THE EU'S MATURE COUNTERTERRORISM POLICY – A CRITICAL HISTORICAL AND FUNCTIONAL ASSESSMENT

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Abstract:

This paper takes stock of the EU's response to international terrorism since 9/11. The first part provides a summary historical overview, which highlights the event-driven and contingent development of the EU's counterterrorism policy. The second part presents a critical assessment of policy outcomes according to the objectives set out in the EU's Counterterrorism Strategy. Measures 'to pursue', and 'to protect' against, terrorists seem to have grown substantially. In practice, however, they are undercut by a lack of focus and use at the operational level. Similarly, formal capacities 'to respond' to terrorism have been boosted, but there are doubts as to their relevance in real crisis situations. Yet most importantly, the EU remains unable to do more 'to prevent' terrorism. This seriously limits the overall effectiveness and output legitimacy of the EU's efforts. The concluding third part extrapolates these findings into the future, and argues that EU counterterrorism policy is increasingly path-dependent and technologically lop-sided. This maturation process is then briefly discussed from two competing normative positions. The paper sides with a more conventional intergovernmental reading that regards EU counterterrorism policy as politically constrained and basically legitimate, but finishes by stressing the need for adequate ex ante control mechanisms.

This paper takes stock of the achievements and limits of the EU's response to international terrorism since 9/11. Although it has become almost impossible to adequately cover the EU's extensive counterterrorism policy in a single paper, such overviews (Monar 2007) remain a necessary complement to more specialised articles on issues such as fight against the financing of terrorism (Jakob 2006) or judicial cooperation (Nilsson 2007). In particular, by providing a critical reading of the EU's Counterterrorism Strategy, this paper seeks to provide a counterpoint to the official summary of the EU's achievements. This should also help to clarify whether the EU has actually increased its 'output legitimacy' since 9/11, or whether its counterterrorism efforts have only given grounds to political controversy.

The outline of the paper is as follows. The first part presents an historical overview of the EU's response to international terrorism since 9/11. It is shown that events and historical contingency have dominated the development of the EU's counterterrorism agenda, whereas attempts to improve policy coherence and implementation records have faced persistent difficulties. The second part presents a critical assessment of policy outcomes according to the objectives set out in the EU's Counterterrorism Strategy. It is argued that the EU has had only very mixed success in this regard. Measures 'to pursue', and 'to protect' against, terrorists seem to have grown substantially. In practice, however, they are undercut by a lack of focus and use at the operational level. Similarly, formal capacities 'to respond' to terrorism have been boosted, but there are doubts as to relevance in real crisis situations. Yet most importantly, the EU remains unable to do more 'to prevent' terrorism. This seriously limits the effectiveness and possible output legitimacy of the EU's counterterrorism policy as a whole. The concluding third part extrapolates these findings into the future, and argues that EU counterterrorism policy is increasingly path-dependent and technologically lop-sided. Critical theorists would interpret this trend as evidence for the undemocratic empowerment of

security professionals, whereas more conventional analysts would regard it as the fundamentally legitimate result of unanimous decision-making among the member states. The paper sides more with the latter position, and maintains that EU counterterrorism has become more mature and increasingly constrained by different political actors. Nevertheless, just as in many other policy areas there is a need for better *ex ante* control mechanisms.

1. A short history of EU counterterrorism policy

EU counterterrorism policy has been driven by events, which resulted in an uneven rhythm of policy-making. Although terrorism had plagued numerous member states in the past, 9/11 led to an unprecedented political mobilisation at the EU level (den Boer and Monar 2002). The EU's rapid 'beyond-rhetoric' response was built on a number of pre-existing policy proposals that were pushed through the 'window of opportunity' after the attacks (Den Boer 2003). While the European Council set the political direction, it was mainly the Commission and the Council Secretariat that acted as policy entrepreneurs to match 'old' policy solutions to the 'new' problem of terrorism (Bossong 2008). This was most clearly the case with the European Arrest Warrant, which came to be seen as a 'keystone measure' in the EU's counterterrorism policy. The Commission had worked on the EAW since the beginning of 2001, putting it in the fortunate position to be able to table a proposal only eight days after 9/11 (Kaunert 2007). This early intervention - joined by a proposal for an EU-wide definition and criminalisation of terrorism (Council 03/12/2001) - led to unexpectedly swift agreement by the end of 2001 (Mégie 2004). Many other agenda items were similarly accelerated (Bossong 2008), such as the creation of EUROJUST or of joint investigation teams.

In short, 9/11 boosted agreement on policies that were only contingently related to the terrorist threat. During the first phase of agenda-setting the simple availability of a proposal was arguably more important than its effectiveness and proportionality. For instance, the extradition of terrorism suspects did not necessitate the EAW,[1] but could have also been achieved by a more consistent application of existing legal conventions. Of course, there were exceptions, such as the extension of EU competences into the area of aviation security. Yet even this step was built on coincidence, as the Commission had already planned to present a Green Paper on aviation safety in late September 2001 (Poincignon 2004). By contrast, external pressure from the US did not significantly shape the EU's initial policy response to 9/11. The first concrete list of US demands[2] came only after the EU had drawn up its own comprehensive 'Anti-terrorism roadmap' (EU 26/09/01).

In fact, the EU made various diplomatic initiatives of its own to support the international 'coalition' against terrorism (Reckmann 2004). However, this was mostly confined to soft measures, such as visits, resolutions and financial aid or trade concessions to new 'partners' in the fight against terrorism, such as Pakistan. For better or for worse, the EU was neither able nor willing to join the 'War on Terror' in Afghanistan. The main exception to the prevalence of EU internal dynamics over external pressures was the fight against the financing of terrorism. Here the EU basically followed the demands of the UN Security Council and the Financial Action Task Force, which, in turn, were driven by the US. Yet to reach internal agreement, the member states also extended the EU's version of the 'UN blacklist' to domestic terrorists, such as of *Etarras*.[3]

[1] As so many other measures for enhanced criminal justice cooperation, the EAW has, unsurprisingly, turned out to be much more important for the fight against organised crime.
[2] As set out in a letter to the EU, see http://www.statewatch.org/news/2001/nov/06Ausalet.htm.
[3] Interview with national counterterrorism expert, 7 November 2007.

At the latest by the second half of 2002, the EU's new counterterrorism policy ran into increasing difficulties and practical obstacles. Policy proposals that had not already been tabled in 2001 made almost no headway, as was the case with the European Evidence Warrant.[4] In addition, the deadlines of the Anti-Terrorism Roadmap for implementing existing agreements turned out to be very unrealistic. Both at the European and national level other security concerns, such as illegal migration, soon pushed terrorism from the top of agenda. At the operational level, too, actors did not leap at the opportunity for more counterterrorism cooperation under the banner of the EU. For example, the entrenched reluctance of national police and security services to share sensitive information[5] led to the quick dissolution of EUROPOL's new Counterterrorism Task Force (Bures 2006).

These growing constraints on the EU's fight against terrorism were only counteracted by increasing US pressure. In 2002 the US presented a set of controversial demands in matters of border and transport security, such as the transmission of Passenger Name Record (PNR) data or the screening of shipping containers. Despite intensive negotiations, the EU had no choice but to accept these demands if it wanted to maintain the transatlantic flow of goods and people. By contrast, the US' request to improve travel security by means of biometrics identifiers in visas and passports coincided with the interests of the member states to fight 'illegal' migration, leading to far-reaching policies at the EU-level (Aus 2003; Aus 2006).

This transatlantic JHA cooperation was all the more remarkable against the background of the diplomatic crisis in 2002 and 2003. Trouble had been rising over the Israeli-Palestinian conflict and Guantanamo Bay before open conflict erupted in relation to Iraq. Of course, the

[4] Initially, the introduction of the EEW should have directly followed the EAW. However, it took till December 2003 for the Commission to present a first draft, whereas political agreement was only reached by June 2006. At the time of writing the EEW still has not come into force due to parliamentary scrutiny reservations in a number of member states.

[5] See also part 2 of this paper.

question of how to deal with Iraq also created deep divisions among the member states. This further undermined the EU's weak foreign policy contribution to the fight against terrorism. Basically, the EU's role remained limited to diplomatic support for the UN and so-called 'technical assistance' to strengthen the counterterrorism capacities of third countries. In fact, this EU assistance mostly consisted of existing programmes that had been relabelled but not strengthened by new funds.[6] However, once the first military campaign in Iraq was concluded, things started to look up again for the EU's foreign and security policy (Hill 2004). Member states demonstratively put their differences aside and agreed on the European Security Strategy (Council 8/12/2003) as well as on a Strategy on Non-proliferation of Weapons of Mass Destruction (Council 10/12/2003), both of which emphasised the need to cooperate against international terrorism.

Against this background of increasing constraints on, but also reaffirmed commitment to, EU security cooperation, the terrorists struck in Madrid in March 2004. This constituted the second formative moment in the history of EU counterterrorism policy. It 'proved' the argument that international terrorists not only used the EU as a base of operation, but also targeted it directly.[7] Therefore, the increasingly large implementation and transposition deficits of the EU's post-9/11 agenda – particularly in the area of police and judicial cooperation – came to be harshly criticised. The European Council passed the Declaration on Combating Terrorism (Council 25/04/2004) that promised more political direction and a significant improvement in national implementation efforts. This was meant to be supported by the new EU Counterterrorism Coordinator, or 'Tsar'. Moreover, a revised Action Plan on Combating Terrorism (Council 01/06/2004) was drawn up around seven 'strategic

[6] Interview with Commission official,13 March 2008.
[7] As had been proposed by the ESS a few months before.

objectives'[8], so as to improve the coherence of measures that had accumulated on the Anti-Terrorism Roadmap. The ESS was also drawn upon to better define the EU's possible role in the fight against terrorism (Commission 19/03/2004), particularly in relation to the ESDP (Council 03/11/2004).

Meanwhile, the Madrid attacks led to a further expansion of the EU's counterterrorism policy. Again, the Commission (Commission 18/04/2004) and the Council Secretariat[9] were important for driving the agenda forward. Yet member states, too, sought to act as policy entrepreneurs. For example, Sweden pulled an existing proposal for simplified information sharing between law enforcement authorities (Council 04/06/2004) 'out of the drawer'.[10] In fact, the most controversial proposal that made it on to agenda, i.e. mandatory retention of electronic communication data (Council 29/04/2004), was sponsored by several member states that operated such a system at the domestic level. After the terrorist cell behind the Madrid attacks was tracked down on the basis of mobile call records, previous objections to such a regulation at the EU-level were set aside.[11] Yet the new 'window of opportunity' in spring 2004 had its limits. For instance, the idea of a European Intelligence Agency that had been floated by Austria (European Report 21/04/2004) found no support. Instead, the EU tasked SITCEN to generate strategic threat assessments of terrorism (Statewatch 08/2004).

[8] The objectives were already set out in the Declaration on Combating Terrorism. They were:'1. Deepen the international consensus and enhance international efforts to combat terrorism 2. Reduce the access of terrorists to financial and other economic resources. 3. Maximise capacity within EU bodies and Member States to detect, investigate and prosecute terrorists and prevent terrorist attacks 4. Protect the security of international transport and ensure effective systems of border control 5. Enhance the capability of Member States to deal with the consequences of a terrorist attack 6. Address the factors which contribute to support for, and recruitment into, terrorism 7.Target actions under EU external relations towards priority Third Countries where counter-terrorist capacity or commitment to combating terrorism needs to be enhanced'

[9] Interview with national counterterrorism expert, 6 November 2007

[10] Interview with national counterterrorism expert, 6 November 2007

[11] However, political agreement was only reached after the London bombings (see below). For an extensive overview of the debate, see http://www.statewatch.org/eu-data-retention.htm

SITCEN was attractive to the member states, as it was drawn up by relatively few national experts and had no pretensions to deal with operational intelligence.[12]

In the second half of 2004 and first half of 2005 the EU sought to live up to the promises and agenda set out in the European Council Declaration and the revised Action Plan on Combating Terrorism. For instance, more regular and concise implementation reports were drawn up, and established policy areas, such as the fight against the financing of terrorism, and civil protection, were gradually extended (Council 24/05/2005). In particular, by the end of 2004 the new policy objective of critical infrastructure protection (Commission 20/10/2004) developed out of the EU's civil protection policies.[13] Moreover, discussions started on how to tackle the new 'strategic objective' of combating 'support for, and recruitment into, terrorism'. Yet just after 9/11, the political momentum to agree on difficult issues, such as data retention, dissipated fairly quickly. The Counterterrorism 'Tsar' struggled to make a mark, as he had not been given any authority over the diverse actors that played a part in EU counterterrorism policy (Lugna 2006). At best, he occasionally managed to 'shame' laggard member states into speeding up their implementation processes.[14] Otherwise, he mostly fulfilled a purely representational role towards the media and third countries.

Similarly, there were only small substantial advances under the Second Pillar in relation to the fight against terrorism. Most attention was directed towards mending the transatlantic relationship, which resulted in more diplomatic cooperation on issues such as non-proliferation, but which did not help to tackle the more difficult issues in the Middle East. The EU's own efforts to take on a greater role in the Palestinian conflict were also cut short.

[12] Interview with national counterterrorism expert 7 May 2008.
[13] This also occurred against the background of Tsunami.
[14] Interview with Council official, 7 May 2008.

Its missions to build up a police force (EUCOPS) and to monitor the Rafah border (EU BAM) were small and or even irrelevant to fighting international terrorism, while Hamas' victory in 2006 seriously challenged the basis for further EU assistance to the Palestinian authorities (Chikhi and Krauss 2006).[15]

In short the London bombings of July 2005 mainly accentuated that there was a persistent gap between the EU's aspirations in the fight against terrorism and its actual impact on the ground. Member states were, thus, even more concerned with making headway on the existing agenda than adding new proposals. For instance, there was a major political push to conclude the issue of mandatory data retention (Statewatch 07/2005). The Council also consolidated existing arrangements for information exchange and judicial aid in relation to terrorist attacks (Council 29/09/2005). In addition, the attacks of 7/7 underlined the increasingly domestic nature of the terrorist threat, which had already been raised after Madrid. As a consequence, by December 2005 EU agreed on a Strategy as well as an Action Plan 'for Combating Radicalisation and Recruitment to Terrorism' (Council 22/11/2005).[16] So the only genuine innovation that emerged after the London bombings was the EU Counterterrorism Strategy. The second part of this paper will discuss the Strategy in more detail. Suffice it to state here that it better presented, but did not directly influence, the EU's counterterrorism policy, which suited the Euro-sceptic position of the UK (Coxon 2007).

This fairly restrained reaction to the events of 7/7 marked an increasing slowing down of EU counterterrorism policy. This was accentuated by the increasingly critical stance of the ECJ on the freezing of terrorist assets (Vlcek 2006), as well as by the EP's investigation into

[15] It should be also noted that already in 2003/2004 the EU's initially promising negotiations with Iran had broken down due to the stand-off over nuclear enrichment.
[16] Once again, this profited from a timely communication of the Commission (Commission 21/09/2005).

extraordinary renditions to the US.[17] 2006 saw only one major initiative, again in response to an event. The foiled plot to blow up several transatlantic flights by liquid explosives led to a corresponding change in aviation security regulations (Commission 17/10/2006). Otherwise, one could mostly observe incremental work at the technical level, such as on critical infrastructure protection or on the implementation of SISII. By early 2007 political momentum had reached a new low as the member states failed to appoint a new Counterterrorism Coordinator.[18]

However, summer 2007 saw another series of failed or foiled plots, this time in Germany, Denmark as well as the UK. Once again, this revived political interested and led to the appointment of a new Counterterrorism Coordinator, Mr Gilles de Kerchove. The new incumbent had previously been a leading figure in the Council Secretariat and had personally managed much of the EU's counterterrorism agenda. His appointment signalled to insiders that the office of the Counterterrorism Coordinator had become more significant (Internatioanl Herald Tribune 26/09/2007). Finally, in November 2007 the European Commission presented another package of anti-terrorism legislation (Commission 06/11/2007). It should be noted that this package largely consisted in extending existing policies, such as the addition of the crime of 'incitement to terrorism' to the framework decision on combating terrorism. The other main proposal of the Commission package, namely the creation of an EU system for the exchange of PNR data exchange was also modelled on the already existing EU-US agreement. Last but not least, the Commission announced a new Action Plan on improved security of explosives, which had been under discussion since 2004 (Council 18/10/2004). This underlined the increasingly incremental of pace of EU counterterrorism policy.

[17]For the most comprehensive overview of this issues, see http://www.statewatch.org/rendition/rendition.html
[18] The first incumbent, Mr. Gijs de Vries refused to take up a second term 'for personal reasons'. Most observers agreed, however, that he had left in frustration.

2. A critical assessment of policy outcomes according to EU's Counterterrorism Strategy

Although the Counterterrorism Strategy had no direct impact on EU policy-making, it succeeded in staking out the *possible* or *desirable* contribution of the EU. The Strategy presents the EU's fight against terrorism under four objectives, namely to 'prevent, pursue, protect and to respond'. There is a clear logic to these four strands, as can be seen if they are arranged in the following two-by-two matrix.

	Before Attack	**After Attack**
Countering intentional threats	*Prevent*	*Pursue*
Controlling structural hazards/effects	*Protect*	*Respond*

The underlying message is that the EU is covering all possible angles of an effective counterterrorism policy, i.e. the before *as well as* after an attack, and at the level of structure *as well as* agency. It is, therefore, not surprising that the EU has readily taken to the four objectives of the Strategy when presenting its achievements in the fight against terrorism.[19] Yet given the uneven and contingent development of EU counterterrorism policy outlined above, it is clear that this is a rationalisation after the fact. The objectives of the Strategy are so broad that almost any policy can be presented as being relevant.

[19] This includes both concise summaries (Council 19/05/2008) and the more recent editions of the Action Plan on Combating Terrorism (e.g. Council 29/07/03).

Accordingly, the following part of this paper seeks to provide a more critical assessment of the EU's performance according to the objectives of the Counterterrorism Strategy. On the surface, many EU policies could help member states to 'pursue', and to 'protect' against, terrorism. Yet when probing a bit deeper they may lack relevance, or not implemented and used at the operational level. Similarly, there has been formal progress to build up capacities to 'respond' to terrorism. So far, however, this has not proven itself in real crisis situations. Last but not least, policies to 'prevent' terrorism are bound to remain weak, as the EU does not have, and is unlikely to acquire, the necessary competences. This seriously undermines the overall effectiveness and output legitimacy of the EU counterterrorism effort.

2.1. Pursue

Since 9/11 a number policies for increased police and judicial cooperation have been agreed under the heading of counterterrorism (Wouters and Naert 2004; Nilsson 2007). In particular, the European Arrest Warrant and the associated framework decision on combating terrorism have been touted as a success (Verbruggen 2004). Moreover, EUROJUST was not only set up quickly, it is by now operating quite successfully, including in terrorist cases (House of Lords 13/07/2004; Council 21/03/2007). Meanwhile, EUROPOL has been authorised to work on terrorism and to conduct data exchanges with third countries.[20] Another less visible, but apparently successful, contribution to the pursuit of terrorist suspects has been the 'peer review' of national counterterrorism arrangements (Council 18/11/2005).[21] Several more measures of criminal justice cooperation could be added to this summary, such as the framework decision on the retention of electronic communication traffic data (Council

[20] The last, and perhaps most significant step, which may turn out to have an influence on the counterterrorism policy, was the decision of 18 April 2008 to turn Europol into a full EU agency by 2010.
[21] Interview with national counterterrorism expert, 7 May 2008. See also Nilson (2007). Due to this success, there will be future round of such peer reviews.

13/04/2006) or on improved information sharing in relation to terrorism offences (Council 29/09/2005), mentioned previously.

Perhaps the most tangible measures under this objective are EU's actions in the fight against the financing of terrorism (Council 05/10/2007; Jakob 2006). While it may have preventive side effects, the freezing of terrorist assets is mainly a punitive tool to target already known terrorist structures.[22] By contrast, financial surveillance has been used quite successfully to uncover networks of supporters and more hidden members of terrorist organisations, and then to punish them in absence of 'hard' judicial proof by freezing their assets. Despite a growing number of legal challenges area (Guild 2008), the EU has steadily expanded its activities (Council 05/10/2007). For instance, it has not only continuously adapted the list of 'targets' as well as the mechanism for freezing assets, but also has promoted international compliance with FATF recommendations, and toughned up its money laundering legislation.

Nevertheless, the EU can only claim a 'moderate' success in the pursuit of terrorists. While adequate implementation is wide-spread problem for EU counterterrorism policy (Bures 2006; Monar 2007), it has been a particular concern in matters of judicial and police cooperation. For instance, at the time of writing the 2004 Mutual Legal Assistance Agreement with the US still had not been ratified by all member states. Oversight mechanisms are notoriously weak, and member states are often faced with considerable legal difficulties to match EU framework decisions in this area to their diverse legal traditions.[23]

[22] It is almost impossible to prevent conventional terrorist attacks by financial measures, as they are generally very cheap to carry out. It also should be noted that the US has been particularly reliant on financial investigative powers to prosecute criminals and terrorists, which it also uploaded to the international level (Naylor 2006).

[23] This has led to the importation of the concept of 'mutual recognition' from commercial into criminal law harmonization. However, unless one treats civil rights in a light manner, mutual recognition cannot be applied in the same categorical manner in international criminal justice cooperation (Alegre and Leaf 2004). So far the most problematic case for national transposition has been the EAW (Blexxtoon and Ballegooij 2005).

Yet even if implemented, the EU instruments to aid the pursuit of terrorist have not been readily made use at operational level. For instance, even though Joint Investigation Teams were quickly made possible after 9/11, they have not spread in practice (Rijken and Vermeulen 2006). Similarly, the Police Chiefs Task Force, originally intended to create a more operational forum of cooperation, has not made any significant contribution to EU counterterrorism cooperation.[24] Moreover, the exchange of information between national police and Europol remains unsatisfactory (Hojbjerg 2004; Brady 2007), particularly in sensitive areas such as counterterrorism, which blurs the line to intelligence.[25] One national expert even expressed the view that it had been a 'huge mistake' to give EUROPOL a role in the fight against terrorism.[26] The so-called 'principle of availability' that should have ensured better cross-border access to criminal justice information has not provided a way forward either.[27] This is mainly due to the conservatism of police and judicial authorities, which renders even domestic cooperation difficult.[28] National authorities may also lack incentives to take on the added workload that is required by formal European cooperation.[29] In fact, most cross-border cooperation in police and criminal justice matters occurs on a personal and informal basis. The necessary 'trust' for cooperation (Kerchove and Weyembergh 2005) cannot simply be presupposed or created by EU legislation. So the cultural and institutional obstacles to more police and criminal justice cooperation under an EU framework can only be overcome very slowly.

[24] Interview with Council official, 9 November 2007.
[25] This has been expressed in the catch-word of 'intelligence-led policing'. The serious obstacles to intelligence-sharing at the EU level will be discussed further below.
[26] Interview with national counterterrorism expert, 14 March 2008.
[27] Interview with Commission official, 14 March 2008.
[28] Interview with national counterterrorism expert, 7 May 2008.
[29] Interview with Commission official, 14 March 2008.

2.2. Protect

This is the perhaps the most dynamic area of EU activity due to the intersection of member states' interest in controlling migration and US pressure for more border and transport security. As mentioned previously, the EU was basically forced to oblige on the issue of PNR and container security, but was eager to introduce biometric standards in visas and passports. In addition, it has introduced 'counterterrorism' functions to the next generation of the Schengen Information System (Council 15/03/2004). EURODAC and envisaged Visa Information System have also been linked to the EU's counterterrorism effort, and may eventually be opened up to EUROPOL and even national police authorities (Geyer 05/2008).[30] The most straightforward result of 9/11 in matters of transport security has been the extension of EU competences into the area of aviation security (Poincignon 2004). Just recently the European Parliament has agreed to a consolidation and extension of the Commission's regulatory power in this area (Council 09/04/2008), which now also touches controversial areas, such as the use of sky marshals. A parallel, if not quite as extensive, development has taken place in the management of 'maritime security'.[31]

The other and increasingly important component of the EU's 'protective' measures is critical infrastructure protection. Basically, this is intended to protect all core transport, energy and communication networks against 'all-hazards', including terrorism (Commission 12/12/2006). This still fairly new policy area has been flanked by a significant expansion of funding for research on security technology.[32] Both in security research and critical

[30] If this came to pass, these databases would turn into a tool to 'pursue' terrorists.
[31] http://www.emsa.eu.int/end185d007d001d003.html.
[32] http://ec.europa.eu/enterprise/security/index_en.htm.

infrastructure protection the Commission has been keen to seize the initiative,[33] as it matches its established competences in the areas of research funding and the regulator of transnational transport and energy networks.

From a formal point of view, increased border and travel security, security research and critical infrastructure protection could be regarded as a substantial contribution. Yet again, I would maintain that they have only made a 'moderate' contribution to protect against terrorism. Critical infrastructure protection and new financial framework for security research are still recent developments and have not yielded many concrete results (Fritzon, Ljungkvist et al. 2007; Boin 2008). Particularly critical infrastructure protection is a very complex policy area with an unclear number of stakeholders that need to be brought together.[34] Yet apart from time and resource constraints, there is a second, more serious limitation, namely the doubtful relevance of many of these 'protective measures' to an effective counterterrorism policy. This is especially clear in the field of border security, since it is radicalised EU nationals and not migrants - let alone illegal ones – that pose the main threat. It is, of course, conceivable that known terrorists may be caught in attempt to cross a border. However, this is marginal in comparison to the key task of uncovering hitherto unknown groups and plots.

The counterterrorism use of critical infrastructure protection and security research can also be doubted. Cyberterrorism, which initially fuelled the idea of critical infrastructure protection (Bendrath 2001), so far has proved to be a fictional threat.[35] Generally speaking, critical

[33] It has done so not only by adding funds and making policy proposals, but also by building up transnational expert networks and public-private partnerships in which the Commission can play the role of a broker. For instance, the Commission has supported the foundation of the so-called European Security Research and Innovation Forum, which brings together industry representatives in this area.

[34] At least so far, national and private authorities have also been reluctant to accept binding EU regulations in this area.

[35] One possible exception may be the cyberattacks on Estonia. However, this was a more 'conventional' hacking attack that targeted websites rather than critical infrastructures, i.e. it could not cause human casualties.

infrastructure protection policies are designed to improve resilience against levels of destruction that are hard to achieve by conventional terrorist attacks. This has led to the dominance of the concept of protection from 'all hazards', which – probably for the better - has put terrorism lower on the list of priorities.[36] In any case, one should not expect a technological 'protection' from terrorism. There is a limit to how many targets can be 'hardened', whereas terrorists can potentially strike everywhere. Nor should one expect that technology could help to catch terrorists by means of face-recognition or CCTV. Simply speaking, good human intelligence, which - as discussed below - the EU is mostly excluded from, cannot be replaced by technological surveillance and protection systems (Müller-Wille 2008). These fundamental limitations to technological protection from terrorism are not a reason for despair, however, as modern states have proved to be very resilient in face of much more serious threats (Mueller 2005).

2.3. Respond

This strand is almost exclusively constituted by the EU's efforts in the field of civil protection.[37] For instance, since 9/11 the EU has a civil protection 'mechanism' to improve information exchange and coordination in the case of emergencies.[38] Moreover, the EU has also agreed on a number of programmes for improving the response capacities against CBRN attacks (Council 31/05/2005). This mostly has taken the form of exercises, compendia and exchange of best practices, but also resulted in additional funding. There are ongoing discussions for further extending the EU's responsibilities, particularly in the area of biological threats (Council 06/11/2007). Last but not least, since 2004 there has also been a

[36] To downplaying the threat of 'non-conventional' terrorism is not pure wishful thinking, but also linked to the evolution of Al Quaida into an increasingly diffuse network of independent cells that may be harder to detect, but also lack the ability to carry out effective attacks.
[37] Despite their name, civil protection policies are mostly a matter of *responding* to an attack or disaster.
[38] http://europa.eu/scadplus/leg/en/lvb/l28003.htm

small EU fund for projects to assist victims of 'conventional' terrorist attacks (European Report 26/05/2004).

However, the impact of these mechanisms has largely remained on paper (Lindstrom 2004; Ekengren, Matz et al. 2006). Of course, it is most fortunate that the EU did not have to, nor is very likely to, face an attack with WMD. Yet also in the case of natural disasters member states have mostly preferred to deal with it themselves. At least so far, relevant national actors do not seem expect more from the EU than training and added funding (Ekengren 2008). Perhaps the clearest sign for limits to EU cooperation is that there has not been much political support for the creation of a European civil protection force.[39] One possible counterargument is that EU has started to support the hitherto informal network of European special intervention forces ATLAS, and created a legal framework for joint cross-border operations (Block 03/2007). However, this is not likely to be relevant in practice.[40]

Meanwhile, the ESDP has not become an important part of the EU's response capacity to terrorism. To be precise, terrorism has been incorporated into the ESS and the assessment process for the definition of the civilian headline goal. Yet to date no ESDP mission has been noticeably been influenced by the EU's fight against terrorism (Berenskoetter and Giegerich 2006).[41] In any case, the EU is neither willing nor in a position to mount an offensive military response to a terrorist attack. In should also not be forgotten that NATO capacities and structures are still much more significant, also in relation to defensive issues such as the consequence management of a WMD attack.

[39] This was proposed by the so-called Barnier report, see http://ec.europa.eu/commission_barroso/president/pdf/rapport_barnier_20060508_en.pdf

[40] To the best of my knowledge, there has not been a situation in the extensive European history of terrorism that would have require the simultaneous use of special intervention forces from several member states.

[41] This will also be picked up further below in relation to the prevention of terrorism.

In sum, the EU has achieved a moderate level of success in the area of civil protection by adding funds and by promoting the exchange of information or best practices between national authorities. In addition, the EU has created a number of procedures, such the 'EU emergency and crisis coordination arrangement' (EU 2005), and stimulated the formation of informal networks in relation to a range of different crises, such as hostage-takings.[42] Yet considerable doubts remain about the EU 'added value' to the handling of real crisis situations. There are not only technical limits and resource constraints, but also political limits, such as in the case of the ESDP. Basically, no member states would want to 'look weak' and rely on the EU in response to a terrorist attack. And if the situation is genuinely desperate – which thankfully has not yet been the case - one may wonder in how far formal procedures and EU policies would be an important source of help.

2.4. Prevent

Prevention is the most important, but arguably also the most challenging, component of an effective counterterrorism policy.[43] Precisely for this reason the EU, too, has tried to make a contribution (Dittrich 2007). Unfortunately, the EU's Action Plan on combating radicalisation and recruitment (Council 11/11/2005) that should implement the EU's namesake Strategy (Council 22/11/2005) is not publicly accessible. Nevertheless, it is clear that the EU has only played weak role in the area of prevention, as it faces several structural obstacles: the EU is almost completely excluded from operational intelligence-sharing; it has a weak external foreign and security policy; and it has almost no competences in matters of integration, education and social policy.

[42] Interview with Council official, 7 May 2008.
[43] Generally, it is the aim of any security authority to prevent a crime or incident before it happens. This is particularly the case with terrorism, as every attack 'is one too many'.

Timely intelligence is the most valuable tool in preventive counterterrorism work. Yet the EU's possible role in intelligence-sharing remains very limited (Müller-Wille 2002; Müller-Wille 2008).[44] Member states have simply refused to integrate their national security services at the EU level,[45] even though there are various informal European groups for intelligence cooperation, most notably the Club of Berne. The so-called Counterterrorism Group (CTG), which was founded after 9/11 (Council 20/09/2001), has maintained a distance from the EU.[46] The defence of sovereignty in matters of 'national security' is buttressed by a culture of secrecy and independence of these services. Confidential sources and methods of work could be compromised if intelligence was widely shared. Moreover, intelligence is also a 'currency' to obtain other valuable information or political favours. Therefore, it is not appealing to share it on the basis of general rules with all EU member states. Big member states may not be willing to share intelligence with, for instance, Greece, as the latter may have little to offer in return. Last but not least, the EU does not have any human intelligence collection capacities of its own.[47] As mentioned previously, SITCEN remains entirely dependent on voluntary contributions of information from member states' services and does not concern itself with operational intelligence work.

Given these obstacles to more operational action, the EU has defined its role in terrorism prevention in a more structural manner, i.e. to counteract processes of radicalization and recruitment to terrorism. However, this approach has been no less hampered. Contrary to the political rhetoric after 9/11 (European Council 21/09/2001), the EU had not made a substantial contribution to fight the 'root causes' of terrorism through its foreign and external

[44] Many of following constraints also apply to the sharing of sensitive police information, which, as mentioned previously, seriously affects EUROPOL's work. See also Müller-Wille (2008).
[45] As mentioned previously, this reluctance was only very briefly questioned after Madrid by the unsuccessful Austrian and Belgian proposal for a European Intelligence Agency.
[46] Interview with national counterterrorism expert, Brussels, 6 May 2008
[47] It has limited technological intelligence gathering capacities through the EU Satellite Centre (SAT-CEN) and various police and border security databases touched upon under the strand of protection.

security policy (Keohane 2008). Apart from the fact it could not play a significant role in the hotspots of the Middle East, Horn of Africa or Central Asia, it has only begun to formulate a formal position on counterterrorism cooperation in the Western Balkans (Council 15/05/2008). Meanwhile, the effectiveness of EU's 'technical assistance' to aid the counterterrorism policies of third countries is doubtful at best. This is not only due to the fact that it largely consisted in relabeling ongoing programmes, as mentioned above. Even in a designated 'priority country' like Algeria one cannot discern a notable change in the threat situation. And contrary to what the EU's strategy for combating radicalisation (Council 22/11/2005) seems to suggest, there is only sporadic evidence that the EU is an effective 'normative power' for the global justice and democracy. Rather, the fight against terrorism may drive the EU in the opposite direction (Manners 2006). In any case, democracy and the rule of law are no panacea to terrorism, given the persistence of terrorism in liberal democracies.

Of course, these fundamental limits to fighting the international 'root causes' of terrorism apply to European member states, too. The most serious obstacle to a greater *EU* role in counter-radicalisation[48] is its lack of relevant competences and tools. So far only one EU-wide project has been touted as success, namely the German Presidency initiative to 'check the web' for radical websites (Council 29/07/2007)).[49] Otherwise, there seem only to be a number of disconnected and largely national projects, such on counter-radicalisation in prisons. In fact, the EU's limited or 'uneven' progress on counter-radicalization has even been highlighted in a recent implementation report by the new Counterterrorism coordinator (Council 23/11/2007). Of course, Commission has sought to play a part by adding financially

[48] i.e. instead of the operational prevention of terrorist attacks.
[49] This project also helps to 'pursue' terrorists and their supporters.

support[50] as well as by setting up an expert working group on radicalisation (Commission 25/04/2006). However, it cannot act as an agenda-setter or introduce more binding measures in policy areas such as community policing, religious education, or integration policies of second or third generation migrants. As will be picked up on further below, these limitations are likely to remain stable.

Yet before turning to the future, the following table sums up the above assessment of the EU's functional contribution to the fight against terrorism.

	Before Attack	**After Attack**
Countering Intentional threats	*Prevent* **WEAK** Almost no operational intelligence role. Deep limits to structural counter-radicalisation policies due to weak foreign & integration policy capacity	*Pursue* **MODERATE** Added value due to numerous measures in criminal justice cooperation and fight against terror financing, but deficits in implementation, info-sharing & trust
Controlling structural hazards/effects	*Protect* **MODERATE** Dynamic developments in travel and border security, critical infrastructure protection & security research. Latter still new and weak, but all measures may lack relevance for terrorism.	*Respond* **WEAK** to **MODERATE** Added funds and programmes for civil protection (CBRN), emergency coordination & victim support, yet so far largely untested. Contribution of ESDP also below political rhetoric

[50] See http://ec.europa.eu/justice_home/funding/2004_2007/radicalisation/funding_radicalisation_en.htm

3. Future trends and competing normative assessments of the EU fight against terrorism

Two basic points emerge from the previous historical and functional overview of the EU's counterterrorism policy. Firstly, the EU has been able to channel the shocks of 9/11 and 3/11 into a broad political momentum for more security policy cooperation. This was particularly the case with the issues of border and travel security, and criminal justice cooperation. Yet since the EU's extensive agenda was also strongly driven by other security interests and contingency, even seemingly 'successful' policies, such as the introduction of biometrics in travel documents, may not contribute much to an effective counterterrorism policy. Secondly, over time the EU sought to improve on its existing counterterrorism agenda instead of adding contingently available measures after each attack. However, attempts to step up implementation and to devise more targeted counterterrorism policies have run into increasing difficulties. This is partly a question of time, as the necessary cultural and legal changes are happening only slowly. Yet there are more fundamental obstacles to a stronger EU counterterrorism policy, such as the exclusion of the EU from sensitive information/intelligence-sharing. Conversely, those policy areas where the EU has taken on a more 'invasive' role, such as border and transport security, have attracted increasing amounts of judicial and political criticism.

So unless a terrorist attack of unprecedented dimensions occurs, one can expect a continuation of the trends that were outlined over the course of this paper. Swings in political will and a lack of strategic coherence will remain familiar features, even if the EU's counterterrorism agenda has become better defined and monitored. Measures to 'pursue' terrorists will proceed slowly according to the pace of change in domestic criminal justice

structures. Moreover, the exchange of sensitive police information, which is central for effective counterterrorism, is unlikely be improved markedly.[51] By contrast, measures to 'protect' against terrorist attacks will develop in a more dynamic fashion, as the Commission has become a serious player in the 'technical' issue areas of border and transport security, and critical infrastructure protection and security research. Yet just as in the past this will mostly strengthen defences against 'illegal migration' and 'all hazards' rather than against terrorism. The EU's ability to 'respond' to terrorism also continues to be developed. Both technical capacities and policy programmes for civil protection will incrementally be improved. However, as long as civil EU protection policies have not made a more substantial contribution in real crisis situations, the profile of the EU is bound to remain low. Finally, EU will not be able to make a significant contribution in the area of prevention of terrorism. Even if prevention has been highlighted as a future work priority by the new Counterterrorism Coordinator (Council 27/11/2007), the structural constraints outlined above are simply too large, and will not even by affected by the Lisbon Treaty. Intelligence and social or integration policy firmly remain with the member states, whereas the reform of the EU's foreign policy machinery is unlikely to make much of a difference to the fight against the international root causes of terrorism.[52] Given that prevention is the most effective counterterrorism policy, this seriously limits whatever credit or 'output legitimacy' the EU may claim from its counterterrorism policy.

These increasingly fixed trends can, of course, be interpreted in different ways. In fact, normative critiques have been central to the debate on EU counterterrorism policy.

[51] The main exception to this may be flexible integration measures such as Prüm, which cannot adequately be discussed here. Suffice it state to here that Prüm can contribute to police investigations in a broad way, such as by allowing the exchange of DNA data, but it is not designed to ensure the timely exchange of information on terrorist investigations.

[52] It should be recalled that the Treaty of Lisbon maintain unanimous decision-making for almost all aspects of the CFSP and ESDP, so that bold new policies in controversial areas, such as the Middle East, remain unlikely.

Unfortunately, in the remainder of this paper I can only outline two extreme positions that can be found both in the public and academic debate. To be clear, this should be taken as a stimulus for further discussion, not as a replacement for a more thorough theoretical and normative analysis. I will also refrain from further citations so as to avoid caricaturing individual authors by placing them under one or the other stylized position.

The first, critical position is to regard the growing number of 'technical' security measures in EU counterterrorism policy as the expression of a wider historical trend for the dominance of 'security professionals' that push for ever more powerful tools for 'surveillance'.[53] The EU is part-and-parcel of this historical trend by empowering transnational expert networks at the expense of wider democratic participation.[54] In more concrete terms, national security actors have used the more removed and unaccountable EU structures to "agree on things in Brussels they would not have obtained at home".[55] Consequently, the fact that EU counterterrorism has become stable and 'technical' could be interpreted as the normalisation and institutionalisation of previously 'exceptionalist', i.e. illegitimate, practices. Therefore, the European Parliament and the European Court of Justice, as well as transnational civil society, must counterbalance the dominance of security experts. Meanwhile, academics should challenge the prevalent securitising discourses and ideas, such as the supposed trade-off or 'balance' between freedom and security.

The second 'traditional' position highlights a continued importance of member states and their 'national interest'. The EU's counterterrorism policy is as diverse as well as limited as it is, because represents a unanimous compromise of the diverse interests of twenty-seven

[53] This draws inspiration from Foucault's analysis of modern political order as being built on highly sophisticated technologies of social control.
[54] Incidentally,this matches quite will with the postulates of neo-functionalism.
[55] Interview with MEP, 6 May 2008.

member states. Given that not all member states have been directly touched by terrorism, it is unlikely that the EU could develop a strong and focused policy in response. Instead, precisely those security measures that serve other, overlapping security interests, such as the fight against organised crime or illegal migration, make better progress. In any case, all member states are reluctant to transfer their sovereignty in matters of 'national security' to the EU. Therefore, the EU's counterterrorism policy has become more and more limited to technical and supportive policies, whereas the main responsibility of the member states has been underlined. This is not to deny that national executives have not occasionally moved ahead with EU policies that did not reflect the consensus among all domestic actors. This 'political leadership' – or perhaps even 'executive empowerment' - explains the delays in national implementation. Yet over time, parliamentary and judicial actors have caught up. Therefore, EU counterterrorism policy continues to represent a 'rational bargain' between the member states, making it perhaps not a perfectly efficient, but fundamentally legitimate enterprise.

As just mentioned, this paper cannot give an adequate discussion of these two stylised positions, let alone the more complex ones that lie between them. It is clear, however, that this paper lends more support to the second position, in so far as it has highlighted a series of constraints on EU counterterrorism policy. Proponents of the first position should explicate more clearly why (if one assumes a structural dominance of security professionals) the EU's agenda has been heavily dependent on the rhythm of events. The pervasive problem of implementation and lack of interest at the operational level is also not easily accounted for. By contrast, the critical position has an important point in so far as the EU's increasingly stable and technical security policy should not only be regarded as a 'rational' and uncontroversial response to terrorism. With sufficient hindsight one *can* discern a steady accumulation of surveillance and control 'technologies', as well as a shift towards more

unaccountable political venues such as the EU's Third Pillar.[56] In addition, the first part of this paper has highlighted that the Commission and the Council Secretariat have been important actors in their own right, and that member states have been somewhat unsteady in their 'national interest' according to the rhythm of events. Therefore, adequate political control *before* the Council can agree on new counterterrorism measures is vital. Otherwise, each crisis or terrorist attack may lead to a new security policy that would not have been acceptable under 'normal' conditions of decision-making.

Such concerns are all the more important if one does not accept the fundamental premise of the second position, namely that 'rational bargains' between the member states lead to legitimate policy outcomes. It may be hard to prove that member states – or rather their executives - are consistently conspiring against their citizens by seeking to 'agree on in Brussels what they cannot obtain at home'. Yet it cannot be assumed that national executives represent a 'balanced' position at the EU-level, as the extensive debate about the EU's 'democratic deficit' has been brought to the fore. In short, even if the 'traditional' intergovernmental interpretation retains some merit, at least when it comes to understanding the limits of EU counterterrorism policy, this obviously does not mean that problems of political legitimacy, both of the input and output kind, are suddenly resolved. Yet given that these are all too familiar questions, it seems fair to conclude that we have moved on from a period when EU counterterrorism policy seemed dynamic and uncertain, to a more mature phase, with all the imperfections and limitations that this implies.

[56] The abolition of the Third Pillar by the Lisbon Treaty should partly redress this problem, as the European Parliament and the European Court of Justice will gain more oversight powers. Yet neither actor can substitute for the intense political and legal debates on the adequate 'balance' between 'security and liberty' in each member state.

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