*Athina Giannakoula**

The European Agenda on Security – A Comment

The European Agenda on Security sets goals and priorities regarding EU criminal law for the period 2015-2020. The present contribution reviews the distinctive aspects of the Agenda and puts emphasis on significant emerging points of concern.

I. Preface

On 28 April, 2015, the European Commission introduced a "European Agenda on Security" for the period 2015-2020,[1] which in the months that followed was examined by both the Council and the European Parliament.[2] The Agenda, aiming "to support the Member States in ensuring security", determines the principles governing the planned actions, the tools to be used and the measures to be taken; moreover, it identifies the basic priorities regarding security, i.e. the main threats to be tackled. In this respect, *the Agenda affects the future steps of the EU in the field of criminal law*; at the same time, however, questions are raised concerning the necessity of some measures, while new challenges emerge as to respecting criminal law principles and protecting fundamental rights.

II. The main features of the European Agenda on Security

The European Agenda on Security has four distinct parts: an introduction which explains the reasons behind its content and sets the goals of the proposed interventions; an elaborate description of the pillars of the EU action; an analytical presentation of

* Dr jur. – Attorney at Law.

1 COM(2015) 185 final "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions" (Department responsible: Migration and Home Affairs).

2 The *European Parliament* (EP) adopted the *resolution of 9 July 2015 on the European Agenda on Security* (2015/2697(RSP)), P8_TA-PROV(2015)0269; the *Council* approved on 15-16.7.2015 (doc. 9934/15) the "Draft Council conclusions on the development of a renewed European Union Internal Security Strategy" (doc. 9798/15), according to which: "the Council Conclusions of 4-5 December [2014] on the development of the renewed EU Internal Security Strategy and these Council Conclusions with the principles outlined below based on the Commission's Communication 'European Agenda on Security', renew the *European Union Internal Security Strategy* for 2015-2020".

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legislative and operational measures; a listing of the areas of crime the EU needs to address first and foremost.

1. Modern threats to security & the general mission of the Agenda

The Agenda opens with the *aim* of the EU to ensure that *people* "live in an area of freedom, security and justice, without internal frontiers". This general statement is followed by a more specific reference to the need of *Europeans* "to feel confident that, wherever they move within Europe, their freedom and their security are well protected, in full compliance with the Union's values, including the rule of law and fundamental rights". Based on this introduction, it is fair to assume that achieving goals with regard to fighting crime has been designed in the Agenda to be in line with respecting fundamental principles and rights; or, seen from different angle, that the notion of security includes protection not only against crime, but against EU and state authority as well.[3]

Next, the Agenda invokes the characteristics of *modern threats* to security ("new", "complex", "increasingly cross-border and cross-sectorial", deriving from "changing forms of radicalisation, violence and terrorism"), in order to justify the necessity of a renewed Internal Security Strategy in the EU. Moreover, apparently in view of Article 4(2) TEU (: "national security remains the sole responsibility of each Member State"), the Commission explains that the Member States "have the front line responsibility for security, but can no longer succeed fully on their own",[4] and suggests that the Agenda is *shared* between the latter and the EU.[5] Subsequently, it is estimated that the Agenda will bring about "better information exchange", "increased operational cooperation and mutual trust", and ensure "that the internal and external dimensions of security work in tandem", while terrorism, organised crime and cybercrime, "as interlinked ar-

3 See an early reference to this aspect of security in the Opinion of the Committee of the Regions on 'Crime and Safety in Cities' (OJ 2000 C 057/90, para. 5.4.): "The question of public trust and confidence in the authorities responsible for safety and security also has to be addressed. When an individual has a bad experience with the authorities, there are serious repercussions in terms of trust and confidence"; see also para. 10 in the EP's resolution (fn. 2).

4 The EP's resolution (fn. 2) addresses the issue directly, as follows (para. C): "the national security exception included in Article 4(2) TEU cannot be used to allow national security agencies to infringe on the interests, including economic interests, of other Member States, their citizens' and residents' rights and the laws and policies of the European Union and third countries more generally".

5 COM(2015) 185 final (p. 2) also refers to the EU "*respecting national responsibilities* for upholding the law and safeguarding internal security". Declarations of a restrictive nature can also be found in the previous EU Internal Security Strategy, adopted by the Justice and Home Affairs Council on 25-26.2.2010 and approved by the European Council on 25-26.3.2010, where it was clarified (p. 7) that the Strategy was "[…] not aimed at creating any new competences […]". The EP's resolution (fn. 2) focuses (in para. B) on *delivering optimal results* ("in order to deliver optimal results, the concrete implementation of these shared goals and priorities should be associated with a clear division of tasks between the EU level and the national level, on the basis of the principle of subsidiarity").

eas with a strong cross-border dimension", are yet again prioritised, just as they were in the previous Internal Security Strategy of the EU.[6]

2. Key principles

Similarities between the 2015 Agenda and the 2010 Strategy are not limited to the areas of crime; on the contrary, in what is a rational choice, the Commission declares the *continuity* of the EU's Internal Security programmes (: "the strategic objectives set out in the Internal Security Strategy 2010-2014 remain valid and should continue to be pursued"). Consequently, both programmes are founded on basically the same *principles*. However, the Agenda addresses the principles in more detail, and draws attention to the Treaty of Lisbon as a turning point regarding (a) *effectiveness* in the field of police and judicial cooperation, and (b) *fundamental rights protection as well as democratic control* in the said field. On the other hand, though, the Agenda adds *operational goals* in the principles.

a) "Full compliance with fundamental rights"

The first principle is introduced with a statement of major significance: "*Security and respect for fundamental rights are not conflicting aims, but consistent and complementary policy objectives*".[7] With this, the Commission touches a delicate matter, given that the EU has not been ensuring a satisfactory level of respect for fundamental law principles and for the rights of the individual when legislating in the field of criminal law,[8] while its reinforced competences after Lisbon have come with even greater responsibility. Therefore, the relevant commitments cited in the Agenda[9] are of undeniable value. Nonetheless, it is equally vital that these general declarations are transformed into ap-

6 The EU Internal Security Strategy 2010-2014 (pp. 13-15) referred to "significant common threats", and more specifically to "terrorism", "serious and organised crime" and "cybercrime", but also to "cross-border crime" generally, and "violence itself".

7 For this the Commission refers to Article 6 of the Charter of Fundamental Rights and to para. 42 of the ECJ Judgment of April 8th 2014 in joined cases C-293/12 and C-594/12.

8 See various examples in *European Criminal Policy Initiative,* A Manifesto on European Criminal Policy, ZIS 2009, pp. 707 et seq.

9 "The Union's approach is based on the common democratic values of our open societies, including the rule of law, and must respect and promote fundamental rights, as set out in the Charter of Fundamental Rights. All security measures must comply with the principles of necessity, proportionality and legality, with appropriate safeguards to ensure accountability and judicial redress. The Commission will strictly test that any security measure fully complies with fundamental rights whilst effectively delivering its objectives. The impact of any new initiative on free movement and the protection of personal data must be fully in line with the proportionality principle, and fundamental rights. This is a shared responsibility for all EU and Member State actors. EU bodies such as the EU Agency for Fundamental Rights (FRA) and the European Data Protection Supervisor have an important role in assisting EU institutions and other EU agencies to uphold and promote our values".

plicable measures complementing each planned action. Thus, the importance of the first principle must further be verified by the content of the Agenda.

b) "More transparency, accountability and democratic control, to give citizens confidence"

At an abstract level, the second principle of the Agenda shares the significance of the first one, as the Commission points out the fundamental elements of the EU's democratic function and connects them to the citizens' confidence in the authorities. Next, the Commission highlights the role of the democratically elected bodies in the EU (i.e. the European Parliament and the national parliaments) and determines its own obligations towards them.[10] In addition, in an effort to "enhance transparency and participation", it announces the establishment of an *EU Security Consultative Forum* "bringing together Member States, the European Parliament, EU agencies, and representatives of civil society, academia and the private sector".

c) "Better application and implementation of existing EU legal instruments"

The Internal Security Strategy 2010-2014 had introduced a catalogue of seven principles. The last one was different from the rest, since it referred to "mutual trust as a key principle for successful cooperation".[11] In what seems to be its successor, the Agenda's third principle describes the Commission's priority to help Member States to promote *mutual trust*, to "fully exploit existing tools for information sharing" and to "foster cross-border operational cooperation between competent authorities", through "peer evaluation and effective monitoring of the implementation of European measures".

d) "More joined-up inter-agency and a cross-sectorial approach"

The Agenda's fourth principle also deals with operational issues. Its central point is to manifest the need for new or even deeper cooperation and coordination between all the actors in the EU. In this context, one notices that ensuring security is to be pursued by measures taken within the area of freedom, security and justice, *and* by "special actions" performed "in a wide range of EU policies, including in the area of trans-

10 "The European Parliament has taken up its full role as co-legislator, ensuring democratic oversight. The specific role of national parliaments in the area of freedom, security and justice is reflected in the Commission's wider commitment to a renewed political dialogue with national parliaments. Twice a year the Commission will update the European Parliament and the Council on the implementation of this Agenda".

11 The first six concerned "fundamental rights, international protection, the rule of law and privacy", "protection of all citizens, especially the most vulnerable, with the focus on victims of crimes", "transparency and accountability", "the principles of tolerance, respect and freedom of expression", "integration, social inclusion and the fight against discrimination", and "solidarity between Member States".

port, finance, customs, education, maritime security policy, information technologies, energy and public health". Therefore, security appears to be regarded as a *superior objective*, which may penetrate other EU policies and gain from various EU competences.

e) "Bring together all internal and external dimensions of security"

This last principle is equally indicative of the broad scope of security under the Agenda. Starting with the declaration that "EU internal security and global security are mutually dependent and interlinked", the Commission defines a number of EU actions that include working with non-EU actors (e.g. dialogues on security with neighbourhood countries, key strategic partners, international and regional organisations; joint action plans with key third countries; deployment of security experts; mutual legal assistance agreements with third countries, etc.).

3. Types of actions

In the following section of the Agenda, the Commission presents the planned actions, divided into three basic categories: information exchange, operational cooperation, and supporting action. As an introductory note, the Commission clarifies that it must be the priority of all the actors to *"fully implement existing instruments"* and, *"where necessary"*, adopt "new or more developed tools to maximise the added value of EU measures". Both the priority rule and the necessity criterion are of great importance, as they correspond to key elements of the fundamental criminal law principles of ultima ratio and of proportionality;[12] therefore, it is crucial to confirm the extent to which they have served as guiding lines in drawing the exact content of the proposed activities.

a) "Better information exchange"

The Agenda provides a catalogue of the information exchange mechanisms that either already exist or are about to be established in the EU; it further explains how each tool can be used by law enforcement authorities and what the future perspectives are. The catalogue includes: (a) the Schengen Information System (SIS), (b) the Schengen Border Code, (c) the Interpol's database on Stolen and Lost Travel Documents (SLTD), (d) common risk indicators, (e) the Customs Advance Cargo Information System, (f) the Anti-Fraud Information System (AFIS), (g) the Prüm framework, (h) the Europol's Secure Information Exchange Network Application (SIENA), (i) the EU Passenger Name Record (PNR) system, (j) PNR agreements with third countries, (k) communi-

12 *P. Asp*, The importance of the principles of subsidiarity and coherence in the development of EU criminal law, European Criminal Law Review (EuCLR) 2011, p. 44.

cations data, (l) the European Criminal Records Information System (ECRIS), (m) the European Police Record Index System (EPRIS), (n) the Maritime Common Information Sharing Environment (CISE). The Commission considers the Schengen Information System, the Schengen Border Code and ECRIS as "key instruments"; on the other hand, it asks for full implementation especially of the Prüm framework, and for the adoption of pending proposals, such as the EU PNR directive and the Europol regulation. In parallel, it calls for the Data Protection reform, the proposed directive on Data Protection for police and criminal justice authorities, and the negotiation of the Data Protection Umbrella Agreement between the EU and the USA to proceed.

In taking full advantage of the mechanisms mentioned above, exchanging information would involve (among others): information originating from criminal records and police records; comparison of DNA profiles, fingerprint data and vehicle registration data; information on terrorist suspects; information related to fraud; communications data; alerts on wanted or missing persons and objects; information on stolen and lost travel documents, on cargo arriving into and departing from the EU; information provided at the time of booking and check-in, etc. Most of the gathered and shared information is meant to be used by national border authorities. As far as the purpose of exchanging information, the Agenda provides certain specific goals (: implementing travel bans, invalidating the travel documents of persons suspected of wanting to join terrorist groups outside the EU, detecting crime and building an effective case, preventing criminals escaping detection by travelling through another Member State), but sometimes only refers to the general objective of preventing and combating serious crime (the areas of crime cited in the Agenda in relation to information exchange are terrorism, organised crime, drug trafficking, arms trafficking, cigarette smuggling, illegal currency transfers, trafficking in human beings, child sexual exploitation, fraud, piracy, environmental pollution; CISE involves security data also in the area of civil protection and natural disasters).[13]

In total, one notices that this first pillar of the planned activity has a strong *preventive* nature, as *"risk"* is the decisive concept for many information sharing mechanisms. Moreover, in two occasions, the compatibility with the Charter of Fundamental Rights and the introduction of common data protection rules are primarily linked to the *effectiveness* of cooperation. Likewise, proposing more developed tools is usually based on arguments concerning their *added value*, which results into regarding the "need" to adopt them as self-evident.

b) "Increased operational cooperation"

In this particular section, the Commission enumerates EU operational agencies and tools, and shortly describes which aspects of their function are already being used or may be used in the future in relation to the objectives of the Agenda. With the excep-

13 Of course, more specific objectives and additional areas of crime may be provided for by the legislative acts establishing the abovementioned tools or agencies.

tion of the European Public Prosecutor's Office, which has not been established yet, the Agenda as a rule refers to existing levels of cooperation and requests full implementation or more regular application of existing instruments.

In this context, there are different provisions for the various actors. To begin with, *Member States* are called to use more: the EU Policy Cycle for serious and organised crime; the European Judicial Network (EJN) for the execution of European Arrest Warrants and freezing and confiscation orders; the support of EU agencies to tackle crime through joint action; the possibility to involve third countries in Joint Investigation Teams; and the coordination of cross-border investigations and prosecutions provided by Eurojust. *Eurojust and Europol* are urged to enhance their operational cooperation, and the *EU* to continue reinforcing crisis management preparedness and strengthening its capacity for detection of illicit trade in goods or cash. Lastly, the *Commission* expresses its intention to extend the scope of certain activities (risk assessments, cooperation between networks of national specialised units) and to work together with the Member States to fully implement the 2013 civil protection legislation.

Oddly, in two cases the Commission deals with exchanging information. The first one concerns the revised cooperation agreement between Europol and Frontex, which will enable the two agencies to share personal data, "with appropriate data protection safeguards"; the latter phrase is the only explicit mention of guarantees in the section. The Agenda also refers to Police and Customs Cooperation Centres (PCCCs) passing information to one another and to Europol. Notably, although it acknowledges that most of the information exchanged in PCCCs *does not concern serious and organised crime*, the Commission argues that passing it to Europol where appropriate is important, without any further explanation; however, the need to share information not involving serious crime is far from self-evident, especially when Europol is involved.[14]

c) "Supporting action: training, funding, research and innovation"

The last pillar of the proposed activity is in reality relevant to all the previously presented actions. It consists of three parts, the significance of which in relation to security is briefly but rationally justified by the Commission.

Training in particular is directly linked to *implementing* any measure introduced by law and, thus, has a special weight with regard to EU criminal law. As stated in the

14 According to Article 87 TFEU, police cooperation (which includes "the collection, storage, processing, analysis and exchange of relevant information") among the Member States' competent authorities is established in relation to the prevention, detection and investigation of criminal offences in general (not just serious ones). However, Article 88 TFEU links Europol to "*serious* crime affecting two or more Member States, *terrorism* and forms of crime which affect a *common interest* covered by a Union policy", while targeting serious crime is a prerequisite set by Articles 83 and 85 TFEU too. Thus, given also the consequences of information storage to fundamental rights, the obligations deriving form the principle of subsidiarity as well as the overall rationale of the Agenda, it is necessary to support this particular case of sharing information with a convincing explanation.

Agenda, "the effectiveness of cooperation tools relies on law enforcement officers in Member States knowing how to use them". For this reason, it is argued that cross-border cooperation must be included in the training of members of the judiciary and police officers at both EU and national level (European Police College, national police academies, European Judicial Training Network, European e-Justice Portal and e-learning).

As far as *funding* is concerned, the Agenda refers to various instruments (Horizon 2020, European Structural and Investment Funds, EU Justice Programmes, Customs 2020 Programme), but mainly to the Internal Security Fund; the Agenda declares that it provides strategic direction for this Fund, giving priority to "updating national sections of the Schengen Information System, implementing the Prüm framework and setting up Single Points of Contact", as well as strengthening "cross-border operational cooperation under the EU Policy Cycle for serious and organised crime" and developing "exit strategies" for radicalised persons.

Finally, *research and innovation* are considered "essential if the EU is to keep up-to-date with evolving security needs". The Agenda stresses their significance for exposing new security threats and mitigating security risks, and thus for contributing to creating social trust in research-based policies. In this context, it refers especially (a) to producing a standard which will "ensure that EU security products and services respect individuals' rights", (b) to a "competitive EU security industry" enhancing the EU's autonomy in meeting security needs, (c) to a "European Forensic Area", which would "align the processes of forensic service providers in Member States" and thus improve the effectiveness of cooperation and the confidence of the competent authorities.

4. Fields of action

The last section of the Agenda determines the areas of crime that must be addressed as a priority in the coming five years. In a rather detailed presentation, the Commission introduces, on the one hand, special versions of actions described before, and, on the other hand, certain new types of actions, which apparently correspond to specific needs in these areas of crime. Given that the previous section referred to the *pillars* of the EU action, additions of such kind are not precluded by the structure of the Agenda; however, it is important to assess their effect on the extent and the consistency of the EU's planned intervention.

a) "Tackling terrorism and preventing radicalisation"

Terrorism remains a serious threat to EU internal security. The modern face of terrorism is principally expressed in the Agenda by the notion of *foreign terrorist fighters*. The proposed activity touches several issues within the broader scope of terrorism: firearms and explosives, online hate speech and violent extremist content, encryption technologies, illicit trade in cultural goods and illicit cash movements, accessing and

deploying dangerous substances, financing and travelling of foreign terrorist fighters and freezing their assets, protecting critical infrastructures and soft targets. As the terms "tackling" (instead of "combating") and "preventing" reveal, the actions planned are mostly aiming to detect and deter -the preparation of- the commission of the terrorist offences. For this task, the Agenda mainly refers to instruments of *operational cooperation* (especially through Europol), and then to mechanisms within the other abovementioned pillars, e.g. "search of financial *data* when there is reasonable suspicion of terrorist activity" or *training* of public officials to monitor and report incidents of hate crime and hate speech.

Moreover, in order to meet the vital need to *address the roots of extremism,* the Commission targets extremist propaganda with a number of activities in the fields of *education, social care, public awareness, regional authorities alert*, etc.[15] At the same time, though, the Agenda goes significantly further and discusses the prospect of *additional criminalisation*. More specifically, the Commission declares an impact assessment *with a view to updating framework decision 2008/919/JHA*. The update is to take into account the Additional Protocol supplementing the Council of Europe Convention on the Prevention of Terrorism; the latter calls for criminalising *travelling abroad for the purpose of terrorism*, as well as *funding / organising / facilitating travelling abroad for the purpose of terrorism*.[16] Given that even the obligation to criminalise under framework decision 2008/919/JHA was controversial, due to its questionable compatibility with the freedom of expression[17] and due to covering types of conduct only loosely connected to terrorist offences,[18] such an amendment would broaden the scope of criminal law (i.e. of the harshest answer to an offence) to *extremely early stages of preparation*. Thus, the seemingly restrained and definitely substantive approach towards the phenomenon of acceding to terrorism, which is manifested with discussing measures in the field of education etc., is likely to be supplemented by harsh criminal law provisions.

15 The Agenda proposes (a) "strengthening the EU's own strategic communication with common narratives and factual representation of conflicts", (b) fighting "the stigmatisation of any one group or community", by ensuring the enforcement of the EU legislation on discriminations along with the one on terrorism, (d) promoting inclusive education, youth work, volunteering, sport and cultural activities "with a series of concrete actions under the Strategic Framework for European Cooperation on Education and Training ('ET 2020')", (e) providing "financial support to Member States to promote social inclusion, combating poverty and any discrimination" through the European Social Fund, (f) initiating research to better understand the causes of radicalisation, etc.

16 See Articles 4-6 of the Protocol.

17 See for example Council docs 7785/08, 7878/08, 15315/07.

18 Indicatively, the said framework decision has caused problems in the Greek legal order and was met with strong criticism; see *M. Kaiafa-Gbandi,* Prevention of terrorism and the criminal law of pre-preventional repression: New punishable acts for combating terrorism in the EU [in Greek], Poinika Chronika 2009, pp. 385 et seq, *E. Symeonidou-Kastanidou,* The "violent radicalization" targeted by the European Union [in Greek], Poinika Chronika 2009, pp. 583 et seq.

b) "Disrupting organised crime"

Addressing organised crime lies within the foundations of the area of freedom, security and justice. In the 2015 Agenda, the Commission stresses that *serious and organised cross-border crime* finds new ways to operate and to escape detection; moreover, it has huge human, social and economic cost, and feeds terrorism and cybercrime. Against this background, the Commission announces a strain of *operational* and *related to information exchange* measures. A part of the proposed activity is built on the fact that *profit* is the main goal of organised crime; as expected, the *anti-money laundering* legislation and mechanisms of *following and recovering criminal assets* stand out. In this respect, the Commission states that it will soon issue "a feasibility study on common rules on non-conviction based confiscation of property derived from criminal activities". The majority of the other actions planned to "disrupt" organised crime are linked to *special offences*; more particularly, the Agenda mainly refers to trafficking in human beings, smuggling of migrants, trade in firearms, drug smuggling and environmental crime (it also briefly refers to fraud, corruption, counterfeiting and economic crime). Therefore, through the concept of organised crime, the list of the EU's *priorities* under the Agenda touches almost every area of crime described in Article 83 TFEU. Besides, among the areas cited in the latter provision, no minimum rules with regard to illicit arms trafficking have been adopted yet; thus, it is important to see whether the proposal to establish *common standards for neutralising firearms* will result into *new* criminalisation.

c) "Fighting cybercrime"

Finally, cybercrime is included in the EU's priorities as "an ever-growing threat to citizens' fundamental rights and to the economy, as well as to the development of a successful Digital Single Market". The need to fight cybercrime is also based on its connection to other criminal activities, namely to illicit online trade in drugs or weapons, payment fraud, money laundering and child sexual exploitation. In total, the Agenda comprises measures from all its pillars (information exchange, operational cooperation, training and funding). In the framework of this short presentation, it is worth mentioning, firstly, that declarations on respecting data protection principles in this case do not seem to refer to guarantees against the authorities, but actually to the protective nature of criminal law (: "while law enforcement gains access to the data it needs to protect the privacy of citizens against cybercrime and identity theft"); secondly, the Commission plans to assess and perhaps take further measures about payment fraud, as the 2001 framework decision on combating fraud and counterfeiting of non-cash means of payments "no longer reflects today's realities and new challenges such as virtual currencies and mobile payment".

III. Points of concern

The provisions of the European Agenda on Security raise certain concern over the future steps of criminal law in the EU. First of all, it should be noted that the Agenda refers to the persons who would benefit from the implementation of the planned activity, i.e. *the subjects of the right to security*, by using various terms (: "people", "Europeans", "citizens"). Although the aim of the Agenda is presented to be connected to *free movement* and from this perspective it would be justified to consider the citizens of the Member States as the primary subjects of the right to security, the latter is expressly awarded to *everyone* based on Article 6 of the Charter of Fundamental Rights; besides, distinguishing between people within the EU as to the right to security would be a form of discrimination, which is directly targeted by the Agenda. Therefore, it should be clear that *every person in the EU has the right to be secure*.

In principle, the Agenda's reference to the significance of the Lisbon Treaty for the protection of fundamental rights in the EU and for the democratic control over EU policies is correct. However, given that criminal law is the harshest mechanism States employ to achieve social control,[19] adopting and enforcing criminal law measures requires *high* standards in both the abovementioned areas. Consequently, assessing and implementing the Agenda must, as a minimum, take into account the fact that *the EU has not yet acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, due to important difficulties that have occurred in the process;[20] moreover, in addition to any inherent problems of the legislative procedure,[21] there is growing worry over *the transparency of "trilogues"*, i.e. the trilateral informal meetings that the Council, the European Parliament and the Commission hold within the ordinary legislative procedure,[22] which are also challenging the right of the public to *access documents* and thus participate in the EU decision making.[23]

19 *M. Kaiafa-Gbandi,* The importance of core principles of substantive criminal law for a European criminal policy respecting fundamental rights and the rule of law, European Criminal Law Review (EuCLR) 2011, p. 7.

20 See Council doc 12528/15.

21 See for example the special legislative procedures in the field of cooperation in criminal matters (e.g. Articles 86(1), 87(3), 89 TFEU), where there is only need to *consult* with the EP (as though its participation becomes unimportant when it may hinder a unanimous will of the Council to act); also, a legislative act can be adopted when the EP fails to take a decision regarding the Council's position at first reading within three months under the ordinary legislative procedure (Article 294(7)a TFEU).

22 See for example Council doc 13472/14 for the preparation of a "trilogue" regarding the proposal for a directive "on the fight against fraud to the Union's financial interests by means of criminal law".

23 On 26 May 2015 the European Ombudsman launched an Own Initiative Inquiry (OI/8/2015/JAS) as regards the transparency of the "trilogues"; see the response of the Council in doc 11873/15. See also COM(2015) 216 final ("Proposal for an interinstitutional agreement on better regulation"), point 28 ("The three institutions will ensure an appropriate degree of transparency of the legislative process, including of trilateral negotiations between the three institutions").

Another critical issue emerges from the impressive catalogue of *data collecting* agencies and processes. With the data protection regime still under construction, *preventive data collection*, even in relation to admittedly not serious crimes, or not even in relation to a crime but simply to travelling or communicating, appears to be promoted as an end in itself. In this respect, the European Parliament was especially disapproving in its resolution on the Agenda, as it expressed "its *condemnation* of measures entailing the *vast and systematic blanket collection of the personal data of innocent people*, particularly in view of the potentially severe effects on fair trial rights, non-discrimination, privacy and data protection, freedom of the press, thought and speech, and freedom of assembly and association, and entailing a significant potential for abusive use of information gathered against political adversaries"; it also expressed "severe *doubts concerning the usefulness* of mass surveillance measures as they often cast the net too wide and therefore throw up too many false positives and negatives" and warned "of the danger of mass surveillance measures obscuring the need to invest in perhaps less costly, more effective and less intrusive law enforcement measures".[24]

On the other hand, of course, the Commission's statements on data protection constitute *the only concrete reference to protecting the rights of the individuals* found in the sections of the Agenda which describe the pillars of the planned action and the priorities of the EU; in other words, the first principle of the Agenda is only verified with regard to data protection. At the very least, similar commitments should have complemented the activity in the field of operational cooperation. Even if the legal instruments which have established the agencies that act or the tools that are being used in police and judicial cooperation contain rules on the protection of fundamental rights, the Agenda should have cited those rules, in order to provide for a balanced presentation of the future EU activity. Moreover, proposals to enhance cooperation certainly required for more advanced guarantees. However, the Commission announces, without referring to rights and guarantees, the taking of further steps as to measures that have been strongly criticized as deeply problematic from the perspective of the fundamental principles of criminal law, namely the framework decision on terrorism,[25] non-

24 Para. 7 of the EP's resolution (fn. 2).

25 The proposal for a directive replacing Council framework decision 2002/475/JHA on combating terrorism (COM/2015/0625 final - 2015/0281 (COD)), which introduces the offences of "Receiving training for terrorism", "Travelling abroad for terrorism", "Organising or otherwise facilitating travelling abroad for terrorism" and "Terrorist financing", repeats all the provisions of framework decision 2002/475/JHA as amended by framework-decision 2008/919/JHA, *without attempting any improvements* based on the criticism that has been expressed since 2002 and 2008, and *minus the fundamental rights clauses* cited in article 1(2) of framework decision 2002/475/JHA ("This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union") and article 3(1) of framework-decision 2008/919/JHA ("In the implementation of this Framework Decision, Member States shall ensure that the criminalisation shall be proportionate to the legitimate aims pursued and necessary in a democratic society and shall exclude any form of arbitrariness and discrimination").

conviction based confiscation of property, and mutual legal assistance agreements with third countries.

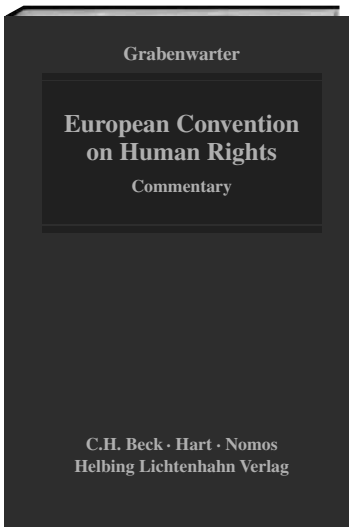
Finally, questions are raised in relation to the Agenda providing sufficient *respect to the ultima ratio principle*. Firstly, instead of assessing the existing tools' effectiveness, and then point to concrete needs,[26] the Agenda focuses on the expected *added value* of the proposed measures, which sometimes is deduced from *the enhancement of enforcement itself*. Secondly, criminalising extremely early stages of preparing the commission of an offence, as in the case of terrorism, is indicative of *using criminal law as "a remedy to all"*, opposite to what the ultima ratio principle dictates. Lastly, one must keep in mind that each area of priority in the Agenda (terrorism, organised crime, cybercrime) actually contains several criminal offences; at the same time, although the EU's competence in the field of substantive criminal law only covers particularly serious offences, *the definition of each offence prescribed by the EU* (i.e. the basis of cooperation) is usually very broad and also includes less *grave types of conducts*; as a result, the proposed measures of the Agenda may be justified when connected to specific serious crimes, but it is doubtful whether they are all truly necessary for the numerous types of conducts they in fact affect.

IV. Concluding remarks

The European Agenda on Security has made an important step towards committing to respect the rights of the individuals and the fundamental principles of criminal law in the process of promoting a high level of security. However, such abstract commitments are insufficient when not followed by concrete provisions in the same direction. Thus, as *security under the Agenda remains a one-dimension notion*, the need to bring balance between protecting people against crime and against law enforcement authorities is still a vital requirement in the EU.

26 The EP "welcomes the underlying principle of the Agenda to fully apply and implement existing instruments in the area of security before proposing new ones", but states that, despite its numerous calls, "an evaluation of the effectiveness of existing EU instruments – also in the light of new security threats the EU is facing – and of the remaining gaps, is still lacking" – para. 13 of the EP's resolution (fn. 2).

ECHR Article-by-Article



European Convention on Human Rights

Commentary

By Prof. Dr. Dr. Christoph Grabenwarter

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The European Convention on Human Rights (ECHR) entered into force in 1953 with binding effect on all member states of the Council of Europe. It grants a number of fundamental rights and freedoms such as: right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry, right to an effective remedy, prohibition of discrimination.

Any person who feels that his or her rights are being violated under the ECHR by the authorities in one of the member states can bring the case to the European Court of Human Rights, established under the Convention. The States are bound by the Court's decisions.

The impact of the Convention will further increase following the accession of the European Union to the Convention.

The commentary systematically deals with the Convention, article-by-article, including development, scope, relevant case-law and literature.