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EU-US Joint Counterterrorism Declaration: is practice matching the words?

On June 3rd the European Union and the United States of America agreed to a Joint Declaration on Counterterrorism. This document supervenes the "EU-US Declaration on Combating Terrorism," published 26 June 2004, which included a commitment to protecting and respecting human rights, fundamental freedoms, and the rule of law--what turned out to be a hollow and misleading commitment, since we now know that, at the time, EU Members and the Bush Administration were collaborating in the operation of the detention facility of Guantanamo, the "secret prisons," and the "extraordinary renditions" programme.

This time around, if actions and commitments are to match the words that both parties subscribed to, the 2010 Declaration might represent a positive step towards a more effective joint fight against terrorism worldwide. But it does not bode well that the European Parliament was again sidelined from the negotiations leading to the Declaration (conducted on the EU side by the Spanish presidency at the level of Justice and Home Affairs ministers) despite the new powers conferred to the EP by the Lisbon Treaty.

Nevertheless, the differences between the 2004 and the 2010 Declarations are significant. For example, in 2004 there was only an initial, brief and perfunctory statement about protecting and respecting fundamental rights and freedoms when countering terrorism; while in 2010, there is an entire section in a three-page document devoted to such principles. Both parties now explicitly recognise that *"the respect for the rule of law and International Law, including human rights law, international humanitarian law, and refugee law, are fundamental in the national and international efforts in the fight against terrorism and are the basis of our shared action."*

This should turn out to be more than symbolic. Europe was relieved to see President Obama discard his predecessor's mistaken and counterproductive "War on Terror" rhetoric, and was able to have the US to specifically agree that *"to avoid impunity in the fight against terrorism, the State whose personnel are alleged to have committed abuses relating to efforts to combat terrorism generally has the responsibility in the first instance for the investigation and consideration of criminal prosecution of such conduct."* This makes the duty to prosecute any officials suspected of abusing individual rights in the context of the fight against terrorism more compelling. Moreover, the Declaration also states both parties' *"commitment to implementing prohibitions on torture, as well as on cruel, inhuman and degrading treatment or punishment,"* which should act as a warning for security and intelligence officials involved in counterterrorism operations--an impact that cannot be neglected.

But in many other ways, these may well be just words. Are we actually seeing these principles being put into practice?

Is the Obama Administration backtracking?

When President Barack Obama stepped into office January of last year, most people in Europe hoped a new day was rising regarding the way the US would act and react to the threat of terrorism, including the means employed in fighting it. But, despite the change in the rhetoric in Washington, the legacy left by President W. Bush is proving resistant, strengthened out of support in Congress, including from legislators in the Democratic camp. And that has led the current Administration to hesitate and even backtrack.

President Obama promised that he would close the Guantanamo Bay detention facility in Cuba within a year after the start of his term. In failing to keep that promise, his Administration has become responsible for prolonging the arbitrary detention and the denial of justice for more than 100 remaining detainees.

Because of bipartisan opposition in Congress, the Obama Administration has not been able to resettle any Guantanamo inmates in US territory-not even the Chinese Uighurs, whose ethnic communities in the US offered to integrate them. Obviously, that only hardens those in Europe who shun sharing the burden by taking detainees who cannot be repatriated into their countries.

It is regrettable that the US Administration was forced, again by opposition in Congress, to put on hold plans to transfer detainees from Guantanamo to a prison in the state of Illinois-the Thompson Correctional Centre-while awaiting trial.

At the same time though, it is disturbing to learn that the Thompson facility was also being considered for holding detainees without the prospect of a charge or fair trial. An EP delegation recently got confirmation at the US State Department that 48 prisoners would be held in indefinite detention. This will mean the perpetuation of George W. Bush's illegal policies, further damaging the US human rights record and therefore undermining its effectiveness in fighting terrorism.

In addition, the Obama Administration's reinstatement of the discredited military commissions to try foreign citizens suspected of terrorism not only contravenes international human rights law and the US Constitution, but actually proves very slow and inefficient: as the American Civil Liberties Union stated in a letter sent to the US President last March, *"after eight years, two statutes, and four different sets of commission rules, only three Guantanamo detainees have been convicted by military commissions, with 2 of those convicted now released,"* while *"by contrast, more than 400 defendants have been convicted of terrorism-related offense in federal criminal courts..."*

In this regard, it is also significant that in the *habeas corpus* requests brought by Guantanamo inmates, US courts have found no grounds for detention in 70% of the cases and ordered the release of the detainees. Ignoring those decisions, the Administration has decided to keep 13 of these detainees imprisoned.

Furthermore, the Obama Administration has been pressured to reverse the decision of Attorney General Eric Holder and the Department of Justice to charge and try those Guantanamo detainees with alleged roles in the 9/11 attacks in federal criminal courts. It is obvious that these would be the most globally significant terrorism trials in history. Therefore, it would be a mistake to reverse the Administration's decision and relegate these trials to irretrievable and defective military commissions. Yet, it would be an even more colossal error to keep the suspects without trial in indefinite detention.

Europeans cannot understand why so many in the US, namely in Congress, persist in conferring a “political status” to terrorists, baptising them as “unlawful combatants” and exempting them from criminal charges, instead of putting them on trial in federal courts as the criminals they are.

European and international concerns should also focus on the detention regime and the trial of *all* those who are held on international terrorism charges in the detention facilities operated or used by the US around the globe, such as in Iraq and Afghanistan, or entrusted to questionable regimes in Syria, Pakistan, Egypt, or Ethiopia.

Last March it was reported that President Obama had authorized a programme that considered the possibility of hunting down and killing suspected terrorists anywhere in the world. Alarmingly, these reports were not denied. Any legal theory deriving from the rhetoric of the “Global War on Terror” and purporting to legitimize such killings must be dismissed as blatantly violating international law. Furthermore, it is counterproductive because it works in favour of terrorist recruitment narratives.

What about European accountability?

Let us not forget, however, that European governments are also responsible for serious human rights violations in the context of the Bush-led “War on Terror”.

The illegal activities that the CIA was allowed to conduct on European soil and airspace, (partly uncovered in a 2007 EP report) will continue to affect Europe’s credibility in promoting human rights and its effectiveness in fighting terrorism as long as EU governments refuse to disclose the extent of their collaboration and account for the damages caused to individuals abducted and illegally detained.

Proper investigation followed by prosecution, when and where the evidence permits, is the course the EU Member States should follow in dealing with the CIA and the military flights shuttling prisoners between Guantanamo and the secret prisons, some of which were based in Europe .

Europeans are also responsible for not doing enough to help clean up the mess left by the Bush Administration. Some Member States (Portugal, Belgium, Sweden, Germany, Hungary, Ireland, Italy, Slovakia, Spain, and France) have accepted to resettle some former Guantanamo inmates in their territories; but, other European countries, showing little sense of solidarity with the new US President, have actually prevented the adoption of an EU comprehensive resettlement programme. This means that resettlement is made on the basis of bilateral agreements with the US, thereby hampering security arrangements which should be European-wide to enable the resettled persons to enjoy freedom of movement.

European governments still have a lot to do to account for their own responsibilities in human rights violations committed in collaboration with the Bush Administration. Trying to atone through a disjointed effort to resettle a small number of innocent detainees would amount to just sweeping that mess under the carpet.

A truly joint EU-US effort to counter terrorism

To be effective in the fight against terrorism and associated internationally organised crime, good, timely, and effective information sharing is paramount between the US and Europe. An effort is needed to build synergies, rather than relying on the sum of both parties' capabilities and skills.

In this regard, whereas the 2004 Declaration on Counterterrorism merely stated that the EU and the US would *“enhance”* their *“abilities to share information among intelligence and law enforcement agencies,”* the 2010 one goes considerably further, recognising that there is a need to *“commit to foster appropriate information sharing and cooperation in the prevention, investigation, and prosecution of terrorism related offences, including fully utilizing the new tools provided by EU-US Mutual Legal Assistance and Extradition Agreements.”*

The problem is that many doubt these EU-US Mutual Legal Assistance and Extradition Agreements (signed during the Bush Administration) are complying with fundamental human rights and international law. With the new scrutinizing and co-decision powers conferred to the European Parliament by the Lisbon Treaty on matters relating to Justice and Internal Affairs, these Agreements deserve at least a review. It is the same principled logic which led the EP to force a renegotiation of the *“SWIFT”* agreement between the EU and the US on sensitive financial transactions data sharing, and that led to an EP position on a set of guidelines for the start of negotiations for a new *“Passenger Name Record”* agreement not only with the US, but also with Canada and Australia.

There is also an urgent need for both Atlantic partners to engage in a concerted and coherent strategy to counter the continuous and troubling recruitment of terrorists in American and European societies. Home grown terrorism cannot be brushed aside as a trivial phenomenon. It highlights major faults within the intelligence systems. Human intelligence is the most important asset, but both Europeans and Americans have not yet invested enough in it. The EU and the US should also be able to take advantage of the lessons learnt and current practices in the NATO context. Coupled with intelligence sharing, better coordination between countries and regional and international organisations is needed. The 27 EU Member States often still operate under the old habit of engaging on a bilateral relationship basis with the US, rather than relying on the mechanisms and tools provided for at the EU level, or even the NATO level.

Europe: The threat is real and at our doorstep

The 2010 Europol report *“EU Terrorism Situation and Trend Report”* highlights that from 2008 to 2009 there was a 33% decrease in the number of terrorist attacks performed within the borders of the European Union - which means that the figures reflect almost half of those occurred in 2007. In 2009, authorities of six Member States reported 294 terrorist attacks, 13 Member States reported 587 detentions for terrorism related offences, and 391 people, along with one NGO, were brought to justice on terrorism charges.

Among all the cases reported, only one was Islamism-motivated (it occurred in Italy). Also, *“the majority of reported court decisions relate to separatist terrorism, in contrast to 2008 when the majority related to Islamist terrorism.”* According to those figures, separatist-

inspired terrorism is the biggest and most immediate threat to some Member States' internal security—especially Spain, the EU country with by far the most cases.

However, Europol also points out that the EU is, inside and outside its geographic borders, a serious target for international terrorist movements: *"In spite of the fact that only one attack was committed in the EU, Islamist terrorists still aim to cause mass casualties, as demonstrated by the attempt to create an explosion on a flight between Amsterdam and Detroit in December 2009."*

The agency puts emphasis on the fact that home-grown terrorism is growing in importance in Europe and that the real problem lies on self-radicalised individuals: *"EU nationals travelling to conflict areas or attending terrorist training camps may pose a serious threat to the security situation in Member States on their return."* According to the data sent in by the EU governments, despite the lack of criminal occurrences, there are *"indications"* that groups abroad are facilitating terrorist activities inside the EU, essentially providing financial or logistical support, which is *"yet another illustration of the transnational character of Islamist terrorism."*

A consistent EU counterterrorism strategy

With the Lisbon Treaty, the EU has a renewed opportunity to mainstream the fight against terrorism into different policies and actions. A coordinated strategy is needed.

The Treaty should provide more clarity and strength for the Union as a global player, namely in the field of external action. However, the new tools will only be put to full use if the EU assures proper coordination of all efforts: effective counterterrorism requires a comprehensive, multifaceted, and cross-pillar approach. EU action, or inaction, in conflicts areas like Afghanistan, Somalia, or Palestine does have an impact in the effectiveness of a counterterrorism strategy worldwide, especially if it gives ammunition for fuelling the recruitment narrative of global terrorist franchises.

There is an urgent need for a clearer definition of what the EU Counterterrorism Coordinator should be doing in this new institutional setting, so as to eliminate incoherent policies where European funds, projects, or missions are found overlapping or even contradicting each other's efforts in the common endeavour to fight terrorism. For example, consider the EU training mission in Uganda that is meant to provide security forces for Somalia, where the TFG (transitional federal government) appears to be less and less functional. It's possible that the EU will ultimately end up training recruits for the Al Shabab militia.

Conclusion

It is time to stop relying on prayers and start matching words with actions. It is time for the governments who authored the recent EU/US Joint Declaration on Counterterrorism to account for the litany of transgressions committed or envisaged in the name of the fight against terrorism.

If Europe and the US continue to contradict the human rights and rule of law principles they boast in the Counterterrorism Declaration, they will further undermine their effectiveness in fighting terrorism--the EU and US will in fact be playing into the hands of terrorists: after all, their purpose is to defeat our democratic and lawfully based way of life.

Moreover, this Joint Declaration comes at a time when the EU and US are still very much targets for highly organised and resourceful terrorist networks around the globe, despite the almost nine years that have passed since the 9/11 attacks, which should have drastically changed global perceptions on security.

It is essential for politically correct rhetoric to be followed by practically action, forged within the framework of principles outlined in the EU/US Joint Declaration, the recently reviewed US National Security Strategy, and the European Security Strategy.