Evaluating the European Arrest Warrant As a Counter-Terrorism Measure – Security at All Costs? An Analysis on 'Third Pillar-Legislation' with Regard to Human Rights

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I. Introduction

The attacks of September 11th in 2001 were incisive in many respects. Within a short period of time, it seemed that the need for security rose, particularly in America. The call for stricter regulations and laws was heard and soon taken care of by the American Congress.[1] Various military orders were issued by the President, one of which openly discriminated non-U.S. citizen and even gave authorization to keep suspicious detainees for an indefinite period of time in custody.[2]

Although the U.S. were the country affected, the incident triggered off debates about legislative measures to prevent and punish terrorism around the globe. As a consequence, the *Anti-Terrorism, Crime and Security Act 2001*[3] was enacted in the UK; the German Parliament adopted the so-called *Terrorismusbekämpfungsgesetze* (Security Package I and II) in November and December of the same year.[4]In January 2005 another law which was considered as a cornerstone in German legislation and which concerned air security (*Luftsicherheitsgesetz*) came into force.[5]

Against the background of well-organized cross-border crime legal steps were, not surprisingly, as well taken on EU level. Cooperation in terms of judicial and police matters was pressed ahead. Subsequently, Europol was asked to introduce a 'Task Force for the Fight Against Terrorism' which started to operate in November 2001. One of its tasks concerned the evaluation of the financing of terrorism.[6] Although the establishment of Eurojust, an institution for documenting and clearing-purposes in relation to combating crime, was decided on in Tampere in 1999, it was attributed an even bigger role after the terrorist offence on the U.S.[7]

All these measures, national as well as supranational, point into one direction. They aim to deal with a specific form of crime characterized by dimensions existing laws do either not sufficiently regulate or do not encompass at all. There is no doubt that terrorist acts need to

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[1] See 'Uniting and Strengthening of America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001' (USA Patriot Act) promulgated on October 24, 2001.

[2] See Military Order of November 13, 2001, 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror'.

[3] 'Anti-Terrorism, Crime and Security Act 2001' prepared in December 2001.

[4] Gesetz zur Bekämpfung des internationalen Terrorismus (Terrorismusbekämpfungsgesetz) of January 9th, 2002 (BGBl. I S. 361, 3142).

[5] Gesetz zur Regelung von Luftsicherheitsaufgaben (Luftsicherheitsgesetz) of January 11th, 2005 (BGBl. I S. 78).

[6] Den Boer, Monica, '9/11 and the Europeanisation of Anti-Terrorism Policy: A Critical Assessment', Policy Paper Nr. 6 September 2003, available at: http://www.eulec.org/Downloads/antiterrorism.pdf, accessed on May 21, 2005.

[7] For more information on Eurojust, see: Esser, Robert/ Herbold, Anna Lina, 'Neue Wege für die justizielle Zusammenarbeit in Strafsachen – Das Eurojust-Gesetz', [2004] 34 NJW, 2421-2424.

be condemned and if possible prevented. But, where is the borderline? To be more precisely, how much security is too much in the sense that civil liberties and human rights are endangered? Critics have in abundance elaborated on this issue, in the media[8] as well as in legal journals.[9] A lot of them reveal an apparent antagonistic relation between freedom and security. It is feared that in an overzealous rush into a 'War on Terrorism' fundamental democratic values could possibly get undermined. Therefore, it is said to be of vital importance to ensure that in an age where terrorism threats are omnipresent fundamental rights are to a full extent guaranteed. Now, are there reasons to believe that human rights on grounds of anti-terrorism legislation are disregarded? Most of the EU measures were adopted within the third pillar – what role does the structure of the pillar play in this context?

This paper will primarily focus on the European Arrest Warrant (EAW) as an example of EU counter-terrorism measures. It will first expose general aspects of the EAW and then specifically examine its nature with regard to accountability, competence, judicial review and human rights. This will be carried out by presenting and assessing the opinion by Sionaidh Douglas-Scott.[10] Finally, this paper will consider third pillar legislation in general, which includes a glance at judicial review and an outlook to the Draft Constitutional Treaty of the European Union. First of all however, an outline on the legal basis and procedures of the third pillar will be given.

II. The Third Pillar of the EU

1. Legal Basis and Procedures

The third pillar contains 'Provisions on Police and Judicial Cooperation in Criminal Matters' and can be found in Title VI (Art. 29 – 42) of the Treaty of the European Union (TEU). According to Art. 29 TEU the main objective aims at creating an area of freedom, security and justice by providing a high level of safety and by combating and preventing racism and xenophobia. This shall in particular be achieved by developing a common action among Member States.

The pillar had been amended and renamed when major changes were first carried out with the Treaty of Amsterdam signed in 1997 and then four years later with the Treaty of Nice. As a result, asylum and immigration matters, as well as border control issues were for example considered to be better placed under the first pillar, and therefore incorporated in the EC Treaty.[11] This overhaul was primarily done, because of the sensitive topics some of

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[8] See newspaper articles: 'An der Grenze des Rechts' by Bernhard Schlink, published in: DER SPIEGEL on January 17, 2005/ 'Datenschutz kontra Sicherheit: Innenminister haben Gesellschaft erschüttert' by Holger Dambeck, published in: DER SPIEGEL on May 10, 2005/ 'Gleiches Unrecht für alle – Höhlen EU-Gesetze den deutschen Rechtsstaat aus?' by Jochen Bittner, published in: DIE ZEIT on April 6, 2005.

[9] Roberts, Anthea, 'Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11', [2004] 15 *European Journal of International Law*, 721-749/ Fenwick, Helen, 'The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?', [2002] 65 *Modern Law Review*, 724-762/ Zöller, Verena, 'Liberty dies by inches: German Counter-Terrorism Measures and Human Rights', [2004] 5 *German Law Journal*, 469-494.

[10] Douglas-Scott, Sionaidh, 'The rule of law in the European Union – putting the security into the "area of freedom, security and justice" ', [2004] 29 *European Law Review*, 219-242.

[11] Horspool, Margot, *European Union Law* (Butterworths , London, 2003), 29.

these provisions touched – topics, which require thorough legal control and judicial review not sufficiently granted within the third pillar.[12]
The process of enacting a measure under the third pillar needs to be distinguished from adopting one under the EC Treaty. Regarding legislation, Member States do have a right to propose third-pillar measures (Art. 34 II TEU), whereas within the scope of the first pillar it is the Commission that suggests proposals. Additionally, Art. 34 II TEU stipulates that the Council acts by unanimous voting – in this context, Art. 34 II c and d TEU are exceptions to the rule hardly being applied. The European Parliament is informed on a regular basis, but is only authorized to give comments and recommendations under the third pillar, where it plays a rather passive role (Art. 39 TEU).
As far as judicial review within the third pillar is concerned, the TEU gives some hints in its Art. 35 II and III. According to these provisions the Court delivers preliminary rulings solely to Member States which have declared their explicit approval. The Court is not competent to decide on validity or proportionality of operations carried out by national law enforcement services (Art. 35 V TEU). Moreover, Art. 35 VI and VII TEU grant the Court to review the legality of decisions and framework decisions relating to competence, interpretation, application and procedure. A grave deficit however is the non-existence of an infringement action comparable to Art. 226 EC, which allows the Commission to appeal to the Court in cases where Member States do not comply with Community Law. Therefore, these provisions remain restricted within their scope.[13]
Another relevant aspect concerns legal instruments available under the third pillar. Framework decisions on the harmonization of laws as well as regular decisions on matters besides harmonization are binding, however they shall not entail direct effect. Also, Member States are free to choose the form and method of transforming a framework decision into national law as long as the desired result is achieved (Art. 34 II TEU).

2. Specific Nature of Third Pillar Issues

The Member States' criminal laws are to a great extent influenced and formed by various traditions, culture and national peculiarities. On grounds of this divergence criminal law matters fall generally within the province of national sovereignty. This constitutes one reason why criminal law is categorized as a sensitive area where Member States only reluctantly give up competences. Consequently, the third pillar is considered to only promote a closer cooperation in police and judicial issues and is not functioning on a supranational level. Arguments that give reference for this approach include among other things an exclusion of the Court's jurisdiction on a general term basis and the establishment of a 'cooperation' instead of introducing provisions, which are not practicable with the binding effect of EC law.[14] This procedure characterized by its intergovernmental features reveals the weakness of measures adopted within the third pillar: The Court, the European Parliament and the Commission only have limited powers whereas the Member States if

[12] Craig, Paul/ De Burca, Grainne, *EU Law* (OUP, Oxford, 2002), 39.
[13] Wasmeier, Martin/ Thwaites, Nadine, 'The "Battle of the Pillars": Does the European Community have the Power to Approximate National Criminal Law?', [2004] 29 *European Law Review*, 615.
[14] Jimeno-Bulnes, Mar, 'European Judicial Cooperation in Criminal Matters', [2003] 9 *European Law Journal*, 116/117.

agreeing on a certain matter enjoy far-reaching competences.[15] On top of that, measures that come into force under the third pillar are primarily operational and executive ones, on the contrary to legislative actions which are thrusted into the background.[16]

III. The European Arrest Warrant

1. General Overview

Quite an impressive amount of third-pillar instruments were promulgated as a reaction to the events of September 11th. In this context however, the focus will in the first place be put on the European Arrest Warrant (EAW) which is described as the 'star rule' in the fight against terrorist crimes, although applicable to other forms of criminal offences, too. Based on a council framework decision[17], the EAW was introduced to serve the purpose of establishing a unified extradition system within Europe which enables a faster and simplified surrender procedure. The system was built upon the assumption that the concept of mutual recognition functions fairly-well throughout the EU and that Member States have confidence in each others' criminal law systems.[18] In fact, not only the Preamble emphasized this last point, but the Commission as well stressed the meaning by calling the warrant 'the first and most symbolic measure applying the principle of mutual recognition'.[19] The adoption of the EAW involved substantive as well as procedural changes, the last of which are considered to be weightier. The most striking example represents the requirement for each Member State to establish one or more 'competent judicial authorities' which will be empowered to issue and to execute an EAW by the virtue of law of either the issuing or the executing state.[20] As a consequence, decision-making, including extradition, will no longer be in the hands of the executive, but in those of judges or prosecutors.[21] A new procedural aspect concerned the omission of a judicial remedy against an imposed EAW, whereas the majority of Member States had in fact granted access to judicial remedies.[22]
Another controversially discussed matter of the EAW was the removal of the principle of double criminality relating to 32 listed categories of offences.[23] The principle lays down that an extradition is only acceptable when the criminal offence concerned is sanctioned in the issuing as well as the executing state. It had so far been an essential component of

[15] Wasmeier, Martin/ Thwaites, Nadine, 'The "Battle of the Pillars": Does the European Community have the Power to Approximate National Criminal Law?', [2004] 29 *European Law Review*, 613.
[16] Douglas-Scott, Sionaidh, 'The rule of law in the European Union – putting the security into the "area of freedom, security and justice" ', [2004] 29 *European Law Review*, 219.
[17] Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the Surrender Procedures between Member States of June 13, 2002.
[18] Knoops, Geert-Jan A., 'International Terrorism: The Changing Face of International Extradition and European Criminal Law', [2003] 10 *Maastricht Journal*, 161/162.
[19] Commission Report COM(2005) 63 final of February 23, 2005.
[20] See Art. 6 Framework Decision.
[21] Blekxtoon, R., 'Europees arrestatiebevel', [2002] 22 *Nederlands Juristenblad*, 1058.
[22] Knoops, Geert-Jan A., 'International Terrorism: The Changing Face of International Extradition and European Criminal Law', [2003] 10 *Maastricht Journal*, 161/162.
[23] See Art. 2 II Framework Decision.

existing laws regulating extradition, which now is to be replaced by mutual trust and recognition briefly mentioned before.[24]
A delicate point which needed to be elucidated, relates to the issue of refusing to execute an EAW. The problem was solved by applying a rather traditional approach: regulations were introduced on two levels, on an optional as well as on a mandatory one. The mandatory provision which gives rise to the obligation not to execute includes among other things the refusal on basis of age. On the contrary, a Member State has discretion not to execute, if the 'res judicata rule' applies or if a case of double criminality is involved which falls not within the scope of Art. 2 of the framework decision. More exceptions to the rule can be found in Art. 3.[25]

2. Raised Concerns

The EAW is subject to complaints, because critics see democratic legitimacy and human rights affected. In this context, the critical viewpoint of Sionaidh Douglas-Scott[26] will be presented and at a later stage be evaluated.
A first aspect that caught the author's disapproval was idea that the principle of mutual recognition is an integral part of the Union. The principle which is based on the scheme that Member States acknowledge each others' decisions and judgments was with respect to criminal matters first mentioned by the Tampere Conclusions of the European Council in 1999. According to the author, it is of paramount importance to enhance mutual trust between Member States in order to establish a 'European judicial space'[27] some time in the future. But, looking at the present situation not even solidarity has developed to a perceptible degree. A constant promotion of mutual recognition could however according to the circumstances result in a state in which the concept becomes applicable within criminal law systems on the whole. A state, as assessed by the author, quite undesirable as far as individual rights are concerned.
Secondly, Douglas-Scott criticizes the abolition of double criminality as the Article regulating the matter contains terms which are not definied in general. Therefore the interpretation of notions used in Art. 2 II of the framework decision might differ among Member States. This is in particular of interest when looking at newly evolved terms that are not yet specified in detail. The vagueness just described is perceived as a problem which stems from a general unawareness of other Member States' legal systems.
Thirdly, attention needs to be paid to the lack of parliamentary participation which prevails while the legislative process takes place. From the authors' standpoint it is not acceptable that the Parliament hardly plays a factor in this procedure. Arguing that the Parliament should be more involved in drafting and negotiating, Douglas-Scott also emphasizes the requirement of transparency.

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[24] Alegre, Susie/ Leaf, Marisa, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – European Arrest Warrant', [2004] 10 *European Law Journal*, 208.
[25] Plachta, Michael, 'European Arrest Warrant: Revolution in Extradition?', [2003] 11 *European Journal of Crime, Criminal Law and Criminal Justice*, 188.
[26] Douglas-Scott, Sionaidh, 'The rule of law in the European Union – putting the security into the "area of freedom, security and justice" ', [2004] 29 *European Law Review*, 219-242.
[27] Douglas-Scott, Sionaidh, 'The rule of law in the European Union – putting the security into the "area of freedom, security and justice" ', [2004] 29 *European Law Review*, 227.

Finally, the protection of human rights under the EAW is taken into account. The author explains that, although certain fundamental rights are granted to the individual, still some considerable deficiencies exist. These include the facts that there is neither a reference to the Court, nor legible reference to the ECHR. Also, a provision which allows the refusal of extradition on grounds of human rights is missing. As a consequence the human rights protection provided calls for revision and expansion.

3. Own Analysis

Some of the concerns Douglas-Scott puts forward are indeed substantial. Having raised the discrepancies on the principle of mutual recognition, some fundamental aspects need to be discussed. First of all, the idea to base a system on a concept which is not even anchored within the EU is very optimistic, or considered from another viewpoint, naive. This ultimately leads to the next question: who will observe the way the principle is dealt with in order to guarantee a lawful application? The response to the question is alarming in the sense that there is no such controlling body.[28] What happens in the case where a Member State neglects to perform its duty? The Commission has no rights to take legal proceedings against a Member State before the Court, since this measure is exclusively reserved for Member States. It is certain that until the EAW becomes applicable it needs to be implemented into national law. If this transformation is carried out incorrectly, because of a wrong translation for instance, the whole procedure has serious consequences.[29]
The abolition of dual criminality is supposed to enhance the ways to suppress terrorist acts. Does this opening however serve in fact its purpose? The 'definition-problem' does have an impact which should not be underestimated. Although a European definition of 'terrorism' was introduced by the Framework Decision on combating terrorism[30], other terms are not generally defined. Besides, some designated the definition on terrorism as a makeshift not being in line with the 'nullum crimen sine lege certa-principle'.[31]
The lack of parliamentary involvement can be attributed to the structure of the third pillar as explained at the beginning of this paper. In order to establish a greater participation of the Parliament and therefore an increase of democratic legitimacy the legislative part under the third pillar would have to be changed. This would on the one hand certainly affect the simple and speedy process which is now in force, however, on the other hand it would entail controversial debates which are of immense significance when dealing with democracy. Also, it would eventually lead to transparent procedures the public can take notice of. At this point emphasis has to be put on the fact that especially in the time period after September 11th measures were swiftly adopted by the Council consulting the Parliament only on a last-minute-basis, something which would undoubtedly not have occurred had there been a different regulation procedure.

[28] Alegre, Susie/ Leaf, Marisa, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – European Arrest Warrant', [2004] 10 *European Law Journal*, 201.
[29] Den Boer, Monica, '9/11 and the Europeanisation of Anti-Terrorism Policy: A Critical Assessment', Policy Paper Nr. 6 September 2003, available at: http://www.eulec.org/Downloads/antiterrorism.pdf, accessed on May 21, 2005.
[30] Council Framework Decision 2002/475/JHA on Combating Terrorism of June 13, 2002.
[31] Plachta, Michael, 'European Arrest Warrant: Revolution in Extradition?', [2003] 11 *European Journal of Crime, Criminal Law and Criminal Justice*, 188.

Human rights are within the framework of the EAW to a certain extent provided. Article 11 of the framework decision includes the right to be informed of the warrant and its content, the right to be supported by a legal counsel and if needed by an interpreter, and the right to be informed of the option to consent the surrender. Douglas-Scott sees these rights as not nearly being sufficient. But is for example an explicit reference to the ECHR within the EAW really necessary? It can be argued that all EU Member States have consciously signed the ECHR and are as a result bound by the rules it sets up – the ECHR already 'forms part of the EU acquis'[32]. I agree on the point that a reference to the ECJ should be integrated. Once such a rule is laid down no unnecessary conflicts resulting from competence questions arise. Also, it gives a general certainty as to whom one can turn to. The last aspect discussed namely the omission of a refusal on grounds of human rights is as well arguably. In my opinion, Article 13 of the Preamble which provides that 'no person should be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment' is sufficient.
To give a summarizing statement, Douglas-Scott is in fact correct in pointing to the deplorable state of affairs, however I consider some issues as controversial as the one exposed above.

IV. The Protection of Human Rights under the Third Pillar

Having discussed the EAW, there should also be paid attention to fundamental rights in matters of the third pillar. The question arises on what basis the protection of human rights is ensured under this heading. The only explicit rule to the matter is Article 6 II TEU which stipulates that fundamental rights are to be respected by the Union. In this context, a reference is made to the ECHR, to common constitutional traditions and to general principles of Community law. The provision however which displays a rather general and vague character, gives rise to criticism, because fundamental rights in terms of police and judicial cooperation are left out completely.[33] Therefore one can conclude that fundamental rights under the third pillar are in general not sufficiently protected. Conditions which urgently call for revision!

1. Judicial Review

The Court's competences under Art. 35 TEU have briefly been described. It should be noticed that while the Court decides in preliminary rulings on the validity or proportionality of decisions or framework decisions, it already takes human rights aspects into account. This observation however, does not alter the fact that judicial review lacks remarkably behind within the third pillar. Not only does the Court's role remain unclear, but there is in addition no indication as far as national courts are concerned. Some critics also complain

[32] Alegre, Susie/ Leaf, Marisa, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – European Arrest Warrant', [2004] 10 *European Law Journal*, 205.
[33] Edwardsson, Eva, 'The EU Charter on Human Rights and Fundamental Freedoms', available at: http://www-hotel.uu.se/juri/utbildning/fordjupning/VT2003/ECcommarket/pdf/charter.pdf, accessed on May 21, 2005.

about the fact that individuals cannot institute proceedings comparable to Art. 230 EC, however at this point the prerequisite of direct and individual concern comes into play.
Besides, the fact that there hardly exists any case law concerning this issue adds to the lack of regulation in the sense that no interpretative action by the Court has developed. On the contrary, the Court ruled under the first and second pillar on a huge amount of cases which led to a jurisdiction that progressively created and established case law.[34] Clarity could for instance simply be established by introducing a provision which gives clear information as to what matters the jurisdiction of the Court is accountable for. This way judicial control could be expanded and the third pillar cooperation would become a more human rights orientated platform.

2. Outlook: New Regulation under the Draft EU Constitution[35]

The third pillar constitutes an integral part of the Constitution. Criminal matters are placed under Part III of the Constitution, although not explicitly mentioned in Part I.[36] However, Article 3 of the Constitution states that 'the Union shall offer its citizens an area of freedom, security and justice without internal frontiers'. Again, as laid down in Article 5 I of the Constitution the principle of mutual recognition plays a major role in achieving this aim. This time another legal method can be applied if circumstances demand for it: the approximation of criminal laws.[37]
Guild[38] sees this approximation as a consolidation of powers regarding criminal law within the EU. It might on the one hand, as she states, imply harmonization, on the other hand however, the principle is limited by necessity which could be an indication against consolidation. The Constitution provides legal instruments applicable for the Union as well as the Community, such as European laws and European framework laws.[39] A progress is made by introducing the infringement procedure to criminal issues, too.[40] Additionally, Part II of the Constitution contains the Charter of fundamental rights of the Union. It includes among other things the right to a fair trial, the principle of 'ne bis in idem', the right of defense and the presumption of innocence, the principle of legality and proportionality of offences and sanctions. On top of that, Art. II-47 contemplates the right to an effective remedy. As one can see, some points have been changed, some remained the same, for instance the right to initiatives is still preserved to the Commission and the Member States.[41]

[34] Edwardsson, Eva, 'The EU Charter on Human Rights and Fundamental Freedoms', available at: http://www-hotel.uu.se/juri/utbildning/fordjupning/VT2003/ECcommarket/pdf/charter.pdf, accessed on May 21, 2005.
[35] Draft EU Constitution published in the Official Journal on July 18, 2003.
[36] Wasmeier, Martin/ Thwaites, Nadine, 'The "Battle of the Pillars": Does the European Community have the Power to Approximate National Criminal Law?', [2004] 29 *European Law Review*, 632/ 633.
[37] Art. III-158(3) Draft EU Constitution.
[38] Guild, Elspeth, 'Crime and the EU's Constitutional Future in the Area of Freedom, Security and Justice', [2004] 10 *European Law Journal*, 219.
[39] Art. I-32 Draft EU Constitution.
[40] Art. III-302 Draft EU Constitution.
[41] Art. I-33/ Art. III-165 Draft EU Constitution.

V. Conclusion

As we have seen there is a lot of work to be done in order to get a clear idea on how human rights are guaranteed under the third pillar. A European Court of Justice equipped with a wider range of competences could be considered as a first step. Some of the issues are already taken into consideration within the Draft EU Constitution. However, it is still unclear whether this document will one day be ratified at all. After the French and the Dutch people had rejected the text of the Constitution in May and June 2005, the Heads of State adopted a declaration which called for a 'period of reflection'. In October 2005 the European Commission launched the so-called Plan D (Democracy, Dialogue and Debate) in order to promote the discussion about the future of Europe in particular with respect to challenges Europe will face in the 21st century.[42]
The impact of terrorist threats cannot be ignored. Camera surveillance, stricter identity controls, and the establishment of electronic databases are just a few examples as to what has changed so far. But are these threats given in reality? Do these measures pursue their aim with proportionate and adequate means? The tightrope walk between protection of citizens and interference with fundamental rights has to be observed. Amnesty International indicates to the very same problem and urges the Council to protect human rights relating to counter-terrorism efforts in one of its recommendations.[43] We all know to what extent a disregard can lead to, and although the human rights violations on Guantanamo Bay are extreme, they should serve as a negative example as to how far people can be removed from what we call fundamental rights.[44] Therefore our response to terrorism needs to be balanced, and we must not do the very bad mistake to see human rights as a hindrance to an imperative fight against terrorist acts.

[42] Press release of the European Commission, 'The Commission's contribution to the period of reflection and beyond: Plan-D for Democracy, Dialogue and Debate' of 13th October 2005 COM (2005), 494 final.
[43] More Justice and Freedom to Balance Security: Amnesty International's Recommendations to the EU, September 27, 2004, available at: www.amnesty-eu.org, accessed on May 25, 2005.
[44] For more information on prison camp of Guantanamo, see: Franck, Thomas M., 'Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror', [2004] 98 *American Journal of International Law*, 686-688/ Steyn, Johan, 'Guantanamo Bay: The Legal Black Hole', [2004] 53 *International and Comparative Law Quarterly*, 1-15.