



Statewatch analysis no 8

New EU measure on terrorism criminalises all refugees and asylum-seekers

- All refugees to be vetted for any connection with "terrorism"
- Four measures by-pass any democratic accountability
- Application of measures not legally accountable
- Measures adopted by "written procedure" the day after Christmas

Introduction

On 27 December, just after Christmas, the Council of the European Union adopted four Acts by "written procedure" (the measures were simply circulated to EU governments and adopted unless any objections are raised) on "terrorism". None of the measures was subject to democratic scrutiny.

Re-defining "terrorism"

The first, the "Council Common Position on combating terrorism", is based largely on the UN Security Council Resolution 1373 (2001) which was passed on 28 September in the immediate aftermath of the 11 September attacks on the USA. There are however very significant differences.

Point 2(a) of the Security Council Resolution says that "states" are obliged to refrain from supporting "entities or persons involved in terrorist acts". Article 4 of the EU's Common Position is instead worded to require Member States to prevent "the public" from offering "any form of support, active or passive" to such persons or entities (Article 4 of the Common Position). The change of meaning by the EU fails to distinguish between individuals who consciously assist those involved in terrorist acts and those who simply share the same goals as the "terrorists" but who do not pursue these goals by violent means or knowingly assist with the preparation of violent acts.

Nor does this EU definition distinguish between support for "terrorist" groups and liberation movements - as does the Statement attached to the proposed EU Framework Decision on harmonising national laws on terrorism agreed by the Justice and Home Affairs Council on 6-7 December (this has yet to be formally adopted).

Criminalising refugees and asylum-seekers

The last seven points in the EU's Common Position, Article 11 to 17, are not binding in the UN Security Council Resolution but there are in the former. Article 16 says:

*"Appropriate measures shall be taken in accordance with the relevant provisions of national and international law, including international standards on human rights, **before granting refugee status**, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts. The Council notes the Commission's intention to put forward proposals in this area, where appropriate"* (emphasis added)

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Under EU law this Common Position is binding on all Member States and will mean that all asylum-seekers and refugees are subject to vetting by the police and security services before their status can be granted. In effect a file will have to be created on each person/family as to their political and trade union activity in their country of origin or any other country they have stayed in. And, certainly in the new UK Anti-Terrorism, Crime and Security ACT, they would never know what "intelligence" or suspicions had been recorded against them.

This provision, taken in conjunction with Article 4 of the EU Common Position covering "any form of support, active or passive" for terrorist activities, could mean that a person who had helped raise funds to support the humanitarian needs of , say PKK prisoners in Turkish jails, could be refused refugee status.

Moreover, the interface of surveillance and intelligence-gathering to combat terrorism and "illegal immigration" can easily be combined. At the end of December the UK placed undercover MI6 "Asian operatives" inside the Sangate detention centre in northern France (Sunday Express, 30.12.01). The MI6 (the UK's external intelligence service) operatives were supported by a team of 25 Special Branch officers providing logistical and intelligence support. The Special Branch is comprised of specially trained police officers who work in plainclothes, are proficient in at least one foreign language and who monitor the activities of specific "foreign" national or ethnic groups resident in the UK.

No democratic accountability

The adoption of the two Common Positions by the Council of the European Union (the 15 EU governments) by "written procedure" were made under Article 15 of the Treaty on European Union which gives a very general power simply to "adopt common positions" and "Member States shall ensure that their national policies conform to the common positions".

Common Positions are thus binding on all EU Member States but do not have to be submitted to national or European parliaments for scrutiny, they are simply adopted. In these two instances the measures adopted cover both Common Foreign and Security Policy (CFSP) and "third pillar" issues on police and criminal cooperation (Title VI of the TEU) and the European Community's migration and asylum policy (Title IV of the TEC).

By choosing to adopt these measures as Common Positions the Council has not only bypassed the European Parliament, it also means that their validity cannot be challenged before the Court of Justice.

Analysis: The EU's Common Positions on terrorism - an absence of legal and democratic accountability

Introduction

On 27 December 2001, the Council of the EU agreed by written procedure four measures relating to terrorism. None of them were subject to any form of democratic scrutiny, at least at the EU level, before adoption and in part these measures also circumvent democratic scrutiny over other proposals. Also, to a large extent the application of these measures is not legally accountable either.

Analysis of the measures

First of all, it should be observed that none of the four measures adopted on December 27th was the proposed 'Framework Decision' harmonising national law on terrorism which was the subject of a 'political agreement' at the EU Justice and Home Affairs Council on 6/7 December

2001. This proposal is still subject to parliamentary scrutiny reserves from Denmark, Ireland and Sweden, along with reconsultation of the European Parliament.

The first two of the four measures were 'Common Positions' based on both Articles 15 and 34 of the EU Treaty. This means that these measures address matters both within the scope of the Common Foreign and Security Policy (CFSP) and within the field of police and criminal cooperation.

1) Common Position 2001/930 (OJ 2001 L 344/90)

This is clearly based very closely on Security Council Resolution 1373 (2001) which was adopted shortly after the attacks on the USA (28 September). In fact Articles 1 to 15 of this Common Position correspond in turn to points 1(b) to (d), 2(a) to (g) and 3(a) to (e) of the Security Council Resolution.

However there are certain differences between the Resolution and the Common Position:

a) the last seven points, in Articles 11 to 17 of the Common Position, were not binding obligations in the Security Council Resolution; the Security Council merely 'call[ed] upon' states to take the relevant measures.

b) in point 1(d) of the Resolution, states were required to prevent their nationals and entities within their jurisdiction from providing funds to 'terrorists'. However, Article 3 of the Common Position appears to impose a total prohibition of any funds to such persons. It is questionable whether the Council can impose prohibitions outside Member States' jurisdiction.

c) in point 2(a) of the Resolution, states were obliged to refrain from supporting 'entities or persons involved in terrorist acts'. Article 4 of the Common Position as worded instead requires Member States to prevent the public from offering 'any form of support, active or passive', to such persons or entities. This change to the meaning of the Resolution is questionable in the absence of any clarification of such a prohibition, to distinguish between individuals who knowingly assist those involved in terrorist acts with their plans and those who merely share the same goals as the 'terrorists', but do not pursue those goals by violent means or knowingly assist with the preparation of violent acts.

Also, parts of this Common Position are potentially questionable from a legal point of view. Articles 10, 16 and 17 deal with subjects which form part of the European Community's migration and asylum policy. As such it is doubtful that the EU can adopt a foreign policy measure affecting these subjects, thereby circumventing the European Parliament and the European Court of Justice.

Similarly, points 1, 5, 8, 9 and 11 deal with police and criminal law issues. These points, particularly point 1, arguably go beyond the powers conferred on the Council by the EU Treaty when it adopts a third pillar 'Common Position', since the Treaty implies that third pillar 'Common Positions' are not binding and also makes clear that the Council must adopt a 'framework decision' if it wishes to harmonise national law. In this case the Council purports to bind Member States and to harmonise national law by use of a Common Position. Again there is a lack of judicial and democratic accountability, since (unlike other third pillar measures) the European Parliament does not have to be consulted on 'Common Positions', their validity cannot be challenged before the Court of Justice, and national courts cannot ask the European Court questions about their validity or interpretation.

2) Common Position 2001/931 (OJ 2001 L 344/93)

The second Common Position addresses 'the application of specific measures to combat terrorism'. First of all, it defines 'terrorist act' in several ways (Article 1(3)). This definition comes directly from the Council's political agreement of December 2001 on the proposed framework decision on terrorism (Council doc. 14845/1/01, 7 Dec. 2001, available on the Statewatch 'Observatory'). More precisely, Article 1 of the agreed Framework Decision is repeated as Article 1(3)(i), (ii) and (iii)(a) to (i) of the Common Position; Article 2(2) of the Framework Decision is repeated as Article 1(3)(iii)(j) and (k) of the Common Position; and Article 2(1) of the Framework Decision is repeated as the final paragraph of Article 1(3) of the Common Position.

Applying this definition, the Council decrees that the 'persons, groups and entities' listed in the Annex to the Common Position are subject to certain restrictions. Article 4 of the Common Position states that Member States 'shall' assist each other as regards criminal investigations, et al into all the persons and groups listed in the Annex. Articles 2 and 3 specify that further European Community acts will freeze the funds of, and block any resources going to, any of the international 'terrorist' persons, groups or entities listed in the Annex. These Articles do not apply to the domestic groups listed in the Annex (for example, Basque organisations, organisations on opposite sides of the Northern Ireland dispute and listed 'ETA activists'), apparently because the Council assumed that the EC did not have the power to freeze the funds of or block any resources going to those groups or persons.

Again it is legally questionable whether the Council can use a Common Position to harmonise the criminal law of the Member States, and there is again a gap in judicial and democratic accountability because the Common Position cannot be challenged directly or even indirectly through the national courts by the persons, groups or entities named in the Annex and because there was no involvement of the European Parliament. In fact, it is particularly questionable that the Council used the mechanism of a Common Position to adopt a definition of terrorism that was (in the form of the Framework Decision) still under scrutiny in several national parliaments and subject to reconsultation in the European Parliament.

There are also added human rights concerns with the Common Position. The draft Framework Decision on terrorism contains extensive references to human rights protection in its Article 1b, its preamble and in statements to be adopted by the Council when it is adopted. These provisions attempt to ensure that the definition of 'terrorism' is not so broad as to endanger the protection of human rights. In contrast, while the Common Position takes over the definition of 'terrorism' from the draft Framework Decision, it does not take over the provisions related to human rights. In fact, there is no reference at all in this Common Position to the principle that the definition of terrorism and the fight against it must be in accordance with human rights obligations.

3) Regulation 2580/2001 (OJ 2001 L 344/70)

This Regulation, based on Articles 60, 301 and 308 EC, implements part of Common Position 2001/931, setting out the details of the freezing of funds and the ban on the issue of resources to 'terrorist' persons, groups or entities. As noted above, the Regulation only applies to international terrorism, apparently because of the belief that the EC lacks the legal powers to agree a Regulation concerning domestic terrorism. The Council has the power, acting unanimously, to adopt a list of persons, groups and entities to which the Regulation applies (Article 2(3)). This Regulation is subject to possible rulings by the European Court of Justice on its interpretation or validity, but this prospect may be weakened because of the Regulation's connection with the Common Position. Also, the Council had to consult the European Parliament before adopting the Regulation, but it ignored the Parliament's views in several key respects, particularly as regards an expiry date for the application of the Regulation.

4) Decision 2001/927 (OJ 2001 L 344/83)

This Decision implements Reg. 2580/2001 for the first time, listing the persons, groups or entities covered by the freezing of funds and the ban on the supply of resources. In fact, the list is the same as the list of international terrorist groups, persons and entities attached as the Annex to Common Position 2001/931. Again, while the Decision (along with any future amendments to it) is subject to the jurisdiction of the Court of Justice on its interpretation or validity, that power might be circumscribed by the existence of the Common Positions. Also, there was no involvement of the European Parliament in the adoption of the Decision, and there will likewise be no involvement in any later Decisions adding persons, groups or entities to this list.

For Background documents please see Statewatch's "Observatory in defence and freedom and democracy":

www.statewatch.org/observatory2.htm

1. Four Acts adopted by the Council of the European Union by written procedure, 27.12.01.
2. UN Security Council: Resolution 1373(2001) dated 28 September 2001: UN Res 1373

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