92.

[32] Argomaniz, Bures and Kaunert, "A Decade of EU Counter-Terrorism and Intelligence." Argomaniz, *The EU and Counter-Terrorism,* 138.

A full-fledged Counter-Terrorism Strategy was developed after the London attacks in 2005 as well, in an attempt to streamline European anti-terrorism.[33] The strategy is based on the four strands of prevention, protection, pursuing and responding. Although the EU's strategy facing terrorism is labeled 'counter-terrorism', it contains foremost anti-terrorism tools according to my definition of the term. This is a logical consequence of the EU's capabilities since the EU is most able to provide input, support, coordination and policymaking on anti-terrorism, rather than counter-terrorism (due to lacking EU special forces or troops). That the British approach of facing terrorism left its mark on EU strategies on the matter becomes clear by comparing the labels and structure of the UK's and the EU's strategies. The EU's strategy operates with four categories of 'counter-terror' measures, just as the UK's anti-terrorism strategy CONTEST. Three of these categories are identical with categories used in the UK strategy (Prevent, Pursue and Protect). Only the UK's Prepare category is exchanged to a Response category.[34] Clearly, the British CONTEST strategy served as orientation and basis for the EU strategy. This circumstance is another indication of the interrelation of national and EU anti-terrorism approaches.

The EU aims under Prevention mainly at preventing individuals from becoming terrorists by tackling the root causes of terrorism (examples for such root causes are in the EU's perspective propaganda, poverty, and a lack of education or good governance). Besides promoting economic and political development, the EU counts spotting and tackling problem behavior (e.g., on the Internet or of people traveling into conflict zones) as prevention measures. In terms of Protection, the EU Strategy aims for "protecting citizens and infrastructure […] through improved security." The EU includes a range of very heterogeneous measures in this category, e.g. the establishment of biometrics in passports, security of transport (e.g., aviation), a Visa Information System and strengthened control of the EU's external borders. It becomes clear from some of these points that some of the measures can be (and are) used for other policy objectives than anti-terrorism, e.g., to prevent illegal migration (I will come back to this point). Pursuing is then the category that mixes anti-terrorism and counter-terrorism measures in the understanding of this thesis, albeit overwhelmingly staying in the realm of anti-terrorism. Under Pursuing the EU understands "to pursue and investigate terrorists across our borders and globally", including the disruption of support networks and of funding and to "bring terrorists to

[33] Argomaniz, *The EU and Counter-Terrorism*, 138.

[34] David Omand, "What Should be the Limits of Western Counter-Terrorism Policy?" In *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English (Oxford: Oxford University Press, 2015) 68. Bures, *EU Counterterrorism Policy: A Paper Tiger?* 72. David Whittaker, *Counter-Terrorism and Human Rights* (Harlow: Longman, 2009), 118. Andrew Staniforth, *The Routledge Companion to UK Counter-Terrorism* (London: Routledge, 2013), 347.

justice". This reflects an understanding of terrorism as a global phenomenon that needs a global answer. Accordingly, the UN is mentioned as a forum for anti-terrorism as well. Although the claim of "bringing terrorists to justice" sounds quite belligerent, it is followed up by the demand that this is to be carried out while "continuing to respect human rights and international law". Tools which the Pursue category introduces are e.g., the European Arrest Warrant, intelligence cooperation, an attempt to prevent terrorists from attaining explosives, to strengthen cooperation via Europol and to strengthen national capabilities to "combat terrorism". The fourth strand of the EU's strategy on terrorism, Respond does not include measures that shall prevent terrorism or pursue terrorists but deals largely with crisis coordination in case of and in the aftermath of an attack.[35] The four strands of the strategy provide the EU with a multifaceted anti-terrorism approach spanning over a wide array of policy fields.[36] In relations to the four strands (and their sub-points) in the EU Strategy, it is important to emphasize that the EU Strategy of 2005 does not contain any prioritization.[37] Therefore, the strategy has at times been described as a long list of potential options of policymaking, rather than an actual specific and coherent strategy. It has often been critically pointed out, that almost all EU policymaking that somehow touches on internal security can be justified via the EU's 2005 strategy, simply since the strategy is that broad.[38] Although the EU's Counter-Terrorism Strategy claims that human rights shall be protected while tackling the issue of terrorism, it lacks a detailed explanation on *how* exactly human rights are supposed to be protected in the course of terrorism policies. Ideas for how to tackle both challenges, diminishing the threat of terrorism *and* preserving high rights standards, remain a blind spot of the overall strategy.[39]

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[35] The European Union Counter-Terrorism Strategy from 2005.

[36] Argomaniz, Bures and Kaunert, "A Decade of EU Counter-Terrorism and Intelligence."

[37] Daniel Keohane is an example for a scholar who sees this characteristic of the strategy as a problem. Keohane, "Implementing the EU's Counter-Terrorism Strategy," 65.

[38] Bures, *EU Counterterrorism Policy: A Paper Tiger?*, 73.

[39] In order to counteract the broad nature of the EU Counter-Terror Strategy, the EU attempts to operationalize the strategy in Action Plans, which spell out measures that are more detailed. The Action Plan of 2010 contains, for example, a program for de-radicalization of Muslim youths in Denmark under the Prevent stream. The Action Plan also explains measures aiming at enhancing transport security and cybersecurity under the Protect stream. An example of the Pursue stream in the Action Plan is the Terrorist Finance Tracking Programme. See the EU's *Action Plan on combating terrorism* from 2010. Still, also the Action Plans have been criticized for lacking priorisation, failing in contributing to a coherent long-term approach and constituting a mere 'laundry list.' This is reflected in the fact that the first Action plan after 9/11 already contained more than two hundred measures. Argomaniz, *The EU and Counter-Terrorism,* 140-143. Hans Nilsson, "The EU Action Plan on Combating Terrorism: Assessment and Perspectives," In *International Terrorism: A European Response to a Global Threat*, ed. by Jörg Monar and Dieter Mahncke (Brussels: Peter Lang, 2006), 74.

Whereas the attacks of 9/11, Madrid, and London provided the impetus for increased anti-terrorism action at EU level in the early 2000s, the wave of IS-inspired terrorism in Europe since 2015 renewed this impetus. Since then, developments of EU anti-terrorism efforts include the implementation of new tools for pursuing and preventing terrorism on a pan-European level. For instance, the EU now maintains a European Counter-Terrorism Center (ECTC), an Internet Referral Unit (IRU) and a Radicalization Awareness Network (RAN). The ECTC was established in January 2016 as a reaction to shortcomings of intelligence cooperation concerning Islamist attacks in Paris 2015 and is affiliated with Europol. It is supposed to provide operational support to member states' security organizations and to strengthen cooperation between international counter-terrorism authorities, for instance in regard to information exchange on terrorism financing and arms trade. The IRU, operated by Europol as well, owns the task of referring violent extremist content on internet platforms to providers in order to have this content banned. The IRU is thus clearly a prevention tool. The RAN is a network of police and prison staff practitioners, as well as researchers, social workers, and members of other professions dealing with or doing research on radicalized individuals.[40] The network is supposed to strengthen capabilities by sharing expertise and experiences. The ECTC is the most important of these three new anti-terrorism tools, the last two programs are rather limited in scope.

Besides a new impetus for anti-terrorism policymaking, recent years have seen the trend of anti-terrorism being dealt with through an even broader scope at the EU level. Formerly the issue was dealt with mainly by Home Affairs officials at the EU level and Interior or Foreign Ministers of member states at the EU Council level. Now, ministers of justice, youth or education are included in the process of cooperation and policymaking on the issue. In other words, the issue of anti-terrorism at EU level has gained "broader ownership," as Jorge Bento Silva from the EU Commission explained.[41]

In general, anti-terrorism moved rapidly to the forefront of the EU's policy agenda after 9/11, with the result that the twenty-eight members of the EU are now obliged to implement a vast body of legislation and policy. More

[40] Europol, "European Counter Terrorism Centre." https://www.europol.europa.eu/about-europol/european-counter-terrorism-centre-ectc. Europol, "Europol Internet Referral Unit One Year On," Press Release, July 22, 2016 https://www.europol.europa.eu/newsroom/news/europol-internet-referral-unit-one-year. European Commission, "Radicalisation Awareness Network (RAN)." https://ec.europa.eu/home-affairs/what-we-do/networks/radicalisation_awareness_network_en.

[41] Jorge Bento Silva, "The European Union Agenda on Security," World Counter Terror Congress, London, April 19-20, 2016.

than a hundred anti-terrorism measures have been produced at the EU level.[42] This includes a common legal definition of terrorism and terrorist offenses, and a host of substantive criminal and procedural laws and mechanisms for cross-border police cooperation, as well as 'security' and 'preventative' measures (some of these measures will be under scrutiny in the next section).

In terms of perceptions of terrorism, the EU has followed similar trends as seen in the two country cases in this thesis. One of those trends is that terrorism is at the EU level foremost understood as a problem of Islamist terrorism. The same was detected for the UK and Germany (see above) and is potentially the case in the entire West. That it is Islamist terrorism that the EU is most conscious about can be deduced from a range of indications. First, as seen above, anti-terrorism action at the EU level received its biggest impetus after moments of a perceived terrorism crisis, mostly constituted by Islamist terrorism (9/11, Madrid, London and the IS wave of 2015-2017).[43] Severe incidents of right-wing terrorism, e.g. the attacks of Anders Breivik in Norway, did not cause any considerable push for anti-terrorism at the EU level. Second, for many years the focus of the EU was on international terrorism, a strand of terrorism that was very much identified with the Islamist Al-Qaeda network. Third, Europol, in its regular trend reports on terrorism in the EU underlines the perception of terrorism as mostly Islamist terrorism. In its 2017 trend report, Europol spent eighteen pages describing the threat by Islamist terrorism, but only three pages each on right-wing, left-wing and separatist terrorism (right-wing violence against asylum seekers was deliberately left out in the report). Furthermore, twelve out of fourteen observations of Europol on current terrorism trends covered information on Islamist terrorism.[44] Fourth, the focal points of the EU's terrorism strategy and action plans, as well as many of the EU's anti-terrorism measures (data retention, the PNR agreement or de-radicalization) in their essence aim at tackling Islamist terrorism.

The perception of terrorism at European level parallels the perception at the member state level additionally on the point that it sees the

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[42] Argomaniz, *The EU and Counter-Terrorism,"* 137.

[43] A study conducted for the EU's LIBE committee defined these attacks as main stepping-stones for EU anti-terrorism as well. European Parliament, "The European Union's Policies on Counter-Terrorism: Relevance, Coherence and Effectiveness," Directorate General for Internal Policies, 2017 http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU(2017)583124_EN.pdf.

[44] Europol, "EU Terrorism Situation and Trend Report (TE-SAT) 2017." https://www.europol.europa.eu/activities-services/main-reports/eu-terrorism-situation-and-trend-report-te-sat-2017. These trend reports do actually have an impact on the EU's approach to terrorism at large. Arun Kundnani and Ben Hayes, "The globalisation of Countering Violent Extremism policies Undermining human rights, instrumentalising civil society," *Transnational Institute*, February 2018. https://www.tni.org/files/publication-downloads/cve_web.pdf.

aim of terrorism, and, here, as mentioned, primarily Islamist terrorism as attacking common European "values." When significant terrorist attacks were committed in Europe in the last eighteen years (e.g., in Paris, Brussels or Berlin), and especially when they were motivated by Islamist ideology, interpretations were that 'European civilization', 'European values' or democracy would be threatened by such attacks. The President of the EU Commission Jean-Claude Juncker and the EU's Counter-Terrorism Coordinator Gijs de Vries, among others, offered such claims.[45] Juncker and de Vries were thus in line with several European heads of state or government such as Angel Merkel, German President Joachim Gauck, or Austrian Chancellor Werner Faymann, who all declared their readiness to defend the common European values.[46] It is, additionally, often portrayed in utterances of top politicians that terrorism seeks to undermine 'our way of living' or 'our openness'. Thus, the EU leadership very much seems to be in line with European state leaders in terms of a lacking self-reflection and self-criticism in terms of potential different root causes of terrorism. The EU leadership rather follows the state leaders in spinning a discourse of easy answers, instead of challenging these assumptions.

Besides these trends, two further points about European perceptions of terrorism might be underlined. First, the latest years have seen the constitution of a Europeanization of terrorism perceptions.[47] This has boosted a common willingness for anti-terrorism action in Europe and thus distributed anti-terrorism from the European center stages of anti-terrorism to its peripheries. Attacks such as the ones in Paris in 2015 or Brussels in 2016 created an echo which saw the atrocities as an attack on all of Europe, although in most cases the attacks were confined to only one country and often the perpetrators were coming from the inside, being either citizens or residents. In this sense, some of the described attacks are in their effects and perceptions increasingly not confined to national boundaries anymore but trigger a Europe wide audience, as well as a European policy reaction. Zygmunt Bauman, e.g., underlined this interpretation when he held in a 2016 publication that the mentioned terror attacks managed "to make sure that wherever their outrage is committed its effects will reverberate all over the European Union."[48] And indeed, leaders of the EU, as well as the member

[45] Bonnici, "Recent European Union developments on data protection," 163. nachrichten.at, "Terror in Brüssel: Reaktionen in Zitaten." March 22, 2016. http://www.nachrichten.at/nachrichten/spezial/art194059,2185153.

[46] nachrichten.at, "Terror in Brüssel: Reaktionen in Zitaten." The EU had already after 9/11 declared that the attacks would constitute "an assault on our open, democratic, tolerant and multicultural societies." Conclusions and Plan of Action of the Extraordinary Council Meeting on 21 September 2001, "Press Release 140/01."

[47] Argomaniz, Bures and Kaunert, "A Decade of EU Counter-Terrorism and Intelligence." Nilsson, "The EU Action Plan on combating Terrorism," 81.

[48] Zygmunt Bauman, "A Few Comments on the Mis-Imagined War on Terrorism,"

states, often engaged in a discourse which emphasized 'the whole of Europe' being the aim of the attack. Fittingly, Jean-Claude Juncker claimed after the attacks in Brussels: "Today Brussels was hit, yesterday Paris – but Europe as a whole is the target."[49] In this sense, we have seen an increasing development of a genuine European awareness in regard to terrorism. This European awareness has effects on policymaking at the EU level as well. For instance, this process affects the policymaking of states that are not at the core of the EU or at the core of terrorist threats, as Bauman explains. He holds that efforts to enhance security following a terror attack in Europe affect not only the directly assaulted places but far away spots in the countries of "second speed" Europe, "which the terrorists […] have no intention of attacking."[50] Europe might thus be at the beginning of a genuinely European history of terrorism and anti-terrorism.

Second, the attack in Brussels (the *de facto* EU capital) in 2016 had a particular character for the EU, as one of the bombs blown off exploded in a metro station in the very EU quarter of the city, only a few hundred meters from the main buildings of the EU Commission and the Council of the EU. A place that thousands of EU employees pass every day. Therefore, this part of the Brussels attack comes closest to what could be evaluated as a direct attack on the EU bodies. Consequently, many EU leaders and staff perceived the Brussels attack as an attack on the institutions of the EU. Pictures of a Federica Mogherini (High Representative of the EU for Foreign Affairs and Security Policy and Vice-President of the EU Commission) shedding tears during her official statement on the attack went around the world.[51]

Coming back to the EU's overall role in European anti-terrorism, the EU is trying to establish grand scale cooperation.[52] The EU is working to improve cooperation between its member states, but also between its member states and third states, just as between itself and third states, or itself and other organizations, such as the UN. Although the terrorism policies of the individual EU-member states are, still, looking different, and the states are remaining to be the major source of anti-terrorism activities, the EU is relevant as an initiator of an overarching anti-terrorism framework and of specific terrorism policies.[53] The role of the EU in European terrorism

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socialeurope.eu, March 29, 2016.

[49] Juncker as cited in nachrichten.at, "Terror in Brüssel: Reaktionen in Zitaten," [own translation]. One could further read that 'the heart of Europe' had been attacked.

[50] Bauman, "A Few Comments on the Mis-Imagined War on Terrorism."

[51] nachrichten.at, "Terror in Brüssel: Reaktionen in Zitaten."

[52] Qurine Eijkman and Baart Schuurman, *Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation* (The Hague: ICCT, 2011), 6.

[53] TTSR (*Transnational Terrorism, Security and the Rule of Law*) Research Project. *Mapping Counterterrorism: A categorization of policies and the promise of empirically-based,*

policies has increased significantly since 2001, and it is now an important focal point for cooperation and decision-making.[54] Correspondingly, Jorge Bento Silva from the EU Commission evaluated in 2016 that "enormous progress has been made" in terms of cooperation on anti-terrorism at the EU level. More than twenty countries would e.g. contribute with intelligence to strengthen pan-European efforts. The challenge would be to develop this process further and to bring the existing tools and efforts together to one coherent framework.[55]

It is, however, important to keep in mind that the execution of the EU's Counter-Terrorism Strategy in particular and the EU's anti-terrorism policies, in general, differs from that of states themselves. The EU is not a state and does not have the traditional competences of a state activated in counter-terror measures. The EU does not have its own police force, military capabilities, legal prosecutors, or intelligence services.[56] It is, still, the member states who provide the majority of European anti-terrorism activity.[57] The EU, therefore, aims mostly at carrying out measures for which it's supranational and intergovernmental institutions are suited. This concerns providing cooperation at the EU level but also pushing for initiating new EU-wide legislation (often with the aim to *ease* cooperation).[58] EU organs – and here mostly the Commission and the Council – push for the creation of EU-wide anti-terrorism measures which the member states are supposed to implement. Of course, such measures are agreed upon with the participation of national decision-makers. A push for a Europeanization of anti-terrorism is thus delivered from both the EU and member state level.[59] The member states and the EU continuously increase entanglement in terms of anti-terrorism. Anti-terrorism policies thus become 'distributed' from the core EU states to the EU periphery, as well as from countries that are at the center of terrorist threats to those that see very little terrorist activity

systematic comparisons, 2008, 12-21. https://www.transnationalterrorism.eu/. Lindstrom, "The EU's approach to Homeland Security," 115-116.

[54] Nilsson, "The EU Action Plan on Combating Terrorism," 81.

[55] Bento Silva, "The European Union Agenda on Security."

[56] Gijs de Vries, "The European Union's Role in the Fight Against Terrorism: The Role of the EU in the Fight Against Terrorism," *Irish Studies in International Affairs*, Vol. 16, (2005), 8.

Although Europol, the EU's agency for police cooperation, has seen a considerable growth of capacities since the beginning of the century. With Eurojust, the EU has created an agency for judicial cooperation as well, including on terrorist related cases. Bures and Ahern, "The European Model of Building Regional Cooperation Against Terrorism," 187. Szyszkowitz, "The European Union," 176-177. Argomaniz, Bures and Kaunert, "A Decade of EU Counter-Terrorism and Intelligence." Nilsson, "The EU Action Plan on combating Terrorism," 80.

[57] Argomaniz, *The EU and Counter-Terrorism*, 137.

[58] De Vries, "The European Union's Role in the Fight Against Terrorism."

[59] Bures, *EU Counterterrorism Policy: A Paper Tiger?* 69. Argomaniz, *The EU and Counter-Terrorism*, 140.

(including potential rights problems). National politicians, however, at times blame the EU for unpopular laws and regulations, although they might themselves have been part of bringing them in place.[60] This method of indirectly implementing desired measures is also called 'policy laundering' and can be found in the policy field of anti-terrorism as well.[61] Still, EU-wide cooperation on terrorism policies is not preventing smaller groups of member states from cooperating more closely. An example of such smaller groups of European anti-terrorism policymaking is e.g., the Prüm Convention from 2005 which then had seven member states as its parties. In 2015, the Prüm Convention, reflecting a sort of 'laboratory' for future EU cooperation, had already fourteen member states as parties. The convention, however, respected EU law and was thus compatible with EU regulations and laws on the issue.[62]

Although the EU has clearly boosted its activity in terms of terrorism policies and has strengthened cooperation between member states, the EU is still criticized for being underdeveloped and ineffective in anti-terrorism policies with regard to several points. First, the EU faces the criticism that its anti-terrorism efforts are not sufficiently implemented in its member states. The national governments would "often lack the political will to align laws or make their police forces work together."[63] Even when this political will is given, the concrete implementation of agreements is often a slow process. As an example, Keohane mentions the slow implementation of joint teams of investigators, taking several years after this measure was agreed on in 2002.[64] Implementation was, however, going quicker in case of the European Arrest Warrant (only a couple of years). Therein, cooperation in terms of terrorism policies is a declared will of the member states and the EU, but implementation is not always going as quick and effective as wished for by the EU Commission. The underlying reason is often the unwillingness of member state authorities to give away sovereignty in a policy field perceived to be at the core of every state, security.[65]

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[60] Ilija Trojanow and Juli Zeh, *Angriff auf die Freiheit: Sicherheitswahn, Überwachungsstaat und der Abbau bürgerlicher Rechte* (München: Carl Hanser Verlag, 2009), 102.

[61] Barry Steinhardt, "Problem of Policy Laundering," American Civil Liberties Union, August 13, 2004. Ian Hosein, "The Sources of Laws: Policy Dynamics in a Digital and Terrorized World," *The Information Society,* Vol. 20 No.3 (2010). https://doi.org/10.1080/01972240490456854.

[62] Keohane, "Implementing the EU's Counter-Terrorism Strategy," 67. Hillebrand, *Counter-Terrorism Networks in the European Union,* 180.

[63] Keohane, "Implementing the EU's Counter-Terrorism Strategy," 68.

[64] Ibid.

[65] Brown, *European Union, counter-terrorism and police co-operation, 1992-2007,* 189. Keohane, "Implementing the EU's Counter-Terrorism Strategy," 72. Bures and Ahern, "The European Model of Building Regional Cooperation Against Terrorism," 221-222. Argomaniz, *The EU and Counter-Terrorism,* 146. Szyszkowitz, "The European Union," 187.

Second, shortcomings of EU anti-terrorism policies do not only lie in its implementation, sometimes the very creation of effective and relevant legislation is a slow process as well. An example of this is the process of common legislation on blank firing guns. Such guns (deactivated guns and rifles) were used during the two series of IS attacks in Paris in 2015 (sixteen out of forty-five weapons). Due to different procedures in the twenty-eight member states, the terrorists were able to purchase deactivated guns in Eastern European member states, reactivate them and use them for their attacks. The EU Commission was aware of the problem of different procedures for the deactivation of guns (e.g., guns deactivated in Denmark or Germany cannot be reactivated again), but did not move fast enough. In fact, the Commission was working on a new common directive on the issue since 2008 but never finished it.[66] This example shows the lack of speed in finding common solutions to security problems that, at times, persists at the EU level.[67]

Third, the EU member states are criticized for their security service cooperation not being sufficient. European intelligence agencies at times refrain from sharing vital information with each other, and rather share 'sanitized' information.[68] This criticism indirectly concerns the EU as well, since it is a declared aim of the EU to facilitate such cooperation.[69] Especially in the aftermath of the IS attacks in Brussels in 2016, the lacking cooperation between European security services came to the attention of the European public. In regard to these attacks, warnings by other services were not processed effectively by the Belgian services.[70] In order to strengthen such cooperation, Europol created the ECTC (European Counter Terrorism Center) in 2015. Police staff at this center is supposed to collect information from the different connected secret services, especially on the issue of returning Jihadis, financing of terrorism, weapons trade and terrorist internet propaganda. However, the crucial point is that also this center is reliant on the information the national services provide. Many analysts still interpret this supply as non-sufficient.[71] These three points of relative ineffectiveness

[66] Jakob Sheikh and John Hansen, "Spor fra terrorangreb peger mod kælder i Slovakiet," *Politiken*, March 20, 2016.

[67] The EU is, however, not that slow with all its anti-terrorism policymaking. For instance, a common definition terrorism was adopted rather fast after 9/11, and the same is valid for the adoption of a European Arrest Warrant.

[68] In part due to fears of enclosing sources. Wilkinson, "International Terrorism." Wilkinson, *Terrorism Versus Democracy*, 179.

[69] Szyszkowitz, "The European Union," 176.

[70] Tim King, "Why Belgian politicians haven't lost their jobs," *Politico*, March 30, 2016. https://www.politico.eu/article/why-belgium-politicians-havent-lost-their-jobs-resignation-political-failures-security-brussels-terror-attacks/

[71] Deutsche Welle, "Insufficient data sharing hinders defense against terrorism," March 24, 2016. http://www.dw.com/en/insufficient-data-sharing-hinders-defense-against-terrorism/a-19141514.

are bemoaned after every bigger terror attack in Europe, and after every attack, politicians demand improvement on these points. Still, a certain ineffectiveness persists.[72]

To summarize, this section pointed to the fast development of anti-terrorism policymaking after 9/11, especially when compared to the meager results of cooperation between the 1970s and 1990s. After 9/11 and the Madrid and London bombings in 2004 and 2005, the EU bodies adopted a range of policies directed towards terrorism. Due to this increased activity and the established common strategy and terrorism definition, the anti-terrorism policies of the EU and its member states have become connected (or Europeanized). The EU now owns a real coordination role in terms of anti-terrorism (still, member states often try to steer the EU's general approach on the issue). The section additionally pointed out that the perception of terrorism at the EU level, similar to the perception in most member states, is a perception of Islamist terrorism. Other strands of terrorism, e.g. right-wing terrorism, enjoy less attention. Although the coordination role of the EU does not always deliver, the EU has produced results. Some of these results, however, include policies that threaten rights standards. I will in the next section scrutinize these policies.

The EU's Post-9/11 Anti-Terrorism: A Human Rights Perspective

After shedding light on the development of anti-terrorism, as well as the perception of terrorism at the EU level, this section will scrutinize specific EU policies implemented in the EU's efforts to fight terrorism. This analysis will be carried out by having the high human rights standards that the EU has set for itself in mind. As mentioned, the EU perceives itself as a human rights frontrunner and builds a large part of its raison d' être on stabilizing, improving and spreading individual rights. An emphasis on human rights is existent in the EU's rhetoric on anti-terrorism as well. The EU has, e.g. pointed out that it wants to tackle terrorism "while protecting human rights and upholding the rule of law," as well as international law.[73] The

[72] One could add as a fourth point, that the position of the EU Counter-Terrorism Coordinator (CTC) is criticized for holding too few powers. The position owns small budget and staff, the post includes no right to propose EU legislation on terrorism, nor can the CTC call for a meeting of the relevant ministers of the member states in order to set the agenda of EU terrorism policies. The most specific anti-terrorism representative at the EU level has thus only very little direct influence on the actual course of policymaking. The agenda-setting function on the issue stays with the governments of the member states and the EU Commission. The role of the CTC is thus limited to trying to ease the cooperation between the more powerful players. Keohane, "Implementing the EU's Counter-Terrorism Strategy," 65. Szyszkowitz, "The European Union," 186. Argomaniz, *The EU and Counter-Terrorism*, 142. Qurine Eijkman and Baart Schuurman, *Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation* (The Hague: ICCT, 2011), 10.

[73] The European Union, "Annual Report: Human rights and Democracy in the World in 2014,"

compatibility of human rights and anti-terrorism is a declared aim in the EU's official Counter-Terrorism-Strategy from 2005, and was underlined in a 2012 publication by the EU's Counter-Terrorism Coordinator, Gilles de Kerchove, which read that "promoting human rights is one of our most effective ways to counter terrorism."[74] Jörg Monar, therefore, denoted the EU's anti-terrorism efforts a "war on two fronts", as the focus would be on tackling the issue of terrorism, while at the same time trying to avoid the "undermining of civil liberties and human rights standards as a result of counter-terrorism measures."[75] Measures and legislation that interfere with human rights ideals in an ineligible fashion thus undermine one of the cornerstones of the EU itself. I will, in the following, scrutinize EU policies concerning such interferences.

- **Data Retention at the EU Level**

The Justice and Home Affairs (JHA) Council agreed in 2005 on bringing forward a directive on data retention measures, making it mandatory for member states to adopt legislation that obliges telecommunication service providers to store metadata for six to twenty-four months. State authorities would then have the opportunity to access the retained data at any time. As mentioned earlier, metadata saved by data retention consists of information on communication without saving the content of communication, thus saving, e.g., who is in contact with whom, at what time, for how long and the location of the cell phones involved. These data can be automatically analyzed and provide for a detailed insight into an individual's life. The storage of such data comes close to a "logbook of a person's behavior and life."[76] The data retention directive was a response to the terror attack in Madrid in 2004, where perpetrators of the attack could be traced by phone

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[74] Villy Søvndal, Gilles de Kerchove and Ben Emerson, "Counter-terrorism and human rights," *European Voice,* March 19, 2012. Co-publisher of this statement was the then Danish Foreign Minister Villy Søvndal, showing that also national governments engage in a discourse trying to avoid the trade-off between rights and security. Jorge Bento Silva, from the EU Commission, further emphasized the importance of the principles of transparency and democratic control concerning EU anti-terrorism efforts. Bento Silva, "The European Union Agenda on Security."

[75] Jörg Monar, "Conclusions," In *International Terrorism: A European Response to a Global Threat*, ed. by Monar and Mahncke (Brussels: Peter Lang, 2006), 156.

[76] Laura Donohue, *The Future of Foreign Intelligence: Privacy and Surveillance in a Digital Age* (New York: Oxford University Press, 2016), 39. Markus Beckedahl and Falk Lüke, *Die digitale Gesellschaft: Netzpolitik, Bürgerrechte und die Machtfrage* (München: dtv, 2012), 35. Lilian Mitrou, "The impact of communications data retention on fundamental rights and democracy – the case of the EU Data Retention Directive," In *Surveillance and Democracy*, ed.by Kevin Haggerty and Minas Samatas (London: Routledge, 2010), 128-137.
The European Data Protection Supervisor showed concern about the data retention directive early on. Lindstrom, "The EU's approach to Homeland Security," 125.

records.[77] The idea for the directive was thus to gain insights into the communication and networks of terror suspects.[78] However, data retention did not only aim at EU citizens, but the communication of all individuals passing through the EU's infrastructure (equaling a considerable share of the world's population).[79] Therein, the data retention directive constitutes the EU's most comprehensive policy in terms of surveillance until further.[80]

The directive was, however, not only developed at the EU level but at the member state level as well. Germany was one of the member states pushing the directive at EU level; especially Otto Schily, Interior Minister at the time, was a proponent of the directive. The German government not only aimed at the implementation of data retention legislation at the EU level out of convictions concerning European cooperation and coherence but also since a directive coming top-down from the EU might spare the German government of becoming the target of critics. The EU thus functioned as an important vehicle for distributing the measure of data retention to all member states.[81] This process of utilizing the EU as a means to establish a piece of legislation that was anyway considered on the national level can be identified as a case of policy laundering. Still, a pro-active role of the EU in terms of data retention can be traced in the fact that the relevant EU Commissioner at the time, Cecilia Malmstroem, repeatedly bemoaned a slow and too diverse implementation of the directive in several member states.[82]

However, after national data retention legislation had already come under pressure in some member states (e.g., Germany), the EU's own data retention directive was declared non-valid as well. In 2014, the ECJ ruled that it was violating the fundamental rights to privacy and data protection (art. 7 and 8 CFREU) of EU citizens in an unjustifiable fashion and therein incompatible with the EU's CFREU. The court held that the directive interfered with citizens' rights in a non-proportional manner since it demanded the collection of data on virtually all EU citizens and residents. The data retention directive did thus not live up to the demands for a justifiable derogation from rights as defined in the CFREU (upholding the principles of proportionality and necessity of derogation). Additionally, the court held that the data retention directive failed to define limits on data

[77] Dorle Hellmuth, *Counterterrorism and the State: Western Responses to 9/11* (Philadelphia: University of Pennsylvania Press, 2016), 115.
[78] Mitrou, "The impact of communications data retention on fundamental rights and democracy," 129.
[79] Konrad Lachmayer and Normann Witzleb, "The Challenge to Privacy from Ever Increasing State Surveillance: A Comparative Perspective," *University of New South Wales Law Journal*, Vol. 37 No. 2 (2014): 755.
[80] Fabbrini, "Human Rights in the Digital Age."
[81] Beckedahl and Lüke, *Die digitale Gesellschaft,* 34. Hellmuth, *Counterterrorism and the State,* 116.
[82] Hellmuth, *Counterterrorism and the State,* 117.

access of security organs and failed to provide satisfactory safeguards in terms of data security and data storage.[83] All national law based on the directive was thus no longer compliant with EU law already by 2014.[84]

In December 2016, as mentioned earlier, the ECJ expanded its stand on data retention in a ruling on data retention regimes in the UK and Sweden. The court explained that data retention provides for severe interference with the right to privacy and the right to data protection, as it would allow for precise conclusions on private lives. Freedom of expression as defined in article 11 of the CFREU was evaluated to be interfered with as well by the court. The court held that indiscriminate data retention would possibly construct the impression of constant surveillance. Based on this evaluation the court ruled that indiscriminate and non-transparent retention of electronic communication is ineligible. Such indiscriminate retention (covering virtually all individuals in European societies) would exceed the limits of necessity (and proportionality) and would not be justifiable in a democratic society. The condition for a derogation of privacy rights was thus not met. The court pointed out that only such data retention that served the purpose of combatting serious crime, including terrorism, is eligible, however, only if retention is aimed at specific suspects.[85] Furthermore, each act of data retention would demand a specific authorization by a court or an independent body. In order to uphold a sufficient level of transparency, a notification of the application of a data retention measure would have to be supplied to affected individuals as soon as the measure was not in use anymore. The court demanded member states to reform and renew their data retention laws along the lines of its judgment (abolishing indiscriminate collection and implementing the mentioned safeguards).[86] It can thus be concluded that the EU's data retention directive breached human rights on a legal basis. Furthermore, based on the court's verdict it becomes hard to imagine how any form of indiscriminate mass surveillance in the EU would be in accordance with ECJ jurisdiction.[87]

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[83] Court of Justice of the European Union "Press Release No 54/14." Fabbrini, "Human Rights in the Digital Age."

[84] Privacy International, "National Data Retention Laws since the CJEU's Tele-2/Watson Judgment," September 2017. https://privacyinternational.org/sites/default/files/2017-12/Data%20Retention_2017.pdf.

[85] Owen Bowcott, "EU's highest court delivers blow to UK's snooper's charter," *The Guardian*, December 21, 2016. Lorna Woods, "Data retention and national law: the ECJ ruling in Joined Cases C-203/15 and C-698/15 Tele2 and Watson (Grand Chamber)," *EU Law Analysis*, December 21 (2016). Privacy International, "National Data Retention Laws since the CJEU's Tele-2/Watson Judgment," September 2017.

[86] ECJ, "Judgment of the Court (Grand Chamber)," December 21, 2016 http://curia.europa.eu/juris/document/document.jsf?docid=186492&doclang=EN. Bowcott, "EU's highest court delivers blow to UK's snooper's charter."

[87] Privacy International, "National Data Retention Laws since the CJEU's Tele-2/Watson Judgment." Fabbrini, "Human Rights in the Digital Age," 86-87.

Additionally, the EU's data retention directive violates the wider aims of human rights or the spirit of rights. The data retention directive negatively interferes with the right to privacy, and in consequence with the right to freedom of expression, freedom of movement and freedom of association.[88] Again, privacy is an integral part of what it means to be human. If humans do not feel free from unnecessary control their abilities of self-definition, of creating relationships and to personal, moral, intellectual, and political development are restrained. The same is valid for individuals' abilities to make autonomous decisions and to freely express opinions and gain political influence.[89] By triggering a situation in which all individuals potentially feel surveyed at almost all times, one cannot speak of a sound atmosphere of rights anymore. In such a situation, perceptions of human dignity and notions of freedom are undermined. The same is valid for the human capabilities of thinking and moving freely, and engaging in political decision-making. However, all of these points are central parts of what human rights, in general, try to support.

Since the data retained from mobile phones very often include location data, it is, by the help of these data, possible to construct movement profiles of individuals. The possibility of indiscriminately tracking movement effectively decreases the general amount of freedom of movement in society, as well as undermines the crucial idea of freedom of movement, to *freely* move in public space (without being tracked).[90]

If the feeling of being under surveillance or control persists in a society or a fraction of society, individuals can be expected to start behaving differently. They might start to avoid expressing opinions in political debates and engaging in political campaigns. In other words, a process of self-censoring in fear of potential false incrimination might be launched. Humans very often start to act differently when they become aware of external surveillance and control, by conforming their behavior to mainstream expectations (this was, as mentioned before, acknowledged in the ECJ ruling from 2016 and documented in a recent French study).[91] Such a development

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[88] According to article 10 of the ECHR freedom of expression is only guaranteed if public authorities refrain from obstructing the reception and impartion of information.

[89] Which is one of the reasons why totalitarian regimes systematically suppress privacy rights of their citizens. Mitrou, "The impact of communications data retention on fundamental rights and democracy," 129-132.

[90] Some people, perceiving a specific vulnerability to state surveillance, might even start to change their movement based on awareness of the tracking of movement.

[91] Ragazzi et al., "The Effects of Counter-Terrorism and Counter-Radicalisation Policies on Muslim Populations in France," *Centre d'etude sur les Conflits, Liberte et Securite (CCLS)*, 2018. Beckedahl and Lüke, *Die digitale Gesellschaft*, 53.
As another example, a study by Forsa, conducted in Germany in 2008, showed that eleven percent of the respondents had in that year at least once refrained from using phones or email due to data retention concerns. Mitrou, "The impact of communications data retention on fundamental rights and democracy," 141.

would severely damage every democratic society since the free engagement of citizens and individuals is crucial for every functioning democracy.[92]

Furthermore, via surveillance processes, the state increases its amount of power over its individuals, to the extent that the democratic cornerstones of society might become fragile.[93] Lilian Mitrou argues that indiscriminate data retention reflects a shift of the state from a constitutional state providing protection in concrete scenarios of a threat to a primarily security-oriented, preventive state.[94] With indiscriminate data retention, collecting information on all individuals, not only suspects of crime, states enter the realm of pre-emptive action. Surveillance as a practice is transformed from the exception to the norm, enabling a much easier sorting and categorizing of individuals. Every individual communicating electronically becomes a target for surveillance and thereby a potential suspect.[95] The data retention directive shows that the EU is not only contributing to policies that undermine rights by providing a forum for the cooperation of member states but also pushes itself for the implementation of policies that are ineligible from a human rights standpoint (by demanding states to implement such policies).[96]

Although indiscriminate data retention both violates the spirit of human rights and the CFREU and although member states have an obligation to make sure their data retention laws are in accordance with ECJ jurisprudence, member states have been very reluctant to reform their data retention laws according to the demands of the ECJ. Many member states have not changed their data retention laws after the 2014 and 2016 verdicts, although these laws are by now in breach of EU jurisdiction. Many member states seem to be willing to disdain the ECJ's judgment and let their legally non-eligible data retention laws run as long as possible. A proposed solution has been the adoption of a 'rights compliant data retention directive' at the EU level. Currently, the Council is in an official "reflection process" on data retention and how to make data retention practices compatible with the

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[92] Donohue, *The Future of Foreign Intelligence*, 101. Mitrou, "The impact of communications data retention on fundamental rights and democracy," 133-138. Fabbrini, "Human Rights in the Digital Age," 85.

[93] Fabbrini, "Human Rights in the Digital Age," 68. Constanze Kurz, *Die Datenfresser* (Frankfurt: S. Fischer, 2011) 144-146. And again, a rapid increase of state power in itself endangers societies social and political structures. Donohue, "Security and Freedom on the Fulcrum," 60.

[94] Mitrou holds that indiscriminate data retention is "diametrically opposed to a regime designed to minimally impair rights." Mitrou, "The impact of communications data retention on fundamental rights and democracy," 129, 141.

[95] Mitrou, "The impact of communications data retention on fundamental rights and democracy," 135-137.

[96] Bonnici argued already in 2007 that data protection was watered down at the EU level via efforts to fight Islamist terrorism. Bonnici, "Recent European Union developments on data protection."

demands by the ECJ.[97] However, such an EU wide solution would have to be adopted by the member states in the European Council. Moreover, data retention would have to change dramatically in character in order to end up 'human rights compliant'.

Tellingly, despite the fact that data retention has been declared in breach of essential human rights more than once by relevant European courts, the EU still develops new policy ideas based on the mass retention of internet data. For instance, in 2018 the EU published plans to give investigators of one member state the right to access data retained by internet service providers in another country, including emails, chat protocols, videos, and photographs. Data access would have to be granted in the course of ten days and in emergency cases after the latest six hours.[98] These plans show that a learning effect on the side of the EU Commission based on the court verdicts does not seem to have materialized. Mass data retention still constitutes the basis for the extension of investigation powers, this time even including concrete content and not 'only' metadata (since photographs and videos are included). Furthermore, the fact that the policy proposal includes a process that is not based on actual emergency situations indicates that the idea of preventive policing along the lines of e.g. the German concept of 'looming danger' seems to have entered the policymaking processes at the EU level as well. Thus, although mass data retention has been scrutinized extensively by European courts in the recent past, the idea to utilize this measure of mass surveillance has survived, not only at the member state level but at the EU level as well.

- **The Passenger-Name-Record Directive**

Another example of an EU anti-terrorism policy that exercises pressure on human rights norms is the Passenger-Name-Record directive (PNR) adopted in 2016.[99] The directive makes it mandatory for airlines to save a range of

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[97] European Union Agency for Fundamental Rights, "Data Retention Across the EU." https://fra.europa.eu/en/theme/information-society-privacy-and-data-protection/data-retention. Privacy International, "National Data Retention Laws since the CJEU's Tele-2/Watson Judgment."
Statewatch, "Council wants a "comprehensive study" on data retention that considers "a future legislative initiative"," April 10, 2019. www.statewatch.org/news/2019/apr/eu-council-data-ret-con.htm.

[98] Spiegel Online, "EU-Plan: Fingerabdrücke im Ausweis sollen bald Pflicht sein," April 17, 2018. http://www.spiegel.de/politik/deutschland/eu-fingerabdruecke-im-personalausweis-sollen-bald-pflicht-sein-a-1203405.html

[99] It took the directive a long time to reach the stage of adoption. It was discussed since 2002. Before the adoption of the directive, the EU had made agreements with the US about transfer of PNR data. See e.g., Hillebrand, *Counter-Terrorism Networks in the European Union*, 169-170. Vassilios Grammatikas, "EU Counter-terrorist Policies: Security vs. Human Rights?" Conference Paper, First Annual Conference on Human Security, Terrorism and Organized Crime in the Western Balkan Region, Ljubljana, Slovenia, November 2006.

data on passengers and transfer them to member state institutions, e.g. name, address, travel date, itinerary, other ticket information, contact details, travel agent, all forms of payment information, seat number or baggage information. The data are to be saved for all flights from third countries entering the EU. However, the member states agreed to save data on EU-internal flights as well. These data can additionally be delivered to authorities in the US, Canada or Australia. The PNR data are to be stored in a personalized fashion (connected to real names) for six months and are to be completely deleted after five years.[100] The data are not to be saved in specific situations of threat but at all times. Accordingly, data collected under the PNR directive are based on a general presumption of threat, not a specific one. In effect, the PNR directive operates as the facilitator of another measure of indiscriminate data collection and storage. Therein, the directive constitutes another instance of indiscriminate surveillance.[101]

The official purpose of the directive is to "prevent, detect and investigate terrorism and other forms of serious crime."[102] Thomas De Maiziere, German Interior Minister at the time, argued that the directive would provide insight into so-called 'endangerers' entering Europe.[103] However, the EU includes a wide range of issues in its definition of serious crime in connection with the PNR directive, e.g. corruption, fraud, forgery of documents, drug offenses or industrial espionage (in total twenty-six different crimes are listed). Thus, the directive covers a lot more than only terrorism, and it covers more than violent crime as well. Therefore, the PNR directive appears to constitute another example of a side-effect anti-terrorism policy, which is a policy that does have an anti-terrorism purpose, or that is sold to the public mainly as an anti-terrorism measure, but that does try to suffice other purposes as well and foremost shows effects in regard to these other purposes.

The directive had been in the pipeline of EU policymaking for around five years already, without reaching consent in the European Parliament. The US issued external pressure on the EU for a number of years to get the EU to approve the directive and to include an agreement about the potential transfer of the data to US authorities. The attacks on the editorial board of the *Charlie Hebdo* magazine in January 2015 then provided a push

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[100] European Commission, "Passenger-Name-Record," June 11, 2018. https://ec.europa.eu/home-affairs/what-we-do/policies/police-cooperation/information-exchange/pnr_en. Directive (EU) 2016/681 of the European Parliament and of the Council, April 27, 2016. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016L0681&from=EN.

[101] Woods, "Data retention and national law."

[102] European Commission, "Passenger-Name-Record."

[103] Markus Becker, "Fluggastdaten: EU-Innenminister beschliessen PNR-Richtlinie," *Spiegel Online*, December 4, 2015. http://www.spiegel.de/netzwelt/netzpolitik/fluggastdaten-eu-innenminister-beschliessen-pnr-richtlinie-a-1066116.html.

for the policy proposal at the EU level. Still, the policy saw another delay since France initially demanded a longer data saving period. Finally, the directive was adopted in April 2016.[104] However, in 2018 fourteen EU member states still missed implementing the directive into national legislation.[105] This process exemplifies, again, three different points that I have tried to make. First, anti-terrorism policymaking at the EU level can take a long time, since different demands by the many member states have to be brought in line. Second, concrete attacks can provide a push for policy-proposals that potentially had been discussed for years, without successfully finding a compromise. Third, anti-terrorism policymaking at the EU level and the member state level are intertwined. France provided both a push and a delay in the process, and the directive forces the member states to adopt national laws implementing the goals of the EU directive. Furthermore, the example of the PNR directive shows that the EU is at times an object of external pressure in terms of anti-terrorism policy, here to pressure by the United States.

Now, using my human rights analysis framework, I would like to argue that the EU's PNR directive undermines both the right to privacy and the CFREU's right to data protection (art. 8 CFREU). So far, no verdict has been delivered on the matter of the PNR directive by the ECJ. Still, the directive, due to its indiscriminate collection and storage of data, appears to provide a potentially ineligible interference with the right to privacy and the right to data protection from a legal perspective. One might argue that states might limit or derogate from these rights in order to prevent severe threats, however, if the conditions of necessity and proportionality are upheld in case of the PNR deems at least questionable. To save extensive data on all air travel, in order to potentially catch a few suspects, or gain insights into the movement and network of a considerably small amount of individuals, appears just as non-proportional as the saving of communication data of all citizens; especially since no proof has been provided how the PNR directive might prevent a terror attack. Again, the indiscriminate saving of PNR data is just another mass surveillance measure; and such indiscriminate surveillance has been declared ineligible by the ECJ in the past based on the legal norm of privacy rights (see above).[106] Therefore, the same

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[104] Becker, "Fluggastdaten: EU-Innenminister beschliessen PNR-Richtlinie." Javier Argomaniz, "When the EU is the 'Norm-taker': The Passenger Name Records Agreement and the EU's Internalization of US Border Security Norms," *European Integration*, Vol. 31 No.1 (2009): 119. Kurz, *Die Datenfresser*, 189.

[105] Statewatch, "Travel surveillance: Commission demands PNR Directive implementation by 14 Member States as 'Informal Working Group' settles in," July 23, 2018. http://www.statewatch.org/news/2018/jul/eu-pnr-infringements.htm.

[106] Justine Chauvin, "EU-PNR directive: Overlooking EU fundamental rights will not make Europe safer." *Politheor*, January 9, 2016. http://politheor.net/eu-pnr-directive-overlooking-eu-fundamental-rights-will-not-make-europe-safer/

interpretation of articles 7 and 8 of the CFREU (covering privacy and data protection) as delivered by the ECJ in case of data retention might be delivered for the PNR directive; the similarities of the character of data collection are obvious.[107] Admittedly, the share of people traveling by plane is smaller than the share of people using electronic communication, but still, the data collection and storage is likewise conducted in an indiscriminate fashion, not targeting specific individuals, as demanded by the ECJ in its 2016 verdict on data retention. Moreover, in terms of the transfer of PNR data to third states, the ECJ has already issued a negative opinion in 2017, forcing the EU to at least adopt additional safeguards. The ECJ declared at the same time that the EU has so far not successfully proven that the directive is necessary (a condition for derogating from the mentioned rights under the CFREU).[108] Furthermore, it is not unlikely that PNR databases might be used in a dragnet fashion, implementing discriminatory profiling practices, thus violating the right to be free from discrimination (see Chapter 3 on the legally discriminatory nature of dragnet searches). Based on these points, the EU might head for a future legal setback concerning the PNR directive. And indeed, the German legislation implementing the EU's PNR directive has recently been charged in Germany, e.g., by Emilio Capitani, former head of the Secretariat of the EP's LIBE Committee, based on some of the points laid out above, e.g., the indiscriminate nature of data collection.[109]

Since the directive constitutes another indiscriminate surveillance measure, it is at odds with the spirit of rights and wider aims of human rights as well. The argumentation is similar to the one presented above in connection with data retention. The PNR directive negatively interferes with privacy rights and therein undermines one of the central conditions for humans to thrive in democratic societies. It interferes with the protection of individuals' social space and diminishes individual autonomy. It constitutes another control regime, interfering with the wider human rights aim of freedom and a general notion of human dignity. By creating another surveillance instrument the perception of being surveyed at all times might increase amongst the population. By that, the directive rather damages than supports an atmosphere of enjoyment of rights. The human capability of moving freely, without tracking, is undermined as well. In such a situation, one must expect negative consequences for the notion of being treated in a

[107] Lorna Woods, Professor of Internet Law, shares this evaluation. Woods, "Data retention and national law."

[108] Estelle Masse, "Border surveillance: what Europe's "PNR" ruling means for your privacy," *accessnow.org*, September 7, 2017 https://www.accessnow.org/border-surveillance-europes-pnr-ruling-means-privacy/.

[109] Vincent Manancourt, "Government access to flight passenger data challenged in Germany," *Global Data Review*, May 17, 2019. https://globaldatareview.com/article/1193088/government-access-to-flight-passenger-data-challenged-in-germany.

dignified way and of having one's personhood protected. The perception that the state (or the EU) supports the maximization of the freedom of its citizens (and non-citizens) and is ready to concede limits on its own power is undermined as well. Since the directive enhances the amount of power authorities hold over the populations, it feeds into Mitrou's argument that indiscriminate data collection and storage reflects a shift towards a security-oriented and pre-emptive state.[110] Surveillance increasingly becomes the norm, rather than the exception, by the introduction of instruments such as the PNR directive; and by targeting all travelers indiscriminately, all become potential suspects (instead of being recognized as 'ends in themselves'). Again, the cornerstone of the modern human rights idea, human dignity is damaged by ever-extended indiscriminate data collection.

In spite of potential future challenges facing the PNR directive and the problems it constitutes for the spirit of human rights, the Romanian presidency of the EU Council, in the spring of 2019 suggested an extension of the PNR regime to other means of transportation.[111] Thus, one might see more surveillance of individuals' transportation in the future, not less. And, more such surveillance would be triggered by processes playing out at the EU level.

- **The Implementation of Biometric Passports and ID Cards**

Another example of a questionable anti-terrorism measure that was pushed at the EU level is the implementation of biometric data on passports and ID cards. This implementation has been conducted in two steps. First, a regulation on the implementation of biometric passports was adopted in 2004. Second, a new regulation from 2018 makes the implementation of biometric data in ID cards mandatory.

First, in 2004, the EU adopted a regulation that demanded all its member states (with the exception of the UK, Ireland, and Denmark), to implement biometric data (two fingerprints and a biometric picture) in passports.[112] Such biometric data allow for secure verification of the identity of individuals.[113] One of the major justifications for the implementation of the regulation was its alleged contribution to a heightened level of security, (especially in the context of the 'War on Terror'). As mentioned before, the

[110] Mitrou, "The impact of communications data retention on fundamental rights and democracy," 129.

[111] Statewatch, "Biometrics, extended travel surveillance, internal-external "synergies": Presidency note outlines future counter-terrorism priorities," March 19, 2019. www.statewatch.org/news/2019/mar/eu-terrorism-doc.htm

[112] The UK, Ireland and Denmark could not participate in the regulation since it was closely linked to those parts of the Schengen rules that these countries are not a part of.

[113] Monica den Boer, "Counter-Terrorism, Security and Intelligence in the EU: Governance Challenges for Collection, Exchange and Analysis," *Intelligence & National Security*, Vol. 30 No. 2-3 (2015): 219.

EU's directive was a result of political pressure from the US, who threatened the EU to abolish visa-free travel for citizens of EU member states to the US if biometric data would not be included in European passports. Still, also the German government supplied pressure at the EU level in order to push the biometric passport issue on the EU's political agenda.[114]

The fact that it was the EU, who pushed the measure of implementing biometric passports on the European political agenda, resulting in the implementation of biometric passports in almost all member states, provides an example of the relevance and power of the EU in European anti-terrorism. The specific issue of the regulation on biometric passports, however, illustrates as well that the EU is vulnerable to external pressures in terms of terrorism policies, especially from the side of the US. This vulnerability to US pressure surfaced in other cases as well, as e.g., seen with the PNR agreement.

This first regulation from 2004 *is* from a legal perspective eligible. In 2013, the ECJ ruled that the inclusion of fingerprints in electronic passports is admissible. The court acknowledged that the storing of fingerprints constitutes an interference with the right to privacy and the right to the protection of one's data. However, it argued that this interference was justifiable since the measure would contribute to enhanced security, since the storage of two fingerprints would not constitute a very sensitive issue and since the regulation would help to meet an objective of the general interest of the EU (preventing illegal entry into the EU). Still, the court emphasized that its verdict is only applicable to the process of storing the biometric fingerprint data directly in the passport, which is then handed over to the individual, not for extended processing of the biometric data, e.g. by creating centralized biometric databases.[115]

Although the direct storage of biometric data on passports has received legal consent, the measure is still somewhat questionable from a spirit of rights perspective. One might claim that the act of handing over one's fingerprints to state authorities interferes with perceptions of one's overall human dignity, even if the data are directly stored on the passport only. This concern was even expressed in a report by the EU's own fundamental rights agency FRA.[116] The act of providing fingerprints is

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[114] Deutsche Welle, "Germany Introduces Biometric Passports," November 1, 2005. https://www.dw.com/en/germany-introduces-biometric-passports/a-1762338. Kurz, *Die Datenfresser*, 125.

[115] Diana Dimitrova, "The Willems judgment: CJEU's missed chance to rein in biometric data usage," *Media Policy Blog*, September 9, 2015. http://eprints.lse.ac.uk/82387/. European Digital Rights (EDRi), "European Court Of Justice: Fingerprints In Electronic Passport Are OK," October 23, 2013. https://edri.org/european-court-of-justice-fingerprints-in-electronic-passport-are-ok/.

[116] European Union Agency for Fundamental Rights, "Under watchful eyes: biometrics, EU IT systems and fundamental rights," 2018, 41.

culturally connected to suspects of crime, having all individuals provide fingerprints arguably means regarding all individuals as potential future suspects. This is especially valid since the legitimizing context for the implementation of the regulation was to filter out potential terror suspects. This additionally constitutes an infringement of the general presumption of innocence, a central part of due process (and the basis for the wider rights aim of equal justice).

In the latest years, the EU has renewed its focus on biometric data and tries to push for their extended use (via legislation and budgeting). This has for instance been manifested with the development of a new regulation on mandatory biometric data in ID cards. In the spring of 2018, the EU developed a new regulation, making it mandatory for all ID cards in the EU to include two electronic fingerprints, as well as a biometric photograph (extending the earlier demands to now encompass ID cards as well). The new regulation, adopted in April 2019, subjects around 175 million EU citizens to exchange old ID cards with new biometric ones. The EU Commission emphasized that the new regulation supports European anti-terrorism efforts since terrorists could use forged ID cards in order to enter the EU. At the same time, the Commission justified the regulation with general efforts against transnational crime.[117] Thus, one can arguably regard the new regulation as a side-effect anti-terrorism measure as well, since its use is at the outset not confined to potential anti-terrorism benefits, but encompasses efforts against regular crime as well and will with a high probability see its main effects in preventing regular crime (see my definition of side-effect anti-terrorism). The timing of the push for the new regulation supports my earlier argument that anti-terrorism measures are, at times, extended, even if the peak of a specific terror threat has passed. The new regulation would have appeared to be more in line with current terrorism contexts if it had been proposed at the recent high time of IS terrorism in Europe (roughly from January 2015 to the summer of 2017). Of course, one might ascribe the late initiation of the regulation to the slow nature of EU policymaking, however, if the peak of a threat has passed, the new measure could just as well have been dropped, if not it is to serve other purposes as well (such as tackling transnational crime).[118]

Questionable circumstances of the new regulation pertain its scope and its purpose or necessity. First, the new regulation adds many million individuals in the EU to the owners of biometric identification documents, thus the scope of biometric identification is considerably expanded and the amount of people that are forced to provide sensitive, digitally transferable

[117] Spiegel Online, "EU-Plan: Fingerabdrücke im Ausweis sollen bald Pflicht sein," April 17, 2018. Statewatch, "Identity cards: there is still time to oppose the EU's 'Fingerprinting Regulation'," March 5, 2019. www.statewatch.org/news/2019/mar/eu-id-cards-text.htm.
[118] Statewatch, "Identity cards."

data when issuing an identification document is growing. This expanded scope of the biometric identification documents, especially ID cards, deems questionable. It does not meet the official purpose of protection from terrorism. Most owners of ID cards do not use them for traveling in or out of the Schengen zone (here often a passport is needed or used), and most checks on ID cards do rather aim at other irregularities or offenses than terrorism. Furthermore, the two main categories of people entering Europe (who do not own a European ID card in the first place) and posing a threat are refugees who become radicalized after entering Europe and returning nationals of member states who fought for IS. The latter might, however, potentially return on their own identity papers or via secret routes without passport control. Thus, a preventive effect in terms of biometric ID cards in connection with these two groups cannot necessarily be expected. Cases of IS members traveling to Europe by using forged ID and committing terror attacks have at least not been in the headlines in terms of latest Islamist terror attacks in Europe. In light of this, the regulation appears ever more futile in its anti-terrorism purpose.

Second, the issuing of new ID cards via biometric data entails the risks of misuse of that form of data collection from the side of state authorities. Suddenly the data might not only be stored on the card any longer but in national databases as well. Such developments are already underway. For instance, Germany has in a recent law given its intelligence agencies full access to data on passports and ID cards. The access might result in the construction of biometric databases based on biometric information in ID documents. [119] The granting of access to such data by intelligence services constitutes a violation of the original purpose of the EU regulation that stood at the start of the process. Such a misuse of the purpose might in the future have legal repercussion for both the German legislation and the EU regulation as a whole (although the ECJ has thus far abstained from entering the discussion about extended usage of biometric data gained via issuing passports). This point gains in its validity by keeping in mind, that the new General Data Protection Regulation by the EU (adopted in 2016 and implemented in 2018) classifies biometric data as sensitive data, such data enjoy therefore an extra degree of protection in the perspective of the EU itself.[120]

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[119] Matthias Monroy, "Im Bundestag: Automatisierter Zugriff auf biometrische Passbilder für alle Geheimdienste," *Netzpolitik.org*, May 17, 2017. The construction of such databases has been considered in the Netherlands as well. European Union Agency for Fundamental Rights, "Fundamental rights implications of storing biometric data in identity documents and resident cards: Opinion of the European Union Agency for Fundamental Rights," September 5, 2018. https://fra.europa.eu/en/opinion/2018/biometric-id.

[120] Steve Peers, "Biometric data and data protection law: the CJEU loses the plot," *EU Law Analysis*, April 17 (2015). http://eulawanalysis.blogspot.com/2015/04/biometric-data-and-data-protection-law.html.

Third, concerning this new regulation, it is important to point out, that the EU Commission did not produce any specific argumentation on the necessity or proportionality of the new regulation in relation to affected civil rights.[121] However, since the regulation covers the collection and storage of sensitive data (the EU itself evaluates fingerprints and biometric pictures as sensitive data), the categories of proportionality and necessity should have been considered for a justification of the regulation. Non-proportional data collection and data storage of sensitive data on many million individuals constitute a potential interference with privacy rights and the right to data protection. That the EU did not legitimize the proportionality and necessity of the regulation, clearly disregards demands for a derogation of these rights under the CFREU. This disregard might bear the potential for legal challenges.

In terms of the spirit of rights, the following points of criticism can be provided. Since the purpose of the extension of the scope of biometric data in identification documents was the prevention of terrorism, every individual is regarded as a potential suspect. This undermines the notion of every human being constituting an end in itself and therein interferes with the general notion of human dignity and personhood on which human rights concepts are based. Furthermore, the expansion of the scope of people covered by demands for issuing biometric documents marks a trend of ever more far-reaching electronic control mechanisms in Western democratic societies; a trend that undermines notions of privacy rights and data protection (see my points on the risks concerning the security of biometric data above). The trend towards enhanced data collection and data control on the side of European authorities additionally feeds into the development towards a pre-emptive state. This, again, exemplifies that the rights aim of enabling maximal individual freedom and setting the necessary limits for state power are not provided in current European anti-terrorism. The disregard of the categories of necessity and proportionality by the EU in its justification for the new regulation disregards the rules set in a democratic and liberal system for how to deal with the collection of sensitive data, and more broadly, for how to deal with questions about individual rights in general. As with a range of other anti-terrorism measures presented in this thesis, the new regulation on ID cards contributes to additional accumulation of knowledge about individuals for state authorities. Thereby, the power balance between state and individual tips further in the advantage of the state.[122] And last, if intelligence agencies are allowed access to biometric data, an increase of secret surveillance measures becomes a very probable

EU General Data Protection Regulation https://eur-lex.europa.eu/eli/reg/2016/679/oj.

[121] Statewatch, "Identity cards."

[122] Electronic Frontiers Foundation, "Mandatory National Ids and Biometric Databases." https://www.eff.org/issues/national-ids.

scenario, based on the revelations about secret surveillance in the recent past (see Germany and UK chapter). Such surveillance has, as explained before, severe repercussions on the general notion of human dignity, and the wider aims of the human rights idea.

Summing up, biometric data integrated into passports and ID cards do in themselves not constitute a legal breach of human rights norms (at least as long as they are only stored on passport or chip itself). However, some criticism can be applied from a rights perspective, as mentioned above. This goes for both a legal perspective and a spirit of rights perspective. Furthermore, the collection and storage of biometric data via issuing passports open the door for the initiation of other measures which endanger rights norms and ideas, for instance giving intelligence agencies access to biometric data (as seen in the German example explained above) or the general trend towards the establishment of biometric databases. The latter will be the focal point below.

- **The Push for Biometric Databases**

As mentioned, the EU and its member states increasingly push for extended use of biometric data, e.g. in biometric databases and, as a future scenario, in connection with facial recognition technology. In recent years both the EU and the member states have pushed for the construction of additional databases on a range of issues, supplementing already existing databases. For example, the EES (Entry-Exit System) database will from 2020 onwards replace the current system of manually stamping passports. It will electronically record all crossings of an EU external border of nationals of third countries and will store biometric pictures and four fingerprints of the travelers for up to four years. The data will be available to law enforcement units and Europol and serves (at least partly) the official purpose to prevent or detect terrorist acts. Another addition is a database on passenger records of flights to, from and inside of the EU (under the PNR directive). These databases will supplement already existing ones. For instance, the EURODAC (European Dactyloscopy) database, established in 2003 and storing data on five million individuals, stores all ten fingerprints of asylum seekers and stateless persons (according to a new Commission proposal a biometric picture will be stored as well). The SIS II (Schengen Information System II) database stores data (including biometric data) on criminal suspects or missing persons and is accessible by law enforcement units in the EU. The VIS (Visa Information System) database collects data on all individuals applying for visa entry into the Schengen Area, including the storage of all ten fingerprints. Currently the database stores data on seventeen million visa applications. Under the Prüm Convention, the fourteen members

(all EU member states) exchange DNA and fingerprint data on crime suspects via a connected database.[123]

EU databases, such as VIS, SIS II, and EURODAC, are subject to continuous growth, managing ever-increasing loads of data. In order to tackle this challenge, and by the help of improving technology, EU bodies, and member states undertake efforts to make these databases interoperable. In other words, all these databases are now to become an interrelated entity, creating a conjunction between the databases. Thus, both at the member state level and the EU level one can observe a trend for enabling investigators to check all of these databases by using only one search interface ('checking all databases with one click').[124] In such an interoperable database system, law enforcement officers could then search for individuals using biometric data, including the usage of facial recognition software (facial recognition software, which is already utilized in order to search for suspects in individual databases).[125]

The political pushes for the key feature of interoperability came from both the EU Commission and the governments of certain member states, e.g. the German government. The then German Minister of the Interior, Thomas de Maiziere presented in March 2016, just after the attacks in Brussels, a policy-paper demanding the creation of conjunction between all these databases. De Maiziere argued for this step with the evaluation that "in times of crises data protection is nice, but security enjoys priority." The Commission followed in April 2016 by demanding the interoperability of the mentioned databases (the Commission had already called for interoperability

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[123] Eijkman and Schuurman, *Preventive Counter-Terrorism and Non-Discrimination in the European Union*, 8. Matthias Monroy, "EU-Innenkommissar fordert Abfrage mehrerer Polizeidatenbanken 'mit einem einzigen Klick,'" *netzpolitik.org*, April 25, 2016. https://netzpolitik.org/2016/eu-innenkommissar-fordert-abfrage-mehrerer-polizeidatenbanken-mit-einem-einzigen-klick/. European Commission (Migration and Home Affairs), "Identification of applicants (EURODAC)." https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/identification-of-applicants_en. European Union Agency for Fundamental Rights, "Under watchful eyes: biometrics, EU IT systems and fundamental rights." Carla Bleiker, "EU to implement border fingerprint checks similar to United States," *Deutsche Welle*, October 25, 2017. https://www.dw.com/en/eu-to-implement-border-fingerprint-checks-similar-to-united-states/a-41111621. Ben Hayes, "'Full Spectrum Dominance' as European Union Security Policy: On the trail of the 'NeoConOpticon'", in *Surveillance and Democracy*, ed. by Kevin D. Haggerty and Minas Samatas (Oxon: Routledge, 2010), 151. Kurz, *Die Datenfresser*, 131. Member states maintain such databases as well, often including biometric data. For instance, the German state maintains a criminal database including data on four million people. Matthias Monroy, "BKA schliesst Probelauf zur Gesichtserkennung ab."

[124] den Boer, "Counter-Terrorism, Security and Intelligence in the EU," 221-225. European Union Agency for Fundamental Rights, "Fundamental rights implications of storing biometric data in identity documents and resident cards."

[125] European Union Agency for Fundamental Rights, "Fundamental rights implications of storing biometric data in identity documents and resident cards."

of Europol databases in 2005). At that point (2016), preparatory cooperation on databases was already taking place. For instance, authorities from six different member states, including the German BKA, cooperated with Europol in order to develop a single search interface for conjuncted databases in the nearest future.[126] Several member states consider the construction of biometric databases as well, e.g. the Netherlands.[127] It is likely that national databases will be linked to the European ones as well, providing for an even more powerful overall database.[128]

The creation of an interrelated database combining SIS II, VIS, EURODAC, EEAS, and a travel database was adopted by the EP in April 2019 under the name of the Common Identity Repository (CIR) initiative. A conjunction of these databases will mean the construction of a biometric 'super-database' covering the data of many million individuals with EU citizenship or residing in the EU, as well as individuals from third countries (at least 350 million). The conjuncted database is supposed to be in place by 2023. The adoption of this initiative feeds into trends of already started cooperation towards unifying member state databases. The EU Commission has gathered an expert commission in order to clear out the legal details of creating interoperability between these databases since each database is maintained for a specific purpose and could thus far not be arbitrarily interrelated.[129]

From a legal perspective, the erection of databases is not declared eligible, but also not banned. In a recent verdict on biometric data on ID cards, the ECJ surprisingly avoided taking a position on the possible construction of biometric databases. It has thus neither allowed nor banned such databases (likewise, the new EU regulation itself, neither prescribes nor bans the construction of databases).[130] This move by the ECJ surprised many legal experts since it would appear logical that the court would point out if the further use of data collected for issuing passports (e.g. storage in a database) constitutes an eligible measure.[131] In the case of data retention laws, the ECJ took a different standpoint and declared the data retention

[126] Monroy, "EU-Innenkommissar fordert Abfrage mehrerer Polizeidatenbanken 'mit einem einzigen Klick.'" Hillebrand, *Counter-Terrorism Networks in the European Union*, 177. Catalin Cimpanu, "EU votes to create gigantic biometrics database," *ZDNet*, April 22, 2019. https://www.zdnet.com/article/eu-votes-to-create-gigantic-biometrics-database/.

[127] European Union Agency for Fundamental Rights, "Fundamental rights implications of storing biometric data in identity documents and resident cards."

[128] Matthias Monroy, "Bitte lächeln: Interpol startet neue Datenbank zur Gesichtserkennung," *netzpolitik.org*, December 14, 2016. https://netzpolitik.org/2016/bitte-laecheln-interpol-startet-neue-datenbank-zur-gesichtserkennung/.

[129] Monroy, "EU-Innenkommissar fordert Abfrage mehrerer Polizeidatenbanken 'mit einem einzigen Klick.'"

[130] European Union Agency for Fundamental Rights, "Fundamental rights implications of storing biometric data in identity documents and resident cards."

[131] Dimitrova, "The Willems judgment."

directive for invalid, also based on the argument that the directive failed to regulate the further usage of the data on the national level. Additionally, in an earlier verdict, the court had pointed out that EU legislators must ensure that biometric data are "effectively protected from misuse and abuse."[132] In any case, the construction of an interoperable 'super-database' is clearly not covered by the ECJ's positive 2013 ruling on biometric data in passports since the court only declared the direct storage of biometric data on the document itself as eligible.

Still, the construction of big databases involving sensitive data such as fingerprints, face pictures, and DNA affects several human rights. The right to privacy and the right to data protection are both affected. In terms of legal standards, the erection of databases is, as mentioned, not declared eligible, but also not prohibited. Still, there are reasons to assume that the construction of a European super-databank on biometric data might run into legal trouble. First, already the construction of some of the individual databases is questionable. A legal study on the eligibility of the new EES database concluded that the indiscriminate nature of the collection of traveler data violates fundamental rights (again, the right to privacy and data protection). Furthermore, the circumstance that the data would be stored for a full four years would be a problem as well. Fittingly, the ECJ has ruled in July 2017 that Canada cannot be allowed to store data of European travelers indefinitely or for a long time; data would have to be deleted as soon as the stay was over.[133] Thus, if the indiscriminate nature of individual databases implies legal problems, the conjunction of such databases to a super-database appears questionable from a legal perspective as well. Second, all currently existing databases have been initiated for a specific purpose, the storage of certain data is thus legally connected to a specific purpose as well (e.g. in terms of EURODAC to avoid asylum seekers to register several times in different states).[134] Furthermore, article 8 of the CFREU, demands that personal data of individuals must be processed "for a specified purpose."[135] However, it appears at least questionable what the specific purpose of a super-database should be and how authorities would be able to justify and defend it. Third, according to the GDPR adopted by the EU in 2016, biometric data are sensitive data and deserve special protection. However,

[132] Peers, "Biometric data and data protection law." Apart from such legal action allowing or disallowing the construction of databases, the critical question whether populations can trust their governments and intelligence services with biometric data is more than justified, both in light of the scandals around secret surveillance of the last years and in light of the trend towards the construction of biometric databases when possible.

[133] Bleiker, "EU to implement border fingerprint checks similar to United States." The office of the European Data Protection Supervisor warned against a potential rights infringing nature of the EES database as well.

[134] Hillebrand, *Counter-Terrorism Networks in the European Union*, 177.

[135] See CFREU, art.8.

the storage of many million sets of biometric data in a super-database would make it hard to trace that special protection.[136] Fourth, since the necessity and proportionality of some of the sub-databases can already be questioned (e.g., why save all flight data when the amount used for security purposes is tiny), it seems far-fetched to argue for the necessity and proportionality of a super-database. Since European courts have decided that the storage of all Internet metadata in an indiscriminate fashion is not proportionate, how can the storage of all flight data or all travel data of non-EU citizens be proportionate, let alone the storage of biometric data on millions of individuals in a single databank? The answer is that it appears at very questionable if relevant international courts (e.g., the ECJ) would see the demand of proportionality to be fulfilled. Fifth, a new potential biometric super-database would additionally provide the opportunity for dragnet investigations.[137] In fact, the EU had already in the early years after 9/11 recommended the usage of profiling systems in order to combat recruitment and radicalization.[138] Dragnet investigations, involving indiscriminate scanning of data in big databases, have in the past been declared to be in breach of legally manifested human rights norms (see Chapter 3). Based on these arguments, it can at least be pointed out that the construction of a super-database interferes with the right to privacy and data protection, not unlikely in an ineligible fashion. The EU's Fundamental Rights Agency (FRA) likewise evaluated the construction of such databases as interfering with these rights and held that necessity and proportionality of such databases could not be demonstrated. The Agency additionally pointed out that the EU legislators should make clear that storage of biometric data in databases is not eligible.[139]

From a spirit of rights perspective, the increasing construction and conjunction of databases clearly constitute a problem. Conjuncted databases make it even more difficult (or almost impossible) for individuals to keep track of the information saved on them in the various databases and evaluate the accuracy of such information, therein, undermining individuals' ownership of their own information.[140] Additionally, as mentioned before,

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[136] It is an additional problem that the databases might be hacked or leaked, resulting in sensitive information about millions of individuals ending in the hands of criminals. Furthermore, since around five per cent of ID documents are stolen or lost each year, a considerable amount of biometric data run the risk of coming into the wrong hands, even without hacks or leaks. Electronic Frontiers Foundation, "Mandatory National Ids and Biometric Databases."

[137] Monroy, "EU-Innenkommissar fordert Abfrage mehrerer Polizeidatenbanken 'mit einem einzigen Klick.'"

[138] Hayes, "'Full Spectrum Dominance' as European Union Security Policy," 160.

[139] European Union Agency for Fundamental Rights, "Fundamental rights implications of storing biometric data in identity documents and resident cards."

[140] Hillebrand, *Counter-Terrorism Networks in the European Union,* 180.

such a process defines a huge amount of individuals, if not whole populations as potential suspects. It undermines the presumption of innocence, as well as the general notion of individuals' dignity. Furthermore, such a 'super-database' interferes with the right to privacy and data protection and opens up for risks of misuse concerning the large amounts of stored data. Moreover, the construction of a 'super-database' contributes to additional accumulation of power by the state versus all affected individuals.[141] However, as pointed out earlier, it is a core aim of the human rights idea to empower individuals, not state authorities. Thus, the empowering of the individual, as well as the democratic quality of political systems, would be undermined. The 'super-database' would thus feed into the development towards a continuously growing scope of surveillance and digital control, as well as the trend towards pre-emptive state action, disregarding the rights aim of establishing boundaries to state power.

As a next potential step, the described conjunct databases, or 'super-database' might be connected with searches via facial recognition over CCTV and social media. Such a potential next step is according to current technological and political developments not a far-fetched, but rather a realistic scenario for the near future.[142] For instance, FRA the EU's fundamental rights agency has pointed out that the use of facial recognition systems operating with a link to biometric databases is a potential future development.[143] The Romanian Council presidency proposed in the spring of 2019, that the use of biometric data and databases, as well as facial recognition systems, should be extended.[144] Thus, a push for the implementation and usage of facial recognition by the help of biometric databases is provided at the EU level. Furthermore, Germany, one of the EU's most influential member states has, as mentioned, run test projects linking databases and facial recognition (just as the UK) and has announced to implement such systems in regular use at points of public interest (railway stations or airports). Interpol, the International Criminal Police Organization, with which the EU's police agency Europol maintains close cooperation, has already documented its interest in linking biometric databases, with facial recognition technology and CCTV systems or social media. Already today, Interpol is operating searches in biometric databases with facial recognition software.[145] Europol is cooperating with Interpol on such biometric searches.

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[141] All anti-terrorism measures that increase the authorities' investigative and prosecutorial powers, strengthen state power versus the individual. See, e.g., Elies van Sliedregt, "European Approaches to Fighting Terrorism," *Duke Journal of Comparative & International Law,* Vol. 20 (2010): 426.

[142] Electronic Frontiers Foundation, "Mandatory National Ids and Biometric Databases."

[143] European Union Agency for Fundamental Rights, "Fundamental rights implications of storing biometric data in identity documents and resident cards."

[144] Statewatch, "Biometrics, extended travel surveillance, internal-external "synergies."

[145] Monroy, "Bitte lächeln: Interpol startet neue Datenbank zur Gesichtserkennung." Matthias

Europol is itself maintaining its own facial recognition system (FACE), recognizing individuals via picture or video material in databases on suspects and contacts of suspects.[146] Based on these examples, one must evaluate that solid indications for the usage of facial recognition systems in European countries in the near future are provided. The trend to digitalize anti-terrorism, and to combine the collection of digital data on one's citizens with live surveillance technology is on the agenda of relevant EU bodies, making the widespread future use of such systems quite likely.

From a legal standpoint, the connection of a 'super-database' with systems of facial recognition is questionable, especially in terms of facial recognition via CCTV and social media. The linking of biometric data, biometric databases, and facial recognition systems would constitute another, more intense, level of surveillance. The rights to privacy, assembly, association and freedom of expression would all be constrained. Quite obviously, privacy is constrained if one is potentially tracked in public space with one's own biometric data, but in the event of assemblies in public space, the right to assembly, association, and freedom of expression are constrained as well. Now, such restrictions of rights could only be legally justified if the conditions for rights limitation or derogation are upheld. However, this does not seem to be the case with facial recognition technology as already argued in Chapter 3. If thousands or hundreds of thousands of individuals would be scanned every day in an indiscriminate fashion, in order to track a few subjects, the demand of proportionality is not met. Since relevant courts have decided in the past that indiscriminate data collection, storage, and procession via other measures (e.g. data retention) is ineligible, even when a general terror threat is given, this evaluation must be valid in case of searches via facial recognition and biometric databases as well. Furthermore, the use of biometric data in facial recognition systems would in many cases not uphold the specific purpose with which these data were collected in first place (as biometric data collection is, as mentioned above, connected to a specific purpose defined in legal documents, e.g. to prevent double registrations of asylum seekers or the identification of visa applicants). Therefore, usage of these data in a super-database in connection with facial recognition systems would constitute a misuse of the basis of data collection and might be expected to be legally challengeable.

At times individual anti-terrorism measures first reveal their full rights invasive impact when combined with each other. The combination of the directive on biometric passports by the EU combined with video surveillance ordered by member states and the upcoming technology of automated face recognition (pushed by the EU and member states) provides

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Monroy, "Interpol und Europol bauen Gesichtserkennung aus," *netzpolitik.org*, March 26, 2019.

[146] Monroy, "Interpol und Europol bauen Gesichtserkennung aus."

a vivid example. Therein, from a spirit of rights perspective, the possible connection of a super-database to systems of facial recognition (via CCTV or social media) reflects a severe problem. The construction of a 'super-database' that can be used in connection with digital recognition systems would severely interfere with the right to privacy, freedom of movement, association, assembly, and expression, as well on general notions of dignity. Self-perceptions of being free and of exercising one's rights might be eroded. A connection between biometric databases and facial recognition systems would mean that virtually no citizen or resident of an EU member state would be able to move freely in the (urban) public without running the risk of being automatically recognized.[147] Individuals would be recognized during daily transport (e.g. at railway stations), but also during political activism in public space, e.g. during demonstrations, being captured by a panoptic surveillance system. Therein, the awareness of recognition can arguably lead to a change of behavior or the cancellation of behavior, for instance, not to participate in a demonstration.[148] Again, the last would equal a decline in the level of public scrutiny and a decline in democratic quality. Furthermore, facial recognition systems might still give a false alarm (false positives) even when using biometric data, thus many individuals would come under closer scrutiny by state authorities without justification, arguably undermining the wider human rights aim of justice.[149] Consequently, individuals, or at least a certain share of the population, which might perceive itself to belong to a group that is under special scrutiny, might start to not make use of their civil and political rights to the fullest degree possible; or in the terminology of Martha Nussbaum, not enjoy their capabilities to the fullest (e.g., the capabilities to political engagement, free movement and non-discrimination).[150] This might contribute to perceptions of a lacking full recognition of personhood from the side of the state and trigger perceptions of injustice and discrimination (including the potential consequences described earlier). In conclusion, and as argued earlier in regard to facial recognition in Germany and the UK, linking biometric databases and facial recognition systems would from a spirit of rights perspective constitute an erosion of the wider human rights aims of individual dignity, freedom, and equal justice. It would equal the erection of a panoptic system in European societies, which no longer regards all individuals as potential owners of dignity, but as potential threats that

[147] As mentioned, the tracking of movement was evaluated by the ECtHR as an interference with freedom of movement. European Court of Human Rights, "Case of Uzun v. Germany (Application no. 35623/05) Judgment Strasbourg," September 2, 2010.

[148] Mitrou, "The impact of communications data retention on fundamental rights and democracy," 133.

[149] Electronic Frontiers Foundation, "Mandatory National Ids and Biometric Databases."

[150] Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge: Belknap Press, 2011). Martha Spurrier, "Facial recognition Facial recognition is not just useless. In police hands, it is dangerous," *The Guardian*, May 16, 2018.

necessitate surveillance and control. State organs would gain an even larger amount of insight into individuals' life and therefore power over the individual.

- **Prevention of Radicalization at the EU Level**

After 9/11, the EU (just as many member states) started to develop efforts to prevent radicalization.[151] Although violent radicalization was not a new phenomenon on the European continent, such efforts were a new policy area for the EU.[152] In the first years after 9/11, the EU foremost focused on international terror networks and foreign perpetrators in their anti-terrorism efforts (just as many of its member states). Root causes of such terrorism and of radicalization of individuals were understood to be connected with poverty, autocratic regimes and lacking education in third states.[153] However, from 2004 onwards, the EU further increased its emphasis on anti-radicalization and started to focus increasingly on preventing the radicalization and recruitment of individuals inside the EU. Triggers for this development were the attacks in Madrid (2004) and London (2005), which were committed by so-called home-grown terrorists. Many of the insights into the radicalization history of the perpetrators from Madrid and London functioned as an inspiration for subsequent anti-radicalization approaches.[154] After Madrid, the EU saw a multitude of strategies, action plans and other official announcements on the prevention of radicalization. For instance, in 2004 the EU member states agreed to fight factors contributing to "the involvement of individuals in terrorist activities."[155] An emphasis on efforts to prevent radicalization was set in the EU's Action Plan on terrorism in 2004 as well. In 2005, the EU Council adopted a European Strategy to Combat Radicalization and Recruitment (updated in 2009 and 2014), aiming at disrupting the networks of 'radicalizers' and the prevalence of 'mainstream voices.'[156] The strategy did, however, not include a precise definition of what

[151] I have presented anti-radicalization efforts of especially the UK above.

[152] Edwin Bakker, "EU Counter-radicalization Policies: A Comprehensive and Consistent Approach?," In *EU Counter-Terrorism and Intelligence: A critical Assessment*, ed. by Javier Argomaniz, Oldrich Bures and Christian Kaunert (London and New York: Routledge, 2016), 113.

[153] Lorenz, "The European Union's Response to Terrorism." The focus on root causes was gradually scaled back from 2005 onwards. Kundnani and Hayes, "The globalisation of Countering Violent Extremism policies undermining human rights."

[154] Bakker, "EU Counter-radicalization Policies, 113.

[155] Bonnici, "Recent European Union developments on data protection," 162.

[156] The exact contents of this strategy are not publicly accessible; this goes for many anti-radicalization documents of the EU. In fact, none of the action plans was ever published in full length, preventing these plans from being exposed to public scrutiny. Bures, *EU Counterterrorism Policy: A Paper Tiger?* 73-74. Bossong, *The Evolution of EU Counter-Terrorism,* 113-115. Kundnani and Hayes, "The globalisation of Countering Violent Extremism policies undermining human rights."

constitutes radicalization, but rather pointed out that radicalization encompasses the "practical steps an individual must take to become involved in terrorism."[157] In 2005, the Council suggested preventing radicalization via education (in schools and on the Internet), through integration policies, efforts for greater inter-cultural understanding and interfaith dialogue (including pleas to the 'moderate Muslim communities' to intervene in radicalization processes, in other words winning the 'hearts and minds').[158] In 2007 EU Justice Commissioner Franco Frattini suggested efforts to shape a 'European Islam,' e.g. by a specific European religious education (of Islamic clerics); all in the name of preventing radicalization.[159] The measure of data retention, discussed above, can be understood as an EU measure reflecting the aim of disrupting networks of radicalizers as well.[160] Altogether, these approaches reflect a great diversity and variation of ideas. Still, the focus of EU anti-radicalization was always Islamist radicalization and the major understanding behind this radicalization was always 'vulnerable' Muslims falling prey to external radicalization efforts.[161] Despite the mentioned diversity, five key goals and guidelines remained relatively unchanged: first, a focus on communication in order to counter 'extremist' propaganda, to improve explanations on EU policies and to avoid inaccurate perceptions of Muslims. Second, a focus on directly disrupting radicalization and recruitment in key environments such as prisons, Mosques or the Internet. Third, the provision of equal opportunities for all. Fourth, establishing cooperation between an array of different actors such as law enforcement and civil society, and fifth, providing opportunities for the exchange of information, intelligence, research, and experience.[162]

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[157] Kundnani and Hayes, "The globalisation of Countering Violent Extremism policies undermining human rights."

[158] Euractive.com, "Anti-terrorism Policy" November 7, 2012. https://www.euractiv.com/section/science-policymaking/linksdossier/anti-terrorism-policy/. Kundnani and Hayes, "The globalisation of Countering Violent Extremism policies undermining human rights." Bonnici, "Recent European Union developments on data protection," 163. Wilkinson, *Terrorism Versus Democracy*, 177. Bures, *EU Counterterrorism Policy: A Paper Tiger?*, 69.

[159] Daily Mail, "Terror-spooked EU: 'Don't say Muslims'," July 4, 2007. https://www.dailymail.co.uk/news/article-466130/Terror-spooked-EU-Dont-say-Muslims.html.

[160] Whittaker, *Counter-Terrorism and Human Rights*, 127.

[161] Kundnani and Hayes, "The globalisation of Countering Violent Extremism policies undermining human rights." Bakker, "EU Counter-radicalization Policies," 112.

[162] Kundnani and Hayes, "The globalisation of Countering Violent Extremism policies undermining human rights." Bakker, "EU Counter-radicalization Policies, 113. Despite all these efforts and aims, the EU acknowledges the key role played by the member states and member state law enforcement units in terms of anti-radicalization. Bures, *EU Counterterrorism Policy: A Paper Tiger?,* 75.

Efforts to prevent radicalization have been intensified again in latest years, as a consequence of a range of terror attacks committed by member-state nationals, who had declared allegiance to the so-called Islamic State (see e.g. the attacks in Paris 2015 and Brussels 2016). Consequences of this were in terms of institutional efforts, the establishment of a Radicalization Awareness Network (RAN) and an Internet Referral Unit (IRU). The RAN is a network of relevant practitioners (e.g. police and prison staff,), experts, and academics who are dealing with radicalized individuals or providing research on the topic. The network aims at strengthening anti-radicalization capabilities by sharing insights, expertise, and experiences. The IRU, operated by Europol, is supposed to refer violent extremist content on internet platforms (Facebook, Twitter, YouTube, etc.) to internet providers in order to remove this content. The idea is to prevent radicalization and recruitment by preventing the spread of terrorist material.[163] Focus thus shifted from identifying illegal content to triggering its removal.[164] In terms of policy content, the recent terror wave resulted in an update of the EU's anti-radicalization strategy in 2014 (albeit still lacking a precise definition of radicalization), putting emphasis on threats by 'lone-wolf-terrorism', terrorist use of social media and foreign fighters. The five key points explained above, however, remained intact.[165] Still, an important novelty of the 2014 strategy is its establishment of a 'whole of society' approach, including everyday institutions such as schools, universities, sports clubs and health-care institutions into efforts of anti-radicalization.[166] This approach mirrors very much recent British Prevent efforts and it thus constitutes another indication of active uploading processes of national anti-terrorism to the EU level (or Europeanization processes). The establishment of a 'whole

[163] Europol, "European Counter Terrorism Centre." https://www.europol.europa.eu/about-europol/european-counter-terrorism-centre-ectc. Europol, "Europol Internet Referral Unit One Year On," Press Release, July 22, 2016 https://www.europol.europa.eu/newsroom/news/europol-internet-referral-unit-one-year. European Commission, "Radicalisation Awareness Network (RAN)." https://ec.europa.eu/home-affairs/what-we-do/networks/radicalisation_awareness_network_en.

[164] Kundnani and Hayes, "The globalisation of Countering Violent Extremism policies undermining human rights."

[165] Council of the European Union, "EU counter-terrorism strategy," https://www.consilium.europa.eu/en/policies/fight-against-terrorism/eu-strategy/. Kundnani and Hayes, "The globalisation of Countering Violent Extremism policies undermining human rights." The term 'foreign fighter' pertains mainly to potential terrorists returning to the EU from Syria and other crisis hotspots. European Commission, "Preventing Radicalisation to Terrorism and Violent Extremism: Strengthening the EU's Response," January 15, 2014.

[166] European Commission, "Preventing Radicalisation to Terrorism and Violent Extremism." Kundnani and Hayes, "The globalisation of Countering Violent Extremism policies undermining human rights."

society' approach at the EU level mirrors the same potential problems that are present in the UK's efforts in that regard in connection with the country's Channel program (see Chapter 4).

Some of the EU's efforts in terms of anti-radicalization and recruitment constitute a problem from a human rights perspective. I will provide one very telling example in the following. I would like to draw attention to the EU's fight against terrorist content on the Internet and, more specifically, the EU's most recent draft regulation aiming at preventing the spread of such content. This draft regulation on preventing the dissemination of terrorist content on the internet from September 2018 constitutes an anti-radicalization measure that is quite questionable in the face of the EU's official human rights commitment. It reflects one of the EU's top priorities in countering radicalization, namely the spread of terrorist content by already radicalized individuals. The regulation is in effect an extension of practices that are already in place at Europol's IRU unit.[167] Terrorist content is in the draft regulation understood as content that instructs, incites or 'glorifies' terror acts, often by video or pictures.[168] Indeed, several European countries have in the latest years witnessed terror attacks committed by individuals who were (at least in part) incited to terrorist violence by material available on the internet. This is especially valid for terrorists who simply claimed allegiance to a cause without being a fixed member of a terror group. Examples can be found for both Islamist and right-wing attacks, see e.g. Chapter 3.[169]

The regulation demands two major measures. First, it demands internet service providers (all of them, not only tech giants such as Google or Facebook) to delete terrorist content within one hour of the upload. Content will be referred to by national authorities or by Europol and is then supposed to be deleted by the providers (without the involvement of judicial institutions). Second, it prescribes service providers to take proactive measures in order to prevent the re-upload of content that has previously been deleted and to prevent the upload of terrorist content in the first place. These demands would with a high probability lead to the installment of so-called automated 'upload filters'. In other words, algorithms would automatically search for such content and propose its deletion or block its upload. However, automated systems do have a hard time understanding the exact context and purpose under which material has been uploaded. Many tech experts, as well

[167] The EU had furthermore criminalized incitement to terrorism already in 2002. Kundnani and Hayes, "The globalisation of Countering Violent Extremism policies Undermining human rights."

[168] Regulation of the European Parliament and of the European Council on preventing the dissemination of terrorist content online https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-preventing-terrorist-content-online-regulation-640_en.pdf

[169] Still, online material is far from the only cause of individuals being incited to terrorist violence.

as the legislators themselves, do not themselves properly understand how exactly such a filter would work. The EU Commission's own impact assessment expects 'false positives', in other words, the deletion or block of legal content. An example of the potential faulty nature of such automatic upload filters was delivered in April 2019, when the Mueller Report on the Trump administration was blocked by an automatic filter used by the online platform Scribd (checking not for terrorist content, but copyright issues). The regulation owns thus an experimental nature. Furthermore, due to the relatively small size of illegal content compared to legal content, it can be expected that more legal than illegal content will be blocked.[170] Additionally, the definition of what constitutes terrorist content is kept rather vague in the draft regulation. Crucially, the regulation omits intention as a component of its definition, thus deviating from the EU's own definition of terrorism (see above). Thereby, the regulation constructs the scenario that an extensive amount of terrorism-related content might come under scrutiny, including NGO content or academic work, simply since an *intent* for incitement or instructing to terrorism is missing in the demands for when content can be blocked or deleted.[171]

The draft regulation has received support by many European top-politicians, especially Interior Ministers. For instance, Austria's Interior

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[170] See, 'Regulation of the European Parliament and of the European Council on preventing the dissemination of terrorist content online.' European Digital Rights (EDRi), "Recommendations for the European Parliament's Draft Report on the Regulation on preventing the dissemination of terrorist content online," December 2018. https://edri.org/files/counterterrorism/20190108_EDRipositionpaper_TERREG.pdf. Ernesto Van der Sar, "EU Members Approve Upload Filters for "Terrorist Content", *Torrentfreak.com*, December 14, 2018. https://torrentfreak.com/eu-members-approve-upload-filters-for-terrorist-content-181214/.
Julia Reda MEP, Draft Opinion 2018/0331(COD), European Parliament, December 13, 2018. Julia Reda, "Terrorist Content Online: The Return of the Upload Filter," February 1, 2019. https://juliareda.eu/2019/02/terrorist-upload-filters/. Afef Abrougui, "EU proposal pushes tech companies to tackle 'terrorist content' with AI, despite implications for war crimes evidence," *Global Voices*, February 18, 2019. https://globalvoices.org/2019/02/18/eu-proposal-pushes-tech-companies-to-tackle-terrorist-content-with-ai-despite-implications-for-war-crimes-evidence/
Simon Hurtz, "Upload-Filter löschen Dutzende Kopien des Mueller-Berichts," *Süddeutsche Zeitung*, April 21, 2019. https://www.sueddeutsche.de/digital/upload-filter-mueller-bericht-scribd-1.4416802

[171] European Digital Rights (EDRi), "Recommendations for the European Parliament's Draft Report on the Regulation on preventing the dissemination of terrorist content online." Julia Reda, "Terrorist Content Online: The Return of the Upload Filter."
The UK is working on a system to block 'extremist' and inciting content on the internet as well (see Chapter 4). Germany has implemented a piece of legislation that targets cases of hate speech on big social media, demanding providers to delete material that is "evidently unlawful." The Guardian, "Germany approves plans to fine social media firms up to €50m," June 30, 2017. https://www.theguardian.com/media/2017/jun/30/germany-approves-plans-to-fine-social-media-firms-up-to-50m.

Minister, Herbert Kickl, argues that there would be an urgent need for action in terms of terrorist content on the internet, which would catalyze radicalization, ultimately leading to terror attacks in Europe. The regulation would be part of protecting Europe's citizens.[172] Julian King, the EU's 'Commissioner for the Security Union', one of the driving forces behind the regulations, likewise argued that blocking terrorist content would constitute an important anti-terrorism contribution by preventing self-radicalization.[173]

These measures are not adopted yet; the regulation is still a draft regulation. However, it has already received approval of the EU Council in December 2018, which means that it will be approved if/when the European Parliament gives its consent.[174] Although the EP has in the past (at times) taken the role of a counter-force to Council and Commission efforts in potentially rights infringing anti-terrorism policies, in the end, the policies were almost always adopted nonetheless (at times after some amendments). An example is here the mentioned recent adoption of an interrelated database of biometric data (see above). Based on that, and since the EP just recently adopted an upload filter in the name of copyright issues, it can very well be expected that the EP will approve the regulation on terrorist content as well.[175]

The upload filter, which would be necessary in order to uphold the demands of the regulation would intensify surveillance of populations since all potential uploads would have to be scanned by automated systems. The filter would feed into the current trend of intensifying surveillance, it would feed into a "digital information ecosystem in which everything we say, even everything we try to say, is monitored."[176] The effects of surveillance on privacy rights have been explained in detail above. The regulation would intensify the web of surveillance that European politics has constructed in the course of anti-terrorism in the last years.

The draft regulation, in its current form, would furthermore interfere with the right to freedom of expression. The automated scanning and evaluation of uploaded content, in connection with the very short timeframe for deletion and the vague definition of terrorist content, will with a not

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[172] Cited in Ernesto Van der Sar, "EU Members Approve Upload Filters for "Terrorist Content."

[173] Jon Porter, "Upload Filters and One-Hour Takedowns: The EU's Latest Fight Against Terrorism Online, Explained," *The Verge*, March 21, 2019. https://www.theverge.com/2019/3/21/18274201/european-terrorist-content-regulation-extremist-terreg-upload-filter-one-hour-takedown-eu.

[174] However, since the UK has been a major power behind the new regulation, Brexit could stall or at least slow down the adoption process. Porter, "Upload Filters and One-Hour Takedowns."

[175] Under the name of the Common Identity Repository (CIR) initiative. Monroy, "EU-Innenkommissar fordert Abfrage mehrerer Polizeidatenbanken 'mit einem einzigen Klick.'"

[176] Evelyn Austin from the digital rights organization Bits of Freedom, cited in Abrougui, "EU proposal pushes tech companies to tackle 'terrorist content' with AI."

insignificant likelihood lead to an overly excessive deletion practice by internet providers. The regulation gives providers all incentive to always delete material when in doubt in order to not bring the providers anyway near a liability, thus a referral of Europol or a national unit will with a high likelihood always lead to a block or deletion of content.[177] In effect, a high amount of content that is both legal and justifiable, uploaded by organizations and regular citizens, will not be uploaded anyway, undermining the freedom of expression of those affected. A danger for freedom of expression is indeed perceived by a range of NGOs in the field and the relevant UN special rapporteurs.[178] Moreover, members of parts of society that perceive themselves to be more in focus of state authorities in the first place might refrain from trying to upload content in fear of becoming the object of additionally intensified scrutiny. In other words, the practice of scanning all uploads could lead to self-censoring processes (as already discussed for other surveillance practices). Freedom of expression would thus be undermined to a higher degree for some specific groups. In general, the filter would support conformist behavior rather than a diversity of viewpoints. However, the inclusion of a multitude of opinions in the public sphere is a necessary component of every free society (as e.g., Rawls argued). Automated processes of referral, leading to extensive deletion undermine democratic processes since they undermine options to freely share information, express and discuss opinions. In addition, the human capability of using one's mind and of interacting with others would be hampered as well. Such processes might therein mute legitimate dissent, as well as undermine the conditions for a sound public sphere, a vital part of every democratic society, and a crucial component for realizing the core of the human rights idea (dignity, freedom, and justice). These core ideas would themselves be negatively affected based on the interference with the rights to privacy and freedom of expression (I explained the connection between these basic aims of the human rights framework and privacy and freedom of expression in detail earlier).

Moreover, since content would be deleted or blocked after the referral of national authorities, a law enforcement agency of a single member state could trigger the deletion or block of content for the whole of Europe. This might open up for questionable scenarios of such actions being exploited by certain governments (e.g. the Hungarian government, which is

[177] Julia Reda, "Terrorist Content Online: The Return of the Upload Filter." European Digital Rights (EDRi), "Recommendations for the European Parliament's Draft Report on the Regulation on preventing the dissemination of terrorist content online."

[178] Several NGOs active in the field of civil rights or trying to defend a free internet share these concerns, e.g., European Digital Rights, the Electronic Frontier Foundation, Digital Rights Watch, the Open Rights Group or the Center for Democracy and Technology. Porter, "Upload Filters and One-Hour Takedowns." Afef Abrougui, "EU proposal pushes tech companies to tackle 'terrorist content' with AI."

taking an increasingly extreme standpoint on many issues itself).[179] In a worst-case scenario, state authorities might use internet filters in order to censor the spread information from specific groups in society. Another detrimental feature of the regulation would be its effect on the capability of NGOs, news-organizations and research organizations to document human rights violations and war crimes. Since the removal of content and the upload filter would be carried out by automated systems, a high error rate in terms of evaluating the source and context of the upload can be expected. Thus, organizations who document violent terror acts might have their content deleted as well. Some organizations have already experienced such a process by over-excessive deletion practices of internet providers. For instance, YouTube deleted thousands of videos documenting war crimes and human rights violations since 2017, e.g. by the Orient News Channel operating in Syria.[180] Likewise, Google deleted over a thousand videos taken during the Syrian civil war, including material by the Syrian Archive an organization aiming at preserving footage of the conflict.[181] Just recently, the French branch of the IRU demanded the deletion of hundreds of webpages on the internet archive (archive.org), based on allegations of the webpages containing terrorist propaganda; a claim that seems far-fetched taking the nature of the affected webpages into account, e.g. the American Libraries collection or TV broadcast by the US House of Representatives).[182] Thus, since the risk of over-extensive deletion already exists there is a good reason to assume that widening the scope of systems, which are not able to test for the context of a media item will aggravate the problem considerably. An erasure of documenting material would in effect undermine the ability of civil society actors to hold certain governments and political actors accountable, it would thereby undermine one of the cornerstones of democratic societies.[183]

Furthermore, necessity and proportionality of the measure, two decisive criteria for making the interference with the rights to privacy and free expression legally eligible can be questioned. The necessity of the

[179] European Digital Rights (EDRi), "Recommendations for the European Parliament's Draft Report on the Regulation on preventing the dissemination of terrorist content online." Ernesto Van der Sar, "EU Members Approve Upload Filters for "Terrorist Content."

[180] Abrougui, "EU proposal pushes tech companies to tackle 'terrorist content' with AI." Porter, "Upload Filters and One-Hour Takedowns." European Digital Rights (EDRi), "Recommendations for the European Parliament's Draft Report on the Regulation on preventing the dissemination of terrorist content online."

[181] Porter, "Upload Filters and One-Hour Takedowns."

[182] Statewatch, "French anti-terrorist unit demands removal of adverts, books, US-government produced reports from web archives," April 11, 2019. www.statewatch.org/news/2019/apr/iru-internet-archive1.htm.

[183] Chantal Mouffe, *On The Political* (London and New York: Routledge, 2005). Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge: Cambridge University Press, 2012).

regulation can be questioned since a great amount of illegal extremist content has already been removed from mainstream social media and networks in the last years.[184] The EU Commission's own impact assessment points out that only two of the assessed nineteen member states reported an increase of terrorist online content, whereas twelve reported a decrease. Furthermore, only six percent of all internet users reported about ever coming across such content in a Eurobarometer survey.[185] The regulation does additionally not seem proportionate, as only a very small amount of service providers has ever had to deal with the upload of illegal extremist content in the first place, estimates range from one to five percent of providers.[186] Moreover, the draft regulation would not allow for a sufficient amount of transparency of the process for the affected individuals, and would not provide options for legal remedy, thus undermining core ideas of rule of law.[187]

Thus, based on the interference with freedom of expression and privacy rights, while not upholding the criteria for such rights limitations, it must be concluded that the EU's regulation on preventing the dissemination of terrorist content online bears the potential to eventually run into legal troubles. If adopted in its current form it will with a high likelihood end in front of the ECJ who would then face the task to determine the legal boundaries of the regulation.[188] In any case, the proposed upload filter is, based on its detrimental effect on privacy and especially freedom of expression in conflict with the spirit of rights framework introduced in this thesis.

- **Summarizing Observations**

First, although the EU claims to aim at upholding human rights standards while fighting terrorism, this promise does not seem to hold true. At several instances, the EU has undermined and still is undermining the same human

[184] Porter, "Upload Filters and One-Hour Takedowns."
[185] European Digital Rights (EDRi), "Recommendations for the European Parliament's Draft Report on the Regulation on preventing the dissemination of terrorist content online."
[186] Porter, "Upload Filters and One-Hour Takedowns." Julia Reda, "Terrorist Content Online: The Return of the Upload Filter."
[187] European Digital Rights (EDRi), "Recommendations for the European Parliament's Draft Report on the Regulation on preventing the dissemination of terrorist content online."
[188] In April 2019, the European Parliament's Civil Liberties Committee (LIBE) made amendments to the draft regulation, specifying the definition of what constitutes terrorism and terrorist content and deleting the demand for pro-active measures such as an upload filter. This constitutes a clear improvement of the draft regulation and would prevent some of the human rights infringements described above. However, the LIBE Committees amendments are not binding, the European Parliament and the European Council will have to find a compromise. Thus, the risk that the EP's amendments will be rolled back is given. Chloé Berthélémy, "Terrorist Content Regulation: Successful "damage control" by LIBE Committee," *European Digital Rights (EDRi*), April 8, 2019. https://edri.org/terrorist-content-libe-vote/.

rights norms, which it has itself declared to function as cornerstones of its own identity (as well as for all democratic European societies). However, in terms of data retention, the PNR directive, biometric passports, the wider use of biometrics and the latest efforts for preventing dissemination of terrorist content the EU has actively implemented measures that reflect interferences with rights norms. At times, courts have declared EU measures ineligible (data retention), for most other examples, such court verdicts have not (yet) been delivered; still, many measures stand on shaky legal grounds. In any case, they undermine the spirit of rights. The EU is, therefore, having its share in tendencies threatening to erode human rights ideas in a European context. Thus, one might speak of a growing inconsistency between the EU's self-declared core value of human rights, and the EU's role in anti-terrorism policymaking. This might in the long-run have a detrimental effect on the EU's self-proclaimed human-rights-based identity.

Furthermore, although EU member states carry out the bulk of rights invasive anti-terrorism policies and not the EU bodies, the impetus for rights invasive policies on the member state level, at times, comes from the EU. Examples for this are, as mentioned, the directives on data retention and biometric passports. Moreover, the EU at times constitutes a hub for big member states to distribute such rights invasive measures to other or all other member states. For instance, Germany attempted to export its measure of dragnet investigation to other member states by implementing it in EU legislation. Additionally, the coordination role of the EU in terms of European anti-terrorism, does occasionally, get the EU involved in questionable practices from a rights perspective, e.g., in regard to coordination of intelligence at EU level (opening the door for a circular swap of data). Thus, although the EU is not involved in as many rights infringing policies and measures as the member states analyzed above, it still does actively contribute to measures that are highly questionable from a human rights perspective.

Second, despite its active involvement and establishment of rights-infringing anti-terrorism measures, the EU owns a double-edged role in terms of anti-terrorism and human rights. On the one hand, it is responsible for the adoption of rights infringing policies, while it, on the other hand, provides legal and political institutions which often attempt to protect rights against excessive terrorism policies. Thus, EU bodies constitute a certain paradox in terms of questionable anti-terrorism policies. Three entities of the EU have been most active in efforts of counter-balancing rights invasive terrorism policies, the CFREU, the ECJ, and the European Parliament (EP).[189] The proclamation of the CFREU and its establishment as a legally

[189] This is not to say that human rights action at the EU level only exists at these specific sub-institutions. For instance, in July 2006, the European Council demanded the US administration to close Guantanamo prison based on a human rights argumentation. Gershon Shafir, Alison

binding rights document in the course of the adoption of the Lisbon Treaty increased the level of scrutiny the ECJ is able to apply on EU legislation, including anti-terrorism. For instance, the ECJ produced a landmark verdict in connection with the data retention regulation, emphasizing the importance of the protection of privacy rights even under terror threats. Furthermore, the DRIPA legislation was declared unlawful by the ECJ based on the law being at odds with the CFREU (see above). Clearly, the corrective function of courts, including the ECJ, is one of the strongest forces of counter-acting rights invasive anti-terrorism measures. However, in the course of Brexit, the ECJ will lose its function as a 'corrective' of British anti-terrorism legislation. Thus, with the Brexit in effect, the ECJ will not have this option of acting as a safeguard for rights in the UK anymore. However, the UK would still be bound to other legal international human rights standards, e.g. the ECHR, the ICCPR and the ICESCR (although the conservative government has played with the thought of leaving the ECHR as well).[190] The EP has at several occasions acted as a protector of rights in the face of terrorism policies as well.[191] For instance, the PNR directive was first proposed by the European Commission in 2011 but was shot down by the EP, based on concerns for the freedom of movement in 2013.[192] Moreover, also in the case of the EU directive on data retention, the EP acted as a rights-interested counter-balance to the Council.[193] This circumstance emphasizes that the different EU bodies often have different standpoints and priorities when reflecting on rights and security. The EP seems to be most concerned about rights, whereas the member state representatives at the Council often prioritize additional alleged security measures. Recently the EU's General Data Protection Regulation (GDPR) directive came into force (the EP played an important role in the drafting and adoption of the directive). The directive set stricter standards for the protection of data of individuals in the EU, e.g.,

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Brysk and Daniel Wehrenfennig, "Conclusion," In *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, ed. by Brysk and Shafir (Berkeley: University of California Press, 2007), 179.

[190] Anushka Asthana and Rowena Mason, "UK must leave European convention on human rights, says Theresa May," *The Guardian*, April 25, 2016. https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum.

[191] Bures and Ahern, "The European Model of Building Regional Cooperation Against Terrorism," 222.

[192] European Movement International, "Upholding freedom of movement and EU citizens' rights in the proposed PNR Directive," https://europeanmovement.eu/wp-content/uploads/2015/11/Call-for-action-PNR-Directive_ECAS-EMI.pdf. A second version of the PNR, introducing minor changes, was, however, adopted by the EP in 2016.

[193] Mitrou, "The impact of communications data retention on fundamental rights and democracy," 142. Bonnici, "Recent European Union developments on data protection," 164. Lindstrom, "The EU's approach to Homeland Security," 124.

vis-à-vis companies and organizations.[194] Therein, the EU implemented a significantly increased standard of data protection, which aims at giving citizens as much control over their data as possible.

Third, side-effect anti-terrorism measures exist at the EU level as well. The EU has connected its anti-terrorism policies with a range of other policy fields. Some policies, sold in the name of anti-terrorism, end up rather affecting policy fields than the struggle against terrorism.[195] Such policies constitute side-effect anti-terrorism policies (see Chapter 2). An example of such a measure that was 'sold' in the course of anti-terrorism, but that is used mostly for other purposes is the European Arrest Warrant (EAW). The EAW is a legal instrument to make the extradition of suspects between EU member states easier and faster (extradition is supposed to take a maximum of ninety days). Suspects here include terror suspects, however, the EAW is not confined to terrorism but established the option to extradite suspects of a range of other offenses as well, as long as offenses are punishable by a sentence of at least twelve months. The EAW entered into force in January 2004. And indeed, the aim of the was EAW achieved, the extradition time decreased from an average of nine months to only forty-three days in the course of two years. This was achieved by constituting mutual judicial recognition of extradition demands, connecting procedures to fixed standards and barring the influence of national executives on the process.[196] Since its implementation in 2004, this measure was used more than 130.000 thousand times.[197] It becomes clear by this huge number that not all of these warrants can have been connected to terror suspects. The official statistics from Europol only counted six hundred arrested terror suspect for all EU member states in 2009 and a thousand for 2016 (and this is all suspects arrested, not

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[194] The directive protects basic identity information such as name, address and ID numbers, web data such as location, IP address, cookie data and RFID tags, health and genetic data, biometric data, racial or ethnic data, political opinions and sexual orientation. Michael Nadeau, "General Data Protection Regulation (GDPR) requirements, deadlines and facts," *CSO Online*, April 23, 2018. https://www.csoonline.com/article/3202771/data-protection/general-data-protection-regulation-gdpr-requirements-deadlines-and-facts.html.

[195] Bossong, *The Evolution of EU Counter-Terrorism,* 4.

[196] Plans for the EAW had existed at the EU Commission for a number of years already, the EAW was actually first proposed at the Tampere Council in 1999. Only the events of 9/11 diminished earlier controversies around the measure and sped up the adoption process considerably.
Wilkinson, *Terrorism Versus Democracy,* 175. Keohane, "Implementing the EU's Counter-Terrorism Strategy," 66. Szyszkowitz, "The European Union," 175. van Sliedregt, "European Approaches to Fighting Terrorism," 416. den Boer, "The EU Counter-Terrorism Wave," 195-196. Bures and Ahern, "The European Model of Building Regional Cooperation Against Terrorism," 192-193. Brown, *European Union, counter-terrorism and police co-operation, 1992-2007,* 113-121.

[197] Europa.eu, "European Arrest Warrant." https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do.

those facing extradition, a much rarer occasion).[198] Most warrants were actually issued in the course of an investigation covering 'traditional' inter-state crime. The EAW might be an improvement in the course of such investigations as well, but it was originally implemented as an anti-terror measure and not a measure pertaining to regular crime.[199] It contributes to the Pursue chapter of the EU's Counter-Terrorism Strategy. However, this function is not its major effect. The EAW thereby reflects a case of a side-effect anti-terrorism policy.

A further example of an EU measure implemented (at least partly) by using the argument of preventing terrorism, that, however, mainly covers other purposes than anti-terrorism is the extended control of the EU's external borders. Intensified border controls were implemented by using the argument that current terrorism often involves interstate travel and that terrorism, therefore, can only be effectively fought by tightening border controls. However, most of the big recent terror attacks in European member states were carried out by citizens or residents of these same member states (e.g., London 2005, Paris 2015). Allowedly, a few perpetrators of terror attacks in Europe and some arrested suspects used the refugee stream as a camouflage entering Europe, and controls of some borders could arguably contribute to the Protect stream of the EU's terrorism policy strategy.[200] However, the amount of these individuals was rather small, whereas the border controls had as its biggest effect (and main intention) a drastic reduction of the influx of refugees, as well as stopping criminals and illegal migrants, and not terrorists. The border controls, both EU-internal and external reflect therefore not a 'real' anti-terrorism measure, but an instance of side-effect anti-terrorism.

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[198] Europol, European Union Terrorism and Trend Report 2017. https://www.europol.europa.eu/tesat/2017/trends.html. Europol, European Union Terrorism and Trend Report 2010. https://www.europol.europa.eu/sites/default/files/.../tesat2010.pdf.

[199] Wolfgang Kaleck, "Der Europäische Haftbefehl – ein problematisches Instrument," *Zeit Online*, October 30, 2014.

[200] For instance, two of the perpetrators of the November 15 attacks in Paris came to Europe via the refugee stream that year. http://www.bbc.com/news/world-europe-34832512. Although most terrorists who came to Europe as refugees turned to terrorism first *after* they had entered the continent, e.g. the perpetrators of the attacks of Berlin, Ansbach and Wurzburg in Germany or Jabed Al-Bakr who had planned an attack in Berlin and committed suicide in detention. Kai Biermann et al., "Weihnachtsmarkt: Was wir über den Anschlag in Berlin wissen, *Zeit Online*, December 19, 2016. Focus Online, "Nach Anschlag von Ansbach: Gutachten über Attentäter zeigt: Ihm war ein "spektakulärer" Suizid zuzutrauen," July 27, 2016. https://www.focus.de/politik/deutschland/nach-anschlag-von-ansbach-gutachten-ueber-attentaeter-offenbart-27-jaehriger-plante-spektakulaeren-suizid_id_5766363.html. Anna Reimann and Christoph Reuter, "Toter Terrorverdächtiger: Wie Jaber Albakr zum Fanatiker wurde," *Spiegel Online*, October 17, 2016. http://www.spiegel.de/politik/deutschland/jaber-albakr-wie-der-terrorverdaechtige-zum-fanatiker-wurde-a-1116952.html.

Fourth, a continuous problem in EU anti-terrorism efforts is the reluctance to provide precise and tangible definitions on crucial terms related to the matter. As pointed out earlier, the EU owns a rather vague definition of the term terrorism. Additionally, concerning its anti-radicalization efforts, the EU maintains a vague definition of 'terrorist content' (which the EU at the same time heavily targets with current measures). 'Radicalization', is strikingly not officially defined by the EU at all. This reluctance of defining crucial terms can potentially be explained by the general tendency of states, state federations, and IOs to provide as much leeway for the own policies and measures in anti-terrorism as possible. Narrow definitions would potentially prevent new policy ideas early on. However, vague definitions undermine the public accountability of anti-terrorism policies and potentially contribute to the legal precariousness of some pieces of anti-terrorism legislation.

Fifth, in the aftermath of 9/11, the EU has not only increased its anti-terrorism activity on its own initiative or via impetus delivered from its member states but also due to external pressure, e.g. exercised by the US.[201] Already shortly after 9/11, the US sought to increase its police and judicial cooperation with the EU, and it pressed for further influence on the EU's internal security agenda. For instance, the implementation of biometric passports was not only initiated due to policy ideas by the EU Commission or pressure from certain member states (e.g. Germany) but due to external pressure by the US as well. The adoption of the directive on the collection and storage of passenger data (the PNR directive) was, in part, a consequence of external US pressure as well, resulting in the "internalization of US-produced border security norms" in the EU.[202] Thus, the 'partnership' between the EU and the US on anti-terrorism is not an emancipated one. The US is able to exert higher and more effective pressure in regard to the implementation of certain measures.[203] Still, this is not to deny the EU its responsibility for its own anti-terrorism policies, including rights-infringing policies. The general direction and content of EU anti-terrorism policymaking are clearly determined by European political players.[204] These players have actively steered the EU towards borrowing into the anti-terrorism trends of anti-radicalization and preventive surveillance, providing detrimental effects on rights ideas and frameworks.

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[201] den Boer, "The EU Counter-Terrorism Wave," 185, 205. Bures, *EU Counterterrorism Policy: A Paper Tiger?,* 64. Argomaniz, Bures and Kaunert, "A Decade of EU Counter-Terrorism and Intelligence."

[202] Argomaniz, "When the EU is the 'Norm-taker,'"119.

[203] den Boer, "Counter-Terrorism, Security and Intelligence in the EU," 225, bemoans this. Argomaniz speaks of an asymmetrical relationship as well. Argomaniz, "When the EU is the 'Norm-taker.'"

[204] Bossong, *The Evolution of EU Counter-Terrorism,* 127.

Chapter VI
Comparing European Human Rights Problems in the Course of Anti-Terrorism

In this chapter, I will compare the anti-terrorism policies of the three cases analyzed above. The major focus will be on the differences and similarities of the three entities, especially concerning human rights infringements in the course of anti-terrorism.

First, comparing the cases of my two states, it becomes clear that Germany and the UK follow rather similar overall trends of anti-terrorism. Both countries have adopted a range of similar in the last seventeen years. Both have e.g., implemented data retention, widened intelligence surveillance, or extended CCTV surveillance (including the implementation of facial recognition). Therein, both countries followed the wider trend of extending surveillance and concentrating on preventing radicalization, as well as detecting alleged radicalized individuals among the own population, in order to prevent so-called homegrown terrorism, instead of tracking down members of international terror networks (at least since roughly 2005-2006). Furthermore, both countries adopted a range of policies that pressure the civil rights level of a vast amount of the population, if not virtually all individuals of German or British society. However, anti-terrorism in both countries owns a clear focus towards Islamist terrorism and therein the Muslim minority in regard to a range of policies (basically all policies and measures that are supposed to detect radicalized individuals). Thus, members of this minority have seen an even larger interference with their civil rights than the 'average' member of society. Moreover, both countries implemented policies that were sold as anti-terrorism policies, but which are rather used for other objectives (I called such policies 'side-effect' anti-terrorism). In neither of the two countries, have the extent of anti-terrorism legislation and scope and degree of anti-terrorism measures been cut back in phases of a reduced threat level.[1] Thus, a move away from a situation that should be regarded as exceptional, that is the limitation of and derogation from universal rights norms has not taken place, even in the context of a decreased threat. This shows that policymakers and security organs quickly start to perceive additional security measures that might have been implemented as preliminary measures, as the new normal. Such a trend is triggering a likely race to the bottom in terms of human rights standards. The tendency towards implementing sharper anti-terrorism policies in a continuous fashion has been independent, in both countries, of the composition of the government. The trend towards rights

[1] Germany had a slow phase of anti-terrorism during those years, no far-reaching new measures were adopted. However, none of those measures adopted after 9/11 were rolled back. After the start of a new wave of Islamist terrorism in Europe, Germany started to adopt new measures again.

infringing anti-terrorism policies continued regardless of which of the big parties held governmental power.[2]

Still, and this is the second overall point of this comparison, differences between German and British anti-terrorism are observable as well. The UK has adopted a larger amount and range of anti-terrorism and the UK has often adopted policies that are going further in terms of putting a sound human rights framework at risk. Additionally, the UK has often been faster in adopting such rights infringing policies, as well as policies that reflect a new trend. In other words, the UK has been more of a frontrunner and trendsetter in anti-terrorism policymaking than Germany (and most other EU member states), whereas often at the cost of undermining human rights.

In terms of differences in the extent or degree of anti-terrorism, one might point to a range of examples. For instance, early after 9/11, the UK adopted a policy enabling the indefinite detention of (foreign) terror suspects. Germany has not yet seen the adoption of such a policy on indefinite detention at the federal level, however, very recently at the state level (Bavaria). In course of adopting indefinite detention, the UK became the only European country to declare an emergency after 9/11 (until France declared a state of emergency in 2015).[3] In reaction to a court ruling declaring indefinite detention of terror suspects for ineligible the UK implemented so-called control orders - effectively measures to control terror suspects without regular detention. This measure triggered problems with rights norms as well. Germany did not implement any similar measures for a long time, whereas recently Germany has seen the implementation of demands for so-called 'endangerers' to wear electronic tags. In general, the UK has been a frontrunner among Western countries in terms of the spread of CCTV systems, and plans for the implementation of facial recognition systems have existed in the UK very early on as well. Germany has been slower, and potentially more careful for many years in terms of extending its net of CCTV, however, the country is now following the trend of extensive public CCTV surveillance as well, including the usage of facial recognition software.[4] Furthermore, the UK implemented a system for number plate

[2] Admittedly, potentially more far-reaching policies were at times prevented by the involvement of the Green Party and the Liberal Democrats in the German and respectively British government. However, their influence on the general trend was overall small.

[3] Dorle Hellmuth, *Counterterrorism and the State: Western Responses to 9/11* (Philadelphia: University of Pennsylvania Press, 2016), 179.

[4] Germany experimented with facial recognition technology only a few years after 9/11 as well. However, the extent of CCTV had been significantly bigger in the UK during all years since 9/11, and the UK had been even earlier with scenarios for recognition systems. For instance, Rosen discussed such technological developments and the approving attitude of British authorities towards them already in 2003. Jeffrey Rosen, "A Cautionary Tale for A New Age of Surveillance," In *Terrorism in Perspective*, ed. by Pamala L. Griset and Sue Mahan (Thousand Oaks: SAGE Publications, 2003).

recognition, a system indiscriminately scanning number plates of all vehicles already in the early 2000s. Such a system has not been implemented for the whole of Germany (several federal states did though). However, the German Constitutional Court has recently ruled the continuous practice of automatic control of number plates as unconstitutional (February 2019).[5] For another example of German-British anti-terrorism differences, one can point to the UK's establishment of a prevention system that targets mere political viewpoints rather than political violence or intentions to apply violence (e.g., via the Channel program). Such a far-reaching system, pervading the whole public sector, has not been established in Germany.[6] Furthermore, in the aftermath of the revelations by Edward Snowden, the UK government legalized a broad range of mass surveillance measures with the IP Act of 2016, a piece of legislation that has been described as very invasive for a democratic state. In fact, Snowden himself described the IP Act as "the most extreme surveillance in the history of western democracy."[7] The IP Act made the UK the first liberal democracy to establish a statuary footing for widespread hacking practices of its security organs. Additionally, data access was granted to dozens of public institutions and was not restricted to security organs (e.g., tax institutions were included as well). The German government has increased surveillance measures in the country as well in the last years (e.g. by bringing back data retention measures or by adopting the BKA law), however, these efforts fall short of the UK's IP Act legislation in terms of scope and effect, e.g. the German BKA legislation does not go as far as the British IP Act. Surveillance measures under the BKA Act are more closely connected to demands for an existing danger of terrorism, and data access is not handled as loosely as in the British case. Furthermore, the UK has closer ties to some questionable components of the US anti-terrorism framework than Germany. Surely, both German and British intelligence services cooperated with the American NSA. However, the British GCHQ engaged in closer cooperation with the NSA than the German BND (based on the GCHQ being a member of the 'Five Eyes' intelligence cooperation).[8] The

[5] Spiegel Online, "Was bedeutet das Autokennzeichen-Urteil?," February 5, 2019.

[6] The only noteworthy exception in the German context is the implementation of 'hate speech' as reason for deportation of foreigners, as established in the 2004 Immigration Law. According to the law so-called 'mindset arsonists' or 'hate preachers' of foreign origin can be deported. However, the speech acts would have to have a clear connection to inciting violence. Moreover, in comparison with the UK, the measure is not pervading the whole public sector. It is, however, another measure reinforcing the tendentious focus of German authorities on Islamist terrorism. William Hiscott, "New German Migration Regime. An Analysis," Multicultural Center Prague, February 2004. Daniel Bax, "Placebo gegen das Symptom," *taz*, May 29, 2013.

[7] Ewen MacAskill, "'Extreme surveillance' becomes UK law with barely a whimper," *The Guardian*, November 19, 2016.

[8] Glenn Greenwald, *No Place to Hide: Edward Snowden, The NSA and the Surveillance State* (London: Hamish Hamilton, 2014).

GCHQ additionally appears to carry out more far-reaching mass surveillance measures in comparison to the BND.

Moreover, both countries, especially in the first years after 9/11, showed tendencies to go back to some historical legacies of their respective anti-terrorism. For instance, the UK implemented a system of indefinite detention, utilizing official derogation options in the process, and restricted certain acts of speech (e.g., banning terror 'glorification'). Similar practices were used by the UK during the Troubles.[9] Germany fell back to the measure of dragnet investigation, which was used already in the 1970s. Such historical anti-terrorism has, at least at times, contributed to shaping reactions to current terror threats. These historical legacies in effect contributed to differences between German and British reactions to anti-terrorism.[10] Still, due to convergence effects of European anti-terrorism policies in the last years, such historical legacies do currently not play such a big role. In other words, the point of historical legacies does not negate the development of common trends of European terrorism policies.

Emphasizing another difference, it appears that the public in Germany is slightly more critical towards rights infringing anti-terrorism measures and policies than the British public. Whereas in the UK one can detect strong support for sharpened anti-terrorism measures and a general increase of anti-terrorism throughout the post 9/11 timeframe, the picture is more mixed in Germany. In the UK, public surveys found majorities for the implementation of indefinite detention (sixty-two percent supported this in a 2004 ISM survey and sixty-seven percent in a 2006 ISSP survey, making this the highest value of agreement in thirty-three countries covered by the latter survey), increased use of CCTV systems (eighty percent in a 2004 ICM survey), for tapping into peoples' phones in the scenario of an imminent attack (seventy-eight percent agreed to this in the same ISSP survey), extended stop-and-search powers for the police (sixty-nine percent supported this in a 2004 ICM survey and seventy percent in a 2005 Populus survey), and data retention measures (fifty-three percent agreed with that in a 2015 YouGov survey).[11] In a survey from 2007, seventy-three percent of British

[9] Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge: Cambridge University Press, 2011), 241.

[10] Monica den Boer and Irina Wiegand, "From Convergence to Deep Integration: Evaluating the Impact of EU Counter-Terrorism Strategies on Domestic Arenas," In *EU Counter-Terrorism and Intelligence: A critical Assessment*, ed. by Javier Argomaniz, Oldrich Bures and Christian Kaunert (London and New York: Routledge, 2016), 208.

[11] Anthony Richards, "Countering the psychological impact of terrorism: Challenges for homeland security," In *The Psychology of Counter-Terrorism*, ed. by Andrew Silke (London and New York: Routledge, 2011), 194-195. Petra Guasti and Zdenka Mansfeldova, "Perception of Terrorism and Security and the Role of Media," Paper prepared for the 7th ECPR General Conference (2013): 13-16. Will Dahlgreen, "Broad support for increased surveillance powers," YouGov, January 18, 2015. However, some surveys do detect a noteworthy opposition against certain rights infringing measures. For instance, a YouGov poll

respondents agreed with the argument that the government should put combating terrorism ahead of civil liberties concerns.[12] In general, the surveys clearly demonstrate the widespread willingness of large parts of the British population to curtail basic rights in order to increase the perceived likelihood of preventing terror attacks. In Germany, certain measures of anti-terrorism receive high public support as well, while other measures receive less support. For instance, an increase of CCTV has seen support by the German public (polls found an agreement by between sixty and eighty-three percent).[13] Another survey produced a majority for extended surveillance (seventy percent supported a general increase of surveillance in a 2016 infratest dimap survey). However, for the measure of indefinite detention, even in the scenario of an imminent threat, a majority could not be found (in an ISSP survey from 2006).[14] In addition, when surveillance practices of NSA and GCHQ were revealed in 2013, many Germans showed concern over the issue. A survey from August 2013 showed that many Germans were critical of the revealed mass surveillance, fifty-one percent stated that they did not want 'somebody to be able to check what I am doing on the internet'.[15] Moreover, in a number of surveys, the majority of respondents declared to feel generally well protected against terrorism (between fifty-one and fifty-eight percent).[16] Even in the summer of 2016, just after the attack of Nice and in between two attacks in Germany, fifty-nine percent of Germans declared that protection measures are sufficient, only thirty-one percent did not agree with that.[17] Thus, the picture of public support for or opposition to rights infringing anti-terrorism is much more mixed in Germany. Other than in the UK, almost automatic support cannot be detected.

Furthermore, and this is an important point, the climate and discourse towards human rights have been somewhat more positive in

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from 2006 detected that half of the population was unhappy with having their data stored in national databases (including DNA data). However, the poll did not mention the terms terrorism or anti-terrorism, which could be an explanation for the somewhat higher reluctance towards state surveillance in this survey. Still, the survey did not produce a counter-argument against the point that the British public in general is in agreement with sharpened anti-terrorism measures, since most proposed measures still found a majority in the same survey. YouGov/Daily Telegraph Survey Results, November 28-30, 2006 http://www.yougov.com/archives/pdf/TEL060101024_4.pdf.

[12] Richards, "Countering the psychological impact of terrorism," 194.

[13] Moritz Wichmann, "Mehrheit der Bürger spricht sich nach Anschlag von Berlin für mehr Polizei und Videoüberwachung aus," *YouGov.de,* December 28, 2016. Infratest dimap, "ARD-Deutschlandtrend," January 2017.

[14] Infratest dimap, "ARD-Deutschlandtrend," January 2016. Guasti and Mansfeldova, "Perception of Terrorism and Security and the Role of Media," 13-14.

[15] Allensbach. "Wirkungslose Aufregung," 2013.

[16] tagesschau.de, "ARD-DeutschlandTrend: Keine Angst vor Terroristen," January 5, 2017.

[17] Forschungsgruppe Wahlen, "Politbarometer Juli II 2016."

Germany than in the UK, especially in the last years. In the first years after 9/11, the governments of both countries were still pointing to the importance of human rights in anti-terrorism. For instance, Gordon Brown spoke in October 2007 of a British interpretation of liberty, which would assert "the importance of freedom from prejudice, of rights to privacy and of limits to the scope of arbitrary state power."[18] However, in the latest years, the UK government has made headlines with ideas to take the country out of legally binding human rights frameworks. First, in 2015, the Conservative government forwarded plans to exchange the UK's Human Rights Act from 1998 with a so-called 'British Bill of Rights', and in the course of the Brexit process, Theresa May (Interior Minister at the time) revealed plans to withdraw the UK from the ECHR, arguing that the ECHR made the UK a less safe place and would not improve human rights situations in third countries.[19] Although the UK Human Rights Act of 1998 is a piece of national legislation it is highly relevant concerning the international human rights obligations of the UK and the general attitude of the UK towards international human rights. The Human Rights Act is clearly intended to further the goals of the ECHR (it actually manifested the ECHR in domestic British law, e.g., all articles of the Human Rights Act refer back to the ECHR).[20] The ECHR itself is supposed to promote the goals of the UDHR. Thus, abolishing the Human Rights Act, just as taking the UK out of the ECHR, equals a grave backlash on the promotion of international human rights aims and norms in the UK (and for the global framework of universal rights as well). Furthermore, by leaving the legal boundaries of the EU in the course of Brexit the UK would (most likely) leave the legal obligations of the CFREU behind as well.[21] In Germany, despite the country's worrying trend of growing right-infringing anti-terrorism, the government at least upholds rhetoric that marks freedom and civil rights as important components of policymaking. For instance, Angela Merkel in her New Year's Address at the end of 2016 emphasized the importance of freedom and a general balance between security and freedom in anti-terrorism (said after an eventful German year in terms of terrorism, when Germany saw several Islamist terror attacks).[22] In 2015, Frank-Walter Steinmeier, German

[18] Gordon Brown, October 2007, quoted in Conor Gearty, *Liberty and Security* (Cambridge: Polity Press, 2013), 86.
[19] Anushka Asthana and Rowena Mason, "UK must leave European convention on human rights, says Theresa May," *The Guardian*, April 25, 2016. https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum.
[20] Todd Landman, "Imminence and Proportionality: The U.S. and U.K. Responses to Global Terrorism," *California Western International Law Journal*, Vol. 38, No. 1 (2007): 93.
[21] Lorna Woods, "Data retention and national law: the ECJ ruling in Joined Cases C-203/15 and C-698/15 Tele2 and Watson (Grand Chamber)," *EU Law Analysis*, December 21 (2016).
[22] Zacharias Zacharakis, "Angela Merkel: Keine Angst," *Zeit Online*, July 28, 2016.

Foreign Minister at the time, held that both the support of rights principles and efforts of tackling terrorism would be at the core of the German presidency of the OSCE.[23] In sum, while similarities exist between German and British anti-terrorism in the last seventeen years (see above), the British authorities have often gone one or two steps further than their German counterparts in terms of sacrificing human rights for alleged security benefits.

Third, the EU anti-terrorism framework entails severe problems as well, as explained earlier. However, the number of policies that infringe human rights and the degree of such infringements is not as high as for the two analyzed EU member states. Surely, the circumstance that the EU does not possess any independent military units, or only limited police capacities (Europol) and very limited intelligence capacities (at the ECTC and the IRU) contribute to this fact. Since the EU does not have the capacity to indefinitely arrest suspects, to extensively search individuals in the street, to extensively survey its citizens via intelligence services or to shoot down a civilian airplane, the EU is hard to compare to the two states. The fact that the EU does not violate civil rights on the same range, does, however, not mean that the EU does not follow similar trends as its member states (at least in some regards). In fact, the EU feeds into the same big trend of continuously growing surveillance and prevention measures and of moving towards pre-emptive security policies. The EU has, for instance, adopted data retention surveillance, making it mandatory for member states to collect data on internet traffic, has established initiatives to prevent radicalization and track down radicalizers, has adopted a directive making the indiscriminate collection of data of all individuals travelling by plane mandatory, has pushed for the usage of biometrics in different regards (in passports but also for facial recognition purposes), is supporting the construction of a biometric super-database, and is now supporting a 'whole of society' approach in order to counteract radicalization (an approach reflecting the British measure of tackling radicalization in all areas of public service via the Channel program). Especially in face of the last examples, one might argue that the EU has become looser on its rights norms in the latest years, compared to the first years after 9/11, when one did not see many (clearly) rights infringing anti-terrorism measures at the EU level. Moreover, a politically steered rollback of rights infringing policies in times of a reduced threat has not taken place at the EU level either (e.g. the directive on data retention could have been rolled back or reduced in scope during the somewhat more calm years between 2006 and 2013). Furthermore, just as Germany and the UK, the EU has implemented what I defined as side-effect anti-terrorism policies, thus

[23] OSCE, "Dialogue, trust and security are watchwords for 2016 Germany's OSCE Chairmanship, Foreign Minister Steinmeier tells OSCE Permanent Council," July 2, 2015. http://www.osce.org/pc/168131.

policies that were sold to the public at the moment of adoption as policies with a clear anti-terrorism focus, but which to a great extent suffice other purposes (mostly regular criminal prosecution). Examples in case of the EU are the regulation on the implementation of biometric passports, the PNR directive, and the European Arrest Warrant.

At the same time, however, the EU constitutes the entity of the three analyzed cases that tries the most to push human rights on the European and global agenda. For instance, the EU has adopted the CFREU (containing a large part of international human rights norms) and elevated it to the status of an EU treaty, the EU denotes human rights and human dignity as major aims to be achieved in the TEU (the treaty which constitutes the basis of EU law), the ECJ regularly takes the role of a human rights watchdog in European policymaking, the EU points to human rights conditionality as important component of its enlargement and development policy, and the EU regularly mentions the preservation of civil rights as an aim in anti-terrorism, both in documents and via statements of EU officials.[24] For instance, the EU mentions compatibility of human rights and anti-terrorism as a central aim in its 2005 Counter-Terrorism Strategy, and the EU's Counter-Terrorism Coordinator, Gilles de Kerchove, underlined that promoting human rights could in itself be a means of tackling the problem of terrorism.[25] Thus, one can conclude that although the EU does contribute to a very worrisome trend of an ever-growing amount of rights infringing anti-terrorism, its (official) general attitude towards the idea of human rights is still positive. The EU is, in this sense, positioning itself, at least discursively on the human rights side. In that point, the EU rather reflects the human rights position of the German government than the attitude of the UK government. This attitude of the EU might be of significance for the general European perception of human rights since the EU's discourse can have a legitimizing or de-legitimizing effect on the infringement of human rights in the course of anti-terrorism. Still, as mentioned, the EU has, especially in the latest years, been feeding into the trend of an ever more expansive anti-terrorism framework. Especially in terms of surveying whole populations and trying to detect allegedly radicalized individuals, the EU has followed the trend of member states such as the UK and Germany.

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[24] Consolidated version of the Treaty on European Union, October 26, 2012. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012M002. Alison Brysk, "Human Rights and National Insecurity," In *National Insecurity and Human Rights: Democracies Debate Counterterrorism,* ed. by Alison Brysk and Gershon Shafir (Berkeley: University of California Press, 2007), 7. Council of the European Union, "Human Rights and Democracy in the World," 2014, 38.

[25] Villy Søvndal, Gilles de Kerchove and Ben Emerson, "Counter-terrorism and human rights," *European Voice,* March 19, 2012. Akiva Lorenz, "The European Union's Response to Terrorism," *International Institute for Counter-Terrorism,* May 1, 2006.

Fourth, the mentioned differences in all three analyzed entities are clearly inter-related in regard to European anti-terrorism, and all three are driving powers of a common European anti-terrorism. As mentioned before, both Germany and the UK have pushed some of their anti-terrorism preferences at the EU level. For instance, the UK's CONTEST strategy has been used as an orientation for the EU's Counter-Terrorism strategy, the UK's policy of facing radicalization inside of public institutions like schools and universities has been taken up at the EU level as well in recent years, Germany tried to implement the measure of dragnet investigations at the EU level, and Germany was one of the members states most strongly pushing for the implementation of a directive on data retention at the EU level.[26] The EU's force in terms of European anti-terrorism has been shown by its efforts in terms of coordinating European measures facing terrorism (e.g. via its Action Plans and Counter-Terrorism Strategy), its development towards becoming an important focal point for anti-terrorism decision making, its construction of relevant anti-terrorism institutions at a European level (e.g. the ECTC or the IRU under Europol), and by a range of binding directives on anti-terrorism that member states are demanded to adopt and implement, e.g. on data retention, PNR records or biometric passports. The EU has additionally been pushing the construction of wide-scale biometric databases in the name of anti-terrorism. Accordingly, the EU has had a converging effect on the states' terrorism policies, similarities have been growing between member states' anti-terrorism and the EU is one influential factor in the explanation of that circumstance.[27] Thus, all three entities are interrelated and resemble driving forces of European anti-terrorism. Another good example of this inter-relation is the EU's definition of terrorism, which has been implemented as the only valid definition in several member states (e.g. Germany).[28] Moreover, due to their influence on European anti-terrorism policies, the three players do not only mutually influence each other, but also push anti-terrorism trends and developments to the periphery of the EU, as well as to countries that see only little terrorist activity. In effect, both the member states and the EU have been pushing for a Europeanization of anti-terrorism policymaking in the last decades, continuously increasing inter-relations in the policy field. Thus, due to the increasing entanglement between the three players, each of them owns an increasing amount of responsibility for anti-terrorism practices and policies that threaten a sound human rights framework.

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[26] Gearty holds that British anti-terrorism policies have been emulated elsewhere. Conor Gearty, "No Golden Age: The Deep Origins and Current Utility of Western Counter-Terrorism Policy," In *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English (Oxford: Oxford University Press, 2015), 82.

[27] den Boer and Wiegand, "From Convergence to Deep Integration," 208.

[28] In this regard, the UK is arguably less closely aligned with EU anti-terrorism than Germany, since the UK still maintains a definition of terrorism independent from the EU's definition.

Fifth, all three analyzed cases have embraced a precautionary logic in their anti-terrorism efforts. The notion of a precautionary logic goes back on considerations by Cass Sunstein. When having implemented a precautionary logic, policymakers aim at taking all steps possible to protect against potential harms for society at large. Protective efforts are obviously not negative, however, in a precautionary logic, such efforts are carried out, even if causal chains leading to potential harms are unclear and even if it is not certain that such harms would occur without pre-emptive measures. The logic follows, in plain terms, the catchphrase "better safe than sorry," or Dick Cheney's doctrine of "doing something is better than doing nothing." The idea is to avoid risks as much as possible and to implement a margin of safety in all areas. Harms are supposed to be tackled as soon as one perceives risk and not first when harms have occurred.[29] This principle is applied in security politics and anti-terrorism as well.[30] Applied on the relation between human rights and anti-terrorism, this means that risks of terrorism are supposed to be tackled, even when it is not sure that actions will diminish the risks and even when rights interferences might be highly disproportionate to existing risks. The risk for the implementation of unjustifiable actions via the application of a precautionary principle in anti-terrorism increases if a minority of society overwhelmingly carries the costs.[31] Now, the purpose and current nature of much of the anti-terrorism of the analyzed cases is feeding into this precautionary logic, e.g. by focusing on pre-empting or preventing radicalization and recruitment via bulk surveillance, or by extensive use of stop-and-search practices.[32] One can observe, at the member state level and at the EU level, a dissociation of the concept of risk from concrete acts, and a move towards the attempt to prevent certain risks in a general fashion.[33] Examples are initiatives on radicalization, as well as measures enabling investigators to identify radicalized individuals via data retention. The possible construction of a Panopticon via linking biometric data, CCTV and facial recognition systems is another example.[34] Recently, the EU has started

[29] Cass Sunstein, *Laws of Fear – Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005). Richard Jackson, "The epistemological crisis of counterterrorism," *Critical Studies on Terrorism*, Vol. 8 No. 1 (2015).

[30] A salient example from this realm mentioned by Sunstein is the internment of the Japanese-Americans in the US during WWII.

[31] Sunstein, *Laws of Fear*.

[32] Genevieve Lennon, "Stop and search powers in UK terrorism investigations: a limited judicial oversight?" *The International Journal of Human Rights*, Vol. 20 No. 5 (2016).

[33] Lilian Mitrou, "The impact of communications data retention on fundamental rights and democracy – the case of the EU Data Retention Directive," In *Surveillance and Democracy*, ed.by Kevin Haggerty and Minas Samatas (London: Routledge, 2010), 139.

[34] The European Parliament itself acknowledged this trend towards mass surveillance becoming a key feature of anti-terrorism in 2011. Javier Argomaniz, Oldrich Bures and Christian Kaunert, "A Decade of EU Counter-Terrorism and Intelligence: A Critical Assessment," *Intelligence and National Security*, Vol. 30 No. 2-3 (2015).

in its overall policy framework, to encourage the member states to reinforce this precautionary logic, thus the EU is not standing better in terms of an application of the precautionary principle than the member states.[35]

Sixth, it can be emphasized that all three entities maintain institutions, both judicial and legislative that take an active role in trying to confine extensive anti-terrorism policies. All entities maintain courts as counter-balance to rights invasive policies (the German Constitutional Court, the British High Court, and the ECJ), and all three maintain a second legislative chamber that (at times) plays the role of an anti-terrorism watchdog as well (the Bundesrat in the German case, the House of Lords in the UK and the European Parliament in case of the EU).[36] Tony Blair agreed to this evaluation of the government's course, at times, being curtailed by courts and opposing political forces: "We, of course, wanted far tougher laws against terrorism. We were prevented by opposition and then by the courts in ensuring that was done."[37] Clearly, the mentioned courts have had a much greater impact in terms of confining and abolishing rights invasive policies, as could be seen in my three case studies.[38]

Seventh, this leaves this section to summarize the question of which of the three players is infringing human rights to the highest degree. One might argue that this question is hard to answer given some of the players have adopted policies that are not to be found in other cases. For instance, the UK has adopted a full-fledged surveillance program in its public sector with the Channel program and Germany had adopted legislation enabling the downing of a civil airplane (including its passengers). Regarding the question as to which of the two is the most grave human rights curtailment, the surveillance of potentially millions of citizens in institutions of public trust

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[35] Monica den Boer, "Counter-Terrorism, Security and Intelligence in the EU: Governance Challenges for Collection, Exchange and Analysis," *Intelligence & National Security*, Vol. 30 No. 2-3 (2015): 225. den Boer and Wiegand, "From Convergence to Deep Integration."

[36] However, the motives for counter-acting rights invasive anti-terrorism policies on the side of the second legislative chambers are far from always placed in a genuine interest for providing high rights standards. For instance, the German Bundesrat has often delayed anti-terrorism legislation in order to gain concessions for (some of) Germany's sixteen federal states in other policy areas. Hellmuth, *Counterterrorism and the State*. Arguably, the Bundesrat is the one of the three described chambers with the least supportive action in terms of human rights prevention.

[37] Tony Blair, October 1, 2006, quoted in Todd Landman, "The United Kingdom: The Continuity of Terror and Counterterror," In *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, ed. by Alison Brysk and Gershon Shafir (Berkeley: University of California Press, 2007), 75.

[38] Fiona de Londras argues in the same direction, when she holds that it no other organs than the courts have been insisting more on preserving a balance between rights and security in the case of the UK and the policy of indefinite detention. Fiona de Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (Cambridge: Cambridge University Press, 2011), 280-283.

(schools, hospitals, universities, etc.) or setting the groundwork for the theoretical case of a country killing a couple of hundred of its own citizens (or more), appears tricky to provide with an ultimate answer. However, as mentioned before, some general differentiating trends can be detected in my analysis. The UK has adopted a larger amount of rights infringing measures and policies as the two other analyzed cases, the UK has adopted policies that have gone further in terms of undermining a sound human rights framework, and the UK has in its general rhetoric and attitude moved further away from the ideal of maximizing human rights than Germany and the EU. Thus, one can conclude that the UK is responsible for the most critical human rights record of the three analyzed cases concerning anti-terrorism post 9/11.[39] Germany then follows after the UK, since the country has adopted more critical anti-terrorism policies than the EU, both in quantity and quality. Although the EU is here categorized as the 'least bad' case, I would like to emphasize that this does not mean that the EU has an overall positive record in terms of human rights in the course of anti-terrorism; the opposite is the case (see above). Furthermore, all three entities have moved away from the objective of full realization of human rights as a major aim of their general policymaking (the full realization and full enjoyment of rights is the teleology of rights). Limitation of and derogation from rights norms (legal and spirit norms) has become the rule rather than the exception in European anti-terrorism. Thus, none of the three entities reflects a maximalist attitude towards human rights.[40]

Reflecting the question of European anti-terrorism in a wider context, it must be emphasized that the implementation of tough anti-terrorism laws in the UK, Germany (and at the EU level) after 9/11 does not constitute a unique development in a European context, but rather reflects a common European trend. Many European countries have implemented new laws on anti-terrorism in this timeframe, and the three cases at the center of my analysis are not the only countries that have come close to or crossed the line of rights invasive measures in this policy field. France is another prominent example of a traditionally rights-oriented country, which has opened up for a process of continuously curtailing rights for alleged security benefits. France, for instance, first proclaimed a state of emergency after IS attacks in 2015, which was renewed for two years before transformed into

[39] De Boer and Wiegand share this evaluation – at least for the first years after 9/11 - when they claimed that the UK (together with France) showed a stronger reaction to terrorism after 9/11 than Germany (as well as Italy, Spain and the Netherlands). den Boer and Wiegand, "From Convergence to Deep Integration," 207.

[40] Again, a maximalist understanding of human rights reflects the aim to realize as much of human potential as possible, or to secure the full enjoyment of human capabilities. See, e.g., Ben Dorfman, *Rights under Trial, Rights Reflections: 13 Further Acts of Academic Journalism and Historical Commentary on Human Rights* (forthcoming, Frankfurt: Peter Lang, 2019), 12-16.

permanent legislation. This legislation contained a range of measures that are at least questionable from a human rights perspective, such as expansive powers to raid houses and detain terror suspects, house arrest schemes, stop-and-search practices of the police in specific areas, the closing of places of worship, as well as extensive surveillance programs, all entailing the discriminatory tendencies towards Muslims that were described in detail for the cases in focus in this thesis.[41] Accordingly, a 2019 study conducted in France revealed that many Muslims feel stigmatized in anti-terrorism practices, e.g., via being deliberately chosen for checks by the police.[42] Besides the right to non-discrimination, the right to liberty, freedom of assembly and freedom of religion have come under pressure as well in France. Just as many other countries, France is setting the conditions for implementing measures that were supposed to deliver additional security for a specific period of time as the new norm. And, similar to other countries, France is operating its anti-terrorism course based on a rather vague definition of terrorism.[43] Moreover, the perception of discrimination in the course of anti-terrorism is widespread among Muslim minorities in Europe, as Eijkman and Schuurman report.[44] The cases that I focused on in this thesis are thus not to be understood as odd cases but rather as reflecting the general picture of European anti-terrorism policy development of the last seventeen years.

Reflecting on the mentioned developments, one might wonder why a majority of citizens in the countries in question does not stop such anti-terrorism policies.[45] A larger and influential movement among the population taking up invasive anti-terrorism policies and potentially setting an end to

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[41] Nicholas Vinocur, "New French anti-terror law to replace 2-year state of emergency," *Politico*, October 31, 2017. Angelique Chrisafis, "Macron's counter-terror bill risks France's human rights record, say UN expert," *The Guardian*, September 28, 2017. https://www.theguardian.com/world/2017/sep/28/macrons-counter-terror-bill-risks-frances-human-rights-record-says-un. France has been a driving force behind European anti-terrorism cooperation as well, both at the EU level and in smaller fora (the Prüm Convention) or in bilateral agreements. For instance, France maintains a bilateral anti- and counter-terrorism cooperation with the UK. Frank Foley, *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past* (Cambridge: Cambridge University Press, 2013), 322-323.

[42] Centre d'étude sur les Conflits, "The Effects of Counter-Terrorism and Counter-Radicalisation Policies on Muslim Populations in France: A quantitative Study," June 28, 2019. http://www.ccls.eu/fr/the-effects-of-counter-terrorism-and-counter-radicalisation-policies-on-muslim-populations-in-france-a-quantitative-study/.

[43] Angelique Chrisafis, "Macron's counter-terror bill risks France's human rights record, say UN expert."

[44] Qurine Eijkman and Baart Schuurman, *Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation* (The Hague: ICCT, 2011), 19.

[45] As mentioned, when rights infringing policies were stopped in the analyzed cases, then mostly by court rulings (often supported by NGO action).

them via political pressure, cannot be detected. Certain hypotheses can be constructed in order to explain the lack of resistance in Western societies. In earlier research, I tried to find out why people are not showing more resistance to mass surveillance. The abstractness of the issue, the lack of concrete victims of surveillance that one might identify with, the missing hope for an abolishment of surveillance, the fact that the perception of privacy rights as important has declined, and the consequential lack of intense anger in face of mass surveillance were some of the reasons for a lack of resistance in Germany.[46] It can be expected that some of these variables are also relevant to the case of the UK. Jeanne Bonnici argued in a similar way when she claimed, "public apathy to privacy and data protection needs have characterized developments of recent years, while the regulations that fashion European society continue to be fuelled by concerns about terrorism, security and safety."[47] Not even the revelations about surveillance, provided by Edward Snowden have triggered a determined movement forcing an abolishment of rights infringing surveillance activities. After these revelations, an awareness concerning privacy problems was initially growing but did not stay a 'mainstream' concern.[48] In the last years, engagement with the problem, as well as the general interest in it, has somewhat faded. Gearty proposes another promising variable for explaining the lack of resistance to rights infringing anti-terrorism measures. He argues that the majority of the British society is not concerned about the government's rights infringing anti-terrorism measures, as they would have gained the understanding that these measures are in reality not aimed against them, but against minorities, foremost Muslims and non-Westerners. Thus, many members of the majority society would be indifferent with harsh anti-terrorism policies since they would not feel that they would ever be hit (other than maybe in an abstract fashion).[49] The majority would be "quite prepared to truncate" the liberty of minorities, "while contriving to continue to believe not only in our own freedom but in liberty as a universal value."[50] Minority groups do however understand rights infringing measures as a threat to their personal lives including the development of discriminatory tendencies.

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[46] Sandro Nickel, "Current Western Reactions to Mass Surveillance: Movement or Just Protests?" In *Politics of Dissent,* ed. by Martin Bak Jørgensen and Oscar Garcia Agustin (Frankfurt: Peter Lang, 2015).

[47] Mifsud Bonnici, "Recent European Union developments on data protection … in the name of Islam or 'Combating Terrorism'" *Information & Communication Technology Law* Vol, Vol. 16 No. 2 (2007): 173.

[48] Nickel, "Current Western Reactions to Mass Surveillance."

[49] Gearty, *Liberty and Security,* 93. Eijkman and Schuurman argue in a similar direction. Eijkman and Schuurman, *Preventive Counter-Terrorism and Non-Discrimination in the European Union,* 18.

[50] Gearty, *Liberty and Security,* 107. This is part of the groundwork for the widespread usage of the argument of not having anything to hide when faced with questions about state-led mass surveillance.

Lastly, I would like to note that the fact that I have detected a range of rights problems in anti-terrorism policies since 2001, does not mean that all anti-terrorism is illegitimate. Examples of legitimate measures can be found and some have been mentioned already. For purposes of clarity I would like to point to a few examples constituting non-rights-invasive anti-terrorism, e.g., the ban of membership in terror organizations (if that is defined properly), the ban of financing of terrorism (again, terrorism must be defined properly and third persons cannot be stripped of economic rights), the ban of joining foreign wars, the ban of incitement to violence (again, under a narrow definition and judicial oversight), *individual* instances of surveillance of suspects in cases of concrete indication of a connection with terror plans, international cooperation on anti-terrorism (given that cooperation does not include cooperation with rights infringing services), a ban of online weapon trading, anti-terrorism and counter-terrorism exercises of police forces, or the increase of police staff and budgets.

Discussion

After I detected a range of human rights problems in the course of German, British and EU anti-terrorism policies, and after comparing these policies, it shows that the current relationship between anti-terrorism and human rights has developed in a negative direction on the European front in recent years. We have seen a move away from rights ideals and the initiation of a status quo that sees rights restriction to be the new norm rather than the exception.[1] This leaves the question of how a more sound relationship between rights and anti-terrorism would look. I will thus now delve into how the relation of human rights and anti-terrorism is understood in theory, opening up for different perspectives on this relation. Then I will reflect upon the question to what extent human rights should be curtailed in terms of anti-terrorism, or if at all. I will, in the course of this, relate to the question of whether anti-terrorism and human rights are necessarily contradictory concepts. Essentially, the struggle between rights and anti-terrorism represents a struggle between different perceptions regarding the quantity and character of security measures necessary in a society facing the threat of terrorism.

A first position that one can identify regarding the relationship between human rights and terrorism policies is often referred to as a 'realist' understanding. In this view, human rights would at best be subordinate to security interests and policies, or not relevant at all in terms of security policies.[2] Alison Brysk refers for instance to Frank Biggio as a typical proponent of a realist stance on the relationship between human rights and terrorism policies. Biggio argues that a state has the justified right to exercise preemptive and unilateral action against terrorism. This argument is based on the idea that terrorism poses "a total threat to the existence of democratic societies".[3] Due to this unprecedented and existential threat, far-reaching measures would be justified in order to secure stability (of the state, a state's hegemony, and the world order). Measures such as military strikes against terrorist camps, kidnappings or assassinations of terrorist leaders may become morally justified when faced with such a threat, Biggio holds. Terrorists would have become "enemies of mankind", in his opinion (resembling a 'crimes against humanity' vocabulary), forfeiting national as well as humanitarian protection.[4] Another proponent of such a perspective is John Ashcroft former Attorney General in the administration of George W. Bush. He tried to devalue the importance of rights in facing the threat of

[1] Richard Jackson pointed to such a trend as well. See Richard Jackson et al., *Terrorism: A Critical Introduction* (Basingstoke: Palgrave Macmillan, 2011), 235.

[2] Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004), 12.

[3] Frank Biggio in Alison Brysk, "Human Rights and National Insecurity," In *National Insecurity and Human Rights: Democracies Debate Counterterrorism,* ed. by Alison Brysk and Gershon Shafir (Berkeley: University of California Press, 2007), 10.

[4] Brysk, "Human Rights and National Insecurity," 10.

terrorism with claims such as the following: "[T]o those who scare peaceloving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends."[5] Such positions were popular in the direct aftermath of the 9/11 attacks, especially among American policymakers.[6] Essentially, this argumentation, the idea that rights do not have to be regarded in constructing security, takes away the legitimization of having rights; it undermines one's right to have rights.[7] Such positions come close to what Laura Donohue labeled "the perversion of the liberal dialogue." Argumentations such as the ones presented above try to legitimize the abolishment of liberal institutions of societies (such as rights) in an attempt to ensure security. However, this is what these institutions were supposed to protect.[8] Since the mentioned positions refrain from even considering rights as an important focal point of anti-terrorism policymaking, such a stance must, obviously, be refused from a human rights perspective.[9]

A second, more commonly displayed, position regarding the relationship between human rights and terrorism policies is the so-called 'trade-off position', pointing at finding the right balance between liberty and security. In other words, the balance analogy is resting on the idea of a conflict between (the right to) security and (other) civil rights.[10] Many proponents of this position underline the potential importance of human rights. However, most writers in this camp end up with the viewpoint that in the face of a terrorist threat, security would have to have priority over human rights. Human rights would have to be diminished to the advantage of more effective terrorism policies. The relation between human rights and security is here understood as a zero-sum game; if the one is increased, the other is necessarily in decline.

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[5] CNN, "Ashcroft: Critics of new terror measures undermine effort," December 7, 2001. http://edition.cnn.com/2001/US/12/06/inv.ashcroft.hearing/.

[6] Ishay, *The History of Human Rights*, 12.

[7] Hannah Arendt defined human rights in that way. Hannah Arendt, *The Origins of Totalitarianism* (New York: Schocken, 2004), 297.

[8] Laura Donohue, "Security and Freedom on the Fulcrum," In *Terrorism and Human Rights*, ed. by Magnus Ranstorp and Paul Wilkinson (London and New York: Routledge, 2008), 71.

[9] The stance does reflect a traditional realist position, declaring the primacy of states and their pursue of security and survival as the major promoter of international relations processes. Ideas such as human rights, belonging to the realm of political ethics, would not have a place in such a realist understanding of international relations, since states would be meant to pursue their survival, not ethics. Marie-Benedicte Dembour, "Critiques," In *International Human Rights Law*, 2nd ed., ed. by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 57.

[10] Mifsud Bonnici, "Recent European Union developments on data protection … in the name of Islam or 'Combating Terrorism'" *Information & Communication Technology Law* Vol, Vol. 16 No. 2 (2007): 164.

Jeremy Waldron explains that it is assumed that "there is always a balance to be struck" between liberty and security. It would always be a necessity "to strike a balance between the individual's liberty […] and society's need for protection." A common suggestion after a terror attack is thus to demand an increase of security and a derogation of liberty in order to restore the balance that the attack destroyed.[11] Many would in such a situation develop the perception that "it might be unreasonable to insist on the same restrictions on state action" as was insisted on before an attack (Waldron uses 9/11 as an example). Many would start to think that the risks of providing a certain amount of liberty or rights are higher than they assumed before the attack. In other words, a change of threat perception will often deliver a justification for changing the balance between rights and security.[12]

American journalist Nicholas Kristoff explained the position in a 2002 publication this way: "9/11 lifted the toll into the thousands, and terrorists are now nosing around weapons of mass destruction that could kill hundreds of thousands. As risks change, we who care about civil liberties need to realign balances between security and freedom. It is a wrenching, odious task, but we liberals need to learn from 9/11 just as much as the F.B.I. does."[13] Judge Richard Posner (judge at the US Circuit Court of Appeals) argued in a similar fashion when he held that "in times of danger, the weight of concerns for public safety increases relative to that of liberty concerns, and civil liberties are narrowed. In safer times, the balance shifts the other way and civil liberties are broadened."[14] Eric Posner and Adrian Vermeule argue that lawmakers could not evaluate the right amount of rights derogation and that the judiciary should allow the executive branch to trade-

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[11] Jeremy Waldron, "Security and Liberty: The image of balance" *The Journal of Political Philosophy*, Vol. 11 No. 2 (2003): 191. Waldron, however, points out that the calculation between liberty and security could be conducted the other way around as well. Instead of limiting freedom via defining a certain amount of necessary security, one could also imagine a minimum demand of freedom. If it were not possible to deliver this minimum demand of freedom without increasing the risks, then greater risks would be taken into regard. Waldron as quoted in Donohue, "Security and Freedom on the Fulcrum," 62.

[12] Waldron, "Security and Liberty," 191.

[13] Nicholas Kristoff, "Liberal Reality Check: we must look anew at freedom vs. security," *New York Times*, May 31, 2002. http://www.nytimes.com/2002/05/31/opinion/31KRIS.html. However, as statistics show, the high number of terrorism-victims in 2001 was rather an unusual outlier, rather than the consequence of a general trend. This is valid for both the US and Western countries as a whole. The years after 2001 did in any case see much fewer victims of terrorism (again), until an IS campaign let death tolls increase again in the US and Europe. See, e.g., statistics by the START research institution and the Global Terrorism Database.

[14] Richard Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006), 9. However, as we have seen in the empirical cases analyzed earlier, security policies are not really rolled back again when a terror threat decreases.

off rights for security if necessary.[15] Other contemporary authors holding that a restriction of rights in the face of terrorism is necessary are e.g., Alan Dershowitz, Michael Ignatieff, James Nickel, Philip Heymann, or John Yoo (I will come back to some of their positions below).[16] Alison Brysk regards the phenomenon of a constitution of a "cluster of historically liberal analysts" accepting rights derogation as a post-9/11 novelty.[17] And Jack Donnelly evaluated that since 9/11 "security and human rights are again increasingly coming to be seen as competing rather than reinforcing concerns."[18] However, the idea that individuals should sacrifice some freedom in order to gain security is everything else but new; it goes back to e.g., ideas by Thomas Hobbes and Niccolo Machiavelli.[19]

A scenario that is often used in order to legitimize a balancing to the disadvantage of rights and liberty is the so-called 'ticking-time-bomb' scenario. Alan Dershowitz is an example of an author utilizing this scenario. He holds in a post-9/11 publication that the isolated and supervised usage of torture could be permissible in case of an imminent threat to public security.[20] The scenario is mostly based on the hypothetical situation that authorities have captured a suspect who is believed to have information on a devastating imminent terror attack. Authorities should - according to Dershowitz - be allowed to derogate from some basic rights of the suspect, e.g., his right not to be tortured in order to make him hand over information that will prevent the attack (Dershowitz endorses non-lethal torture with judicial oversight). The rights derogation would be permissible because many lives could be saved.[21] Although I do not look at cases of torture in my anti-terrorism

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[15] Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (New York: Oxford University Press, 2007).

[16] Alan Dershowitz, *Why Terrorism Works* (New Haven: Yale University Press, 2002). Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton: Princeton University Press, 2004). James Nickel, *Making Sense of Human Rights,* 2nd ed. (Malden: Blackwell Publishing, 2007) Philip Heymann, *Terrorism and America: A Commonsense Strategy for a Democratic Society* (Cambridge: First MIT Press, 2000). John Yoo," The United States needs to reasonably limit civil liberties and bolster executive powers," In *Debating Terrorism and Counterterrorism: Conflicting Perspectives on Causes, Contexts, and Responses*, ed. by Stuart Gottlieb (Washington D.C.: CQ Press, 2010).

[17] Brysk, "Human Rights and National Insecurity," 11.

[18] Jack Donnelly, *Universal Human Rights in Theory and Practice,* 2nd ed. (Ithaca and London: Cornell University Press, 2003), 241.

[19] Hobbes held in his *Leviathan* that individuals would sacrifice some freedoms in the process of entering into society and thereby gain security. Machiavelli assumed that individuals are willing to give away freedom in order to achieve personal security as well. Donohue, "Security and Freedom on the Fulcrum," 59. Mahmood Monshipouri, *Terrorism, Security, and Human Rights* (Boulder and London: Lynne Rienner Publishers, 2012), 188.

[20] Dershowitz, *Why Terrorism Works.*

[21] Ibid., 88-89. The scenario of a ticking time bomb is confronted with a range of criticism. First, it is argued (e.g., by Jeremy Waldron and Jack Donnelly) that only few such cases (maybe even none at all) can be detected in real life in connection with terrorism. Waldron,

analysis, this scenario does bear some relevance, since it reflects the same type of thinking that tries to justify the implementation of rights curtailing or rights derogating anti-terrorism policies and measures analyzed earlier.

Other writers have indeed used similar modes of argumentation to justify rights infringing anti-terrorism measures. For instance, Michael Ignatieff constructed one of the most widely known arguments, for why human rights derogations are permissible in the face of a serious threat by terrorism. Ignatieff claimed in his book *The Lesser Evil*, that "If the threat is sufficiently great, preemptive detention of suspects […] may be necessary. It is unrealistic to think that commitments to dignity, coupled with a conservative bias against departing from tried legal standards, will be sufficient to cope with any eventuality in the future."[22] Besides preemptive detention, Ignatieff deems interrogation "to the limits of their psychological endurance" as another potentially necessary evil.[23] Ignatieff holds that "respect for one right [security] might lead us to betray another." James Nickel outlines a similar argumentation: "if a terrorist emergency is severe enough it may be justifiable to enact a system of detention without trial of

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"Security and Liberty," 207. Donnelly, *Universal Human Rights in Theory and Practice*, 245. Second, it is argued – e.g., by Henry Shue or Alison Brysk – that such a position opens up for a slippery slope of rights derogations, which ultimately leads to the widespread use of preventive detention and torture. Governments would "not be able to […] uphold a clear distinction between coercive interrogation and torture." Brysk, "Human Rights and National Insecurity," 13. Henry Shue spoke already in 1978 of "considerable evidence of all torture's metastatic tendency." Henry Shue "Torture," *Philosophy & Public Affairs*, Vol. 7 No. 2 (1978): 143. Third, several studies have shown that information gained by torture (or measures very short of torture), are everything but reliable. Individuals subjected to such procedures will often fabricate information or even incriminate themselves, just in order to have the procedure stopped. Sumner B. Twiss, "Torture, Justification, and Human Rights: Toward an Absolute Proscription," *Human Rights Quarterly*, Vol. 29 No. 2 (2007). A prominent example is former Al-Qaeda member Ibn al-Shaykh al-Libi, who fabricated connections between Al-Qaeda and Iraq's former leader Saddam Hussein after being subjected to several months of torture. Al-Libi's 'testimony' was later used by the American administration as justification for the invasion of Iraq in 2003. Jeremy Scahill, *Schmutzige Kriege* (München, dtv, 2013), 51. This point was already made in the 18th century by the Italian criminologist Cesare Beccaria when he claimed that a "sensitive but guiltless man will tend to admit guilt if he believes that, in that way, he can make the pain stop." Beccaria as quoted in Ishay, *The History of Human Rights*, 87. Michael Sandel adds a fourth point to the discussion by emphasizing that (most of) those arguing for overriding rights, and torturing the suspect would not only act on basis of a cost and benefits calculation but also based on the (non-utilitarian) moral standpoint that terrorists are bad people who deserve to be punished. He argues that this becomes clear when one alters the scenario to an innocent being tortured in order to prevent a terror attack; e.g., via the scenario that a suspect's innocent child be tortured in order to make the suspect talk. Most of those formerly ruling for overriding the right not to be tortured, Sandel argues, would "flinch at the notion" of this scenario. Michael Sandel, *Justice: What's the Right Thing to Do?* (New York: Farrar, Straus and Giroux, 2009), 40.

[22] Ignatieff, *The Lesser Evil*, 10.

[23] Ibid., 9.

suspected terrorists arrested in the national territory."[24] Philip Heymann (a former US Deputy Attorney General) concluded in a 2002 publication that "preventative detention may be justified albeit unpopular."[25] That the relation of human rights and security is understood as a trade-off or zero-sum game by Heymann becomes clear when he writes that "electronic surveillance, coercive interrogation, and limitations on association, detention, and speech […], controlled or forbidden by the United States Constitution, are likely to be promising ways of […] preventing terrorist initiatives."[26] The position taken by these writers reflects arguably a utilitarian position.[27] A utilitarian position would argue along with the 'ticking-time-bomb' argument, pointing out that it would at times be necessary to restrict or even violate rights (even basic human rights as the prohibition of torture) in order to prevent 'greater harm'. This argumentation goes back to Jeremy Bentham's (1748-1832) dictum of establishing the "greatest good for the greatest number" (which in case of a terror attack would be to minimize suffering for the greatest amount of people). This utilitarian reasoning should according to Bentham be the basis for public policy and law.[28]

Support for a balancing of rights and security is, however, not only detectable in the academic literature, but at the level of political leadership as well. For instance, Barack Obama held in a 2013 speech that there was a "need for a balance to be struck between […] security and citizens' rights to privacy."[29] Angela Merkel argued that the German government works "to bring freedom and security into a balance, and thereby secure our way of living."[30] John Reid, British Home Secretary from 2006 to 2007 argued (in 2006) that some freedoms would have to be "modified" in the short run in order to save civil liberties in the long run.[31] And, Andy Burnham of the British Labour party employed this balance analogy in the public debate regarding the IP Act.[32] The EU likewise emphasizes that it wants to strike a balance between liberty and security (e.g., in the EU Counter-Terrorism Action Plan 2005).

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[24] Nickel, *Making Sense of Human Rights,* 122.
[25] Heymann as cited in Brysk, "Human Rights and National Insecurity," 11.
[26] Ibid.
[27] Brysk, "Human Rights and National Insecurity."
[28] Sandel, *Justice: What's the Right Thing to Do?,* 31.
[29] Adrian Guelke, "Secrets and Lies: Misinformation and Counter-Terrorism," In *Illusions of Terrorism and Counter-Terrorism,* ed. by Richard English (Oxford: Oxford University Press, 2015), 107.
[30] Zacharias Zacharakis, "Angela Merkel: Keine Angst," *Zeit Online,* July 28, 2016.
[31] John Reid, August 9, 2006, quoted in Todd Landman, "The United Kingdom: The Continuity of Terror and Counterterror," In *National Insecurity and Human Rights: Democracies Debate Counterterrorism,* ed. by Alison Brysk and Gershon Shafir (Berkeley: University of California Press, 2007), 75.
[32] BBC, "Investigatory Powers Bill: May defends surveillance powers", March 15, 2016.

In the end, many policymakers still seem to evaluate human rights and anti-terrorism as contradictory concepts, resulting in attempts at restricting rights and liberties in order to enhance security and an effective anti-terrorism regime (this was demonstrated by many examples in my analysis). Fearful publics often support such a prioritization.[33] Thus, policymakers' and the public's theoretical understanding of the relation of human rights and anti-terrorism has repercussions on real-life anti-terrorism policymaking. Administrations, which deem rights less important as security and which are willing to trade-off rights in the name of security will implement measures that curtail human rights more than administrations holding approaches which try to achieve both. Again, the administrations analyzed earlier (at least at most times since 9/11) have taken a stance that favors restrictions of rights.

Such standpoints by politicians and the above-mentioned scholars reflect a so-called 'hierarchy of rights' perspective. This line of argument claims that the state would in certain situations necessarily be forced to concentrate its efforts on the protection of the most important right, mostly perceived as the right to life, or right to security. Therefore, other rights constituting an obstacle to the effective protection of these most important rights would have to be restricted.[34] The argument of a hierarchy of rights appeared in the German discourse on the issue in July 2013 when the then German Interior Minister Hans-Peter Friedrich declared the right to security to a 'Supergrundrecht' (super basic right) in order to defend limitations of other rights in the course of Edward Snowden's revelations.[35] Tony Blair had already pointed in this direction from the British perspective in 2001 when he claimed that: "Civil liberties are a vital part of our country, and of our world. But the most basic liberty of all is the right of the ordinary citizen to go about their business free from fear or terror."[36] The idea of balancing rights and security in times of terror threats to the disadvantage of rights rests often on the implementation of a precautionary principle (see Chapter 6). Furthermore, this 'hierarchy of rights' perspective sometimes divides between individual and collective rights, emphasizing that (at times) individual rights to liberty would be trumped by collective rights to

[33] Brysk, "Human Rights and National Insecurity," 6.

[34] Benedetta Berti, "Escaping the Prisoner's Dilemma: Securing a Role for Human Rights in Counter-Terrorism," in *Effectively Countering Terrorism*, ed. by Cornelia Beyer and Michael Bauer (Brighton: Sussex Academic Press, 2009) 79-117. Monshipouri, *Terrorism, Security, and Human Rights*, 192-193.

[35] This crude categorization not only earned him a lot of criticism from rights activists, but also made him the object of mockery among German media. Veit Medick and Philipp Wittock, "Minister Friedrich und die NSA-Affäre: Der USA-Verteidigungsminister," *Spiegel Online*, July 16, 2013.

[36] The Guardian, "Full text of Blair's speech to the Commons," September 14, 2001. https://www.theguardian.com/politics/2001/sep/14/houseofcommons.uk1.

security.[37] In other words, individuals would have to sacrifice a certain amount of personal freedom in order to secure the freedom of society as a whole.[38] Again, this perspective clearly reflects a utilitarian argumentation line of 'the greatest good for the greatest number'.[39]

However, some differentiation is necessary when going through positions on the balance issue. Whereas those authors that have so far been presented take a rather harsh stance and advocate a balance to the disadvantage of rights (e.g., Dershowitz, Ignatieff, Nickel, Heymann), other voices can be found as well. An author using the analogy of a balance while trying to argue against a widespread restriction of rights is e.g., Paul Hoffman, who demands a restoration of "the balance between liberty and security by reasserting the human rights framework, which provides for legitimate and effective efforts to respond to terrorist attacks."[40]

Furthermore, one should keep in mind that the restriction of rights rests on a legal basis (although restrictions are according to a maximalist perspective necessarily in conflict with the spirit of rights regardless of a legal basis). As I pointed out before, the idea of rights derogation in times of emergency is not unknown to human-rights-law itself. In fact, "international human rights standards and humanitarian law have always been sensitive to the balance between liberty and security," as Paul Hoffman notes.[41] Again, according to the principle of *jus cogens*, all of the legally binding human rights documents used in this thesis contain provisions for the derogation of rights (see Chapter 1).[42] Relevant courts have used the analogy of balancing as well. For instance, the ECtHR held in 1989 that "a fair balance between the demands of the general interest of the community [e.g. national security] and the requirements of the protection of the individual's fundamental

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[37] Brysk, "Human Rights and National Insecurity," 6.

[38] Lilian Mitrou, "The impact of communications data retention on fundamental rights and democracy – the case of the EU Data Retention Directive," In *Surveillance and Democracy*, ed.by Kevin Haggerty and Minas Samatas (London: Routledge, 2010), 140.

[39] Donohue, "Security and Freedom on the Fulcrum," 62.

[40] Paul Hoffman, "Human Rights and Terrorism," *Human Rights Quarterly* Vol. 26 (2004): 932. The analogy of balancing liberty and security is used as well by David Whittaker and Jörg Monar, however, in a more neutral fashion. For instance, Whittaker declares the search for the "balance between operating strategies and programmes and the importance of conserving human rights" for one of the main issues of terrorism policy. Whittaker, *Counter-Terrorism and Human Rights*, 2. Monar in his elaboration on the EU's anti-terrorism framework used the analogy as well, emphasizing that the EU and all its international partners would face the challenge "of maintaining a balance between the need to protect its citizens […] and the need to protect those citizens' civil liberties." This challenge would constitute "a fight on two fronts." Jörg Monar, "Conclusions," In *International Terrorism: A European Response to a Global Threat*, ed. by Monar and Mahncke (Brussels: Peter Lang, 2006), 156.

[41] Hoffman, "Human Rights and Terrorism," 950.

[42] Still, a certain core of rights is defined that is not to be derogated under any circumstances. Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), http://hrlibrary.umn.edu/gencomm/hrc29.html#_edn3.

rights," is inherent in the whole convention [the ECHR].[43] Thereby, authors with so different positions as Dershowitz and Ignatieff on the one side and Hoffman on the other side, as well as the ECtHR, are still relating to the same idea – a direct relation between security and rights, in which a fitting balance of rights and security can be detected.

However, the idea of a balancing process between rights and security is flawed. Several authors point to some of those flaws. For instance, Jeremy Waldron is very skeptical about giving up any rights or liberties at all. He remarks that when negative liberties (or negative rights, as described in Chapter 1) are reduced, the powers of the state necessarily increase. This might be risky since state power would "always and endemically [be] liable to abuse.[44] Martin Scheinin calls for caution in regard to using the balance analogy. He argues that whenever this picture of balance between security and liberty is applied, security will appear as the dominant factor.[45] Conor Gearty argues that a viewpoint, which sees "security and human rights in an inevitable collision," is potentially undermining the general acknowledgment of the idea of human rights.[46] Indeed, perceptions of terror threats have started to undermine the acceptance of human rights as a normative cornerstone. Gearty accords with this evaluation when he claims that questions have arisen asking why killing and torturing terrorists cannot be justified.[47] Peter Katzenstein is another scholar criticizing the argument that a trade-off between rights and security is necessary when facing a terrorist threat. He underlines that "one should be wary of putting too much trust in government promises that tilting the balance decisively against civil liberty will be rewarded with special gains in security".[48] Laura Donohue, Ruth Costigan and Richard Stone, as well as Richard Jackson, support this claim that restricting freedoms might not necessarily result in greater security.[49]

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[43] Council of Europe Guideline, 31.

[44] Waldron, "Security and Liberty," 205. Monshipouri argues in a similar fashion. Monshipouri, *Terrorism, Security, and Human Rights*, 195. The term 'negative liberty' was defined by Isaiah Berlin as the absence of interference with an agent's actions by exterior social bodies. Isaiah Berlin, *Liberty*, 2nd ed. (Oxford, Oxford University Press, 2002).

[45] EUI Interviews, "Martin Scheinin on the legality of mass surveillance." https://surveille.eui.eu/

[46] Gearty, *Liberty and Security*, 342.

[47] Ibid., 360.

[48] Peter Katzenstein, "Same War—Different Views: Germany, Japan, and Counterterrorism," *International Organization*, Vol. 57 No. 4 (2003): 757. Jack Donnelly is skeptic towards the idea of restricting rights in order to enhance security as well. For him, a connection between curtailing civil liberties and protecting people against terrorism "is unclear at best." Donnelly, *Universal Human Rights in Theory and Practice*, 247. Monshipouri takes the same position. Monshipouri, *Terrorism, Security, and Human Rights*, 171-172.

[49] Donohue, "Security and Freedom on the Fulcrum." Ruth Costigan and Richard Stone, *Civil Liberties & Human Rights*, 11th ed. (Oxford: Oxford University Press, 2017), 454-455.

In general, the balancing analogy is (at least at times) built on a conception of a possible rational calculation around the benefits and losses in regard to the increase of either anti-terrorism or human rights.[50] However, human rights are essential preconditions for a life in dignity. Rights ideals are supposed to constitute the core of our societies and of our conception of how to provide a life build on dignity. Such notions of dignity and potential full enjoyment of rights and capabilities can hardly be quantified in a way that is fathomable in a rational-choice account. Furthermore, besides the question of practicability of such calculations, I would argue that utilizing a rational choice approach on human rights and human dignity misses the bigger picture due to the described essential nature of rights for individuals and societies. Rational choice calculations do not grasp the true nature of what rights are all about, their wider aims and their spirit are neglected (the latter are the 'bigger picture'). Based on this point and the points delivered in the previous paragraph, I would like to argue that the idea of a necessary balance between security and liberty, and especially anti-terrorism and human rights, contains various loose ends and misleading points. Consequently, it does not serve the purpose of finding a sound course of action in the face of terrorist threats (such a sound course reflects an approach that does not erode the spirit of rights, while still being beneficial).[51]

And indeed, the balance analogy (and its proponents) seems to miss the larger picture in regard to the long-term negative effects of many rights infringing anti-terrorism measures.[52] Such effects are not easy to calculate via a rational choice framework (e.g. potential processes of self-censoring or increased perceptions of being constantly surveyed). Disregarding potential long-term consequences of anti-terrorism can equal counter-productive effects of the same. One such mechanism pertains to the counter-productive long-term effect of discriminatory tendencies. Waldron convincingly describes the groundwork of this process. He holds that "the real diminution in liberty may effect some people more than others." One should not make "the claim that civil liberties are diminished equally for everyone." Waldron therein suggests the existence of a specific distribution of the changes to the alleged balance in the name of security. Certain measures might "trade off the liberties of a few against the security of the majority". He claims that ethnic minorities identified with terrorism (currently often Muslim communities), will potentially lose a higher amount of liberty than other

Richard Jackson et al., *Terrorism: A Critical Introduction* (Basingstoke: Palgrave Macmillan, 2011), 235.

[50] Gustav Lindstrom, "The EU's approach to Homeland Security: Balancing Safety and European Ideals," In *Transforming Homeland Security: U.S. and European Approaches*, ed. by Esther Brimmer (Washington: Center for Transatlantic Relations, 2006), 126.

[51] In the Conclusion, I will point to some measures that try to reflect such a 'sound approach'.

[52] Donohue, "Security and Freedom on the Fulcrum," 60.

groups.[53] What Waldron has in mind here is that certain measures might have a discriminatory character. As an example, Waldron points to the American Patriot Act, which allowed for more extensive surveillance of foreigners than US citizens. Scheinin supports Waldron's claim when he holds that "certain groups of individuals are affected more than the average citizen by counter-terrorism measures" and […] "ethnic or religious minorities are often targeted by counter-terrorism measures affecting a broad range of human rights."[54]

The results of the analysis in this study support these claims. Examples of such processes could be found in the UK's detention of foreign terror suspects, discriminatory tendencies in stop-and-search practices, or discriminatory tendencies in the German dragnet investigation (to name only a few examples). Thus, Waldron's claim indeed holds true, some groups lose more rights in anti-terrorism than others.

Now, via such an unequal loss of rights, processes of radicalization amongst groups who perceive to be treated unfairly can be triggered, with the result that an unequal trade-off of rights can lead to more terrorism and not less.[55] Personal grievances and experiences of personal injustice and lacking opportunities of individual expression (e.g. via cracking down on freedom of expression) are important factors for the engagement of individuals in terror groups.[56] Grievances, experiences of injustice and limited opportunities, however, are with a high likelihood perceived by a larger number of people in a context of an ever more severe and rights-ignorant anti-terrorism framework.[57] Scheinin provides the example of discriminative stop-and-search measures in the UK as potentially facilitating terrorist recruitment.[58] And indeed, a study conducted in Germany in 2007 showed a link between discrimination experiences and radicalization.[59]

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[53] Waldron, "Security and Liberty: The image of balance," 204. Ronald Dworkin agrees to this claim in his essay *The Threat to Patriotism* from 2002. Alan Dershowitz points to this unequal loss of rights and liberties as well. Dershowitz, *Why Terrorism Works*, 194. The same is valid for Donohue, "Security and Freedom on the Fulcrum," 71.

[54] Martin Scheinin, "Terrorism," In *International Human Rights Law*, ed. by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 557. Cass Sunstein is another eminent scholar supporting this argumentation. Cass Sunstein, *Laws of Fear – Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005), 207-223.

[55] Scheinin, "Terrorism," 561.

[56] Donohue, "Security and Freedom on the Fulcrum," 63-69. Jackson, *Terrorism: A Critical Introduction*, 235. Another author who implies that perceptions of injustice give rise to terrorism is Martha Crenshaw. Martha Crenshaw, "The Causes of Terrorism," *Comparative Politics*, Vol. 13 No. 4 (1981): 383.

[57] Donohue, "Security and Freedom on the Fulcrum."

[58] Scheinin, "Terrorism," 561.

[59] Ibrahim Seaga Shaw, "Stereotypical representations of Muslims and Islam following the 7/7 London terror attacks: Implications for intercultural communication and terrorism

Therein, my point is that a discriminatory or in general harsh anti-terrorism course can lead to counter-productive effects. The likelihood of breeding a larger number of individuals in society that will be ready to use violence in order to express their frustrations and political viewpoints increases via implementing policies that curtail rights. Therefore, harsh efforts against terrorism might backfire by a growing amount of future violence.[60] This process is amplified if rights-curtailing measures have a clear disproportionate effect on certain minorities. The validity of this claim is e.g. indicated by the mentioned study conducted in Germany (see above), the fact that the majority of suicide bombers are drawn from vulnerable communities, or historical examples. For instance, the case of Northern Ireland has shown that an increasingly severe anti-terrorism course, including the restriction of civil rights, amplifies grievances and the readiness for violent action among affected individuals and groups.[61]

Instead of a defeat of terrorism, as postulated by some of the above-mentioned scholars, one will, via restricting rights, rather see the breeding of new terrorists, undermining the security situation of countries and populations even more. Thus, the analogy of a balance between security and

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prevention," *International Communication Gazette*, Vol. 74 No. 6 (2012). Donohue supports this point that perceptions of injustice via restrictions of rights will potentially lead to more violent prone individuals as well. Donohue, "Security and Freedom on the Fulcrum," 72.

[60] A range of researchers point to such potential processes, e.g.: Donohue, "Security and Freedom on the Fulcrum," 63. Scott Atran argues that retaliation increases peoples' readiness to act according to radical doctrines and policies. He points to a 2002 poll conducted amongst Palestinians in which sixty-six percent were stating that operations of the Israeli army increased their backing of suicide terrorism. Scott Atran, "Genesis of Suicide Terrorism," *Science*, Vol. 299 No. 5612 (2003): 1538. The UN in its Global Counter-Terrorism Strategy points to violations of human rights as conducive for the spread of terrorism as well. Scheinin, "Terrorism," 562. English underlines that via illegal policies terrorism policies would be "at odds with our ultimate purpose in countering terror in the first place," and would be ineffective and create new terrorists. Richard English, *Terrorism: How to Respond* (Oxford: Oxford University Press, 2009). Andrew Silke argues that harsh counter-measures by states "can have a negative impact far greater than many of the issues which are traditionally seen as root causes of terror." Andrew Silke, "Fire of Iolaus: The role of state countermeasures in causing terrorism and what needs to be done," In *Root Causes of Terrorism: Myths, Reality and Ways Forward*, ed. by Tore Bjørgo (London and New York, Routledge, 2005), 241. Mikkel Thorup and Morten Brænder argue that parts of states' fight of terrorism will create further radicalization and violence. Mikkel Thorup and Morten Brænder, "Undtagelse og terror," In *Antiterrorismens idehistorie – stater og vold i 500 år*, ed. by Thorup and Brænder (Aarhus: Aarhus Universitetsforlag, 2007), 50.

Often terror groups aim at triggering an overreaction by state organs just in order to reap recruitment benefits. Robert J. Art and Louise Richardson, *Democracy and Counterterrorism: Lessons from the Past* (Washington D.C.: US Institute of Peace Press, 2007), 97.

[61] Donohue, "Security and Freedom on the Fulcrum," 63-69. Costigan and Stone, *Civil Liberties & Human Rights*, 455. Similar trends could be observed for the cases of Algeria, Palestine, Cyprus and Kenia. See also my references on historical British anti- and counter-terrorism efforts in Chapter 4.

liberty, and anti-terrorism and human rights, that can easily be adjusted and that will provide security gains in both short and long term scenarios, does not hold true. The relationship between human rights and security (or anti-terrorism) is not an inevitable zero-sum game.[62]

Now, instead of seeing anti-terrorism and human rights as mutually exclusive, one should regard the support of human rights as a promising way of decreasing the risk of terrorism. This position is the third perspective presented here and at the same time the position that this thesis tries to support. I would, thus, like to argue, that the very upholding of human rights standards is a necessary basis for effective anti-terrorism policies. In fact, the support of human rights norms and an increase in the level of enjoyment of human rights in society is an important part of anti-terrorism.[63] Just as certain levels of security can be the basis for the enjoyment of rights, so can rights be the basis for the enjoyment of security.[64] Support of human rights might make a country not less, but more safe, e.g., by pointing, again, to the issue of violent radicalization. Supporting the idea of human rights and putting effort into a high level of rights enjoyment in society is a viable way to decrease the threat of terrorism in the long run. If one understands terrorism (at least partly) as an effect of underlying variables (root causes), then the best strategy appears to be to tackle these variables instead of aggravating the effects of said variables.[65] Or, as Donohue put it: "If part of the reason for the violence in the first place is related to constricted liberty, will further restricting freedoms […] have the desired effect?"[66] In turn, the support of

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[62] Lindstrom, "The EU's approach to Homeland Security," 130.

[63] Shafir, Brysk and Wehrenfennig argue in a similar direction. Gershon Shafir, Alison Brysk and Daniel Wehrenfennig, "Conclusion," In *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, ed. by Alison Brysk and Gershon Shafir (Berkeley: University of California Press, 2007), 177. The same is valid for Monshipouri. Monshipouri, *Terrorism, Security, and Human Rights*, 171.

[64] For instance, Berthold Meyer argues that security efforts have given important stimulation to the whole 'process of civilization'." Berthold Meyer, "Fighting Terrorism by Tightening Laws: A Tightrope Walk between Protecting Security and Losing Liberty," In *Fighting Terrorism in the Liberal State*, ed. by Samuel Peleg and Wilhelm Kempf (Amsterdam: IOS Press, 2006), 88.

[65] Michael Bauer and Cornelia Beyer claim that terrorism policies of states should address the root causes at the social level to deny radicalization. Cornelia Beyer and Michael Bauer, "Introduction," In *Effectively Countering Terrorism*, ed. by Cornelia Beyer and Michael Bauer (Brighton: Sussex Academic Press, 2009), 2. Richard English too claims that states should, when possible, address underlying root causes. English, *Terrorism: How to Respond*. Again, Dershowitz shows a very different opinion. Dershowitz claimed that states should not try to solve the root causes of terrorism. He even claimed that doing so would mean offering encouragement to terrorism, as this would indicate to terrorists that their tactic is effective. "We must commit ourselves never to try to understand or eliminate its alleged root causes, but rather to place it beyond the pale of dialogue and negotiation," Dershowitz held. Dershowitz, *Why Terrorism Works*, 24.

[66] Donohue, "Security and Freedom on the Fulcrum," 63.

human rights to a degree that avoids grievances, experiences of injustice and lacking opportunities (as much as possible) opens up for a higher degree of security as well.[67] The provision of high human rights standards is in this sense understood as terrorism prevention. Via refraining from violating human rights in the course of anti-terrorism, as well as actively working for individuals to enjoy the maximum of rights in the first place (e.g., via social programs, fighting discrimination, supporting education and supporting the full enjoyment of human capabilities at large), terrorist movements will find it much harder to recruit new members, as well as convince individuals of social groups they seek to represent to take up violent means in order to represent the interests of these social groups.[68] In other words, actively supporting human rights is a component of increasing security levels.[69] Fittingly, Scott Atran holds that "ethnic profiling, isolation and preemptive attack on potential (but not yet actual) supporters of terrorism probably will not help […], reducing perceived humiliation may help."[70] Since experiences of discrimination undermine trust in state organs, as a recent study has shown, avoiding the causation of more injustices and grievances would also help in upholding or re-establishing cooperation of minority groups with state organs.[71] That way, it would become more likely that information about

[67] Andreas Bock argues in a similar direction when he claims that states should try to contain the psychological roots of terrorism. States should counter-act the perceptions of discrimination and humiliation among big parts of the Muslim population in Western and non-Western countries. States should try to 'win the hearts' of people instead of creating belligerent strategies. Andreas Bock, *Terrorismus* (Paderborn: UTB, 2009). Wilkinson argued in a similar way, when he claimed that governments should engage more in a "battle of ideas", in order to prevent frustrated citizens from turning to terrorism. Paul Wilkinson, "International terrorism: the changing threat and the EU's response," *Chaillot Paper,* Vol. 84 (2005): 84.

[68] Donohue, "Security and Freedom on the Fulcrum," 74. Monshipouri, *Terrorism, Security, and Human Rights*, 173.

Admittedly, empirical studies have struggled to show a clear correlation between increased education levels and a preventive effect in terms of terrorism. See e.g., Alan B. Krueger and Jitka Maleckova, "Education, Poverty and Terrorism: Is There a Causal Connection?" *Journal of Economic Perspectives*, Vol. 17 No. 4 (2003). Still, improving education levels is not the only necessary approach here, but only one of a wider range of approaches.

[69] Donohue argues for an active support of rights as well in order to increase security of societies. Donohue, "Security and Freedom on the Fulcrum," 68.

[70] Atran, "Genesis of Suicide Terrorism," 1538. Communications scholar Richard Leeman had already constructed a normative approach to terrorism policies in the 1990s, in which he clearly emphasized prevention measures. His starting point was to prevent conflict altogether. The prevention of explicit acts of terror is only a second step in his conception. Leeman underlines that terrorism policy objectives will have to be in line with "democratic value system[s]", and should prevent to abandon democratic principles in the course of such policies. Richard Leeman, *The Rhetoric of Terrorism and Counterterrorism* (Westport: Greenwood Press, 1991), 12**.**

[71] Centre d'étude sur les Conflicts, "The Effects of Counter-Terrorism and Counter-Radicalisation Policies on Muslim Populations in France: A quantitative Study," June 28, 2019.

imminent attacks will reach relevant organs and security would actually be increased, instead of diminished.[72]

Several researchers in the field support the position I take here. For instance, Gearty holds that security cannot be delivered without an "effective system of human rights protection."[73] Paul Hoffman argued that "a war on terror waged without respect for the rule of law undermines the very values that it presumes to protect" and that "the fulfillment of universal human rights is essential to building a world in which terrorism will not undermine our freedom and security."[74] Zygmunt Bauman called on leaders to focus on solving the root causes of terrorism and thereby deprive "the terror-lovers and promoters of the luxury of ample and still swelling recruiting ground."[75] Brysk held in a 2007 publication that "if we can rethink national security so it is […] an evolving mode of protection for citizens from both external and institutional violence, human rights become neither a trade-off nor a luxury. Rather, they constitute an integral part of a sustainable defense of the citizenry and the democratic political community."[76] She furthermore points out that national security builds on human security, which in turn rests on human rights.[77]

A position claiming that supporting rights and constructing politics aiming at the maximal enjoyment of rights can lead to security benefits is, however, not only taken by academics, but also by representatives of international organizations, e.g., the UN.[78] For instance, Sergio Vieira de

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[72] As Donohue pointed out, a loss of trust is counter-productive in terms of anti-terrorism since alienated communities will provide less information about potential imminent threats to state organs. Donohue, "Security and Freedom on the Fulcrum," 64. Todd Landman and Nick Brooke emphasize such points as well. Todd Landman, "Imminence and Proportionality: The U.S. and U.K. Responses to Global Terrorism," *California Western International Law Journal*, Vol. 38, No. 1 (2007): 89. Nick Brooke, "Learning the Lessons of Terrorist Failure: The Dogs that Didn't Bark in Scotland and Wales," *ICCT Policy Brief*, (2019): 11.

[73] Gearty, *Liberty and Security*, 113.

[74] Hoffman, "Human Rights and Terrorism," 932-934.

[75] Bauman furthermore claims that one should rather be afraid of Europe "stooping to the terrorists' mindset and code of behavior", as well as giving up on its defining ideas, e.g., morality, liberty, and equality. Zygmunt Bauman, "A Few Comments on the Mis-Imagined War on Terrorism," *socialeurope.eu*, March 29, 2016.

[76] Brysk, "Human Rights and National Insecurity," 2.

[77] Ibid., 13. In a slightly more neutral tone, Alex Schmid deemed that upholding the moral high ground, when faced with a terrorist threat, would be more important than intelligence in the long run. Alex Schmid, *The Routledge Handbook of Terrorism Research* (London: Routledge, 2013), 32.

[78] The same is valid for NGOs working in the human rights field. For instance, Amnesty International argues that human rights protection and protection against terrorism are two mutually reinforcing concepts, instead of contradictory ideas. They argue that necessary anti-terrorism measures could be carried out inside the boundaries of human rights law and that upholding the own moral high ground (by living up to the own standards) lets the number of people motivated to carry out terror attacks decline. Amnesty International, *Security and*

Mello, former UN High Commissioner for Human Rights shared this view when he declared in 2002 that "the best — the only — strategy to isolate and defeat terrorism is by respecting human rights, fostering social justice, enhancing democracy and upholding the primacy of the rule of law."[79] Furthermore, Kofi Annan - then UN Secretary-General – declared, "there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long run, we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism."[80] Later, he added that "respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism — not privileges to be sacrificed at a time of tension." Otherwise, Annan underlined, "we deliver victory to terrorists no act of theirs could achieve."[81]

National governments have, in opposition to UN representatives, been more careful in terms of declaring the support of human rights for a strategy that can increase security (if they have not taken a trade-off stance as exemplified above). For instance, the German government on the occasion of Germany taking over the chair of the OSCE in January 2016, argued for the general compatibility of human rights and anti-terrorism. The then German Foreign Minister Frank-Walter Steinmeier declared that both the support of human rights principles and the fight against terrorism would be at the core of the German chair presidency of the OSCE.[82] Thus, the

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Human Rights: Counter-Terrorism and the United Nations (London, Amnesty International Publications, 2008), 15.

[79] Office of the UN High Commissioner for Human Rights, "Terrorism." https://www2.ohchr.org/english/issues/terrorism/.

[80] Kofi Annan as cited in Alex P. Schmid, "Terrorism and Human Rights: A Perspective from the United Nations," In *Terrorism and Human Rights*, ed. by Magnus Ranstorp and Paul Wilkinson (London and New York: Routledge, 2008).

[81] Annan as cited in David Whittaker, *Counter-Terrorism and Human Rights* (Harlow: Longman, 2009), 33. The new Secretary General of the UN, Antonio Guterres argues in a similar fashion. In a speech at the SOAS University in London, he held that: "Terrorism is fundamentally the denial and destruction of human rights. The fight against terrorism will never succeed by perpetuating the same denial and destruction. […] Terrorism thrives when disenfranchised people meet nothing but indifference and nihilism. It is deeply rooted in hopelessness and despair […] societies based on respect for human rights and with economic opportunities for all represent the most tangible and meaningful alternative to the recruitment strategies of terrorist groups." United Nations Association, "Terrorism is fundamentally the denial & destruction of human rights: UN chief's robust, principled approach to countering terrorism," November 16, 2017. Not all UN representatives have, however, directly pointed to a supportive role of human rights. Mary Robinson, former UN High Commissioner for Human Rights, formulated more neutrally that it is possible to fight terrorism "while fully upholding human rights." Robinson as cited in Whittaker, *Counter-Terrorism and Human Rights*, 33.

[82] OSCE, "Dialogue, trust and security are watchwords for 2016 Germany's OSCE Chairmanship, Foreign Minister Steinmeier tells OSCE Permanent Council," July 2, 2015.

awareness for human rights as a potentially effective tool in terms of decreasing terror threats still needs to be better developed at the level of European governments (especially when reflecting the statements by Tony Blair and Theresa May provided earlier). Still, a policy line that supports human rights instead of undermining them not only lives up to binding legal obligations as well as the spirit of rights, it additionally constitutes a policy line that bears a larger potential for reducing terror threats.

The EU has in a similar fashion pledged to fight terrorism while respecting human rights. See e.g., the EU Counter-Terrorism Strategy 2005. Of course, concerning such government statements, it is always the question to what extent speeches, publications, and policy papers are consistent with the actual anti-terrorism policies carried out by such authorities.

Conclusion

I have tried to show that human rights have been undermined by anti-terrorism policies in the cases of Germany, the UK, and the EU. Several courts ruled that despite existing terror threats some anti-terrorism policies have not been upholding demands for rights limitation and derogation (often proportionality).[1] Based on such court rulings and readings of important rights documents from the ECHR to the ICCPR, my sense is that many policies involved in current European anti-terrorism stand on very shaky legal ground. However, as a larger point, wider human rights aims emanating from the UDHR and the spirit of rights have been violated in numerous cases.[2] Therein, a range of rights for citizens and residents of the mentioned countries have come under pressure. These rights include the right to privacy, freedom of expression, freedom of association and assembly, freedom of movement and the right to life, liberty and security. A range of policies or measures additionally entailed a discriminatory character, violating the right to be free from discrimination. The UK has implemented the greatest number of rights invasive policies and arguably the policies with the most severe impact on human rights. Examples of such policies are the former practice of indefinite detention of foreign terror suspects, the UK's data retention scheme, British mass surveillance or the IP Act. Germany has curtailed rights in the course of anti-terrorism policy as well, e.g. via policies on data retention, its Air Security Law, or dragnet investigations. The EU is e.g., responsible for criticizable policies in relation to data retention, the collection of flight data, or the construction of biometric databases. Therein, all three cases arguably contribute to the deterioration of rights standards in European anti-terrorism.

The policy line by the players addressed here has become ever stricter and gradually more rights invasive; alleviations have been only rarely detectable (if so, then only for isolated policies), a softening of the general policy line (or a rolling back of infringing anti-terrorism measures) has not taken place in any of the analyzed cases, even in years when the frequency of terror attacks dropped.[3] Accordingly, sunset clauses were only attached to

[1] In other words, anti-terrorism policies did often not survive the legal evaluation of weighing different rights principles (e.g. the rights to bodily integrity or security against the mentioned undermined rights) against each other (*Rechtsgüterabwägung* in German).

[2] The political motivation for implementing such policies often seems to stem from a widespread perception of being too vulnerable to terrorist threats in case such policies are *not* implemented. The trigger for implementation is often a concrete attack, sometimes in combination with public cries for more security. Thus, many anti-terrorism policies are implemented in order to give the majority of society a feeling of reassurance by sacrificing freedoms and rights in the course of installing a perception of stability and security.

[3] Gearty evaluates that current anti-terrorism legislation tends to be permanent, instead of constituting a time-limited response. Conor Gearty, "No Golden Age: The Deep Origins and Current Utility of Western Counter-Terrorism Policy," In *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English (Oxford: Oxford University Press, 2015), 91. Jeanne

anti-terrorism legislation in the minority of cases.[4] In general, the restriction of and derogation from rights norms has rather become the norm than the exception in European anti-terrorism. This trend is not surprising if one reflects on how the threat by terrorism is often understood. Since anti-terrorism measures are implemented to tackle or solve the problem of terrorism, the amount of anti-terrorism must logically increase, as terrorism can never be defeated or eradicated in its entirety.[5] Therefore, one can witness a continuous addition of new layers of anti-terrorism. When a specific anti-terrorism policy or practice was stopped in the latest years, then it was predominantly against the background of a ruling in a relevant international or national court. In essence, European anti-terrorism policy follows a trend of "increased reliance on the precautionary logic".[6] Such a precautionary logic aims at preventing risks at almost all costs, even when causalities are unclear and the interferences with human rights might be highly disproportionate to existing risks.[7] The party affiliation of high-stake policymakers (the governments) does not seem to play a decisive role in terms of such processes (in all three cases).

In general, two major approaches to dealing with terrorism could be detected among the three analyzed cases. First, to construct a system that is supposed to scan all of society for potential threats, and second, to

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Bonnici speculated in 2007 that potentially a major case of breach of privacy rights becoming public could restore "the balance between security and rights" in the sense of decreasing rights infringing measures against the populations' privacy. Jeanne Bonnici, "Recent European Union developments on data protection … in the name of Islam or 'Combating Terrorism'" *Information & Communication Technology Law*, Vol. 16 No. 2 (2007), 173. However, although such a big case did indeed occur with the Snowden revelations, not much changed in terms of rights infringing surveillance and its detriment effects on privacy rights.

[4] Monica den Boer, "Counter-Terrorism, Security and Intelligence in the EU: Governance Challenges for Collection, Exchange and Analysis," *Intelligence & National Security*, Vol. 30 No. 2-3 (2015): 220.

[5] English holds that one key aspect of responding to terrorism would be the acknowledgment that "terrorism is not going to go away". He evaluates that the War on Terror can never end, as "war against terrorism as such is not winnable, we cannot utterly eliminate terrorism". We would have to learn to live with this fact, and rather concentrate on minimizing destruction and casualties. Richard English, *Terrorism: How to Respond* (Oxford: Oxford University Press, 2009), 122.

[6] den Boer, "Counter-Terrorism, Security and Intelligence in the EU," 219. Such a trend is, however, not only detectable for Europe but the Western world as such, or even on a global level. For instance, John Ashcroft, Attorney General under George W. Bush, spoke openly of the US following such a 'paradigm of prevention.' Ashcroft as cited in David Cole, "Respecting civil liberties and preventing overreach are critical to preserving America's security and ideals," In *Debating Terrorism and Counterterrorism: Conflicting Perspectives on Causes, Contexts, and Responses*, ed. by Stuart Gottlieb (Washington D.C.: CQ Press, 2010).

[7] Cass Sunstein, *Laws of Fear – Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005).

concentrate on the social group that is perceived to constitute the most severe threat. Both approaches are implemented simultaneously.

The first approach is reflected by a trend towards an increasingly dense net of broad surveillance in efforts of detecting alleged radicals among the own population.[8] The use of surveillance has become a permanent institution, and surveillance of individuals is no longer connected to genuine suspicion.[9] However, this approach of moving towards all-encompassing surveillance is both ineffective and rights-invasive. As pointed out earlier, surveillance interferes with the right to privacy, freedoms of expression, assembly, association, and movement. By undermining these rights, the independent role of the citizen in society is endangered. Therein, wide-scale surveillance measures change the relationship between the individual and the state, to the advantage of the state. Democratic societies rest on the idea that its citizens hold the state accountable; however, in a surveillance society, the state is holding its citizens accountable.[10] If privacy is "a matter of individual control and choice," surveillance eradicates this possibility of self-determination.[11] Via digital storage of information, authorities can potentially save decades of communication of every individual. The movement of individuals can be surveyed as well in a detailed fashion. Surveillance, therein, becomes a tool for social control.[12] Awareness of such developments might lead to self-censorship, a damaged public sphere, and a more conformist society. Thereby, everyone's potential to speak truth to power - indispensable for every functioning democracy - is damaged.[13] This trend of growing surveillance warrants comparison to Bentham's Panopticon. Just as the Panopticon, the increasingly dense net of surveillance that individuals are faced with triggers the preconditions for some parts of society to eradicate unwished behavior and become more conforming. Online surveillance, as well as surveillance of public areas, might thus make the Panopticon's promise of a less visible but effective state control a reality. Reflecting on

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[8] Torin Monhan spoke of a trend towards a growing pervasiveness of surveillance as well. Torin Monahan, "Surveillance as governance: Social inequality and the pursuit of democratic surveillance," In *Surveillance and Democracy*, ed. by Kevin D. Haggerty and Minas Samatas (Oxon: Routledge, 2010), 105.
Indeed, the UK has played an active and important role in the construction of this extensive surveillance system, with Germany and the EU supporting the major players of Western surveillance, the Five Eyes (US, UK, Canada, Australia, and New Zealand).

[9] Konrad Lachmayer and Normann Witzleb, "The Challenge to Privacy from Ever Increasing State Surveillance: A Comparative Perspective," *University of New South Wales Law Journal*, Vol. 37, No. 2 (2014): 774.

[10] The current surveillance system is non-transparent; accordingly, it is not possible to hold authorities accountable.

[11] Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World* (London: Atlantic Books, 2016), 288.

[12] Monahan, "Surveillance as governance," 105.

[13] Garton Ash, *Free Speech: Ten Principles for a Connected World*, 292.

Foucault's take on the Panopticon, surveillance is indeed increasing a permanent consciousness of state power and opening up for an automatic functioning of this power.[14] Truly, terrorism policies have had their part in constructing a system that knows the potential for all-encompassing surveillance to be a reality.[15] In the context of such ever-intensified surveillance, enabling an ever-growing reach of anti-terrorism, members of traditionally free societies "are increasingly becoming glass people," and "tagged pigeons."[16] The effectiveness of such far-reaching measures must be questioned. Despite growing amounts of data available to security agencies, the latest wave of IS-related terrorism could not be stopped. The biggest challenge seems to be to process data in the right way, not to gain more and more data. For instance, German authorities had all necessary information on Anis Amri, the perpetrator of the 2016 attack on the Berlin Christmas market (from traditional sources, not mass surveillance). However, they were not processed in an effective way.[17] Therein, the potential for a better anti-terrorism lies also in the improvement of data processing, not the rights infringing collection of as many data as possible.

The second approach, to execute special scrutiny on the perceived 'suspect community' is illegitimate and ineffective as well. The discriminatory tendencies against Muslims that can be found in a range of anti-terrorism policies, not only violate rights norms, but also contribute to a split in society, which is counter-productive.[18] Discriminatory tendencies in the anti-terrorism policy sector feed into other instances of discrimination or 'special treatment' of Muslim minorities. This amplifies the effect of the discriminative anti-terrorism policies. In the latest years, several Western societies have adopted laws that ban Burkas and Niqabs, prevent all public service employees from wearing headscarves of any variety or halted the construction of minarets or mosques.[19] When such measures are combined

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[14] Michel Foucault, *Discipline and Punish: the birth of the prison* (New York: Pantheon Books, 1977).

[15] Lachmayer and Witzleb, "The Challenge to Privacy from Ever Increasing State Surveillance," 774.

[16] Garton Ash, *Free Speech: Ten Principles for a Connected World*, 283, 324.

[17] As mentioned earlier, the 9/11 Commission pointed out similar problems in connection with the 9/11 attacks.

[18] Scott Atran, "Genesis of Suicide Terrorism," *Science*, Vol. 299 No. 5612 (2003): 1538. Discrimination on basis of ethnicity or religion is further listed as one of fourteen preconditions of terrorism in Tore Bjørgo, *The Root Causes of Terrorism*. Adrian Hyde-Price, "Germany: Redefining its security role," In *Global Responses to Terrorism: 9/11, Afghanistan and Beyond*, ed. by Mary Buckley and Rick Fawn (London and New York: Routledge, 2003).

[19] Radhika Sanghani, "Burka bans: The countries where Muslim women can't wear veils," *The Telegraph*, August 17, 2017, https://www.telegraph.co.uk/women/life/burka-bans-the-countries-where-muslim-women-cant-wear-veils/. Nick Cumming-Bruce and Steven Erlanger, "Swiss Ban Building of Minarets on Mosques," *The New York Times*, November 29, 2009, https://www.nytimes.com/2009/11/30/world/europe/30swiss.html.

with anti-terrorism policies that mainly target Muslim minorities, e.g. in terms of de-radicalization, and coupled with at times aggressive foreign policy towards the Middle East, as well as a social context that sees Muslim minorities to hold a lower average income and education levels, higher unemployment and poverty rates, the perception of discrimination is amplified. The perception of being discriminated and standing outside of mainstream society increases the risk of additional radicalization and recruitment for terrorist actions, it creates more angry and disillusioned members inside of Europe's Muslim communities.[20] Such perceptions will distill a tiny minority of individuals that are willing to use violent measures in order to overcome grievances of personal or perceived religious nature (e.g. by helping to construct a Caliphate).[21] In this sense, rights-infringing anti-terrorism equals throwing logs on the fire of international and intercultural conflict, instead of quenching it. Furthermore, as a consequence of a one-sided approach, authorities are not sufficiently prepared against other sorts of terrorism, which does not reflect an efficient approach towards terrorism as a whole.

Rights norms came under pressure in Germany, the UK and at the EU level, while all three entities were connected to legally binding rights norms and while (some) leaders of these entities continue to emphasize the importance of rights. Thus, one can point to a clear misfit between human rights protection in theory and in practice, constituting what Gearty called an "ambiguity towards the practice of human rights" of those very countries that are commonly identified with promoting human rights.[22] By moving away from rights norms and assigning considerably less importance to the overall framework of human rights (including plans to step away from of binding international rights treaties, e.g., the UK in case of the ECHR and the CFREU) such states move away from the "right side of history".[23] However, moving away from rights obligations damages European democracies. As

[20] Laura Donohue, "Security and Freedom on the Fulcrum," In *Terrorism and Human Rights*, ed. by Magnus Ranstorp and Paul Wilkinson (London and New York: Routledge, 2008). Furthermore, police cooperation of minorities is diminished in contexts of discriminatory tendencies. Gershon Shafir, Alison Brysk and Daniel Wehrenfennig, "Conclusion," 180.

[21] The reasons for engagement of individuals in terror groups often rest on personal grievances (personal experiences of injustice) or lacking modes of expression (or change), as terrorist literature on the psychological aspects tell us. Donohue, "Security and Freedom on the Fulcrum," 63.

[22] Conor Gearty, "Terrorism and Human Rights," *Government and Opposition*, Vol. 42 No. 3 (2007): 346.

[23] After the end of the Cold War, several Western states self-righteously applauded themselves "for having been on the right side of history," as Gearty remarks. This would already at the time have reflected double standards, since many Western states were themselves struggling with the growing gap between rich and poor, as well as upholding basic social and economic human rights, such as healthcare and ensuring social security. Gearty, "Terrorism and Human Rights," 345-346.

democracies are dependent on a sound level of individual rights, a trend that diminishes individual freedom in a continuous fashion is a severe threat to liberal democracy. When governments of liberal states stop to act on liberal norms and to protect individual rights democratic systems might become fundamentally altered, to the degree that the democratic core of such systems vanishes.[24]

Moving away from rights obligations, however, undermines not only the idea of democracy, but also the mentioned spirit of rights. Therefore, the primary issue produced in my analysis may really be the negative effects of anti-terrorism measures on the rights' philosophical framework (the spirit of rights). Simply, we are looking at a range of policies eroding the grounds for liberty's universality, the space for the individual's self-realization, the ability to freely formulate opinions and communicate them, and for equal, just and dignified treatment of all members of European societies. One can make arguments about the need for security. Clearly, that is a human right too. Security is, however, not the *only* human right, or a more important right. Therein, one can wonder what attempts to increase security are worth if it does not allow for broad senses of dignity, democratic practice, inclusion, and the ability of individuals to pursue their capabilities. The gold standard for human rights is whether or not one is able to engage in the "full" realization and development of the self. If one needs to fear retribution by the state if one holds an unusual opinion, is a member of an ethnic minority, or may not have citizenship in the nation in which one resides, then the conditions for such a full realization and development are not provided. For sure, one has a right not to be harmed in one's physical integrity by a terrorist attack. One also has a right, however, to enjoy the protection of all other rights emanating from the human rights framework; only when all rights are regarded, the promise of universal, indivisible and inalienable rights is fulfilled. In any case, individuals in European societies - and in Western societies in general - need to ask themselves the crucial question if they are willing to continue legitimizing political leaders in curtailing, or at least making *de facto* overtures to curtailing essential human rights.

[24] Donohue, "Security and Freedom on the Fulcrum," 67. Furthermore, rights infringing anti-terrorism measures have potential repercussions on rights practices in authoritarian or dictatorial regimes. Such regimes will gain the option to hide behind European malpractices or justifications concerning their own rights violations. Conor Gearty, *Liberty and Security* (Cambridge: Polity Press, 2013), 103. By not living up to their own standards, the entities in focus in this study make it easier for other players to excuse policies, which violate human rights. In this context, Tim Dunne warns against "copy-cat breaches of fundamental rights" in China, Russia, Israel or Egypt. This point follows the fact that governments import and export anti- and counter-terrorism measures and policies. Tim Dunne, "The Rules of the Game are Changing: Fundamental Human Rights in Crisis After 9/11," *International Politics*, Vol. 44 (2007): 281. Shafir, Brysk and Wehrenfennig, "Conclusion," 182.

On these grounds, I would like to emphasize anti-terrorism approaches that potentially will have a positive impact without endangering rights and democracy. These approaches are both short-term and long-term and rest on a mix of 'sticks and carrots'.[25] This duality of approaches reflects state authorities' problem to be pressed to react swiftly to concrete acts of terrorism while trying to construct a long-term strategy in order to undermine the phenomenon.[26] Too often after 9/11, governments have given the impression to rest too much on short-term approaches. However, a definition of long-term goals and approaches is a necessity.[27] Admittedly, as no 'silver bullet' against terrorism exists, also the following approaches will not eradicate the threat of terrorism. Still, they might open different allays to contain and reduce it.[28] Whereas long-term approaches seem more promising for preventing terrorism in the first place, legitimate short-term policies are necessary in order to tackle the 'symptoms' of already existing terrorism. Such short-term measures can, for instance, be the surveillance of known violence-prone individuals, (so-called 'endangerers'), legal actions against those inciting to concrete violence, banning people from joining a foreign war, banning weapons exports and strengthening the resilience of urban areas, as well as strengthening police capacities, and European cooperation.[29]

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[25] This is broadly following categorizations by Crelinsten and Schmid, as well as Art and Richardson. Ronald Crelinsten and Alex Schmid, "Western responses to terrorism: a twenty-five-year balance sheet," In *Western Responses to Terrorism*, ed. by Crelinsten and Schmid (London: Frank Cass Publishers, 1993). Robert J. Art and Louise Richardson, *Democracy and Counterterrorism: Lessons from the Past* (Washington D.C.: US Institute of Peace Press, 2007), 564.

[26] David Long recognized this problem already in 1995. David Long, *The Anatomy of Terrorism* (New York: Free Press, 1995).

[27] Art and Richardson, *Democracy and Counterterrorism*, 97. Admittedly, some state strategies behind terrorism policies do include long-term approaches, aiming at tackling the roots causes of terrorism, e.g., the UK's CONTEST strategy. However, these approaches, for instance an outreach to the Muslim community or poverty eradication are not prioritized and not delivered upon. Qurine Eijkman and Baart Schuurman, *Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation* (The Hague: ICCT, 2011), 5.

[28] Art and Richardson point out that there is no silver bullet to fight terrorism and that this simple fact deserves continuous reiteration. Art and Richardson, *Democracy and Counterterrorism*, 564.

[29] David Omand rightly claims that in order to improve security, cooperation between European intelligence powers is necessary. David Omand, "Pursue and Prevent: Keynote Panel Discussion, Security – Judicial Oversight – Secure Communications – Cost Civil Liberties: Can we strike a balance between these competing priorities?" World Counter Terror Congress, London, April 19-20, 2016. English too argues that close coordination in the course of terrorism policies would be crucial, both between domestic institutions and on the international level (e.g., between local police forces). English, *Terrorism: How to Respond?* Leeman held already at the beginning of the 1990s that "the primary objective of international counterterrorism should, therefore, be to ensure international cooperation, especially for the purpose of preventing the escalation of conflict." Richard Leeman, *The Rhetoric of Terrorism*

However, this must be done in accordance with human rights standards. One might furthermore try to get into a dialogue with groups responsible for terrorist actions, not in order to necessarily start negotiations and make concessions, but rather to launch a process of discourse and counter-discourse in the public sphere, which might in effect reveal the moral, empathic and humane emptiness of certain violent groups (e.g. IS).[30]

The upholding of rights standards is also a necessity in efforts to de-radicalize violence-prone extremists or to prevent radicalization in the first place. For sure, anti-radicalization programs are acting on a fine line, between potentially undermining rights and freedoms and benefitting societal security. Instead of operating with confrontational approaches, as the British Channel program, anti-radicalization programs should rather implement an inclusionary approach as its cornerstone. If anti-radicalization efforts and programs do not interfere with human rights, they can form legitimate tools of anti-terrorism.[31] The prevention of violence-prone radicalization of minor age refugees would be an important application area for inclusive anti-radicalization efforts. This is especially valid for those minor age refugees who entered Europe all alone and are thus particularly vulnerable to radicalization (as well as crime).[32] Alone eight thousand minor age refugees have been reported missing in Germany alone in the last years (as of 2017). Many of them find themselves in desperate situations and are thus vulnerable to harmful influences, including radical violent Islamism. This is valid for minors in prisons as well. A 2018 study amongst thirty-two German juvenile prisons showed that three-quarters of them were dealing with radicalization issues of inmates (both Islamist and rights wing, including incitement to violence). However, only half of the prisons were offering support programs for such inmates (e.g., exit support or anti-

and Counterterrorism (Westport: Greenwood Press, 1991), 12.

[30] Still, Bock evaluates that negotiating with terrorists and terroristic organizations could be a promising strategy. By negotiating one could give potential supporters of terrorists the perception that only non-violent measures such as making compromises bring progress. This would diminish the picture of Western governments as 'the enemy', and in consequence, diminish the number of potential supporters of terrorism. Andreas Bock, Terrorismus (Paderborn: UTB, 2009), 70-86.

[31] One component of a broad scale anti-radicalization effort, which would reflect a democratization effort at the same time, could be educational initiatives in terms of digital literacy and critical consumption. This might be a promising approach in an age of growing post-factualism. Julia Ebner, *The Rage: The Vicious Circle of Islamist and Far-Right Extremism* (London and New York, I.B. Tauris, 2017), 205.

[32] An Israeli study showed that individuals in desperate situations are more receptive for radical 'solutions' including violent acts. Angelika Finkenwirth, "Terrorismus: Gefährder abschieben ist nur ein Teil der Prävention," Zeit Online, July 31, 2017. https://www.zeit.de/politik/deutschland/2017-07/terrorismus-gefaehrder-praevention-faq

aggression training).[33] Of course, the provision of 'treatment' programs in prisons does not guarantee success, although some specific approaches such as early release options as rewards or exposure to 'mainstream' Islam appear to have potential. Of course, to expect that such programs will work with everyone would be unrealistic, but a lack of such programs will for sure produce worse results.[34]

Another short-term (or potentially middle-range) strategy pertains to European intelligence services. It has been pointed out that powers given away to intelligence agencies will always be used, and additionally almost always be misused.[35] This claim connects with a point by Shoshana Zuboff who argued, "every digital application that can be used for surveillance and control will be used for surveillance and control, irrespective of its originating intention."[36] Global terrorism has often provided a welcome justification to intensify the grip of intelligence agencies on individuals' data and to enlarge surveillance programs.[37] Therefore, it is not enough to call on intelligence services not to misuse powers provided to them, rather, effective scrutiny and oversight on the actions of such agencies are necessary, combined with a larger amount of transparency.[38]

Another short-term approach, when reflecting on the media and public, would be to reduce alarmist attitudes. For sure, attacks are tragic events; however, does every attack have to lead to new demands for sharper anti-terrorism policies? Clearly, ignoring the problem is not going to be effective as well, but there is a difference between hysteric alarmism and rational observation of developments (this includes the attitude of mass media). Therefore, 'to learn to live with it', or an attitude towards terrorism

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[33] Nadine Zeller, "Radikalisierung statt Resozialisierung: In Jugendgefängnissen verbreitet sich der Salafismus." *Allgemeine Zeitung*, February 25, 2018.
Such de-radicalization or prevention programs reflect a battle of ideas (sometimes called for the 'battle for the hearts and minds'). For example, Alex Schmid proposes such a battle as one of his twelve rules for preventing and combatting terrorism. Alex Schmid, The Routledge Handbook of Terrorism Research (London: Routledge, 2013), 38.

[34] Andrew Silke, "Terrorists and extremists in prison: Psychological Issues in management and reform," In *The Psychology of Counter-Terrorism*, ed. by Andrew Silke (London and New York: Routledge, 2011), 131-132.

[35] Eric King, "Pursue and Prevent: Keynote Panel Discussion," World Counter Terror Congress, London, April 19-20, 2016.

[36] Shoshana Zuboff, "Be the friction – our response to the New Lords of the Ring," *Frankfurter Allgemeine Zeitung*, June 25, 2013.

[37] Adrian Guelke, "Secrets and Lies: Misinformation and Counter-Terrorism," In *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English (Oxford: Oxford University Press, 2015), 108.

[38] Shafir, Brysk and Wehrenfennig argue in a similar direction when they demand that national security policies must be made more transparent and protected from serving the interests of a narrow elite. Gershon Shafir, Alison Brysk and Daniel Wehrenfennig, "Conclusion," 179. Martin Scheinin rightly demands more scrutiny for all anti-terrorism legislation (including legislation steering intelligence agencies). Scheinin, "Terrorism," 557.

that resembles the British 'Stiff Upper Lip'[39] towards the German Blitz in the 1940s would be a more prudent attitude. A change of attitude could, as well, diminish the pressure perceived by leading politicians to be forced to deliver an ever-enhancing anti-terrorism framework in order to please frightened citizens. Arguably, first signs of such a 'Stiff Upper Lip' were perceivable amongst the German public after the attack on the Christmas market in Berlin in December 2016. The public reacted not with hysteria, but with considerateness. However, German politicians were instinctively willing to tighten the anti-terrorism legislation, even before an analysis of the attack was provided. Thus, a change of attitude towards Islamist terrorism might be developed on the side of the population, before being adopted by policymakers.

As an addition to these short-term strategies, temporary limitations of and derogations from (few) rights, are not inconceivable. However, only in exceptional situations and if they are *clearly necessary* for a reduction of the threat and if they are transparent and short-term (sunset clauses could be an effective way of increasing the likelihood of the last).[40] Furthermore, they cannot be of such frequency that they would become the rule instead of the exception (as it seems to be the trend in several European countries).

Generally, (inclusive) long-term approaches seem more promising in order to reduce the general level of potential terrorist violence, than trying to tackle the symptoms.[41] The overall idea is to tackle the root causes of terrorism and to respond to grievances that might trigger violent reactions such as terror tactics.[42] Therein, Western societies need to look at their own

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[39] English, *Terrorism: How to Respond?*, 120. Peter Lehr, "PURSUE and PROTECT: Looking Ahead – How Can We Expect Terror, and Counter Terror, to Develop over the Medium-Term?" World Counter Terror Congress, London, April 19-20, 2016. One might also use Herfried Münkler's term of 'heroic composure'. Herfried Münkler, "Der Terror und wir," In *Terrorismus und Extremismus: der Zukunft auf der Spur*, ed. by Uwe Kemmesies (München: Luchterhand, 2006).

[40] Costigan and Stone fittingly emphasized that the crucial category in terms rights restrictions is *necessity* (as opposed to e.g. a 'balance'). Ruth Costigan and Richard Stone, *Civil Liberties & Human Rights*, 11th ed. (Oxford: Oxford University Press, 2017), 454. Gustav Lindstrom supported the idea of an increased usage of sunset clauses. Lindstrom, "The EU's approach to Homeland Security," 131.

[41] Long-term approaches almost necessarily need to try to bolster rights instead of pressing them, since – as explained earlier – a strategy of pressing rights in the name of security is likely to be counter-productive in the long run. Donohue, "Security and Freedom on the Fulcrum," 73. In this sense they need to be inclusive approaches, as e.g., proposed by Clive Walker. Walker holds that democracies faced by terrorism must remain inclusive and must hold their nerve and their "cherished values in the face of the heat and light of the terrorist spectacular." Clive Walker, "Policy Options and Priorities: British Perspectives", In *Confronting Terrorism: European Experiences, Threat Perceptions and Policies*, ed. by Marianne van Leeuwen (The Hague: Kluwer Law International, 2003), 35.

[42] Shafir, Brysk and Wehrenfennig share my demand to tackle such grievances in order to decrease the threat of terrorism. Shafir, Brysk and Wehrenfennig, "Conclusion," 180. So do

shortcomings. A starting point is here to reconsider foreign policy, e.g. abandoning overreactions such as military invasions, which stir resentment and additionally might leave a power vacuum for extremist forces or reconsidering alliances with extremist regimes, e.g., Saudi Arabia.[43] Additional potentially promising focal points aiming at the 'external' are a process of successful development support (including humanitarian help) and conflict prevention abroad.[44] However, the larger scope of policy options lies in the domestic arena. Here Western states need to reconsider some shortcomings as well. I have already discussed how avoiding reactions from the side of authorities that are rights evasive (and especially discriminatory), will create fewer angry and frustrated individuals and will be beneficial in the long-run. This approach is to be suggested as one domestic focal point. Still, a more active policy approach is asked as well. This pertains to facing shortcomings in terms of injustices in social policy which higher the risk of people turning to terrorist violence.[45] For example, to strengthen efforts of integrating youths with migrant backgrounds into the labor market, as well as society and culture at large, in order to prevent them from turning to other alternatives deems highly significant.[46] Such efforts point at a full enjoyment

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Michael Bauer and Cornelia Beyer, who claim that terrorism policies of states should address the root causes at the societal level to deny radicalization. Cornelia Beyer and Michael Bauer, "Introduction," In *Effectively Countering Terrorism*, ed. by Beyer and Bauer (Brighton: Sussex Academic Press, 2009), 2.

[43] English, for instance, points to the creation of IS which was (at least in part) made possible by the US military invasion in Iraq in 2003. Richard English, "Introduction: The Enduring Illusions of Terrorism and Counter-Terrorism," In *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English (Oxford University Press: Oxford, 2015), 2. English builds his point, that over-militarized responses should be avoided, on historical examples, which would show that "military means can be ambiguous and often counterproductive, […] French experience in Algeria, British experience in Northern Ireland and Israeli experience with Palestinian terrorism all suggested the limitations of military muscle." English, *Terrorism: How to Respond*, 120-143. TTSR (*Transnational Terrorism, Security and the Rule of Law*) Research Project. *Theoretical Treatise on Counter-Terrorism Approaches*, 2008, 25. https://www.transnationalterrorism.eu/. Rashmi Singh, "Counter-Terrorism in the Post 9/11 Era: successes, Failures and Lessons Learned," In *Illusions of Terrorism and Counter-Terrorism*, ed. by Richard English (Oxford: Oxford University Press, 2015).

[44] Mahmood Monshipouri, *Terrorism, Security, and Human Rights* (Boulder and London: Lynne Rienner Publishers, 2012), 6. Humanitarian help is evaluated as a promising strategy by Bock in order to reduce hostile attitudes. He explains that the share of people in Indonesia holding a positive view of the US increased from fifteen to thirty-eight percent in the course of the US emergency help to Indonesia after the big Tsunami in 2004 (the approval of Osama Bin Laden dropped from fifty-eight to thirty-five percent meanwhile). Bock, *Terrorismus*, 70-86.

[45] Kofi Annan's statement about a connection between questions of social justice and terrorism points in this direction as well. Kofi Annan as cited in Alex P. Schmid, "Terrorism and Human Rights: A Perspective from the United Nations," In *Terrorism and Human Rights*, ed. by Magnus Ranstorp and Paul Wilkinson (London and New York: Routledge, 2008).

[46] I mention here the integration of youths as main priority since this group has the highest

of ESC rights as an element of preventing violent radicalization and terrorism and thus certainly concern a wide range of government action.[47] Questions of social inequality must come to light in the course of such efforts.[48] In other words, the full spectrum of rights needs to be supported in order to counteract the root causes of terrorism. If such efforts are successful, results in terms of decreasing terrorist threats are not unrealistic.[49] That some of those ideas have been (at least partly) ingrained at top security levels was demonstrated when Rob Wainwright, head of Europol, proposed community engagement, employment efforts and efforts towards social cohesion in a 2016 speech. However, implementation and prioritization of such ideas are still insufficient.[50]

Considering long-term strategies, one might additionally reflect upon ideas to 'update' legal human rights norms. We can currently see the starting phase of the implementation of technology that increases possibilities in various areas, including anti-terrorism, e.g. in regard to surveillance. Digitalization, machine learning, and big data processes will bring ever-increasing changes to the everyday lives of individuals in our societies, enabling an even smoother utilization of online surveillance, GPS tracking, centralized databases, facial recognition, and automatic behavior evaluation.[51] The degree of change these technologies bring might not stand behind those social changes triggered by the industrial revolution of the nineteenth century. Such potential impacts of new technologies could make one raise the question if Western societies need an 'update' or a renewal of human rights in relation to the digitalization of human lives. Demands for such updates have been voiced in the literature.[52] One could e.g., imagine a

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likelihood to turn to violent means such as terrorism. It is, however, a fact that integration of the more than twenty-three million Muslims in Europe is a problem in many member states regardless of the age group. Akiva Lorenz, "The European Union's Response to Terrorism," *International Institute for Counter-Terrorism*, May 1, 2006.

[47] Martin Scheinin proposes such an approach. Scheinin, "Terrorism," 562.

[48] Social injustice is also among the fourteen preconditions of terrorism in Tore Bjørgo, *The Root Causes of Terrorism.* Art and Richardson likewise mention social privation as contributing factor to terrorism and point out that governments should address social issues in their anti-terrorism efforts. Art and Richardson, *Democracy and Counterterrorism*, 577.

[49] Donohue, "Security and Freedom on the Fulcrum," 74.

[50] Rob Wainwright, "Protect: Cooperation and International Responses to Security and Counter-Terror Strategy in Europe," World Counter Terror Congress, London, April 19-20, 2016.

[51] Lachmayer and Witzleb, "The Challenge to Privacy from Ever Increasing State Surveillance: 775. Consequences of such innovations might, in dark scenarios, be comparable to the social point system already established in parts of China, exercising control over the population via assigned value to surveilled behavior.

[52] For instance, Eliza Watt demanded a modernization of article 17 of the ICCPR, including a more specific definition of the right to privacy of communication in the digital sphere. Eliza Watt, "The right to privacy and the future of mass surveillance," *The International Journal of Human Rights*, Vol. 21 No. 7 (2017): 787-788.

human rights charta for the digital age. However, the human rights regimes that are currently in place are, in theory, strong enough to check rights-curtailing usage of data, they simply need to be respected by governments and furthermore defended by populations and the judiciary. It is in this regard worrying that certain European governments, including the UK government, try to soften up the ECHR, Europe's most important human rights document. If the mentioned technological advances are not checked against their potential negative influence on the rights and freedoms of individuals, these rights and freedoms might be critically diminished. Certainly, facing and challenging these threats to rights regimes is crucial.[53]

Another important focal point could arguably be to elevate the understanding of the misfit between the perception of threat triggered by terrorism and the factual threat it, on average, constitutes for individuals in Western society. As mentioned earlier, the risk of being killed or harmed by a terror attack is (at least in Western countries) significantly smaller than being harmed by other social risks (e.g. crime). However, the human tendency to focus on spectacular risks instead of unimposing risks lets the perceived threat of terrorism grow and delivers the groundwork for ever-increasing anti-terrorism. Policymakers, at least at times, take advantage of this misperception in order to adopt new security measures and to broaden the power base of the state versus its individuals. It is in the face of such reflections that states must be urged not to overreact to terrorist threats. Yes, such threats are real, and terrorism, unfortunately, causes victims, but terrorism does not constitute a threat to the existence of Western states per se or a situation comparable to war. And, whereas threat perceptions might change societies, it is, in essence, the reactions of public and policymakers that decide if terrorism threatens a 'Western way of life'; e.g. via the abolishment of those rights and freedoms that are essential for democratic

[53] As mentioned earlier, even Microsoft's President Brad Smith pointed to the abusive potential of facial recognition technology (as one example of the various technologic innovations I speak about) and called for government regulation. "Facial recognition: It's time for action," December 6, 2018.

Western societies.[54] Therefore, as English argues, states should maintain strong credibility and refrain from overdoing terrorism threats.[55]

No doubt, terrorism by Al-Qaeda, IS and their sympathizers has intensified not only threat perceptions, but also fear of and stereotypes towards Muslims in Western societies. Increased threat perceptions have given political and security elites incentives to adopt ever more policies that are supposed to prevent future attacks. Unfortunately, these policies are in its biggest majority not inclusive, e.g. attempting to bridge the widening split in society but rather aim towards one certain minority, the Muslim minority. The consequence is the creation of a new suspect community (e.g. replacing 'the Irish' as suspect community in the UK), which in turn amplifies anger and fear inside of Muslim communities, increasing the likelihood of home-grown (glocal) Islamist violence and in turn, the likelihood of right-wing violence and even harsher anti-terrorism policies. This is nothing else than the initialization of a vicious circle of reaction and counter-reaction, a vicious circle of mutual contempt, as well as violence and counter-violence.[56] Now, instead of solidifying this vicious circle with the adoption of more rights infringing policies, states (and civil society actors) need to aim at breaking this circle by implementing inclusive policies, by reducing fear towards a minority and by deconstructing the perception of an existing conflict between 'the West' and Islam'. In short, the ambition must be to unite instead of dividing. In utilizing this maxim, in terrorism policy, a starting point should be to fight *all* sources of terrorism with equal seriousness, in other

[54] Here I follow an argumentation by e.g., Richard English, *(Terrorism: How to Respond)*, or Julia Ebner, (*The Rage).* Laura Donohue argued that the provocative effect that terrorism aims to implement, works only if governments and populations play along this rationale. Donohue, "Security and Freedom on the Fulcrum." Charles Townshend argued in a similar direction when he claimed that liberalism in Western societies is not really threatened by terrorism itself, but by reactions of the state to the same. A reaction without proportionality, build on emergency laws and the usage of special units would decompose liberal traditions. Such reaction would, furthermore, endanger the trust of (parts of) the population to the government and thus the legitimacy of the government. Charles Townshend, *Terrorismus: eine kurze Einführung* (Stuttgart: Philipp Reclam jun., 2005), 183. Paul Wilkinson had already in 1979 warned against the danger of state over-reaction to terrorism. Paul Wilkinson, *Terrorism and the Liberal State* (London: MacMillan, 1979), 296.

[55] English, *Terrorism: How to Respond.* For instance, by not acting based on false facts spread among the public, as in the case of the US and the 2003 Iraq War.

[56] Julia Ebner describes the relation between Islamist and right-wing extremism in her 2017 book *The Rage.* She points out that both camps of violence prone extremists, Islamists and right-wing groups can enter in a relationship of "reciprocal radicalization", including effects of victimization and mutual demonization. In a similar note, Roger Eatwell coined the term 'cumulative extremism', describing how "one form of extremism can feed off and magnify other forms." Roger Eatwell, "Community Cohesion and Cumulative Extremism in Contemporary Britain," *The Political Quaterly*, Vol 77 No. 2 (2006).

words, eradicating the bias towards Islamist terrorism and Muslim minorities.[57]

On a broader note, the strengthening of the idea of human rights and of universal empathy is a crucial long-term strategy.[58] Suffering and conflicts can be sources of political violence, including terrorism. If notions of universal empathy for human suffering and concern about political conflicts are in decline the probability that 'we' as a European community will be able to solve intercultural conflicts resulting in violence may decline as well. Therefore, strengthening the idea of human rights and supporting notions of universal empathy, as well as supporting democratic and cosmopolitan identities, can be a way of preventing terrorism in the long run.[59] In terms of facing violent threats such as terrorism, the principles of human rights and rule of law are providing better guidance than attitudes, which build on increasing security capabilities at all costs, implementing the precautionary principle, or disregarding rights altogether and handing all power to the state.[60] If a stronger sense of empathy and support for human rights could be developed the possibility of the emergence of a bigger public resistance to rights infringing anti-terrorism would increase as well.

I have, in this thesis, tried to argue for an approach towards anti-terrorism and towards human societies in general that aims at a maximal fulfillment of the human rights idea, enabling a dignified life, a maximal enjoyment of human capabilities, and the fulfillment of the rights aims of justice and freedom. Of course, one might ask the question if such an approach actually rather constitutes a utopia in the face of security threats such as terrorism and

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[57] Some of my proposed strategies are reflected in contributions by other researchers in the field, but especially in publication of Critical Terrorism Studies, see e.g., Sondre Lindahl, "A CTS model of counterterrorism," *Critical Studies on Terrorism*, Vol. 10 No. 3 (2017) or Benoit Gomis, *Counterterrorism: reassessing the policy response* (Boca Raton: CRC Press, 2015).

[58] I point to the importance of *universal* empathy instead of simply 'empathy', since the latter can be understood and utilized in a non-universal partisan fashion as well. As Ebner points out, violent extremist groups, including groups using terror tactics do motivate their members by triggering a sense of empathy for the suffering of a certain group. Empathy for this suffering is a part for the explanation for why some individuals join terror groups and are willing to risk their life for a political cause. However, the empathy of these individuals does not reach further than the boundaries of this specific group, empathy for the suffering of victims on 'the other side' is not given. Ebner, *The Rage*.

[59] Shafir, Brysk and Wehrenfennig support the promotion of such identities in their case for a "human rights education in the broadest sense." Shafir, Brysk and Wehrenfennig, "Conclusion," 180. Ronald Crelinsten and Iffet Ozkut demanded a promotion of human rights, tolerance and mutual understanding in efforts to create a sociopolitical climate preventing conflicts already in 2000. Crelinsten and Ozkut, "Counterterrorism Policy in Fortress Europe: Implications for Human Rights," In *European democracies against terrorism: governmental policies and intergovernmental cooperation*, ed. by Fernando Reinares (Aldershot, UK: Ashgate, 2000), 263.

[60] Gearty, *Liberty and Security*, 114-115.

other potential constraints of *Realpolitik*.[61] In a sense, this approach is utopic, yes.[62] Especially realists would claim that full enjoyment of human rights, especially in the context of terrorist threats, is both unrealistic and illegitimate. However, this does not, in my opinion, invalidate a maximalist rights framework (and its utopian outlook). First, trying to achieve such a utopia provides not only a potential fulfillment of the human rights idea but also security benefits. Second, is it not the case that most societies do lay out goals or principles which they want to achieve? Indeed, the idea of human rights often functions as a strategy, guideline or set of ideas for improving the world – creating the "better society," as such.[63] That is, at least in part, the point of political society. The Vienna Declaration of 1993 in its preamble called upon all UN member states to promote human rights in order to secure the full enjoyment of rights. This reflects, in a sense, a call for a utopia as well. It at least calls on us to strive for a progressive and better society, build on the framework of the *idea* of universal rights. Reflecting on human rights as a guideline for the better society one might point to a statement by Marie-Benedicte Dembour, who fittingly pointed out that human rights "represent the language of not-yet-realized – and ever-to-be reidentified – political claims […]."[64] In this sense, terrorism cannot be fought by not working towards realizing such political claims but only by attempting to do just that.

[61] This can be understood as answer to a Realist critique of human rights norms in the context of terrorism policies.

[62] Consequentially, Moyn denoted human rights "the last utopia." Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard Bellknap, 2010).

[63] Ben Dorfman, *Rights under Trial, Rights Reflections: 13 Further Acts of Academic Journalism and Historical Commentary on Human Rights* (forthcoming, Frankfurt: Peter Lang, 2019).

[64] Marie-Benedicte Dembour, "Human Rights Talk and Anthropological Ambivalence: The Particular Contexts of Universal Claims," In *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity*, ed. by O. Harris (London: Routledge, 1996), 20.

SUMMARY

This Ph.D. thesis delivers a human rights-based analysis of post 9/11 anti-terrorism policies in a European context, looking at the cases of the UK, Germany, and the EU. Terrorism policies that are under scrutiny in this thesis are e.g. indefinite detention, dragnet investigations, data retention, intelligence mass surveillance, facial recognition systems, and various prevention measures. Affected rights are e.g. the right to life, liberty and security, the right to privacy, the freedoms of expression, association, assembly, and movement and the right to be free from discrimination. The major claim of this thesis is that the mentioned entities do curtail essential human rights in the course of anti-terrorism since 9/11. Such curtailments threaten the free and full unfolding and development of human beings, the full enjoyment of human capabilities, and additionally change the power-relation between the individual and the state.

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