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**CIVIL LIBERTY WOES WHEN DEALING WITH UNCIVL FOES:
THE EFFECT OF CIVIL LIBERTIES AND HUMAN RIGHTS ON
COUNTERTERRORISM OPERATIONS**

by

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

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PAPER ABSTRACT

Many of the counterterrorism tools created in the wake of the September 11, 2001 terrorist attacks to protect the world are now struggling to survive multiple legal challenges in domestic and international courts. There is a shift in the operational legal environment fueling a movement towards increased protection for individual civil liberties and human rights at the expense of counterterrorism efforts. Increasing restrictions on the ability of the United States and its partners, specifically in Europe, to share information and intelligence is limiting the ability to maintain the terrorist watchlist system. Legal challenges regarding extraterritorial detention are directly affecting the operational commander's ability to arrest and detain terrorist suspects. Courts have ordered the release of classified counterterrorism intelligence to terrorist suspect's defense counsels in federal prosecution, which threaten the operational commander's ability to protect his means and methods of intelligence collecting. The legal shift is eroding the latitude the operational commander has to conduct counterterrorism operations. The operational commander must understand and plan for the changing operational legal environment in the counterterrorism realm or risk the degradation of vital counterterrorism tools such as terrorist watchlists, international intelligence sharing, extraterritorial detention and arrests, and the criminal prosecution of terrorist suspects.

INTRODUCTION

The initial legal estimate of the attacks conducted against the United States (US) on September 11, 2001 (9/11) is that they were a criminal act carried out by a transnational terrorist organization, Al Qaeda (AQ).¹ However, the national passion for responding aggressively to the terrorist attack led the US to approve the use of military force against AQ and the hosting government in Afghanistan. The United States Congress quickly passed the Authorization for Use of Military Force (AUMF)² placing the US on a “war footing” and the Patriot Act,³ which drastically broadened law enforcement investigatory authorities and reduced privacy rights of Americans.⁴ The United Nations (UN), United States, and Europe Union (EU) all took significant steps to facilitate the tracking, targeting, and detention of terrorists, terrorist supporters and their financial assets.

It is in this flexible legal environment that the operational commander and the joint force have become accustomed to conducting counterterrorism operations. The actions of the UN, EU and US established a legally liberal operating environment that facilitated and enabled the prosecution of what the Bush administration deemed the Global War on Terror (GWOT). In the time since 9/11, the legal environment has gradually moved toward a refocus on protecting civil liberties and human rights, and the operational commander faces an uncertain future when it comes to addressing terrorist threats effectively.

¹ Michael Schmitt, "International Law and the Use of Force (The Jus ad Bellum)," Newport: Naval War College Lecture, March 24, 2014.

² *Authorization for the use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

³ *See USA PATRIOT Act*, Pub. L. No. 107-56, 115 Stat. 272 (2001). The Patriot Act altered the restrictions on intelligence gathering within the United States.

⁴ Elizabeth Rindskopf Parker, “Civil Liberties in the Struggle Against Terror,” In *Legal Issues in the Struggle Against Terror*, edited by John Norton Moore and Robert F. Turner. Durham, (NC: Carolina Academic Press, 2010), 141-170, 142.

The shift to the operational legal environment has gained momentum and is moving towards the more conservative legal norms observed prior to the 9/11 attacks.

Counterterrorism techniques have come under increased legal scrutiny as violations of individual civil liberties and human rights. Current legal trends in the US and Europe are hampering the widespread use of terrorist watchlists, international intelligence sharing, extraterritorial detention and arrests, and the criminal prosecution of terrorist suspects.

Trends indicate increasing pressure to divulge methods and sources of intelligence information used to interdict terrorist threats and movement towards a legal environment that emphasizes greater protections for civil liberties and human rights. The increased protections are interfering with current counterterrorism tools and practices.

How these legal cases and rulings affect the operational commander's ability to sustain and employ current counterterrorism tools such as terrorist watchlists, international intelligence sharing, extraterritorial detention and arrests, and the criminal prosecution of terrorist suspects has yet to be fully determined. How will recent legal challenges and associated rulings resulting in increases in civil liberties/human rights protections impact operational practices, protection of currently classified processes and systems, and the ability to work with current and future multinational partners in the conduct of counterterrorism operations? The operational commander must understand and plan for the changing operational legal environment in the counterterrorism realm or risk the degradation of vital counterterrorism tools such as terrorist watchlists, international intelligence sharing, extraterritorial detention and arrests, and the criminal prosecution of terrorist suspects.

LEGAL TRENDS

Prior to the 9/11 terrorist attacks, the United States' operational legal environment remained a consistent struggle between the protection of individual civil liberties and the security of the nation. There was arguably an appropriate balance, with the protection of individual rights often prevailing on the premise that the US is a nation of laws empowered by the very people's liberties it protects. Historically, the protection of individual rights has ebbed and flowed based on the perceived threat the US faces and the desire for national security measures. The events of 9/11 resulted in a predictable shift toward national security and less protection of individual civil liberties.⁵ Congress passing the AUMF immediately following 9/11 significantly increased the military's legal operational space. Treating terrorist suspects as military targets under the Law of Armed Conflict (LOAC) supplanted investigation and prosecution, traditionally understood to be part of law enforcement.

Europe has a philosophically different approach to counterterrorism than the US based on defeating terrorism via law enforcement vice military action. Where the US has relied heavily on military forces, along with law enforcement strategies, to disrupt and destroy terrorist networks, the European counterterrorism approach has drawn chiefly upon multinational cooperation and improvement among law enforcement capabilities. Europe would not accept armed forces interdicting terrorist threats in a similar fashion to the ones used in Afghanistan and Iraq due to concerns about human rights and civil liberties.⁶ European nations emphasize human rights and individual freedoms, incorporating legal

⁵ Ibid.

⁶ Edward Garrant, *A European Solution to Islamic Extremism in Western Europe*, National Defense Univ., Norfolk VA, Joint Advance Warfighting School, 2006, 56.

provisions to protect them through a series of treaties, EU law, and national laws.⁷ European protections of personal liberty are robust and have created an open society.

The pendulum swing that enabled the AUMF has changed direction and is gaining momentum in its movement to protect civil liberties and human rights, eroding the latitude the operational commander has to conduct counterterrorism operations. The change in procedures used to secure air travel typifies the shift in the legal operating environment. Prior to 9/11, the American public accepted the limited measures employed by airport security to facilitate safe travel. It would have been unacceptable to have to remove your shoes or your jacket when going through airport security and prior to boarding an aircraft. After 9/11, however, with sweeping changes in security posture and the creation of the TSA, Americans were subjected to, and willingly accepted, much greater security measures at airports such as full body pat downs and scans. The nature of the perceived terrorist threat to the nation required these additional security measures. With the passage of time and the events of 9/11 over a decade past, the tolerance of these personal intrusions is beginning to wane as evidenced by the increased legal challenges to the systems emplaced to protect society following 9/11.⁸

The pendulum swing affects more than US legal precedence, but also European counterterrorism operations and international law. The US does not operate internationally

⁷ The European Convention on Human Rights and The Charter of Fundamental Rights of the European Union.

⁸ Cases include: *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004). *Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006). Case T-228/02, *People's Mojahedin Org. of Iran v. Council of the European Union [PMOI I]*, 2006 E.C.R. II-4665, ¶ 1. *People's Mojahedin Organization of Iran v. Council (OMPI III)*, 2008 E.C.R. I.I. 3487 (2008). *Kadi and Al Barakaat International Foundation v. Council and Commission*, 2008 E.C.R. I. 6351 (2008). *Nada v. Switzerland*, 2012 E.C.H.R. 1691 (2012). *European Commission & the Council of the European Union v Yassin Abdullah Kadi*, joined Cases C-584/10 P, C-593/10 P and C-595/10 P [2013] ECR not yet reported (Jul. 18, 2013). *Latif v. Holder*. Case 3:10-cv-00750-BR, Document 110, (D. Ore. Filed Aug. 28, 2013). *Smith v. MoD* [2013] UKSC 41. *Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB). *United States v. Daoud*. Case 1:12-cr-00723, Document 92 (D. Illinois, January 29, 2014).

in a legal vacuum; the decisions of national and international courts weigh heavily on the US partners' authorities to conduct counterterrorism operations. Important to the operational commander is the consideration of how to collaborate with European partners who have different interpretations of what constitutes adequate protection of civil liberties and human rights when conducting multinational counterterrorism operations.

Joint Publication 3-26, *Counterterrorism*, emphasizes that when conducting counterterrorism operations with multinational partners the success “hinges on the US ability to work within each partner’s political restraints, traditional structures, policies, and procedures.”⁹ With distinct and often dramatic differences in how the US and its multinational partners, specifically our European partners in European Command (EUCOM), identify civil liberties and human rights it poses a significant challenge when conducting counterterrorism operations with partner forces.

TERRORIST WATCHLISTS

The UN, EU and US have adopted individual sanctions, listing terrorist suspects, freezing their financial assets and restricting their freedom to travel as primary counterterrorism tools.¹⁰ Several UN Security Council Resolutions (UNSCR) serve as the basis for the watchlist systems. UNSCR 1267, 1333, and 1390 oblige UN member states to adopt restrictive measures against individuals related to the Taliban and Al Qaida, directly

⁹ U.S. Office of the Chairman of the Joint Chiefs of Staff, *Counterterrorism*, Joint Publication (JP) 3-26. Washington, DC: CJCS, 19 Nov 2009, xvii.

¹⁰ Christina Eckes, *The Legal Framework of the European Union's Counter-Terrorist Policies: Full of Good Intentions?*, Working Paper Series, Amsterdam: Amsterdam Center for European Law and Governance (2010), 31.

identifying personnel affected.¹¹ Under UNSCR 1373, UN member states must identify people, organizations, and entities with freezable funds in accordance with national laws.¹²

At the European level, sanctions against individuals adopted under European law reflect the two UN sanctions regimes.¹³ Under the first regime, the EU reproduces the UN lists and adopts restrictive measures against those listed while under the second regime, the EU draws up its own list of terrorist suspects.¹⁴ People listed face a host of sanctions from freezing of assets to EU travel restrictions.¹⁵ On July 22, 2013, the EU finally placed Hezbollah on its watchlist.¹⁶ In May 2013, the US National Counter Terrorism Center, which manages the Terrorist Identities Datamart Environment (TIDE) database released figures that the number of names of suspected terrorists has grown to 875,000.¹⁷ The TIDE database is the prime source for the Terrorist Screening Database (TSDB); the US's unified terrorist watchlist databases for law enforcement, intelligence, and other agencies.¹⁸

Operational and theater commanders, such as the EUCOM Commander, utilize these terrorist watchlists to thwart terrorist threats. EUCOM's intelligence provides data needed to include terrorists on watchlists. While operational commanders do not maintain the watchlists, their command and staff maintain connectivity and relationships with the entities that feed the watchlist system it uses. EUCOM has structures and organizations to discuss, develop, analyze the impact, the utilization, the lawfulness and usefulness of the lists.

¹¹Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (New York: Oxford University Press, 2009), 41, 43.

¹²Elena Bratanova, "Terrorist Financing and EU Sanctions List: Is the Court's Annulment of a Council Decision a Lasting Protection for an Organization," *Columbia Journal of European Law Online* 15, no. 7 (2009) 8.

¹³Eckes, *EU Counter-Terrorist Policies and Fundamental Right*, 43.

¹⁴*Ibid*, 43-44.

¹⁵Matthew Dalton, "EU Court's Ruling Deals a Blow to Counterterror Efforts: Saudi Businessman's Removal From List is Upheld," *The Wall Street Journal*, July 18, 2013.

¹⁶Brussels (AP), "Hezbollah Placed on EU's Terror Watchlist," *The Fredrick News Post*, July 23, 2013.

¹⁷Shaun Waterman, "Terror Watchlist Grows to 875,000," *Washington Post*, May 3, 2013.

¹⁸*Ibid*.

The UN, EU, and national watchlist systems routinely suffer challenges in court and judges are highly critical of them for infringement on individual civil liberties, human rights, and for breaching the most fundamental procedural rights.¹⁹ The administration of the lists falls clearly short of basic fairness standards. There are multiple deficiencies: 1) no standard for who qualified, 2) no specifics about required evidence, 3) no notice required to listed entities, 4) no opportunity to defend against listing, 5) no process for delisting, and 6) it is not clear which courts could hear challenges.²⁰ Additionally, states are unwilling to share necessary information with either suspects or courts, making it impossible for courts to render a judgment.²¹ If criteria of listing and delisting are not discernible and comprehensible, watchlists fail to be incentives for change.²²

The UN, EU, and US face strong pressure from courts to ensure that watchlists comply with the fundamental standards of due process.²³ The UN Human Rights Committee decision in *Sayadi* found that a UNSC listing interfered with freedom of movement and privacy rights.²⁴ In the 2008 *Kadi case*, the European Court of Justice (ECJ) ruled that the EU listing process violated human rights standards. The ECJ found that the sanction system infringed on rights by not informing the affected of the reasons for the listing and the right to contest such reasons before an independent body.²⁵ In the *PMOI* cases,²⁶ the European

¹⁹ Eckes, *The Legal Framework of the European Union's Counter-Terrorist Policies*, 31.

²⁰ Monika Heupel, "I've Got a Little List," *The World Today*, Aug. - Sept. 2008: 28.

²¹ Eckes, *The Legal Framework of the European Union's Counter-Terrorist Policies*, 16.

²² Dr. Hans J. Giessmann, *The Implications of EU Antiterrorism Legislation on Post-Conflict Political Processes and on the Standing of the EU as a Mediator in Regional Conflicts*, Ad Hoc Briefing, Brussels: European Parliament: Directorate General for External Policies of The Union, Directorate B, Policy Department (2013), 7.

²³ Heupel, "I've Got a Little List," 28.

²⁴ Róisín Pillay, *Current Challenges Regarding Respect of Human Rights in the Fight Against Terrorism*, Briefing Paper, Brussels: European Parliament: Directorate General for External Policies of the Union, Directorate B, Policy Department (2010), 18.

²⁵ *Kadi and Al Barakaat International Foundation v. Council and Commission*, 2008 E.C.R. I. 6351 (2008). See Pillay, *Current Challenges Regarding Respect of Human Rights in the Fight Against Terrorism*, 18.

Council's decisions to list an organization as a terrorist suspect were annulled three times.²⁷

Each time the Council changed the procedure slightly and then relisted the applicant as a terrorist organization. The fundamental flaws remained: not sharing the relevant information that led to the listing with PMOI or the EU courts, and as a consequence, PMOI could not exercise its right for a hearing or for judicial review.²⁸

The watchlist system recently received a few more blows that are significant. The 2013 European Court of Human Rights (ECtHR) ruling in *Nada v. Switzerland* and the ECJ ruling in a follow up to the *Kadi* case directly affect the use of financial sanctions against terrorist suspects in favor of civil liberties.²⁹ In July 2013, the ECJ upheld a decision that removed Yassin Kadi from the EU list of people involved in terrorism, stating governments face the burden of showing that people belong on the list.³⁰ These cases establish the primacy of European courts over the UNSC and its resolutions. The ECtHR and CJEU are two of the most influential courts in Europe, and their jurisprudence extends in many aspects over almost all of Europe to include two UNSC permanent member countries. These courts are often a bellwether for the globe, and these two cases, in rapid succession, highlight our

²⁶ The case of the *Organisation des Modjahedines du peuple d'Iran or People's Mojahedin of Iran*. See Christina Eckes, *The Legal Framework of the European Union's Counter-Terrorist Policies: Full of Good Intentions?*, Working Paper Series, Amsterdam: Amsterdam Center for European Law and Governance (2010), 32. See also Case T-228/02, *People's Mojahedin Org. of Iran v. Council of the European Union [PMOI I]*, 2006 E.C.R. II-4665, ¶ 1. *People's Mojahedin Organization of Iran v. Council (OMPI III)*, 2008 E.C.R. I.I. 3487 (2008).

²⁷ Eckes, *The Legal Framework of the European Union's Counter-Terrorist Policies*, 32.

²⁸ *Ibid.*

²⁹ *Nada v. Switzerland*, 2012 E.C.H.R. 1691 (2012). *European Commission & the Council of the European Union v Yassin Abdullah Kadi*, joined Cases C-584/10 P, C-593/10 P and C-595/10 P [2013] ECR not yet reported (Jul. 18, 2013). See also Erika De Wet, "From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions," *Chinese Journal of International Law* 12, no. 4 (2013): 787-808, 787-88.

³⁰ Dalton, "EU Court's Ruling Deals a Blow to Counterterrorism Efforts"

European allies' emphasis on protecting civil liberties and human rights over the potential safety of the 27 EU countries.³¹

Then in the US, on August 28, 2013, a US federal court ruled constitutional rights are at risk when the federal government places Americans on the No Fly List. The Court concluded there is a constitutionally protected liberty involving international air travel affected by placement on the list.³² The decision by the ECJ and the US federal court add fuel to criticism that terrorism lists maintained by the UN, EU, the US, and other governments deprive people of due process rights.³³

These cases show a trend of successful legal challenges to the watchlists, which are increasing in frequency. These cases threaten the integrity of the watchlists that operational commanders and partner forces use. If operational commanders continue to rely on faulty or restricted lists, then potentially the whole counterterrorism targeting process is at risk. Commanders are one legal judgment away from losing these lists entirely. The inability to rely on this data would be detrimental to the operational commander's counterterrorism efforts.

INTERNATIONAL INFORMATION/INTELLIGENCE SHARING

The change in the operational legal terrain has had a dramatic impact on the operational force and how it conducts information and intelligence sharing for counterterrorism operations. Domestically, as already shown, support for counterterrorism activities is shrinking. The public's concerns that counterterrorism efforts are eroding civil

³¹ de Wet, "From Kadi to Nada: Judicial Techniques Favoring Human Rights Over United Nations Security Council Sanctions," 787-88.

³² *Latif v. Holder*. Case 3:10-cv-00750-BR, Document 110, (D. Ore. Filed Aug. 28, 2013), 4. See also ACLU, "Federal Court Sides With ACLU in No Fly List Lawsuit: Court Recognizes Due Process Rights of Americans on List," *ACLU: American Civil Liberties Union Website*, August 29, 2013. <https://www.aclu.org/national-security/federal-court-sides-aclu-no-fly-list-lawsuit> (accessed September 2, 2013).

³³ Dalton, "EU Court's Ruling Deals a Blow to Counterterror Efforts"

liberties is resulting in less understanding for the need to support counterterrorism measures that require the continuing and growing sacrifices to civil liberties.³⁴

The sharing of private and personal data, across international boundaries in near real time is necessary to interdict terrorist threats before they arrive on the shores of the US. The 9/11 Commission found that a lack of information sharing was one of the contributing factors to the failure of the US to anticipate and thwart the attacks on September 11, 2001.³⁵ It was this failure of information sharing that led the US and many of its foreign partners to rush to create numerous bilateral agreements following the attacks to facilitate the sharing of information. These agreements created a new legal operating environment of international intelligence cooperation that facilitated the necessary higher security, arguably at the expense of individual civil liberties. The public outcry to protect civil liberties was not initially present, but the increased number of legal challenges to counterterrorism practices is evidence that this has changed.

In Europe, counterterrorism measures have increased the tension between the populations and the states where strong counterterrorism responses have eroded the value of the very society they are meant to protect, in effect weakening the society against terrorism instead of strengthening it.³⁶ Counterterrorism measures seem too stringent if they interfere with the perceived fundamental right of privacy of personal data. It is within this legal environment, where operational commanders must operate. A perceived lack of standards for private personal data handling has caused many European partners to refuse to share data

³⁴ National Research Council (US), Committee on Technical and Privacy Dimensions of Information for Terrorism Prevention and Other National Goals, *Protecting Individual Privacy in the Struggle Against Terrorists: A Framework for Program Assessment*, 2008, 283.

³⁵ 9/11 Commission. "Final Report of the National Commission on Terrorist Attacks Upon the United States." *Washington, DC: US Government* (2004).

³⁶ European Security: High Level Study on Threats, Response and Relevant Technologies Consortium (ESSTR). *New European Approaches to Counter terrorism* (2006), 20.

with the US when it is unclear if the US meets European standards for data protection.³⁷

European partners have vital concerns that the US will not preserve their citizen's privacy data once transferred. Additionally, and more consequentially, violations of privacy rights due to improper or inadequate processing of personal information will result in decreased support for counterterrorism efforts.³⁸

Empowered with the majority of personnel and financial capability, the operational commander is often a major stakeholder in the information collection, analysis, and intelligence dissemination for the area where counterterrorism operations occur. During information sharing, the operational force commander has a protective responsibility for the privacy, civil rights, and civil liberties of personnel affected. The *National Strategy for Information Sharing and Safeguarding* published in 2012 directs that operational commanders ensure the conduct of missions in accordance with all existing laws and policies regarding the protection of privacy, civil rights, and civil liberties.³⁹

Operational commanders must issue guidance that is in accordance with national and international data sharing agreements that will address the requirements to protect the civil rights, civil liberties, and privacy, while enabling adaptability to fulfill mission requirements. This operational guidance will support the management and monitoring of intelligence operations from conception through execution to ensure the implementation of proper information accountability and compliance mechanisms across the entire organization.⁴⁰

³⁷ Mark Holmstrup, *Privacy Protection Standards for the Information Sharing Environment*, Naval Postgraduate School, Monterey CA, 2009, 75.

³⁸ National Research Council (US), *Committee on Technical and Privacy Dimensions of Information for Terrorism Prevention and Other National Goals*, 283.

³⁹ *National Strategy for Information Sharing and Safeguarding*. Washington, D.C.: United States Government, 2012, 9, 13.

⁴⁰ *Ibid.*

Information sharing is inherently a trust based activity. Commanders must foster and maintain trust with multinational partners and domestic audiences to ensure that information and intelligence is withheld only by exception and sharing is the norm. Improved information sharing enables the ability for intelligence and law enforcement agencies to determine and identify indicators and warnings of potential terrorist attacks.⁴¹ In Europe, EUCOM can engage European intelligence community entities, such as the Joint European Union Situation Center and the EU Intelligence Analysis Center that monitor and assesses security and terrorist threats to the EU. The operational commander must ensure that counterterrorism operations meet the requirements to support the sharing of intelligence and potentially evidence with our international partners.⁴² In the end, the operational commander has an obligation to protect freedoms, civil liberties and privacy rights guaranteed to all US persons while facilitating the compliance with international intelligence sharing agreements to support international counterterrorism efforts.

TERRORIST DETENTION

Perhaps the most troubling legal trend for the operational commander is the increased protections granted to terrorist suspects internationally that dramatically limit the options the commander has to detain and interdict extraterritorial terrorist threats. The current movement indicates that the protections afforded terrorist detainees under the employment of the AUMF in accordance with LOAC are not strong enough. The operational commander must give a decision regarding the pre-mission training for forces and the structure of interagency operational elements.

⁴¹ Paul Wilkinson, *International Terrorism: the Changing Threat and the EU's Response*, European Union Institute for Security Studies, 2005, 35.

⁴² Steven P. Haight, *The War on Terror, Intelligence Convergence, and Privacy*, Office of the Director of National Intelligence, Washington DC, 2012.

Working with European partners in conducting counterterrorism operations is becoming more difficult as the operational legal environment continues to constrict options for the operational commander. In June 2013, the United Kingdom Supreme Court ruled in the case of *Smith (No. 2)* that the European Convention on Human Rights (ECHR) extends to service members serving in combat outside of Europe.⁴³ The extension of the ECHR in an extraterritorial manner means that the ECHR applies to terrorists detained by British forces overseas. Article 5 (Right to Liberty and Security) of the ECHR requires detention to be part of the judicial process, and necessitates judicial oversight for preventative security detention and requires processing of prisoners towards trial or release.⁴⁴

Terrorist detention operations took another blow on May 2, 2014 in *Serdar Mohammed v. Ministry of Defence*⁴⁵ when a UK court held the United Kingdom does not have detention authority under the international humanitarian law/law of armed conflict regarding personnel captured during the non-international armed conflict in Afghanistan. The court ruled that British detention policy violates Article 5 of the ECHR and restricts holding individuals longer than 96 hours.⁴⁶

In these two recent court cases, the judge chose human rights law to apply over LOAC in terrorist detention. Human rights standards are creeping in and dictating how the military commander has to conduct counterterrorism operations. The cases create considerable concern for US operational commanders who will be conducting

⁴³ *Smith v. MoD* [2013] UKSC 41. See Thomas Tugendhat & Laura Croft, *The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power* 31 (Policy Exchange, 2013), 28, available at <http://www.policyexchange.org.uk>.

⁴⁴ *Ibid.*, 37.

⁴⁵ *Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB). See Marko Milanovic, "High Court Rules that the UK Lacks IHL Detention Authority in Afghanistan," *EJIL: Talk! Blog of the European Journal of International Law*, May 3, 2014. <http://www.ejiltalk.org/high-court-rules-that-the-uk-lacks-ihl-detention-authority-in-afghanistan> (accessed May 4, 2014).

⁴⁶ *Ibid.*

counterterrorism operations with the British, one of the US's staunchest allies.

Considerations for the operational commander are: do the British have the judicial capacity to provide the required oversight in Afghanistan to support ECHR Article 5 requirements and how will these new requirements impact joint operations? These rulings are likely to have a detrimental effect on British and US-British joint counterterrorism operations. More importantly, will more European partners quickly follow suit?

TERRORIST PROSECUTION

Both domestic and international legal challenges have reduced the ability to prosecute terrorist suspects successfully in US federal courts. Operational commanders are in a difficult position when it comes to assisting in the prosecution of terrorist suspects. The difficulty comes from the inability of the operational commander to ensure that the prosecution of a terrorist suspect and eventual conviction can occur without risking the classified information that was used to form the case.

During the conduct of counterterror operations, Service Members are transiting from combat and stability activities to perform what are typically police-like functions of arrests, processing of "crime scenes," and evidence collection for potential terrorist prosecution.⁴⁷ The AUMF leveraged the military's capabilities to conduct intelligence collection and analysis to support counterterror targeting in support of the nation's policy decisions. The shift to a military intelligence based process is less restrictive regarding evidence due to a focus on protecting the nation and the rights of US citizens are less likely to be affected.⁴⁸ This operational legal environment enabled the operational commander to utilize multiple counterterrorism tools without having to disclose sources, methods, and policies.

⁴⁷ Haight. *The War on Terror, Intelligence, Convergence, and Privacy*.

⁴⁸ Parker, "Civil Liberties in the Struggle Against Terror," 147.

Unlike the US, Europe still has strong protections against national intelligence agencies sharing information with any domestic law or security enforcement agencies.⁴⁹ There are strict limitations on what type or sources of information may be accepted from foreign governments and as evidence that could eventually end up supporting a criminal terrorist prosecution.⁵⁰ The impact for the operational commander is an increasingly restrictive intelligence sharing environment. Europe is a concentration point that terrorists use to export attacks against the US and EUCOM and the collective European nations may not be in a position to interdict.⁵¹ The restrictive intelligence sharing environment also limits the operational commander's chances of gaining a successful terrorist conviction if that conviction has to rely on evidence or intelligence collected obtained in a manner solely in line with US policies.

The Federal Rules of Evidence (FRE) govern evidence used in federal criminal terrorist prosecutions, and it covers both the classified and unclassified types of evidence. With the majority of the best evidence coming from classified intelligence sources, the risk is the prevention of US federal courts using the evidence due to current US judicial procedures. The operational commander is then at risk of not supporting the requirements necessary for a conviction.⁵² Additionally, difficulties with ensuring the authentication of physical evidence, commonly referred to as a chain of custody, and witness availability present further concerns that can limit the commander's ability to support a successful terrorist prosecution.⁵³ The 2011 arrest of former Guantanamo Bay detainee, Salim Ahmed Hamdan is illustrative of the

⁴⁹ Garrant, *A European Solution to Islamic Extremism in Western Europe*, 56.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Ricardo Grave de Peralta, "Ensuring the End Game Facilitating the use of Classified Evidence in the Prosecution of Terrorist Subjects," PhD diss., Monterey, California, Naval Postgraduate School, 2010, 12.

⁵³ *Ibid.*

chain of custody issues if there is military involvement in the arrest of a potential terrorist who we later want to prosecute. When Hamdan was stopped and apprehended by US and Afghan Special Forces he had in his possession documents, photographs and passports. However, the military personnel involved in his arrest, not understanding evidence recovery techniques, the rules of evidence, or chain-of-custody, did not collect the information in Hamden's possession in a manner that would provide accurate accountability.⁵⁴

Evidence collection for domestic law enforcement may resemble military intelligence collection, but the methods can differ substantially. Military intelligence collection is conducted to inform the commander to enable decisions and improve understanding of the operational environment. There is often significant pressure to collect intelligence to meet the operational time limitation. Evidence collection for law enforcement purposes is conducted to legal standards to establish things known as "probable cause" or "beyond a reasonable doubt" to facilitate the conviction of a terrorist in a criminal court of law.⁵⁵

In an effort to improve the collection of both evidence and intelligence, operational commanders can utilize specific units to conduct "sensitive site exploitation" (SSE). SSE units have dramatically improved the operational forces ability to exploit documents, data, personnel and captured material during the conduct of operations. However, the ability to gather intelligence with SSE practices does not resolve the issues surrounding the utilization of that intelligence in US federal court for terrorist prosecution. The limited utilization of intelligence leaves operational commanders with the question of how to transition the

⁵⁴ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006). See also Grave de Peralta, "Ensuring the End Game Facilitating the use of Classified Evidence in the Prosecution of Terrorist Subjects," 15.

⁵⁵ Grave de Peralta, "Ensuring the End Game Facilitating the use of Classified Evidence in the Prosecution of Terrorist Subjects," 13.

intelligence and information into evidence that will result in a criminal terrorist conviction without compromising his sources or support the required for testimony in a courtroom?⁵⁶

The ruling in *United States v Daoud* appears to be a real threat to the revelation of US intelligence collection procedures to terrorist defendants. Following 9/11, intelligence collected domestically and abroad has been used in the criminal prosecutions of terrorist suspects. Since 2001, courts have honored the United States Government's requests to keep secret information used by the prosecution out of the hands of defendants and their attorneys. This process has enabled the operational commander to exploit intelligence advantages and to facilitate criminal prosecution of terrorist suspects. On 29 January 2014, United States District Judge Sharon Johnson Coleman wrote an unprecedented opinion granting Daoud's attorney access to secret information presented to the Foreign Intelligence Surveillance Act (FISA) Court, citing what she felt was the requirement to protect the defendant's rights to receive effective counsel.⁵⁷

The United States Government is opposing Judge Coleman's ruling to allow the disclosure of the FISA applications. FISA applications must contain an affidavit from an appropriate law enforcement official or intelligence officer detailing the reasons for the FISA surveillance. FISA applications often include or reference secret or sensitive intelligence sources and practices that the United States Government rightly does not want given to a terrorist suspect undergoing prosecution.⁵⁸ This decision runs contrary to the entire history of FISA court precedence, over 36 years, and is halting a practice that has been an effective

⁵⁶ Ibid.

⁵⁷ *United States v. Daoud*. Case 1:12-cr-00723, Document 92 (D. Illinois, January 29, 2014). See also Jason Meisner, "Defense in Loop Plot Bomb Case to get Secret Terror Court Filings," *Chicago Tribune*, January 29, 2014.

⁵⁸ David Laufman, "The Snowden Effect and NSA Snooping: A Court Finally Demands Feds Justify FISA Spying," *Washington Times*, February 3, 2014.

tool operational commanders could rely on to support the interdiction and prosecution of terrorist suspects while protecting the intelligence apparatus that supported the prosecution.⁵⁹ Judge Coleman's ruling presents the operational commander with the question of how to conduct intelligence based counterterrorism activities that support prosecution of terrorist suspects without risking the secret intelligence sources, practices, and personnel involved from disclosure to terrorists and their affiliated supporting organizations.

CONCLUSION

The counterterrorism tools that the US and Europe employed since 9/11 are under attack in courtrooms around the globe. The operational commander and the joint force face a litany of legal assaults to the counterterrorism tools that have enabled the protection of the homeland for the past decade. The watchlist regime is currently facing a multipronged attack on its authority to secretly track suspected terrorists in the US and Europe. Courts are struggling to balance the need for secrecy of intelligence that helps interdict terrorist threats with the rights of individual to privacy. Information sharing between counterterrorism partner countries is at risk as European countries impose greater restrictions on the personal data that law enforcement agencies may maintain or share. Recent rulings in Europe mandated the same protections for terrorist suspects detained on the battlefield as those provided to citizens domestically to protect civil liberties. Judges in the US are questioning the 36 year history of not allowing terrorist or their legal team, to see all the associated intelligence that forms the basis for a FISA case. This trend is problematic because it may disclose the methods and personnel the joint force uses to collect threat intelligence.

⁵⁹ Carrie Cordero.. "What Would Have Been Big News: The Daoud Disclosure Order." Lawfare, Hard National Security Choices, February 7, 2014, available at <http://www.lawfareblog.com/2014/02/what-would-have-been-big-news-the-daoud-disclosure-order>.

The trends are clear and the legal operational environment of the future looks challenging. Operational commanders have already seen changes in the way they can conduct counterterrorism operations. The operational commander must stress to their subordinate commands to conduct counterterrorism operations within the boundaries of the ever-developing operational legal environment. The joint force needs to focus on fighting the terrorists, rather than the rules. Therefore, the operational commander must understand and plan for the changing operational legal environment in the counterterrorism realm.

RECOMMENDATIONS

Operational commanders and the joint force must understand and plan for the changing operational legal environment that is rebounding to ensure more civil liberties and human rights protections in the conduct of counterterrorism operations. With regards to Europe, EUCOM must take into account UN, European, and US civil liberties and human rights pressures and concerns and look for ways to work within this ever changing operational legal environment. As EUCOM conducts more UN sanctioned and European partnered force counterterrorism activities, EUCOM needs to understand the shortfalls in the counterterrorism tools currently employed and work to strengthen them in order to facilitate US counterterrorism operations. The joint force must understand the consequences of conducting counterterrorism operations with multinational partners that have different views of civil liberties, privacy and human rights from the US. EUCOM can play a vital role by facilitating the communication between actors, creating a system that protect rights, ensures due process, provides for redress, and maintains usable counterterrorism tools.

The operational commander's staff must actively research and comprehend the impacts of international legal changes to counterterrorism tools such as terrorist watchlists,

international intelligence sharing, extraterritorial detention and arrests, and the criminal prosecution of terrorist suspects in order to assist in planning successful counterterrorism operations. Each year the George C. Marshall Center for Security Studies and EUCOM Staff Judge Advocate sponsor an International Legal Conference (ILC).⁶⁰ The ILC provides an optimal opportunity for European and US lawyers to collaborate on the issue of terrorist watchlists.⁶¹ The ILC would facilitate formal and informal consultation on this complex policy and legal issues facing the EUCOM Commander's ability to conduct counterterrorism effectively.⁶²

Special Operations Command Europe (SOCCENT) is the ideal element to tackle the issues of threats to counterterrorism tools. SOCEUR is the lead for EUCOM's counterterrorism mission and is responsible for monitoring, facilitating, coordinating, and synchronizing all counterterrorism efforts.⁶³ SOCEUR established the CT-Core Cell to monitor, facilitate, coordinate, and synchronize counterterrorism efforts across the theater.⁶⁴ SOCEUR works closely with our European partners, the US intelligence community, and other US combatant commands to identify and counter threats to the US and focuses on intelligence, information-sharing and developing partner capabilities.⁶⁵ Access to diverse resources makes the CT-Core Cell a perfect forum to improve counterterrorism tools.

Operational commanders need to establish practices and procedures at every level to ensure the protection of privacy information and that those protections enable the rapid

⁶⁰ United States European Command Website, Key Activities, Partnership Programs, International Legal Conference. <http://www.eucom.mil/key-activities/partnership-programs/international-legal-conference> (accessed Aug. 30, 2013).

⁶¹ Ibid.

⁶² Ibid.

⁶³ US Congress, House and Senate. Testimony of Admiral James Stavridis, United States Navy, Commander, United States European Command, the 113th Congress (2013), 26, SOCEUR Appendix i.

⁶⁴ Ibid, SOCEUR Appendix iii.

⁶⁵ Ibid.

sharing of intelligence where possible. Operational commanders should continue to develop the SSE skills, training, and execution to support successful prosecution of terrorist suspects. The integration of trained and authorized law enforcement personnel into the operational force ensures the protection of civil liberties when conducting counterterrorism operations. Using trained law enforcement personnel will help preserve evidence for federal terrorist prosecutions and allow military forces to focus on intelligence collection.

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