

# Responses to terror

By Judith A Sullivan

**I**N A RECENT STATEMENT, outgoing United Nations Commissioner for Human Rights, Mary Robinson, echoed some of the human rights and privacy concerns raised by anti-terror measures in the wake of the September 11th terrorist attacks.

"I am particularly concerned that counter-terrorism strategies pursued after September 11th have sometimes undermined efforts to enhance respect for human rights," said Robinson. "Excessive measures have been taken in several parts of the world that suppress or restrict individual rights, including privacy, freedom of thought, presumption of innocence, fair trial, the right to seek asylum, political participation, freedom of expression and peaceful assembly."

In a report dated March 20th, former Irish President Robinson did not cite any one country by name. She may well have been concerned about Europe, where legislative response to the US attacks was both swift and broad-based. Privacy concerns were raised in some of the larger countries, such as France, the UK and Germany, but they have been overshadowed by other similar issues, such as detainment without charges and increased police powers.

Some groups involved in anti-capitalisation and anti-globalisation efforts claim that European states have used the response to the events of September 11th to undermine and stifle their legal, peaceful activities. Some of the most specific and damning charges stem from a Spanish group called Nodo50. They have alleged that the Ministry of Internal Affairs is essentially spying on them and extracting e-mails and other data directly from the organisation's servers.

It may or may not be the case that in the aftermath of the Genoa summit disruptions last summer, European

authorities have swept peaceful protesters under the same rug as illegal and suicidal anti-American activities. What is certain is that several countries and pan-European bodies have used their legislative and enforcement powers to muscle in on suspected and known terrorists.

Seven countries (Belgium, France, Germany, Greece, Italy, Spain, and the UK) have passed new anti-terror legislation, while eight others fit anti-terrorism into existing law. All of the new anti-terror laws were passed in late November through to the end of 2001 – a speedy response to the September 11th events.

## GERMANY

Germany passed two sets of laws, France, Italy, and the United Kingdom were content with one (see notes for further information).

Germany has been singled out for criticism by civil liberties and privacy activists. Much of the criticism has been directed at Home Affairs Minister Otto Schily. Though praised by US officials for his tough stance, he has incurred the ire of many European activists. This is due to his proposal that police investigators be granted access to telephone calls, fax and e-mail data for a period going back six months. The proposal was voted down.

The government hoped to alter existing legislation so that companies such as Deutsche Telekom would be required to hold records for six months. That effort failed, but there was a change in that the state may

now ask Internet Service Providers and phone companies to provide future data (e.g. they could request on March 5th to obtain records for a date in April). The duration of the German law is also longer than the others – it is up for review in 5 years.

## UNITED KINGDOM

The new UK laws all sparked a lesser amount of parliamentary and popular dissent. Human Rights Watch, for instance, expressed the concern that the UK's derogation from certain provisions of the European Convention sends a signal to other Council of Europe member states that obligations under the Convention can be disregarded with ease.

Further objection concerned the speed with which the legislation was passed (the bill was fast tracked through parliament with cross-party consent). The UK's Information Commissioner, Elizabeth France, expressed reservations. "I am particularly concerned," she said, "that leaving matters to a voluntary code of practice, or to agreements, may pose difficulties for data protection and human rights compliance."

## FRANCE

In France, where several opposition parties to the left-centre majority are represented in government, the Greens stayed away on the day of the vote for new terrorism legislation. The Communists took special umbrage at the provision allowing the police to search people and cars, and abstained from the vote.

There was also some dissent from the right, but it failed to stop the legislature from according greater powers to France's mayors and to allow for night-time searches of private residences, previously a 'no-no' within the French judicial system.

The French authorities are currently working with the Commission Nationale de l'Informatique et des Libertés (CNIL, the national data protection authority) to develop the technical parameters that would allow the authorities to access electronic data. The French law, which makes it illegal to hold on to data for longer than is needed for the specific purpose at hand, remains in force.

### ITALY

In Italy, the checking system works the other way round and the police must inform the judicial authorities as soon as they have completed a search. The "carabinieri" must inform prosecutors of what they have done and what they have found, as expeditiously as possible.

### EUROPEAN UNION

In all of the countries with new anti-terrorist laws there are specific provisions to curtail the monitoring of Internet and e-mail data for law enforcement purposes. There are some important differences between the level of privacy protection in the laws, for example, the extent to which wire and phone tapping is allowed and, in which circumstances.

Pan-European bodies were also keen to leap on the anti-terror bandwagon. Some adapted existing law and infrastructure to the evidence of a major geo-political shift. Others promptly put in place new statutes and structures to act pre-emptively against the arming and financing of terrorist cells.

The perceived need to protect against terrorism has led to internal changes within the European Union (EU), notably the creation within Eurojust of a framework decision to bring together and manage cross-jurisdictional issues. These concepts are all underpinned by the notion that terror-

ists a) work in Europe and b) travel and do business across national borders.

Set up by the EU before last September to help coordinate the investigation and prosecution of serious cross-border crime, Eurojust is a high level team of senior lawyers, magistrates, prosecutors, judges and other legal experts seconded from every EU country to advise one another and to give immediate legal advice and assistance in cross-border cases to investigators, prosecutors and judges in different EU member states. Eurojust has no authority to launch or carry out investigations itself. Now based in the Hague, it has yet to secure a permanent headquarters.

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The EU's framework decision defines what is meant by terrorist acts targeting the member states: intentional acts, infringements linked to terrorist activities (theft, forged documents, extortion of funds etc.). It also covers behaviour that may contribute to terrorist acts in third countries, thus contributing to the fight against terrorism at the international level, especially in the framework of the United Nations and G8.

It approximates the level of sanctions between member states according to the principle that sentences have to be both proportional and dissuasive. To this end, minimum and maximum sentences vary, depending on the gravity of the offence.

Another effort is the European arrest warrant that creates a single security area in which there are no more national frontiers. It is no longer necessary to extradite "terror-

ists" in order to transfer them from one member state to another

On February 6th, the European Parliament voted to support the EU definition of terrorism and European arrest warrant and to support the two proposed Framework Decisions on combating terrorism and on creating a European arrest warrant. An attempt by some Green/European Free Alliance MEPs to amend the European arrest warrant proposal, on grounds that it lacked *Habeas Corpus* and minimum standards for holding suspects, was defeated by 412 votes to 122 against, with 20 abstentions. Also mentioned within the European Parliament is that no EU body, nor any member nation has officially proposed reinstalling the death penalty as a sentence, following conviction for a terrorist offence.

Other European/international bodies have taken steps. The Organisation for Economic Cooperation and Development (OECD), through its Financial Action Task Force, has committed itself to a policy of strengthening customer identification measures in international and domestic wire transfers. Its members will also regularly publish the amount of suspected terrorist assets frozen, in accordance with UN Security Council Resolutions.

### ENFORCEMENT

EU and national initiatives place a differing emphasis between the values of privacy and security, especially regarding police powers. Reinforced police powers are in all of the national laws, but always with some oversight on the part of the legal authorities. In France, for example, the Ministry of the Interior – and not the chief of the police forces (garde des sceaux) – has responsibility for police activity covered by the law. The role of France's "judges of liberty and detention" is also stepped up, to respond to concerns that the police might overstep their authority.

In some cases, there are sanctions for failure to protect the security of personal data. That is the case with the Italian law which, for instance, speci-

fies that any disclosure of information picked up from “interceptions” to non-authorised people is punishable by up to three years incarceration. Revelation of who participates in such undercover operations might net the perpetrator six years in prison (see 4.4.3 of the law).

The French law grants magistrates the right to use some of the more technologically sophisticated decrypting technology operated by the special services of the Central Criminal Investigation Directorate. The police may monitor when transmissions occur but not the content of messages.

### CIVIL LIBERTIES PERSPECTIVE

The UN Security Council expressed cautionary sentiments on September 28th 2001. “While we recognise that the threat of terrorism may require specific measures, we call on all governments to refrain from any excessive steps, which would violate fundamental freedoms and undermine legitimate dissent. Such steps might particularly affect the presumption of innocence, the right to a fair trial, freedom from torture, privacy rights, freedom of expression and assembly, and the right to seek asylum.”

Since the passage of specific legislation, civil liberties groups in Europe have expressed concern about the potential for civil rights violations in European law and in the separate national laws. However, infringement of privacy is lower on their list than other issues, such as unlawful or lengthy detention. Much of the commentary and dissent was of a more general nature, rather than specifically related to data protection. Germany was briefly the one exception, but the unpopular Schily proposals, on retaining data for five years, were voted down.

International human rights watchdog, Statewatch, has expressed concern over the detention of UK suspects without charge, often at the high-security Belmarsh prison. Statewatch cited the case of Lotfi Raissi, an Algerian pilot settled in the UK for years, freed by Belmarsh

magistrates court because the US failed to produce any evidence to substantiate claims that he may have trained people involved in the September 11th attacks. He had been in custody for three months.

For Human Rights Watch, one of the main worries is sloppiness linked to a sense of urgency. Rushing to put laws in place runs the risk of sacrificing “critical debate and input from the civil society” on such issues as fair trials and the human rights of refugees and migrants.

Finally, many of the personal interviews and documents consulted indicate that at both European and national level, much of “worrisome” post September 11th developments simply built on efforts already in the works for a year or more to combat terrorist activities, money laundering and drug smuggling. One example is the French law, responding to years – not weeks – of requests by the police authority to search car trunks or private homes at night.

The European Union’s privacy watchdog, the Data Protection Working Party, was quick on the draw, issuing a report in mid-December that called on the EU and

member states alike to examine “questions on the respect of the fundamental principles of legal security and legality of offences and sanctions.” Like other parties, it warned against too much haste or “enthusiasm” in the drafting and passing of anti-terror laws. Some caution is advised because “measures against terrorism should not and need not reduce standards of protection of fundamental rights which characterise democratic societies.”



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*This report formed the basis of a presentation by Stewart Dresner, Chief Executive of PL&B, at Scientific American’s Summit on Privacy, Security and Safety, held in New York during March 2002*



1: The German laws first passed in September and entered into force in December, come under the heading of Terrorismusbekämpfungsgesetz, or law to combat terrorism.

2: The French law 2001-1062 is dated November 15th 2001 and called Loi relative a la sécurité quotidienne (or law relating to everyday safety).

3: Italy’s’ DL 18-10-2001 n 374 was approved on October 18th provisionally and came into force on December 15th, 2001.

4: The UK’s Anti-Terrorism, Crime and Security Act 2001 received Royal Assent on December 13th, 2001. First introduced on November 12th, it merited several days of debate in committee and in both the Houses of Commons and Lords.

#### Websites of Interest:

##### EU Data Protection area:

[www.europa.eu.int/comm/internal\\_market/en/dataprot/](http://www.europa.eu.int/comm/internal_market/en/dataprot/)

##### Eurojust:

[www.europa.eu.int/comm/justice\\_home/news/laecken\\_council/en/eurojust\\_en.htm](http://www.europa.eu.int/comm/justice_home/news/laecken_council/en/eurojust_en.htm)

##### European Parliament:

[www.europarl.eu.int/home/default\\_en.htm](http://www.europarl.eu.int/home/default_en.htm)

##### Human Rights Watch Europe:

[www.hrw.org/europe/index.php](http://www.hrw.org/europe/index.php)

##### Privacy International:

[www.privacyinternational.org](http://www.privacyinternational.org)

##### Statewatch:

[www.statewatch.org](http://www.statewatch.org)

##### UK Home Office:

[www.homeoffice.org.uk](http://www.homeoffice.org.uk)

