The EU as an Actor in International Counter-terrorism: Law and Practice

Master’s thesis
in Law

by

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Foreword

This thesis is the result of hours of research, investigation and writing and could not have been finished without the help of others. There were times were I thought I would never be able to finish it. It sometimes felt like staring down into an abyss with no end in sight. Luckily for me I could always go see my promotor, Prof. Dr. Peter Van Elsuwege for guidance. During my research I was able to come into contact with a number of individuals who have been and still are active in the field of counter-terrorism. The interviews I had with them helped me write this thesis. That is why I would also like to thank Jean de Moraes, John Alaert, Poly Stevens (who made contacting the two previous personages possible), Patrick Beeken and Evelien Penning for their help.
I. Introduction

When I first started working on this paper I started from the very broad title ‘The EU and Counter-terrorism’. Feeling ambivalent about it, I slowly started reading up on the subject and even created a very rough preliminary draft of what I could include in my paper. It quickly became apparent that I started on a titanic quest with no end in sight. I came to the conclusion that it would be better for my sanity to focus on a single aspect of this humongous subject. The aspect I finally chose to pursue was the international aspect of EU actions in the fight against terrorism. Sure I could have decided to choose the human rights aspect or the institutional aspect of my subject, but I have always been rather interested in external relations and how nations and international and supranational organisations work together to tackle some of the greater issues the world is confronted with. As such it seemed natural for me to gravitate towards my current subject: The EU as an Actor in International Counter-terrorism – Law and Practice.

One of the difficulties I, as a normal student with zero clearance level, encountered and which I was warned about by people working in this field is that not all documents relevant to my topic would be readily available. This is because counter-terrorism not only touches upon the core of state sovereignty, but counter-terrorism policy is part of a broader security aspect of the EU and each member state. As such, certain secrecy reigns over what actions have already been taken, what is underway, and what might possibly be planned for the future. It is thus my belief that in my research I might not have been able to get all the relevant information and for this I apologise. I have tried to create a paper that is as coherent as possible with the sources available to me. What I have done is read through relevant texts and articles, EU official documents, websites and press releases, and publications made by some international organisations such as OECD and the UN.

Before I can get into discussing the role the EU has taken upon itself I would like to discuss the nature of terrorism. Terrorism is a type of conflict that has existed for quite some time. However, up until this day, we have yet to develop a common international definition of terrorism. This is partly due to the changing nature of this threat. Some academics have been arguing about whether terrorism as we know it now does not differ completely from terrorism in the 1970s. As such, my first chapter will talk about this definition of terrorism and whether terrorism as we knew it in the 1970s is still the terrorism we are confronted with today. It is important for us to discuss this before talking about the EU’s specific role because defining terrorism and understanding how others look at it have a great impact on international cooperation. A definition gives a framework for nation states and international organisations. It promotes greater co-operation and co-ordination. It breeds understanding between partners. This is a necessity if we want to be able to tackle the problem of terrorism adequately and efficiently.
In the next section of my thesis I will first discuss the role of the EU at the international level in the field of counter-terrorism.

From a brief read through of the TEU (Treaty of the European Union) it is apparent that the EU is looking for a bigger and more diverse role in the field of counter-terrorism. Granted, the EU has preferred taking a secondary role in the fight against terrorism, especially when it comes to international cooperation. However, it is noticeable that the EU is pushing for a more active role on this front.

When taking a closer look at the TFEU (Treaty on the functioning of the European Union) and TEU which together form the EU Lisbon treaty one can ascertain that the EU has a number of goals in this field at the international level. Already in the preamble of the consolidated version of the treaty on the European Union it mentions promoting peace and security both in Europe and in the rest of the world. Furthermore, it emphasizes the importance of multilateral co-operation in art.21 of the TEU. In this provision it takes upon itself the role to promote multilateral solutions to common problems within the framework of the United Nations. In paragraph two of the same provision a number of fields within which the EU shall cooperate internationally are listed. In my opinion, both part (a) and (c) are important for this paper as they give an indication as to what the EU could see as a reason to co-operate internationally in the field of counter-terrorism. Part (a) mentions that one of the EU’s goals is to safeguard its values, fundamental interests, security, independence and integrity. In a world where terrorists have a global reach the only way to effectively safeguard its security and its integrity is, in my opinion, to cooperate on the international level. Part (c) is even more explicit in putting forward the EU’s goals in the field of counter-terrorism: ‘preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter…’. Terrorism is considered to be a major problem by the UN, and one could interpret this

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1 Resolved to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence in accordance with the provisions of article 42, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world.

2 The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

3 safeguard its values, fundamental interests, security, independence and integrity;

4 preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders.
provision as saying that the EU considers terrorism as one of its goals in the field of international co-operation within the framework of UN Co-operation.

It is also apparent from art.28 TEU that the EU not only sees the exchange of information and the setting up of black lists for suspected and known terrorists as its only role in this field. The EU further elaborates on this more active role in art.42 TEU and art.43 TEU. This last provision lists a number of possible tasks it can take upon itself in the fight against terrorism. Two other provisions of the TFEU that play a significant role in the field of counter-terrorism are art.75 TFEU and art.215 TFEU. Both theirs wording allow for the application of targeted sanctions against individuals, with art.215 TFEU having been accepted by the European Court of Justice as a proper legal basis for smart targeted sanctions against individuals, with the aim of tackling counter-terrorism.

Nevertheless, the way in which the EU’s goals are portrayed in the Lisbon Treaty does not fully explain the role it has and that which it is planning to take in the field of counter-terrorism.

It is my goal to try and elucidate this international role. I will start with the development of the EU’s counter-terrorism policy up until this day. Within this chapter I will first, briefly, discuss the EU legal instruments before the turn of the century, which will then be followed up by a part on the reaction to the attacks of 9/11 and the reactions to the Madrid and London bombings. I will then end this chapter by elaborating about the EU Counter-terrorism Strategy of 2005 and a number of reports on

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5 The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States.

6 The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.

7 Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph. The acts referred to in this Article shall include necessary provisions on legal safeguards.

8 1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

9 Judgment of the Court (Grand Chamber), Case C-130/10, European Parliament v Council of the European Union [2012].
the implementation of this strategy. I will focus on three aspects in this last part: Coherence, radicalisation and recruitment and the link between development and security.

**The next chapter will pertain** EU counter-terrorism action after the Lisbon treaty. **The first part** will be about the institutional framework of EU counter-terrorism after Lisbon, which will be **followed up by a sub chapter** on a number of concrete EU actions in the Field of counter-terrorism and which, in my opinion have an international aspect. Here **I will deliberate about** EU assistance to third countries in the fight against terrorism. **I will start** by giving a brief overview of a number of instruments the EU has at hand to facilitate this assistance. I will then focus on a number of specific countries and sub-regions where the EU is actively providing counter-terrorism assistance. These are Pakistan, the Sahel region, Morocco and Algeria. These are not the only regions where the EU is active, but they are, in my opinion, the regions where the EU is most active due to the importance of these regions in the international fight against terrorism.

**This part will be followed by** a chapter on the tackling of financing of terrorism, with a closer look at the process of blacklisting and the freezing of funds applied by the EU. In this part of the thesis I will start with the basis of EU actions in this field. I will then discus the problems the EU faced in implementing those UN resolutions which listed individuals with no link to a government or territory. I will end this part by discussing what the Lisbon treaty brought to the table and the case C-130/10 which concerned the question of which provision could be used as a legal basis for the regulation No 1286/2009.

**In the last section** of my thesis I will then take a closer look at EU’s relationship with international organisations and third countries, with particular emphasis on the EU-US relationship in the field of counter-terrorism. The reason why I look closer at the EU-US co-operation is because the US and the EU are considered to be each other’s most important partners in the fight against terrorism. However, this relationship has not always been one of the smoothest. **I will start** by briefly mentioning a number of ways in which the EU promotes counter-terrorism at the multilateral and bilateral level. **The next chapter** will then focus on the EU-US relationship specifically and will highlight a number of ways in which both world powers work together. I will end this section of my thesis by taking a closer look at the EU-US PNR agreements as an illustration of what the some of the stumbling blocks are for a closer EU-US partnership.

I will finish this thesis with a conclusion giving a small recapitulation of the main points of this thesis as well as my overall thoughts on the EU’s role in Counter-terrorism at the international level.
II. Defining Terrorism

1. Evolution vs Revolution

Terrorism is not a twenty-first century phenomenon. Europe has been targeted by terrorist attacks numerous times before such as the hostage taking of Israeli athletes at the 1972 Munich Olympic Games, or those by IRA in Ireland and ETA in Spain. However, terrorism as such has not remained the same. Before the twenty-first century most terrorist attacks in Europe were orchestrated by national terrorist groups in their respective countries, and as such were mostly considered to be a national problem in which other nations states had no say, other than to conclude extradition agreements. The 9/11 bombing signalled a change in terrorist activities, that would be continued with the Madrid and London bombings. Clearly terrorism was no longer solely an internal problem, the threat could as easily emanate from outside a targeted country’s borders. Terrorism became one of the great international problems, next to poverty and hunger. This is an “evolution” of terrorism rather than a “revolution” as Anthony Field suggests10.

Ever since the 9/11 attacks both academics and policy makers have been talking about a new type of terrorism completely different from what came that of the past11. Supporters of this dichotomy have identified a number of aspects which clearly mark a fundamental distinction between traditional and new terrorism.

1. The first difference purported by those in favour of the term ‘new terrorism’ is the underlying motivation of terrorist groups. According to them new terrorists are motivated by religious beliefs rather than secular motivations based on political ideologies which was the case for the traditional terrorist groups12.

2. The second difference concerns the willingness of terrorists to compromise and negotiate. Traditional terrorists supposedly had clear-cut goals and were open to negotiations. In comparison new terrorists are no longer interested in compromise and want unilateral surrender to further their aims13.

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3. A **third difference** put forward is the idea that the scale of terrorist demands has greatly increased, with new terrorists having global aspirations in comparison to the more muted, small scale and mostly regional/national demands of traditional terrorists\(^{14}\).

4. The change in organisational structure, from the more traditional hierarchical and pyramidal structure to a more horizontal and interconnected cell system as well as the geographical scope of terrorist activities is considered to be **another difference** between traditional and new terrorism\(^{15}\).

5. A **fifth difference** highlighted by proponents of this division is the role of violence, death and terror. According to them, traditional terrorists would employ these as a means to an end, whereas new terrorists allegedly see violence as an end in itself, damn the consequences\(^{16}\).

6. **Another alleged difference** is that new terrorists are much more indiscriminate, lethal and violent than past traditional terrorists\(^{17}\).

7. Supporters furthermore push forward a **last difference**, which is that new terrorists try to get their hands on weapons of mass destruction to further their ends, whereas traditional terrorists had little use for these\(^{18}\).

I do not agree with the above train of thought but rather underwrite to the ideas of Anthony Field and other academics that we are faced with an evolution rather than a dramatic revolution in terrorism. This is because most of the characteristics that - according to advocates of a clear divide between the two categories of terrorism - are only apparent in new terrorist groups can also be detected in the more traditional terrorist groups of the past\(^{19}\). Anthony Field illustrates this by identifying a number of traditional terrorists that adhere to the same characteristics as new terrorists and which should have been exclusive to the latter. The IRA is a prototype of the traditional terrorists whose motivations were not only based on secular ideals but also religiously inspired\(^{20}\). Conversely, some of the new terrorists that aspire towards religious ideals have broken those down into tangible political goals, through which they can obtain their promised land\(^{21}\). The idea that all traditional terrorists were open to negotiations and compromise is wrong as well, one need only look at the PKK. The amenability of terrorist groups towards dialogue depends on the strategic importance of this dialogue, rather than on whether the terrorist group has religious motives or not.\(^{22}\) The same thing goes for the fact that supposedly only the new terrorists have global objectives. An example of this, given by Anthony field, is the Rote Armee Fraktion which was an advocate of a utopian left wing agenda to reshape the known

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\(^{17}\) A., FIELD, “The ‘New Terrorism’”, p199.


world\textsuperscript{23}. Neither are these two categories of terrorists that much different organisationally. The 9/11 attacks would not have been possible without a proper vertical and hierarchical structure within Al Qaeda. On the other hand, the IRA also worked with loosely connected smaller cells independent from each other\textsuperscript{24}. Furthermore, traditional terrorists could be as indiscriminate as new terrorists and their violent attacks did not always have a clear political or ideological motive besides inflicting as much damage to as many people as possible\textsuperscript{25}. Lastly, the idea of making use of weapons of mass destruction is not a new one. An example of this was the attempted attack on a nuclear power plant by ETA\textsuperscript{26}.

Why then the increased frenzy and the rebranding of terrorism as the most important issue of the 21\textsuperscript{st} century, when terrorism was never something new? In my opinion this is primarily because of the unprecedented scale of the 9/11, Madrid and London attacks. Secondly it was made painfully clear to the whole world how fragile and insecure human life is, even in the west. It thirdly made apparent to everyone just how far terrorist organisations could reach in the pursuit of their ideals. The impact these attacks had was finally enhanced because of the ease of access people all over the world had to information.

Although I support the idea of an evolution rather than a revolution of the concept of terrorism, some clear differences between former and present terrorism have been pointed out to me in an interview with someone\textsuperscript{27} who is active in this field.

One of the clear distinctions between terrorism of today and that of the 60s/70s are the underlying reasons. It has been said that terrorism is inextricably linked with the political context in a given time. The political context of the 60s/70s was that of the Cold War, where the USSR and the US waged a war by proxy be it in South America, Africa or in the Middle East. At the time Western Europe was busy building up its own defences against the influence of Communist USSR. The USSR did not like seeing this happen, and the way it chose to prevent this was by funding the different terrorist organisations (such as the Rote Armee Fraktion, the CCC, la Brigade Rouge) active in Western Europe at the time. It funded the chaos in Europe to keep its Member States weak. The sponsored organisations had rather forward thinking and progressive ideas. Additionally the greater public could not help but feel a bit of sympathy for some of them. This was because at the time South America was largely ruled by a number of dictators and most of the terrorists professed their sympathy and support to the people living under their tyranny. Looking at terrorism in the twenty-first\textsuperscript{st} century, it would be difficult to say that terrorism was being funded by different nation parties in an indirect confrontation

\textsuperscript{25} A., FIELD, “The ‘New Terrorism’”, p203.
\textsuperscript{26} A., FIELD, “The ‘New Terrorism’”, p204.
\textsuperscript{27} Unfortunately I cannot mention his specific position for security reasons.
between each other. Only the origins of the ‘Salafist’ or ‘Islamic’ terrorism can be found in the context of the Cold war. Both warring sides supported different groups in power in the Middle East in the hope of gaining access to the ground oil reserves in the region (It is a public secret that the now deceased Al Qaeda leader, Osama Bin Laden, had been trained by the US and provided with support to oppose the Soviet encroachment in Afghanistan). However, it has today grown to be something independent, and as such can no longer to be considered to be terrorism in the same vein as that of the 60s and 70s.

In comparison to the terrorism of the 60s and 70s being progressive, terrorism of today can be seen as being regressive. This new brand of ‘religious’ terrorism has as goal ‘occupation’, whereas terrorism of the 60s and 70s wanted to engender public participation in government (this through chaos). Terrorism of today tries to turn back the clock on modernisation and the evolution of societal norms.

A third difference which I was made aware of was the fact that terrorism in the 60s and 70s was transient in nature. One could almost consider it to have been a fad. In comparison to this, the most prevalent terrorism in this day and age is much more enduring. I admit that some of the terrorist organisations of the past still endure to this day, albeit in a watered down version (I.E. the PKK which since 2013 has had a ceasefire agreement with the Turkish Government). The reason why terrorism today is much more enduring, in my opinion, is because it is entrenched and reinforced in religious beliefs, albeit a radical interpretation of those beliefs. Despite it being the youngest of the Abrahamic religions, Salafism is the most rigid and resistant to modernisation in my opinion. Professor Jacques Riflet once said in his book “L’islam dans tous ses états”:

“Le monde arabe ne nous pardonnera jamais les croisades”

2. The Need for an International Definition of Terrorism

The evolution of terrorism towards a greater global and international threat than before meant that any single country alone was not going to be able to defend itself adequately. The fact that more than one country was being targeted and the fact that these terrorist groups had shoots and roots all over the world meant that the only effective and adequate way to fight terrorism was to cooperate more strongly on an international level.

The lynchpin to such international cooperation is the use of a single definition of terrorism. Antonio Cassesse states correctly:

28 It is with trepidation that I use such terms to define the type of terrorism we are confronted with these days, but it cannot be argued that the general threat of terrorism emanates from that direction.
“Hence, however imperfect and incomplete, a common working definition is necessary so that all states concerned may agree on the target of their repressive action: how can states work together for the arrest, detention or extradition of alleged terrorists, if they do not move from the same notion?"\textsuperscript{29}

An international definition is also important because, as Reuven Young mentions: "It shapes states’ understanding of the problem, delimits their responses to it, and helps to distinguish lawful from unlawful responses."\textsuperscript{30}

From as far back as the 1960 the UN has been struggling to create a universal definition of terrorism. Every attempt has failed due to a perceived subjectivity of any such definition and a lack of consensus on what actions should fall under such a definition\textsuperscript{31}. In the wake of the 9/11 attacks, the UN Security Council issued Resolution 1373\textsuperscript{32} mandating its Member States to take a range of actions in to curb terrorist activities and to effectively cooperate with each other. The fact still remained that there was no single universal definition of terrorism upon which the UN Member States could base their actions\textsuperscript{33}. The UN tried to solve this problem with Resolution 1566\textsuperscript{34}, which provided a list of acts that could and should be considered terrorism. Unfortunately the Resolution limits itself by further stating that only those offences as generally accepted as terrorist acts in previous international conventions can be seen as falling under the definition of terrorism as it is described in Resolution 1566\textsuperscript{35}. So it was left to the Member States themselves to each draw up their own terrorism definitions.

This lack of a common definition meant that cooperation on the international level was made more difficult and convoluted as one member state could consider some actions to fall under the definition of terrorism, while another member state might consider the same actions not to. The EU, for example, works with its own definition\textsuperscript{36} of terrorism introduced in the Council framework decision on combating terrorism in 2002\textsuperscript{37} concluded on the same day as the European Arrest Warrant\textsuperscript{38}.


\textsuperscript{33} S., SETTY, “What's in a Name - How Nations Define Terrorism Ten Years after 9/11”, p12.


\textsuperscript{36} Art. 1: Each member state shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organization where committed with the aim of:
- seriously intimidating a population, or
- unduly compelling a Government or international organization to perform or abstain from performing any act, or
Seeing as this thesis is all about the EU’s role in counter-terrorism it is only fair for me to elaborate on the definition it uses.

As explained in the Framework decision, the definition does not regard terrorism as a common type of crime, not even a common type of organised crime. Whereas most other crime definitions disregard the underlying motivations or aims of acts, the EU definition of terrorism actually uses the political motivations as its core criterion to define terrorist acts. 

Nevertheless we are not left in a complete vacuum. According to Antonio Cassesse one can distinguish a number of elements used within definitions of terrorism, throughout numerous international conventions, protocols and national laws, which enjoy general consent. These elements are:

(1) acts normally criminalized under any national penal system, or assistance in the commission of such acts whenever they are performed in times of peace; those acts must be,

(2) intended to provoke a state of terror in the population or to coerce a state or an international organization to take some sort of action, and finally,

(3) politically or ideologically motivated, i.e. are not based on the pursuit of private ends.

The consensus about certain aspects of terrorism or even certain acts being terrorism is a step forward towards better co-operation in the field of counter-terrorism. Nonetheless, it cannot be argued that the absence of a clear definition accepted by all makes things more convoluted than they need to be.

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40 A., CASSESE, “Multifaceted Criminal Notion of Terrorism in International Law”, p937.
III. The International Role of the EU in the Fight against Terrorism

1. A Brief History of EU Initiatives before the Turn of the Century

Before the 9/11 attacks, counter-terrorism policy was mainly conducted through informal co-operation and intergovernmental channels.

Even before the terrorist attacks on the World Trade Center on 11 September 2001 in New York the Council of Europe and the European Community were already discussing and issuing counter-terrorism policy. The hostage taking and massacre during the 1972 Olympic Games in Munich, when 11 members of the Israeli Olympic team were taken hostage and eventually killed along with a German police officer by the Palestinian group Black September, called for action by the European states. They turned to the Council of Europe since it had a much larger membership than the European Community and it held a mandate in security affairs whereas the European Community only had competences in economic affairs. In 1977 the Convention on the Suppression of Terrorism was issued which built further upon an older European Convention on Extradition. The aim of this convention was to abolish the political offence exception on extradition, but sadly enough, the contracting state parties still maintained the possibility to not regard certain crimes as a political offence. This undermined the effectiveness of the extradition procedure in terrorist cases. The European Community tried to remedy this and apply the substance of the Convention on the Suppression of Terrorism to the EC Member States (9 at that time) with the Dublin Convention in 1979. Unfortunately, this last convention failed due to a lack of ratifications.

Of interest are the Petersberg Tasks which were agreed upon at the June 1992 West European Union (WEU) Council of Ministers. They defined the types of military action the EU could take in crisis management operations and included:

- Humanitarian and rescue tasks;
- Peacekeeping tasks;

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43 Council of Europe (1957), ‘European Convention on Extradition’.
• Tasks of combat forces in crisis management, including peacemaking.

After the cold war the Petersberg tasks would be integrated in the ESDP, through the treaty of Amsterdam (The Lisbon treaty would further expand upon these tasks and now fall under art.42 TEU)\textsuperscript{44}.

The most notable EU initiative at the time was the TREVI\textsuperscript{45} working group of 1976, created during the European Council summit of 1st and 2nd December 1975 in Rome, which consisted mostly of a high level meeting of European police chiefs and concerned itself with the threat of terrorism and coherent police cooperation\textsuperscript{46} (discussions held by TREVI would eventually lead to the creation of the European drug unit which in turn would later be redubbed Europol). The Maastricht treaty of 1992 would integrate the TREVI acquis into the third pillar of the European Union.

Another important European endeavour was the Schengen acquis. Though initially not meant specifically for combating terrorism, it provided a very useful tool for this, namely, the Schengen information system (SIS), which compiled a list of people and groups which might pose a danger to the Member States\textsuperscript{47}.

One more notable initiative taken before the tumultuous events of 2001 was the Council recommendation for more cooperation on combating the financing of terrorist groups\textsuperscript{48}.

Counter–terrorism policy did not go much deeper because at the time most EU Member States had a different definition of terrorism and different ways of dealing with it. Some were never even confronted with this issue and thus did not feel as compelled as the others in dealing with terrorism\textsuperscript{49}.

After the terrorist attacks in the beginning of the 21\textsuperscript{st} century the EU would start working on a comprehensive strategy dealing specifically with counter-terrorism\textsuperscript{50} (at the time, terrorism was mostly discussed as a sub-category of broader security strategies such as the Tampere\textsuperscript{51} and The Hague\textsuperscript{52}.

\textsuperscript{44} http://www.eea.europa.eu/csdp/about-csdp/petersberg/index_en.htm.
\textsuperscript{45} D., CASALE, “EU Institutional and legal Counter-terrorism Framework”, p49.
\textsuperscript{46} G., KHANDEKAR, “The EU as a Global Actor in Counter Terrorism”, July 2011, p2.
\textsuperscript{48} Council Recommendation (1999/C 373/01) of 9 December 1999 on cooperation in combating the financing of terrorist groups, OJ C 373/1, 23/12/1999.
\textsuperscript{49} H., BRADY, “Intelligence, emergencies and foreign policy: The EU’s role in counter-terrorism”, London, Centre for European Reform, p1 (Hereinafter shortened to: H., BRADY, “Intelligence, emergencies and foreign policy”).
\textsuperscript{51} This programme called for greater external action, stipulating that all competences and instruments open to the community, especially external competences should be used to further develop the Area of freedom, security and justice.
programmes, although it was always considered one of the key security issues). Although concurrent with the EU counter-terrorism strategy, counter-terrorism would remain one of the key priorities in the field of establishing an area of freedom, security and justice, as is apparent from the Stockholm Programme\textsuperscript{53}.

2. **Initial Response to the 9/11 Attacks**

Though the 9/11 attacks were a great tragedy it provided a positive impetus to the EU’s wish to have a greater role in International politics, not only in the field of economics, but also in politics and defence. Louis R. Golino stated this in one of his texts:

\textit{“in the long-term the events of 11 September should accelerate Europe’s drive to become a unified and cohesive political-military power.”}\textsuperscript{54}

A. **The Stumbling Block Which Was the Three Pillars structure**

Before the EU could come to this, it faced a number of problems. One of these was the fact that it usually took a long time before any action could be taken by the EU (As the EU grows bigger, the danger exists that any decision making procedures will grow too cumbersome and slow to respond to immediate crisis situations). Even then coherent and unified EU action has always been a stumbling block\textsuperscript{55}.

\textsuperscript{52} Emphasis is put on recruitment and financing, prevention, risk analysis, protection of vulnerable infrastructure and consequence management. Furthermore, it states that effective counter-terrorism is only possible through cooperation with third countries and relevant international organisations.

\textsuperscript{53} This programme identifies 2 areas which can be improved, these are combating radicalization and financing of terrorism. Furthermore, point 7 and 7.1 of the programme underline the importance of integrating both the internal and external aspects of security as it is understood that these are inseparable: “The Council recognises that CSDP and many external actions in the area of freedom, security and justice have shared or complementary objectives. CSDP missions also make an important contribution to the Union’s internal security in their efforts to support the fight against serious transnational crime in their host countries and to build respect for the rule of law. The European Council encourages greater co-operation and coherence between the policies in the area of freedom, security and justice and CSDP to further these shared objectives.”

\textsuperscript{54} L.R., Golino, “Europe, the War on Terrorism, and the EU’s International Role”, Brown Journal of World Affairs, Vol. 8, Issue 2 (Winter 2002), p70 (Hereinafter shortened to: L.R., GOLINO, “Europe, the War on Terrorism, and the EU's International Role”).

The biggest problem with a coherent EU response was the split in competences between the national, supranational and intergovernmental. Though national responses were more easily applied, these were inadequate to deal with the problem of international terrorism. Through discussion it became apparent that most policy competences with which to combat international terrorism fell under purview of the European Community. As such the Commission became the main policy maker of that time.\textsuperscript{56}

Since the creation of the EEC, the European Community has been trying to create not only an economic union, but also a political and a defence union. Nonetheless, unto this day, the Member States have always, with particular hard-headedness, resisted this evolution because of the importance the areas of security, foreign and defence have in relation to state sovereignty.\textsuperscript{57} This reluctance is also apparent in the initial unwillingness of Member States to hand over information gathered by their national security institutions to Europol and Eurojust. (Although, today, according to the president of Eurojust Ms. Michèle Coninsx, the Member States have recently started providing more and more information after becoming aware of the added value of Europol and Eurojust. They have access to more information and are thus able to create more adequate and informative policy documents which in turn can be used by Member States in developing their own policies.).

The EU response to the 9/11 attacks was plagued by the way the EU was split into three different pillars each with their own decision making procedures. The difficulty of a coherent and comprehensive EU response came from the fact that all three pillars could be used to implement a number of counter-terrorist initiatives, but none of them could on their own form an all-embracing response to the problem.

Under the first pillar, which was the EC pillar, the areas of competence that could serve as a legal basis for security and peace keeping initiatives, were air and sea transport, trade, external economic and financial programmes and assistance, information security and data protection.\textsuperscript{58}

The second pillar, the common foreign and security policy was the intergovernmental pillar where the Member States retained most of their sovereignty, concerns itself - as the name would suggest - with external relations, mostly in the field of security and defence.

The third and last pillar, being the justice and home affairs pillar, concerned itself mostly with police and judicial cooperation.\textsuperscript{59}

It is apparent from this that all three pillars could provide a basis for certain actions in the field of counter-terrorism; nonetheless, the way they were structured made it almost impossible to develop a

\textsuperscript{56} D., \textsc{Spence}, “International Terrorism”, p76.
\textsuperscript{57} D., \textsc{Spence}, “International Terrorism”, p76.
\textsuperscript{58} D., \textsc{Spence}, “International Terrorism”, p76.
\textsuperscript{59} D., \textsc{Spence}, “International Terrorism”, p76-77.
response that was not piecemeal. Additionally, whereas the initial reaction of the EU Member States following the 9/11 attacks was that of overwhelming support, when the US decided to invade Iraq cracks started to appear between member state policies.\textsuperscript{60} If the EU wanted to become a bigger player on the world stage it needed to try to find a way not only to bring together its disparate competences but also to try and show the rest of the world a common front in the fight against terrorism. A first step in the right direction was the European Security Strategy\textsuperscript{61} adopted in 2003, in which it identified terrorism as a key threat to the EU and to peace\textsuperscript{62}. It also links terrorism to the threats of proliferation of WMD weapons, regional conflicts, organised crime and state failure, meaning that if the EU was serious in taking a more proactive role in suppressing terrorism it would also have to tackle the other threats as they are all interlinked\textsuperscript{63}. Clearly the EU already knew that dealing with the threat of international terrorism only through military mission would not be enough (Furthermore, I would think that any military mission would be vetoed by numerous EU Member States.).

B. Initial Visceral Reaction to the Terrorist Attacks

The EU’s first response to the attacks on the United States was a general and overwhelming outpouring of well wishes, sympathy and condolences. There was also a greater support for US military actions\textsuperscript{64} against the terrorists in the months following the attacks. Although there were a couple of anti-war marches organised in different European countries, the majority of people seemed to endorse the military reprisals\textsuperscript{65}. Besides this, the EU also immediately started shoring up support for the US by opening direct dialogues with other nations as well as by encouraging the ratification of a number of important UN conventions\textsuperscript{66} and UNSC Resolution 1373\textsuperscript{67}.

Nevertheless, as the conflict in Afghanistan intensified and as the public was increasingly confronted with the civilian casualties of the conflict and it became increasingly clear that this war against

\textsuperscript{60} D., SPENCE, “International Terrorism”, p79.


\textsuperscript{62} European Security Strategy, p3.

\textsuperscript{63} European Security Strategy, p5.

\textsuperscript{64} This military action was based on UNSC Resolution 1368.

\textsuperscript{65} L.R., GOLINO, “Europe, the War on Terrorism, and the EU’s International Role”, p62.

\textsuperscript{66} D., SPENCE, “International Terrorism”, p81.

\textsuperscript{67} This resolution provides a whole list of priority areas in the fight against terrorism. It included: The prevention and suppression of financing of terrorism; Dealing with the problem of radicalisation and recruitment; Improving closer co-operation between countries in the field of information exchange; Criminalising all acts connected to terrorism; Improving border control and ensuring that terrorist may not find any safe havens; Improve police and judicial co-operation and assistance; Improve bilateral and multilateral co-operation in the field of counter-terrorism especially by ratifying and implementing all conventions and protocols relevant to counter-terrorism (Today, there are 14 conventions and protocols which are relevant to counter-terrorism); Dealing with the illegal traffic in small arms, explosives or sensitive materials and WMDs.
terrorism was not going to end quickly, support for military action started to erode in EU Member States. Even in the UK, at that time considered to be one of the most loyal US allies, public sentiment was turning against further military action. Even with public sentiment taking a more anti-war sentiment, EU leaders and nations kept professing their support of US military action by providing the US with over-flight rights, access to military bases and logistical support.

In addition to the purely technical assistance given to US military troops many EU nations also sent help in the way of military personnel (some of this help was even refused by the US). The United Kingdom for example provided reconnaissance planes, submarines for refuelling and by the end of October was planning on sending 4200 ground troops to the conflict. The UK was only one of the EU Member States to send help in the form of military personnel, vehicles and ordnance (some of the more powerful Member States of the EU such as France, Germany and Italy also sent military aid). All this in spite of the usual adverse sentiment of EU nations towards military action. This sentiment is understandable when you look at the history of the European continent and the failure that was the ethnic massacre following the disintegration of Yugoslavia.

C. The EU Starts Developing its Own Comprehensive Policy on Counter-Terrorism

To develop its own policy response the EU was confronted with its three pillar structure. To provide a co-ordinated response it needed to bring together instruments from all three pillars. This was because, as was mentioned above, all three pillars provided different ways to deal with terrorist attacks and none of them could individually provide an all-encompassing solution to the problem. The resulting EU action plan, which was presented at the Extraordinary Council meeting of 21 September 2001, consisted of: the implementation of UNSC Resolution 1373; the execution of orders to freeze property or evidence; introducing new legislation that would expedite and improve police and judicial co-operation as well as promoting the principle of mutual recognition; the introduction of anti-
terrorism clauses in agreements with third countries; working on its own terrorist blacklist; stepping up co-operation with the US in the field of counter-terrorism; updating the SIS; activities to combat bio-terrorism; and co-operation with external partners.

The JHA Council met for a regular meeting on 27 and 28 September 2001, at which the Council Secretariat presented the ‘Anti-terrorism Roadmap’\(^75\). This roadmap structured the measures and would be crucial in the subsequent definition of the EU’s overall counter-terrorism effort with the JHA Council as leading institution\(^76\). Unfortunately, the roadmap, although frequently updated, would end up disappearing in 2003 due to it being too ambitious and the Union feeling it had overstretched itself\(^77\).

On 27 December 2001, the Council adopted Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, which includes a ‘terrorist list’: a list of persons, groups and entities that are considered terrorist (groups)\(^78\).

A number of specific counter-terrorism measures the EU envisaged early on were: bringing terrorists to justice; denying terrorists financial and material resources; promoting and assisting third countries with their counter-terrorist programmes; and identifying the political and social issues terrorists draw upon for strength and dealing with these\(^79\).

We did not have to wait long for the EU to take concrete action as both the Framework Decision on the European arrest warrant and the Framework Decision on combating terrorism (which included an EU definition of terrorist acts) were adopted in 2002. These two legal instruments were quickly followed by a legal framework for closer police cooperation within EU borders through joint investigation teams\(^80\). The EU also quickly worked on strengthening its external borders (FRONTEX\(^81\) being the latest evolution of this train of thought) as well as allowing security agencies to access the SIS II. The EU also increased the ability of Europol by creating a special counter-terrorism task force within the institution\(^82\).

\(^79\) D., SPENCE, “International Terrorism”, p82.
\(^81\) Although primarily targeting the problem of illegal immigration, the fact remains that it can provide help in counter-terrorism. Especially if it can access SIS data.
\(^82\) D., SPENCE, “International Terrorism”, p83.
Even though this all largely pertains to internal security, this also has an impact on the external security of third countries, as it makes it less certain that terrorism groups may make use of the EU as a base for further international action. A secure Europe enhances the security of its partners.

Other EU actions that were largely meant to increase internal security but had the added benefit of enhancing their cooperation with third countries, were such as the increase in air transport security and the agreements pertaining to that security concluded with the US and Canada. Europol even went so far as to conclude a co-operation agreement with the US on personal data exchange. This co-operation between the EU and the US has unfortunately been plagued by large setbacks (This will be discussed more thoroughly in chapter IV).

Besides internal security, the EU response to terrorism also put a strong emphasis on tackling the financial and material resources of terrorists. The EU encouraged the ratification of all relevant conventions (such as the United Nations Convention for the Suppression of the Financing of Terrorism) and supported the implementation of UN resolutions - by its own member states and third countries - as well as the recommendations stipulated by the Financial Action Task Force (FATF, which is part of the OECD), which, since 2001, has also been targeting terrorism financing. In this area the EU developed a number of important tools. These were the Council Framework Decision on the execution of orders freezing property or evidence of 22 July 2003 and the Third Money Laundering Directive, which would explicitly include the financing of terrorism within its scope at a later date.

The EU action plan further envisaged a greater role for the EU in tackling the root causes of terrorism, such as social, economic and political instability within certain countries, some of which could be considered weak states. David Spence surmises this rather well:

“Terrorist networks have deep roots in weak states and draw social and political capital from societies where there is unresolved conflict or social upheaval and economic stagnation.”

84 D., SPENCE, “International Terrorism”, p 85-86.
87 Members have yet to ratify all of the FATF recommendations.
88 http://www.fatf-gafi.org/
A good example of such a country is Afghanistan, which was the home country of Al Qaida, whose acts plunged the world into a decade-long battle against terrorism still raging to this day.

As such the EU also put emphasis on identifying those states where the population has a greater risk of becoming susceptible to terrorist propaganda and providing these states with the tools, the resources and, more importantly, the knowledge to tackle this problem before it can get any worse. The provision of assistance to third countries was not alien to the EU as it was something the EU had always been doing, just never specifically with counter-terrorism as a goal.

D. Europe Itself Becomes a Direct Victim of Terrorist Attacks

In the following years the EU would personally be confronted by the atrocities of terrorist attacks when both Madrid and London became the victims of the next wave of bombings. Following up on the Bombings in Madrid, a ‘Declaration on Combating Terrorism’ was passed by the European Council on 25 March. It recalled various aspects of the EU’s Anti-terrorism Roadmap such as the European Arrest Warrant and aimed in general for improved co-operation between the member states, Europol and Eurojust. Concurrently, an Austrian idea for an ‘EU CIA’ was proposed at the JHA Council of February 2004, but was dropped as it was deemed unrealistic. It was replaced by the proposal of Javier Solana to strengthen the EU’s Situation Centre (SITCEN) which had originally been formed to predict security crises.

On the same date the position of Counter-terrorism Co-ordinator would be created. The idea was to give this person the possibility to oversee all initiatives being taken in the field of counter-terrorism so that a greater coherence could be reached in this area. Gijs De Vries was appointed as first EU Counter-terrorism Co-ordinator.

This all led to a revision of the Action Plan on Combating Terrorism at the European Council of 1 June 2004. It included some of the outstanding measures of the old counter-terrorism roadmap, new

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93 Council of the European Union (29/03/2004a), ‘Declaration on combating terrorism’, 7906/04,
94 Council of the European Union (09/03/2004), ‘2571st Council meeting - General Affairs’, 7380/04,
p 77.
96 Summary Transcript of Joint Press Briefing: Javier Solana, EU High Representative for the CFSP, Gijs de VRIES, Counter-terrorism Co-ordinator, Brussels, 30 March 2004, S0090/04,
97 Council of the European Union (01/06/2004a), ‘EU Plan of Action on Combating Terrorism’, 10010/04,
items from the Declaration on Combating Terrorism and the related proposals from the Commission98. On a separate track, a German initiative for a separate intergovernmental Treaty on increased information-sharing and police cooperation outside the EU framework resulted in the Treaty of Prüm of 27 May 2005 between Belgium, the Netherlands, Luxembourg, Germany, Austria and Spain99. These states agreed upon the exchange of DNA, biometric and vehicle data (precisely those issues that had been raised by the Commission and referred to in the Declaration on Combating Terrorism). The Prüm acqui was later absorbed by the EU treaties100.

Of interest is the adoption of a protocol by the Council of Europe amending the Convention on the suppression of terrorism of 1977101. On 16 May 2005 the Council of Europe would even conclude a new convention: the ‘Convention on the prevention of terrorism’102.

Finally, on the 22nd of November 2005, the EU would develop a specific counter-terrorism strategy103. This new strategy document would lead to a new revision of the EU action plan on counter-terrorism, rather than a replacement of the old action plan as was initially planned. I choose to discuss this strategy document more in-depth than previous EU documents because most of the EU initiatives that will be taken afterwards will be based on the four strand approach of the counter-terrorism strategy document.

3. EU Counter-Terrorism Strategy

The EU counter-terrorism strategy would identify four different working areas for the fight against terrorism. These would be: Prevent, Protect, Pursue and Respond.

The “prevent” strand targets ways in which radicalisation and recruitment can be dealt with. The “protect” strand looks at ways to protect citizens and infrastructure, with a focus on securitisation of borders, transport and critical infrastructure. The third component is “pursue” and concerns the pursuit and investigation of terrorists both within the EU as well as globally and to make it as difficult

102 Council of Europe Convention of 16 May 2005 on the prevention of terrorism.
for them to escape from justice (also looking at ways to tackle them financially). The last aspect is the “respond” strand of the strategy and concerns ways in which to deal with the aftermath of terrorist attacks and minimising the consequences of such incidents.

This document furthermore considers the EU member states as being the principal actors in the fight against terrorism but sees an important spot for the EU to further strengthen individual member state action in this field. It sees four ways in which it can have an added value, namely: strengthening national capabilities, facilitating European cooperation, developing collective capability and promoting international partnership (It is clear from this that the EU sees an opportunity to take up an international role in the fight against terrorism).

The strategy document starts off by acknowledging it has a responsibility to contribute to global security and building a safer world. Additionally it recognises that terrorism is an issue that crosses borders and the only way to adequately deal with it is to cooperate with third countries and to offer assistance to those countries in need. Central to the EU’s counter-terrorism role at the international level is the promotion of good governance and the rule of law.

Under the prevention strand, as mentioned above, the EU sees a co-ordination and subsidiary role for itself in the creation of effective programmes to combat radicalisation. The document also states that although tackling radicalisation starts within EU members states themselves, radicalisation itself is an international phenomenon, and as such, the EU can help its third country partners in dealing with this issue, be it through co-operation and assistance programmes or through the work of international organisations. One of the main ways in preventing further radicalisation is through the promotion of good governance, democracy and the rule of law as well as by eliminating discrimination and inequalities (these last two issues can be considered to be one of the root causes of further radicalisation).

As was the case under the prevention strand, the EU also recognises the fact that most competences falling under the protection strand of the strategy fall under member state responsibility. It is first and foremost their responsibility to reduce the vulnerability and impact of attacks on key infrastructures. However, the EU area is characterised by open internal borders, shared infrastructures, transport and external borders. It is in this area that the EU plays a role. Any action taken at this level will necessitate a greater degree of co-operation, which can more easily be enabled through the EU. Systems such as the VIS(VISA Information System) and the SIS II (Schengen Information System) have dual legal basis, formed by: Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen
will help in the more efficient access and exchange of information, which in turn will provide greater protection at our external borders. SIS II provides two important possibilities to tackling terrorism. Art. 24 of Regulation (EC) No 1987/2006\textsuperscript{108}, makes it possible to issue an alert (maximum 10 years) on refusals on entry or stay, based on a threat to public policy or public security or to national security. The second opportunity is presented by art. 36§2, b of the JHA Council Decision of 12 June 2007\textsuperscript{109}, which makes it possible to track those same people (those that were signalled on the basis of art. 24 of Regulation (EC) No 1987/2006) and submit them to an in-depth or discreet observation and control. Both of these systems have international ramifications as they impact anyone entering and leaving the EU via its external borders. As such Dialogue and co-operation with important third country partners is therefore of great consequence. Securitisation of transport is significant in providing adequate protection, and seeing as transport goes across borders (especially marine and aerial transport), it is in everyone’s best interest to work together in this field (An illustration of this is the on-going discussion on the adoption of an EU PNR, following a re-submission by the Commission, in 2011, of its 2007 proposal for an EU PNR\textsuperscript{110}).

A second area where international co-operation is necessary to provide robust protection is the non-proliferation of CBRN materials and small arms. Some terrorist threats emanate from third countries whose security forces are inadequate to deal with the growing threat, so any technical assistance the EU and its international partners can provide will and should contribute to the providing security for the EU as a whole\textsuperscript{111}.

The **third strand** of the strategy, concerns **pursuit**. This includes disrupting terrorist activities, pursuing them and bringing them to justice, be they within EU borders or abroad. To do this the EU strongly urges Member States to make greater use of Europol and Eurojust to enhance their police and judicial co-operation. An important aspect of the pursuit strand is the fact that for greater co-operation in this field it is imperative that all relevant partners are working from the same basic understanding of what are the existing terrorist threats. The joint situation centre is ideally placed for the demystification of such threats as it receives, compiles and analyses information received from Member States and Europol. This co-operation should not end at our external borders, as most terrorist threats originate outside of them and even if they do emanate from within, they might target third


\textsuperscript{110} COM(2011) 32 final, Proposal for a Directive of the European parliament and of the council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

\textsuperscript{111} The EU Counter-terrorism Strategy, p11.
countries (in such cases the EU would only be used as a base of operations). To efficiently combat such threats international co-operation is necessary. The strategy document envisages closer co-operation within the UN framework, such as the creation of a UN document on assistance in the fight against terrorism, and through agreements with third countries, for example for the exchange of information or capacity building. Tackling the financing of terrorism also falls under this leg of the strategy as it concerns ways in which terrorism channels can be interfered with.

Finally comes the respond strand which deals with the aftermath of a successful terrorist attack. In principle it is the Member States’ responsibility to respond to any such attack on its territory. However, the EU envisages situations where such attacks exceed the capabilities of a single member state or affect multiple Member States due to the cross border characteristic of the attack. In such cases it is imperative for a greater and more efficient response to be able to co-ordinate member state action through the EU institutions, especially in light of the solidarity clause of the Lisbon treaty. EU co-operation takes a more international slant when you think about the many EU civilians working abroad. In a situation where terrorist attacks are organised abroad and where EU civilians have fallen victim, the EU has a responsibility to send assistance to the area. For this assistance to be as good as possible, it is crucial to conclude agreements with third countries (not only the country where the attack took place, but with those countries sending help as well) so that any help or assistance can be given more swiftly and in full.

4. CTC Implementation Discussions on the EU Counter-terrorism Strategy

Since its inception and the creation of the Counter-Terrorist Co-ordinator (CTC), the CTC has reported bi-annually on the implementation and the further evolution of the EU counter-terrorism strategy.

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113 The EU Counter-terrorism Strategy, p12-15.
114 Art. 222 TFEU: The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:
(a) - prevent the terrorist threat in the territory of the Member States;
- protect democratic institutions and the civilian population from any terrorist attack;
- assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.
2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.
115 The EU Counter-terrorism Strategy, p15-17.
A. Coherence

Coherence in EU action has always been one of the recurring issues of greater EU influence. The Treaty of Lisbon has gone a way to enhance the coherence and consistency, however, co-ordination problems still remain. This is apparent from numerous EU documents wherein the need for greater coherence and consistency is being is repeatedly stressed.

On the topic of greater coherence between internal and external aspects are the draft council conclusions on enhancing the links between internal and external aspects of counter-terrorism of 6 June 2011116.

In this document, the Council recognises that to reach the goals it has put forward in the field of counter-terrorism (keeping in mind its obligations agreed upon in numerous strategy documents such as European Union Counter-Terrorism Strategy and the EU Action Plan on combating terrorism, the Internal Security Strategy for the European Union "Towards a European Security Model", the Internal Security Strategy, as well as the UN Global CT Strategy of 2006117) there must be effective co-ordination between all aspects and actors active in the field of counter-terrorism118.

The Council also acknowledges the fact that due to the ease of global communications and travel access, the internal and external aspects of the threat and counter-terrorism measures cannot be separated from each other119. Both tracks of counter-terrorism must be properly integrated to provide for the best possible consistency in EU actions in the field of counter-terrorism.

From all this, it is apparent that the EU is aware of the complexity of the threat and what is necessary for the EU to have a more effective impact in this policy area.

In his discussion papers and reports the CTC has also repeatedly stressed the importance of a greater coherence between, not only, internal and external security but also security and the broader development programmes supported by the EU120.

An interesting document pertaining to the interwoven nature of security is the Strategy for the External Dimension of JHA: Global Freedom, Security and Justice of 30 November 2005 by the presidency. In this document three issues - terrorism, organised crime and migration flows - are identified as being

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118 Draft Council Conclusions on enhancing external/internal links, p4.
119 Draft Council Conclusions on enhancing external/internal links, p4.
challenges which the EU, on its own, cannot solve. The document also mentions the inextricable link between AFSJ, CFSP, CSDP (former ESDP) and EU development policies. It states that conflict, instability and poverty can only be reduced if weak governance and state failure in third countries are handled properly.

The document on the strategy for the external dimension of the JHA also refers to the co-dependency of its JHA competences and its economic and trade competences. It asserts that in the globalised world of today, working together with third countries on issues falling under the JHA (such as counter-terrorism) supports the EU’s broader economic and trade policy. Stable countries and secure regions are more attractive for economic development and international commercial links. The opposite would only detract economic investment.

On the link between development and security the CTC mentions that you cannot have the one without the other. Development programmes organised by the EU in key third countries can hardly be effective when conflict and violence rule these areas. As such programmes on capacity building envisaged under the counter-terrorism strategy will be complementary towards greater development. Concurrently, as prevention is one of the goals of the counter-terrorism strategy, development programmes funded by the EU in third countries helps in dealing with some of the root causes of radicalisation and recruitment.

Furthermore the CTC stresses that all of these programmes should be grounded in effective human rights principles and the rule of law. Not doing so risks exacerbating the problem. The CTC also notes that in some countries human rights and rule of law violations by government institutions in the fight against terrorism contribute to greater radicalisation. Moreover, seeing the high human rights and rule of law obligations the EU has, it is imperative that the EU encourages third country partners in the fight against terrorism also adhere to strict rules so that there are no additional road blocks in the fields of police and judicial co-operation.

To improve such co-operation the EU must not only endorse UN activities\textsuperscript{125} but also encourage third countries through bilateral agreements.

Incidentally, when discussing the pursuit strand, the role both Europol and IntCen play makes me question the coherence of EU action. In my opinion both institutions play a similar role, i.e. gathering information, analysing it, and finally creating in-depth policy documents for the Member States. Therefore, one might wonder whether this does not lead to a certain degree of duplication of work and as such runs counter to the EU goal of greater coherence and efficiency.

After sifting through numerous EU documents, discussion papers, reports, council conclusions and policy papers I would like to vent my opinion, as someone who is not intimately informed of all the goings on within the EU. The EU has repeatedly stressed the importance of closer co-ordination between its different competences on numerous occasions, going as far back as the EU’s security strategy. Yet, when I read the EU CTC’s reports and discussion papers, in which the same issues of coherence, consistency and co-ordination keep on cropping up, it seems like the EU has thus far taken minimal steps in optimising its performances in the field of counter-terrorism. Even the Lisbon treaty, which abolished the three pillar structure, does not seem to have been the solution to this as it has not truly abolished all the differences.

This creates an image of an EU that is so complex that it is unable to implement its own suggestions. This in turn detracts from the EU’s will to have a bigger part of the international counter-terrorism policy.

\textbf{B. Combating Radicalisation and Recruitment}

To underline the importance of this track of the counter-terrorism strategy, the EU developed a separate strategy to deal with radicalisation and recruitment\textsuperscript{126} which was adopted on the 24 November 2005, just two days after the adoption of the Counter-terrorism strategy.

\textsuperscript{125} Which it has done repeatedly, as almost all EU documents I have come across reiterate the central position the UN has in the international counter-terrorism policy, and stresses the importance of implementing all UN resolution and conventions relevant to counter-terrorism.

\textsuperscript{126} Council of the European Union (24/11/2005), The European Union Strategy for Combating Radicalisation and Recruitment to Terrorism, 14781/1/05 REV 1, \url{http://register.consilium.europa.eu/pdf/en/05/st14/st14781-re01_en05.pdf} (Hereinafter shortened to: EU Counter Radicalisation and Recruitment strategy).
i) The European Union Strategy for Combating Radicalisation and Recruitment to Terrorism

Initially the EU planned on only focusing on radicalisation and recruitment related to the Al Qaeda terrorist threat. The strategy espouses three main points of action, all the while promoting respect for fundamental rights:

- Disrupt the activities of the networks and individuals who draw people into terrorism:
  In the globalised world of today, due to the ease of travel and communications, it is very easy for people to come into contact with more radical ideas. One only has to look at the problem certain European countries face with young adults going to Syria and fighting for a ‘noble cause’. The danger here is that these freedom fighters will come back having been radicalised by the conflict. Furthermore the internet can form a further gateway to radicalisation as it provides a means for indoctrination to happen from a distance. As such the first task is to identify the means through which such indoctrination takes place and to nip the problem in the bud before it starts growing like a weed. Those actively spreading such radical ideas must be monitored closely and their actions must be limited. The EU must also strive to make it as difficult as possible for individuals to undergo terrorist training. To do this effectively not only must this be done within the EU but also in those countries as those where actual training takes place. In light of this the EU must open dialogue with third countries and provide them with the knowledge and assistance to tackle the problem.

- Ensure that voices of mainstream opinion prevail over those of extremism:
  The essence of propaganda is that it distorts truths in a way that supports personal beliefs. The most insidious of propagandas is that which supports violent action as the only solution to solving their problems. It not only gives a reason but it also provides a justification for their actions. To counter this, the EU must foster cross cultural dialogue and debate so that more moderate voices of society can be heard and so greater understanding of each other’s beliefs may be gained. This must be done both on a national level but also on a global level.

- Promote yet more vigorously security, justice, democracy and opportunity for all:
  The only way to tackle the problem of radicalisation and recruitment as effectively as possible is to identify the underlying issues. This Strategy document enumerates some environments which can play a role in facilitating radicalisation: states moving from autocratic control via inadequate reform to partial democracy; rapid but unmanaged modernisation; and lack of political and economic prospects, unresolved international and domestic strife; and inadequate and inappropriate education or cultural opportunities for young people. The strategy

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127 EU Counter Radicalisation and Recruitment strategy, p3.
128 EU Counter Radicalisation and Recruitment strategy, p3.
129 EU Counter Radicalisation and Recruitment strategy, p4.
acknowledges that these structural problems must be dealt with both within the EU as outside its borders\textsuperscript{130}.

ii) Implementation of the Strategy for Combating Radicalisation and Recruitment

In his implementation report of 2007\textsuperscript{131}, the CTC, took stock of a number initiatives taken by the EU in combating radicalisation and recruitment. Of interest are: a programme (with each member state having a specific task) initiated in 2006 to provide counter-terrorism technical assistance to Morocco and Algeria; the will to include radicalisation and recruitment in future technical assistance programmes with Indonesia\textsuperscript{132}; a plan by the European Commission to develop a strategy on culture, with cross-cultural dialogue, internally as well as externally, being one of the main policy objectives\textsuperscript{133}; the continuing encouragement of partners in ratifying and implementing 16 conventions and protocols relevant to counter-terrorism, as well as carrying out the provisions of the UN’s global counter-terrorism strategy\textsuperscript{134}; two projects, agreed by COTER, the first a dialogue, between numerous different authorities and actors in the field, on ways to deal with terrorism and one concerning finding an alternative answer to extremism and radicalisation\textsuperscript{135}; numerous cross-cultural dialogues, ranging from the Euro-Mediterranean partnership to the ASEM (Asia-Europe Meeting) interfaith dialogue\textsuperscript{136}, developing an non emotive lexicon so that any communication by the EU on the subject does not further exacerbate regional and belief sensitivities; focusing on better education in assistance programmes, organised in third countries, stressing the importance of understanding, mutual respect, human dignity and democratic values\textsuperscript{137}. I have only highlighted some of the EU initiatives which, to my understanding, have an international effect. The CTC report included many more programmes and plans, most of which dealt with the internal aspect of the issue.

However, according to the latest report 23 May 2012\textsuperscript{138} by the CTC, the EU has not done enough under its ‘prevent’ thread in third countries whose security is important to the EU. The CTC mentions that Mauritania is the only country in the Sahel region where counter radicalisation programmes are being developed, and wonders why this is so when the ‘prevent’ strand is one of the more important goals of the counter-terrorism strategy.

\textsuperscript{130} EU Counter Radicalisation and Recruitment strategy, p4.
\textsuperscript{132} EU Counter Radicalisation and Recruitment strategy - Implementation Report, p5.
\textsuperscript{133} EU Counter Radicalisation and Recruitment strategy - Implementation Report, p8.
\textsuperscript{134} EU Counter Radicalisation and Recruitment strategy - Implementation Report, p12.
\textsuperscript{135} EU Counter Radicalisation and Recruitment strategy - Implementation Report, p5.
\textsuperscript{136} EU Counter Radicalisation and Recruitment strategy - Implementation Report, p7.
\textsuperscript{137} EU Counter Radicalisation and Recruitment strategy - Implementation Report, p15.
\textsuperscript{138} 23 May 2012 CT Discussion paper, p7.
The CTC calls for greater effectiveness through better integration of the development and security programmes and policies. As an example of development programmes which have an impact on radicalisation and recruitment the CTC points towards a vocational training project in Pakistan. The programme aims at improving the socio-economic situation of the Punjab area, creating jobs and assuaging poverty. It has been reported that this programme has had a definite impact in tackling radicalisation in the area. The CTC is not advocating that development policy should be shoehorned into an instrument in the fight against terrorism, however, as it has been proven in a number of areas (as was the case for the previously mentioned above) it can help in dealing with a number of the underlying problems of radicalisation and recruitment. This interlinked relation between development and security is also shared by the Commission. In its agenda for change document the commission says:

“The EU must intensify its joined-up approach to security and poverty, where necessary adapting its legal bases and procedures. The EU's development, foreign and security policy initiatives should be linked so as to create a more coherent approach to peace, state-building, poverty reduction and the underlying causes of conflict.”

However, just having development programmes is not enough in dealing with radicalisation as a whole. Targeted counter-terrorism initiatives/programmes are also necessary. These mostly consist of capacity building programmes which for example train local security forces in better dealing with radicalisation. Yet the way in which radicalisation takes place is greatly influenced by the local and geographical predispositions. As such there is not a one size fits all solution to dealing with this issue. The CTC supports the work of the Instrument for Stability (IFS), which provides a flexible means of co-operation with civil societies and local governments in the field of counter-terrorism and which is made explicitly to fund capacity building initiatives (although the amount of money which it receives is not that significant).

The CTC opines that the first thing the EU has to do is to define a strategic framework within which both development programmes and specific counter-terrorist initiatives have a co-operative role and how these can help in dealing with radicalisation. Furthermore, to make sure that any programmes/initiatives developed are a fit to the local subtleties, the CTC encourages the EU to launch field studies. With the help of such studies the EU will more easily find out what the underlying problems might be, who the most affected are and also which local actors might be of help in dealing with the problem. On the basis of all this, the EU can then more precisely tailor its initiatives/programmes to the needs of these specific regions. In addition to all this, the CTC urges greater co-operation with civil societies, both those in the EU with ties to these third countries and

140 23 May 2012 CT Discussion paper, p9.
those operating in those specific regions. Co-operation with such organisations will lead to better tailoring of initiatives as they might have a greater understanding of the underlying intricacies that course through the relevant localities.\(^{141}\)

The CTC also finds it imperative that the EU works closely together with initiatives taken by individual Member States so as to not only prevent redundant effort but also to be able to have a greater impact. In line with this is to make sure that any efforts undertaken by the EU are taken with the full support of the relevant country.\(^{142}\) I would also like to add to this that to have an even greater impact on radicalisation it would be interesting to see what other third countries are planning in the same geographical areas and which also deal with capacity building and development. If for example both the EU and the US plan on starting up initiatives in the same area and both have as goal to tackle radicalisation it would only be logical for both world powers to discuss beforehand what their specific plans so that the issue may be dealt with in the most efficient way possible.

On the 6th and 7th of June, a Justice and Home affairs Council Meeting was held.\(^{143}\) In the Council conclusions, the Council acknowledges that terrorism remains an active threat to international peace and security and that the trends in terrorist attacks as well as radicalisation are not static but evolving (see the more frequent appearance of lone wolf terrorist attacks, such as the one in Woolwich, where two men killed a British soldier in retaliation for Muslim deaths abroad\(^{144}\)). The conclusion again underlined, that most of the competences in this area lie with the Member States, but that the EU can provide a framework for the sharing of best practices. At this meeting the JHA council called for an update to the EU strategy for combating radicalisation and recruitment to terrorism. It also encouraged the European Commission to develop concrete measures on ways to counter radicalisation and violent extremism.

If I can be so bold, I would like to express some of my thoughts on the EU’s role in this specific track. I have been confronted with but I get the feeling that most of the actions organised in this field amount to nothing more than dialogue and that only rarely do we see concrete measures being taken to actually resolve the underlying problems of radicalisation. It is because of those undercurrents that radical extremist ideas manage to take root so effectively, which in turn reinforces those ideals.

Additionally, although the EU says that its main role is the co-ordination of member state activities so that - taken as a whole - the EU can a have a greater impact on the problem, I find that we have ended up with Member States each acting individually and only occasionally looking at what others are

\(^{141}\) 23 May 2012 CT Discussion paper, p9.
\(^{142}\) 23 May 2012 CT Discussion paper, p9.
\(^{144}\) Press Article, Woolwich killing: meat cleaver, knife and jihadist claims filmed on mobile, http://www.theguardian.com/uk/2013/may/22/woolwich-attack-cleaver-knife-jihadist
doing in the area and working together. This not only leads to a loss of efficiency, but also to an image of Europe moving in different directions.

Finally I find it rather strange that hardly any mention is made of working towards greater co-operation with third country partners that have also established numerous counter radicalisation and recruitment initiatives. Would it not be in everyone’s best interest for the EU to co-ordinate its own initiatives with those of Russia or other international organisations that are active in this field? I feel slightly strengthened in my opinion because the CTC has alluded to this as well in the discussion paper of 23 May 2012.

C. Development and Security, Inter-Linkage of Policies

The idea to challenge counter-terrorism not only through specific instruments but also through broader development policy has also existed within the Organisation for Economic Co-operation and Development (OECD) and as early as 2003. This is when the OECD published a document entitled ‘A Development Co-operation Lens on Terrorism Prevention’¹⁴⁵. In its foreword the Development Assistance Committee (DAC) states:

“Painful experience, and the cost and difficulty of economic and political reconstruction show that preventing instability and violent conflict brings enormous benefit to human life, social and political stability, governance of institutions, poverty reduction and growth.”

As the DAC considers terrorism to be a type of violent conflict any initiative that tackles and tries to end this violent conflict will be a step forward in greater development policy¹⁴⁶.

In this document the DAC takes a look at how development initiatives and programmes might help in removing the support terrorists enjoy. Development plays an important role in removing those circumstances on which terrorists feed. The DAC recognises that many of the conditions that allow terrorists to thrive, to find new recruits, to create safe havens outside the law, already fall under the purview of development co-operation. Any initiative taken in this field will put a dent in terrorist operations. Not only does this mean that donors (those that are funding some of the OECD development co-operation programmes) would continue with already underway initiatives, but also that these programmes would be calibrated for a greater integration of conflict prevention, more specifically tackling the underlying problems which lead to acceptance of terrorism. It would also

¹⁴⁶ DAC, “Development Co-operation Lens on Terrorism Prevention: Key entry points for Action”, p11.
mean that any new approaches being developed will have to take into consideration those programmes underway so as to be able to provide funds most efficiently. According to the DAC development co-operation can provide greater help to:\footnote{DAC, “Development Co-operation Lens on Terrorism Prevention: Key entry points for Action”, p12.}

(1) Support structural stability:\footnote{DAC, “Development Co-operation Lens on Terrorism Prevention: Key entry points for Action”, p12.}

Bolstering long term stability means providing support to programmes which foster poverty reduction; respect for human rights and the rule of law; sound political development; inclusive globalisation; peace; environmental sustainability; and economic and social well-being. This can only be done by taking a closer look and analysing the under currents which undermine this stability and which support, encourage and strengthen terrorist activity.

(2) Dissuade disaffected groups from embracing terrorism:\footnote{DAC, “Development Co-operation Lens on Terrorism Prevention: Key entry points for Action”, p12.}

Such groups must be made aware of alternative ways of showing their dissatisfaction with a certain system as well as be shown what the possible ramifications might be if they opted for a more violent option. Furthermore, they must be made aware of the importance of human rights and dignity, both theirs and others. This must be communicated in a way that is as broad as possible, through media and public debate. On top of this, initiatives may be taken to promote understanding and acceptance by giving a voice to the different strata of society as well as by encouraging productive dialogue between different types of faith and belief. The media play a big role in this, and as such programmes that try to improve the way the media works must be realised. The problem of disenfranchised youths must be tackled as the DAC notes from research that terrorist groups find a larger pool of recruitments among poorly educated men aged between 14 and 30, with very little employment prospects. To do this the DAC provides a number of ways through which this issue may be dealt with, namely by improving the quality of education, creating dynamic employment structures and schemes for youths, teaching them how to mesh together both traditional values and those ideas brought on by modernisation. Dissuasion of the disaffected can also be strengthened by attacking poverty and implementing poverty reducing efforts.

(3) Deny groups or individuals the means to carry out acts of terrorism:\footnote{DAC, “Development Co-operation Lens on Terrorism Prevention: Key entry points for Action”, p16.}

This would include strengthening political governance and promoting the rule of law and democracy, especially in those states which are considered to be failing or have outright failed (including providing support systems to legal, judicial and law enforcement issues...
dealing with international terrorism), as well as improving the security system as part of
governance and public sector reform.

(4) Sustain coherent, broad-based international co-operation in the struggle against
terrorism\(^{151}\):

Stress that Globalisation and modernisation are not diametrically opposed traditional
values and recognise that development co-operation plays a key role in understanding and
responding to the factors associated with the support for terrorism. Key to all this is that
there is consistency and coherence to the different development policies and initiatives.
The DAC notes that any such initiative that is poorly thought out and creates a feeling of
inequality between different groups of society might have the opposite effect.

On the basis of this the CTC, in his 2012 report on the counter-terrorism strategy, in my opinion,
correctly presupposes that **official development assistance (ODA)** may be used to support counter-
terrorism initiatives, especially those falling under the ‘prevent’ strand, as many of the actions
envisaged under this umbrella also fall under the ODA, as described in the DAC document discussed
above.

Moreover, the CTC mentions that development projects may also include aspects of security and more
specifically counter-terrorism, referring to 2 different cases\(^{152,153}\) in which it is apparent that the treaty
does not include a provision that prohibits this. Another point in favour is the fact that the AMISOM
mission is being funded by the **European Development Fund (EDF)**\(^{154}\)

The CTC encourages the EU to make greater use of the **Development Co-operation, the Pre-
Accession and the European Neighbourhood Policy Instruments**\(^{155}\) (all three of which are
development instruments) as tools for enhancing counter-terrorism capacity in third countries. He
laments the fact that none of these refers to counter-terrorism as one its goals in their development-
security matrix. The closest any of these instruments has come to explicitly referring to terrorism was

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\(^{151}\) DAC, “Development Co-operation Lens on Terrorism Prevention: Key entry points for Action”, p17.

\(^{152}\) Judgment of the Court (Grand Chamber), Case C-403-05, European Parliament v Commission of the
European Communities [2007]; Here, the European court of justice rejected a development programme because
the member states had excluded a provision on counter-terrorism as one of the objectives of the co-operation.

\(^{153}\) Judgment of the Court (Grand Chamber), Case C-91-05, Commission of the European Communities v
Council of the European Union [2008]; Here, the court ruled that the rights of the commission had been
infringed upon because the prevention of small arms could be dealt with under the community development
competence.

\(^{154}\) 23 May 2012 CT Discussion paper, p14.

\(^{155}\) The Strategy for the external dimension of the JHA, also made mention of both the Pre-accession and the
European neighbourhood instruments as vessels for the JHA’s external aspects.
the European Neighbourhood Partnership Instrument, in its previous draft (in the newest draft the mention of terrorism has disappeared)\(^{156}\).

From all this I can only surmise that development co-operation is a valid way through which the EU may take up a more global role in the fight against terrorism. Granted, not all actions that fall under the counter-terrorism strategy will be an option, but most of the initiatives and programmes which fall under the ‘prevent’ objective can be reached through development co-operation. Additionally the EU has ample experience in the field of development co-operation and is considered to be one of the more important actors in this field. It would, therefore, be ideal for the EU to be able to use the knowledge it has accrued over the years in this field to play a bigger and more effective role as well as share this knowledge with key partners in the fight against international terrorism. The European Security Strategy of 2003 explicitly mentions the fact that the EU is the biggest provider of assistance and should as such be ideally placed to pursue the goal of reform to combat terrorism through trade and development policies.

5. EU Counter-terrorism After the Lisbon Treaty

A. An EU with Larger Ambitions

The EU has always seen a space for itself in the global fight against terrorism. It has repeatedly been said that, terrorism being an international problem, Member States and third country partners have everything to gain by joining hands with the EU in facing this threat\(^{157}\). It is a transnational problem and it can no longer be dealt with by one country on its own. Just like the rest of the world, terrorist have taken advantage of globalisation. However, the EU considers its role to be complementary rather than parallel to that of its Member States\(^{158}\). It is a mostly nationally driven competence with the EU playing a more supporting role. Erstwhile Counter-Terrorism Co-ordinator Mr. Gijs de Vries stated:

"The role of the union is not to supplant Member States but to support them in working internationally and the main thrust of Europe’s defense against terrorism remains firmly at the level of national governments"\(^{159}160\)

\(^{156}\) 23 May 2012 CT Discussion paper, p14-15.
\(^{157}\) H., BRADY, “Intelligence, emergencies and foreign policy”, p15.
\(^{158}\) G., KHANDEKAR, “The EU as a Global Actor in Counter Terrorism”, July 2011, p5.
\(^{159}\) L., LUGNA, “Institutional Framework of the European Union Counter-Terrorism Policy Setting”, Baltic Security & Defence Review, Vol.8, 2006, p.101; As a side note, from this statement one could affirm that the
Internally the role of the EU is to create a common legal infrastructure that makes co-operation in the field of counter-terrorism more effective and efficient. It strives for a higher level of internal security standards throughout the EU\textsuperscript{161}.

This national basis to the fight against terrorism has repercussions on the ability of the EU to provide a coherent counter-terrorism policy. This is because each member state does not have the same view and will to combat terrorism (as not every member has been impacted, if at all, by such attacks). Furthermore even those that feel counter-terrorism to be one of the most important issues do not always agree on the way in which terrorism should be thwarted\textsuperscript{162}. This is compounded by the fact that member states are very reluctant to exchange information gathered by their own national information centers and intelligence services. Security and information gathered in this field touches upon the very core of state sovereignty. EU institutions, such as Europol and IntCen, which were created to encourage co-operation within the EU concerning information gathering and analysis, have suffered from this reluctance. According to the 2012 TE-SAT report\textsuperscript{163} there were 153 court proceedings concerning terrorist charges reported, while only 27 of those were registered at Eurojust\textsuperscript{164}. This in spite of the 2005 Council Decision on the exchange of information and co-operation concerning terrorist offences\textsuperscript{165}.

Furthermore this lack of a common view is reflected in the EU treaties with counter-terrorism being listed both under the AFSJ (area of freedom, security and justice) and the CFSP (common foreign and security policy). This has led the EU to be unable to exercise its competences to the fullest\textsuperscript{166}.

In this matter, individual EU Member States still eclipse the EU. Foreign nations will prefer concluding bilateral agreements with the Member States themselves rather than the EU as long as confusion remains on what the actual EU competences are and what it can do in the field of counter-terrorism. An example of this is the role Europol plays in centralising security information from across the EU and producing analysis on this information. Foreign counties still prefer to exchange

\footnotesize{most important role of the EU plays in the fight against terrorism must happen at the international level, leaving most internal aspects of counter-terrorism up to the Member States.}
\footnotesize{As a side note, from this statement one could affirm that the most important role of the EU plays in the fight against terrorism must happen at the international level, leaving most internal aspects of counter-terrorism up to the Member States.}
\footnotesize{H., BRADY, “Intelligence, emergencies and foreign policy”, p7.}
\footnotesize{TE-SAT 2012 EU Terrorism Situation and Trend Report.}
\footnotesize{23 May 2012 CT Discussion paper, p.5.}
\footnotesize{G., KHANDEKAR, “The EU as a Global Actor in Counter Terrorism”, July 2011, p5.}
information directly between nation states rather than working with Europol, especially for those countries that are already members of Interpol\(^{167}\).

Nonetheless, even with its wings partially clipped, the EU’s contributions remain important, if only because it provides a forum for greater co-ordination, both within the EU itself and outside its borders (combined with the EU the Member States manage to give more weight to their voices and may be able to have a greater influence on how to deal with the threat of terrorism).

Another reason why the EU can be a worthwhile partner in the field of counter-terrorism is their slightly different approach to the problem in comparison to others. The EU considers, terrorism, at its core, to be just another type of crime, albeit a large international type of crime which has global consequences. As such the EU approaches counter-terrorism through the lens of crime prevention, and the best way it thinks to block the threat is not only by targeting terrorists directly but also by knocking them off their pedestals and by taking away their support base. In other words, by looking at the underlying causes of terrorism\(^{168}\) (that is why so much emphasis is put on the ‘prevention’ strand of the EU counter-terrorism strategy\(^{169}\)).

**B. EU Counter-Terrorism Institutional Architecture**

With the treaty of Lisbon came the abolition of the three pillar structure. The idea was to bring more coherence in EU policies. However, the treaty did not succeed in completely removing the distinction between some of its different branches of competences. Most notable is the fact that competences falling under CFSP and AFSJ respectively still get different decision making procedures. Furthermore, counter-terrorism is one of the areas where the EU’s tasks are spread across the TFEU, the TEU and national competences of its Member States\(^{170}\).

The EU’s response has grown to encompass even those competence areas such as the internal market, trade, environment, agriculture, even though at the time when such competences were given to the EU it was never foreseen that they would provide a vehicle for the fight against terrorism.

One of the more important tasks of the EU is legislation, with the internal aspects of security emanating from the Commission, and most of the external aspects of security being handled by the European Union External Action Service (EEAS). Under the Commission the greatest weight is given to the DG Home and the DG justice, however, seeing as terrorism is something that touches

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\(^{169}\) See above under chapter III, part 3.

upon almost all EU competences, other DG’s also play a role. For example, the Data Retention Directive on the storing of data related to the internet and telephone conversations falls under the auspices of the DG Information Society and Media or DG Internal Market and Services.\textsuperscript{171}

The EEAS was brought to life by the Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service.\textsuperscript{172} Its main task is assisting the High representative, in conducting the common foreign and security policy.\textsuperscript{173} It helps with co-ordination and consistency of the EU’s external relations. This includes the co-ordination of a number of CSDP missions, some of which are military assistance missions in the area of counter-terrorism. Within the EEAS, the Conflict Prevention and Security Policy Division of the Global and Multilateral Issues Directorate, is the one responsible for dealing with issues of counter-terrorism, both the purely external security aspects and the external aspects of internal security.\textsuperscript{174} However, terrorism is not only dealt with by this group within the EEAS. It can utilise all policy instruments which it has available for external action to face the problem of terrorism.\textsuperscript{175} The EEAS is also competent to formulate the EU’s development policy, and so it is ideally placed to combine both counter-terrorism actions with development actions to form a more holistic approach to both issues.\textsuperscript{176}

One of the winners of the Lisbon treaty was the European Parliament, as it managed to gain a greater and more important role in EU legislation. As a consequence, the parliament now has a larger say in the field of counter-terrorism.\textsuperscript{177}

Besides the aforementioned two institutions, one must not overlook the importance of the European Council, which is the main body for political dialogue between Member States and the COREPER, which plays a preliminary role in any discussions put forward at Council level. Additionally the Council has created a number of smaller specialised units and committees that all work on matters relating to terrorism.\textsuperscript{178} Some of these are:

- The European Union Intelligence Analysis Centre (IntCen): Formerly known as the Joint situation centre, it was created by the former High Representative Xavier Solana. After being rebranded it has been integrated into the EEAS and falls under purview of the High Representative. It is responsible for monitoring the international security situation and

\textsuperscript{173}http://eeas.europa.eu/what_we_do/index_en.htm
\textsuperscript{175}R., Balfour, A., Bailes, M., Kenna, “The European External Action Service at work”, p32.
\textsuperscript{176}R., Balfour, A., Bailes, M., Kenna, “The European External Action Service at work”, p33.
\textsuperscript{177}http://consilium.europa.eu/eeas/security-defence.aspx?lang=en
assesses terrorist threats to the EU. It operates around the clock and produces reports which are in turn used by other EU agencies (Europol being one of them) in the field of counter-terrorism and security. It falls under the purview of the EU’s High representative\(^\text{179}\).

- **The Political and Security Committee (CSP):** It functions as a preparatory body, at the ambassadorial level, of the EU council. Its main task is keeping track of the international situation and helping define policies within the common foreign and security policy\(^\text{180}\).

Besides these two specialised units the EU has created a number of working groups that are active in the field of security and more specifically terrorism. These Working groups were created to have regular discussions meetings on specific and important issues the Council has to deal with. The **Terrorism Working group** (TWG) deals with internal aspects of terrorism, whereas the **working party on terrorism** (COTER) deals with external aspects of terrorism. Just to name a few other working parties\(^\text{181}\): the **art. 36 committee** (CATS) which deals with police and judicial co-operation; the **CP 931 working group** and **RELEX**\(^\text{182}\), which both play a role in in discussions about the blacklisting regime of terrorists. There are many more working parties, too many to list them all here.

One cannot be remiss in mentioning those agencies active in the field of CSDP:

- The first of the actors has already been mentioned above, it being the **CSP**.
- The **European Union Military Committee (EUMC):** It has as task to direct all EU military activities and provide the PSC with advice and recommendations on military matters\(^\text{183}\).
- The **Crisis Management and Planning Directorate (CMPD):** It is a part of the EEAS and its main tasks are: strategic planning of CSDP missions and operations; strategic reviews of existing CSDP missions and operations; developing CSDP partnerships; co-ordinating the development of civilian and military capabilities; developing CSDP policy and concepts; conducting exercises and developing CSDP training\(^\text{184}\).
- The **European Union Military staff (EUMS):** The EUMS works under the direction of the EUMC and under the authority of the high representative. Its main task is providing the EEAS with collective military expertise. It co-ordinates the military instrument, with emphasis on operations/missions and the creation of military capability\(^\text{185}\).


\(^{180}\) http://europa.eu/legislation_summaries/foreign_and_security_policy/cfsp_and_esdp_implementation/r00005_f r.htm


\(^{183}\) www.eeas.europa.eu/csdp/structures-instruments-agencies/eumc/index_en.htm

\(^{184}\) www.eeas.europa.eu/csdp/structures-instruments-agencies/cmpd/index_en.htm

\(^{185}\) www.eeas.europa.eu/csdp/structures-instruments-agencies/index_en.htm
- **The Civilian Planning and Conduct Capability (CPCC):** It is part of the EEAS and is responsible for the effective planning and conduct of civilian CSDP crisis management operations, as well as the proper implementation of all mission-related tasks.\(^{186}\)

Seeing all these different actors active in the field of counter-terrorism, one can only wonder how the EU manages to co-ordinate all its actions and initiatives. This role is given to the **Counter-Terrorism Co-ordinator (CTC)**. The Current CTC is Dr. Gilles De Kerchove\(^{187}\) and his main task is attending meetings of different working groups, reporting on their work and other EU documents in the field of counter-terrorism as well as assessing the on-going initiatives in the field of counter-terrorism (such as the EU counter-terrorism strategy and the implementation of the action plan on combating terrorism). The CTC forms a link and bridge between the different EU institutions and working parties and tries to ensure that each entity is aware of what the others are doing so as to guarantee coherence in EU action in the field of counter-terrorism.\(^{188}\)

Other than the ones mentioned above, institutions such as **Europol** and **Eurojust** obviously also play an important role in combating this threat, by enhancing police and judicial co-operation. Seeing the great emphasis the EU puts on criminal approach to counter-terrorism, these two institutions play a central role in this approach. Europol for example has created a specific counter-terrorism taskforce to deal with the threat of terrorism on top of the terrorism unit it already had.\(^{189}\) Europol and Eurojust are not only significant for their role as a repository of information and knowledge on combating crime, including terrorism, but also allows a way for the EU and its Member States to deepen their police and judicial co-operation with third countries and international organisations. An example of this is the Europol-US agreement on the exchange of personal data\(^{190}\) and the Memorandum of Understanding to improve judicial co-operation and intensify the fight against crime, particularly serious crime, signed by Eurojust and UNODC (United Nations Office on Drugs and Crime).\(^{191}\)

While both function primarily as clearing houses for information gathering in all matters criminal, both institutions strive to be more than that. Eurojust for example, besides being central to judicial co-operation, can also play an important role in tackling the financing of terrorism with its power to seize

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\(^{190}\) 2001 Agreement between the United States of America and the European Police Office.

financial assets of suspected criminals\textsuperscript{192}. As such, Eurojust plays an important role under the ‘pursue’ strand of the EU Counter terrorism strategy.

The CTC, in his discussion paper of 23 may 2012, mentions that although steps have been taken towards greater co-operation between these two institutions, Eurojust does not take part in the two Europol Analytical Work Files concerning terrorism (Hydra and Dolphin). Another relevant entity that plays a role in European counter-terrorism policy is \textbf{FRONTEX}, which is the \textbf{European External Borders Agency}\textsuperscript{193} and was setup by Council Regulation of 26 October 2004 establishing a European Agency for the Management of Operational Co-operation at the External Borders of the Member States of the European Union\textsuperscript{194}. Its mission is to enhance and strengthen the Common EU external borders through promoting co-operation between the different member state border agencies\textsuperscript{195}. With Regulation (EU) No 1168/2011\textsuperscript{196}, FRONTEX now has the mandate to process personal data. This in turn allows for closer co-operation between Europol and Eurojust\textsuperscript{197}.

Like other initiatives taken by the EU, such as the blacklisting of individual terrorists and terrorist organisations and the Council Framework Decision on the execution of orders freezing property or evidence, the development of FRONTEX was part of a broad range of initiatives in implementing UNSC Resolution 1373.

\textbf{The European Police College (CEPOL)} must also be mentioned when talking about institutions that can and do play a role in the global fight against terrorism. Erected by a Council decision on 20 September 2005\textsuperscript{198}, it is an EU organisation that brings together senior members of police forces around Europe. Its main task is creating a network for and encouraging cross-border co-operation in criminal matters. It does the latter predominantly through training programmes. Although mostly focused solely on the internal security aspects of the EU it has also organised a number of training programmes that aim to increase police capabilities abroad and encourage international co-operation in the fight against crime. One such example is the CEPOL Euromed Police II Project\textsuperscript{199}, which strives to

\textsuperscript{192} H., BRADY, “Intelligence, emergencies and foreign policy”, p8.
\textsuperscript{193} G., KHANDEKAR, “The EU as a Global Actor in Counter Terrorism”, July 2011, p12.
\textsuperscript{195} http://www.frontex.europa.eu/about-frontex/mission-and-tasks
\textsuperscript{197} 23 May 2012 CT Discussion paper, p4.
improve international co-operation on issues such as terrorism and organised crime, human trafficking and international police co-operation.

These are but a few of all the players in the field of counter-terrorism, but I feel they represent some of the more important ones. However, it is apparent that both the EEAS and the CTC – both of which are responsible for increasing the coherence and consistency of EU actions – have a great challenge ahead of them in trying to bring all of these actors in line. If two of the main entities (Europol and Eurojust) in the field of judicial and police co-operation do not work together, that the relationship between COTER and TWG seems equally as fractious, then it does not bode well for EU counter-terrorism at all.

Unfortunately, when talking to people active in the field of counter-terrorism, most of them have an image of the EU as a creature with many heads with each doing their own thing. This is unfortunate when one considers the unfulfilled potential the EU has to help in tackling terrorism.

6. The EU’s International Counter-Terrorism Policy in Action

The EU first and foremost strongly supports the role of the UN in creating a greater consensus on the threat of International counter-terrorism and the ways through which this threat must be dealt with. It not only tries to secure the implementation and adoption of all UN resolutions (such as the UN global Counter-terrorism strategy of 2006) and UN conventions relevant to the fight against terrorism by all UN Member States. In my opinion, any internal initiative taken by the EU on the basis of a UN resolution or convention can be considered to represent an aspect of the EU’s international role in the field of counter-terrorism. The EU also strives to improve its co-operation with third countries and other international organisations on a bilateral level. In my opinion the EU tries to do a little of what it already does internally, within the EU, at the international level in its relationship with strategic partners.

Another area wherein the EU is active is providing assistance to and directly contributing to strengthening counter-terrorism initiatives in third countries and regions known for their links to international terrorism (I.E. the Sahel region, Yemen, Pakistan, Morocco, Algeria, just to name a few). This assistance consists of technical assistance, training (training security forces within these third countries to better deal with terrorists, how to catch onto early stages of radicalisation, etc), promotion

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of the principles of good governance and the rule of law, promotion of respect for human rights and fostering understanding, financial aid, institution building, as well as capacity building\textsuperscript{201}.

One aspect of the EU’s counter-terrorism policy which I consider to be both internal and external (although some might see it only as an aspect of its internal counter-terrorism policy) is the use of blacklists for known or suspected terrorists and the application of specific targeted sanctions against such individuals and organisations (mostly targeting their financial and material resources), especially considering the close link suspected between organised crime and terrorism. In this day and age it would be the height of naivety to think that terrorist groups do not receive cash flows from both within and outside the EU. It is entirely possible that terrorist organisations active in a certain region of the world while gaining funds and resources from another region entirely.

By introducing such blacklists the EU not only protects itself but also protects the wider world. This is because, in such a case as the one I mentioned just above, the actions taken by the EU to address terrorism funding will have an impact on the activities organised by the terrorist organisation outside the EU. As such the EU provides security on an international level.

In all of its initiatives the EU stresses the importance of building on past and existing initiatives in this field as well as making sure that any new initiative complements the global counter-terrorism efforts undertaken at the multilateral (UN) and bilateral level.

Having given a small overview of some of the actions the EU takes part in at the international level, I will discuss some of them more in-depth.

**A. EU Assistance to Third Countries**

Counter-terrorism policy is already a very tricky business internally, let alone when you try to provide assistance in this field to third countries. There are a wide number of priorities and the EU has an ample amount of competences to deal with those priorities. Due to the wide range of issues which can be dealt with, things can get confusing though. A paper written under the auspices of the European Policy Centre identifies two frameworks which form the basis for EU counter-terrorism assistance to third countries\textsuperscript{202}. These are the UN framework\textsuperscript{203} which is based largely around UN Security Council Resolution 1373 and the European Union Counter-terrorism strategy. Both provide a number of areas

\textsuperscript{201} G., Khandekar, “The EU as a Global Actor in Counter Terrorism”, July 2011, p15.


\textsuperscript{203} The UN framework is further expanded by the UN global counter-terrorism strategy of 2006 and numerous resolutions reiterating the importance of tackling terrorism.
through which terrorism can be dealt with, one of them being the furnishing of assistance and capacity building to third countries.

I will start this segment of my thesis by discussing a number of instruments the EU has at hand which can be used in the field of counter-terrorism. My next step will then be to discuss a number of specific assistance cases in different countries around the world.

i) EU Assistance Instruments

The EU assistance in the field of counter-terrorism encompasses a wide range of issues, such as: justice, socio-economic and development issues, security, education, media, radicalisation, transport, good governance and rule of law. The means through which to do this are the development aid policies, CSDP missions, political dialogue, counter-terrorism clauses and sanctions as well as a number of targeted technical assistance programmes.

The main instruments the EU makes use of in this area are:

- The Instrument for Stability (IFS):
  Established in Regulation No 1717/2006 of the European Parliament and of the Council on 15 November 2006, the Instrument came into force on 1 January 2007 and replaced a number of other instruments in the field of drugs, mines, uprooted people, crisis management, rehabilitation and reconstruction. It is the new strategic tool designed to deal with a number of security and development challenges (including terrorism and all other aspects linked to it). Justification for the EU’s competences in this field can be found in art.179(1) and art.181a of the treaty establishing the European community.
  The IFS budget for 2007-2013 is 2.062 Billion Euros split between two components, a long term component and a short term component. The short term component aims to prevent conflict, to support post-conflict political stabilisation and to ensure early recovery after a natural disaster. Within the long term component, three main priorities have been identified. These are: fighting and protecting against the proliferation of weapons of mass destruction; strengthening response capacities of non-EU member countries to cross-border threats such as terrorism and organized crime, including the illicit trafficking of weapons, drugs and human beings; enhancing pre- and post-crisis preparedness capacity building.

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204 P., WENNERHELM, E., BRATTBERG, M., RHINARD, “The EU as a counter-terrorism actor abroad”, p11.
Although this instrument has a broader aim than just counter-terrorism, it nonetheless provides the means to tackle the peripheral issues linked to terrorism. An example of this is art.4(1)(a)§3 of Regulation No 1717/2006 which states: “With regard to assistance to authorities involved in the fight against terrorism, priority shall be given to supporting measures concerning the development and strengthening of counter-terrorism legislation, the implementation and practice of financial law, of customs law and of immigration law and the development of international procedures for law enforcement”.

- The European Neighbourhood Partnership Instrument (ENPI):
  This instrument has as aim the achievement of the European Neighbourhood Policy and was introduced by Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006. The same provisions as those used for the IfS form the basis for this EU instrument. It has a budget of 11 181 million for the period of 2007-2013. Just like the IfS, and most of the other financial instruments the EU can make use of, it targets a much broader sphere of assistance than just Terrorism. However, specific mention of assistance in the field of counter-terrorism is made in art. 2.2(r) of Regulation No 1638/2006: “supporting reform and strengthening capacity in the field of justice and home affairs, including issues such as asylum, migration and readmission, and the fight against, and prevention of, trafficking in human beings as well as terrorism and organised crime, including its financing, money laundering and tax fraud.”
  Unfortunately, as has been mentioned earlier in this paper, the EU seems to have taken a step backwards as the newest draft of the ENPI no longer mentions Terrorism as one of the areas for which the ENPI may be used.

- The European instrument for Democracy and Human Rights (EIDHR):
  It was introduced by Regulation (EC) No 1889/2006 of the European parliament and of the Council of 20 December 2006 and based on art.179(1) and art.181a(2) of the treaty establishing the European community. With a budget of 1.104 billion Euros, its main goals are the promotion of Human rights and Democracy in Non-EU countries. The aim was to make EU assistance to Non-EU countries more transparent and effective. It identifies the promotion of human rights and democracy as prime objectives of the EU’s development policy and

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economic, financial and technical co-operation with third countries. The possibility to make use of this instrument in the fight against terrorism can be construed from the EIDHR strategy paper of 2007-2010, wherein it is stated that the promotion of human rights, democracy and the rule of law is indispensable to the fight against terrorism.

- The Development Co-operation Instrument (DCI):
  Brought to life by Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006, it is based on art.179(1) of the treaty establishing the European Community. It has a budget of 16.9 billion Euros for the period of 2007-2013, which is split between three components: geographic programmes which support action in the field of poverty reduction, health, education, employment, governance, human rights, regional integration, institutional reform, environmental protection and sustainable use of resources, sustainable use of energy and water, developing infrastructure and improving telecommunication technology, sustainable rural development and food security and assistance in post-crisis situations and fragile states; thematic programmes, which benefit all developing countries and which support actions in the field of investing in people, environment and sustainable management of natural resources including energy, non-state actors and local authorities in development, food security and migration and asylum; programme of accompanying measures for the 18 African, Caribbean and Pacific (ACP) Sugar Protocol countries.

Although, at face value, this instrument seems to have nothing to do with counter-terrorism, some of the thematic programmes are explicitly related to counter-terrorism (I.E., the migration and Asylum programme).

Although these are the main instruments the EU can make use of in the field of Counter-terrorism assistance, the CSDP missions (both military and civilian) as well as the EDF may function as vessels for EU counter-terrorism assistance abroad.

Of interest to the role CSDP missions have is the document reviewing the conceptual framework of the ESDP (Now CSDP) dimension of counter-terrorism. According to this document any initiative taken on the basis of ESDP competences should be governed by 6 basic principles:

215 http://ec.europa.eu/europeaid/how/finance/dci_en.htm
• solidarity between EU Member States;
• voluntary nature of Member States’ contributions;
• clear understanding of the terrorist threat and full use of available threat analysis;
• cross pillar co-ordination in support of the EU common aim in the fight against terrorism\textsuperscript{219};
• co-operation with relevant partners;
• complementary nature of the ESDP contributions, in full respect of Member States’ responsibilities in the fight against terrorism and with due regards to appropriateness and effectiveness considerations.

From this one could consider the ESDP competences to be complementary and additive rather than the main way through which the EU can contribute to counter-terrorism\textsuperscript{220}.

This document then goes on to identify four main areas of action (reminiscent of the EU counter-terrorism strategy), these being: \textbf{prevention, protection, response/consequence management and support to third countries in the fight against terrorism}\textsuperscript{221}. The document ends with a list of action points for the implementation of the ESDP dimension to counter-terrorism\textsuperscript{222}.

With the entry into force of the treaty of Lisbon the ESDP (rebranded as CSDP) was fully integrated into the CFSP and as is apparent from art.42 and art.43 TEU, the Union may set up both military and civilian CSDP missions with the goal to tackle counter-terrorism.

However, of the 17 missions that are active at this moment only two of these explicitly refer to counter-terrorism as one of its aims\textsuperscript{223}. These two are:

• The \textbf{EUTM Mali} mission, which is an EU training mission with as end goal the restoration of Mali’s territorial integrity and the reduction of the terrorist threat.
• The \textbf{EUCAP Sahel Niger} mission, with one its goals being the improvement of Niger’s security forces in the fight against terrorism and organised crime, and this in an effective and co-ordinated way.

\textsuperscript{217} Conceptual framework on the European security and defence policy dimension of the fight against terrorism, \url{http://www.consilium.europa.eu/uedocs/cmsUpload/ESDPdimension.pdf} (Hereinafter shortened to: ESDP dimension of the fight against CT).
\textsuperscript{218} ESDP dimension of the fight against CT, p2.
\textsuperscript{219} This document was created before the entry into force of the Lisbon treaty as such, one of the principles refers to cross pillar co-ordination. Although the pillars no longer exist I feel that this principle still exist but should now refer to the better co-ordination between different EU competences (I.E. development and security).
\textsuperscript{220} The way in which ESDP is portrayed is characteristic of the problem the EU faces in the creation of a more defensible Europe.
\textsuperscript{221} ESDP dimension of the fight against CT, p4.
\textsuperscript{222} ESDP dimension of the fight against CT, p6.
\textsuperscript{223} CSDP Note: Overview On-going CSDP Missions, \url{http://www.isis-europe.eu/sites/default/files/publications-downloads/CSDP%20Overview%20July%202013_2.pdf}
Though, all the other missions make no explicit reference to counter-terrorism as being one of their aims, in my opinion they still contribute to the global counter-terrorism struggle. This is because most of the missions organised, tackle issues such as strengthening the rule of law, improving the capacity of local security forces and the judicial system, strengthening local and national governments, enhancing stability and governance. All these issues can be linked with the threat of terrorism, be it either as a consequence of terrorist activities or as a cause and breeding ground for terrorism. So any mission that tries to solve such issues - in regions of the world where terrorism is a known problem - also directly affect the international fight against terrorism. Yet it is unfortunate that so few missions explicitly refer to counter-terrorism (as it would portray the EU as being active in the field of counter-terrorism) when it is apparent that these missions may give added value to the international role of the EU in counter-terrorism.

**ii) EU Assistance to Pakistan**

The region of Pakistan is well known for its problems with terrorism, with the Taliban and Al Qaeda having a base of operations in the country. This is partly made possible because of a weak government which is perceived to be corrupt. Even with the adoption of numerous programmes to root out this corruption, corruption still seems to pervade certain government institutions, especially the military and security institutions. It does not help that Pakistan’s intelligence agency, being independent from the central government and not under its control, is seen as working together with certain terrorist groups, using them in the conflict around the Kashmir region.\(^{224}\)

Furthermore, the fact that large areas of Pakistan’s territory seem to be under autonomous control of Islamist militants, underscores the weakness of its central government. This lack of control leads to the creation of safe havens for terrorists. More worryingly is the report of growing radicalisation in these regions, even attracting EU nationals for terrorist training.\(^{225}\)

In response to these concerns the Pakistani government organised a number of large scale counter-terrorism operations. Rather than improve the situation it further exacerbated the problem due to the way in which these operations were handled in some cases. Some of these operations have unfortunately resulted in large-scale civilian displacements, arbitrary arrests, property destruction and extrajudicial executions. Neither does the government have a great track record when it comes to

\(^{224}\) P. WENNERHELM, E., BRATTBERG, M., RHINARD, “The EU as a counter-terrorism actor abroad”, p19.

human rights and its judicial system. Rather than improve the situation, in some cases it further exacerbated the problem due to the way in which these operations were handled\textsuperscript{226}.

As such, Pakistan has been and remains a key focus for EU assistance in the field of counter-terrorism. The 2004 EU-Pakistan co-operation agreement paved the way. Further co-operation was expanded upon by the Pakistan-European Community country strategy paper for 2007-2013. In this last document it refers to both the DCI and the IfS as useful instruments to provide assistance in the field of security and justice reform, conflict prevention, governance, human rights and democracy, and this to provide Pakistan with a greater ability to oppose terrorism\textsuperscript{227}.

The IfS multi annual indicative programme for 2012-2013 mentions a number of key priorities for the funding of programmes on the basis of the IfS regulation, one of them being counter-terrorism. In the field of counter-terrorism, IfS projects and programmes will focus on\textsuperscript{228}: Capacity building in the field of law enforcement, criminal justice and aviation security capacities; promoting UN standards in counter-terrorism; countering violent radicalisation. Whereas the 2009-2011 IfS counter-terrorism programmes focused primarily on the Sahel region, the 2012-2013 programs will focus on the Pakistan and Horn of Africa regions.

“The long-term IfS CT programmes aim to fully contribute to the implementation of the EU development and security strategies on Horn of Africa and Sahel as well as with the proposed EU Security Strategy for Pakistan, while complementing related measures supported under EU geographic instruments, short term IfS crisis response actions, CFSP/CD SP activities, and EU Member States”\textsuperscript{229}

The EIDHR, in comparison seems to play a more minimal role as only three out of 30 missions funded by the instrument seem to have counter-terrorism links\textsuperscript{230}. One of them dealing with the problem of illegal immigrants, which, under UN Security Council resolution 1373, is considered to be one of the issues linked to counter-terrorism countries should deal with.

\textsuperscript{226} P., WENNERHELM, E., BRATTBERG, M., RHINARD, “The EU as a counter-terrorism actor abroad”, p19.
\textsuperscript{229} IfS multi annual indicative programme for 2012-2013, p7.
\textsuperscript{230} P., WENNERHELM, E., BRATTBERG, M., RHINARD, “The EU as a counter-terrorism actor abroad”, p20.
EU-Pakistan co-operation was further enhanced by the EU-Pakistan 5 year engagement plan of March 2012\textsuperscript{231}. The idea was to intensify dialogue and co-operation in a number of key priority fields, including security where counter-terrorism is seen as a key objective of EU-Pakistan co-operation.

This 5 year engagement plan was closely followed up by an EU Counter-Terrorism/Security Strategy on Pakistan on 21 August 2012\textsuperscript{232}. The aim of this document was to set up a concept as to how to further EU-Pakistan counter-terrorism/security co-operation for the future. The focus of the EU will be on: law enforcement, rule of law, criminal justice, including capacity building and the problem of violent radicalisation. Furthermore, the strategy document stresses the importance of integrating both internal and external aspects and recognises the mutually reinforcing relationship development and security has. It also stresses that any co-operation between the EU and Pakistan must complement international multilateral co-operation (UN being the central actor in this area)\textsuperscript{233}.

The Strategy document envisages the practical implementation of this strategy through two EU Action plans\textsuperscript{234}:

- action plan on security/law enforcement/rule of law/criminal justice;
- action plan on countering violent extremism

\textbf{iii) EU Assistance to the Sahel Region}

Nowhere else is the development and security nexus so prevalent than in Africa, the Sahel region being a particularly volatile environment. As far back as 2000, the EU has been concerned by the political, security, human rights and humanitarian situation in the region. This concern was only worsened by the Arab spring revolutions in North Africa. The political upheavals not only had a direct impact on the whole region but also led to militia men, who took part in the revolutions, going back home still carrying weapons (It is no surprise that Mali was confronted by the more rapid encroachment of its territory by AQIM not long after the Arab Spring events.)\textsuperscript{235}.

It is also a very important region for the EU because of its close proximity to the EU’s neighbouring countries. The EU fears that any violence in the Sahel region might easily cross over into the countries bordering the Mediterranean Sea and end up on the EU’s doorstep. On 25 October 2010 the Council of

\textsuperscript{231} EU-Pakistan 5 year engagement plan of March 2012, http://eeas.europa.eu/pakistan/docs/2012_feb_eu_pakistan_5_year_engagement_plan_en.pdf
\textsuperscript{233} EU Counter-Terrorism/Security Strategy on Pakistan, p3-6.
\textsuperscript{234} EU Counter-Terrorism/Security Strategy on Pakistan, p6.
foreign affairs called up on the Commission and the High Representative to formulate a comprehensive strategy paper on development and security in the Sahel Region. This strategy paper was then presented at the Foreign Affairs Council meeting of 21 March 2011.236

The strategy document focuses on three countries specifically, being, Mali, Mauritania and Niger. It works around four key themes:

- **Firstly**, that security and development in the Sahel cannot be separated, and that helping these countries with security is integral to enabling their economies to grow and poverty to be reduced.
- **Secondly**, that achieving security and development in the Sahel is only possible through closer regional co-operation. This is currently weaker than it needs to be, and the EU has a potential role to play in supporting it.
- **Thirdly**, that all the states of the region will benefit from considerable capacity building in areas of core government activity, including the provision of security and development co-operation.
- **Fourthly**, that the EU therefore has an important role to play both in encouraging economic development for the people of the Sahel and helping them achieve a more secure environment in which it can take place, and in which the interests of EU citizens are also protected.

As such development cannot be attained by ignoring the security issues (terrorism being a key aspect of it) and vice versa.

The strategy paper identifies four challenges: governance, development and conflict resolution; coordination at the regional political level; security and rule of law; the fight against and the prevention of violent extremism and radicalisation.238

To effectively tackle these challenges the EU plans on splitting objectives between 5-10 year perspectives and three year perspectives. The objectives the EU will try to reach over a period of 5-10 years are: enhancing political stability, security, good governance, social cohesion, education and economic opportunities, mitigating internal tensions and countering violent extremism. In its three year perspective its objectives are: improving the population’s access to basic amenities, improving education and economic opportunities, reducing terrorist attacks and kidnappings, limiting the capabilities of AQIM and criminal networks, improving security in the contested zones of the Sahel, 236 Press release: Council conclusions on a European Union Strategy for Security and Development in the Sahel, 3076th Foreign Affairs Council meeting, 21 March 2011, http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/120075.pdf
contributing to the fight against corruption, promoting peace settlements, raising awareness and training to better understand the threat of terrorism and how to react to this threat.

To do this effectively the EEAS calls upon the EU to co-ordinate its initiatives with all other international actors active in the region such as the African Union and Ecowas, the Arab League and the Arab Maghreb Union as well as a number of foreign countries (US, Canada, Japan and the Maghreb countries). Furthermore, the EU must more closely co-ordinate its own existing initiatives in the regions, including those operational in the Maghreb countries.

To do all this, the EEAS encourages the EU to make use of all possible instruments that may be applicable in this field. Objectives under the improvement of governance and human rights could be reached by making use of the EIDHR and the DCI. As mentioned under the chapter on Assistance to Pakistan the IfS annual indicative programmes identify security (terrorism being a part of it) as being one the key areas for which the IfS instrument may be used for. There are already two active CSDP missions in the area (EUCAP and EUTM). The EDF has also proven to be a useful tool in this region, having already provided 660 million Euros to the region. Additionally, the ENPI could also potentially contribute to improving the development and security of the Sahel region. Due to its close proximity, any initiative taken under ENPI for the Maghreb countries may have a positive impact on the objectives in the Sahel region.

iv) EU Assistance to Algeria and Morocco

Both countries have suffered from political instability and returning militia men from conflict zones such as the Afghan-Soviet war, which promoted the creation of a number of terrorist groups (AQIM, which started in Algeria but then expanded to other countries in the region and Groupe Islamique Combatant Marocain in Morocco) in their territories. Characterised as countries with weak governance, corruption and domestic terrorism, these countries have functioned both as a base and as targets of terrorism.

The main vessel through which the EU provides assistance in the field of counter-terrorism in these two countries is the ENPI. The Moroccan ENP action plan identifies enhanced political dialogue on the CFSP and CSDP (then ESDP) and enhanced co-operation on combating terrorism as one of the key priorities of the EU-Morocco relationship in the ENP. While the EU does not have an ENP

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The EU has initiated a number of programmes in these two countries, mainly in the field of judiciary and rule of law reform and border-control, police and law enforcement reform\footnote{The CEPOL Euromed Police II Project 2007-2010.} (Algeria), and Anti-corruption (Morocco)\footnote{P., WENNERHELM, E., BRATTBERG, M., RHINARD, “The EU as a counter-terrorism actor abroad”, p13-17.}. Unfortunately, although the previous ENPI draft listed counter-terrorism as one of its objectives, it has never been used for such measures in any of the countries that fall under the ENP\footnote{P., WENNERHELM, E., BRATTBERG, M., RHINARD, “The EU as a counter-terrorism actor abroad”, p16.} (According to the CTC, the chances of this happening are slim, now that terrorism has been removed from the newest draft does not bode well). Equally unfortunate (as with EU assistance to Pakistan) is the fact that although numerous projects are set under EIDHR, only a handful of these could be considered to deal with the threat of terrorism.\footnote{P., WENNERHELM, E., BRATTBERG, M., RHINARD, “The EU as a counter-terrorism actor abroad”, p13-17.}

**B. Tackling the Financing of Terrorism and Terrorist Blacklisting**

The financing of terrorism is considered a core component of the EU’s counter-terrorism strategy. The revised strategy on terrorism financing of 2008\footnote{Council of the European Union (07/07/2008), Revised strategy on terrorist financing, 11778/1/08 REV 1, http://register.consilium.europa.eu/pdf/en/08/st11/st11778-re01.en08.pdf} stressed this aspect of counter-terrorism numerous times. This revised strategy aimed at re-energising the EU’s actions in this field, as inertia was setting in. In this document the CTC applauded the EU’s motivation on the implementation of the FATF recommendations, and other EU initiatives (I.E. the Third anti-money laundering directive, which extended the scope to terrorism financing; the Council Framework Decision on the execution of orders freezing property or evidence; Council framework decision on confiscation of crime-related proceeds, instrumentalities and property\footnote{Council framework decision (2005/212/JHA) of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property, OJ L 319/1, 5/12/2007.}). He nonetheless stressed that what we had was not enough and that the EU needed to stay active in this field as terrorist will find new ways to slip through the cracks.

The revised strategy called for an increased effort in implementing the FATF recommendations, taking stock of new payment methods and finding out how these might be misused by terrorists, increasing the protection of the non-profit sector, working closely together with the private sector, building and expanding upon existing measures in this field (Such as the listing of terrorists and the application of targeted sanctions), enhancing and improving co-operation within the EU and with international strategic partners (I.E, the EU-US TFTP agreement). With regard to this last aspect the CTC mentions that the tracking of terrorist financing not only helps in stripping them of their financial resources but can, together with other terrorism intelligence, prove a way to tackle terrorist networks as a whole.

What is of greater interest to me and consequently to this paper, are the listing of terrorists and the application of targeted financial sanctions against those listed.

i) Blacklisting of Individual Terrorists and Terrorist Organisations

Blacklisting makes it much easier for countries, especially their law enforcement and judicial authorities, to monitor and track those suspected of links to terrorism. EU action in this field is almost entirely based on UN resolutions.

Even before the turn of the century the UN was already making use of targeted sanctions in the fight against terrorism. These resolutions, which were based on Chapter VII of the Charter of the United Nations, consisted of a list of those targeted and the measures Member States needed to take against those listed. It also created a sanctions committee which was responsible for monitoring the implementation of the resolutions as well as amending the list of targets.

Initially the resolutions only targeted those individuals with a link to governments or the governmental bodies themselves. The aim of these sanctions was to put political pressure on those in power to change national policies. Resolution 1267 and 1333 targeted the Taliban Government of Afghanistan, and called upon all Member States to freeze the funds and other financial resources owned by the Taliban. The EU was of the mind that a co-ordinated response was needed and so decided to implement these two resolutions through two Common Positions (Under the CFSP).

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252 The CTC calls for closer and more co-ordinated co-operation especially between the Financial Intelligence Units Europol IntCen (Then SitCen) and Eurojust.
concerning restrictive measures against the Taliban. These in turn were implemented through Regulation (EC) No 337/2000\textsuperscript{259} and Regulation (EC) No 467/2001\textsuperscript{260}, both of which used art.60 EC and art.301 as a legal basis\textsuperscript{261}.

However, this would change with resolution 1390\textsuperscript{262} and resolution 1453\textsuperscript{263}. These resolutions differed from the ones before because the Taliban was no longer in power and as such were not considered to have any links to the Afghan government. Furthermore, these two resolutions also targeted Usama Bin Laden, his associates and any member of Al Qaeda (None of them could be considered to be a part of a government). The EU would again adopt these resolutions through two Common Positions, namely, Common Position 2002/402/CFSP\textsuperscript{264} and Common Position 2003/140/CFSP\textsuperscript{265}. These in turn would be implemented by Regulations 881/2002/EC\textsuperscript{266} and 561/2003/EC\textsuperscript{267}. Contrary to the two previous regulations these would be based on art.60 EC, art.301 EC and art.308 EC\textsuperscript{268}.

Furthermore, the UN also created resolution 1373, which as was stated earlier in this paper, contained a number of general recommendations, one of which was the tackling of terrorist financing. It also called for the creation of the Counter-Terrorism Committee which would be responsible for the implementation of the resolution as well as any amendments to it.

\textsuperscript{26}26 February 2001 concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP, OJ L 057, 27/2/2001.
\textsuperscript{259}Regulation (EC) No 337/2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ L 43/1, 16/2/2000.
\textsuperscript{260}Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000, OJ L 067; 09/3/2001.
\textsuperscript{266}Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ L 139/9, 29/5/2002.
\textsuperscript{267}Regulation (EC) No 561/2003 of 27 March 2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban OJ L 82/1, 29/3/2003.
As was the case with the previous resolutions the EU was of the opinion that concerted actions were necessary to deal with this issue. That is why Common Position 2001/930/CFSP\textsuperscript{269} and Common Position 2001/931/CFSP were adopted to implement Resolution 1373\textsuperscript{270}. While the former was more an expression of intent, Common Position 2001/931/CFSP contained a list of individuals and organisations deemed to be terrorists or linked to them (in an annex), and stated that the EU would apply the freezing of funds and other measures against those listed in the annex, in so far as the EC treaty allowed it\textsuperscript{271}. The EU would also adopt Regulation No 2580/2001\textsuperscript{272} (with as legal basis art.60 EC, art.301 EC and art.308 EC) which contained a list annexed to it and which orders the freezing of funds and other resources of those in the list. The list annexed to this regulation is the same as the one in Common Position 2001/931/CFSP, with one difference. The list in the common position contains both a list of asterisked individuals and organisations and one that is not. Only the non-asterisked list is the same in both the regulation and the common position\textsuperscript{273,274}.

All these lists are regularly amended, through the adoption of new resolutions and regulations, with Common Position 2001/931/CFSP, Regulation (EC) No 2580/2001 and Regulations 881/2002/EC\textsuperscript{275}.

\textbf{ii) The Kadi and Al Barakaat Cases}

Although this seems pretty cut and dry, the legal basis used by these three acts (art.60 EC, art.301 EC and art.308 EC) was put to the test in the Kadi and Al Barakaat cases\textsuperscript{276} brought before the European Court of Justice. The main thrust of the complaints brought before the European court of Justice (ECJ) concerned the human rights aspects of the blacklisting and application of freezing sanctions. However, this is not the subject of this thesis and so will not be discussed here. What is of interest is the legal basis aspect of these cases.

Before the Kadi and Al Barakaat cases, art.301 EC and art.60 EC were seen as sufficient for any measures targeting individuals even though both provisions only refer to countries. Art.301 EC

\textsuperscript{271} I., CAMERON, “European Union Anti-Terrorist Blacklisting”, p229.
\textsuperscript{274} The reason why there is a non-asterisked list and an asterisked list is that those with an asterisk are dealt with through the police and judicial co-operation within the framework of the PJCC (now AFSJ, mostly).
\textsuperscript{275} http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/crisis-and-terrorism/financing/index_en.htm
\textsuperscript{276} Judgment of the Court (Grand Chamber), Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008].
provides the possibility to adopt restrictive sanctions against individuals, provided there was a prior CFSP common position or joint action. Art.60(1) EC provided a specific legal basis for measures envisaged under art.301 EC. The EU managed to use this dual legal basis successfully in a number of cases, such as for the sanctions against an associate of Charles Taylor (Former President of Liberia) after he was removed from power (T-362/04 Minin) and a number of restrictive sanctions against Milosevic and associates, even after they stepped down from power. From this it is apparent that the Court of First Instance used a broad and very liberal interpretation of art.60 EC and art.301 EC.

However, the problem with the Kadi and Al Barakaat cases was that the EU started adopting restrictive sanctions (smart sanctions) against individuals who did not have a link to any government entity or particular territory. In such cases the EU based its actions on art.60 EC, art.301 EC and art.308 EC.

Interestingly enough, the CFI, the Advocate General (AG) Maduro and the court of justice all agreed that the EU had competence to apply such restrictive measures against individuals, irrespective of their links to a territory or government. Their opinions only differed on what the proper legal basis was for such actions.

Initially the applicants questioned whether art. 60 EC and art.301 EC could function as a proper legal basis for Regulation 467/2001. However, this regulation eventually got repealed by regulation 881/2002, which was adopted on the basis of art.60 EC, art.301 EC and art.308 EC. The applicants then decided to amend their claims retracting the legal basis question from their appeals.

Nonetheless, the CFI found that the question of a proper legal basis was a matter of public policy and should be raised on its own motion.

The CFI started by stating that art.60 EC and art.301 EC could not be used as the sole legal basis for the contested regulation. They argued that although art. 60 and 301 EC allowed for the implementation

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277 The Adoption of ‘Targeted Sanctions’ and the Potential for Inter-institutional Litigation after Lisbon, p 490
283 Judgment of the Court (Grand Chamber), Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008], para 46.
284 Judgment of the Court (Grand Chamber), Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008], para 51-53.
of smart sanctions, the necessary link with a third country, more specifically a link to the governing regime of a third country, was absent in the case at hand. On their own they did not provide a sufficient legal basis.\footnote{Judgment of the Court (Grand Chamber), Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008], para 59-61.}

The next question then was if art.308 EC could be used as the only legal basis. The CFI would again answer this question negatively. It would state that - the ultimate sanctions objective being the safeguarding of international peace and security - the regulation concerned an EU objective. Seeing as art.308 EC is a community instrument, this would amount to ignoring the fact that the EC and EU are separate but linked legal orders.\footnote{Judgment of the Court (Grand Chamber), Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008], para 62-64.}

However, a combination of art.308 EC and art.60 and art.301 EC was acceptable to the CFI. The CFI reasoned that the bridge created by the Maastricht treaty in art. 301 EC could be extended to art.308 EC. The court sustained that this allowed for the import of EU objectives into the community, which meant that one could make use of community instruments to reach an EU objective.\footnote{Judgment of the Court (Grand Chamber), Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008], para 65-68.}

In their appeals before the court of justice the applicants would reject the CFI’s logic. They argued firstly that art.60 EC and 301 EC could not be used as the sole legal basis because these two provisions only referred to third countries and not to individuals and entities not linked to third countries. They argued further that recourse could not be had to art.308 EC to expand the EC’s competence in this field as this would constitute a breach in the principle of conferred powers.\footnote{Judgment of the Court (Grand Chamber), Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008], para 121-126.}

Of interest in the case brought before the Court of Justice are the commission’s arguments because they differ from those brought forward by the other parties. The commission was of the opinion that art.60 EC and 301 EC were sufficient as a legal basis and so no recourse could be had to art.308 EC. The commission reasoned that the wording of these provisions did not preclude the possibility of expanding these measures to individuals not linked to third countries. The fact that measures can be taken against a country implies that measures are also possible against individuals in that country. Furthermore they stated that the wording of art.301 EC was similar to that of art.41 of the UN charter indicating that the authors of art.301 EC meant it as a platform for the implementation by the
community of UN resolutions. Lastly the commission argued that art.133 EC could be used as a legal basis seeing as the measures fall within the ambit of the common commercial policy\(^{289}\).

Just like the commission, the AG argued for the use of art.60 and art.301 EC as the sole legal basis. In his view use of these provisions only requires that the measures reduce or interrupt trade with third countries. He argues that due to the nature of international finances and economy, measures taken against an individual have an effect on the economy of a country and as a consequence will inevitably affect the relations with a third country\(^{290}\).

However, the most important reasoning of all is that of the Court of Justice itself. It is on the basis of their interpretation of treaty provisions that community law is created.

Firstly the Court of Justice rejects that art.60 EC and art.301 EC could be used as the sole legal basis because of the absence of a link to a third country. To interpret them otherwise would mean that no account would be taken of the requirement, apparent from their very wording that such measures can only be taken against third countries. Furthermore, the Court of Justice rejects the Commission’s reasoning that art.133 EC could eventually be used as a correct legal basis, because the ultimate sanctions objective is the safeguarding of international peace and security, not a CCP objective. The fact that these measures may have an impact on the CCP does not mean that it falls under the ambit of the CCP\(^{291}\).

In a similar reasoning it rejects the arguments of the AG stating that the aim of the regulation is the fight against terrorism and not economic relations with third countries\(^{292}\).

Just like the CFI, the Court of Justice argued that art.60 EC, art.301 EC and art.308 EC combined formed the proper legal basis for the contested regulation. However, to complicate matters, the Court of Justice rejected the reasoning of the CFI. It rejected the possibility to use an EC instrument to reach an EU objective, which is what the CFI was arguing for. The Court of Justice holds that this is contrary to the clear wording of art.308 EC which refers to objectives of the community. To interpret it otherwise goes against the principle of conferred powers, and so the bridge created in art.301 EC

\(^{289}\) Judgment of the Court (Grand Chamber), Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008], para 135-142.


\(^{291}\) Judgment of the Court (Grand Chamber), Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008], para 166-193.

\(^{292}\) Judgment of the Court (Grand Chamber), Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008], para 184-185.
cannot be transposed on art. 308 EC to widen community powers beyond the treaty conferred powers and the provisions defining the tasks and activities of the community.²⁹³

How then did the Court of Justice come to the conclusion that art.60 EC, art.301 EC and art.308 EC could form a legal basis for the contested regulation? The Court of Justice made it possible by identifying an implicit EC objective of art.60 EC and art.301 EC: that of facilitating the adoption of financial sanctions, adopted on the basis of actions taken under CFSP, through the use of community instruments. As a consequence recourse could also be had to art. 308 EC seeing as there was no longer a crossover between EU and EC objectives. The requirement of a link to the operation of the common market in art.308 is justified by the Court of Justice, by stating that as the measures are economic by nature they provide for a link, by their very nature, to the operation of the common market; and that if such measures were taken unilaterally by Member States they might have an impact on trade between Member States and could lead to distortions in competition.²⁹⁴

Although the ECJ would rule that there was a proper legal basis for the measures taken by the EU, the court would rule in favour of the plaintiffs on the grounds that a certain number of their human rights had been violated. As such the ECJ made it impossible for the EU to implement the resolutions on blacklisting and freezing of funds, that is, not until the UN could provide more adequate guarantees for respect for human rights of those listed in these resolutions.

This would eventually lead to an amendment by the UN of the existing resolutions which the EU would in turn adopt through a CFSP joint action or common position. By the time this happened the Lisbon treaty had already come into being and changed the legal basis landscape drastically.

iii) The New Legal Basis

The Treaty of Lisbon made the previous discussion redundant by introducing two explicit provisions on the basis of which they can adopt financial sanctions against individuals and non-state entities. Art. 352 now also explicitly states that it cannot be used to attain CFSP objectives.

The two new provisions are art. 75 TFEU and art.215 TFEU and they replace both art.60 EC and art.301 EC. However, they no longer refer to each other. On the contrary: both have different aims and

²⁹³ Judgment of the Court (Grand Chamber), Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008], para 195-204.
²⁹⁴ Judgment of the Court (Grand Chamber), Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008], para 212-216 & 219-230.
²⁹⁵ (4) This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.
are based on different decision making procedures. Art. 215 TFEU belongs to the CFSP and paragraph (2) explicitly makes it possible to implement CFSP decisions to adopt restrictive measures against natural or legal persons and groups or non-state entities. Such a CFSP decision can only be taken by following the procedures in paragraph (1), more specifically, by a Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission.296 On the other hand, art. 75 TFEU allows the EU to adopt a number of restrictive measures to tackle the financing of terrorism, within the framework of the AFSJ and its aims. Such measures will be adopted by framework regulations following the ordinary legislative procedure.297

One would think that now that we have two provisions which can be used to apply restrictive measures against individuals in the field of counter-terrorism there would no longer be a problem. This unfortunately is not the case. The reason for this is that each provision provides a different decision making procedure and not all EU institutions are involved equally in both. Art.75 TFEU falls under the scope of AFSJ and so any decision is taken following the ordinary legislative procedure. This means that both the Council as well as the European Parliament have an equal say in the matter. This is not the case under art.215 TFEU which is considered to fall under CFSP competences. The European Parliament only plays a minimal role under this provision. The only thing art.215 TFEU says about the European Parliament is that it will be informed of decisions taken on the basis of this provision.

Furthermore, with the abolition of the pillar structure, the treaty of Lisbon adopted art.40 TEU which states that the implementation of the CFSP may not hinder the application of other EU competences and vice versa. CFSP was effectively put on equal footing with the rest of the EU competences.298

This makes it much harder for the ECJ to do a centre of gravity test for any where both CFSP and other EU competences come into play. Additionally, both provisions have as aim to apply restrictive measures against individuals so a normal test of the aims and content of a decision will be particularly complicated.299

Academics have been arguing about a number of ways through which the relationship between these two provisions can be elucidated.

297 M., CREMONA, “EC/EU Competence and EU Counter-terrorism Measures”, p12
One suggested option would be to consider these two provisions as lex generalis (Art.215 TFEU) and lex specialis (Art.75 TFEU) and this on the basis of their respective wording. Art.75 TFEU provides more specific measures, whereas art.215 TFEU has a more general wording to it. As such art.75 TFEU would provide a more suitable basis for counter-terrorist restrictive measures.

A second option would be to differentiate between them on the basis of external and internal aspects of terrorism, with art.75 TFEU targeting internal terrorism and art.215 targeting external terrorism. This would however go counter to what the EU is trying to achieve which is to bring more coherence and co-ordination between EU actions. 

A third option presented by academics would be to differentiate between two types of terrorists, the European autonomous list (cf. the asterisked list) and the non-European list as handed down by the UN (those with no asterisk). Art. 75 TFEU would then be applied to the EU autonomous list, while art.215 TFEU would apply to the UN list. However, the wording of art.215 does not restrict itself to purely the UN list. Furthermore, terrorist today are no longer bound by national borders. Any individual on the autonomous list can easily move abroad and continue with terrorist activities making it much harder to only deal with them on the basis of AFSJ competences.

A fourth possibility opined by some is to differentiate between them on the basis of the type of measures applied by each provision. Art. 75 TFEU would then apply counter-terrorist measures, while art.215 would apply general foreign policy measures.

A last suggestion pushed forward is using both provisions as a dual legal basis. However, this option is contingent upon the condition that the decision making procedures for the provisions are not incompatible and do not undermine the rights of the European Parliament.

This discussion came to a head when the Council adopted Regulation No 1286/2009 on 22 December 2009. It was adopted on the basis of art.215(2) TFEU following a joint proposal by the High representative of the Union for Foreign Affairs and Security Policy and the Commission. It aimed at amending Regulation No 881/2002 in response to the judgement on the joined cases of Kadi and Al

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300 Especially in the field of counter-terrorism where the border between what is internal and what is external is almost none existent these days.
Barakaat. This led to a case before the ECJ between the Council and the European Parliament (C-130/10 - Parliament v Council). On the 19th of July 2012 the ECJ decided on a judgement\(^\text{304}\).

In this case the European Parliament argued that art.215 TFEU could not function as the proper legal basis for Regulation No 1286/2009 and that art.75 TFEU was the proper legal basis.

The ECJ first found that the difference in decision making procedures between both provisions is such as to make them incompatible, even when the contested regulation pursues objectives covered by both art.75 TFEU and art.215 TFEU. As such the contested regulation cannot be adopted on the basis of a dual legal basis\(^\text{305}\).

The ECJ agrees with all parties in the case that the legal basis for the contested regulation must be the same as the one for Regulation No 881/2002. However, it disagrees with the argument of the European Parliament that the legal basis represented by art.60 EC, art.301 EC and art.308 EC can be found under art.75 TFEU. On the contrary, the Court finds that the content of the previous EC articles are mirrored in the wording of art.215 TFEU. It notes that art.301 EC is worded in the same way as art.215(1) TFEU and that a reference to financial relations in art.60 EC can also be found in art.215(1) TFEU. Furthermore, the ECJ notes that the context and tenor of art.75 TFEU differ from those of art.60 EC and art.301 EC\(^\text{306}\).

The ECJ goes on to say that although, art.215 TFEU does not explicitly mention countering terrorism and its funding as reasons for the application of restrictive measures, nothing in its wording prohibits it from doing so. The Court states that this was also the case for art.60 EC and art.301 EC. Furthermore, although combating terrorism and its funding may be among the objectives of the AFSJ, this objective can also be considered to be an objective of the Unions CFSP. Given that terrorism is a threat to international peace and security and that one of the objectives of the CFSP is to tackle such threats, art.215 can be used to apply restrictive measures to obtain this objective. This is further strengthened by the fact that those provisions on the CSDP explicitly mention that CSDP missions may contribute to the fight against terrorism. The Court also rejects the argument that art.75 TFEU is more specific than art.215 TFEU\(^\text{307}\).

\(^{304}\) Judgment of the Court (Grand Chamber), Case C-130/10, European Parliament v Council of the European Union [2012].

\(^{305}\) Judgment of the Court (Grand Chamber), Case C-130/10, European Parliament v Council of the European Union [2012], para 47-49.

\(^{306}\) Judgment of the Court (Grand Chamber), Case C-130/10, European Parliament v Council of the European Union [2012], para 50-54.

\(^{307}\) Judgment of the Court (Grand Chamber), Case C-130/10, European Parliament v Council of the European Union [2012], para 55-66.
As a consequence it finds art.215(2) TFEU to be a proper legal basis for the actions envisioned in the contested regulation\textsuperscript{308}.

The Court goes on to reject the arguments of the European Parliament that there was no valid joint proposal and that there was no CFSP decision on which the contested regulation was based\textsuperscript{309}.

From this one can conclude that art.215 TFEU has become the legal basis for any future regulations which aim to apply restrictive measures to individuals in the fight against terrorism. The question that then remains is, what with art.75 TFEU?

\textsuperscript{308} Judgment of the Court (Grand Chamber), Case C-130/10, European Parliament v Council of the European Union [2012], para 78.
\textsuperscript{309} Judgment of the Court (Grand Chamber), Case C-130/10, European Parliament v Council of the European Union [2012], para 100-111.
IV. Co-operation with Third Country Partners and International Organisations

As has been repeated numerous times, terrorism is a threat that has repercussions around the globe. Numerous countries have been the victim of this threat or have been used as a base from which attacks were planned. As EU Member States have found out that tackling terrorism is not something you do on your own, so has the EU itself known since the beginning that the world as a whole needs to work more closely together to be able to tackle this problem adequately and effectively.

To this end the EU has sought greater co-operation with numerous third countries and international organisations.

One way in which the EU tries to do this is by introducing counter-terrorism clauses in its co-operation and partnership agreements (whatever name they take). Most of these clauses are very broad with an emphasis on helping implement UN Resolutions and conventions relevant to counter-terrorism. Examples of these are the Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part - Final Act, and the Partnership and Co-operation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Tajikistan, of the other part. However, although this is a step forward in the fight against terrorism, it is unfortunate that the EU, in most cases does not make the continuing existence of such agreements contingent upon the continuing respect of such clauses by the partner countries. This means that even though the EU might have a clause providing closer co-operation in the field of counter-terrorism, this might in reality mean nothing because the partner countries do not feel obliged to do any extra work in that field.

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310 Art.15 of the agreement states: The Parties agree to cooperate in the fight against terrorism in accordance with international conventions and with their respective laws and regulations. They shall do so in particular: (a) in the framework of the full implementation of Resolution 1373 of the United Nations Security Council and other relevant United Nations Resolutions, international conventions and instruments; (b) by exchange of information on terrorist groups and their support networks in accordance with international and domestic law; (c) by exchange of views on means and methods used to counter terrorism, including in technical fields and training, and by exchange of experiences in respect of terrorism prevention.”

311 Art.71 of the agreement states: “The parties reaffirm the importance of the fight against terrorism and, in accordance with international agreements and their respective laws and regulations, agree to cooperate on the prevention and elimination of terrorist acts. In particular they will cooperate: - in the framework of the full implementation of UN Security Council Resolution 1373 and other UN resolutions, agreements and other international instruments relating to this matter; - by exchanges of information, in accordance with the international and national laws on terrorist groups and their support networks; - and by exchanges of views on the means and methods used to counter terrorism, including technical fields and training, and by an exchange of experience concerning the prevention of terrorism.”
Besides introducing counter-terrorism clauses into broader co-operation and partnership agreements, the EU has also managed to conclude a number of agreements centred specifically on counter-terrorism and security. One on-going project is the creation of a common space of external security with Russia. Within this common space, terrorism is earmarked as a key threat. The conclusion of a number of PNR agreements, with the US, Canada and Australia and the conclusion of the swift agreement (also known as the EU-US TFTP agreement) are further examples of closer co-operation (Although any agreement with the US on the use of personal data has been riddled with challenges and problems.).

A number of EU institutions play an important role in improving the world’s capacities in the fight against terrorism. Both Europol and Eurojust are able to conclude agreements with third countries and international organisations. Europol has been able to do this since a Council decision of 27 March 2000. On the basis of that decision Europol has concluded numerous operational agreements (including the exchange of personal data and better co-operation for the tackling of those crimes for which Europol is competent, including terrorism) and strategic agreements with non EU states and organisations (So far it has concluded agreements with Interpol, the World Customs Union and UNODC.). Similarly, Eurojust can, on the basis of art.26a of the Eurojust decision, conclude agreements with non-EU countries and international organisations. Any agreements concluded by either of these two, aim at improving the police and judicial co-operation at the international level as well as the exchange of information and know how. The EU, being one the pioneers in cross-border co-operation in these fields, has a lot it can teach.

Besides this bilateral track to the EU’s role in counter-terrorism, the EU also promotes a broader and more global approach to the problem. The EU has made use of numerous types of world summits, such as the G7/G8, the G20 and other international organisations and initiatives (I.E. the OECD’s FATF) to improve the world wide consensus about the threat of terrorism. The most important international organisation the EU co-operates with at the multilateral level is the UN.

The EU puts a lot of emphasis on the UN framework for co-operation in the field of counter-terrorism. As an illustration of this is that the EU repeatedly stresses the central role the UN plays in

313 Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program.
315 One example of this was already given earlier in this paper under the chapter on the EU institutional framework, with the memorandum of understanding between Eurojust and UNODC.
316 This is apparent from the fact that in the framework of assistance provided to third countries one of the central aims of such assistance is to help these countries to implement and adopt the relevant UN resolutions and conventions.
the international fight against terrorism. It considers the UN Security Council to have the primary responsibility for the maintenance of international peace and security. As such, one the EU’s main priorities in the fight against terrorism is to strengthen the role of the UN and to help build a consensus within this framework\(^{317}\). Since 1964 the UN has concluded 14 conventions and four amendments in the area of counter-terrorism\(^{318}\) and has managed to work out a Global counter-terrorism strategy with an action plan implementing this strategy in an annex\(^{319}\). Central to the EU’s co-operation with the UN is its promotion of the implementation of the different UN legal instruments relevant to counter-terrorism. It does this both within the UN itself, through its Member States, as well as within its own bilateral agreements with third countries. The EU also promotes the role of the EU by sponsoring a number of UN programmes in the field of counter-terrorism. The EU has done this through the funding of a number of UNODC programmes\(^{320}\) and by improving the co-operation and information exchange between some of its institutions (Eurojust, Frontex, Europol) and UNODC’s terrorism prevention branch\(^{321}\). A third level in the EU-UN relationship is the co-operation between these two in other international organisations, such as the FATF\(^{322}\).

In the next part of this chapter I will take a closer look at the EU-US partnership in the fight against terrorism.

1. **EU-US Co-operation: a Rocky Road Full of Bumps and Potholes**

The 9/11 attacks not only precipitated the EU’s efforts in creating an area of freedom, security and justice, it also led to closer EU-US co-operation. This has led to the conclusion of a number of agreements and dialogues all with the aim of improving each other’s capabilities in the fight against terrorism. In 2001 and 2002 the US and Europol concluded two agreements on the exchange of

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\(^{319}\) United Nations General Assembly Resolution 60/888 (20 September 2006), UN Doc A/RES/60/288


personal data and on closer co-operation between law enforcement agencies. These two agreements had as aim: preventing, detecting, suppressing, and investigating serious forms of international crime through the exchange of strategic and technical data as well as personal data. Similarly, in 2006, Eurojust and the US concluded a co-operation agreement with the aim to enhance the co-operation between the United States of America and Eurojust in combating serious forms of transnational crime including terrorism. Additionally, these agreements also set up the exchange of liaison officers between the US and these two EU institutions.

This closer co-operation also led to the start of negotiations in two new agreements, one on extradition, and the other on mutual legal assistance. These two agreements aim to facilitate and speed up extradition procedures, facilitate contact between EU and US agencies, provide access to banks for both partners and provide the possibility to set up joint investigation teams. Although negotiations had started in the aftermath of the 9/11 attacks it wouldn’t be until February 2010 that they would enter into force. One of the reasons for the long time it took for them to be approved of was that the EU demanded guarantees that no person extradited by the EU to the US would face the death penalty and that any EU citizen indicted in the US would be extradited to the EU.

EU-US co-operation has also led to the conclusion of two very controversial agreements, these being the EU-US PNR agreements and the EU-US TFTP agreements. Both of these agreements target the exchange of personal data, with the PNR agreement focusing on the data of passengers flying between the US and the EU, and the TFTP agreement which focuses on the exchange of financial information. The controversy came from the fact that The EU felt that the US was not able to provide adequate data protection guarantees for information they received from the EU. This same problem has resurfaced numerous times in the EU-US relations in this field (The Eurojust-US agreement suffered from the same problems.).

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323 Agreement between the United States of America and the European Police Office; Supplemental agreement between the Europol police office and the United States of America on the exchange of personal data and related information.
325 Agreement between Eurojust and the United States of America.
326 EU-US Agreement on extradition between the European Union and the United States of America.
327 EU-US Agreement on mutual legal assistance between the European Union and the United States of America.
331 Although controversial, the US has stated that it has helped a lot in a number of terrorism investigations in the US.
Besides agreements enhancing co-operation, the EU and US organise numerous dialogues and set up working groups on more specific aspects of counter-terrorism. For example, a US–EU group consisting of senior officials meet every six months to discuss police and judicial co-operation against terrorism. Furthermore, regular dialogue is being held on topics such as terrorism financing, border, air and maritime security and in 2010 an EU-US expert level dialogue was set up on the topic of critical infrastructure. The US and EU have also started dialogues on the prevention of radicalisation and violent extremism, which the US believed to be a European problem only.

Furthermore, the EU and the US have also stepped up its mutual co-operation in international organisations such as the International Maritime Organisation (IMO), the International Civil Aviation Organisation (ICAO), the UN and numerous other international organisations. Within the ICAO and the IMO, both the EU and the US strive for improved worldwide standards of security when it comes to borders and transportation. In the field of maritime cargo security, the EU and US have mutually recognised each other’s trusted shipper programmes.

The EU and US have also adopted a number of Declarations on counter-terrorism. Such as the Declaration at Dromoland Castle on 26 June 2004 which listed 7 areas for closer co-operation. These were:

- deepening the international consensus and enhancing international efforts to combat terrorism;
- working more closely together to tackle the financial and other resources of terrorists;
- working together to maximise the capacities to detect, investigate and prosecute and prevent terrorist attacks;
- seek to further protect the security of international transport and ensuring effective systems of border control;
- developing further their capabilities to deal with the consequences of terrorist attacks;
- diminishing the underlying conditions that terrorists can seize to recruit and exploit to their advantage;

335 S., PLESCHINGER, “Allied against Terror: Transatlantic Intelligence Cooperation”, p57.
• Targeting their external relations actions towards priority third countries where counter-terrorist capacity or commitment to combating terrorism needs to be enhanced.

In 2010, the EU and US adopted a new declaration on combating terrorism highlighting what they had already achieved and further deepening their co-operation in counter-terrorism. It set up a new framework with an emphasis on: fighting terrorism while respecting the principles of the rule of law, democracy and human rights; EU-US efforts in counter-terrorism must be more action oriented, specifically in the fields of law enforcement, judicial co-operation, intelligence, diplomacy, security and financial; an effective an long-term approach to combat violent extremism and radicalisation.

Unfortunately, in spite of the numerous agreements and on-going dialogues, EU-US relations have always been rocky. One of the reasons for this in my opinion is that for a long time (even now this is still the case) the EU and the US saw counter-terrorism in a different light. The EU considered it to be just another type of organised crime, albeit one with global ramifications and very persistent, whereas the US considered itself to be at war with the terrorists. These different views have coloured the way in which they each tackle the issue. Furthermore, the EU has always been a proponent of human rights and stresses the importance of always weighing its actions against human rights.

Another problem which has regularly resurfaced is the conditions and situations of terrorist detainees. The practice of extraordinary renditions, the use of secret facilities within certain EU Member States and the on-going use of Guantanamo as a prison facility have soured some of the goodwill within Europe for the US stance on terrorism.

Another problem that has surfaced is the fact that the US prefers to work with EU member state agencies for the exchange of intelligence rather than with EU institutions. The US have long viewed such channels as being unsuited for co-operation on foreign and security policy, including intelligence sharing (The agreements the US concluded with both Europol and Eurojust have alleviated some of these concerns, although the US does not consider Europol as an effective agency for information and intelligence).

Another aspect of this co-operation, which until recently was seen as a black mark by the US, was the refusal of the EU to list Hezbollah as a terrorist organisation. However, this changed on the 25th of


K., ARCHICK, “U.S.-EU Cooperation Against Terrorism”, p5; Allied Against Terror: Transatlantic Intelligence Cooperation, p64.
July 2013 when the EU terrorist list was amended with the addition of the military wing of the Hezbollah.\textsuperscript{342}

Lastly, the SWIFT and more specifically the PNR agreements must be mentioned, as they are perfect illustrations of turbulent EU-US relations.

In 2006, media reports brought to light a massive US programme which transferred financial data to the US which it received from the Society for Worldwide Interbank Financial Telecommunication (SWIFT), a syndicate of international banks, located in Belgium. As soon as it came to light the European Data Protection Supervisor (EDPS) ruled that such an exchange ran counter to EU data protection laws. This led to the conclusion of a first interim agreement on the exchange of financial data (SWIFT I) in 2009 by the council. However, in 2010 the European Parliament shot down the agreement, nullifying it. This led to the negotiations of a new agreement (SWIFT II) which was eventually accepted by both the Council and the European Parliament and concluded in 2010\textsuperscript{343} (although data protection organisations and certain members of the European Parliament argued that there was not much difference between this agreement and the previous one\textsuperscript{344}).

The EU-US PNR agreements ran into much the same problems as the SWIFT agreements, though they were much more drawn out than the previous batch of agreements. I find that the problem EU-US co-operation faced in the last decade is perfectly illustrated by the perils of the EU-US PNR agreements. That is why I will discuss these agreements more in depth so as to give the reader a better understanding of the conflict between the EU’s data protection stance and the US’s war on terror.

2. EU-US PNR Agreements: Counter-Terrorism Co-operation Put to the Test

A. What are PNR Agreements?

The events of 9/11 marked the advent of an ever-increasing counter-terrorism policy in general (supra) and securitization of air travel between states in particular. This not only included more thorough inspections at airport security checkpoints across the country, increased baggage searches and tighter


\textsuperscript{344} K., ARCHICK, “U.S.-EU Cooperation Against Terrorism”, p10.
restrictions on carry-on items\textsuperscript{345}, but also the use of PNR data to help screen those who enter a state’s territory\textsuperscript{346}. This last mechanism is very controversial because it contains a lot of private information on anyone who has ever travelled with an aviation company. It can include data contained in passports, telephone numbers, travel carriers, credit card numbers, seat numbers and other elements\textsuperscript{347}.

The retention itself of passenger name records is not controversial, but the aim for which the PNR data is retained is what poses the problem. Aviation companies have been storing this data for years without any problems, but that is because this data was only used for commercial purposes. However, over the years the analysis of PNR data has become a tool used by a number of countries to identify dangerous people.

The US was one the first countries to use PNR data as an instrument in their fight against terrorism\textsuperscript{348}. The US started asking all aircraft carrier companies to forward their PNR data. Eventually other countries would mimic the US and create their own policies on this matter. PNR data would, from now on, not only be used for commercial purposes but also in the context of the fight against terrorism. As a consequence, seeing terrorism as an international problem, the international exchange of any relevant information on dangerous individuals is necessary. This has led to the creation of bilateral PNR agreements between the EU and the US, Canada and Australia aimed at transferring and processing of passengers’ personal data\textsuperscript{349}.

Some of these agreements have been more controversial than others. This is due to the fact that national and European legislation on the protection of human rights, and more specifically the right to privacy in the context of counter-terrorism policies, differs from member state to member state.

Only the EU-Canada agreement has been in force since 2006, the 2007 EU-US and the 2008 EU-Australia agreements have only been applied on a provisional basis as the European Parliament had never given its consent (\textit{infra}). Other than that, the fact that the Lisbon Treaty has entered into force in


\textsuperscript{348} C., JONES, “Statewatch Analysis: Making Fundamental Rights Flexible: The European Commission’s Approach to Negotiating Agreements on the Transfer of Passenger Name Record (PNR) Data to the USA and Australia”, p1 (Hereinafter shortened to: C., JONES, “Statewatch Analysis: Making Fundamental Rights Flexible”).

the meantime was a clear indication that new agreements with the US\textsuperscript{350} and Australia\textsuperscript{351} as well as with Canada were necessary.

New agreements have been signed with both the US and Australia respectively and negotiations with Canada are still underway for the conclusion of a new PNR agreement\textsuperscript{352}. Furthermore there is also a proposal for an EU PNR agreement that would be applicable to air travel exclusively within the EU\textsuperscript{353}.

However, before discussing the specific agreements, I will try to give a short review of all the instruments in which the right to privacy and more specifically the right to the protection of personal data is enshrined, with an emphasis on those instruments that protect European citizens.

\section*{B. The Right to Privacy}

\subsection*{1) Universal Declaration of Human Rights}

The conclusion of these Agreements has never been easy. This is because the retention and storage of PNR data is a clear violation of the right to privacy which is enshrined in a number of important conventions both international and regional. The first important convention is the \textit{Universal Declaration of Human Rights (UDHR)} and more specifically art. 12 UDHR:

\textit{“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks\textsuperscript{354}.”}.

The wording of this article has been reproduced in art 17 of the 1966 International Covenant on Civil and Political Rights\textsuperscript{355}.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{350}] Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection (2004).
\item[\textsuperscript{351}] Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian customs service.
\item[\textsuperscript{352}] Agreement between the European Community and the Government of Canada on the processing of Advance Passenger Information and Passenger Name Record data.
\item[\textsuperscript{353}] COM(2011) 32 final, Proposal for a Directive of the European parliament and of the council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.
\item[\textsuperscript{354}] United Nations General Assembly: the Universal Declaration of Human Rights of 10 December 1948.
\item[\textsuperscript{355}] United Nations General Assembly: International Covenant on Civil and Political Rights of 16 December 1966.
\end{itemize}
\end{footnotesize}
ii) Guidelines Governing the Protection of Privacy and Trans-border Data Flows of Personal Data

The OECD also has an important instrument entitled ‘Guidelines governing the protection of Privacy and Trans-border Data Flows of Personal Data’ which was adopted in 1980 by the member states. These Guidelines contain eight principles for the creation of data exchange instruments. These are: (1) Collection Limitation Principle, (2) Data Quality Principle, (3) Purpose Specification Principle, (4) Use Limitation Principle, (5) Security Safeguards Principle, (6) Openness Principle, (7) Individual Participation Principle and (8) Accountability Principle.

iii) European Convention on Human Rights

The next step in the protection of the right to privacy is that at the regional level, more precisely European level. As is apparent from most evolutions on the European continent the Council of Europe will be the first to consolidate this right at a regional level. This is self evident as the whole reason for the creation of the Council of Europe was the protection of human rights after World War II. Its primary tool is the European Convention on Human Rights. The relevant article for us is art. 8 ECHR which in its first paragraph states:

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

This is not an absolute right as is apparent from the second paragraph which states:

“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The aim and extent of art. 8 ECHR has further been developed through case law of the European Court of Human Rights. From this case law three prerequisites can be distilled for a state to be able to encroach on an individual’s privacy: the restrictive measure must (1) be prescribed by law, (2) pursue a legitimate aim and (3) must be necessary in a democratic society in order to pursue that legitimate aim.

358 M., NINO, “Protection of Personal Data in the Fight against Terrorism”, p64.
iv) Convention of 1981 for the Protection of Individuals with Regard to Automatic Processing of Personal Data

Alongside the ECHR the Council of Europe also concluded the Convention of 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention nr. 108). The convention ensures that all Council of Europe member states enact legislation adequately protecting personal data that is automatically processed. Art. 5 of the convention contains quality standards for the personal data being processed and art. 6 contains special categories of personal data, called sensitive data, which may not be processed automatically, save under special circumstances. In 2001 the Council of Europe adopted an additional protocol which set up a supervisory authority, whose task it would be to assess the legal protection of data transfer to a party outside the jurisdiction of a member state’s judicial authority. This convention had one important lacuna, namely the fact that it only concerned automatic processing of personal data.

This aberrance in legislation was luckily plugged up by a directive of the European Union in 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Directive 95/45/EC). The aim of the directive is to create a baseline for data protection legislations in all member states. Art. 2 of the directive gives a definition of personal data processing and explicitly states that it can be either automatic or not by automatic means. Any personal data processing must furthermore be in respect with the principles listed under art. 6 of the directive:

“(a) processed fairly and lawfully,

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that member states provide appropriate safeguards,

(c) must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed,

359 Council of Europe: Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data.
360 Council of Europe: Additional Protocol of 8 November 2001 to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and trans-border data flows.
361 D.R., RASMUSSEN, “Is International Travel Per Se Suspicion of Terrorism”, p557.
(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified and kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data collected or for which they are further processed. Member states shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.”

Just like in Convention nr. 108 the directive contains a special category of personal data in art. 8, which may not be processed unless in the specific circumstances enumerated in paragraph 2 of the same provision. It is this provision that has served as a point of contention as it states that any data concerning a person’s ethnic or racial origins is considered to be sensitive data which can only be processed under specific circumstances. With the rise of xenophobia after the 9/11 attacks, the balancing act between security of its citizens and the protection of their privacy was highly sensitive on this issue.363

Most relevant to what is being discussed in this paper are art. 25 and art. 26 of the directive. Art. 25 states when and how personal data may be transferred to third parties, insofar as those third countries ensure an adequate level of protection, whereas art. 26 states the specific situations where transfer of personal data to third countries is possible where an adequate level of protection within the meaning of art. 25 is not ensured.364

The scope of the directive is enshrined in art. 3. This provision not only states for which areas the provision is applicable but also in which competence areas it is inapplicable. Unfortunately one of the areas that falls outside of the scope of the directive is the processing of personal data:

“...in the course of an activity which falls outside the scope of community law, such as those provided for by titles V and VI of the treaty on the European union and in any case to processing operations concerning public security, defense, state security (including the economic well-being of the state when the processing operation relates to state security matters), and the activities of the state in areas of criminal law.365”

This hole in the protection of personal data led to the possibility of negotiating a PNR agreement with the US in 2004, 2006 and 2007.


The above mentioned lacuna was eventually solved with the conclusion of the Council Framework Decision 2008/977/JHA\(^{366}\) on the protection of personal data processed within the framework of police and judicial co-operation in criminal matters\(^{367}\). As stated in art. 1 of the framework decision, its aim is

“...to ensure a high level of protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data in the framework of police and judicial cooperation in criminal matters, provided for by Title VI of the Treaty on European Union, while guaranteeing a high level of public safety”.

Furthermore the framework decision ensures that the general principles on the protection of personal data enshrined in directive 95/45/EC and Convention nr. 108 are also applicable in the areas formerly falling under the third pillar (now AFSJ). Similarly to the directive, this framework decision also contains a provision on the transfer of personal data to third countries or even to international bodies (art. 13 of the Council framework decision).

This Council framework decision has nonetheless been criticized for not going far enough. The EDPS has questioned the efficiency of the framework decision because it does not ensure an adequate level of protection for the transfer of personal data to third states and that the purpose limitation of the framework decision does not provide for an equal protection as that of directive 95/45/EC\(^{368}\). Moreover, the Council framework decision is critiqued for not concerning domestic data\(^{369}\).

With the advent of the Lisbon Treaty European citizens have gained an added layer of protection in the form of the charter of fundamental rights\(^{370}\). This charter forms an integral part of the consolidated treaty and should as such be placed on the same level as the other two parts of the Lisbon treaty (TFEU and TEU). This charter not only has a provision on the respect for private and family life (art.7), but also a specific provision on the protection of personal data (art.8):


\(^{367}\) M., NINO, “Protection of Personal Data in the Fight against Terrorism”, p67-68.


“1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.”

C. EU-US PNR Agreements before the Lisbon Treaty

i) EU-US PNR Agreement of 2004

The EU and US signed the first PNR agreement in 2004. This international agreement required air carriers to provide U.S. Customs and Border Protection (CBP) with access to passenger name records for purposes of screening individuals travelling to and from the United States. The 2004 agreement contained a list of 34 elements of PNR that needed to be conveyed to the CBP. The 2004 agreement however also included a filter stating that the CBP could only use those elements to prevent and combat: (1) terrorism and related crimes, (2) other serious crimes, including organized crime and (3) fleeing from warrants or custody for those crimes. The method through which the PNR data elements were transmitted to the US was by a “pull” system. This meant that the CBP itself would look through the PNR data collected by aviation companies and pull out the relevant data fields.

Before the European Council could conclude the agreement however, voices were raised in Europe, exclaiming that the right to privacy and more specifically the protection of personal data was being violated. Most notable of those was the opinion of the art. 29 working party. This working party was created on the basis of art. 29 of Directive 95/46/EC on the compatibility of the US PNR data collection requirements and the Directive 95/46/EC. In its opinion the working party not only expressed its concerns on the level of data protection assured in the US but also stated that aims for which PNR data could be used and processed were much too vague. Especially the second of those aims listed in the undertakings (these were meant to ensure the commission that the CBP

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373 M., NINO, “Protection of Personal Data in the Fight against Terrorism”, p72.
375 M., NINO, “Protection of Personal Data in the Fight against Terrorism”, p71.
376 UNDERTAKINGS OF THE DEPARTMENT OF HOMELAND SECURITY BUREAU OF CUSTOMS
implemented the agreement on the basis of adequate levels of protection), and as such formed an unjustified limitation of the right to privacy as protected by Directive 95/46/EC<sup>377</sup>.

Additionally it opined that a list of 34 elements was much too large to be exchanged with a third country. The working party was of the opinion that not all data fields included in the list were relevant to the aims of the agreement, namely the prevention and combating of crime. Another concern was the amount of time for which this data was stored before being destroyed.

Not only the Working party but the European Commission and the Parliament were concerned with the agreement due to the discrepancies between US and EU legislation in the area of privacy protection and personal data. One of those concerns was the fact that only US citizens enjoyed protection under the US privacy legislation<sup>378</sup>. As a consequence the EU would pile on pressure on the US to accommodate the EU worries on protection of personal data<sup>379</sup>. This eventually led the Commission to conclude an adequacy decision, stating that the guarantees given by the CBP in the undertakings document were sufficient to function as an adequate level of protection for the personal data handled by the CBP<sup>380</sup>.

However, the European Parliament (supported by the European data protection supervisor) would keep opposing the conclusion of the 2004 PNR agreement on the basis of the adequacy decision of the commission. This opposition would eventually lead to two cases, cases C-317/04<sup>381</sup> and C-318/04<sup>382</sup> brought before the European Court of Justice. These would later on be merged<sup>383</sup>. In 2006 the Court would conclude its judgment which was the annulment of both decisions. Unluckily for the human rights activists the court had however, not annulled the decisions due to an infringement of the right to privacy, they were annulled because the Court ruled that the agreement was not based on the proper legal basis to be adopted<sup>384</sup>. As such the Court of Justice had bypassed the whole privacy issue, meaning that any future PNR agreement would become subject to the same inadequacies.

Unfortunately, the decision of the ECJ put aviation companies between a rock and a hard place as they had the choice of either receiving sanction from the US government for not divulging their PNR data (the US threatened to fine the aviation companies for every passenger whose PNR data was not

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<sup>377</sup> M., NINO, “Protection of Personal Data in the Fight against Terrorism”, p72.
<sup>378</sup> D.R., RASMUSSEN, “Is International Travel Per Se Suspicion of Terrorism”, p580.
<sup>379</sup> M., NINO, “Protection of Personal Data in the Fight against Terrorism”, p71.
<sup>381</sup> Judgment of the Court (Grand Chamber), joined cases C-317/04 and C-318/04, European Parliament v Council of the European Union and Commission of the European Communities, 2006.
<sup>383</sup> M., NINO, “Protection of Personal Data in the Fight against Terrorism”, p491-492.
<sup>384</sup> D.R., RASMUSSEN, “Is International Travel Per Se Suspicion of Terrorism”, p583.
transmitted to the US authorities)\textsuperscript{385} or being found in violation of privacy legislation by the European Union and its member states. The only option for the EU to resolve this void of certainty was to conclude the interim EU-US PNR agreement of 2006\textsuperscript{386} (this agreement would be replaced by the permanent EU-US PNR agreement of 2007)\textsuperscript{387}.

ii) EU-US PNR Agreement of 2006 and 2007

The new 2006 agreement was only meant to be applicable for one year. It included a less clear and precise description of the PNR data to be transferred\textsuperscript{388}. Secondly it expanded the list of US agencies that could access this PNR data. This was a blow to the EU compared to the 2004 agreement in terms of data protection because under the 2004 agreement the only competent authority to handle this PNR that was the CBP. The only prerequisite for those agencies were comparable standards of personal data protection with the EU\textsuperscript{389}. Thirdly the agreement hardly referred to an adequate level of protection as it stated that the processing of data would be protected by applicable US laws and constitutional requirements\textsuperscript{390}. Furthermore the “pull” system was kept in place\textsuperscript{391}. This meant that no single step forward had been made in the area of the protection of personal data.

As stated earlier this agreement was supplemented by the permanent EU-US PNR agreement of 2007\textsuperscript{392}. The 2007 agreement does not only consist of the text of the agreement but also of a letter of the US to the EU, wherein the US guarantees that the data being transferred to the US from the EU and processed in the US are subject to adequate levels of protection. It is therefore no wonder that not only the European Parliament and the art. 29 working party but also the media had certain misgivings with the signing of the agreement. The fact that the guarantees were included in a letter with no legally

\textsuperscript{385} KUHELIJ, A., “The Twilight Zone of Privacy for Passengers on International Flights between the EU & USA”, U.C. Davis Journal of International Law & Policy, Vol. 16, Issue 2 (Spring 2010 ), p403 (Hereinafter shortened to: KUHELIJ, A., “The Twilight Zone of Privacy for Passengers on International Flights between the EU & USA”).

\textsuperscript{386} Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security of (2006).

\textsuperscript{387} Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement).

\textsuperscript{388} D.R., RASMUSSEN, “Is International Travel Per Se Suspicion of Terrorism”, p585.


\textsuperscript{390} D.R., RASMUSSEN, “Is International Travel Per Se Suspicion of Terrorism”, p585.

\textsuperscript{391} M., NINO, “Protection of Personal Data in the Fight against Terrorism”, p75.

\textsuperscript{392} Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement).
binding power meant that they could be altered at any time at the discretion of the US\textsuperscript{393}. EU citizens had no iron-clad assurances that their right to privacy would not be inordinately violated.

As has been the case in the past both the European Parliament (in a resolution in 2007\textsuperscript{394}) and the art.29 working party (in opinion 2/2007\textsuperscript{395}) voiced their critiques on the negotiated text. One of the concerns was that the aims for which PNR data could be processed by the United States Department of Homeland Security (DHS) had been widened. Furthermore this widening did nothing in making it clear for what exactly the DHS would be allowed to use the data. It criticized the openness and vagueness of definitions used in the letter. The Parliament recognized in its resolution that the use of this data was important in the fight against terrorism, but stated that this did not mean that state authorities could just wantonly violate the privacy of its citizens\textsuperscript{396}.

A second concern was the time span of storing personal data by the DHS. Whereas the 2004 agreement planned to store data for three and a half years, the new 2007 agreement planned on retaining data for seven years in an active database where after it is subsequently transferred to a dormant database for eight years. This meant that personal data would be retained for a total of 15 years. In the eyes of the European Parliament and the art. 29 working party this retention period was seen as disproportionate when compared to the purposes to be achieved\textsuperscript{397}. Although the US guaranteed that any sensitive data fields and terms included in the PNR data would be destroyed, the US still retained the possibility to even store that data in so far as the DHS was of the opinion that it was necessary\textsuperscript{398}.

Although the US states that it expands the US Privacy legislation to EU citizens, the lack of a general US framework on the protection of personal data and the statement that all PNR data will be processed and used in accordance with US law was alarming. This not only meant that the number of agencies that could access this information would drastically increase but also meant that the US at its own discretion could decide to share personal data with third countries without ever taking into account the EU acquis\textsuperscript{399}.

\textsuperscript{393} \textsc{Kuhelj, A.}, “The Twilight Zone of Privacy for Passengers on International Flights between the EU & USA”, p404.

\textsuperscript{394} European Parliament resolution of 12 July 2007 on the PNR agreement with the United States of America, OJ C 175 E/564, 10/7/2008.


\textsuperscript{396} M., \textsc{Yano}, “Come Fly the (Unfriendly) Skies”, p495.

\textsuperscript{397} M., \textsc{Nino}, “Protection of Personal Data in the Fight against Terrorism”, p76.

\textsuperscript{398} \textsc{Kuhelj, A.}, “The Twilight Zone of Privacy for Passengers on International Flights between the EU & USA”, p.404-405.

\textsuperscript{399} M., \textsc{Nino}, “Protection of Personal Data in the Fight against Terrorism”, p77.
The Parliament however, was happy with the fact that the means through which PNR data would be acquired would no longer employ the ‘pull’ mechanism but the ‘push’ mechanism. This meant that the DHS could not go fishing for data but needed the aviation companies to send them the relevant data.\textsuperscript{400}

The US also addressed the EU’s concerns on access and redress of the personal data subjects. In the agreement the US states that personal data subjects were free to dispute the retention of their personal data insofar as that possibility was given to them under the US Privacy Act and the US Freedom of Information Act\textsuperscript{401}. The possibilities for access and redress were however, not as all-encompassing as those assured by the EU due to the fact that there was no general framework on the right to privacy.

One more relevant change put into place by the agreement was the decrease in the number of data fields that would be transmitted to the DHS. Where the 2004 agreement included a list of 34 elements, the 2007 agreement used a list of 19 elements. Unfortunately, this decrease in transmitted elements was merely an illusion as this decrease was compensated by combining a number of elements and creating subcategories within the remaining elements\textsuperscript{402}.

In the end the European Council would put its signature at the bottom of the 2007 EU-US PNR agreement despite the serious concerns voiced by the European parliament, the art.29 working party and the general public. However, with the Lisbon Treaty on the horizon and the institutional changes that this treaty entailed, this agreement was never concluded (\textit{supra}) but applied on a provisional basis. This would set the stage for negotiations of the 2011 EU-US PNR agreement\textsuperscript{403}.

\textbf{D. The 2011 EU-US PNR Agreement}

\textit{i) Communication of the Commission on the Global Approach to Transfers of Passenger Name Record Data to Third Countries of 21 September 2010.}

With the advent of the Lisbon Treaty and the still outstanding issues of the 2007 agreement the Committee on Civil Liberties, Justice and Home Affairs (LIBE committee) advised the EU to open up negotiations with the US on a new PNR agreement replacing the 2007 agreement. Of relevance to this

\textsuperscript{400} D.R., RASMUSSEN, “Is International Travel Per Se Suspicion of Terrorism”, p.587.  
\textsuperscript{401} M., YANO, “Come Fly the (Unfriendly) Skies”, p.498.  
\textsuperscript{402} M., NINO, “Protection of Personal Data in the Fight against Terrorism”, p76.  
paper is a communication of the Commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries of 21 September 2010.\textsuperscript{404}

The Commission has found it necessary to create a new global approach to the transfer of PNR data to third countries due to the recent evolutions in society. It has increasingly become clear that, according to national authorities, the use of PNR data is a necessary tool for the prevention and fight against terrorism and serious crime.\textsuperscript{405} The Commission states in his communication that as more and more countries implement their own national mechanisms for the processing and use of PNR data, the Union needs to develop a coherent and general strategy in how to deal with third country requests for personal data of EU citizens. The Commission recognises that the transfer of PNR data is useful in the fight against terrorism but also stresses that the right to protection of an individual's personal data is a fundamental right. Therefore it is imperative that the EU only co-operates in this field with those countries that can provide an adequate level of protection for the PNR data originating from the EU.

Furthermore the negotiating of PNR agreements in the past was demand driven and was taken care of on a case by case basis, which led to a divergence in the content of these agreements. Not all had the same standards of data protection.\textsuperscript{406}

In its communication the Commission identifies five reasons for which a revised global approach is necessary:

1. \textit{Fight against terrorism and serious transnational crime}: The EU recognises that it has a responsibility to co-operate with third countries in the fight against terrorism. As such the use of PNR data is a necessary tool to make this fight more efficient.

2. \textit{Ensure the protection of personal data and privacy}: As one of the forerunners in the protection of human rights, the EU needs to make sure that adequate levels of protection for personal data are in effect, especially when taking into consideration that not all third countries have the same levels of protection.

3. \textit{Need to provide legal certainty and streamline the obligations on air carriers}: Air carriers need to be able to find out with certainty what their legal responsibilities and rights are in field of PNR data transfer.

\textsuperscript{404} COM(2010) 492 final, Communication from the commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries.
\textsuperscript{405} COM(2010) 492 final, Communication from the commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries, p5.
\textsuperscript{406} COM(2010) 492 final, Communication from the commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries, p5.
\textsuperscript{407} COM(2010) 492 final, Communication from the commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries, p6.
(4) **Establish general conditions aimed at ensuring coherence and further developing an international approach:** the divergence as to the content of past PNR agreements needs to be eliminated. Therefore a general and standardised approach to future PNR agreements is necessary and as such general criteria need to be developed on the basis of which future PNR agreements will be negotiated.

(5) **Contribution in increasing passenger convenience**

The Commission identifies a number of criteria and standards which need to be fulfilled by each PNR agreement before it can be concluded.

Firstly, it states that there should be purpose limitation, meaning that the scope for which PNR data can be used needs to be limited. Therefore the areas for which PNR data may be used need to be clearly defined and limited. It should be no more wider than necessary for the aims envisaged. Concretely for PNR agreements, this would be mean that PNR data could only be used for the fight against crime and serious transnational crime\(^{408}\). However, these two notions need to be clearly defined on the basis of EU definitions. Furthermore, purpose limitation also refers to categories of elements contained within the PNR data being transferred. These categories should be strictly limited and proportionate with the aim. Any sensitive data should never be retained and should not be used unless under exceptional circumstances\(^{409}\). It is however discomforting that no clear definition is given as to what those circumstances can be and how great the discretionary power of a state is to label a situation as an exceptional circumstance as this was one the issues for which the art.29 working party and the European Parliament were concerned with in past PNR agreements.

Secondly, any data transferred needs to be protected against abuse and unlawful access. Furthermore an independent authority needs to be made responsible for the supervision of those agencies working with PNR data. To be effective these authorities need real powers of intervention and enforcement\(^{410}\).

Thirdly, any personal data subject needs to be informed of the fact that their personal data will be shared with foreign authorities. They need to know who will be processing their data and what their rights are. They also need to be able to rectify and even ask for deletion of their personal data. They need to have an effective right to administrative and judicial redress in case their right to privacy has

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\(^{408}\) COM(2010) 492 final, Communication from the commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries, p8.

\(^{409}\) COM(2010) 492 final, Communication from the commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries, p8.

\(^{410}\) COM(2010) 492 final, Communication from the commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries, p8.
been infringed upon\textsuperscript{411}. Incidentally, no decision with potential adverse effects on an individual may be based solely on an automated processing of personal data.

Additionally, the period of data retention may only be as long as it is necessary for the performance of the defined tasks. Any disproportionately long retention period must be seen as an infringement of a person right to privacy. It should not only take into account the different ways in which PNR data may be used but also the modalities through which data may slowly be anonymised\textsuperscript{412}.

Lastly, any PNR agreement needs to strictly limit the number of agencies which may make use of the PNR data. Transfer of PNR data from one such agency to another agency should only be allowed if those agencies afford the same protection as the original recipients of the PNR data. This transfer of data may only be applied on a case by case basis. Furthermore there must be very strict restrictions on onward transfers to third countries. The recipient third country may only forward PNR data to competent authorities of another third country if that third country guarantees the same levels of protection set out in the agreement and that the use of the transfer of data is limited to the purposes defined in the agreement between the recipient third country and the EU\textsuperscript{413}.

The criteria and standards enumerated above only refer to the data protection level. The Commission also recommends the ‘push’ mechanism should be the only mechanism by which PNR data is transferred. Also, there should be a limit to the number of times the recipient country may request the transfer of data\textsuperscript{414}.

\textbf{ii) Opinions of the European Data Protection Supervisor and the European Parliament on the Commissions Communication}

Two opinions\textsuperscript{415} would be ‘published’ on the global approach as developed by the Commission. The authors of these opinions are the European Data Protection Supervisor (EDPS) and the European Parliament. Both would laud the evolution of more protection for personal data and would reiterate

\textsuperscript{411} COM(2010) 492 final, Communication from the commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries, p9.
\textsuperscript{412} COM(2010) 492 final, Communication from the commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries, p9.
\textsuperscript{413} COM(2010) 492 final, Communication from the commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries, p9.
\textsuperscript{414} COM(2010) 492 final, Communication from the commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries, p9-10.
\textsuperscript{415} Opinion of the European Data Protection Supervisor (2010/C 357/02) on the Communication from the Commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries, OJ C 357/7, 30/12/2010; European Parliament resolution of 11 November 2010 on the global approach to transfers of passenger name record (PNR) data to third countries, and on the recommendations from the Commission to the Council to authorise the opening of negotiations between the European Union and Australia, Canada and the United States, OJ C 74 E/8, 13/3/2012.
that the fight against terrorism is one of the more important competences of the EU, one in which international co-operation is paramount. However, they both stress that this does not mean that protection of individual rights should be put on the back burner. The EDPS, unlike the European Parliament, however remains unconvinced that the criteria suggested by the Commission in their communication are sufficient to provide an adequate protection of EU citizens. The EDPS proposes for the application of stricter conditions, especially with regard to the processing of sensitive data, the purpose limitation principle, the conditions of onward transfers and the retention of data\textsuperscript{416}.

\textbf{iii) The New EU-US PNR Agreement of 2011}

All this has led to the initialling of a new EU-US PNR agreement on 28 November 2011. There was a need for a new agreement not only because of the new global approach tauted by the Commission, but also because of the institutional changes brought by the Lisbon Treaty. Due to the Lisbon Treaty the European Council could no longer take decisions on its own (except in certain circumstances). The Treaty of Lisbon introduced co-decision as the normal procedure, meaning that no decision could be concluded without the consent of the European Parliament.


In accordance with the past this new PNR agreement would also be subject to huge controversy and concern. Both the EDPS and the art.29 working party would publish an opinion\textsuperscript{417} in which they would strongly discourage the Parliament from giving its consent.

Both the EDPS and the art.29 working party note modest improvements in the agreement of 2011, however they are chagrined by the fact that most of the concerns that they had with the previous

\textsuperscript{416} Opinion of the European Data Protection Supervisor (2010/C 357/02) on the Communication from the Commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries, OJ C 357/7, 30/12/2010.

agreements remained unanswered. The art.29 working party still remains unconvinced about the necessity and proportionality of mass transfers of PNR data.

One of the first issues with which they are having trouble with is the purpose limitation of the agreement, enshrined in art.4. According to both entities the agreement lacks clarity in defining the limits within which PNR data may be used. One of the problems of art.4 is that it makes use of open ended wording. Furthermore the definitions given to the notions ‘transnational serious crimes’ and ‘terrorism’ are much to vague. Additionally, one of the categories, as specified in art.4, points towards the possibility of using PNR data for any crimes for which a prison sanction of more than three years is applicable. This is a big point of contention as it does not make clear which crimes would fall under such a definition since the EU and US do not necessarily apply a a prison sanction of more than three years for the same crimes. It is then clear from the wording of the purpose limitation provision to both the EDPS and the art.29 working party, that PNR data will also be able to be used for crimes other than terrorism and serious transnational crimes. As such the use of PNR data is clearly disproportionate. The art.29 working party also points towards the fact that although the European Parliament has strictly forbidden the use of PNR data for data mining or profiling in its Resolution of 5 May 2010\(^{418}\), the agreement does not contain a provision clearly stating that such use should be forbidden\(^{419}\).

Another recurring issue concerns the deletion of sensitive data. According to art.6 sensitive data is only masked and not destroyed, whereas the art.29 working party would much prefer that the filtering of sensitive data would be done by the carriers themselves\(^{420}\).

Linked to these concerns is the fact that the list of 19 elements used in the 2007 agreements seems to have generally been copy-pasted into this agreement. As this had already been seen as disproportionate at the time of the 2007 agreement, there is no reason for the EDPS and the art.29 working party not to consider this disproportionate as well\(^{421}\).

Both also note that the retention period defined in art. 8 is unnecessarily long. The fact that data is stored for 5 years in an active database and subsequently stored in a dormant database for 10 years is considered to be disproportionate. After five years personal data is the de-personalized, however the problem is that some of the data fields that do not get masked still make it possible to individualize the data. Additionally, the fact that no clear explanation is given as to why data which will not be used is


\(^{419}\) EDPS Opinion on 2011 EU-US PNR Agreement, p4; Art.29WP Opinion on 2011 EU-USPNR Agreement.

\(^{420}\) EDPS Opinion on 2011 EU-US PNR Agreement, p5; Art.29WP Opinion on 2011 EU-USPNR Agreement.

\(^{421}\) EDPS Opinion on 2011 EU-US PNR Agreement, p4; Art.29WP Opinion on 2011 EU-USPNR Agreement.
still being stored for 10 years compounds the issue. Furthermore once 15 years have passed data is not destroyed but merely anonymised. A more positive comment can on the other side be made on the choice of the ‘push’ mechanism for the way PNR data is transferred. However, both the EDPS and the art.29 working party deplore the fact that art.15 only forces carriers to make use of this system within two years of this agreement as all carriers should already have been using this system according to the 2007 PNR agreement. This issue is further aggravated by the fact that the US reserves itself the right to still make use of the ‘pull’ system in certain circumstances. The fact that these circumstances are not strictly defined just rubs salt in the wound.

However, these two opinions are not devoid of shoulder pats. Both applaud the increased protection provided in the area of data security, supervision and enforcement, access and redress. In the area of supervision it is laudable that provision refer to an independent authority competent for effective review of the agencies using data protection. In contrast, doubts still remain in the area of access and redress. This is due to the fact that although personal data subjects (irrespective of their nationality, country of origin, or place of residence) may be able to lodge a complaint on the use of their personal data. Any administrative or judicial action is on the other hand only possible insofar as applicable US legislation allows.

One last area in which the EDPS and the Art.29 working party have voiced concerns is the domestic sharing and onward sharing of PNR data. Not only does art.16 of the PNR agreement contain a list of agencies which may make use of this data which is excessive, it also allows these agencies to share PNR data with other domestic agencies that are not listed. The only prerequisite is that these agencies provide adequate and comparable protection to the protection set forth in the agreement. The Art.29 Working Party would much prefer a further specification on how this protection would be ensured and that such transfers would only happen on a case by case basis. Regarding onward transfer to third countries art.17 states that it is only possible if the intended use in the third country is in line with the EU-US agreement and can guarantee comparable protection standards as those enumerated in the agreement.

The EDPS and the Art.29 working party both conclude with a statement that review of the implementation of the agreement should not only be exercised by the competent authorities but also by national data protection authorities. Additionally both are chagrined by the fact that it is not clear what

References:
422 EDPS Opinion on 2011 EU-US PNR Agreement, p8; Art.29WP Opinion on 2011 EU-USPNR Agreement.
423 EDPS Opinion on 2011 EU-US PNR Agreement, p6; Art.29WP Opinion on 2011 EU-USPNR Agreement.
424 EDPS Opinion on 2011 EU-US PNR Agreement, p6; Art.29WP Opinion on 2011 EU-USPNR Agreement.
425 EDPS Opinion on 2011 EU-US PNR Agreement p7; Art.29WP Opinion on 2011 EU-USPNR Agreement.
the legal form of the agreement will be in the US legislation and as such wonder if it will have any binding legal effect in US law\textsuperscript{426}.

Taking into account both opinions, one would think that most issues raised by this new agreement were practically the same as those generated by past PNR agreements and as a consequence that the European Parliament would not give its consent.

However, this was not the case: on the 19\textsuperscript{th} of April 2012 the European Parliament gave its consent in a legislative resolution\textsuperscript{427}. The 2011 EU-US PNR agreement has now become a reality.

\textsuperscript{426} EDPS Opinion on 2011 EU-US PNR Agreement, p7; Art.29WP Opinion on 2011 EU-USPNR agreement.

V. Conclusion

The 21st Century saw a rapid increase in legal documents in the area of counter-terrorism, both internally and externally. It is apparent from what was discussed that the EU considers itself to be an active player in the field of international counter-terrorism. It has also taken a different approach to most other countries (most closely resembles the UN approach in its Global counter-terrorism strategy), which is the criminal act approach. It endeavors to tackle the issue through a holistic approach, an approach that tries to look at all aspects of terrorism and tackle each of them. EU action in the field of counter-terrorism has been facilitated by the fact that it has a usable definition of terrorism.

In its approach, it has become apparent, at least to me, that the EU puts great stock in looking at the underlying problems of terrorism and dealing with those rather than tackling the terrorist organisations themselves. When it does deal with them directly it is mostly through the financing of terrorism, and mostly through criminalization.

In its pursuit of the underlying issues, the EU has been slow in coming to terms with the fact that to effectively deal with those problems the EU needs to better co-ordinate its different competence areas. I say slowly because this issue was already apparent in 2003, if not earlier, when the OECD published a document detailing the importance and intricate link between development and security. We now find ourselves a decade later and the CTC still makes mention of the need for greater coherence between EU competences in dealing with this problem.

In my opinion, one key problem lies within EU architecture itself and is the innumerable amount of actors active in the field of counter-terrorism. Granted the EU has a CTC whose main goal is to be aware of all initiatives being undertaken, but this hardly prevents the EU from duplicating its work. The CTC cannot be everywhere at the same time, as such it would not be strange that some entities end up doing the same thing without taking into account what the others do. Furthermore, it is all well and good to have a competent entity for each and every aspect of counter-terrorism, but if they do not adequately and regularly consult with each other what we end up with is a patchwork of suggestions that do not necessarily mesh together.

Another unfortunate problem seems to be the apparent unwillingness to make use of all the instruments it has at hand to combat terrorism. I refer to the low use of CSDP missions that specifically tackle counter-terrorism, and the lack of ENPI, EIDHR or DCI use for tackling counter-terrorism, even though the importance such instruments can play in counter-terrorism has been stressed a number of times by the EU itself.
Not only must there be greater coherence between different competence areas, there must also be greater coherence between the different initiatives organized to combat terrorism. However, the only time I really felt like the EU was taking into consideration all other initiatives, be it their own, the member states or another countries or International Organisation, was in the strategy for the Sahel region. In all other cases it felt like everyone who is active in this area is doing their own thing without regard to what others are doing.

This lack of co-ordination has much to do with the nature of the EU and how it is perceived by the outside world. The first problem the EU faces is that its competences in this field only go so far as the member states allow. As such the EU can be viewed as being a chained entity whose activities only go so far. Furthermore, even if we would like to think that all member states are always in accord on every topic this is not the case. To be able to be an active and strong player at the international level the EU needs all its member states to stand as one, something which is very difficult with an issue as delicate as counter-terrorism. That is why we have seen such great disparities between individual member state actions in this field. And nowhere is this togetherness as needed as in the UN. In its fight against terrorism, the EU has stated numerous times that it considers the UN to be the main actor. However, to be able to have an active influence in the direction the UN takes in counter-terrorism, the EU needs its member states to all stand together before hand. If there is no consensus between Member states before hand, it will not be able to influence UN decisions adequately. This is understandable, when you consider the fact that the EU has 28 member states, but it will only become harder to reach a consensus as the EU keeps growing. Furthermore the EU has shown that, although it considers the UN as the main actor, it does not always feel obliged to implement UN Decisions (See the Kadi cases).

This apparent lack of co-ordination and real competences has also scared away potential partners, with them preferring to work together with the member states rather than the EU itself. A good example of this is the US, which for a long time (Even now), preferred to work together with member state intelligence offices rather than Europol and Eurojust to tackle terrorism. EU-US relations in this field have further been complicated by their different stances on how far one can go to eradicate the problem. Whereas the EU finds it imperative that any actions in the field of counter-terrorism should be in line with human rights, the US is willing to go further. One key area of human rights where both parties keep butting heads is the right to privacy and personal data protection. Any agreement the EU and the US have signed and concluded which was related to personal data has been bogged down by opposing views on the protection of personal data.

Both the EU and US have acknowledged this and in March 2011 negotiations began on a EU-US Data privacy and protection agreement, with the aim to streamline the exchange of data in the context of law enforcement. Negotiations are still ongoing and have hit a number of snags being: the possibility
for redress, the retention period of such data and purpose limitations (such issues have keep rearing their heads in any EU-US agreement on the exchange of personal data)\textsuperscript{428}.

I have to admit that compared to the past, the EU has managed to expand its influence and importance, albeit slowly, in the field of counter-terrorism, especially when you look at the internal aspects of EU counter-terrorism. Nonetheless, even in this area the EU seems to be losing some ground. The Principle of mutual recognition which was touted as ushering a new era of closer co-operation within Europe has been questioned more and more. Some member states have voiced the sentiment that maybe it was too early to implement this principle as is and that it might be better to ratchet it back a bit.

Even with all its deficiencies I can only applaud the fact that the EU is trying to make a difference in the fight against terrorism. But in my discussions with people active in the field of counter-terrorism I have become aware that the EU is not viewed as an actor with any effectiveness in the fight against terrorism. It is viewed as an organization bogged down by its size and structural complexities, not being able to adequately respond to the threat of terrorism in a timely and effective manner.

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