

Normative Power Europe? The power of the EU in its Relation to the USA in the Policy Field of Counter-terrorism

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Marga Groothuis and Arne Niemann

Abstract

This paper examines the extent to which the EU constitutes a normative power in its relation to the United States in the policy field of counter-terrorism. Normative power is analysed along three dimensions: normative intent (the genuineness of EU normative commitment), normative process (the extent to which an inclusive and reflexive foreign policy is pursued), and normative impact (the development of norms in the third country, in our case study the US). Our empirical analysis focuses on the promotion by the EU of three fundamental rights in the policy-area of counter-terrorism: the prohibition of inhuman treatment of detainees suspected of acts of terrorism, the right to a fair trial for these detainees, and the right to respect for private life and data protection of citizens whose personal data are being processed for counter-terrorism purposes. The findings of this study suggest an only moderate record concerning EU normative power in its relation with the US. For example, our analysis indicates that the EU – in its promotion of the norm of prohibition of inhuman and degrading treatment – to some extent applied double standards in terms of what it expected from the US and what it expected from its own Member States. Furthermore, the study suggest that while in theory there have been substantive normative changes in the US towards the three norms promoted by the EU in the policy-field of counter-terrorism, these changes have so far only to a limited extent been implemented in practice. The picture arises of strong normative impact on paper but little normative impact in practice. Finally, we hold that side by side with the EU, the Council of Europe acts as a normative power vis-à-vis the US. The influence of the Council of Europe on the normative basis of the EU and on EU normativity vis-à-vis third states has so far been underexplored in normative power theory. This study illustrates that the Council of Europe has acted as a driving force behind the EU's commitment to promote the above norms.

Keywords: Council of Europe, Council (of the EU), counter-terrorism, data protection, EU external policy, European Parliament, European Union (EU), Guantanamo Bay, Justice and Home Affairs (JHA), Lisbon Treaty, Normative Power Europe, norms, privacy, prohibition of torture, right to a fair trial, United States of America (USA).

Introduction

“The concept of normative power is an attempt to suggest that not only is the EU constructed on a normative basis, but more importantly that that this predisposes it to act in a normative way in world politics. It is built in on the crucial and usually overlooked observation that the most important factor shaping the international role of the EU is not what it does or what it says, but what it is.” (Manners 2002: 252).

With these words, published a decade ago, Ian Manners constituted the concept of Normative Power Europe (NPE). Manners' formulation of Normative Power Europe has triggered

substantial academic debate in subsequent years.¹ While the literature on ‘normative power Europe’ was initially largely shaped on the conceptual level, a body of empirical work has begun to emerge (e.g. Tocci 2008; Whitman 2011). However, given the geographical and thematic breadth of EU foreign policy, there is substantial scope and need for additional empirical analysis.

This paper aims to analyze the extent to which the European Union (EU) constitutes a normative power in its relation to the United States (US) in the policy field of counter-terrorism. Normative power is examined along the three dimensions formulated by Niemann and de Wekker (2010): (i) normative intent (how genuine is EU normative commitment?), (ii) normative process (does the EU pursue an inclusive and reflexive normative policy?), and (iii) normative impact (does the EU have the ability to shape conceptions of what is ‘normal?’).

In our investigation we focus on three fundamental rights which have been central in the transatlantic political societal and academic debate about ‘counter-terrorism and human rights’ since 2001, the year of Al Qaeda’s terrorist attacks on the USA and the subsequent counter-terrorism measures taken by the USA: a) the prohibition of torture (including inhuman treatment) of detainees suspected of acts of terrorism, b) the right to a fair trial of those detainees, and c) the right to respect for private life and data protection of citizens whose personal data are being processed for counter-terrorism purposes. We choose to investigate the promotion of these three norms because they are arguably still under-researched in the context of normative power EU, and especially in the context of EU normativity vis-à-vis the US. The first two norms are closely related to each other. Without the right to a fair trial, and in particular the right to access to a judge (a core element of this right), the prohibition of torture cannot be effectuated in court. The promotion of the third norm (right to respect for private life and data protection) is also investigated, because legal studies have indicated that this norm, together with the first and second norm, is most at risk of being violated in counter-terrorism measures.²

The outline of this study is as follows. First we offer a brief review of the literature on normative power EU. Next (in section 2) we specify our operationalization of the NPE concept. The subsequent parts together form the empirical probing of the study. In section 3 we examine the degree of genuineness and seriousness of the EU’s normative commitment. In section 4 we investigate to what extent the EU has acted inclusively and reflexively. Next, in section 5, we analyse the degree of normative change in the United States and the extent to which this can be attributed to the EU. Finally, we review the findings of this paper and draw conclusions.

1. Normative Power Europe

In the past four decades research on European integration has recurrently addressed the role of the EU in international politics. Duchêne (1972) introduced the concept of ‘civilian power Europe’. This concept emphasized that the European Community, as a ‘civilian’ group of states with significant economic but low military power, has an interest in using ‘civilian’ means of exercising influence, in pacifying international tensions and in the juridification of international politics. While this concept has been criticized (Bull 1982; Zielonka 1998; Whitman 1998), it has still remained influential in the academic discourse, not least as a point of reference in the debate concerning the ‘militarization’ of the EU (Orbie 2006; Smith 2004; Stavridis 2001).

Thirty years after the introduction of Duchêne’s concept of ‘civilian power’, a new concept regarding the international role of the EU was coined by Manners (2002): the concept of normative power EU. In Manners’ view, conceptions of the EU as either a civilian power or a

¹ An overview of important reactions and points of critique can be found in Manners (2006b); Sjurson (2006a: 169-170); Niemann and de Wekker (2010); Niemann and Junne (2011).

² See *inter alia*: Ball and Webster (2003); Cameron (2004); Gonzalez Fuster, De Hert and Gutwirth (2008); Papakonstantinou and De Hert (2009); International Commission of Jurists (2004).

military power, both located in discussions of capabilities, need to be augmented with a focus of an ideational nature characterized by common principles and a willingness to disregard Westphalian conventions. In other words: “the ability of the EU to shape conventions of normal in international relations” should be given much more attention (Manners 2002; 239).

According to Manners (2002: 241-242), the EU has a special claim to constitute a normative power.³ He argues that the particular normative basis of the EU is founded on its history (that is, its foundation in reaction to World War II), its hybrid (partly supranational, partly intergovernmental) polity and its political-legal constitution. In Manners’ formulation, the central component of normative power Europe is that it exists as being *different* to pre-existing political forms, and that this particular difference *pre-disposes* it to act in a normative way. As to the EU’s normative basis, Manners identifies five ‘core norms’ out of the vast body of European Union laws and policies which comprise the *acquis communautaire* and the *acquis politique*: peace, liberty, democracy, rule of law, and respect for human rights and fundamental freedoms. In addition to these core norms, Manners suggests that it is possible to derive four ‘minor norms’ from the constitution and practices of the EU: social solidarity, anti-discrimination, sustainable development and good governance. In his view, the most important factor of the international role of the EU is not what it does or what it says, but what it is: a normative power which should act to extend its norms into the international system (Manners 2002: 252).

When comparing the concepts of ‘civilian power Europe’ and ‘normative power Europe’, two main differences can be mentioned. First, while civilian power values direct physical power in the form of real empirical capabilities (even if economic in nature), normative power emphasizes cognitive and ideational processes. Second, while civilian power Europe is status-quo oriented, normative power Europe reflects the idea of change (Manners 2002; Niemann and Junne 2011). However, there are also overlaps between the concepts normative and civilian power. Both concepts seem to rely primarily on soft power to attain foreign policy objectives. And while civilian power need not necessary be guided by norms, it has been argued that normative power should predominantly be civilian.⁴

Manners’ formulation of ‘Normative Power Europe’ (NPE) has triggered substantial debate and research. We summarize what we consider the most important reactions and points of critique.⁵ Hyde-Price (2006) criticizes the idea of NPE from a neo-realist angle. He argues that structural-realist theory can shed considerable light on the emergence, development and nature of EU foreign and security policy co-operation. In his view the EU does not display real normative power. Rather, the EU is used by its Member States as a collective instrument for shaping its external milieu by a combination of hard and soft power. Diez (2005) argues that the ‘normative power’ discourse is not confined to the EU but includes the cases of other great powers, such as the United States. Furthermore, he points out that the ‘normative power Europe discourse’ establishes a particular identity for the EU through turning third parties into ‘others’ and representing the EU as a positive force in world politics. He calls for more reflexivity in the representation of the EU as a normative power. In a reaction to Diez, Manners (2006b) recognizes that the discourse of normative power Europe involves practices of ‘othering’ as part of constructing the international identity of the EU. He agrees with Diez’ argument regarding the need to study the power of normative power representations. He adds that there is no one EU identity. In his view, it is the fluid, complex multiple and relational aspects of the self-other

³ Some authors go one step further and claim that, or investigate whether the EU is a ‘force for good’. See for example Barbé and Johansson-Nogués 2008: 81 ff. Such conceptualisation of NPE has, not without justification, been criticized by several authors, inter alia Sjursen (2006b: 248) and Diez and Pace (2007: 1-15).

⁴ Manners (2006a: 182-199) argued that the militarisation of the EU threatened to undermine its normative power. Tocci (2007: 5-6) however argues that normative power may not necessarily be based on civilian means.

⁵ Overviews and summaries of contributions to the debate can be found in Manners (2006b: 169); Sjursen (2006a: 169-170); Niemann and Junne (2011).

contestations which define the EU as a normative power, rather than the other way around.

Bicchi (2006) raises the question whether the EU is a 'normative power' promoting universal norms, or a 'civilian power' projecting its own understanding of norms on to the rest of the world. In order to answer this question, Bicchi uses inclusiveness and institutional reflexivity as criteria for measuring the normative power of the EU. By inclusiveness is meant the extent to which the EU foreign policy-makers permit a role (in theory or in practice) in European foreign policy (EFP) making for external actors (non-members) affected by EFP. Institutional reflexivity means the capacity of the EU foreign policy-makers to critically analyse the EU's policy and adapt it according to the effects the policy is expected to have on the targeted area. While inclusiveness is about involving non-members, institutional reflexivity is about anticipating effects on non-members and pre-emptively adapting to them. Applying these two criteria in case studies, Bicchi concludes that the EU is a civilian power rather than a normative power. She holds that the EU has a tendency to reproduce itself in its relations with third countries. In that process the EU projects internal solutions to external issues. In other words: the European foreign policy is informed (at least partially) by the idea that 'our size fits all'. Bicchi concludes that the EU's EFP-making is often 'unreflexively eurocentric'.

An indirect challenge to the NPE concept is found in the work of Nicolaïdis and Howse (2002). They hold that what the EU is projecting beyond its borders is an 'EUtopia', rather than the EU as it is. And that utopia itself is necessary a contested one, and not everyone's vision on EU's future. According to these authors, the inconsistency between what the EU is and what it tries to project beyond its borders undermines the credibility in the eyes of its negotiation counterparts and thus affects its power. In other words: the inconsistency between the EU's rhetoric and behaviour and its lack of reflexivity undermine its credibility. They conclude that the EU can best learn about its own flaws and potentials and become a meaningful utopia for its own citizens by bringing the outside world back in. Drawing on Nicolaïdis and Howse, Scheipers and Sicurelli (2007) stress the understanding of normative power in terms of being an ideological power; that is the power to shape the patterns of discourse when it comes to basic principles and values. They underline that normative power Europe is linked to a specific European identity. Furthermore, they argue that, although the aspect of reflexivity is considered to be crucial to the concept of normative power as it is assessed in recent publications, this aspect has thus far remained under-explored.

Sjursen (2006a) points out that the literature on the EU as a 'normative' or 'civilian' power is ambiguous regarding which of these roles the EU is considered to play. Sometimes it seems to suggest that the EU not only interprets or writes itself into a given normative order, but also that it challenges this order and the norms that constitute it. Sjursen argues that, in so far as the EU's 'normative' dimension is linked to the idea of the EU as 'particular', 'novel' or 'different' actor, this would suggest that it breaks with the established normative order. If we are to account for a 'normative' power that actually contributes to shape norms and rules at the international level, we would need to be able to identify a mechanism that could explain this 'norm-shaping'. Furthermore, Sjursen (2006b: 35) remarks that the conceptualisation of the EU as a 'normative' power corresponds very closely to the EU's own description of its international role, which "could be enough to set the alarm bells ringing." A number of empirical observations regarding issues such as EU's policy on democracy promotion, its introduction of human rights clauses in trade agreements and its focusing on international institutions could very well indicate that there is something distinctive about the EU's foreign policy, which requires attention. However, Sjursen argues, the above conceptualizations lack sufficient precision and they do not provide any criteria or assessments standards that would make it possible to qualify, or reject, by means of empirical research, their implicit claim that the EU is 'a force for the good'.

Niemann and Junne (2011), expanding on Bicchi (2006) and Sjursen (2006), have noted that the discussion on NPE has been oriented predominantly internally. On the political level this entails that much (of the EU's) foreign policy action does not appear to seek change in partner countries, but rather to satisfy certain domestic groups (cf. Krippendorff 1963). When

EU/European politicians pose human rights questions in their discussions with China, do they really believe that China will budge an inch from its stance, or do they (more likely) simply not dare to return home without having raised such issues? According to Niemann and Junne (2011: 121), the academic discussion on NPE must be careful not to fulfil a similar function, i.e. be excessively internally oriented. Most empirical studies have been largely approached from an EU perspective and focused chiefly on EU sources (but see e.g. Harpaz 2007). In addition, they point to the conspicuousness that the academic debate is primarily led by European scholars⁶ – in a sub-field (European integration studies) where the proportion of North American scholars is substantial. At the risk of overstating the point they ask: if the EU exercises a policy clearly distinct from that of other Western powers/actors, why have so few colleagues outside Europe caught on to the idea? Hence, care needs to be taken that the discussion does not turn into a complacent navel-gazing exercise from a European perspective. The way forward, they hold, should be to engage in substantive empirical work on normative power Europe, whilst going beyond an inside-out/EU perspective.

Niemann and Junne (2011), further suggest that the NPE debate fails to sufficiently embed EU foreign policy in broader international affairs. The discussion is often led as if bilateral relations between the EU and third countries can be isolated from the worldwide fabric of relations in which many other actors play a role, including most importantly the US, but regionally (i.e. in Europe) also significantly Russia. Closely related, the debate often seems to ignore that there are other, potentially competing, normative powers (that include not only nation-states). International organisations, such as the UN, some of its sub-organisations including the World Bank and the IMF, the WTO and perhaps also the OECD have considerable influence on domestic legal norms (particularly) in developing countries. But do they compete with the EU? The EU countries are after all members of these organisations. The latter could thus also be instruments of EU foreign policy, providing the EU with more scope and leverage. But it seems that overall the above-mentioned organisations constitute ‘transmission belts’ of US rather than EU/European policy (cf. Foot et al. 2003). The US often propagates very similar norms as the EU. Since the EU often does not speak with one voice or does not formulate succinct and distinct positions from the US there is also the danger that the EU is merely seen as a barely distinguishable part of ‘the West’ from the perspective of non-European countries (cf. Niemann and Junne 2011: 122).

Our view on normative power Europe is that it provides a useful concept in the body of work on the EU’s international role, largely for the reasons formulated by Manners (2002). We share the critique formulated by Sjursen in 2006 on the lack of criteria for research. Taking up Sjursen’s critique regarding the prevailing lack of criteria for empirical research, Niemann and de Wekker (2010) have formulated indicators for normative power. According to them, three levels are important for an operationalization of normative power Europe: (i) normative intent (the degree of genuine EU normative commitment), (ii) normative process (the extent to which an inclusive and reflexive foreign policy is pursued), and (iii) normative impact (the EU’s influence on third countries’ conceptions of what is ‘normal’). In this study we draw on the operationalization of NPE developed by Niemann and de Wekker (2010) for the case at hand.

There are two points to the NPE debate which in our view have not yet been sufficiently registered. Our first point is related to the formulation of the normative basis of NPE. In our view, this normative basis – which by its very nature constitutes the core of the NPE concept – deserves more attention. Manners (2002: 242-244) made an important first step in 2002 by identifying five ‘core norms’ and four ‘minor norms’ which allow the EU, in his words, “to present and legitimate itself as being more than the sum of its part”. Later he reformulated and further elaborated on these nine ‘substantive normative principles’, with references to the Lisbon Treaty, as a means of “marking the extent to which such norms have been given concrete form in the face of Eurosceptical opposition” (Manners 2008a: 48)”. There has, however, to our knowledge not yet been a profound academic debate in the literature on the normative basis

⁶ Exceptions include Adler and Crawford (2004) and Harpaz (2007).

of NPE as formulated by Manners. In our view, further interdisciplinary theoretical research and debate, combining theories from both legal science and political science, could contribute to further strengthening the basis formulated by Manners. Such interdisciplinary research and debate could in our view advance our understanding of why the EU can – and should – be seen as normative power and thus improve both the ontological quality and the normative quality of the theory of NPE. In particular, such substantial research and debate could contribute to developing methods and criteria for determining what is the normative basis of a certain entity – be it the EU, a different international organisation (such as the UN or the Council of Europe), a state, or a non-state entity.

Our second point concerns the fact that the concepts of ‘Normative Power EU’ and Normative Power Europe’ are used as synonyms, both by Manners and by other authors. We do not mean to address the semantic question whether the EU can be named ‘Europe’, but we wish to point at a dimension of the NPE concept which has, to our knowledge, not yet (explicitly) been addressed, namely the vast influence of the institutions of the Council of Europe – and especially the European Court of Human Rights – on the development of the normative basis of the EU. A key provision in this context is Article 6:3 of the Treaty on European Union, which states that fundamental rights, as guaranteed by the European Convention on Human Rights (ECHR)⁷ and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.⁸ The normative power of the Council of Europe, which operates besides and in cooperation with the European Union, deserves in our view more attention. In this context we refer to the five objectives of the Council of Europe as formulated in The Warsaw declaration (Council of Europe 2005): (1.) to protect human rights, pluralist democracy and the rule of law; (2.) to promote awareness and encourage the development of Europe’s cultural identity and diversity; (3.) to find common solutions to the challenges facing European society; (4.) to consolidate democratic stability in Europe by backing political, legislative and constitutional reform. Furthermore, we refer to the *Memorandum of Understanding between the Council of Europe and the European Union* (Council of Europe 2007), in which these two European organisations, seeking to intensify co-operation and ensure co-ordination of action on issues of mutual interest, have formulated the purposes and principles of their cooperation. A systematic investigation of the cooperation between the EU and the Council of Europe can in our view lead to a better understanding of Normative Power Europe in the broader sense of the term and can help to explain ontological, empirical and normative elements of Normative Power EU.

2. Operationalisation

Normative intent

A truly normative power would bind not only others, but also itself to collective rules (Tocci 2007: 6). In this context one can distinguish between an internal and an external dimension (Niemann and de Wekker 2010). The internal dimension refers to the extent to which the norm is, or is not, well-grounded in the wider EU acquis. The external dimension refers to the extent to which the EU and its member states have signed and ratified relevant international treaties concerning the norm in question.

To arrive at empirical findings here is no small challenge. In our case study, we, *first*, attempted to establish to what extent the EU (itself) adheres to the norms it promoted vis-à-vis third states (here the US). *Second*, we investigated the EU’s motivation in promoting these

⁷ A Treaty adopted by the member states of the Council of Europe and to which the EU is not (yet) a Party.

⁸ See also European Court of Justice 1979.

norms: how strong is the EU normative commitment in its relation to the United States with regard to the treatment of (foreign and American) suspects of terrorism. Our goal was to discover, for the three norms, to what extent the EU institutions have undertaken concrete action to promote the involved norm vis-à-vis the US in the policy area involved (counter-terrorism). Were the three norms at the centre of the EU relationship with the US, or were they rather peripheral to the EU's engagement? If the three norms were not at the forefront, this is an indication for a lesser normative commitment of the EU. *Third*, we attempted to explore whether the three exported norms serve or hurt EU interests. We addressed this research question by investigating – inter alia – whether, and how, the pursuit of the norm (prohibition of torture, fair trial, private life and data protection) is related to domestic politics and constituencies.

Fourth, we took the reaction time into account: how quickly, or slowly, has the EU reacted to human rights violations by the US Administration in the context of its counter-terrorism policy. If the EU reacted immediately, or soon after, a human rights violation - or a policy which implies a human rights violation - became known, this is an indication that the EU normative commitment is strong. If, on the contrary, the EU reacts only years after the violation became known, this is an indication of a lesser normative commitment.

Fifth, we examined the degree of to which the EU acts consistently (Niemann and De Wekker 2010: 8-9). A truly normative actor would act so as to fulfil its normative intent (Tocci 2007: 7).⁹ Here, two dimensions were distinguished): (1) Does the EU internally apply the three norms that it asks of the US to apply? (2) Does the EU apply the same standards for different third countries? Or in other words: are there indications that the EU, when promoting the three norms in its foreign policy, is less, or more, normatively committed towards the US than towards other countries? For both dimensions, we looked at 'words' of the EU institutions, but also investigate whether these words were followed by 'deeds' (concrete actions that led to the pursued aim).

As regards the first dimension: explorative research suggested that the alleged use of European countries by the CIA for the extra-ordinary rendition, transportation and illegal detention of prisoners constituted an important case here (Marty Report 2006, 2007; Radsan 2009: 299-306; Human Rights Watch 2005); Amnesty International 2008). How did the EU institutions react to the reports of extraordinary rendition, transportation and illegal detention of prisoners by the CIA, taking place within the borders of (at least two) EU Member states in the period 2006-2008? Did the EU institutions attribute equal significance to putting an end to the human rights violations (violation of the prohibition of inhuman treatment and the right to a fair trial)? If different EU institutions (Parliament, Commission, Council) attribute the same significance to the involved norms, this is an indication of genuine EU normativity. And are there indications that the EU applied substantially different human rights standards in its relation to the US authorities – in particular the CIA – than in its relations to authorities of third states?

Finally, we looked at the coherence of the EU policy with regard to its 'counter-terrorism and human rights' policy as an indicator for normative intent. If inconsistencies in its policy – for example when characterized by the use of double standards, or by using different standards to the US than vis-à-vis third states – cannot be justified on the basis of a valid principle, the policy in question is incoherent (Lerch and Schweltnus 2006: 308-309; Niemann and De Wekker 2010: 8-9, 17). This would be an indication of lower normative commitment.

⁹ See also footnote 12 in Niemann and De Wekker (2010), in which they suggest: “[A]s much as consistency constitutes a useful indicator of normative intent, it also requires some qualification, as normative power may also necessitate a certain degree of pragmatism or case by case evaluation in the pursuit of longer-term normative objectives”.

Normative process

Furthermore, we explored whether the EU pursues an inclusive and reflexive foreign policy vis-à-vis the US, with regard to counter terrorism and human rights issues (cf. Bicchi 2006; Niemann and de Wekker 2010). As for inclusiveness – more generally, the question is whether the EU takes account of the views of those whose normality will be affected. Concretely, inclusiveness means that EU decision-makers give a role to external actors (of affected third countries) during the process.

As for *reflexivity*, we tried to establish whether EU representatives were open to learning and adapting their position in the negotiation process when faced with a convincing, ‘better’ argument offered by the US representatives and if so, whether the EU representatives would in this case anticipate adverse consequences of the involved EU export of norms for the US Administration or US Congress. In this context we investigated whether the EU representatives, during the negotiation processes, make a conscious effort to critically analyze the effects of their actions for their (negotiation) partner, the United States (rather than act in a ‘routine-based’ way, trying to impose its own standards and templates on the US representatives without taking the particularities of the US into account). Furthermore, we looked whether the EU regularly evaluates the outcomes of its policies (here the promotion of the three involved norms in negotiation processes with the US) and thereby actively engages US representatives.

For this purpose we studied relevant US and EU policy documents, speeches and press statements with regard to ‘counter terrorism and human rights’, with a focus on the EU US Transatlantic Legislators Dialogue, the Transatlantic Dialogue for Legal Advisers and the EU US High Level Contact Group on Data Protection. We tried to gain further insights with regard to this research question by interviewing 15 officials on both sides of the Atlantic.

Furthermore, we investigated what types of norms the EU promotes. The EU risks acting in a Eurocentric manner unless it promotes norms that are universally applicable (Niemann and De Wekker 2010: 9). Therefore it was necessary, in our case-study, to establish whether the promoted norm was merely an EU-specific norm, or rather a norm that is universally applicable. Sjursen (2006b: 243), drawing on Habermas, has argued that, in order to identify the EU as a normative power, the question would be whether or not its external action relies on norms that may be tested and found to be in accordance with the following principle (principle of universalization): “Does the EU, in its external action, refer to reasons that can be expected to gain approval in a free and open debate in which all those affected can be heard?” Niemann and De Wekker (2010: 10) have suggested that, while this constitutes a sound principle, it seems less practical for empirical research, as it is difficult to operationalize. Instead, to establish whether merely EU-specific norms or universally applicable norms are promoted, they draw on Manners (2008a: 45) who suggests that the norms advanced by the EU should be generally acknowledged by the United Nations, to be universally applicable. They suggest that the criterion for establishing whether a norm is universally applicable should be: ‘Is the EU norm recognized through the instruments of the UN system?’ We applied this ‘UN standard test’ in our case study, by establishing whether the three norms promoted by the EU vis-à-vis the US - prohibition of torture, fair trial, and respect for private life – had been recognized through the instruments of the UN system.

Normative impact

Finally, we investigated the Union’s normative impact. For that purpose we explored whether there had been normative change in the US towards the three norms that are central in our study: the prohibition of torture, the right to a fair trial and the right to private life, in the context of the US counter terrorism policy. If such norm change was found, we investigated whether this norm change could indeed be attributed to the EU.

As a *first step* (norm change) we investigated whether, at the end of our investigation period (2010), the EU goals had been realized: a (higher) respect of the three norms by the US in the context of its counter terrorism policy. This was done by analysing changes in the US legislation with regard to counter terrorism measures, in particular changes in the federal legislation in three core domains of the US counter terrorism policy: a) interrogation techniques of suspects of terrorism, b) the procedures for bringing these suspects to justice, and c) the legislation with regard to the processing of air line passenger data and the transfer of financial data for the aim of combating terrorism. Furthermore, we looked at the degree to which deficiencies of violations of the three norms (as seen from an EU perspective) had, or had not been 'rectified' (cf. Young 1999; Niemann and Junne 2011).

The *second step* was to ascertain whether a certain normative change (with regard to one or more of our three norms) was really induced by the EU. To answer this question, we analysed inter alia speeches of politicians, judgments of the Supreme Court, media reports. In doing so, we particularly registered whether the EU was, or was not, mentioned by these sources as 'example to be followed' or 'point of reference' for the norm interpretation. In this context, we also looked at the timing of the norm change: did norms change after the EU's normative commitment began, or did the norm change precede it? In the latter case the EU is unlikely to have been a (significant) source of the change (Niemann and De Wekker 2010: 11). Moreover, we investigated whether alternative sources of norm change could be found. In this context we looked, in particular, at the role of the Council of Europe, the role of the United Nations and domestic causes for norm change in the United States.

In the next three sections we present the findings of our investigation into EU normativity, along the three dimensions outlined above, in the case of EU relations with US in the policy field of counter terrorism. As indicated in the introduction particular emphasis will be placed on the norms of prohibition of torture (including inhuman treatment) of detainees suspected of acts of terrorism, the right to a fair trial of those detainees and the right to respect for private life and data protection of citizens whose personal data are being processed for counter-terrorism purposes.

3. Normative intent: did the EU act out of genuine normative commitment?

The central question to address here is whether the EU acts out of genuine normative commitment *vis-à-vis* the US and/or rather out of self-interest. It must be remarked that these two motivations can run in parallel (Diez 2005: 624-625; Niemann and De Wekker 2010: 15). Still, to be a genuine normative power, the EU should, first, promote norms that are universally applicable and itself adhere to these three norms internally and externally. Second, these norms should be central in the EU relationship with the US. And third, the EU should display consistent behaviour and abstain from double standards.

Adherence to the promoted norms

The first issue to investigate is whether the EU itself adheres to the three norms it promotes *vis-à-vis* the United States. The *prohibition of torture* is one of the core provisions of the European Convention on Human Rights (Article 3).¹⁰ Article 6:3 of the Treaty on European Union states that the fundamental rights guaranteed by the European Convention constitute general principles of the Union's law. The prohibition of torture and inhuman treatment is also enshrined

¹⁰ This provision forbids submitting a person to torture, inhuman treatment or punishment, and degrading treatment or punishment.

in the Charter of Fundamental Rights of the European Union (Article 4), which has been integrated into the Lisbon Treaty and is thus legally binding on the European Union and EU Member States. *The right to a fair trial* has been laid down in Article 6 of the European Convention¹¹ and in Article 47 of the Charter of Fundamental Rights of the European Union. *The right to respect for private life, including the right to protection of personal data* is enshrined in Article 8 of the European Convention on Human Rights and in the Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. This right is further protected and regulated in the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.¹²

We can conclude that the EU and its Member States *internally* adhere to the three norms the EU promotes *vis-à-vis* the US. This is a first indication for genuine normative commitment. Furthermore, EU Member States are also bound by these norms *externally*: each of the 27 Member States has signed and ratified the UN Covenant on Civil and Political Rights (ICCPR) and have thus, legally, bound themselves at UN-level to respect the prohibition of torture, the right to a fair trial, and the right to private life. This is another indication for genuine normative commitment.

Centrality of the norms in the EU-US relationship

Next, it is necessary to investigate the centrality of the norms in the EU-US relationship: how *strong* is the EU's commitment to promoting the three norms (prohibition of torture, right to a fair trial, and right to private life and data protection) *vis-à-vis* the United States? Were these norms at the core of the EU relationship with the US, or were they rather peripheral to the EU's engagement? If the three norms were not at the core, this is a strong indicator for non-normative commitment. Below, we investigate these questions, for each of the three norms separately. We thereby distinguish between the roles performed by the European Parliament, the Commission and the Council.

Prohibition of torture

The European Parliament (EP) has, in the period 2002-2010, played an active role in bringing the prohibition of torture to the centre of the EU-US relationship. As early as February 2002, only days after the first reports in the media on systematic torture and inhuman treatment in Guantanamo Bay, the European Parliament adopts its first resolution on the human rights situation in this US detention centre in which it critically addresses the human rights situation in this US detention centre and thus puts it on the EU US Agenda (European Parliament 2002). In March 2004, the Parliament increases the pressure on the Council to bring the human rights situation in Guantanamo Bay to the forefront of the EU-US-relation. In a landmark resolution the Parliament first notes that "EU institutions, Member States and public opinion are increasingly concerned about conditions at the Guantánamo Bay Naval Base and about the physical and mental states of the detainees". Next, it addresses the recommendation to the Council to "call upon the US for the prisoners to be treated in accordance with the rule of law, regardless

¹¹ Core elements of this provision are the principle of equality of arms, the right to adversarial proceedings, the right to be present (in person) at the trial and the right to an oral hearing, the right to a public hearing, the right (in principle) to have the assistance of a lawyer, as well as the requirement that the judicial decision must state the reasons on which it is based (cf. Van Dijk and Van Hoof 2006).

¹² Core norms laid down in this (CoE) Convention are the right to access to the recorded data, the right to verification, the right that the disclosure of personal data to others be surrounded by procedural guarantees. The right to private life and data protection is not absolute: restrictions can be justified if they are prescribed by law, imposed for a legitimate aim and 'necessary in a democratic society' (cf. Van Dijk and Van Hoof 2006: 340-342).

of their nationality or origin”, [...] to comply fully with its obligations under international human and humanitarian law with respect to proper determination of status of combatants [...] and safeguarding the treatment of prisoners of war in the wake of the recent conflicts. More specifically, it recommends to the Council to call upon the US “to comply with its obligations under the abovementioned Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and in particular Article 3 thereof, which prohibits the expelling, return (‘refoulement’) or extradition of a person to countries where there are substantial grounds for believing he or she would be subjected to torture”.

In early 2006 the Parliament adopts a new Resolution in which, again and this time in strong and direct words, recommends to the Council to call on the US “to close the Guantánamo Bay detention facility and insist that every prisoner should be treated in accordance with international humanitarian law” (European Parliament 2006a). In December 2007, the Parliament takes the initiative for a cooperation between the EU and the US with the aim of finding a ‘solution’ for the detainees still held in Guantanamo Bay: it calls upon the Commission and the Council “to launch an initiative at the European and international levels for the resettlement of Guantánamo prisoners from third states who cannot be returned to their country of origin because they risk being persecuted or tortured” (European Parliament 2007b). From now on, Members of the EP do not only act in words but also in deeds: in 2008 Members of the European Parliament actively seek contact with US Members of Congress to gain support for this initiative. These contacts take place between January 2008 and February 2009 in the context of the Transatlantic Legislators Dialogue (Interviews, 2010, with Members of Parliament C. Buitenweg, and J. Hennis-Plasschaert). At that stage no concrete results are reached, but these contacts do contribute to bringing ‘Guantanamo Bay’ more to the forefront of the EU-US relationship (interviews with the above mentioned Members of Parliament, and confirmed in the interview with M.L. Warren of the US Mission to the European Union).

After the election of US President Barack Obama in November 2008 and his decision to sign an executive order committing to closing the Guantanamo Bay detention facility in one year (but keeping it open as a transitional measure, until 22 January 2010), the Parliament reacts immediately, thus keeping the topic high of the EU-US political agenda: in two resolutions (European Parliament 2009a,b) it welcomes the decision by the US President on closing the Guantanamo Bay detention facility and “calls on the Member States, should the US administration so request, to cooperate in finding, on a case-by case basis, solutions to the issue of accepting some of the Guantánamo inmates in the EU”.

We can conclude that the European Parliament has throughout the years 2002 until 2010, made several attempts to bring the human rights situation of Guantanamo Bay, and especially the inhuman and degrading treatment of its detainees, to the centre of the EU-US Relationship.

The Commission and the Council, on the contrary, hardly addressed the issue of the treatment of detainees suspected of acts of terrorism *vis-à-vis* the US Administration between February 2002 and January 2009. It must be remarked, though, that the issue was frequently raised in “silent diplomatic contacts” between representatives of the Council on the one hand and representatives of the US Administration on the other hand (Interviews with G. de Vries, June 2010; and T. Jones, July 2010).

In addition, it must be remarked that the Commission and the Council did in 2004-2008 in other non-public ways bring the issue of ‘prohibition of torture and degrading treatment’ on the EU US Agenda, especially during EU-US negotiations on judicial cooperation. A remarkable example took place during the negotiations for the 2009 EU-US Agreements on Extradition and on Mutual Legal Assistance, when the Commission, mandated by the Council, actively negotiated with the aim of, and finally succeeded in, including clauses in these Agreements stating that the standards of the European Convention of Human Rights, including the prohibition of torture and inhuman and degrading treatment, would apply (interviews with G. de Vries, June 2010; interview at the Council Secretariat, June 2010).

The main point remains, however, that the Commission and the Council did not take any firm steps to publicly bring the issue of ‘torture of degrading treatment’ to the centre of the EU US relationship between February 2002 and February 2009. Promoting the norm publicly (rather than only in silent diplomatic contacts) is an indication of strong normative commitment: it shows that the EU really stands for the norm it promotes and is prepared to defend it in an open and transparent way, even when this could go against the EU’s interest of maintaining a “good” relationship with the state towards which the norm is promoted, in casu the US. The topic of ‘prohibition of torture and inhuman treatment’ was not directly and publicly addressed on the EU US Summits between 2002 and 2008, despite explicit and repeated calls from both the European Parliament and from human rights organizations to do so. Illustrative in this context is an open letter from Amnesty International (2004), in which the organisation, referring to “EU’s embarrassing silence on US torture” calls on “the Irish Presidency of the European Union to end the EU’s embarrassing silence in the face of the United States’ ongoing breaches of fundamental human rights and humanitarian law principles in the pursuit of its "war on terror". The Council did not, bring an end to the silence, and the topic was not (openly and critically) addressed in the Joint Declaration of the Summit of 26 June of that year. Even more illustrative is the fact that while the European Parliament (2006b, 2008a) called on the EU Presidency to call on the US Presidency, on the forthcoming US-EU Summit, to close Guantanamo Bay, the EU Presidency did not do so: the topic was, again, not (publicly) addressed on those Summits.

In February 2009, two months after the election of the new US President Obama, the passive attitude of the Council suddenly ended. The Council started negotiations with the new US Administration aimed at reaching a political agreement on ‘human rights and counter-terrorism cooperation’, and more specifically a solution for the detainees of Guantanamo Bay. On 15 June 2009 the EU Council of Ministers and the US Administration adopted the US-EU Joint Statement on Closure of Guantánamo Bay and Future Counter Terrorism Cooperation (US-EU Joint Statement 2009). Based on “shared values of freedom and democracy”, and drawing on “respect for international law, the rule of law and human rights”, the joint statement provides a framework that permits individual EU member states to admit Guantánamo Bay detainees. However, it must be stressed that this active attitude of the Council from 2009 aimed at promoting the norm of prohibition of torture *vis-à-vis* the US, began only seven years after the first reports of large scale inhuman and degrading treatment in the US detention facility Guantanamo Bay, and at a time when there had been a change of government on the side of the US. Had the Council been genuinely committed to the promotion of this norm *vis-à-vis* the US, it would have brought the topic to the centre of the EU-US relationship at a much earlier stage. Now, the Council only got involved when it saw a reasonable chance to succeed. By that time, however, the need for EU involvement had lessened, since the new US President had announced, already on its second day in office that he intended to bring an end to the inhuman treatment of the Guantanamo Bay prisoners (President of the United States 2009a).

The picture arises of the Council being willing to promote this norm only when it “runs into an open door”, and not when the door is still closed and pushing would be needed.

Right to a fair trial

In the period March 2004 - December 2006 the European Parliament attempted to bring the norm of ‘fair trial’ to the centre of the EU US relationship three times. It starts to promote the right to a fair trial for suspects of acts of terrorism *vis-à-vis* the US Administration in March 2004. The European Parliament (2004a) makes (inter alia) the following recommendations to the Council:

- “urge the US administration to confirm that the ad hoc military commissions established in the abovementioned Military Order of 13 November 2001 and the subsequent Military Commission Orders issued by the Defence Secretary as a ‘competent court’ will meet all

international law standards within the meaning of Article 5 of the Third Geneva Convention and Article 14 of the UN International Covenant on Civil and Political Rights”;

- “consider therefore that any trial not conforming with standards under the International Covenant on Civil and Political Rights in respect of due process would be a direct violation and infringement of international law.”

In later Resolutions the European Parliament (2006a, 2006b, 2007b) repeats its calls upon the Council to promote the right to a fair trial for suspects of acts of terrorism *vis-à-vis* the United States, in particular the detainees held in the Guantanamo Bay detention facility.

The Council, however, *only once* publicly addressed the issue of the ‘right to a fair trial’ of suspects of acts of terrorism, and even then without explicitly referring to the United States (Council of the European Union 2006). Instead, the topic of the secret US Military Commissions and the concerns about violations of the right of a fair trial there was raised in “silent diplomatic contacts” between representatives of the Council and the representatives of the US Administration in 2006 (interviews with G. de Vries, June 2010; and T. Jones, July 2010). Yet, it must be emphasized that during the nearly ten years in which the secret US Military Commissions existed (2002-2009), the Council only once openly brought this topic, and the concerns about violations of the right to a fair trial of suspects related to it, to the EU-US agenda.

Had the Council been serious about promoting the right to a fair trial for every person, also suspects of acts of terrorism, *vis-à-vis* the United States, it would have taken a more critical and firmer position with regard to the US Military Commissions. By remaining silent during all those years, while hundreds of suspects of acts terrorism were brought in front of these secret tribunals (e.g. Amnesty International 2010a; Greenhouse 2009; Palitz 2009), and while human rights NGOs – inter alia Human Rights Watch (2002a, 2002b, 2005) and Amnesty International (2002, 2004, 2005a, 2008) – kept reporting about serious violations of the right to a fair trial, the Council did not show a real commitment to promoting this fundamental right *vis-à-vis* the United States.

Right to respect for private life and data protection

Also with regard to the promotion of the right to private life and data protection *vis-à-vis* the United States, there is also a strong difference between the European Parliament on the one hand, and the Commission and Council on the other hand.

The European Parliament has, in the period 2002-2010, played an active and leading role in bringing the norm of respect to private life and data protection to the centre of the EU US relationship, especially in the context of the EU US negotiations on Passenger Name Records (PNR) Agreements 2004 and 2007, and, in 2009-2010, also in the context of the EU US Negotiations on the Terrorist Finance Tracking Programme (TFTP) Agreements 2010 I and II (Argomaniz 2009; Lodge 2004; Gonzalez Fuster et al. 2008; Papakonstantinou and De Hert 2009). In these cases the European Parliament (2003, 2004b, 2006d, 2007d, 2007e, 2009c, 2010a, 2010b) adopted a series of Resolutions in which it – repeatedly and in explicit words – condemned the envisioned transfer of (passenger and financial) data from the EU to the US as excessive and disproportionate to the aims pursued, and called upon the Commission and the Council to ensure that the right to access to the recorded data, the right to verification, the right that the disclosure of personal data to others be surrounded by procedural guarantees, and the right to judicial review be included in the Agreements with the United States. Each of these, essential elements of the right to private life and data protection were eventually, after long and intense negotiations between the EU Commission and Council and the US Administration, laid down in the two Agreements concluded between European Union and the United States: the PNR Agreement 2007 (on data protection for passenger data) and the TFTP II Agreement 2010 (on data protection for personal financial data).

It must be noted, however, that while in the PNR case, the Parliament was active in bringing the norm of 'respect for private life and data protection' to the forefront of the EU-US relationship from the earliest beginning of the negotiations on the PNR Agreement (2003), in the TFTP case the Parliament became active only in a very late stage, seven years after the transfer of these data from the EU to the US had begun (Papakonstantinou and De Hert 2009).

In the period 2002-2007 *none of the EU institutions* was active in the promotion of the right to respect for private life and data protection for citizens whose personal data were being processed by the US authorities under the Terrorist Finance Tracking Programme (TFTP). In 2008 the *Commission* and the *Council* started to become involved in promoting this right, by entering into negotiations with the US Administration for an Agreement aimed at creating a legal basis and at creating safeguards for data protection for the transfer of the personal data. The TFTP I Agreement signed on 30 November 2009 already contained a number of clauses which created safeguards for data protection.

In February 2010, two months after the entering into force of the Lisbon Treaty, *Parliament* started to become involved. It used its new competence under the Lisbon Treaty to reject the TFTP Agreement of 30 November 2009, demanding additional safeguards for data protection (formulated in very concrete terms) to be included in a new (to be concluded) Agreement. In March-July 2010 the *Commission*, in reaction to the Resolution of the *Parliament* and mandated by the *Council*, negotiated with the US Administration on a new Agreement. In July 2010 the new TFTP Agreement, which included more safeguards for the protection of private life, was signed by the *Council*, and approved by the *Parliament*.

The conclusion can be drawn that, in the TFTP-case, a) the EU's normative commitment of promoting the right to private life and data protection vis-à-vis the United States was almost zero in the period 2002-2007, and b) the EU normative commitment has been high in 2009-2010, whereby the Parliament in 2010 – immediately after the entering into force of the Lisbon Treaty – took the lead in this normative commitment and the Commission and Council followed.

Norm consistency and coherence

The next question to be answered is whether the EU has displayed consistent behaviour, and abstained from double standards, in the promotion of the three norms *vis-à-vis* the United States.

Prohibition of torture and right to a fair trial

Norm consistency: the first issue to investigate here is whether the EU and its Member States apply the same human rights standards as they ask from the US. Two 'cases' are important in this context. The first case is the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, in 2005-2007. The second case is the reaction of the EU and its Member States to the request of the US Administration, in February 2009, to admit Guantanamo Bay detainees, i.e. agree that these detainees be accommodated within their borders.

Case 1 – indications of secret detention centres and extraordinary rendition on European soil: As pointed out earlier, two reports – one adopted by the Council of Europe (Marty Report 2006) and one adopted by the European Parliament (2007a) – have concluded that there were strong indications of the existence of secret CIA detention centres in two EU Member States, Poland and Romania, as well as strong indications that suspects of acts of terrorism were, in these detention centres on European soil, subjected to harsh interrogation techniques, so called 'enhanced interrogation techniques', before being transferred to CIA centres elsewhere in the world (so called 'extraordinary renditions'). Does this mean that the EU used double standards? In this context it is important to note how the EU reacted to the first reports, published by NGOs (Human Rights Watch 2005; Amnesty International 2005b) and in the media (e.g. Washington

Post, 4/12/2005) about possible violations of the norm of ‘prohibition of torture’ on European soil. By setting up a Temporary Committee (TDIP) in January 2006 and order it to thoroughly investigate the case, the EU – or more precisely the European Parliament (2006c) – has shown at least some normative commitment.

One should also note, however, that the European Parliament (2007c) “denounces the lack of cooperation of many Member States, and of the Council of the European Union towards the Temporary Committee; stresses that the behavior of Member States, and in particular the Council and its Presidencies, has fallen far below the standard that Parliament is entitled to expect”. This is an indication of inconsistency within the EU: while the Parliament, in its resolutions, actively promotes the prohibition of torture and the right to fair trial vis-à-vis the US, the Council fails to do so. In addition, the European Parliament (2008a) “calls upon the Council and the Member States to issue a forceful declaration calling on the US Government to put an end to the practice of extraordinary arrests and renditions, in line with the position of Parliament.” Such a declaration has never been adopted by the Council. This, too, points to – at least – inconsistency within the EU. We must picture the EU here as Janus-like¹³ : one face (the Parliament) actively (with words) promoting the norm of ‘prohibition of degrading treatment’ vis-à-vis the United States, and the second face (the Council) keeping its mouth shut.

Case 2: EU’s reaction to the request of the US Administration to adopt Guantanamo Bay detainees: When investigating consistency, one must also look at the ways in which the EU and its Member States have reacted to the request of the US Administration, in February 2009, to admit Guantanamo Bay detainees. If the EU and its Member States had reacted by ‘adopting’ detainees and thus actively assisting the US Administration in closing down Guantanamo Bay, this would have been a strong indication for consistency. But how was the reaction of the EU and its Member States in reality? In June 2009, the EU reached an agreement with the US which provides a framework that permits individual EU member states to adopt Guantanamo Bay detainees (US-EU Joint Statement 2009). At the time of the closing of this study (June 2012), the Guantánamo Bay detention centre is, however, still open and 169 detainees are held there.¹⁴ Since June 2009, the US Administration has negotiated with the EU member states, jointly and separately, about the accommodation of these detainees. So far 14 out of 27 Member States (namely Belgium, Bulgaria, Denmark, France, Germany, Hungary, Ireland, Italy, Hungary, Latvia, Portugal, Slovakia, Spain and The United Kingdom) have agreed to adopt detainees (News Release of the US Department of Defense 2010b). Since only 14 out of 27 EU Member States have so far adopted one or more Guantanamo Bay detainees, and 13 out of 27 have not adopted even one such detainee, we must conclude that 13 EU Member States do not act in a consistent way: they act in words by calling (as Members of the EU, and the EU Council) on the US Administration to close Guantanamo Bay and thus end the degrading and inhuman treatment of detainees held there, *but they do not themselves take any concrete step* to end the problem, even if they have the chance to do so (by adopting one or more of the detainees).

Coherence: the next question to investigate is whether the inconsistency (double standards) in the EU ‘counterterrorism and human rights policy’, in the two cases described above, can be justified on the basis of a valid principle (Lerch and Schweltnus 2008: 308-309).

From a legal point of view, the double standards described above cannot be justified. The norm involved, the prohibition of torture, inhuman and degrading treatment is an absolute right: it leaves no scope for limitations on this right. This follows from the formulation of the norm in article 3 of the European Convention of Human Rights (ECHR), article 4 of the Charter of Fundamental Rights, article 7 of the International Covenant on Civil and Political Rights

¹³ Janus is a god in Roman mythology with two faces.

¹⁴ News Release of the US Department of Defense (2012). See also: News Release of the US Department of Defense (2010a, 2010b, 2010c), Scheipers (2009), Amnesty International (2010a) and Human Rights Watch (2009).

and article 5 of the Universal Declaration of Human Rights. It also follows from the case law of the European Court of Human Rights, which held, for the first time in 1978 and again in later judgments, that no derogation is permitted, not even in the event of a public emergency threatening the life of the nation.¹⁵ There is, therefore, *no legal justification* for the inconsistent behaviour of the EU.

From a military and political perspective, it is possible to point at the risks for EU Member States of adopting suspects of acts of terrorism. It is possible to argue that there are security risks (in terms of the possible escape of such detainees) and political risks (in terms of protests at the domestic level, among the electorate, against “adopting terrorists within our borders”).¹⁶ But these risks cannot justify a passive attitude of EU Member States towards the detainees of Guantanamo Bay; it can at least be expected that EU Member States actively seek to assist the Obama Administration in closing Guantanamo Bay. In this context we refer to Scheipers (2009: 9-10), who has pointed at Portugal’s offer (at the end of 2008) to the US Administration to resettle (adopt) a number of Guantanamo detainees, and argues that the difficulties the Obama administration faces with respect to closing the detention facility at Guantanamo Bay “offers an *opportunity* for Europeans to communicate their legal requirements while building a new foundation for transatlantic cooperation in the area of detention” (Scheipers 2009: 9). If, the 169 detainees still at present left in Guantanamo Bay will be forced to stay there, and the EU Member States no more assist the US Administration by adopting some of these detainees, this must be seen as a missed opportunity, and as insufficient commitment of EU Member States to the goal of promoting the norm of ‘prohibition of inhuman and degrading treatment’.

From a military-strategic perspective, it is also possible to argue that the interest of cooperation in a loyal way with the US, the EU’s and EU Member states’ principle ally in the policy field of counter-terrorism, constituted a strong argument for the EU and its Member States to cooperate closely with the US Administration and the CIA in the transportation of, and interrogation of, suspects of acts of terrorism.¹⁷ This military-strategic interest does not, however, justify cooperation with CIA practices which involve secret detention camps and extraordinary renditions on European soil, whereby there are strong indications of violation of fundamental human rights or norms of humanitarian law (Marty Report 2007: 2ff; cf. also Schrijver and Van den Herik 2007: 579 ff). We must conclude that the EU and (at least) two of its member states, *Poland and Romania*, did not act in a coherent way in their promotion of the prohibition of torture and the right to a fair trial vis-à-vis the US in the policy field of counter-terrorism.

Right to respect for private life and data protection

Consistency: did the EU act consistently in its promotion of the right of respect for private life and data protection *vis-à-vis* the United States? It must be remarked that the EU institutions (Parliament, Commission, Council) did not attribute equal significance to this norm. When comparing their normative intent, as described above, we see substantive differences. While

¹⁵ European Court of Human Rights (1978; 1996). An overview of the case law on the absolute character of this norm is given in Van Dijk and Van Hoof (2006: 440-441).

¹⁶ Such voices were heard inter alia in parliamentary debates on ‘closing Guantanamo Bay’ in the Dutch Parliament in 2009: *Handelingen Tweede Kamer* (Proceedings Second Chamber of Parliament) 2009/10, debate of 18 November 2009, 26-2368 ff. Compare also the refusal of the German government to readmit former Guantanamo detainee Murat Kurnaz, a German resident with Turkish citizenship, onto German territory for several years until he was finally allowed to return in 2006. According to Scheipers (2009: 10) this reflects the “stigma” attached to Guantanamo detainees even if allegations against them fail to be substantiated after lengthy periods of detention. Cf also on this stigma: Fletcher and Stover (2008).

¹⁷ Cf. Rees (2009: 108 ff). This interest of the EU could be seen as a ‘utility-based argument’ in the argumentation-theoretical approach to coherence, formulated by Lerch and Schweltnus: Lerch and Schweltnus (2006: 306 ff).

the Parliament showed a genuine and high normative commitment to promoting the privacy-norm in the *PNR case* throughout the period 2003-2009, the normative commitment of the Council and the Commission in this case was lower, especially in the period 2003-2007. In the *TFTP case* the normative commitment of all institutions was low (almost zero) in the period 2002-2007; in 2008/2009 the normative commitment of all the three institutions, suddenly increased. We can conclude that there is i) variation in normative commitment over time, ii) variation in normative commitment among the EU institutions (Parliament, Commission, and Council) and iii) variation from case to case (here: the *PNR case* versus the *TFTP case*), all of which suggests that the EU did not act very consistently in this case.

Coherence: could the three variations/inconsistencies described above be justified on the basis of a valid principle? We have not found any justification for these inconsistencies. None of the policy documents or resolutions examined for the purpose of this case study explains, or attempts to justify, the variation.

This does not mean that no explanation for the observed variations can be found. It is likely that, besides a certain normative commitment (to promote the norm of ‘respect for privacy’ *vis-à-vis* the US) motives of a different nature played a role.¹⁸ As regards the inconsistency on the side of the Parliament (actively promoting the privacy-norm in the *PNR-case* already from 2004, and in the *TFTP-case* only from late 2009), this can possibly be explained by (also) looking at motives of a strategic and/or institutional nature (interviews with L. van Middelaar, Cabinet of the President of the European Council; and with Herke Kranenborg, July 2010). The European Parliament became actively involved in the *PNR-case* in 2004, when it started legal proceedings against the Commission on aspects of EU institutional law (the Parliament argued that the Commission could not use its powers under article 25(6) of Directive 95/46/EC to conclude an agreement with the US on the transfer and processing of *PNR data*). An aspect of EU institutional law – important for the division of powers between the Commission and the Parliament – was at the heart of the conflict. On 30 May 2006 the Court of Justice declared the EU-US Agreement void (European Court of Justice 2006). Once the Parliament had won this legal (internal EU) dispute, it was extra motivated to remain actively involved in this case (confirmed in interviews with Members of Parliament S. in ‘t Veld, C. Buitenweg and J. Wiersma). The Parliament’s sudden activity, from late 2009, in the *TFTP-case* may also (partly) be explained by looking at motives of a strategic nature. In February 2010, two months after the entering into force of the Lisbon Treaty, the Parliament used its new competence under the Lisbon Treaty to reject the EU-US *TFTP Agreement* of 30 November 2009. As one observer remarked: “It is important to note that the *TFTP case* provided an excellent opportunity for the Parliament to ostensibly use its newly obtained power: the power to co-decide in this policy field” (interview with H. Kranenborg, legal advisor to the European Data Protection Supervisor, July 2010).

The found inconsistencies in normative commitment, cannot, however, be justified in principled terms. If the EU were genuinely and highly committed to promoting the norm of ‘respect for private life and data protection’ *vis-à-vis* the US, it would have promoted this norm in a more consistent and coherent way, for all cases in which the protection of private life was at stake. We can conclude that the EU’s commitment to the promotion of the norm of ‘respect for private life and data protection’ *vis-à-vis* the United States is not (yet) coherent. This is an indication of lower normative commitment.

¹⁸ See also Lerch and Schweltnus (2006: 306-307), who distinguish utility-, value- and rights-based arguments. In this context they note (on p. 307): “The fact that an actor predominantly or even exclusively justifies her actions with one type of argument does not necessary indicate that this is the motive behind her action: a rhetorically rational actor might use value- or rights-based arguments for purely instrumental reasons.”

4. Normative process: was the EU inclusive and reflexive vis-à-vis the US?

Normative power is relational. In order to make EU normative power justifiable, it must take the views of those outside the EU into account. In this section we thus investigate the inclusiveness and the reflexivity of the EU. In addition, the EU risks acting in a Eurocentric manner (“our size fits all approach”) unless it promotes norms that are universally applicable (Bicchi 2006: 289).

Prohibition of torture and right to a fair trial

Universality of the norms

The criterion proposed for establishing whether a norm is universally applicable, or merely an EU-specific norm, is: “Is the EU norm recognized through the instruments of the UN system?” (Niemann and De Wekker 2010: 9-10, 22) Both the prohibition of torture and the right to a fair trial are enshrined in the International Covenant on Civil and Political Rights (ICCPR), in the Articles 7 and 14 respectively, and also in the Universal Declaration of Human Rights, in Articles 5 and 11. We can thus conclude that these norms are indeed recognized by the UN system and can be qualified as ‘universally applicable’.

Inclusiveness

To investigate this indicator we look at the extent to which the EU, in its promotion of the norm of ‘prohibition of torture’ and the norm of ‘right to a fair trial’, has taken the views of the US Administration and US Congress into account. In this context we focus in particular on the transatlantic dispute on Guantanamo Bay.

The European Parliament: during 2002-2008 there was a frequent ‘exchange of views’ on Guantanamo Bay, and the fundamental rights of the detainees held there, between Members of the European Parliament and Members of the US Congress (interviews with Members of Parliament J. Wiersma and C. Buitenweg, 2010). Meetings aimed at ‘exchanging views’ took place, inter alia, in the context of the Transatlantic Legislators’ Dialogue, and were often - but not always - initiated by the Members of the European Parliament. J. Wiersma, who participated at these meetings, reported that the meetings were useful for the purpose of learning about the views and arguments of the Members of Congress. He remarked that, in meetings with Members of Congress of the Republican Party, the views of the European Members of Parliament and their American counter-partners were so far apart, that “it was like talking between deaf persons (“praten tussen doven”)”. While Members of Congress would argue that Guantanamo Bay was necessary in the War on Terrorism, Members of the European Parliament would strongly object to the detention regime in this facility. Their objections were on the indefinite nature of the detention regime, the lack of what, if any, legal protection detainees were entitled to, the interrogation techniques and the sweeping and in their views often arbitrary nature of American decisions about whom to detain. The dialogues with the Members of Congress, while “useful in the sense of getting knowledge about the argumentation of the American Members of Congress”, did not influence the views of the Members of the European Parliament (interviews with J. Wiersma and C. Buitenweg, 2010). This is an indication of moderate inclusiveness on the side of the EU: the interviewed MEPS were prepared to listen to the views and arguments of the US Members of Congress, but they were not genuinely open to being influenced.

The Council: in 2002-2005 there were regular “silent diplomatic contacts” between representatives of the Council on the one hand and the US Administration on the other hand, aimed at “exchanging views”, “mutually explaining policies” and “expressing concerns” on the treatment of suspects of acts of terrorism (Interviews with M. L. Warren, G. de Vries, and Timothy Jones). In early 2006, soon after the re-election of President Bush, the new Legal Adviser to President Bush, Mr. John Bellinger III, took the initiative to start the Transatlantic Dialogue of Legal Advisers. The goal of this Dialogue was to exchange views on legal issues and in particular: interpretation of rules of international law as laid down in the Geneva Conventions (Interviews with M. L. Warren, and E. Lijnzaad). Members of the Dialogue were the US Legal Adviser J. Bellinger III, the Legal Advisers to the EU Member States, a representative of the Council of The European Union, and a small number of diplomats. In 2006, the Legal Advisers to the EU Member States in COJUR (Council Working Group on International Law) developed a Non-Paper on Elements of International Law Relevant to Counter-terrorism, and offered this to the US Legal Adviser. In February 2007, the US Legal Adviser and other representatives of the US Administration reacted to this COJUR Paper in a Comment (US Comment 2007). In the next two years (2007-2009), the Legal Adviser of the US and the Legal Advisers of the EU Member States continued on a regular basis (four till six times per year) to exchange views on legal aspects of counter-terrorism measures.

Three participants to the Dialogue whom we interviewed reported that the meetings were constructive. The working method was: an exchange of views with regard to a legal issue on the agenda (e.g. how should a particular provision of the Geneva Convention be interpreted with regard to a certain category of ‘detainee’ of ‘combatant’); analysis of the points on which the participants (from US and EU side) disagree and agree; an attempt to find “common solutions” for issues on which they initially disagree (see also Wilmshurst and Burwell 2009: 1). Through this Dialogue the EU and its Member States “actively, and with open minds”, took account of the views of (the representatives of) the US Administration (interview with M. L. Warren, U.S. Mission to the European Union). We can conclude that the EU (Council) and its Member States (organized in COJUR) were, through their participation in the Transatlantic Dialogue of Legal Advisers, rather inclusive *vis-à-vis* the US Administration.

Reflexivity

In this section we establish whether the EU, in its promotion of the norm of ‘prohibition of torture’ and the norm of ‘right to a fair trial’ has been reflexive *vis-à-vis* the United States. Reflexivity is about *a)* learning and changing behaviour when faced with better arguments and *b)* anticipating (adverse) consequences of exporting an EU norm to non-members and adjusting EU policy to those consequences (Bicchi 2006: 288-289; Niemann and De Wekker 2010: 9).

As described our above the Legal Advisers of the EU Member States, organized in COJUR and a Representative of the Council, have in the past years participated in the Transatlantic Dialogue of Legal Advisers with the Legal Adviser to the US President. In a Joint Statement, published on 15 June 2009, the EU Presidency and the US Administration together expressed their intent to learn from each other as follows:

“Taking into account that the action against international terrorism raises important legal questions, we recognize the importance of deepening our dialogue on international legal principles relevant to combating terrorism. In particular, we will continue working together in semi-annual meetings involving the Legal Advisers to the Foreign Ministries of the European Union member states (COJUR), representatives of the General Secretariat of the Council of the European Union and the European Commission, and the U.S. Department of State Legal Adviser, *with the objective of furthering an improved mutual understanding of our respective legal frameworks, and developing common ground from which we can work more effectively in combating terrorism*” (US-EU Joint Statement 2009).

Were the EU representatives to this Dialogue in practice really open to learning when faced with convincing arguments from the representatives of the US Administration? It is difficult to answer this question, because the meetings of the Dialogue take place behind close doors and the documents prepared for and discussed in the Dialogue are not public. There is one exception: the US Comment on the COJUR Non-Paper on Elements of International Law Relevant to Counter-terrorism was published on the Internet by the US Department of State in 2007.¹⁹ This document gives insight of how the Dialogue works in practice. It is clear from this document that, in this case, there was a real exchange of arguments between the two sides. This follows from the opening statement of the US Comment, which indicates that the Non-Paper (as the US representatives describe it) “represents a basis for discussion among EU Member States, and between COJUR and the Legal Adviser of the U.S. Department of State.”²⁰ It also follows from the detailed legal comments on elements of the EU Non-Paper, on *inter alia* minimum standards of protection for those persons determined not to be prisoners of war (Element 3 of the Non-Paper), and on the question whether Article 3 of the Convention against Torture does, or does not, impose obligations on a State Party with respect to an individual who is outside the territory of that State Party (Element 7). The fact that these legal arguments, on elements which at the heart of the legal framework for counter-terrorism policies both in the US and the EU, are exchanged in such a detailed way, constitutes an indication for reflexivity on the side of the EU (as well as reflexivity on the side of the US).

Are the EU representatives in this Dialogue also open to adjusting their position when faced with convincing arguments from the representatives of the US Administration? We have found no examples of such adjustments. This does not mean that such examples do not exist, but the fact that no examples of this form of reflexivity could be found in any public document, seems to indicate that the EU, at least in the context of this Dialogue, is not reflexive in the sense of actually changing its policy *vis-à-vis* the US when faced with better legal arguments.

Do the EU representatives anticipate adverse consequences of the involved EU export of norms (prohibition of inhuman and degrading treatment and right to a fair trial) for the US Administration? In this context we must note that the Council, following a recommendation by the Parliament (2009a,b), has created a mechanism, the so called “Common Framework” (cf. US-EU Joint Statement 2009), under which detainees of Guantanamo Bay can be adopted by EU Member States. The creation of this framework can be qualified as a form of reflexivity on the side of the EU: by attempting to assist the US to find a “solution” for Guantanamo Bay, the Council has anticipated an adverse consequence of the exported norm (prohibition of inhuman and degrading treatment). If the detainees could not go to Europe (or third countries) while Guantanamo Bay had to be closed, the detainees (seen in the American public opinion as ‘suspects of acts of terrorism’) would eventually have to go to the mainland of the United States, which would have caused severe political problems for the US Administration. By anticipating these problems, and attempting to help to reduce them, the Council showed (some) reflexivity towards the United States. We must recall, however, that in June 2012, three years after the creation of the “Common Framework”, 14 out of 27 Member States had participated in this initiative to assist the US Administration, by actually adopting one or more of the Guantanamo detainees.²¹ This relatively low response of the EU Member States does partly undermine the Council’s reflexivity towards the US.

¹⁹ US Comment on COJUR Non-Paper (2007).

²⁰ US Comment on COJUR Non-Paper (2007, p. 1).

²¹ News Release of the US Department of Defense (2012). See also: News Release of the US Department of Defense (2010c).

Right to respect for private life and data protection

Next, we investigate whether the EU has been inclusive and reflexive towards the US in its promotion of the norm of ‘respect for private life and data protection’, in the policy field of counter-terrorism. In this context we will focus in particular on two cases: i) the negotiations between the EU and the US for the ‘Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security’ (PNR Agreements 2004 and 2007), and ii) the negotiations for the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program (TFTP Agreements 2010 I and II).²²

Universality of the norm

The right to respect for private life is enshrined in the International Covenant on Civil and Political Rights (ICCPR), in Article 17, and also in the Universal Declaration of Human Rights, in Article 12. We can conclude that this norm is recognized by the UN system and can therefore be qualified as ‘universally applicable’. This strengthens the normativity of the EU policy *vis-à-vis* the US and thus ensures a certain degree of normative process.

Inclusiveness

When investigating inclusiveness, it is important to look at the context in which the negotiations took place. During the negotiations for the PNR Agreements 2004 and 2007, there was much pressure on the Commission to reach an agreement with the US, since the absence of an agreement would have had severe economic consequences for European airlines: they would not have gotten permission to fly on the US if they had not delivered the PNR data to the US authorities – under conditions to be agreed upon in the PNR Agreement (Papakonstantinou and De Hert 2009). During the negotiations for the TFTP Agreements I and II (2009-2010), there was again much pressure on the Commission to reach an Agreement with the US Administration: the financial sector in Europe would suffer severe damages if no agreement was reached (Gonzalez Fuster *et al.* 2008).

Did the EU, and in particular the Commission, under these circumstances, take the views of the US Administration into account? Several observers of the negotiation processes for the PNR and TDTP Agreements have reported that the EU US High Level Contact Group on Information Sharing and Privacy and Data protection has been an important forum for inclusiveness (interviews with M. L. Warren, H. Kranenborg, and H. Buss). This forum was set up in December 2006 with the goal of discussing information-sharing and the protection of personal data for law enforcement purposes (including counter-terrorism), jointly analysing on which issues the two sides agree and disagree, and trying find solutions for the legal issues on which they (so far) disagree. An officer of the US Mission to the European Union confirmed, when asked in an interview, that the EU representatives in the High Level Contact Group had, in practice, been open to listen to the views of the US Representatives, and open to learn from them (interview in Brussels, 30 September 2010).

The final report of this High Level Contact Group of 2 July 2008 gives an overview of *‘Agreed upon principles’* (inter alia: Purpose Specification/Purpose Limitation; Integrity/Data Quality; Relevant and Necessary/Proportionality), and analyses the key *‘Outstanding issue’* (is-

²² Empirical background of these negotiation processes and the agreements resulting from them can be found in Gonzalez Fuster, De Hert and Gutwirth (2008); Argomaniz (2009: 119-138); Papakonstantinou and De Hert (2009); Lodge (2004: 235-279).

sue on which the two sides ‘continue to disagree), namely ‘Redress’. The report indicates “that disagreement remains over the necessary scope of judicial redress. The EU side asserts that every individual in the EU has the right to redress before an impartial and independent tribunal regardless of his or her nationality or place of residence, whereas the United States recognizes that some laws treat nationals differently” (Final Report High Level Contact Group 2008: 5). The report also contains an extensive argumentation of the position of both the US Administration and the Commission with regard to Redress.

An analysis of this report shows that the EU representatives in the High Level Contact Group were indeed willing to take into account the views of the US Administration on – *inter alia* - purpose specification, purpose limitation; demands of integrity, the principles of subsidiarity and proportionality, and judicial address. After the exchange of views, and an analysis of ‘points of agreements’ and ‘points of disagreement’, representatives from both sides (EU and US) attempted, during a long series of meetings in 2007-2008, to reach a “common understanding” on the points of disagreement. Once a “common understanding” on one of these elements was reached, the EU, as well as the US, would accept this agreed-upon interpretation and take a corresponding position in the (following) negotiations for the PNR Agreements and the TFTP Agreements (interviews with three participants to the negotiations of the PNR Agreements and TFTP Agreements: M. L. Warren, Heike Buss, and G. Steffens).

We can conclude that (representatives of) the Commission and the Council, through their active participation in the *EU US High Level Contact Group on Information Sharing and Privacy and Data protection* (2007-2010), were rather inclusive *vis-à-vis* the US Administration.

Reflexivity

Has the EU also acted in a reflexive way in its promotion of the norm of ‘respect for private life and data protection’ *vis-à-vis* the United States? Answering this question would require extensive research into US sources, which falls outside the scope of this study. Based on our interviews, we can however suggest the following. The EU seemed indeed prepared to learn from the US Delegation, and change position when faced with “convincing arguments”. It has been emphasized, for instance, that this readiness to learn and adapt a policy was mutual: “Both sides were willing to learn from each other and to adapt their positions once a common understanding on a specific element was reached” (interview with M. L. Warren). H. Buss (European Commission) and G. Steffens (Secretariat of the Council), who participated in the negotiations for the PNR Agreements and TFTP Agreements as members of the EU delegations, confirmed this “willingness on both sides to learn from each other”, *inter alia* in the negotiations on the formulation of safeguards for citizens whose data were going to be processed (interviews with H. Buss and G. Steffens). It has also been indicated that different views on an element of the right to private life and data protection, for example the interpretation of ‘judicial redress’, often occurred when the two sides did not fully understand one or more aspects of each other’s legal systems. By thoroughly explaining these aspects to each other (for example: how citizens whose personal data are processed by US authorities can get access to relevant documents under the Freedom of Information Act and which procedural safeguards apply), and by being open to learn from each other, the two Delegations could, and did, reach “common understandings” (interview with M. L. Warren). We can tentatively conclude that the EU, in its promotion of the norm of ‘respect for private life and data protection’ acted in a reflexive way in these negotiations.

5. Normative impact

In this section we explore the normative impact of the EU *vis-à-vis* the United States in the policy-field of counter-terrorism. *First*, we investigate whether normative changes have occurred

in the US towards the three norms promoted by the EU (prohibition of torture, right to a fair trial, and right to respect for private life and data protection). *Second*, we investigate whether the new norms have really been implemented in practice. *Third*, we explore whether the (found) normative changes were really induced by the EU.

Normative changes

Prohibition of torture

In January 2009 President Obama signed an Executive Order committing to close the US military detention facility at Guantánamo Bay by January 2010 and authorizing a review by the attorney general of each detainee's status (President of the United States 2009a). Section 3 of this Executive Order states:

“The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.”

With this Presidential Order – a form of legislation – President Obama prescribed that the Guantánamo Bay Detention Facility be closed, and that the detention regime there, which had led to inhuman and degrading treatment of detainees, be ended. This can be seen as a – formal – normative change in the US towards a principle promoted by the EU, *vis-à-vis* the US Administration since 2002: the principle that ‘no one will be submitted to torture, inhuman treatment or degrading treatment’.

Right to a fair trial

The normative change in the US with regard to the ‘right to a fair trial for suspects of acts of terrorism’ took place in two steps. The *first step* was a landmark ruling of the Supreme Court on 28 June 2004, in which the Court ruled that the detainees of Guantánamo Bay have access to U.S. Courts to challenge their detention.²³ The *second step* was an Executive Order, issued by President Obama on the second day after his inauguration (22 January 2009), which halted all proceedings before military commission tribunals, in the following words:

“The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.”²⁴

²³ *Rasul v. Bush* (No. 03-334) and *Al Odah v. United States* (No. 03-343), 542 U.S. 466, 28 June 2004 (*Supreme Court 2004*). A detailed description and extensive legal analysis of this decision can be found in: Greenhouse (2009: 1-21); Palitz (2009: 335-364).

²⁴ Executive Order of 22 January 2009 (Section 7) (US Executive Order 2009).

These two developments, taken together, meant that the practice of bringing persons with the status of “unlawful enemy combatants” before the Military Commissions (secret military tribunals) was halted (officially these proceedings were ‘suspended’). Since February 2009, each detainee suspected of terrorism, held at Guantanamo Bay or at other detention centres, has habeas corpus, that is the legal action under American law through which a person can seek relief, before a judge at a U.S. Court, from unlawful detention (Zellick and Sharpe 2008: 2). In these courts basic elements of the right to a fair trial (due process protections) apply. The new rules ensure, inter alia, that: 1) statements that have been obtained from detainees using cruel, inhuman and degrading interrogation methods will no longer be admitted as evidence at trial; 2) the use of hearsay will be limited, so that the burden will no longer be on the party who objects to hearsay to disprove its reliability; 3), the accused will have greater latitude in selecting their counsel, and 4) basic protections will be provided for those who refuse to testify.²⁵ We can conclude that there has indeed been a normative change in the US towards the norm promoted by the EU (the right to a fair trial, for all citizens, including persons suspected of acts of terrorism).

Right to respect for private life and data protection

The normative change on the side of the US is, in both the PNR case and the TFTP case, the final agreements concluded between the US and the EU and the implementation of these agreements by the US authorities. Both agreements, the *Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security* (PNR Agreement 2007) and the *Agreement between the European Union and the United States of America on the Processing and Transfer of Financial Messaging Data from the European Union to the United States for Purposes of the Terrorist Finance Tracking Program* (US EU TFTP Agreement 2010) contain clauses which formulate safeguards for the privacy of citizens whose data are being processed by the US authorities.

Safeguards laid down in the PNR Agreement include, inter alia, a limitation of the purposes for which the PNR can be used (in short: “preventing and combating terrorism and related crimes” and “serious international crimes”), and a limitation of the categories of personal data that can be collected and rules on Access and Redress (a system accessible by individuals, regardless of nationality or residence, for providing redress to persons seeking information about or correction of PNR).

Safeguards laid down in the TFTP Agreement are, inter alia, a limitation of the purposes for which the provided data (personal financial data) can be processed (exclusively for the prevention, investigation, detection, or prosecution of terrorism or its financing), rules on data security and integrity, the proportionality principle (proportionate processing of data), and rules on the deletion of collected data (obligation to delete the data not later than five years from receipt).

Without the conclusion of these two Agreements between the EU and the United States, these safeguards for the privacy of citizens whose personal data are processed by the US authorities, would not have applied in the United States. We can conclude that the entering into force of these Agreements led to norm changes (the safeguards for data protection described above) in the United States as promoted by the EU.

²⁵ President of the United States (2009b). See also, for an extensive description of due process protections in U.S. Courts, Chemerinsky (2006: 565-595).

Theory versus practice

Have the new norms, described above led to a *real* normative change in the US, that is, a change not only in the legal system but also in practice? In order to answer this question we will now investigate the implementation of the new norms: *i.* Executive Order on the Closure of Guantanamo Bay, *ii.* Executive Order on the Abolition of the Military Commissions, and *iii.* the norms laid down in the EU US PNR Agreement and in the US EU TFTP Agreement.

Implementation of the Executive Order on the Closure of Guantanamo Bay

In November 2010 this Executive Order has only partly been implemented: while many detainees have left Guantanamo Bay since early 2009, 169 detainees are still held there (News Release of the US Department of Defense 2010b). And while the ‘advanced interrogation methods’ have stopped, there is still widespread concern about the detention conditions for the remaining detainees (Scheipers 2009: 5-6). Human rights organisations, inter alia Amnesty International (2010a, 2010b), Human Rights Watch (2009) and the Centre for Constitutional Rights (2009), keep calling upon the US Administration to put an end to these ‘inhuman’ and ‘degrading’ conditions.

In this context we also point at hearings for the ‘Universal Periodic Review’ of the UN Human Rights Council during the 9th session of 2010, on 5 November. During these hearings, the United States human rights policies were reviewed (Human Rights Council 2010: 8-91). Six Members of the Human Rights Council asked critical questions and expressed their concerns about the stagnation in the implementation of the Executive Order on the Closure of Guantanamo Bay. Illustrative for these concerns was the recommendation made by Switzerland to the United States during these hearings: “Find for all persons still detained in the Guantanamo Bay detention center a solution in line with the United States obligations regarding the foundations of international and human rights law, in particular with the International Covenant on Civil and Political Rights” (Human Rights Council 2010: 24).

We can conclude that, while the Presidential Executive Order prescribed already in January 2009 that Guantanamo Bay be closed within one year, the implementation of this norm is at present (June 2012) still limited and very problematic.

Implementation of the Executive Order on the Abolition of the Military Commissions

Twenty months after the entering into force, in January 2009, of the Presidential Executive Order on the Abolition of the Military Commissions, the implementation of this new norm has stagnated. The Military Commissions still exist and proceedings against suspects of acts of terrorism, which had been suspended in January 2009, have resumed (Amnesty International 2010b):

In November 2009, Attorney General Eric Holder announced that five detainees accused of involvement in the 9/11 attacks and charged by the Bush administration for trial by military commission – Khalid Sheikh Mohammed, Walid bin Attash, Ramzi bin al-Shibh, ‘Ali ‘Abd al-‘Aziz and Mustafa al Hawsawi – would be transferred for prosecution in a civilian federal court in New York. However, in 2010 the five were still in confinement in Guantánamo and the administration was revisiting its earlier decision. Attorney General Holder told the Senate Judiciary Committee on 14 April 2010 that the administration was reviewing the case, and that a decision was expected in a “number of weeks”.²⁶ On the question of which forum the men should be tried in, he described this decision as “a very close call”. On 4 April 2011, Attorney General

²⁶ Testimonial of Attorney General Eric Holder Before the Senate Judiciary Committee Washington, D.C., Wednesday, April 14, 2010: Senate Judiciary Committee 2010.

Holder announced that he had referred the cases of Khalid Sheikh Mohammed, Walid Muhammad Bin Attash, Ramzi Bin Al Shibh, Ali Abdul-Aziz Ali, and Mustafa Ahmed Al Hawsawi to the Department of Defense to proceed in military commissions. In his announcement, the Attorney General indicated that he had “full faith and confidence in the military commission system to appropriately handle this case as it proceeds” (Attorney General 2011).

In addition, proceedings against Omar Khadr, who has been in US military custody since he was 15 years old (he is now 25), resumed in late April 2010. On 31 October 2010, the Military Commission Courtroom at the U.S. Naval Station at Guantanamo Bay sentenced Omar Khadr to 40 years in confinement.²⁷

Finally, in March 2011 President Obama signed a Presidential Order²⁸ which established a standard for continued detention and rules for ‘Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force’. Thus, the President formally prolonged the existence of the detention system at Guantanamo Bay. We can conclude at present (June 2012) that the implementation of the Executive Order on the Abolition of the Military Commissions of January 2009 has come to a standstill.

Implementation of the PNR Agreement 2007 and the TFTP Agreement 2010

Have the PNR Agreement 2007 and the TFTP Agreement 2010, and in particular the clauses on safeguards on data protection for citizens laid down in them, been implemented in practice?

On the implementation of the TFTP Agreement, a first review was published in March 2011 (Report on the Joint Review of the TFTP Agreement 2011). This review took place six months after the entry into force of this Agreement. The review primarily focused on whether all of the elements of the Agreement had been implemented and its mechanisms had been properly put into place rather than on the effectiveness of the Agreement. The review report was prepared by the EU delegation of the joint review team, based on the work of the joint review team and other work independently conducted by the EU delegation. The report reflects the views of the EU delegation. The EU review team has reached the conclusion that all of the relevant elements of the Agreement have been implemented in accordance with its provisions, including the data protection provisions. It states that “[T]he measures which have been taken to ensure such implementation by the U.S. authorities are convincing” (p. 4 of the report). More specifically, the EU review team is “convinced that the measures taken to ensure data security and integrity are adequate” (p. 14 of the report). The recommendations of the EU review team focus on the desirability of providing more publicly accessible information. This concerns, among other, the overall volume of data provided to the U.S. authorities, and the number of financial payment messages accessed.

As to the implementation of the provisions on retention and deletion of data – a key element of the TFTP Agreement - not much could be said in this first review report (cf. p. 15). According to the provisions of article 6 of the Agreement, the first deletion of data should take place not later than 20 July 2012. All non-extracted TFTP data the U.S. has received from the EU prior to 20 July 2007 should at that date be deleted from all systems. The next Review, which is foreseen for (the end of) 2012, should throw more light on the implementation of – in particular this element of – the TFTP Agreement.

On the implementation of the PNR Agreement 2007 a first ‘Joint Review’ was published

²⁷ Press Release US Department of Defense (2010). In a press release on 20 April 2012 the US State Department indicated that there had been contacts between The U.S. and Canadian Governments on Omar Khadr’s application for transfer to Canada to serve the remainder of his sentence, In the Spring of 2012 Omar Khadr was, however, still in confinement in Guantanamo Bay (Press Release US State Department 2012).

²⁸ President of the United States (2011).

in April 2010 (Report on the Joint Review of the PNR Agreement).²⁹ The review was carried out on 8-9 February 2010 in Washington with teams from both the EU and the US. While the Report indicates in its opening words that “the general finding is that the DHS has made substantial efforts towards the full implementation of the Agreement” (Ibid.: 5), the Report also reveals (in sections 3.1. and 3.2) that there are serious concerns about the implementation of the Agreement by the DHS. *First*, there are “concerns as regards the broad use by DHS of PNR data and in particular the matching of PNR against some databases that have immigration and customs policy elements to them.” DHS is urged to ensure that all processing of PNR data respects the purpose limitation of the agreement. In this context it is remarked that the notion of ‘serious transnational crime’ (one of the purposes for processing PNR data laid down in the Agreement) needs further clarification. *Second*, there are concerns with the EU team both as regards the high number of ad hoc requests and as regards the fact that DHS executes such request by “pulling the data”. The report indicates that there are concerns “whether DHS uses the right to ad hoc requests judicially and proportionally”.

Seen from a legal point of view, the elements in the Agreement about which concerns on implementation are expressed, are key elements of the Agreement: they are aimed at ensuring that the personal data collected by the US authorities are only used for legitimate purposes and in accordance with the principle of proportionality (Papakonstantinou and De Hert 2009: 910-919). The conclusion must be drawn that there are serious shortcomings as regards the implementation of the PNR Agreement, and in particular those clauses in the Agreement that provide safeguards for data protection for the citizens whose personal data are processed.

Did the EU cause the normative changes?

Prohibition of torture

Can the observed normative change in the US, aimed at closing Guantanamo Bay and bringing an end to the practices of degrading and inhumane treatment of detainees there, be (partially) be attributed to the EU’s normative commitment? In this context we note, first, that the Executive Order of President Obama of 22 January 2009 contains the following phrase:

“Some individuals currently detained at Guantánamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and *foreign policy interests of the United States* and the interests of justice. Merely closing the facilities without promptly determining the appropriate disposition of the individuals detained would not adequately serve those interests. To the extent practicable, the prompt and appropriate disposition of the individuals detained at Guantánamo should precede the closure of the detention facilities at Guantánamo” (President of the United States 2009a).

The above indicate that the US President, when deciding to close the Guantanamo Bay detention facility, did take view of ‘concerns internationally’. The words ‘foreign policy interests’ also indicate that improving relations with other states, including relations with the EU and its Member States, were a factor in the decision-making making process of the president. This was also confirmed in an interview with an officer of the U.S. Mission to the EU (interview in Brussels on 30 November 2010).

²⁹ As to the PNR Agreement 2010: since this Agreement was ratified by the European Parliament on 19 April 2012 (European Parliament 2012a) and will “most likely” enter into force on 1 June 2012 (Press Release Council of the European Union 2012), its implementation has not yet begun.

Probably the most important source of the norm change in the US was, however, not the EU, but the *domestic factor of regime change*. A strong indication for this is the timing of the normative change: President Obama published the Executive Order on the Closure of Guantanamo Bay on his second day in Office, 22 January 2009, and only six weeks after he had been elected as President of the United States on 4 November 2008.³⁰

In addition, it is important to look at *alternative sources* that may have contributed to the normative change in the US. In particular, we must look at two international organisations, the Council of Europe and the United Nations which, in the period 2002-2010, have also promoted the principle of 'prohibition of torture, inhuman and degrading treatment' *vis-à-vis* the US. We refer, *first*, to the report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe of 7 June 2006 (Marty Report 2006), which calls on the US to bring an end to extraordinary renditions of suspects of acts of terrorism and to interrogation techniques which constitute violations to the prohibition of inhuman and degrading treatment. *Second*, we refer to the report by the UN Commission on Human Rights of 15 February 2006 on Guantánamo (UN Committee on Human Rights 2006) and to the recent draft report (Human Rights Council 2010). In both reports the Human Rights Council called on the US Administration to close Guantanamo Bay and to treat the detainees (still) held there in accordance with the International Covenant on Civil and Political Rights. *Third*, we point to the conclusions and recommendations of the UN Committee against Torture (2006) concerning the United States of America, which expresses its "concern that detainees are held for protracted periods at Guantánamo Bay, without sufficient legal safeguards and without judicial assessment of the justification for their detention" and calls on the US Administration "to cease to detain any person at Guantánamo Bay and close this detention facility."

We can conclude that, while the domestic factor of regime change in January 2009 was probably the most important cause of norm change, the EU and in particular the European Parliament (since 2002), the Council of Europe (since 2006) and the United Nations (since 2006) had been at work in the years prior to 2009 to promote the norm of 'prohibition of torture and degrading and inhumane treatment' *vis-à-vis* the US. While it is likely that the normative engagement of the EU in the years 2002-2008 was a factor that may have contributed to the observed norm change of the US, the EU certainly was not the only external actor that (possibly) contributed to this norm change in the US.

Right to a fair trial

Also with regard to this norm, probably the most important factor to the observed norm change was the domestic factor of regime change in November 2008. Can the observed – although only formal – normative change in the US, the Executive Order of 22 January 2009 aimed at the abolition of the US Military Commissions, be (partially) be attributed to the EU's normative commitment? Neither in speeches of President Obama³¹, nor in the rulings of the Supreme Court³², nor in debates in Congress on the abolition of the Military Commissions and in particular in the hearings of the United States Senate Committee of the Judiciary, have we have

³⁰ Five interviewees – Gijs de Vries, European Union Counter-terrorism Coordinator, Ton van den Brandt, Amnesty International, Jan Wiersma, Member of European Parliament 1994-2009, Cathalijne Buitenweg, Member of European Parliament 1999-2009, and Rebecca Pugh (European Commission) – argued, when asked which factor was in their view the most important cause for the norm change in the US, that this was the domestic factor of regime change (the election of President Obama and the turning point in the US counter terrorism policy that this brought) in November 2008.

³¹ Speeches and comments published on the website of the presidential campaign of Barack Obama (2006-2008), www.barackobama.com, and Speeches and Remarks published the website of the White House, <http://www.whitehouse.gov/briefing-room/speeches-and-remarks>; President of the United States (2010a).

³² Supreme Court (2004).

found references to the EU in the context of the subject ‘abolition of the Military Commissions’. This suggests that it is unlikely that the normative commitment of the EU *vis-à-vis* the US was a (major) factor that contributed to the norm change.

In this context we also remark that the most important normative change, the ruling of the Supreme Court in which it held that the detainees of Guantanamo Bay have access to U.S. Courts to challenge their detention³³, took place already in June 2004, at a time when the normative commitment of the EU towards the US with regard to ‘right to a fair trial and abolition of secret military tribunals’ had only just begun: the European Parliament (2004a) adopted its first Recommendation to the Council on ‘US Military Commissions’ in March of that year. This makes it unlikely that the EU was a (significant) source to the norm change in the US.

In addition, it is important to note that two other international organisations, the Council of Europe and the United Nations, have since 2006 been active in promoting the norm of ‘right to a fair trial’ towards the US. The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (Marty Report 2006), the UN Commission on Human Rights on Guantánamo, the UN Committee against Torture (2006), and again more recently the UN Human Rights Council (2010) have expressed concerns about a lack of due process protections and have called upon the US to try civilian suspects of acts of terrorism in civil courts and not in military commissions.

We can conclude that besides the EU, other international organisations have been active to promote the norm of ‘right to a fair trial’ *vis-à-vis* the US. While we cannot exclude the possibility that the normative engagement of the EU in the years 2004-2008 was a factor that played a role in the decision of the President Obama (in January 2009) to suspend the practice of bringing persons with the status of “unlawful enemy combatants” before the Military Commissions, the EU was certainly not the only actor that may have contributed to this norm change.

Right to respect for private life and data protection

Without the conclusion of PNR Agreement 2007 and the TFTP Agreement 2010 between the EU and the United States, the safeguards, laid down in these two agreements, for the privacy of citizens whose personal data are processed by the US authorities, would not have applied (interviews with H. Kranenborg and H. Buss). The conclusion of these Agreements between the EU and the US was the primary causal factor which led to the norm changes in the United States. These legal safeguards entered into force, in both cases, on the first day of the month after the date on which the Parties had exchanged notifications indicating that they have completed their internal procedures for this purpose (Art. 23 of the TFTP Agreement, Art. 9 of the PNR Agreement 2010). In other words: the observed norm changes in the US took place immediately after the EU’s normative commitment (of negotiating, and concluding these treaties, with legal safeguards for citizens, with the US).³⁴

It is important to note, furthermore, that similar legal safeguards for data protection have been laid down in international instruments, adopted within the United Nations and the Council of Europe, regarding the protection of privacy and personal data, such as: Art. 17 of the International Covenant on Civil and Political Rights of 16 December 1966, the UN Guidelines for the Regulation of Computerized Personal Data Files (UN General Assembly Resolution 45/95 of 14 December 1990), the Recommendation of the Council of the Organisation for Economic Co-operation and Development (OECD) concerning guidelines governing the protection of privacy and trans-border flows of personal data, and the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)

³³ Supreme Court (2004). A detailed description and extensive legal analysis of this decision can be found in: Greenhouse (2009: 1-21); Palitz (2009: 335-364).

³⁴ We have found no indications of domestic factors playing a (major) role in the observed norm changes in the US.

and the Additional Protocol to that Convention (ETS No. 181) (European Commission 2010: 7). Although the United Nations and the Council of Europe have not (yet) adopted texts which specifically address (the need to for) legal safeguards for PNR, the instruments ascribed above do contribute to setting international legal standards for the processing of PNR and may thus indirectly have contributed to the norm change in the US.

We can conclude that, both in the PNR case and in the TFTP case, the EU has significantly contributed to the norm change in the US. Furthermore we can conclude that the United Nations and the Council of Europe may also, indirectly, have contributed to this norm change.

6. Conclusions

On the basis of the three-dimensional framework and with respect to our analytical focus, our findings suggest an only moderate record concerning EU normative power in its relation with the US in the policy-field of counter-terrorism.

As regards normative *intent*, the norms concerning ‘prohibition of torture’, ‘right to a fair trial’ and ‘privacy and data protection’ do play a role in the relationship between the EU and the US. Our findings indicate, however, that there is substantive variation in EU normative commitment in four ways: i) variation in the normative involvement among the EU institutions (Parliament, Commission, and Council); ii) variation in normative commitment per norm; iii) variation in normative commitment of the EU (as a whole) over time; and iv) variation in normative commitment from case to case. Our analysis also suggests that the EU, in its promotion of the norm of ‘prohibition of torture and inhuman and degrading treatment, to some extent applies double standards in terms of what it expects from the US and what it expects from its own Member States.

As for normative *process*, the inclusiveness of the EU action to promote each of the three investigated norms has been moderate. Again, we see variation in time: our findings suggest that EU inclusiveness towards the US Administration was low in the period 2002-2005, and gradually increased in the years 2006-2009. As regards reflexivity, we see a variation between on the one hand the EU’s promotion of the norms of prohibition of torture and the right to a fair trial, where we found only few indications of reflexivity, and on the other hand its promotion of the right to respect to privacy and data protection, where (since 2007) reflexivity was moderate and at times even high.

As regards normative *impact*, while there have been changes in the national legislation in the US towards the norms promoted by the EU, the implementation of the new legislation is at present, in June 2012, still limited and problematic. The overall picture arises of strong normative impact on paper but little normative impact in practice.

The findings of this study also indicate that, side by side with the EU, the Council of Europe (CoE) acts as a normative power *vis-à-vis* the US and other states. The influence of the CoE on the normative basis of the EU and on EU normativity *vis-à-vis* third states, has so far been underexplored in the writings on Normative Europe. The analysis in this study suggests that the CoE acted as a motor behind the EU’s commitment to promote the norms of ‘prohibition of torture’, ‘right to a fair trial’ and ‘right to respect for private life and data protection’ *vis-à-vis* the US in the policy field of counter-terrorism. Especially the adoption, by the Parliamentary Assembly of the CoE, of the report of Rapporteur Dick Marty on alleged secret detentions and unlawful interstate transfers involving CoE – and EU – Member States, constituted a strong driving force behind the observed EU (and in particular EP) normativity *vis-à-vis* the US that followed.

How can the observed variations and inconsistencies in normative commitment, per EU institution, per case, and in time, be explained? Although a comprehensive analysis regarding the conditions for normative power, and for Normative Power EU, goes beyond the scope of this

study, it is nevertheless possible to point at two factors which can possibly (partly) explain the observed variation in EU normativity.

One factor concerns the division of powers between the EU institutions. The entering into force of the Lisbon Treaty, and the new co-decisive power of the Parliament with regard to the conclusion of treaties, including the right to reject a draft text – in our case: the TFTP Agreement 2010 – enabled the Parliament to force the Commission to actively promote the norm of ‘privacy and data protection’ *vis-à-vis* the US. Thus, the high commitment of the Parliament to include clauses in this Agreement which would offer genuine legal safeguards for data protection, could be effectuated, even against the will of the Commission and the Council.

A second factor that can possibly explain the variation in EU normativity is the distribution of power between the EU and the US. A possible hypothesis is that, if the EU intends to pursue normative goals *vis-à-vis* an (military and economically) strong(er) country, the EU is less likely to make a *normative impact*. Applied to the case studied in this study, this theory may possibly, partly, explain the observed limited normative impact, in particular the observed lack of effective norm impact in practice. The distribution of power between the EU and the US may also explain the observed moderate, in the case of the promotion of the right to privacy almost high, *inclusiveness and reflexivity* of the EU *vis-à-vis* the US. Is the EU likely to act more inclusively towards its powerful ally the United States than towards other, smaller and weaker states, due to the division of power? More concretely: is the power asymmetry in the EU-US relationship, in favour of the US, beneficial for EU inclusiveness and reflexivity? The findings of this study seem to support this hypothesis. Our findings suggest that the EU was moderately, at times almost highly, inclusive and reflexive *vis-à-vis* the US, because it could not afford *not* to learn.

Future research should continue to analyse the explanatory power of these two factors and the extent to which they tend to condition the EU’s normativity. In addition, further empirical research could throw more light on the influence of the CoE on EU normativity and thus lead to a better understanding of Normative Power *Europe*.

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