

Coping with Unpredictability

The European Union and Terrorism



Sanderijn Duquet, Jan Wouters

ABSTRACT

This article analyses the European Union's evolving counterterrorism framework in light of recent attacks and the changing nature of the terrorist threat. It traces the EU's "event-driven" approach since 9/11, the Madrid and London bombings, and the development of the 2005 EU Counterterrorism Strategy with its four pillars: Prevent, Protect, Pursue, and Respond. The authors focus on the integration of risk-based thinking, distinguishing between measures to reduce threats (e.g. radicalisation prevention, intelligence sharing) and those to reduce vulnerability (e.g. legal cooperation, crisis response mechanisms). They argue that an effective EU framework requires a balance between these approaches, deeper cooperation among Member States, and alignment with transatlantic partners.

AUTHORS

Sanderijn Duquet

Deputy Head of Cabinet & Diplomatic Advisor
Belgian Deputy Prime Minister and Minister of Budget

Jan Wouters

Director, Full Professor of International Law and International Organizations
Institute for International Law, KU Leuven

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I. Introduction

Terrorism remains a major concern for the international community. Terrorist attacks are unpredictable events with far-reaching consequences for economic, social, and political life. Having never been far out of the picture, the threat of terrorism seems to have taken centre stage once again. Media and civil society increasingly report the atrocities committed by terrorist organizations, including Islamic State (IS), Al-Shabab, and Boko Haram. Closer to home, deadly attacks on a British soldier in London in broad daylight in May 2013, on tourists at a Jewish Museum in Brussels in May 2014, and, recently, on journalists at the Paris Headquarters of the satirical magazine *Charlie Hebdo* in 2015, have left the European citizen alarmed.

Public authorities have been struggling to anticipate and to respond to sudden, politically-inspired attacks that target citizens and society. The European Union (“EU” or “Union”) is sensitive to the issue and, for many years now, has participated in the fight against terrorism. Following a surge of EU counterterrorism action in the first few years of the 21st century, however, a sense of “fatigue” in fighting terrorism was detectable in the years that followed.¹ This is remarkable, since Europol’s strategic analyses have consistently indicated a high threat of terrorism in Europe.² The EU’s involvement has never been an obvious choice. Traditionally, the EU’s Member States have occupied a central role in this arena, ranging from the work undertaken by their national intelligence services to the criminal prosecution of perpetrators. Yet, the 2015 Paris attacks seem to have created new momentum for the EU and its Member States to manage the unmanageable problem of terrorism. In light of a global context that is different to that of post-9/11, and considering the changing nature of the threat of (home-grown) terrorism, the revitalization of regulatory answers is required. This contribution examines whether and how the EU advances risk-oriented approaches in its counterterrorism management. It will be argued that it is necessary for the Union to focus not only on threats posed by terrorism, but, importantly, to further develop its legal framework on the cooperation among Member States in the criminal sphere. Following a brief overview of the EU’s counterterrorism strategy, we reflect on the use of the concept of risk as a parameter in counterterrorism regulation. A final section concludes.

II. Some Key Principles of the EU’s Counterterrorism Framework

An “event-driven” counterterrorism strategy has dominated the past fifteen years of EU counterterrorism management.³ Three major terrorist attacks (in New York/Washington DC, Madrid, and London) that occurred between 2001 and 2005 serve as landmark moments that have shaped law- and policy-making. All three events caused disorder in Europe, altered threat perceptions, and (at least temporarily) led to a greater political will to address terrorism.⁴

Following the 9/11 attacks, a comprehensive EU Action Plan to Fight Terrorism was adopted within two weeks. The Action Plan implemented parts of the 1999 Tampere Programme, which had until then received little support, and served as the policy basis for legal instruments adopted in the course of the following months.⁵ The most significant of these instruments were the two Council Framework Decisions of 13 June 2002 on Combating Terrorism⁶ and the European Arrest Warrant.⁷ External action in the field of law enforcement was also strengthened. Such cooperation took the form of a Europol-US Agreement on the exchange of personal data⁸ and EU-US Agreements on extradition⁹ and mutual legal assistance.¹⁰ Institutionally, new departments and functions were created and anti-terrorist teams within Europol and Eurojust were established. The Madrid 2004 attack re-invigorated this political will. Only days later, on 25 March 2004, the European Council adopted a Declaration on Combating Terrorism,¹¹ and, in May 2004, the Commission negotiated a

transatlantic agreement on the use and transfer of passenger name (“PNR”) records to the US Department of Homeland Security.¹² In order to facilitate interstate police and judicial cooperation and recognition, frameworks were developed, and extradition and arrest warrant procedures were simplified. In the same month, Gijs de Vries was appointed the first EU Counterterrorism Coordinator within the Council Secretariat to overcome coordination problems related to the proliferation of counterterrorism action in the Union.¹³ Since 2007, the position has been held by Gilles de Kerchove.

In July 2005, the city of London was attacked. This built a fresh wave of political momentum that served to speed up ongoing regulatory work. Importantly, the momentum resulted in the adoption of the EU Counterterrorism Strategy (“CTS” or “Strategy”).¹⁴ The Strategy’s structure reflects the idea that threats should be tackled at different stages and introduces four pillars to this effect (“Prevent,” “Protect,” “Pursue,” and “Respond”). Along with the development of a more comprehensive approach to counterterrorism, for the first time, the CTS added risk parameters to the Union’s counterterrorism policy. It did so by cautiously introducing the concepts of risk prevention and risk response.

In the first decade of the new millennium, the EU’s management of counterterrorism was driven by public shock, often leading to hasty decision-making. Transatlantic talks have been, to a lesser extent, subject to these political mood swings and have continued even in periods of counterterrorism fatigue within the EU. Cooperation focused mainly on the promotion of information sharing (see: the 2010 Terrorist Finance Tracking Program; the 2012 entry into force of the PNR Agreement) and on strengthening border controls and transport security. Such data sharing has been an object of great concern for the European Parliament as well as for European civil liberty groups. The protection of European citizens’ privacy rights has featured in intense debates in Parliament and procedures before the Court of Justice of the EU. This was no different when the Commission tabled a proposal on the development of a European PNR system in 2011, which is still being negotiated with the Council and the Parliament.

III. The Concept of Risk in the EU’s Counterterrorism Framework

Post-2005, strategic thinking grounded in risk analysis has slowly been making an appearance in the Union’s counterterrorism policy. Laws and policies were designed to manage threats posed by terrorism, on the one hand, and to manage the vulnerability of the Union, its Member States, and its citizens, on the other. The first set of laws and policies acknowledges the potential danger of terrorism both within and outside the Union’s borders and focuses on the reduction of threats that can be quantified and analysed. The starting point of the second set of laws and policies is different: it emphasizes the enhancement of the legal framework to make the Union less vulnerable in case a terrorist attack occurs. Rather than centralising external threats (focus on the “other”), it stresses the protection of European citizens via the refinement of EU laws on terrorism (focus on the “self”).

1. Reducing the threat of terrorism

To reduce the threat posed by terrorism, the Union relies on criminal investigation methods and measures preventing radicalisation. Due to its limited powers in criminal law-making, however, the EU is prevented from assuming a leading role in the field: it lacks the necessary competences and operational capacity in criminal matters and intelligence gathering.¹⁵ These constitutional hiccups have not stopped the EU from contributing to threat reduction by playing a supportive and coordinating role. Gradually building common tools to analyse terrorism threats, legal and policy instruments have been developed under the “prevent” and “pursue” pillars of the CTS.

First, the Union combats radicalisation as well as the recruitment of terrorists,¹⁶ mainly by focusing on the disruption of factors that draw people to terrorism. Countering radicalisation requires the alignment of internal and external policies. As such, radicalisation reduction measures have been integrated into the EU's external action instruments, e.g., into its neighbourhood policy (ENP) and political dialogues with third countries as well as into the 2010 Internal Security Strategy, which commits to eradicating terrorism at its source.¹⁷ To this end, a Radicalisation Awareness Network ("RAN") was established by the Commission in partnership with the Committee of the Regions.¹⁸ The network reaches out to actors in the Member States by pooling the expertise of policy makers, law enforcement and security officials, prosecutors, local authorities, academics, field experts, and civil society organisations. It has been referred to as a "network of networks,"¹⁹ in which the EU's role focuses on the facilitation of contacts.

Second, the EU embraces the efforts of domestic intelligence agencies making threat assessments and builds on them in its own counterterrorism activities. Union initiatives have focused on the streamlining of Member States' and EU agencies' ability to access each other's databases and to store data.²⁰ To a certain extent, however, EU actors also analyse scientific data to determine risks while remaining dependent on the expertise and raw intelligence of the Member States. The European Police Office (Europol) and the EU Intelligence Analysis Centre (IntCen) are the main actors involved in dealing with statistics. Europol's task is to "collect, store, process, analyse, and exchange information and intelligence"²¹ while IntCen is the external intelligence actor. Referred to as the European External Action Service's "intelligence hub," IntCen has been particularly active in providing early warning and situational awareness information. Annually, 200 strategic situation assessments and 50 special reports and briefings are produced by its staff of around 70 people.²²

2. Reducing vulnerability

Taking a risk-based approach to counterterrorism goes beyond analysing and diminishing potential threats. Prospective targets also have to be made less vulnerable to terrorism. To reduce its vulnerability, it is necessary that the Union be equipped with sufficient and adequate legal tools. Investigation, prosecution, and assistance procedures have to be up and running and must have the capacity to be activated instantly in order to serve as a defence mechanism if a terrorist attack materializes. In EU policy terms, vulnerability reduction comes mainly under the "protect" and "respond" pillars of the CTS. In contrast to the threat reduction measures discussed above, vulnerability reduction is less context-specific and less dependent on data (collected through Member States).

First, given that terrorism often assumes a transnational character, the protection of citizens demands the improvement of cooperative and coordinative efforts in the criminal sphere. Setting up a framework for Member States to act jointly against terrorists and terrorist groups is not, in itself, a new initiative²³ nor is it reserved for the Union alone.²⁴ In the past 15 years, progress has been made in the EU on the traditionally sensitive subject of the approximation of criminal laws and on the development of mutual assistance and recognition frameworks, a topic that is also featured in the Stockholm Programme.²⁵ It is sometimes conceded that Member States need to move beyond cooperation and coordination, towards forms of integration. Yet, at the present time, Member States remain divided on the topic.²⁶

Second, the Lisbon Treaty provided the EU with a new set of reactive, mutual counterterrorism tools, some of which need to be implemented. One tool is the potential establishment of a European Public Prosecutor's Office (Art. 86 TFEU), which includes the possibility for the European Council to adopt a decision to extend the jurisdiction of the Prosecutor's Office to include serious crimes having a cross-border dimension. This possibility, however, will only be considered in the longer term according to the Commission's 2013 proposal.²⁷ A further tool can be found in Art. 222 TFEU, which introduces a solidarity clause. As a constitutional principle, solidarity refers to a legal obligation for the Union and its Member States to assist each other in the

event of terrorist attacks if requested to do so. Following efforts of the 2010 Belgian Presidency and repeated concerns raised by the EU Counterterrorism Coordinator, in 2014, the Council adopted a decision on the rules and procedures for its implementation.²⁸ The decision provided for the immediate activation of the Integrated Political Crisis Response arrangements (IPCR) and an Emergency Response Centre (ERC), linked to the Commission's Union Civil Protection Mechanism and ensuring a 24/7 operational capacity.²⁹ These initiatives add to the preparedness of the Union should one of its Member States be the object of an actual or imminent terrorist attack.

IV. Concluding Remarks on the Way Forward

Neither the EU nor its Member States can eliminate all threats posed by terrorism. Still, mechanisms can be created that better deal with the challenges relating to the prosecution of terrorists and the protection of citizens, society, and critical infrastructure. Presently, counterterrorism remains a highly fragmented policy field. For that reason, this contribution has used two different, yet interrelated, concepts in risk regulation to evaluate common action: the reduction of threats within and outside the Union and the reduction of the vulnerability of the Union. An accurate and cohesive counterterrorism framework in the EU requires both.

Following the January 2015 twin attacks in Paris, the EU and its Member States have, once again, pledged closer cooperation in the fight against terrorism. Judging by the policy initiatives in the first months following the attack,³⁰ priority is being given to reduction of threat rather than reduction of vulnerability. A further priority seems to be the intensification of the EU's relationship with the US with regard to information sharing. In the following months, it is expected that legal initiatives will materialise on radicalisation over the Internet (by setting up Internet referral capabilities), on fighting the illicit trafficking of firearms, and on stepping up information sharing and operational cooperation. Member States are also looking for broad agreement to reinforce the application of the Schengen Framework. Transatlantic relations seem stronger than ever: it is telling that, on the day Paris marched for the freedom of speech, an EU delegation composed of ministers of those European countries most affected by terrorism, Commissioner for Home Affairs Avramopoulos and the EU Counterterrorism Coordinator, met with US Attorney-General Holder and Secretary of Homeland Security Johnson to discuss a common approach. Some of the most interesting things to follow up on will be the effect of the Paris attacks on the US-EU SWIFT agreement (up for renewal in 2015) and, in the longer term, on the PNR accord (up for renewal in 2019) as well the effect on the development of the European PNR System under preparation by the Commission for a number of years now.

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