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MEDIDAS RESTRITIVAS E A LUTA CONTRA O TERRORISMO NA UE

RESTRICTIVE MEASURES AND THE FIGHT AGAINST TERRORISM IN THE EUROPEAN UNION: RECENT LESSONS FROM THE COURT OF JUSTICE OF THE EU

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I. The attacks in Paris, on November 2015, reminded us again, and in the worst of ways, that the so-called “war on terror” has dramatically changed our way of living in increasing globalized and dangerous societies. As a reaction to the Paris attacks, President Hollande emblematically affirmed that “France is at war”, declaring a state of emergency and closing the nation’s borders. Unsurprisingly, the French President called for the adoption of new laws, urging lawmakers to approve a three-month extension of the nation’s state of emergency, and two days after the attacks, France launched its biggest raids in Syria to date.

It is, however, evident that this is not just a French problem, not even a European one. The fight against terrorism threatens the whole world. Although the content of the announced measures is indisputably different, the French reaction to the Paris attacks does not fundamentally differ from the American response to the 9/11 events. Also, back in 2001, President Bush and the American Congress adopted new legislation to deal with terrorism – the most emblematic being the famous Patriot Act – reinforcing the powers of surveillance over terrorist activities by national agencies, the invasion of Afghanistan taking place the following month. Then as is now, the Head of State affirmed the unprecedented proportions of the events and committed to do whatever is necessary to get the ones responsible and to prevent new attacks from taking place.

The rhetoric is powerful and no one questions – at least openly - the legitimacy of this course of action. However, when it comes to devising the concrete actions to be implemented, the difficult questions inevitably arise. As in all things, the devil is in the detail. Indeed, it is far from clear how can/must democratic societies, founded on the rule of law, react to terrorists events with increasing proportions, less predictability and a higher degree of randomness. In particular, it is unclear what should be the role reserved for Europe and the European institutions in this context.

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With respect to the Paris attacks, former President of the European Commission, Mr. Durão Barroso, stated on November 17th, 2015 – a few days after the attacks – that it is crucial not only that the EU adopts sanctions against people and entities financing terrorism but also that it *targets* and *punishes* anyone associated with those people and entities. These words illustrate the general mindset underlying some of the measures taken so far at the EU level and provide the perfect background for the debate.

II. To deal with terrorism at a global level, the EU has developed a holistic counter-terrorism response. In 2005, the Council adopted the EU counter-terrorism strategy committing the Union to “combating terrorism globally, while respecting human rights and allowing its citizens to live in an area of freedom, security and justice”. The European strategy is built around four pillars: prevent, protect, pursue and respond. Within the third pillar – “pursue” – the Union is committed to investigate terrorists, impede planning, travel and communications, cut off access to funding and materials, and bring terrorists to justice.

In this context, after the Treaty of Lisbon, the Treaties authorized the EU to adopt restrictive measures against a natural or legal persons and groups or non-State entities either in the context of the free movement of capital (cf. Article 75 TFEU) or the interruption or reduction of economic and financial relations with third countries (cf. Article 215 TFEU). These provisions have put an end to one of the most controversial issues brought to light in the famous *Kadi* case.² After Lisbon, it became clear that the EU may adopt restrictive measures against individuals, and that those measures are subject to judicial review by the Courts of the EU (cf. Article 275(2) TFEU).

III. The EU has made a generous use of its *new* competence and has adopted a series of acts dealing with the current most emblematic international conflicts. The list of the measures currently in force is impressive (occupying roughly 140 pages).³ These restrictive measures – also commonly designated as *sanctions* – are considered to be an essential EU foreign policy tool used in accordance with the principles of the Common Foreign and Security Policy. Part of them is imposed by Resolutions adopted by the UN Security Council under Chapter VII of the UN Charter, whereas others are imposed autonomously by the EU.

2. See Joined Cases C-402 and-415/05 P, *Kadi and Al Barakaat International Foundation/ Council and Commission*, [2008] ECR I-6351.

3. Besides the general and most well-known 2001 common position and regulations which dealt with Al-Qaeda and the Taliban, specific measures have been adopted with the aim of combating terrorism all over the world. The list of the targeted countries is striking extending to Afghanistan, Belarus, Bosnia and Herzegovina, Central African Republic, China, the Democratic Republic of Congo, Egypt, Eritrea, Republic Of Guinea (Conakry), Guinea-Bissau, Haiti, Iran, Iraq, Ivory Coast, North Korea, Lebanon, Liberia, Libya, Moldova, Myanmar, the Russian Federation, Serbia and Montenegro, Somalia, South Sudan, Sudan, Syria, Tunisia, Ukraine, United States Of America, Yemen, Zimbabwe and targeting several other terrorist groups.

The Courts of the EU have clarified that the adoption of restrictive measures must comply with the EU fundamental rights standards of protection. Notwithstanding, private parties have increasingly challenged these measures. The diversity of those individuals is noticeable. Amongst them, one finds banks, insurance companies, construction companies, consulting companies; at least one university; the Hamas; the Liberation Tigers of Tamil Elam; a significant batch of Syrian nationals, army officers, businessmen, family of Bashar Al-Assad, (ex)ministries of his government; a Byelorussian journalist; family of Ben Ali from Tunisia; a prosecutor and 109 other individuals (including high ranking officials and police and army officers), 11 companies, and a business man from Zimbabwe; family of Qadhafi; and more recently a former counselor to the former Ukrainian President Viktor Yanukovich. The success of these actions has varied, but it seems that nearly half of the cases have been dismissed by the Courts.

IV. In any case, it is clear that the systematic adoption by the European institutions of sanctions against individuals in the context of the war on terrorism has not proven to be bullet-proof under the rule of law.

At the outset, the Courts of the EU have rejected the attempts of the European institutions to refuse the application of the EU Charter of Fundamental Rights to some legal persons targeted by those measures. The Courts have highlighted that the provisions of the Charter, and in particular Articles 41 and 47, guarantee the rights of “everyone” or “every person”, a form of wording which includes legal persons.

Furthermore, the Courts of the EU have not hesitated to annul restrictive measures both on procedural or substantive grounds. Some of the paradoxes and perplexities of pursuing a legitimate and effective fight against terrorism are brought to light in the Court’s judgements. Put simply, what can one say about the nature and scope of this type of measures?

First, these are *restrictive* measures – *sanctions* -, meaning that they restrict and limit the freedom and property of those targeted by them. The most frequent type of restrictive measures imply the freezing of funds and prohibitions to entry, transit or stay in the territory of the Member States.

Secondly, these measures are applied to people who represent a *risk* or *danger* to the funding of terrorist actions.

Thus, restrictive measures are motivated by the desire to create *external* conditions which ensure with a high degree of probability that the killing of human beings does not occur.

The people targeted by the European institutions are not considered as *suspects* of terrorists acts, and do not benefit from any particular legal status.

Individuals may be targeted by such measures due to the fact that they are *indirectly* related or associated (*e.g.*, family members, members of government, business partners) to someone considered to be dangerous (although not even that person benefits from a formal status, *as a matter of Union law*, as suspect of illegal activities). This point has been extensively validated by the Courts of the EU.

The indirect association with a given regime may be established on the bases of numerous *presumptions* that have been generally accepted by the Courts of the EU. Hence, it is a common practice that the Council infers from certain facts the existence of a danger or a risk to the funding of terrorism. For instance, if one is associated or has ties with an individual exercising political power or linked to a given government, the Council presumes that that person benefits from the political regime at stake. This presumption also works the other way around: if someone benefits from a given regime it is presumed to be associated with it.

Thus, for instance, the former Syrian Ministry of Economy and Commerce was deemed to be associated with the regime even after he left office. Because of the significant responsibilities held by him, the Council could infer that he was one of the leaders of the regime and was not obliged to demonstrate that Alchaar was personally involved in repression.⁴ Also, having been demonstrated that Makhlof, uncle of Bashar Al Assad, maintained links with the rulers of the regime, the Council could presume that he benefited from the regime.⁵ Similarly, the sister of Al Assad, given her family ties to the members of the regime, was legitimately presumed to be supporting or/and benefiting from the regime.⁶

Additionally, the mere exercise of certain economic activities may be enough for the inference of support to the political regime at stake. In the mentioned *Maklof* case, the Court accepted the Council's inference of support to the Syrian regime against managers of the major Syrian companies. With regard to Mr. Anbouba, the General Court considered that the Council was entitled to assume that, as a leading businessman in Syria, he also supported the Syrian regime. The Court stated that, in the light of the authoritarian nature of the Syrian regime and of the close control that the State exercises over the Syrian economy, the Council was justified in taking the view that the activities of one of the principal Syrian businessmen, operating in numerous sectors, could not have succeeded without enjoying the favours of that regime and in return providing a level of support for that regime.⁷

In another case, the Court considered that the Council was entitled to presume that, on the basis of its role as the central purchasing body of the Iranian national oil company, Kala Naft was involved in the procurement of prohibited goods and technology and that reason was in itself sufficient for Kala Naft to be entered on

4. Case T-203/12, *Alchaar/Council*, ECLI:EU:T:2014:602.

5. Case T-383/11, *Makhlof/Council*, ECLI:EU:T:2013:431.

6. Case T-202/12, *Al Assad/Council*, ECLI:EU:T:2014:113.

7. Case T-563/11, *Anbouba/Council*, ECLI:EU:T:2013:429.

the lists of those whose funds were to be frozen.⁸

Hence, the Courts of the EU have generally upheld the lawfulness of the Council's presumptions in so far as they are rebuttable, although insisting that it is the task of the competent EU authority to establish that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative. The articulation of these two ideas is, however, not always entirely clear.

There are no formal criminal or administrative procedures initiated against the people targeted by restrictive measures with the aim of demonstrating that such persons have committed, or are responsible or guilty of some kind of illegal action (crime, offense, infraction). The procedure for the adoption of such measures is confined to that sole objective and does not aim at establishing any type of liability under EU law. In some cases, the EU acts provide that the list of persons concerned is to be drawn up on the basis of information or material which indicates that a decision has been taken by a national competent authority in respect of the persons, groups and entities concerned. That is, however, not always the case.

These measures may apply without limitation in time, which means that they usually produce long lasting effects.

The Courts consider that said measures may be adopted prior to the exercise of the rights of defence – notably the right to be heard –, in so far as it is fundamental to ensure a certain surprise effect.

The evidence considered enough to ground the adoption of these measures would most probably not be sustainable or sufficient to take the targeted individuals to trial nor guarantee a conviction in a court of law. Presumption of innocence hardly finds a place in this context.

The Courts of the EU have often annulled the Council's acts, considering that the Council provided scarce factual elements or insufficient evidence. There are several examples showing the every so often careless and rash approach of the Council in imposing restrictive measures: the *Bank Melli*⁹, *Syria International Islamic Bank*¹⁰, *Sharif University of Technology*¹¹, the *Belarusian journalist*¹², and the *Portnov*¹³ cases constitute good examples of a hasty approach. Notably, the Courts of the EU have clarified that they are not willing to accept measures which are based on factual imputations derived from the press and the internet.

8. Case C-348/12 P, *Conseil/Manufacturing Support & Procurement Kala*, ECLI:EU:C:2013:776.

9. Joined Cases T-35/10 and T-71/11, *Bank Melli Iran/Council*, ECLI:EU:T:2013:397.

10. Case T-293/12, *Syria International Islamic Bank/Council*, ECLI:EU:T:2014:439.

11. Case T-181/13, *Sharif University of Technology/Council*, ECLI:EU:T:2014:607.

12. Joined Cases T-196/11 and T-542/12, *Mikhalchanka/Council*, ECLI:EU:T:2014:801.

13. Case T-290/14, *Portnov/Council*, ECLI:EU:T:2015:806.

This error has proved fatal for the Council in the *Hamas*¹⁴ and *Tamil Tigers*¹⁵ cases.

Some of the evidence aduced as grounds to impose restrictive measures is subject to confidentiality and is therefore excluded from adversarial proceedings. The *Kadi II*¹⁶ ruling allows for such confidentiality where overriding security interests militate against the communication of facts or evidence to those target by restrictive measures.

There has hardly been any attempt to justify the adoption of these measures in light of the context of the fight against global terrorism, by invoking necessity or self-defence doctrines/principles.

When the Courts of the EU annul such measures, they systematically maintain the effects of those measures in order to ensure the effectiveness of any possible future freezing of funds, giving the European institutions the opportunity to remedy the infringements established, by adopting, if it is deemed appropriate, new measures with respect to the persons or entities concerned.

V. In light of the above, four ideas may contribute to insulate the juridical debate.

A) *A criminal law of the enemy?*

First, one should question if the European approach to sanctions adopted in the context of the fight against terrorism, echoes here and there what JAKOBS designated as the “criminal law of the enemy”. Such “law” is conceived as a form of exceptional criminal law, although it’s nature as both *criminal* and *law* is for in of itself questionable. It is significant that the applicants before the Courts of the EU have several times alleged the criminal nature of said restrictive measures.

It is, thus, not to be excluded that we may be facing the emergence of a type of EU *law* marked by the relativization of individual guarantees justified on the basis of public policies pursuing the fight against organized crime in a global world. It could be going too far to say that individuals targeted by EU restrictive measures have been degraded to the status of “enemies of the state”. Notwithstanding, it is of the essence of the “criminal law of the enemy” to target the person and not his/her actions. Here, the status of being someone, somewhere, in a certain moment in time, is decisive for the judgment of the actual danger presented by that person and the need to ensure punishment. Thus, for instance, the sister of Bashar Al Assad is targeted on account of her close personal relationship and intrinsic financial relationship with the Syrian President. In the case of the *Zimbabwean nationals*¹⁷, the Council was allowed to consider that if a person

14. Case T-400/10, *Hamas/Council*, ECLI:EU:T:2014:1095.

15. Joined Cases T-208/11 and T-508/11, *LTTE/Council*, ECLI:EU:T:2014:885.

16. Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and others/Kadi*, ECLI:EU:C:2013:518.

17. Case T-190/12, *Tomana and others/Council and Commission*, ECLI:EU:T:2015:222.

has the status of being a member of the government or associated with it, that is in of itself sufficient to justify the imposition of restrictive measures. Also, restrictive measures could be imposed on the Governor of the Syrian Central Bank on the sole ground that he was the Governor, although the Council was primarily focused on targeting the Bank itself and not the individual.

The “criminal law of the enemy” uses and abuses preventive and interim measures which aim to avoid that a certain crime is committed. JAKOBS required the adoption of a certain deviated conduct by the ones identified as “enemies of the state”, which is not even necessarily the case of some of the people targeted by EU restrictive measures. Certainly this is a type of approach which is grounded on a conception of the “enemy” that contrasts with the European humanist tradition. Despite the obvious difficulties in identifying the “enemy”, and the risk of the unlimited spreading of these notions to other areas of law, one cannot avoid to question: what will the European institutions do when it becomes necessary to target European citizens allegedly associated or related to suspects of terrorism?¹⁸ Will national courts be willing to defer to the jurisprudence and decision making practice of the European institutions in this regard? Is there room for double standards on fundamental rights protection in this respect?

B) State of exception?

Secondly, contrary to the European Convention on Human Rights¹⁹, the EU Charter of Fundamental Rights does not include a provision foreseeing the suspension of rights in case of emergence. The fact that the Charter does not include such a provision may preclude the Courts of the EU to assess restrictive measures – and for what is worth any other measure taken by the EU in the context of the fight against terrorism – in light of emergency considerations. Surely, it could be said that states of exception are by their very nature temporary, which would impede to put the debate on the admissibility of these measures in the context of an ongoing “war on terror”. In any case, it is not to be excluded that overriding considerations regarding EU security interests may be considered as giving rise to a state of necessity which justifies restrictions to the rights protected under the Charter. This may be the more imperative if the existence of a state of “global war” is brought to the debate convening the application of the International principles on the law of war. The fact that France has invoked the European solidarity clause²⁰ following the Paris attacks might be reminiscent of that type of approach.

C) Balancing rights and security interests?

18. See Joined Cases T-307/12 and T-408/13, *Adib Mayaleh/Council*, ECLI:EU:T:2014:926.

19. Article 15 ECHR.

20. See Article 42(7) TEU.

Thirdly, it seems that the Courts of the EU have faced difficulties in reconciling the need to protect individuals' rights and the so-called overriding considerations pertaining to the security of the European Union or of its Member States or to the conduct of their international relations. Surely the Courts have held, pursuant to the *Kadi II* ruling, that the exercise of rights and freedoms recognised by the Charter may be limited under Article 52 of said document. Moreover, the Courts have held that an infringement of the rights of the defence and of the right to effective judicial protection "must be examined in relation to the *specific circumstances of each particular case* ... including, the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question".²¹ Here, it is necessary to take into account, in particular, in Articles 3(1) and (5) TEU and Article 21(1) and (2)(a) and (c) TEU, relating to the maintenance of international peace and security while respecting international law, and the principles of the UN Charter.

However, in the assessment of the individual cases, said security considerations have not been balanced against EU fundamental rights *in concreto*. In most cases, the Courts do not address the existence of any limitation, suggesting that the case does not imply any restriction to the scope of protection guaranteed by the EU Charter.

D) A political questions doctrine?

Lastly, one may question if there is room for a political questions doctrine in this context. As is well known, according to the "act of state" or "political questions" doctrines²² courts cannot, or should not interfere with the political choices defined by the executive, especially those involving a wide margin of discretion. This doctrine has long been recognised in U.S. law²³, but it has no roots in the European legal tradition. Nevertheless, the issue has been mentioned in a few significant cases,²⁴ the most well-known one being the *Macedonian Sanctions* case²⁵. Also in the context of the war on terror, the General Court has acknowledged the Council's wide discretion implying that judicial review must be limited in this field.²⁶

In this light, it could be questioned (*i*) if pragmatically the Courts of the EU are in fact, even if not admitting to it bluntly, applying an "act of state" doctrine, and

21. Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and others/Kadi*, ECLI:EU:C:2013:518, para. 102.

22. COLLINS, "Foreign Relations and the Judiciary", 2002, at 504 *seq.*

23. See *e.g. Colegrove v. Green*, 328 US 549 (1946). More recently, in *Al Odah. v. United States*, No. 03-343 (2003) the U.S. Federal Appeals Court held that the writ of *habeas corpus* did not extend to Guantanamo Bay Cuba and thus it could not review detention of Al-Qaida suspects there.

24. See Case 93/78, *Matheus/Doego*, [1978] ECR 2203.

25. Case C-120/94, *Commission/Hellenic Republic*, [1996] ECR I-1513.

26. Case T-228/02, *Organisation des Modjahedines du peuple d'Iran/Council*, ECR 2006 p. II-4665.

(ii) if, from a more theoretical perspective, such an approach is advisable in this context.

VI. The need to adopt restrictive measures to combat terrorism at the EU level is unquestionable. The need for those measures to be effective and dissuasive is also uncontested. Restricting access to funding by terrorists seems an adequate course of action in this context. Nonetheless, we should not ignore the legal issues arising from the adoption of such measures and the difficulties of pursuing an effective anti-terrorist policy within the framework of a Union of Law. On the morning of 9/11/2001 President Bush declared that freedom itself had been attacked that day, and that freedom would be defended. Whatever the direction of the legal and political debate on the fight against terrorism at the EU level, it is important not to lose sight that the risk of compromising the very ideals that we are fighting to defend is, in this context, highly significant.
