

## Counter-terrorism and the civil rights of Muslim minorities in the European Union

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“Let no-one be in any doubt, the rules of the game are changing,” announced Prime Minister Tony Blair in the wake of the terrorist attacks on London’s subway in July 2005. Among the new measures proposed by his government in response to the bombings were: Easier access to deport persons “fostering hatred” and “advocating violence,” criminalizing “condoning or glorifying terrorism,” granting the police authority to detain terrorist suspects for a longer period (up to three months) before raising charges, granting the Secretary of State the right to issue so-called control orders entailing restrictions on the liberty of terrorist suspects, and the compilation of an international database of persons engaging in “unacceptable behaviour” to be denied entry into the UK.<sup>1</sup>

The UK initiatives are not singular. On the contrary, since 11 September 2001 a number of European countries have gradually tightened their legislation and expanded the powers of law enforcement and security agencies. Tougher penalties for terrorist crimes and enhanced powers conferred to law enforcers and intelligence services to monitor, search, detain, and prosecute terrorist suspects are now a reality across most European countries.<sup>2</sup>

Moreover, the European Union has taken major steps towards coordinating and integrating the counterterrorism efforts of the member states. Gradually, with a common definition of terrorism, common minimum sentences, and a common arrest warrant, EU member states are developing a common legal framework for combating terrorism. It has also been attempted to enhance the sharing of information and intelligence through a number of EU working groups focussing specifically on counter-terrorism.

Proponents of these measures claim that they represent crucial steps in the effort to protect civilians against a terrorist threat, which operates across unguarded inner European borders. The right of European citizens to live in freedom from fear of random and indiscriminate terrorist attacks against soft civilian targets, they claim, must take precedence over the rights of terrorist suspects slated for deportation or placed under surveillance. Critics, however, point out that some of these measures’ broad scope imperils basic civil liberties, particularly of European minorities. They point out how the discursive coupling of problems like illegal immigration, organized crime, and terrorism might cause increasing stigmatization of

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<sup>1</sup>“PM’s Press Conference – 5 August 2005,” [www.direct.gov.uk](http://www.direct.gov.uk), available on <http://www.number-10.uk/output/Page8041.asp> (accessed on 6 September 2005); British Irish Rights Watch, “Briefing on the Prevention of Terrorism Bill,” available on <http://www.birw.org/BIRW%20Briefing.html> (accessed on 5 September 2005); “Is Europe putting up the barricades?” *EurActiv.com*, September 5, 2005.

<sup>2</sup>Dirk Haubrich, “Anti-Terrorismusgesetze und Freiheitsrechte nach dem 11. September,” in T. Jäger, A. Höse, and K. Oppermann (eds.) *Transatlantische Beziehungen* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2005); Oliver Lepsius, “The Relationship Between Security and Civil Liberties in the Federal Republic of Germany after September 11,” in *Fighting Terror: How September 11 Is Transforming German-American Relations*, (Washington, DC: American Institute for Contemporary German Studies 2002), p. 85; Erik van de Linde, Kevin O’Brien, Gustav Lindstrom, Stephan de Spiegeleire & Han de Vries, *Quick Scan of Post 9/11 National Counter-Terrorism Policy-Making and Implementation in Selected European Countries* (Leiden: RAND Europe 2002); Jeremy Shapiro & Benedicte Suzan, “The French Experience of Counter-Terrorism,” *Survival*, 45:1, Spring 2003, pp. 75-77.

Muslims in Europe, and how the expanding EU role in efforts against terrorism is problematic due to an absence of established channels for democratic control and oversight with EU initiatives, agencies, and working groups.<sup>3</sup>

This paper will outline the main new anti-terrorism initiatives of the European Union within the area of intelligence and law enforcement, discuss the pros and cons of these measures, and indicate options for counteracting their negative side effects on the civil rights protection, in particular the protection of the civil rights of Muslim minorities in Europe.

## Counterterrorism in the European Union

The European Union reacted to the emergence of Al-Qaida inspired terrorism with a broad range of initiatives spanning from efforts against the presumed root cause of terrorism to enhanced judicial cooperation and civil protection inside the Union. The many initiatives are summarized in the EU Plan of Action on Combating Terrorism, which is complemented by a host of other plans, programmes and communications.<sup>4</sup>

The Action Plan identifies the EU's so-called seven strategic objectives:

- To deepen international consensus and enhance international efforts to combat terrorism;
- To reduce the access of terrorists to financial resources;
- To maximize the capacity within the EU bodies and Member States to detect, investigate and prosecute terrorists and to prevent terrorist attacks;
- To protect the security of international transport and ensure effective systems of border control;
- To enhance the capability of the European Union and its Member States to deal with the consequences of a terrorist attack;
- To address the factors which contribute to support for, and recruitment into terrorism;
- To target actions under EU external relations towards priority Third countries where counter-terrorist capacity or commitment to combating terrorism needs to be enhanced.<sup>5</sup>

The most significant new initiatives following 11 September have been in the area of intelligence, law-enforcement, and legal cooperation – coordination and cooperation in the effort to detect, intercept, investigate, and prosecute terrorists has broken new ground.

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<sup>3</sup> For examples of the views of both proponents and opponents see Lucy Sherriff, "Clarke: Europe must trade civil liberties for security," *The Register*, available on [http://www.theregister.co.uk/2005/09/07/lib\\_security\\_trade/](http://www.theregister.co.uk/2005/09/07/lib_security_trade/) (accessed on 23 September 2005).

<sup>4</sup> Commission of the European Communities, "Communication from the Commission to the Council and the European Parliament. Critical Infrastructure Protection in the fight against terrorism", Bruxelles, 20. oktober 2004, COM(2004) 702 final; Commission of the European Communities, "Communication from the Commission to the Council and the European Parliament. Preparedness and consequence management in the fight against terrorism", Bruxelles, 20. oktober 2004, COM(2004) 701 final; European Council, "Draft programme to improve the cooperation in the European Union for protecting the population against bacteriological, chemical, radiological or nuclear terrorist threats", Bruxelles, 5. juni 2002, 9593/02; European Council, "EU Plan of Action on Combating Terrorism – Update", Brussels, 2004, 14330/1/4; "Hague Programme – JHA programme 2005-10", EurActiv.com, 19. maj 2005; House of Lords, European Union Committee, "After Madrid: the EUs response to terrorism", London, marts 2005, p. 7 and 11, available on <http://www.publications.parliament.uk/pa/ld200405/ldselect/ldaicom/53/53.pdf> (accessed on 15 October 2005).

<sup>5</sup> European Council, "EU Plan of Action on Combating Terrorism – Update", Brussels, 2004, 14330/1/4, p. 2.

Systematic efforts to coordinate and exchange information between European secret services and police agencies in the effort against terrorism dates back to the 1970s. In 1976 the so-called Trevi-group, consisting of the Home Affairs or Justice ministers of the then EC member states was set up with a goal of strengthening cooperation on internal security in Europe.

A decade later, Belgium, France, Germany, Luxembourg and the Netherlands strengthened practical collaboration, as well as the exchange of information between national police authorities, with the 1985 Schengen Agreement, which envisaged the gradual abolition of checks at the five signatories' borders, but made entry into these countries more difficult for outsiders. The agreement included measures, such as access by all Schengen countries to the Schengen Information System providing personal identity and other data throughout the Schengen area; close police and judicial cooperation; and joint efforts to combat drug-related crime. In May 1999, the Schengen Protocol to the Treaty of Amsterdam of October 2, 1997, incorporated Schengen cooperation into the framework of the EU. Judicial cooperation had been included as an EU objective with the 1992 Treaty of Maastricht, leading, among others, to the establishment of Europol (the European Police Office) with the objective of improving member state cooperation in combating terrorism and organized crime.<sup>6</sup>

The terrorist attacks on the US gave a boost to ongoing EU efforts to intensify police, intelligence and legal cooperation. Just one week after 11 September, the European Commission presented a proposal for a common definition of terrorism, which was later adopted with slight alterations. It included "intentional acts... which given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

- ...(i) seriously intimidating a population, or
- (ii) unduly compelling a Government or international organisation to perform or abstain from performing any act, or
- (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:
  - (a) attacks upon a person's life which may cause death;
  - (b) attacks upon the physical integrity of a person;
  - (c) kidnapping or hostage taking....
  - (e) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss..."<sup>7</sup>

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<sup>6</sup> The Schengen Agreement and the Convention Implementing the Schengen Agreement, available at <http://europa.eu.int/en/agenda/schengen.html>; Malcolm Anderson & Joanna Apap, *Changing Conceptions of Security and their Implications for EU Justice and HomeAffairs Cooperation*, CEPS Policy Brief, no. 26, October 2002, p. 4; Jan Wouters and Fredrik Naert, *The European Union and 'September 11,'* Institute for International Law, University of Leuven, March 2003, p. 20.

<sup>7</sup> Council Framework Decision of 13 June 2002 on combating terrorism, *Official Journal of the European Communities*, L 164, 22 June 2002, p. 4.

This agreement was accompanied by the establishment of common minimum penalties and sanctions relating to terrorist offences.<sup>8</sup> Moreover, the EU Council drew up a common list of specific persons and organizations linked to terrorist activities, which the member countries pledged to investigate and prosecute by close collaboration between law enforcement authorities.<sup>9</sup>

The definitional agreement contributed to pave the way to the adoption of the EU warrant of arrest, which represents an unprecedented departure from traditional interpretations of trans-border law enforcement. The warrant applies where the crime or charge relates to terrorism or other serious crimes such as murder, racism, corruption, illicit drug trafficking and is punishable for a maximum period of at least three years imprisonment. The warrant entered into force in January 2004, but the idea had been discussed since the 1999 EU summit in Tampere (Finland). However, it had gained political traction only after Al-Qaida's 2001 attacks on the US. Based on the principle of mutual recognition of decisions by EU judiciaries, the warrant effectively allows any member state to enforce a sentence or obtain an individual's arrest and extradition from any other EU state with minimal formalities and within 60 days from the extradition request.<sup>10</sup>

The implementation of the warrant has not been smooth. When Madrid was hit by simultaneous bombs in March 2004 two major EU members – Germany and Italy - had still not transposed the warrant into national law. Moreover, only three months after Italy as the last country had implemented the warrant the German Constitutional Court in July 2005 ruled the German implementation law unconstitutional, arguing, that it did not adequately exploit the opportunities for securing the rights of the defendant laid out in the EU framework decision on the arrest warrant.<sup>11</sup> Still, the common warrant is considered a success by the EU inasmuch as it is widely used and has shortened the average extradition time from about nine months to about 40 days.<sup>12</sup>

Also in reaction to the 11 September attacks, Europol – a European police cooperation agency, which began operating in 1999 - was provided additional financing and a new entity, Eurojust, consisting of prosecutors, judges or police officers seconded from the member states, was set up to promote coordination between national authorities in investigating and prosecuting serious crime concerning two or more member states.<sup>13</sup>

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<sup>8</sup> "Information dossiers – Terrorism 2004," Freedom, security and justice, available on [http://europa.eu.int/comm/justice\\_home/news/information\\_dossiers/terrorism\\_2004/documents\\_en.htm](http://europa.eu.int/comm/justice_home/news/information_dossiers/terrorism_2004/documents_en.htm) (accessed 8 September 2005).

<sup>9</sup> "Conclusion and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001," SN 140/01, pp. 1-3; Council Document 12608/02; "Declaration by the Heads of State or Government of the European Union and the President of the Commission, Brussels, 19 October 2001," SN 4296/2/01.

<sup>10</sup> Jan Wouters and Fredrik Naert, *The European Union and 'September 11'*, Institute for International Law, University of Leuven, March 2003, p.14.

<sup>11</sup> The framework decision stipulates a number of instances in which a country is not obliged to extradite and expressly stipulates the inviolability of rights of the detainee following the European Convention on Human Rights – rights which might be brought into question by the arrest warrant (right to information, interpretation, counsel, assistance)..

<sup>12</sup> Commission of the European Communities, Report from the Commission, based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Brussels, 23 February 2005, COM(2005) Final 63, p. 5.

<sup>13</sup> Jan Wouters and Fredrik Naert, *The European Union and 'September 11'*, Institute for International Law, University of Leuven, March 2003, p.23.

To further promote coordination and exchange of information and experience a number of new fora and working groups have been established or have refocused on counterterrorism. Box 1 below provides an overview over some of the major fora.<sup>14</sup>

*Box 1: EU counterterrorism coordination fora*

**Coordination and exchange of intelligence and information in EU Counter-Terrorism**

Council (legislates, updates Plan of Action on Combating terrorism every 6 months, compiles and updates list of terrorist organizations, persons, entities).

Europol (collects, analyzes, shares info about international terrorism).

Eurojust (forum for magistrates and prosecutors, coordinates and supports MS investigations).

Police Chief Task Force, PCTF (operational coordination, exchange of info and experience).

Terrorism Working Group, TWG (reps. from national interior or justice ministries, develops common threat assessment, cooperation between EU bodies).

Working Party on Terrorism, COTER (reps. from foreign affairs ministries, develops threat assessment and policy recommendations as regards 3<sup>rd</sup> countries).

SitCen (merges internal and external threat information to provide a comprehensive threat assessment).

Counter Terrorism Group (reps. from EU national intelligence agencies plus Norway and Switzerland).

The amount of intelligence and information sharing is frequently criticized for being insufficient in light of the transnational character of the threat and the relative ease of movement inside the Schengen area. Among the reasons are allegedly lack of trust between different countries and services, divergent threat perceptions across the different EU member states, turf wars, and excessively complicated institutional structures. A number of member states still prefer to share bilaterally or in smaller informal groupings, like the so-called Group of Five (Germany, France, Italy, Spain, and the UK). The result is that instead of focussing on supporting pro-active investigation and interception of plots and terrorist cells, the various EU coordination groups mainly analyse past events and develop common threat assessments based on these.<sup>15</sup>

Still, it is reasonable to assume, that the amount of information being shared is on the rise and, over time will increase further as more terrorist attacks make threat perceptions converge, and as the necessary trust to share more widely gradually develops as it tends to do over time when the intensity of cooperation between a group of countries is stepped up.

<sup>14</sup> For a fuller overview see Council of the European Union, Brussels 25 May 2004, 9791/04.

<sup>15</sup> “The EU’s role in counter-terrorism. Coordination and action”, *IISS Strategic Comments*, Vol. 11, no. 2, marts 2005; Thierry Balzacq og Sergio Carrera, “The EU’s Fight against International Terrorism”, *CEPS Policy Brief* No. 80, juli 2005, s. 4.

In sum, despite slow implementation of some of the agreed measures by some member states and limited willingness to share sensitive information among broader groups of countries, the EU is gradually creating a common legal framework for combating terrorism and the member states are sharing a growing volume of information through the EU.

## **Pros and Cons of the new Measures**

The waters have been parted in Europe as well as in the US over whether new anti-terror measures and legislative changes as well as the intensification of European level cooperation were necessary or, on the contrary, go too far. Those advocating the new laws and intensified international cooperation typically point out three circumstances, which made these changes imperative: the extreme violence of the new terrorism; its use of the newest technology for communication and organizational purposes; and the threat's transnational character.

First, these advocates point out, the new terrorism is different from both common criminal activities and the kind of political terrorism, which ravaged Europe in the 1970s and 1980s. The "old" terrorism used violence selectively to bring attention to a political cause, or to obtain political concessions. Extreme violence was regarded as counterproductive, since it might have provoked a public backlash and a crackdown by state authorities. In contrast, the new terrorism aims at maximizing casualties. The strikes against the US with their death toll of 2.986 in New York, Pennsylvania, and Washington DC have left no one in any doubt of the terrorists' indiscriminate strategy. Attacks against soft, unprotected and arguably unprotectable targets like the public transportation systems of Madrid and London emphasize the need for instruments that increase the chance of detecting and foiling plots before they are realized or quickly dismantling terrorist networks before they can strike again, the argument goes.<sup>16</sup>

Furthermore, advocates claim, technological development has overtaken existing law. Mobile phones and the Internet as well as the increased sophistication of Al-Qaida operatives and sympathizers in exploiting these technologies, necessitate an update of the legal instruments available to monitor suspects and detect or investigate plots. These instruments include roving wiretaps to keep track of communications through cells and disposable phones, and the authority to monitor and seize electronic correspondence as well as records of internet logs and communication patterns (i.e. who has been in contact with whom, when, and from where?) by e-mails and sms.

Finally, it is pointed out, terrorists operate transnationally and must be countered in part through intensified international cooperation in law enforcement, intelligence, and justice. Particularly in the European Union, where internal border control between the Schengen countries has been abolished. This

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<sup>16</sup> For examples of the arguments of proponents see Andrew Kramer, "Case Against Five Suspected Members of Terrorist Cell Tests Government's New Spy Powers," Associated Press, February 24, 2003; "Speech by Charles Clarke, UK Home Secretary, to the European Parliament – 7 September 2005," website of the UK Presidency of the EU, available on <http://www.eu2005.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1107293561746&a=KArticle&aid=1125559979691&date=2005-09-07> (accessed 23 September 2005); "Statement of Viet D. Dinh, Assistant Attorney General, Office of Legal Policy, Department of Justice, before the Committee on the Judiciary, US Senate," December 4<sup>th</sup> 2001; Ditlev Tamm, "Den usynlige stat," *Ræson*, August 13, 2003; "U.K. Urges Human Right Curbs in EU Terrorism Fight," Bloomberg.com, available on <http://www.bloomberg.com/apps/news?pid=10000102&sid=aoRHRj3qBvKY&refer=uk> (accessed on 9 September 2005).

makes for increased mutual dependence between the EU countries, which not only have to rely on the common external frontier for border security, but also on mutual cooperation in countering organized crime and terrorism, which, unlike security services and police forces can operate more or less freely across internal Schengen borders.<sup>17</sup> The transnational nature of terrorism in a borderless Europe thus calls for information sharing and operational cooperation. It also, the argument goes, increases the need for harmonizing of sanctions and investigative methods to prevent terrorists from exploiting discrepancies between the EU member states and establish bases in the countries with the weakest law enforcement regimes from which other Schengen members can be targeted.<sup>18</sup>

For their part, critics of the new measures maintain that authorities have gone too far in their attempt to shore up security at the expense of basic civil rights. To be sure, they argue, responses to the new and more violent terrorism require that extra resources be allocated to prevent or investigate attacks and that international cooperation is strengthened. However, it is pointed out, new national laws expanding the opportunities to monitor, detain and deport suspects, as well as EU coordinated efforts to seize, compile, and share information about citizens are compromising the inviolability of individual liberty, due process guarantees, the right to a speedy and fair trial, and the protection of private spaces, as well as the secrecy of mail, telecommunication and telegraph-services.<sup>19</sup>

The common EU definition of terrorism is criticized for its broad scope. Similar criticism also regarded measures adopted by individual EU member states. Underpinning this criticism are concerns over the broad criminalization of indirect support for terrorist activities, and over what would be deemed legal and what would constitute an offense under these provisions. For example, critics noted that it might be arduous to judge whether support for, and by humanitarian organizations in the West Bank and Gaza would be regarded as financing terrorism. Moreover, it is pointed out, due process guarantees and the presumption of innocence are compromised by measures such as the automatic freezing of assets belonging to persons or entities on the EU Council's terrorism list, which is drawn up based on secret intelligence.<sup>20</sup>

### **Impact on Muslim Minorities and Social Cohesion of European Societies**

All democratic states face a challenge when it comes to fashioning a counter-terrorism system that does not sacrifice fundamental rights. Yet, arguably, the European states face a greater challenge than the US –

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<sup>17</sup> Currently the Schengen group consists of the EU members plus Norway and Iceland minus the ten new members, the UK and Ireland.

<sup>18</sup> Adam Townsend, *Guarding Europe*, Centre for European Reform, May 2003, p. 1.

<sup>19</sup> We find these rights laid down, for example, in the European Convention on Human Rights, the Danish Constitution *Grundloven*, §§ 71 and 72, and the *United Nations Universal Declaration of Human Rights*, articles 9 and 12.

<sup>20</sup> E.U. Network of Independent Experts in Fundamental Rights (CFR-CDF), *The Balance Between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threats*, submitted to DG Justice and Home Affairs, 31 March 2003; "Action Against Terrorism Must Not Undermine Human Rights, Say High Commissioner for Human Rights," Council of Europe and OSCE," Press Release, Geneva/Strasbourg/Warsaw, November 29, 2001; Oliver Lepsius, "The Relationship Between Security and Civil Liberties in the Federal Republic of Germany after September 11th," in *Fighting Terror: How September 11 is Transforming German-American Relations*, p. 86. See also "Blunkett Terror Plans Under Fire," *The Guardian*, May 12, 2003 (compiled by staff and from agencies reports).

not only rights protection, but also security and the cohesion of societies depend on creating measures, which do not appear arbitrary, and target these measures in ways that do not appear discriminatory to minorities. This is due to differences in the nature of the threat currently faced on the two sides of the Atlantic as well as the composition of societies with relations between minorities and majorities already strained in a number of European societies over issues like welfare state reform and crime.

Whereas the US could, at least initially, focus its response on a foreign terrorist organization with a physical base in a foreign country, the most immediate threat to European security does not emanate from the Afghan mountains or foreign universities and cities. Instead it emanates from Europe's own suburbs, from extremists on the fringes of specific minority groups, witness the composition of the cells that attacked Madrid and London. This kind of homegrown terrorism has given a boost to pre-existing xenophobia and mistrust towards Muslim minorities in Europe.<sup>21</sup> In this context, the potential for terrorism to corrode the social fabric of European societies is high as Al-Qaida inspired violence provokes counter violence from rightist extremists and lines between communities harden. Such vicious cycles were witnessed both in the Netherlands after the murder of the filmmaker Theo van Gogh and after the bombings in London.

Moreover, homegrown terrorism also increases the risk that authorities, eager to intercept or disrupt further plots, are tempted to use dragnet measures, targeting members of specific ethnic or religious groups broadly.

There are indeed indications, that new national powers are used in a way, which is and/or is perceived to be discriminatory. The UK Institute of Race Relations has published a study, scrutinizing the application of the British 2000 and 2001 Terrorism Acts during the three years following September 11<sup>th</sup>. The study, which analyzed about half the number of total arrest and detentions made under these laws – the cases in which the necessary information was available - indicates that the vast majority of those arrested were Muslims of Middle Eastern or North African origin. Moreover, it points to a gap between the number of arrests (609) and the number of convictions secured in open court (15) indicating, that a large number of innocent people were affected.<sup>22</sup> Though official Scotland Yard statistics show only a slight increase in the percentage of Asians (mainly Muslims) being stopped and searched from April 2000-2004 (from about 10% to about 12% of all those being stopped and searched by the London Metropolitan police) the total number of stop-and-search actions have increased significantly since 2000-2001.<sup>23</sup>

Whereas such dragnet measures might have some disruptive and deterrent effect, they also entail that a large number of innocent people have their rights infringed upon or get caught up in humiliating investigations – investigations which frequently do not lead to convictions in open courts. This, in turn, is

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<sup>21</sup> "Summary Report on Islamophobia in the EU after 11 September 2001," European Monitoring Centre on Racism and Xenophobia, Vienna, May 2002, p. 7.

<sup>22</sup> Ironically, though most of those detained were Muslims the majority of the convicted were white rightist extremist. "Arrests under anti-terrorist legislation since 11 September 2001," Institute of Race Relations, 2. September 2004, available on <http://www.irr.org.uk/2004/september/ak000004.html> (accessed 1. June 2005). This might, however, have to do with the fact, that it is generally easier to prove membership of a rightist organization than of a loose terrorist network. The gap does therefore not necessarily indicate gross discriminatory practice, but different levels of difficulty as to prove a detainees guilt.

<sup>23</sup> Rosie Cowan and Alan Travis, "Muslims: we are the new victims of stop and search," *The Guardian*, 29. March 2004. This corresponds to the development in the US, where surveys indicate that Arab Americans are perceiving an increased degree of discrimination and profiling after 11 September 2001. "Profiling and Pride: Arab American Attitudes and Behavior Since September 11," Arab American Institute Foundation, Washington DC: July 2002.

likely to contribute to the perception among Europe's Muslim minorities of being unjustly targeted and thus decrease the willingness to cooperate with the authorities in the counter-terrorism efforts.

As the European Union does not have operational counterterrorism capabilities, clearly, the responsibility to avoid discrimination and alienation as a result of the application of new powers is primarily a member state responsibility. Yet, the Union is an important actor, that through its legislative and coordinating role frames member state action. Critics have specifically expressed concern about a November 2002 recommendation by the European Council, that the member states cooperate through Europol in developing terrorist profiles on the basis of characteristics such as nationality, age, education, and family-situation to help identify terrorists seeking entry or already present on the territory of the member states. Such profiles, it has been argued, are likely to lead to widespread discrimination.<sup>24</sup>

### **Fighting Terrorism without sacrificing the civil rights of minorities**

In order to hedge against discriminatory infringement on the civil liberties of minority groups, security measures should ideally be either extremely targeted, affecting only a very narrow group of suspects, or, if that is impossible, universal and thus non-discriminatory. Across the board measures ensure, that all citizens have a stake in upholding a proper balance between rights and security needs and makes it more likely that the political process will lead to a reasonable balance over time. Air port screening, which affects most citizens in the US and Europe, is an example of the latter, even though a certain profiling might take place in the selection of passengers for extended security checks. Relying on protective measures such as airport screening and control with sites and materials vulnerable or attractive to terrorists, have been emphasized as an alternative to legal and law-enforcement means that directly target individuals and thus impinges much more on civil liberties.<sup>25</sup>

Yet, the open, complex and interdependent western societies have countless vulnerable points. It is practically and economically impossible to protect all potential targets against all types of attack at all times. Arguably, an intensified and internationally coordinated effort by intelligence services and law enforcement agencies is indispensable in the attempt to protect civilians against terrorist strikes—an assessment which is supported by experience from a number of countries engaged in a long-term fight against faith-inspired terrorism and suicide attacks.<sup>26</sup>

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<sup>24</sup>“Information dossiers – Terrorism 2004,” Freedom, security and justice, available on [http://europa.eu.int/comm/justice\\_home/news/information\\_dossiers/terrorism\\_2004/documents\\_en.htm](http://europa.eu.int/comm/justice_home/news/information_dossiers/terrorism_2004/documents_en.htm) (accessed 8 September 2005); E.U. Network of Independent Experts in Fundamental Rights (CFR-CDF), *The Balance Between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threats*, submitted to DG Justice and Home Affairs, 31 March 2003, p. 21.

<sup>25</sup> Remarks by David Cole “Paradigms of Prevention: The Rule of Law and the War on Terror,” Indiana University, 23 September 2005.

<sup>26</sup> Paul K. Davis & Brian Michael Jenkins, *Deterrence & Influence in Counterterrorism: A Component in the War on al Qaeda* (Santa Monica, Calif.: RAND 2002), p. 37; Thérèse Delpech, *International Terrorism and Europe*, Chaillot Paper no. 56, 2002, p. 7; Brian Michael Jenkins, *Countering al Qaeda* (Santa Monica, Calif.: RAND 2002), p. 28; Jeremy Shapiro & Benedicte Suzan, “The French Experience of Counter-terrorism,” *Survival*, 45:1, Spring 2003, p. 77; and Jonathan B. Tucker, “Strategies for Countering Terrorism: Lessons from the Israeli Experience,” *The Journal of Homeland Security*, March 2003, p. 3.

Furthermore, the new prominence of self-motivated and self-recruited terrorist cells composed of persons from Muslim minorities with no previous criminal record or contact to known Al-Qaida members constitute a singular challenge to European counter-terrorism. It might be practically impossible to rely only on very narrow targeting, as the information as to where the next attack will come from is likely to be sparse or non-existing. In sum, it is to be expected that proactive intelligence and law-enforcement efforts will remain key to European efforts against terrorism, and that these efforts will not always be as targeted as one could wish for.

In order to minimize the negative impact of these measures on civil rights protection in general and on the civil rights of minorities in particular, two things are important. First, that the application of these measures is subject to procedural safeguards and democratic oversight, second, that the use of exceptional measures and their impact on liberties is documented, reviewed and evaluated at regular intervals, as argued below.

### *Safeguards and democratic oversight*

Whereas national governments have frequently succeeded in rushing new anti-terrorism measures through national parliaments at high speed in the wake of serious terrorist attacks, the EU system is typically slower due to the higher number of actors involved and complicated power sharing and decision making mechanisms. The speedy adoption of the Framework Decision on the European arrest warrant represents an exception to this rule. It has been pointed out, how the EU in this respect, besides posing a potential threat to basic rights through its expanding role in countering terrorism, is also providing crucial protection of these rights. The cumbersome decision making process decrease the danger that comprehensive new measures are passed quickly and without review.<sup>27</sup>

Moreover, respect for human rights are among the founding principles of the European Union as stated in the EU Treaty and the Treaties of Amsterdam and Nice. In principle, this entails that the obligation to protect fundamental rights take precedence over the obligations to cooperate in the fight against terrorism.<sup>28</sup>

Among the EU actors and institutions, which provide oversight and safeguards are the EU Parliament, which has established itself as a defender of civil and human rights and has frequently managed to moderate Council or Commission proposals in ways favouring the protection of these rights; the European Court of Justice, which provides legal recourse; an EU network of independent experts on fundamental rights (CFR-CDF), which advises the Commission and reports annually on the state of rights protection in the Union. Furthermore, a new independent European Union Agency for Fundamental Rights is being established, with a mandate to monitor developments in the Union and provide expertise and advice to EU agencies on how best to protect these rights in the formulation and implementation of EU initiatives.<sup>29</sup>

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<sup>27</sup> Esther Brimmer, "Safeguarding civil liberties in an era of in-security," in Anja Dalgaard-Nielsen and Daniel Hamilton (eds.) *Transatlantic Homeland Security. Protecting Society against Catastrophic Terrorism* (London: Routledge, 2006), p. 164.

<sup>28</sup> The EU Treaty states the Union shall respect the fundamental freedoms guaranteed by the European Convention on Human Rights of 1950. These include the right to liberty and security, the right to habeas corpus, the right to speedy trial, the right to a fair and public hearing, the presumption of innocence, and the right to respect for privacy as laid out in Article 5, 6, and 8 of the European Convention on Human Rights.

<sup>29</sup> Commission of the European Communities, Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, Brussels, COM (2005) 208 final.

In reality, democratic oversight and rights protection in the EU is not as straightforward as it might appear. A number of the counter terrorism measures adopted by the Union are adopted under the second pillar (external relations) or the third pillar (cooperation in judicial and home affairs) of the EU cooperation where the Court and the Parliament have either limited or no power.

The common list of persons and organizations affiliated with terrorism, for example, is drawn up by the Council under the second pillar, where the European Court of Justice has no jurisdiction. The common list, moreover, is adopted as a so-called Common Positions by written procedure with no parliamentary scrutiny on either national or EU level. Court and Parliament likewise have limited scope to review and influence the counter-terrorism cooperation that falls under the third pillar – in reality the bulk of what the EU has done to counter cross-border crime and terrorism.<sup>30</sup>

Finally, it might be difficult to ensure oversight and accountability when it comes to the activities of new EU agencies and the various EU-level working groups where national representatives work behind closed doors. At the moment, a number of cases challenging the new anti-terrorism powers of US authorities are awaiting decision by US courts and a series of alleged abuses of the new authority to detain suspects have made US politicians demand increased oversight over the Department of Justice. Direct and systematic control and oversight of for example Europol will probably prove more complicated.<sup>31</sup> An individual may, of course, complain of an alleged violation of his or her rights through national courts – a procedure which according to critics, however, is rather long and cumbersome.<sup>32</sup> This problem might become more poignant if Europol, as recommended by the UK Presidency, begins to develop a practical and operational role in cross-border counterterrorism efforts.<sup>33</sup>

Ideally, a strengthening of measures to ensure democratic oversight and accountability ought to go hand in hand with tightened legislation and expanded powers to counter-terrorism agencies at both the national and the EU level. Thus, arguable, as the EU develops a common legal framework and expands the exchange of information and intelligence, the right of the European Court of Justice to review and the European Parliament to co-decide legislation pertaining to internal security and counter-terrorism should be expanded as well.

#### *Review and Evaluation*

When policy-makers debate “the right balance” between liberty and security in the effort against terrorism, the tacit assumption is that various law-enforcement measures, while infringing on liberty, do actually enhance security. This might be so, but it is not necessarily the case.

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<sup>30</sup> For an overview over democratic control and accountability mechanisms in the EU’s legal cooperation see Heather Grabbe, *Justice and Home Affairs: Faster Decisions, Secure Rights*, Centre for European Reform Policy Brief, October 2002. See also Ben Hayes, *Terrorising the rule of law: the policy and practice of proscription*, Statewatch Analysis, June 2005, p.4; Jan Wouters and Fredrik Naert, *The European Union and ‘September 11,’* Institute for International Law, University of Leuven, March 2003, p.40.

<sup>31</sup> Department of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, Office of the Inspector General, Washington, D.C., June, 2003.

<sup>32</sup> Heather Grabbe, *Justice and Home Affairs: Faster Decisions, Secure Rights*, Centre for European Reform Policy Brief, October 2002, p. 4

<sup>33</sup> Center for Transatlantic Relations, Cooperative Security Program, *Shoulder to Shoulder: Views From Governments and Civil Society on Cooperative Security*, Washington, D.C., 1:2, June 2003, pp. 3-4.

Europe's previous experience with separatist and leftist terrorism certainly provides valuable lessons as to how to organize and conduct an effective counter-terrorism campaign. Yet, as compared to today's situation, both the threat and the societal context in which it emerges have changed markedly. As argued above the current problem is a transnational network of persons held together by a common ideology and common perceived grievances. Self-starting cells of self-recruited individuals might conduct planning, fundraising, training and target selection locally or they may receive support from the remnants of Al-Qaida's central structures and leaders. Attackers might have a previous criminal record or they may be apparently well-integrated in European societies. The potential connection between counter-terrorist measures targeting minority groups and radicalization have already been pointed out, as well as the increased risk that Al-Qaida inspired terrorism can corrode the social fabric of European societies. In sum, today's terrorism entails a number of new challenges.

This points to the need for assessment and evaluation of new measures and their impact on both liberties and security at regular intervals. A more widespread European use of the so-called sunset clauses – clauses by which legislation automatically expires at a certain date unless re-enacted by national legislatures – might be a way of ensuring that such evaluations are carried out even in a busy and future oriented political process.

The US Congress included a sunset provision in the *Patriot Act* by which the legislation expires by 2005 unless re-enacted. The extended arrest and detention powers granted to Canadian police in the wake of 11 September are likewise set to expire after five years unless re-enacted.<sup>34</sup> Such sunset provisions are not unknown in Europe – the French as well as part of the German anti-terrorism legislation passed in the immediate wake of the attacks on the US were set to expire in respectively 2003 and 2007. Sun set clauses, however, are not systematically used across Europe, one example is the Danish “anti-terror package,” which has no expiration date.<sup>35</sup>

An expiration date provides an opportunity for civil society organizations and civil rights groups to mobilize and for politicians to reengage in debate over measures that are frequently passed under time pressure in the wake of a dramatic terrorist attack. Approaching expiration dates could also serve as a trigger for systematic efforts to evaluate the pros and cons of different measures. The work of the newly established European Union Fundamental Rights Agency, monitoring respect for fundamental rights can help inform such debates by pointing to the costs of new measures in terms of civil rights infringements. Yet, logically, in order for policy makers to come to informed decisions about the appropriate balance between rights and security, it would be necessary to look not just at the cost side of new counter-terrorism measures, but also at the benefits in terms of security.

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<sup>34</sup> See the contribution of Kent Roach elsewhere in this volume.

<sup>35</sup> As noted previously, this “package” includes changes in the criminal code, the *Administration of Justice Act*, law on competition and consumers' conditions on the market for telecommunications, law on arms, law on the release of, and extradition of criminals to Finland, Iceland, Norway and Sweden, Law no. 378, 06/06/2002 (currently in force). For the French and German legislation see Dirk Haubrich, “Anti-Terrorismgesetz und Freiheitsrechte nach dem 11. September,” in T. Jäger, A. Höse, and K. Oppermann (eds.) *Transatlantische Beziehungen* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2005), p. 291.

The US Department of Justice, prompted by congressional and civil society resistance to the Patriot Act and an upcoming expiration date attempted to document the effectiveness of the new powers it was granted after 11 September in “The Patriot Act at Work.” This report outlines the Department’s arguments for why the legislation is needed and accounts for specific cases where the new powers were important in foiling plots or securing convictions.<sup>36</sup>

Arguably, such reviews of the security benefits and effectiveness of new powers should be independent, not carried out by the agencies, which originally lobbied for the extended powers.

Moreover, it is clearly difficult to identify good indicators of effectiveness in an area, where non-events – the absence of attacks - are the ultimate measure of success. The deterrent effect of anti-terrorism efforts is obviously difficult to measure as the absence of attacks might be taken to indicate either successful deterrence and disruption or simply the absence of actual attempts to target a given country. Likewise, a high number of foiled plots and convictions might be taken to indicate either that counter-terrorism efforts are effective, or, alternatively, that they are not effective since the many plots and convictions also indicate a high level of terrorist activity.

Yet, despite these difficulties, an attempt to gauge the effectiveness of expanded powers and surveillance, even if it has to rely on crude measures and estimates, is a crucial precondition for an informed debate over new laws and powers. Annual reports summarizing the use of various measures and powers as well as outcome of investigations might be a useful starting point, providing greater transparency and possibly also dissipating misunderstandings and unfounded fears as to the extent of the use of new powers. The Canadian anti-terrorism bill, for example, explicitly calls for such annual reports, which, in turn, have made it clear, that new powers of investigative hearings and preventive arrests were not used at all between the enactment of the law in 2001 and the end of 2004.<sup>37</sup> An attempt to account for the usefulness and use of various measures is also likely to be important when it comes to explaining these laws and measures to minorities who feel unjustly targeted. The need to provide feedback in terms of outcomes of arrests and searches has been emphasized, amongst others, by the UK Home Office in a leaked report about radicalization and relations with Muslim communities in the UK.<sup>38</sup>

Finally, periodic reviews would decrease the risk that exceptional measures quietly become a permanent element in European internal security, independently of the threat development. There are historical examples of how civil rights have been temporarily limited during a national security crisis, as when for example Japanese Americans were interned in camps after the attack on Pearl Harbour in 1941. These rights were fully restored with the cessation of hostilities. The open-ended nature of the effort against terrorism, however, casts a long shadow over the duration of rights curtailment. Terrorism has been around for hundreds of years, and arguably there will always be groups of people who—either rightly or wrongly—feel unfairly treated to such an extent that they resort to the use of extreme violence to further their cause. According to the rationale of curbing civil rights in the name of internal security, current tougher

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<sup>36</sup> US Department of Justice, *Report from the Field. The Patriot Act at Work*, Washington DC, July 2004.

<sup>37</sup> In part, though, because Canadian authorities have instead made use of immigration laws in the effort against terrorism. See the contribution of Kent Roach elsewhere in this volume.

<sup>38</sup> Home Office, *Relations with the Muslim Community*, London, 6 April 2004.

provisions could, in principle, be upheld indefinitely. The fact, that anti-terrorism measures tend to stick is illustrated by for example the UK's Prevention of Terrorism Act 1974, originally introduced as exceptional and temporary, eventually becoming accepted as a permanent part of the legal and law-enforcement framework of the UK.<sup>39</sup> Sunset clauses would ensure that changes in the balance between security and civil liberties protection are at least debated.

## Conclusion

Several European countries have already been targets of Al-Qaida inspired terrorism. Further attacks have been intercepted, cell members arrested, and convictions handed down in open courts. Many governments across the continent feel the heat. In result, national laws have been tightened, counter-terrorism agencies furnished with more resources and new powers, and EU level legal and law enforcement cooperation has been intensified.

Whereas there is good reason to assume that effective and internationally coordinated intelligence and law-enforcement efforts are key to countering the threat from Al-Qaida inspired terrorism, there is also much to indicate that intensified counter-terrorism efforts have already impacted negatively on the protection of the civil rights of European minorities, or have the potential to do so in future. This, in turn, is likely to have a negative impact on security as key minority groups will become less inclined to cooperate with authorities in the effort to protect against terrorism. Counter-terrorism measures might thus impact negatively both on liberties and, indirectly, on security.

This accentuates the need for democratic control and accountability and regular evaluation of new measures.

Whereas the European Union through various means help protect basic rights, measures for democratic control and independent oversight have not kept up with the new developments in the cooperation on internal security. Moreover, whereas Europe has seen a lively debate, amongst others in the European Parliament, over whether the balance between security and liberty has been struck in light of the nature of the current threat from Al-Qaida inspired terrorism, there have been few attempts to document and evaluate how and to what extent different measures actually add to security. Such an attempt, possibly, involving key minorities, would not only enhance transparency. It would also make it easier to explain various measures to the targeted minorities while permitting an informed democratic debate over pros and cons of new laws and powers. While time consuming and difficult, evaluation, debate, and dialogue are arguably the key preconditions for fighting terrorism without sacrificing the social cohesion of European societies and the civil liberties of vulnerable minorities.

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<sup>39</sup> Dirk Haubrich, "Anti-Terrorismgesetze und Freiheitsrechte nach dem 11. September," in T. Jäger, A. Höse, and K. Oppermann (eds.) *Transatlantische Beziehungen* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2005), p. 302.