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Introduction: Developments in European Security

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IN THE EUROPEAN UNION (EU), THE IDEAS UNDERPINNING THE CONCEPT OF "SECURITY" are quite diverse and involve a number of different actors. Before the entry into force of the Lisbon Treaty, security provisions used to be found in all three of the EU pillars and covered a wide range of topics, including border security, defence policy, police cooperation and counter-terrorism. The pillar structure has now been abolished and both the 'Area of Freedom, Security and Justice' and the common foreign, security and defence policies have become policy areas of 'shared competence'. This growing involvement of the EU in security matters is all the more remarkable since it was viewed as highly improbable for a long time given the closeness of some of these policy issues to national sovereignty. Interestingly, it also coincides with broader theoretical developments in the study of security. In the last twenty years, the discipline of security studies has experienced crucial changes. As emphasised by Mutimer (1999: 77), traditionally, "'security' was the security of the state, it was threatened by the military power of other states and defended by the military power of the state itself". However, this definition, advocated by strategic studies, has increasingly been viewed as poorly adapted to a changing international environment, especially after the end of the Cold War. Since then, the discipline of security studies has been characterised by the so-called 'widening-deepening debate'. The 'widening' dimension has focused on the extension of security to other issues or sectors than the military, whereas the 'deepening' dimension has questioned whether entities other than the state – such as the EU, for example - should be able to claim security threats (Krause and Williams 1996: 230).

But what are the main security threats to the EU? As argued by various scholars, in particular the so-called 'Copenhagen School' (Buzan *et al.* 1998), it is difficult to objectively assess the significance of various threats. What can be studied is the process through which some issues come to be socially defined as security issues through a process of 'securitization' (Buzan *et al.* 1998). In that respect, there is no doubt that terrorism has come to be defined as one of the key security threats faced by the EU in the aftermath of 9/11. Over the years, various events have contributed to keeping this issue high on the

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political agenda, including the terrorist attacks in Madrid (2004) and London (2005) and the failed attack on Glasgow airport in June 2007 (Kaunert *et al.* 2012). Importantly, terrorism has been a catalyst for policy developments and European integration not only in the field of counter-terrorism, but also more broadly in the relating fields of border controls, intelligence, policing and criminal justice amongst others.

This is aptly demonstrated by the collection of articles included in this special issue, most of which have been presented at various conferences organised by the Editors. These articles cover a wide range of security actors and issues, including policing (Rozée), human trafficking (O'Neill), border security (Marin), counter-terrorism financing (Van Elsuwege), as well as intelligence cooperation (Svendsen, Hillebrand), including the important issue of its democratic oversight (Hillebrand), and the relationship between the military and private contractors in expeditionary operations (Kinsey and Erbel).

Rozée, writing from an International Relations perspective, sets the scene for the discussions and raises several important issues that are also addressed by other contributors. He discusses the need to develop "a unified and interconnected approach to understanding the different elements of the EU's security agenda", in order to develop "valuable insights into the role played by the EU police within the wider framework of the EU's security agenda". This argument neatly sets off the range of articles in this special issue. Rozée's focus is to "investigate the relationship between the EU's police comprehensiveness and its security actorness". In addition, it explores "the contribution of [the] police to the EU's security agenda". These are both timely examinations in light of the massive restructuring of the EU, and its various security and law enforcement provisions under the Lisbon Treaty, issues which underpin many of the later articles in this special issue.

O'Neill focuses on the "low policing" function of trafficking in human beings, which, in 2011, underwent a radical reform at the EU level, with the new EU directive having been passed, with national implementing provisions to follow by April 2013. O'Neill's focus is on the issues that are likely to arise in the implementation of the new directive in the UK, which is not a member of the "Visas, Asylum and Immigration of third country nationals" provisions of the EU, due to its continuing partial opt out of Schengen. She points out that the law enforcement community will generally be challenged by the "victim status accorded to those who have been trafficked or exploited", with the "mandatory support mechanisms" requiring not only a substantial redraft of national laws, but also police practice procedures, and will have a substantial resourcing implication. In light of the existing "highly complex UK Human Trafficking law enforcement structure," it is arguable that the new directive is an opportunity to bring greater clarity and a better structure to this area of law and law enforcement practice in the UK.

Marin moves the focus to the external borders of the EU under the Schengen *acquis*. Taking a legal approach, Marin examines the role of law enforcement, to include a number of naval operations, specifically Joint Operations HERA and NAUTILUS. The lack of transparency relative to these operations has posed problems in this aspect of the EU's law enforcement and security framework. In addition, the issue of the legality of the operations at the external border arises, with the role of Frontex being examined. Marin examines recent developments at Frontex, which include the approval of the recast Frontex Regulation, and the adoption by Frontex of a Fundamental Rights Strategy, and the necessary next steps to "find a *legislative* remedy to a *political* problem which became acute." In addition, Marin argues that the "new legal architecture" post- Lisbon "presents (positive) threats and opportunities" for the development of a more robust and effective legal framework for the policing of the EU's external (Schengen) borders.

Van Elsuwege, also taking a legal approach, focuses on the "targeted" or "smart" sanctions of the EU. Those "typically include measures such as arms embargoes, visa bans and the freezing of financial assets" and have commonly been used in counter-terrorism. He addresses the institutional and structural problems within the EU relating to the multi-dimensional - and thereby multi-policy and multi-pillar – aspect of these sanctions. Acknowledging the ruling in *Kadi*, Van Elsuwege analyses the problems that arise from the EU's legal framework and institutional structure both pre- and post-Lisbon, effectively trying to negotiate his way around what Cremona (2008: 45) has referred to elsewhere as the EU's new "Chinese wall" under Article 40 of the Treaty on European Union. He does argue that "recourse to a dual legal basis" for legislative provisions might provide "an appropriate solution."

Hillebrand, writing from a public policy perspective, examines counter-terrorism policing and focuses on the extent to which "mechanisms of democratic accountability and, in particular, parliamentary scrutiny are in place to hold EU-wide counter-terrorism actors, such as Europol, into account". As she points out, the Lisbon Treaty has altered the underlying legal landscape for transnational EU law enforcement activities. The policy and pillar split within the EU, and the split between the EU and its Member States in the oversight of counter-terrorism policing, are examined. As Hillebrand points out, "counter-terrorism might affect human rights and individual freedoms and it is therefore supposed to be governed by strict rules and norms of democratic control". Given the wide variety of possible institutional actors involved, both at the EU and Member State levels, it appears that there are some noticeable gaps in the oversight framework of EU activities in this area. The increasing role of the European Parliament post-Lisbon may go some way to addressing this issue, although important challenges remain.

Svendsen broadens the scope of the analysis to include security developments in Europe beyond the framework of the EU, "from the Atlantic to the Urals". More precisely, his contribution examines the ever-growing development of intelligence cooperation networks in Europe. He highlights that intelligence cooperation involves an increasingly wide range of actors, from the police to the military, through anti-money laundering units and dedicated intelligence services. In this broader context, he argues that "during the early twenty-first century, generally we have witnessed greater intelligence co-operation in Europe" and that there has been an increasing "regionalisation of intelligence". He points out that this paper is essentially "a comprehensive 'introduction' to this subject", with further work being required on the evaluation of these developments.

In the final article of this special issue, **Kinsey and Erbel** go beyond Europe and focus on issues that have recently arisen in the course of military operations in which European states have been involved alongside the United States in Afghanistan and Iraq. Whilst the other articles in this special issue focus on civilian matters, Kinsey and Erbel's article makes a particularly interesting contribution by focusing on an important trend in the military in recent years, namely the increasing role of private contractors in expeditionary operations. The article examines the origins of and reasons for this increasing outsourcing of tasks to the private sector and highlights the potential benefits and pitfalls of such a trend. The conclusions that they draw are not only relevant to all European states, but also to the EU as it continues to develop its own Security and Defence Policy.

Three main conclusions emerge from the combined reading of these articles. First of all, the speed and the scope of security policy developments in Europe have been truly breathtaking. Secondly, these developments have involved different institutional configurations, as states have – in some cases simultaneously - cooperated on a bilateral basis, within more or less formal transgovernmental networks, within broader multilateral frameworks, or within the EU institutional framework. These developments in European security are therefore also highly interesting for those studying institutional issues and the

development of European integration. Thirdly, these policy developments in various areas of security have been at times contentious and contested, as they have raised important questions with regard to oversight and respect for human rights. It remains to be seen how future policy developments may address some of these challenges.

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The European Union as a Comprehensive Police Actor

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Abstract

The European Union (EU) has responded to changing security threats by seeking to increase cooperation between the law enforcement agencies of the Member States, granting further powers to Europol and other intelligence-sharing institutions, and by undertaking police missions beyond EU borders. The literature relating to EU policing is generally focused on the 'internal' and 'external' dimensions, or on specific aspects of police activity. This tendency to concentrate on narrow or isolated areas of policing has led to a significant gap regarding the broader analysis of the EU as a comprehensive police actor. Important questions about the nature of EU policing as a whole, as well as the contribution of policing activities to the EU's security agenda, remain unexplored in the literature. This article aims to define what is meant by 'comprehensive policing' and to indentify criteria by which the comprehensiveness of EU-level policing may be measured. In addition to this, an integrated actorness/police comprehensiveness framework will be presented as a tool for assessing the EU as a comprehensive police actor.

Keywords

European integration; Security; Police; Actorness

THERE HAVE BEEN A NUMBER OF INFORMATIVE ARTICLES WRITTEN THAT HIGHLIGHT key developments in EU-level policing, particularly post-9/11, as well as some thought-provoking analyses of the linkage between the EU's security agenda and specific police activities. Much attention has been given to the changing role of Europol in counter-terrorism and fighting cross-border organised crime, in terms both of its potential significance and current short-comings (Bures 2008; Kaunert 2010). Other developments in intelligence-sharing at EU-level, such as the Schengen Information System have also received a significant amount of analysis in the literature (Walsh 2006; Den Boer, Hillebrand and Nölke 2008). In addition to this, authors such as Rees (2005) and Mounier (2008) have examined the way in which EU Police Missions have been used to externalise the EU's internal security concerns beyond its borders; this is done in order to protect the EU's 'safe' internal space from the 'unsafe' external environment, and also to externalise EU internal security standards and 'best European practices' in police matters (Mounier 2008; Collantes Celador 2009). This may be viewed as part of scholars' increased questioning of the traditional distinction between the 'internal' and 'external' dimensions of EU security. As multi-faceted areas of EU security become increasingly interwoven, a more comprehensive conceptualisation of security is becoming a requirement for analysis. In the case of EU policing, scholars have focused on the study of narrow aspects of EU policing, or, in some instances, have discussed police in terms of the 'internal' or 'external' dimensions of EU security. There has been no in-depth study of EU policing as a whole, which is a very significant gap in our understanding of the EU as a security actor. There are a number of reasons why filling this gap is important: firstly, the traditional distinction

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between the 'internal' and 'external' dimensions of EU security is continuing to be questioned in the literature (Rees 2005; Mounier 2008), indicating that a unified and interconnected approach to understanding the different elements of the EU's security agenda is required. Secondly, this area of study can offer valuable insights into the role played by EU police within the wider framework of the EU's security agenda: this cannot be done by focusing only on isolated areas of policing as is currently the approach of the literature. Finally, the EU's ambitions as a comprehensive security provider and credible global security actor have been widely discussed by scholars (*e.g.* Brown 2007; Shepherd 2007); this area of research can offer important insights into the role of police within these ambitions. This article aims to address the gap in the literature by presenting a framework for investigating the European Union as a comprehensive police actor. Research based upon this framework will be used to examine the relationship/linkage between the EU's police comprehensiveness and its security actorness, and by doing so to explore the contribution of police activities to the EU's security agenda.

EU-level policing may be understood as including any instance of police functions being undertaken by or in conjunction with EU institutions and agencies. For the purpose of examining the EU as a comprehensive police actor it is necessary to identify what is meant by the notion of an 'actor' and also to explain precisely what constitutes 'comprehensive' policing. Once clearly defined criteria for these concepts have been established, they can then be integrated into a coherent and usable framework for analysis. This article will be divided into three main sections; firstly, theories of actorness will be outlined. This will be done not only in order to clarify what is meant by the term 'actor', but also to understand how actorness may be measured and assessed. The actorness criteria selected for this research should be clearly relatable to policing if they are to be integrated into a usable framework. The second section will consider what 'police comprehensiveness' means, particularly focusing on police functions; that is, the various roles, tasks, and procedures recognised in the literature as comprising policing as a whole. This will lead to precisely defined criteria that may be used to measure and assess police comprehensiveness. A final section of this chapter will then demonstrate and justify how a theoretical framework may be constructed by integrating the criteria for actorness and comprehensiveness into a matrix. This will form the basis of a nuanced and in-depth approach to researching EU-level policing. The goal of this framework is to investigate the relationship between the EU's police comprehensiveness and its security actorness, and to explore the contribution of police to the EU's security agenda. The framework can be applied more generally than this, however, and will also be useful for investigating police comprehensiveness in other cases.

Theories of actorness

There has not been an extensive amount written about assessing the EU's status as an actor, and there is a lack of consensus regarding what it means to be an actor in international relations (Jupille and Caporaso 1998: 213). Neoliberal notions of international relations such as those presented by Keohane and Nye (1977) suggest that there are numerous types of actors, including governmental, intergovernmental, and non-governmental actors. The multi-dimensional nature of global politics was reflected further still by Rosenau (1990: 119), who proposed that citizens, officials and leaders, as well as private actors could be considered 'Micro actors', while states, transnational organisations, leaderless publics, and social movements may be seen as 'Macro actors'. Bretherton and Vogler (1999: 20) claim that Rosenau's view is admirable for its inclusiveness, but further work is required in order to understand how the actorness of the EU as a whole might be assessed. Drawing from ideas regarding European Community actorness presented by Sjöstedt (1977), Bretherton and Vogler offer a scheme that aims to identify and measure

components of actor capability which they directly relate to the EU. They offer the following set of five criteria indicating the basic requirements for actorness:

- shared commitment to a set of overarching values and principles;
- the ability to identify policy priorities and to formulate coherent policies;
- the ability effectively to negotiate with other actors in the international system;
- the availability of, and capacity to utilise, policy instruments;
- domestic legitimation of decision processes, and priorities, relating to external policy.

These criteria are useful and insightful, particularly when applied to the EU. For the purpose of producing a framework for examining the EU as a comprehensive police actor, however, it is Jupille and Caporaso's (1998) criteria for assessing the EU's actor capacity that will be primarily focused upon. While in many ways similar to Bretherton and Vogler's, the scheme presented is somewhat broader and more flexible, and as such may be more easily and effectively integrated with criteria for police comprehensiveness. The four criteria that they suggest - recognition, authority, autonomy, and cohesion - are designed to be 'observable, continuously variable, and abstract from any particular institutional form' (Jupille and Caporaso 1998: 216). Furthermore, they state that their criteria for actorness should be 'conceptually helpful when applied to the EU's global political role and to be applicable more generally in assessments of other entities' capacities to act in world politics' (Jupille and Caporaso 1998: 216). For these reasons, Jupille and Caporaso's criteria will be particularly suitable for research in terms of assessing EU actorness, being adapted to apply to policing, and being combined with criteria for measuring police comprehensiveness. In more detail, the four criteria for actorness are as follows.

Recognition

Recognition by others is an essential condition for actorness. According to Jupille and Caporaso (1998: 215), recognition should be seen as a 'minimum condition that adds little substantive understanding of any given entity, but simply registers it on the analytical radar.'

There are two categories of recognition: *de jure* and *de facto*. *De jure* recognition refers to diplomatic recognition under international law or to formal membership of international organisations. Diplomatic recognition has traditionally been considered as an aspect of sovereign statehood, automatically given to states. This is not always the case, however, as examples such as Kosovo, Israel, and Taiwan demonstrate that states are not always given automatic full diplomatic recognition. Furthermore, where the line is drawn in terms of recognition is not clear. Kosovo is not a member of international organisations, yet is recognised by more than fifty states. The EU is not sovereign, and it is not conferred with any kind of automatic recognition; instead, diplomatic recognition of the EU is at the discretion of third parties.

In practice, the interactions of third states with the EU may implicitly confer *de facto* recognition upon it. However, Jupille and Caporaso claim that simply producing external effects is not sufficient to fulfil the criterion of recognition; it is third parties' *engagement* with the EU in order to discuss, clarify, or modify such external effects that are most significant for recognition, not the effects themselves. In other words, it is states' direct negations with the EU that indicates the Union's de facto recognition as an actor. According to Jupille and Caporaso, the criterion of recognition may be considered satisfied whenever a third party interacts with the EU itself, rather than, or in addition to,

EU member states. They point out that recognition should not be thought of as a 'one-shot, all-or-nothing criterion'; rather, increasing bilateral, regional, and global interactions with third states increases the extent to which EU activity becomes accepted and expected, and the EU's de facto recognition builds accordingly.

For the purpose of examining the EU as a comprehensive police actor, recognition may be assessed by identifying international agreements and third states' interactions with the EU relating to EU-level policing. Examples of this include the signing of international agreements with Europol: many operational and strategic agreements have been made with non-EU states and international organisations, including Interpol and the United Nations Office on Drugs and Crime. Similarly, when third states or other actors directly engage with the EU regarding civilian missions, such as the United Nations and NATO have done in the case of the EU Rule of Law Mission in Kosovo, de facto recognition is conferred.

Authority

The authority to act externally is Jupille and Caporaso's second factor for assessing the EU's capacity as a global actor. In particular, this authority refers to legal competence. Jupille and Caporaso offer several examples of areas where the EU has been given external legal authority, including international and association agreements, and environmental agreements. The EU's legal competences have expanded in many areas during the last decade, including areas related to security and policing, such as Europol and the European Arrest Warrant (which allows a court of an EU Member State to issue a judicial judgement for the arrest and surrender of a person in another Member State). In addition to these, EU Police Missions may also be used to provide examples of the EU being given external legal authority to act. For instance, formal United Nations Security Council approval of a Joint Action provided the EU with legal competence to act in the Rule of Law Mission in Kosovo.

Autonomy

According to Jupille and Caporaso, autonomy implies distinctiveness, and to some extent independence from other actors, especially states. This may be best explained in terms of two factors: institutional distinctiveness, and independence. Institutional distinctiveness refers to having distinctive institutional apparatus, even if these are based in or attached to domestic political institutions. An institution's independence from states should make a difference compared to what would result from an international system comprised just of self-interested state actors. Jupille and Caporaso claim that parts of the institutional structure of the EU with exclusive competence to act may not necessarily be directly translated as areas of Union independence. However, autonomy need not be absolute, as an actor may be autonomous in areas; for instance, the EU is intended to be representative of its member states, and yet may still be considered autonomous from states external to the EU.

The EU's distinctive institutional apparatus involving policing exists at a number of levels. These may be seen as ranging from the Council and other relevant legislative or decision-making institutions, through to Union-level institutions directly involving police and judiciary activities, such as Europol and Eurojust.

Cohesion

Cohesion is not required in order to make a difference in global politics, that is, to have 'presence'; for instance, the EU would still make a significant difference with regards to external consequences without policy cohesion. For this reason, Jupille and Caporaso

argue that there is a difference between 'actor' and 'presence', and that to be an actor requires a certain minimal level of cohesion. As they point out, '[a] random collection of elements could have external effects but would not be judged as being an actor' (Jupille and Caporaso 1998: 219).

The concept of cohesion, as Jupille and Caporaso present it applied to the EU, may be divided into four dimensions: value (goal) cohesion, tactical cohesion, procedural cohesion, and output cohesion. Value cohesion involves similarity or compatibility of goals. Tactical cohesion, on the other hand, is when goals are significantly different but can be made to fit with each other through issue linkages. Procedural cohesion refers to issues where there is conflict, yet some consensus exists regarding the procedures and rules to be used. The fourth dimension of cohesion that Jupille and Caporaso suggest relates to public policies: more cohesion exists when Member States form collective policies, and this is referred to as output cohesion. Cohesion need not be considered an all-or-nothing criterion; it is possible for an actor to demonstrate very high levels of cohesion in some areas and less in others.

In terms of EU-level policing, these four areas of cohesion may be explored by considering EU policy and legislation. Policy documents related policing will provide indication of goals, while legislation will be useful for identifying output cohesion: for example, legislation on the European Arrest Warrant demonstrates output cohesion. Union-level police activities involving contributions from many Member States, such as the EU Police Missions, also provide evidence of output cohesion.

Certain examples of EU police activities, such as police missions and Europol, relate to several or all of the criteria for actorness. This makes them ideal as cases for analysis. Criteria for actorness are not absolute: they may be fulfilled in particular areas or to degrees. For this reason, actorness may be measured both in terms of quality and quantity; that is, the number of instances where criteria for actorness are met, and also the depth to which they are met.

As previously noted, Jupille and Caporaso's approach is flexible and can be generally applied in assessing actorness. It is already designed with the EU in mind, and may easily be adapted to focus more specifically on EU policing. As they stand, however, Jupille and Caporaso's criteria for actorness are not adequate for assessing the EU as a comprehensive police actor because they cannot incorporate the dimension of police comprehensiveness. The broad nature of Jupille and Caporaso's approach will need to be adapted in such a way that police comprehensiveness can be assessed alongside actorness in an integrated fashion. In order to achieve this it will be necessary to systematically examine the functions, roles, and tasks of police, and then reduce them into a small number of clearly defined criteria that may be used to indicate police comprehensiveness. The criteria for both actorness and police comprehensiveness may then be combined into a single framework. This is important, because it is by exploring not only the EU's police comprehensiveness and its actorness, but also the relationship/linkage between these two areas that the contribution of police to the EU's security agenda may be assessed.

The following section of this article will give an overview of police functions and explain how criteria for police comprehensiveness may be produced. A final section will then consider how theoretical approaches to actorness and police comprehensiveness may be integrated into a coherent and usable framework, and how this framework may be applied for research.

Police functions

For the purpose of producing a theoretical framework for assessing the EU as a comprehensive police actor, it is necessary to move towards a complete understanding of the activities, processes and other elements that constitute policing. In order to identify precisely what 'comprehensiveness' means in terms of police, the range of roles and tasks that are deemed to belong to police must be clearly defined. This approach will allow a limited number of criteria to be formulated that may be used to assess police comprehensiveness. The first step in this process is to examine the various *functions* of police, and this may be done by considering how police functions are defined in the policing literature. Goldstein (1977) identified a classic 'ideal set' of police functions which is well-established and commonly referred to by scholars; it is this set that will be used here, although many other authors' work will then be incorporated in order to elaborate on different aspects of policing. According to the classic ideal set presented by Goldstein, the functions of police are as follows:

(1) To prevent and control conduct widely recognised as threatening to life and property (serious crime).

(2) To aid individuals who are in danger of physical harm, such as the victims of violent attack.

(3) To protect constitutional guarantees, such as the right of free speech and assembly.

(4) To facilitate the movement of people and vehicles.

(5) To assist those who cannot care for themselves: the intoxicated, the addicted, the mentally ill, the physically disabled, the old, and the young.

(6) To resolve conflict, whether it be between individuals, groups of individuals, or individuals and their government.

(7) To identify problems that can potentially become more serious problems for the individual citizen, for the police, or for the government.

(8) To create and maintain a feeling of security in the community.

The following section of this article will elaborate on the kinds of police tasks and activities that these functions involve, and then demonstrate how police functions, roles, and tasks may be used to formulate criteria for police comprehensiveness.

The underlying concepts and application of police functions

Certain analytical terms and concepts must be outlined in order to clarify what police functions involve, and examples will be used to illustrate how these functions may be applied in practice. This information will then be linked to Goldstein's set of police functions, which will in turn be adapted into a smaller number of clear criteria that encompass the range and objectives of police work.

Roles

Bittner (1970) draws attention to the 'roles' or essential characteristics of policing. Roles may be thought of as conceptually 'what police do', or what they are essentially supposed to achieve. In particular Bittner focuses on one central aspect: the unquestionable use of force. He claims that the capacity to use force is the core of the police role, and that this involves a monopoly on the legitimate use of force in society. There are a few exceptions

to this, such as a citizen's right to self-defence, and some restrictions, such as on the use of deadly force. In practice, most modern police forces will be expected to act in accordance with established ethical principles related to the 'justifiable use of force' (Waddington 1999: 187). Some examples of when police force may be used are resistance to arrest, dangerous behaviour, protecting public order (such as violence at demonstrations), and to suppress riots. This last example demonstrates that police may sometime operate in a paramilitary capacity, that is, operating with weaponry or tactics that likens them to the military. Use of force and paramilitary activities can both be seen in EU-level policing: the deployment of European Gendarmerie forces (who have both civil and military responsibilities) to Haiti to assist with post-relief security efforts in 2010 provides an example of this. The EU Rule of Law Mission in Kosovo (EULEX) also involves EU police performing crowd control and policing public order tasks, such as using tear gas and stun grenades during violent demonstrations (personal interviews, Brussels, 2011).

Another very central role of policing is information gathering. Nogala (1995) claims that 'information work' is in fact the most important aspect of police work. Conceptually, police work can be viewed as an ongoing cycle of collecting and processing information, which Ericson and Shearing (1986: 129-159) state is used for 'penetration, surveillance, information, registration, knowledge, and administration', and that *all* of these things contribute to social control. Police, at least at the domestic level, are best positioned in terms of society, experience, technology and 'know-how' to gather information and intelligence, and this is an intrinsic part of their role (Ericson and Shearing 1986).

In practice, the gathering and use of information may take a number of forms. While processing data used for police administrative purposes and that relating to maintaining public order and safety form significant parts of information gathering, a large amount police work deals with information related both to investigating crimes and preventing them. Examples of methods for collecting information related to crime include use of reports by the public, witness statements, interviews, covert surveillance, informants, forensic evidence, legal knowledge, negotiation, inspection of documents (such as bank statements), using the internet, and various types of registration information. In terms of the police role, gathering information for crime investigation may be considered part of 'bringing offenders to justice' and a 'search for the truth' (Maguire 2003: 433-437). This kind information and intelligence work is central to the activities of Europol, the European Law Enforcement Agency that aims to improve effectiveness and cooperation among Member States' competent authorities in preventing and combating terrorism, drug trafficking, and other types of organised crime.

Lastly, it is a role of police to strengthen feelings of security in society, in particular to reduce the fear of crime among local people, as well as promoting and achieving public safety (Hughes 2008). Modern policing has put an increased emphasis on this role, as fear of crime, disorder, anti-social behaviour, and 'quality of life' issues have been placed more centrally on the police agenda in both Europe and the United States (Tilley 2003: 146-148). The need to present places as safe and secure locations to live, work and spend leisure time may increase public demand for a visible police presence. Addressing this need is sometimes referred to as the 'reassurance agenda' (Maguire 2003). Strengthening feelings of security and confidence in the police has been an important aspect of EU police forces' work in the Police Missions in Kosovo and Bosnia, and these aims have been pursued by publicising efforts to deal with corruption and organised crime. The training and mentoring provided to local police as a central element of these police missions is designed to enforce European notions of police as a service, as well as to assist local officers in engaging with public concerns and building trust (personal interviews, Brussels, 2011).

Policing tasks

The following sections will outline the range of tasks that police perform. These tasks will then be related back to Goldstein's ideal set of functions, and this will provide the basis for producing criteria for police comprehensiveness.

Crime fighting tasks

Fighting crime is one of the most central aspects of police work, and many policing tasks in some way relate to dealing with convictable violations of law (Loveday 1996). Indeed, dealing with crime may be said to be the original *raison d'être* of policing (Edwards 2005). Crime fighting involves the prevention or reduction of crime, as well as the detection and investigation of crimes that have been committed. Edwards (2005) suggests that crime may be seen as ranging from large-scale crime, such as organised crime, drug trafficking, terrorism, and serious fraud; to personal crime involving individuals, such as domestic violence or murder; and minor or street crime including muggings and vandalism. Crime prevention and reduction concerns those measures taken by police that are designed to stop crimes from occurring.

There are a number of broad approaches used for the prevention or reduction of crime. Some of these are situational; in other words, tailored for particular places and circumstances. Examples of this are community-based programmes, such as police-led drug education programmes, or 'early intervention' programmes in schools to promote community values (Byrne and Pease 2003). The EU Police Mission in Bosnia has regularly employed public information campaigns which aim to promote values in this way, and these tend to be aimed at specific areas of society.

In general, police must focus crime reduction efforts on 'hotspots' where criminal activities are particularly high. According to Clarke (1997) there are four basic methods police and society may employ to reduce crime. Firstly, security techniques such as locks, entry phones, or computer passwords may be used to increase the effort of committing crime, and the means of crime, such as the availability of weapons, may also be controlled. The second method is increasing the risk from committing crime, which may be achieved by formal surveillance, such as CCTV or patrolling police. The third way of reducing crime is by reducing the reward. This can involve anything from removing targets (keeping cars in garages or removing their radio facia when parked) to identifying property with serial numbers. The last method is removing excuses for committing crime, which means clear rule-setting; for example, campaigns designed to stimulate conscience and awareness, such as drink-drive campaigns (Clarke 1997). Making the commission of a crime more difficult or less attractive is sometime called 'target hardening' (Edwards 2005). Many of these techniques require contributions from both police and the public in order to be successful. In addition, Byrne and Pease (2003) argue that effectively putting these methods into practice requires service-level agreements to strengthen cooperation between police and local authorities. Examples of these kinds of service-level agreements can be seen in the EU Police missions in Kosovo and Bosnia, where there is a high-level of cooperation among EU police forces, local police, and local authorities. EU Police Missions also employ a range of crime reduction techniques, including the promotion of security devices, increased police presence, and awareness campaigns.

Gathering information is central element of both crime reduction and crime investigation. There are two primary tasks involved: generating police 'knowledge' and producing 'evidence'. *Knowledge* refers to the understandings reached by police about what crimes have been, or are likely to be, committed, by whom, how and why. The production of *evidence* means obtaining material that may be presented in court to establish whether a

criminal offence took place, and if a suspect is guilty of it (Maguire 2003). An important aspect of this is the use of 'intelligence': information of value and relevance derived from informants of other sources, and the understanding and evaluation of that information. This is important because the analyses of intelligence may be effectively utilised to direct the activities of law enforcement agencies in ways that enable them to disrupt, disable, or undermine criminal threats (Tilley 2008). Since the events of 9/11 there has been a greatly increased emphasis on 'intelligence-led policing' in the field of counter-terrorism. This can be seen in legislation such as the 2004 EU Action Plan on combating terrorism, and in the 2004 Hague Programme which highlighted the priority given by the EU and the importance of EU-level policing with regards to counter-terrorism efforts.

Aside from the information gathering techniques already discussed as part of police roles, there are numerous other ways in which crime may be detected by police, varying depending on the nature and scale of the crime. Much street-level crime is opportunistic, involving offenders roaming until they find a chance to commit a crime (Edwards 2005). A standard approach to detecting this sort of crime is to have police officers patrolling streets and stopping, questioning, and searching individuals that they perceive to be 'suspicious'. This may lead to the discovery of recently stolen property, drugs, or weapons. Other types of crime, including more serious or large-scale crime, may require the targeting and monitoring of particular individuals or premises (Edwards 2005). Detecting and dealing with matters of serious organised crime and fraud, drug trafficking, terrorism, and cybercrime often involves specialist groups of police, sometimes working at the international level. Europol is highly active in these areas, particularly in terms of facilitating the sharing of intelligence among Member States' law enforcement agencies. Specialist police and specialist training for local police are used for dealing with organised crime and drug trafficking in many of the EU civilian missions, including those in Bosnia, Kosovo, the Democratic Republic of the Congo and Afghanistan. In the case of EULEX Kosovo, which has an executive mandate, specialist EU police may themselves undertake investigations relating to crime and corruption, rather than just training and monitoring local police (personal interviews, Brussels, 2011).

Detecting and investigating crime also leads to an area of police work that has received much scholarly attention: the procedures and decisions involved with invoking the law. According to Bittner (1970), powers of arrest and detention mean that police effectively have a greater freedom in proceeding against offenders than any other public officials; police determine the 'outer perimeter of law enforcement', and determine what the business of prosecutors and judges will be. The justice system is designed to deal with offenders, but the justice system can do nothing with an individual until they have been classified as an offender. Here the police have a clear role: after a crime has been committed, the police must investigate it, gather evidence against a suspect, and then prepare a case and bring the suspect before court (Edwards 2005). The criminal justice system cannot operate without police supplying both suspects and evidence against them. In order that they may perform these tasks, police are granted the power to arrest, detain, and question (interrogate) suspects. This is an area in which the EU police institutions and Member States' law enforcement agencies cooperate: whilst EU institutions such as Europol do not themselves have powers of arrest, they facilitate the sharing of intelligence and evidence which may be used by Member States' police to make arrests. Additionally, the European Arrest Warrant is an example of EU-level policing legislation that directly relates to powers of arrest.

Order maintenance tasks

Order maintenance essentially refers to the non-arrest side of police work. The aspect of order maintenance that has received by far the most attention in academic literature is

'policing public order'. Unlike crime fighting, precisely what is meant by policing public order is unclear; Waddington (1996, 2003) points out that the phrase evokes images of riot-clad officers engaged in forceful conflict with political dissents engaged in 'community disorders, but that this is usually far from the case. Protests and picketing are most often policed by officers in normal uniforms, with little violence and few arrests. Furthermore, eruptions of violence requiring forceful suppression by police occur in many situations, from sports matches to street carnivals. Nor can policing public order be defined by the deployment of officers on masse, because such collective police action also occurs in other circumstances, such as at civil disaster (Hills 1997). Waddington (2003: 187) suggests that due to the ambiguity of policing public order, it is useful to focus on certain aspects, in particular 'contentious politics' when they are pursued through protest and related activity. The techniques that police may use to suppress political contention are varied, ranging from benign symbolic presence to aggressive paramilitary responses to disorder. The use of visored helmets, body armour, flame retardant overalls, shields and batons may be seen as a way to protect police from injury while engaged in work that is intrinsically dangerous. However, the increased use of firearms and low-lethality weapons such as CS sprays have contributed to accusations that police are becoming more paramilitary (Rappart 2003). These kinds of order-maintenance activities are part of the executive tasks performed by EU police in EULEX Kosovo, particularly in Northern Kosovo where there have sometimes been violent demonstrations and riots. EU police have used teargas, stun grenades and other crowd control methods, and have deployed officers to guard areas where disorder has occurred against further outbreaks of violence (personal interviews, Brussels, 2011).

The police also perform order maintenance tasks during times of emergency, such as when large-scale accidents, terrorist attacks or natural disasters occur. Emergency management coordination tasks primarily involve working alongside other emergency services, as different agencies will have primary responsibility for dealing with different types of emergencies; for example, the fire service for fire, or the rail board for train crashes (Edwards 2005). Few emergency situations require police only to perform coordination tasks, as major incidents often involve at least the possibility of criminal offences. Crowds may also be attracted, particularly in cities, meaning that other public order tasks may be required. The 2010 activities of European Gendarmerie Forces in Haiti demonstrate both EU policing in a paramilitary capacity and the provision of order-maintenance support in the aftermath of a major natural disaster.

The last area of order maintenance tasks for police involves facilitating the movement of vehicles and people. This is largely to ensure public safety. Traffic police usually operate in areas where there is a high volume of vehicle congestion, areas where vehicles travel at high speed, or when traffic signs and signals are not functioning. Police also observe whether people operating vehicles are doing so in a safe manner in accordance with the law, and those who fail to do so may face a caution, fines or arrest. At large public gatherings police may also monitor and facilitate the safe movement of pedestrians, whilst monitoring for any criminal behaviour or outbreaks of public disorder (Edwards 2005). Finally, police are involved with border control, including the movement of people by public or private transport between countries. These tasks have been included in the activities of EU Police missions, such as the border control assistance provided by EU police officers in Bosnia.

Service tasks

Aside from police work that is related to order maintenance, crime or arrests, police also provide service tasks to the public. According to Walker (2003), the functions of police in the modern state have come to interlock closely with other services involved in the

broader project of providing for citizens' well-being. These services include, for example, health, social security, environmental protection, and utility supply. By providing twenty-four-hour, seven day-a-week availability as well as legal coercion, police have the authority and presence to reinforce such services. This is because police can be pro-active players in terms of planning and coordination in both the local and central administration of these other services. Walker (2003: 113) points out that 'in this sense, policing has both shaped and been shaped by broader framework of multi-functional, co-ordinated regulatory activity we call government and the general container of government power we call the state'.

Police provide a number of other day-to-day services to the public. These include providing directions, general information and advice, and even helping with the cleanliness of communities. Punch and Naylor (1973) point out that after specific emergency services (fire, ambulance, coast guard and so on) the police are often left to deal with other matters, and could be described as the only twenty-four-hour, fully mobile, social service. In a study of public expectations of police, Punch and Naylor found that a great many people felt that they could contact the police when they needed help from an authoritative source, and there was no-one else available; often calls to police are made when even the caller realises that the reasons are not strictly police business (Edwards 2005). Many of the EU civilian missions include the training of indigenous police forces in performing day-to-day service tasks as part of 'generic policing' according to European standards. Additionally, the public awareness campaigns run as part of the Police Missions in Bosnia and Kosovo provide services by educating the young and raising awareness of the range of day-to-day support that police offer to the public.

Transnational dimensions of policing

The last area of police work that needs to be outlined here is 'transnational policing'. Walker (2003) suggests that the term 'transnational' is preferable to 'international'. This is because not all policing beyond the state can be reduced to cooperation between actors whose main reference point is their state of origin; some policing involves networks which are relatively autonomous of their states of origin, and instead owe authority and allegiance to non-state polities or political communities (Walker 2003). The primary examples of this are to be found in EU-level policing.

Cooperation at various levels between police agencies of different states has expanded as international security concerns have increased. The main area in which this cooperation takes place is intelligence-sharing, which is often an important part of states' attempts to deal with cross-border crime such as drug-trafficking or terrorism. The EU offers a particularly far-reaching example of transnational policing, which has developed significantly over the last few decades. Earlier examples of EU policing include the Schengen Information System; a computerised database designed to facilitate the exchange of information and intelligence among European police agencies, as well as operational measures such as pursuit across borders, cross-border observation and controlled delivery of illegal substances (Den Boer 2000). Police cooperation was formally integrated into the supranational structure of the EU in the 1992 Maastricht Treaty, which also established the legal basis for Europol. Europol is a central organisation in a network of relationships with national units in each EU member state, and is used to supply national units with criminal intelligence and analysis. Additionally, Europol receives information from the national units on issues relating to certain forms of transnational crime. The EU supported this by introducing an integrated policy structure and supporting legislative measures in criminal justice cooperation (Walker 2003), and by the time Europol was fully operational its extended remit covered all crimes with an organised criminal structure. Another significant development in EU-level policing was the European Arrest

Warrant (EAW) which came into force in January 2004, which was designed to replace extradition proceedings between EU Member States, and so speed up and remove obstructing political dimensions in the transfer of criminal suspects and fugitives.

Criteria for assessing police comprehensiveness

The following section will explain how the functions of police may be reduced to three analytical criteria without sacrificing the details and quality contained in the full ideal set. Firstly, each of the police tasks that have been outlined in this article may be identified with a function from the set. Each of these functions may in turn be grouped under three broad criteria for assessing comprehensiveness: crime fighting, order maintenance, and service. Some functions may fit more than one criterion, but the tasks within that function will be different in each criterion's case. This will be demonstrated and explained in further detail below. The way in which the criteria relate to police functions and tasks can be explained most clearly by considering each one in turn; the following is a list of police functions grouped with each criterion, and a brief summary of the tasks associated with each based on the more detailed descriptions already given in this article.

1. Crime fighting

Function: To prevent and control conduct widely recognised as threatening to life and property (serious crime).

Tasks: This involves all police tasks related to the prevention or reduction of all types of crime, the detection and investigation of crimes that have been committed, and the apprehension, detention, and charging of suspects.

Function: To resolve conflict, whether it be between individuals, groups of individuals, or individuals and their government.

Tasks: Relates to crime-fighting when conflicts involve illegal activity, such as violence, the threat of violence, or causing serious or dangerous public disorder.

Function: To identify problems that can potentially become more serious problems for the individual citizen, for the police, or for the government.

Tasks: This involves gathering and analysing information and intelligence related to what crimes have been, or are likely to be, committed, by whom, how and why.

2. Order maintenance

Function: To prevent and control conduct widely recognised as threatening to life and property (serious crime).

Tasks: Negotiation management and policing public order at protests and marches, as well as other types of public gatherings such as sports matches, carnivals and so on.

Function: To aid individuals who are in danger of physical harm, such as the victims of violent attack.

Tasks: To coordinate and work alongside other emergency services during times of emergency, such as when large-scale accidents, terrorist attacks or natural disasters occur.

Function: To facilitate the movement of people and vehicles.

Tasks: To ensure public safety in areas where there is a high volume of vehicle congestion, areas where vehicles travel at high speed, or when traffic signs and signals are not functioning. To observe whether people operating vehicles are doing so in a safe manner and in accordance with the law. To monitor and facilitate the safe movement of pedestrians at large gatherings. This also includes police tasks relating to border control.

Function: To assist those who cannot care for themselves, the intoxicated, the addicted, the mentally ill, the physically disabled, the old, and the young.

Tasks: To detain or get help for those who may present a danger to themselves or others, and to take appropriate subsequent action, such as offering advice, referring an individual to a specialist, or charging an individual if the law has been broken.

Function: To resolve conflict, whether it be between individuals, groups of individuals, or individuals and their government.

Tasks: To negotiate, take actions to 'keep the peace' when serious conflict occurs between individuals, and to perform negotiation management and public order policing tasks when conflicts between large groups or groups and their government occur.

Function: To create and maintain a feeling of security in communities.

Tasks: In accordance with the 'reassurance agenda' police should create a sense of security in society though the symbolic presence of police, as well as making efforts to convince the public that they are beating crime and protecting them from criminals.

3. Service

Functions: To aid individuals who are in danger of physical harm, such as the victims of violent attack. *Also*, to assist those who cannot care for themselves, the intoxicated, the addicted, the mentally ill, the physically disabled, the old, and the young.

Tasks: These tasks relate to providing for citizens' well-being. Police should assist those who have been physically harmed, or are in danger of harm, and coordinate with other specialists and emergency services for the protection of citizens. Police are often expected to provide 24-hour, seven day-a-week availability to help with citizens' general needs. Additionally, the notion of police assisting those who need help may also be extended to include service tasks such as the provision of directions, general information and advice. Police service tasks may also include planning and coordination involvement with health, social security, environmental protection, and utility supply.

Function: To protect constitutional guarantees, such as the right of free speech and assembly.

Tasks: To advise and assist citizens planning to hold lawful public protests, gatherings, or other events.

For the purposes of this research, if police perform tasks that can be identified as belonging to a particular function, and those tasks are performed to a similar depth and quality as would be expected of comparable domestic or international police, then that function may be considered fulfilled. Each criterion for comprehensiveness may be considered to be fully met only if all of the functions that comprise them are fulfilled. The foundational 'roles' of policing may also be related to these criteria. Police roles are very broad in nature, and as such may be applied in some way to a large percentage of police functions and tasks. For this reason, the extent to which police fulfil the essential roles of policing may be judged by the extent to which they meet all three criteria for comprehensiveness.

Police comprehensiveness is to be measured both in terms of quantity; that is, the number of roles, functions, and tasks that occur in EU-level policing, and quality; that is, the depth of the function or task that is carried out. This is because quantity alone may not be a sufficient basis to claim that the EU is a comprehensive and credible police actor. Rather, the criteria for police comprehensiveness must be met at a similar level to that which would be expected of comparable domestic or international police forces undertaking the functions and tasks in question. Furthermore, the criteria for comprehensiveness are not 'absolute', 'all-or-nothing' criteria. As with actorness, police comprehensiveness may be fulfilled in certain areas. For example, case studies may indicate that EU-level policing clearly fulfils all of the functions relating to order maintenance, but only some of those relating to crime fighting. In this case, EU-level policing may be considered comprehensive in the area of order maintenance, but partial in the area of crime fighting. Additionally, specific police activities or examples of policing (such as may be used for case studies when applying this framework) would not be expected to include evidence for all three criteria for comprehensiveness. A study of Europol, for instance, would be likely to provide evidence of crime fighting functions, but not of service functions. As will be discussed later in this article, a number of case studies will be required to present a meaningful analysis of the EU as a comprehensive police actor.

Theoretical framework for research

In order to assess the EU as a comprehensive police actor, it is necessary to produce a framework capable of measuring both actorness *and* police comprehensiveness. Furthermore, the approach used should produce an assessment of the relationship between comprehensiveness and actorness, as well as the linkage between each of the criteria to be used. This will be achieved by combining Jupille and Casporaso's criteria for actorness and the criteria for police comprehensiveness presented in this chapter into a single integrated framework. This may be illustrated in the form of a matrix, as shown in Table 1 below:

Table 1: Framework for assessing police comprehensiveness and actorness

	Recognition	Authority	Autonomy	Cohesion
Crime fighting				
Order maintenance				
Service				

When applying this framework to research, police comprehensiveness should be assessed first. Once the extent to which the criteria for comprehensiveness are met has been established, each one must then be measured against the criteria for actorness. This integrated approach forms an interrelated hypothesis; this means that to provide a complete analysis, all elements of the framework must be considered together and in relation to each other. This approach offers several advantages: firstly, by systematically

looking at the linkage between each element of police comprehensiveness and actorness and then considering the overall relationship between them, a highly nuanced analysis may be produced. This will be useful for providing a detailed an insightful answer to the question of whether the EU can be considered a comprehensive police actor. Secondly, it offers an effective way to compare and link case studies. The aspects of comprehensiveness and actorness that different areas of EU policing meet or fail to meet can be identified, and then measured alongside each other. This will be important for producing an accurate over-all assessment of the EU as a comprehensive police actor. Finally, the broad nature of the framework lends itself to being adaptable for this type of research. For a topic as multi-faceted as EU policing this is advantageous, as diverse aspects of policing can be meaningfully examined and compared within the same analytical parameters.

Case studies will be highly useful for assessing whether the criteria for police comprehensiveness and actorness are fulfilled EU-level policing. According to Yin (2003), case studies often 'contribute to our knowledge of individual, group, organisational, social, political, and related phenomena', and that 'the case study method allows investigators to retain the holistic and meaningful characteristics of real-life events - such as individual life cycles, organisational and managerial processes, neighbourhood change, international relations, and the maturation of industries' (Yin 2003: 1-2). A study of EU policing, including its activities, organisation, and functional processes is clearly well suited to this kind of approach. Potential case studies range from broad examples of EU-policing, such as Europol or any of the police/civilian missions, through to narrower, more specific cases, such as the European Arrest Warrant. However, the cases selected must be substantial enough to meaningfully incorporate a study of recognition, authority, autonomy, and cohesion. It should also be demonstrated that the case studies chosen are representative or indicative of EU policing as a whole in order to assure that the findings are generalisable.

Conclusion

This article has identified the absence of an in-depth, systematic study of EU-level policing as a significant gap in the literature; scholars have tended to focus on narrow aspects of EU police activity, or on either the internal or external dimensions. Filling this gap is vital for understanding the contribution of police to the EU's security agenda, which is important as police have increasingly become part of EU security policy-making since 9/11. The framework presented here offers a systematic way to approach the examination of the EU as a comprehensive police actor. Empirical research is to be undertaken to determine in which areas and to what extent EU-level policing incorporates the range of functions, roles, and tasks that constitute comprehensive policing. EU-level policing must also be explored in terms of actorness; in this way it will be possible to examine the relationship and linkage between the EU's police comprehensiveness and its security actorness. This framework can therefore offer valuable insights into the role of police in the EU's ambitions as a comprehensive security provider and a credible global security actor.

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The EU Legal Framework on Trafficking in Human Beings: Where to from here – the UK Perspective

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Abstract

The European Union (EU)'s current provisions on the trafficking in human beings (THB) are provided for, inter alia, in Council Framework Decision 2002/629/JHA. The Council of Europe have more recent provisions in this area, which are not yet widely in force. The EU has some major proposals for reform of its legal framework in the Stockholm Programme, to include the appointment of an EU Anti-Trafficking Coordinator. In addition, the focus of EU Justice and Home Affairs is shifting to the external relations of the EU under the Stockholm Programme. A critical examination of the EU legal framework in the area of THB from a law enforcement perspective is therefore timely. THB is a highly contentious and complicated area for regulation, with issues such as the support of the victims of trafficking, the particular needs of under-aged trafficked individuals, and the issues of due process when a witness may not be considered to be reliable during court proceedings, complicating operations and prosecutions. In addition the issue of illegal immigration adds a further layer of complication, with the UK maintaining its opt out from the EU's illegal immigration provisions. This article will, focus on the illegal trafficking of adults against their will, and the consequences of this crime, in particular, for the UK law enforcement authorities.

Keywords

JHA; Law enforcement; Trafficking in human beings; United Kingdom

THE ACADEMIC DEBATES AROUND TRAFFICKING IN HUMAN BEINGS (THB) ARE VERY complex, and follow many different strands of debate. These cover a variety of perspectives, such as the human rights, migration, labour and gender perspectives. Equally the assessment of THB is governed by the geographical location being studied, while still acknowledging that the trade in trafficked human beings is a global phenomenon, in particular the "trafficking into Europe".[1] Some clarity needs to be brought to this area of debate for effective progress to be made and action plans drawn up, in order to tackle the phenomenon. Where the legal and policy frameworks of individual states, the member states of the European Union (EU), and the external relations framework of the EU allow, then more rapid action can be taken, while ongoing global and inter-regional negotiations and policy frameworks are developed with other countries. Action in more effectively governed countries and regions cannot be held back by third countries and regions which are lagging behind in development in this area. The EU is one such region with a comprehensive legal and policing framework capability, and the new

[1] Wylie G. and Mc Redmond P.; Introduction: Human Trafficking in Europe, chapter 1, pages 1 – 16, in Wylie G. and Mc Redmond P.: Human Trafficking in Europe, Character, Causes and Consequences, Palgrave MacMillan, 2010, p.7.

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EU directive on human trafficking[2] has just been passed, with the intention that it should come into force, at the latest "by 6 April 2013".[3] Whatever the merits or otherwise of the particular approach taken in the directive, the directive has set the definition of THB for the EU, and has determined the approach that will be taken by its 27 member states in this crime area for the foreseeable future. By its very nature, the EU directive concerns itself with cross border trafficking. It should also be used for internal – to a particular EU member state – trafficking, which happens far too regularly, even in the UK,[4] and should be implemented within any particular EU member state accordingly. Given that the EU has now set the standard and the definition for THB, the question arises whether the various EU member states are in a position to effectively react to its provisions. Of particular interest to this writer is whether the UK is in a position to implement its internal and transnational law enforcement provisions in order to deal effectively with the new directive. The UK does not follow the EU line on "policies on border checks, asylum and immigration",[5] due to its ongoing Schengen opt out position, so these matters, to include THB as a frontier issue, will not be addressed in this article.

The new EU legal framework on THB

The new EU directive on human trafficking[6] is a much more substantial document than its predecessor,[7] reflecting "the growing concern among Member States regarding the development of the phenomenon of trafficking in human beings".[8] It takes "an integrated, holistic, and human rights approach"[9] to the issue, building on the pre-existing legal frameworks provided by the UN,[10] the International Labour Organisation (ILO),[11] the Council of Europe,[12] and the EU Charter of Fundamental Rights. The directive itself states that it is aiming to "amend and expand the provisions" of the earlier framework decision, but that "in the interests of clarity" it should replace the earlier framework decision "in its entirety in relation of Member States participating in the adoption of this Directive." While the Republic of Ireland decided at the time of enactment to participate in the developments under the new directive,[13] both the UK[14] and Denmark[15] remained outside. However it is now reported that the UK is seeking to opt into the directive, having obtained clearance from both UK Houses of Parliament.[16] Reliance is made in the new

[2] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 1001/1.
[3] Action-Oriented Paper on strengthening the EU external dimension on action against trafficking in human beings – first implementation report/update of information on Member States' external action, Brussels, 4 July 2011, 12401/11, at page 2, second paragraph.
[4] Marie A. and Skidmore P., A summary report mapping the scale of internal trafficking in the UK based on a survey of Barnardo's anti-sexual exploitation and missing services, 2007, Barnardos,, available on-line at http://www.barnardos.org.uk, accessed on 8 August 2011.
[5] Chapter 2 TFEU post-Lisbon.
[6] Directive 2011/36/EU, op. cit.
[7] Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings OJ L 203/1.
[8] Paragraph 12 of the preamble to Directive 2011/36/EU.
[9] Paragraph 7 of the preamble to Directive 2011/36/EU.
[10] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, adopted by General Assembly resolution 55/25, (in force 25 December 2003) supplementing the United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 (in force 15 November 2000) adopted by General Assembly resolution 55/25 on 12-15 December 2000 and entered into force on 29 September 2003.
[11] *Inter alia*, C 29 Forced Labour Convention, 1930 and C105 Abolition of Forced Labour Convention, 1957.
[12] Council of Europe Convention on Action against Trafficking in Human Beings, 2005, CETS No. 197.
[13] Paragraph 34 of the preamble to Directive 2011/36/EU.
[14] Paragraph 35 of the preamble to Directive 2011/36/EU.
[15] Paragraph 36 of the preamble to Directive 2011/36/EU.
[16] Op. cit. footnote no. 3 at page 111.

directive on the EU's visas, asylum, and immigration of third country national provisions,[17] which do not apply to the Schengen opt out states. This raises the issue as to how the UK, and also the Republic of Ireland, will implement these particular provisions in their respective jurisdictions.

While there are differences in the drafting style between the new directive and its predecessor, the framework decision, much remains similar. The definition of exploitation used in the definition for THB is now broader, expressly including begging, and "the exploitation of criminal activities, or the removal of organs".[18] Europol has pointed out that THB "for the purpose of committing street crime offences such as begging, pick pocketing, street theft and robbery" is very much on the rise.[19] In addition THB for the purposes of "social security, welfare and benefits systems" fraud is also increasing, in addition to "involvement of trafficked children in the production, manufacture and supply of controlled drugs."[20] The forced removal of organs, while uncommon, has occurred within the EU.

A challenge for the law enforcement community will be the victim status accorded to those who have been trafficked or exploited in the course of criminal activities, and the mandatory support mechanism which will be required to be given to these victims under the new directive.[21] The widening of the definition of exploitation in this context could lead to a considerable change, not only of national laws on THB, but also of law enforcement practice in many other crime areas, particularly as "assistance and support for a victim are not [to be] made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial".[22]

The minimum penalty provisions for THB have been made clearer for the standard offence, now to be "at least five years of imprisonment",[23] whereas previously is was to be "effective, proportionate and dissuasive" and was to be extraditable.[24] The aggravated offence is now to be a maximum of 10 years imprisonment,[25] up from the previous 8 years.[26] As previously, the aggravated offence will occur where the victim is particularly vulnerable, or is a child, is committed within the context of an organised crime gang as defined by Council Framework Decision 2008/841/JHA,[27] or either "deliberately or by gross negligence endangered the life of the victim". It is also aggravated if it "was committed by use of serous violence or has caused particularly serous harm to the victim."[28] Added to this provision, the directive states that aggravation will also occur where the offence "was committed by public officials in the performance of their duties".[29] The incitement, aiding,

[17] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration who cooperate with the competent authorities, OJ L 261, p. 19, Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168 p. 24, and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of the citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L 158, p. 77.
[18] Article 2.3 of Directive 2011/36/EU.
[19] Trafficking in Human Beings in the European Union: A Europol Perspective, June 2009, page 9, second paragraph.
[20] Ibid. at page 9, third paragraph.
[21] Articles 11, 13, 14 and 16 of Directive 2011/36/EU.
[22] Article 11.3 of Directive 2011/36/EU.
[23] Article 4.1 of Directive 2011/36/EU.
[24] Article 3 of Council Framework Decision 2002/629/JHA.
[25] Article 4.2 of Directive 2011/36/EU.
[26] Article 3.1 of Council Framework Decision 2002/629/JHA.
[27] Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300, p. 42.
[28] Article 4 of Directive 2011/36/EU.
[29] Article 4.3 of Directive 2011/36/EU.

abetting and attempt offences[30] are now to also be subject to surrender[31] under the European Arrest Warrant.[32]

Provisions on jurisdiction have been expanded, with reliance still being made on pre-existing EU provisions on conflicts of jurisdiction.[33] The new provisions,[34] in addition to redrafting much of the older provisions,[35] requires that where a member state establishes jurisdiction on a basis other than the place where the offence was committed, that the "acts are a criminal offence at the place where they were preformed"[36] In addition the "prosecution can be initiated only following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed".[37]

It is worth noting however, that jurisdiction, as standard, is to be established where "the offender is one of their nationals".[38] There is no caveat that the related offence is to occur within the EU. Forced labour, "illegal adoption or forced marriage in so far as they fulfil the constitutive elements of trafficking in human beings,"[39] and forced begging are included within the ambit of this directive, with "no possible consent should be ever considered valid" in the case of a child.[40] It should be noted that a child is defined as "any person below the age of 18 years of age".[41] The "age of sexual majority", referred to in the framework decision,[42] does not feature in the directive. This is a significant shift in focus, at least on this point, between the two EU provisions.

In establishing what is a particularly vulnerable person, which would lead to a more severe penalty, issues such as "gender, pregnancy, state of health and disability" need to be taken into account.[43] Also relevant would be the use of "serious violence such as torture, forced drug/ medication use, rape or other serious forms of psychological, physical or sexual violence" on the victim.[44] The issue of prevention is addressed by the directive, with member states required to "take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation" related to THB.[45] This should include, *inter alia*, internet campaigns, and the raising of awareness, "in cooperation with relevant civil society organisations and other stakeholders".[46] In addition the relevant professionals need to be trained, to include "front-line police officers",[47] which would be a much broader group than specialists in THB units.

The directive, with twice as many articles as its predecessor, the framework decision, still does not encompass the allied crime areas of child sex tourism or on-line paedophilia

[30] Article 3 of Directive 2011/36/EU.
[31] Article 4.4 of Directive 2011/36/EU.
[32] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, p. 1.
[33] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflict of jurisdiction in criminal proceedings, OJ L 328, p. 42.
[34] Article 10 of Directive 2011/36/EU.
[35] Article 6 of Council Framework Decision 2002/629/JHA.
[36] Article 10.3.a. of Directive 2011/36/EU.
[37] Article 10.3.b. of Directive 2011/36/EU.
[38] Article 10.1b. of Directive 2011/36/EU.
[39] Paragraph 11 of the Preamble to Directive 2011/36/EU.
[40] Paragraph 11 of the Preamble to Directive 2011/36/EU.
[41] Article 2.6 of Directive 2011/36/EU.
[42] Article 3.2.b of Council Framework Decision 2002/629/JHA.
[43] Paragraph 12 of Directive 2011/36/EU.
[44] Paragraph 12 of Directive 2011/36/EU.
[45] Article 18 of Directive 2011/36/EU.
[46] Article 18.2 of Directive 2011/36/EU.
[47] Article 18.3 of Directive 2011/36/EU.

activity. It does, however, have new provisions on seizure and confiscation of assets,[48] although in practice earlier provisions on money laundering[49] and the confiscation of the proceeds of crime[50] continue to be relied on. The directive also has new provisions on non-prosecution or non-application of penalties to the victim "for their involvement in criminal activities which they have been compelled to commit as a direct consequence" of the THB.[51]

New provisions on investigation and prosecution[52] provide that member states should ensure that it is possible to take a prosecution "for a sufficient period of time after the victim has reached the age of majority.[53] Emphasis is put on the training of THB law enforcement units, to including a requirement that member states ensure that THB law enforcement units have "effective investigation tools," to include "those which are used in organised crime or other serious crime cases."[54] This presumably would include the whole range of tools legislated for by the EU for cross border law enforcement operations, to include wiretaps,[55] controlled deliveries,[56] cross border covert surveillance,[57] joint investigation teams,[58] or the use of undercover officers in a cross border investigation,[59] etc. in addition to key national agencies having access to and contributing to Europol's Phoenix Analysis Work File.

While the protection of and assistance to victims was provided for in the earlier framework decision,[60] in one subsection of one article, it is now covered by six articles in the new directive, some of which are quite lengthy. Of these new provisions four articles are devoted to the protection of children and child victims.[61] When dealing with a person of indeterminate age, it is to be presumed that they are a child, until the contrary is proven.[62] In addition the interests of the child are to "be a primary consideration" in any investigation involving children.[63] The traditional interest of the police in law enforcement will therefore have to be tempered, and accordingly accounted for in crime statistics and crime detection rates. Access to education is also provided for, as is the need to appoint a legal guardian or representative if "the holders of parental responsibility" are "precluded form ensuring the child's best interests and/or from representing the child" due to a conflict of interests.[64] The need for special investigation and criminal procedures in the case of a child victim is covered,[65] although it is highly probable that these provisions are already in place in most, if not all, EU jurisdictions. The issue of unaccompanied child victims is also addressed, involving the need to appoint a legal guardian in these cases, if necessary.[66]

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[48] Article 7 of Directive 2011/36/EU.
[49] Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182, p. 1.
[50] Council Framework Decision 2005/212/JHA of 24 February on Confiscation of Crime-Related Proceeds, Instrumentalities and Property OJ L 68, p. 49.
[51] Article 8 of Directive 2011/36/EU.
[52] Article 9 of Directive 2011/36/EU.
[53] Article 9.2 of Directive 2011/36/EU.
[54] Article 9.4 of Directive 2011/36/EU.
[55] Articles 17 to 22 of the EU Convention on Mutual Assistance in Criminal Matters 2000, which is subject to a UK declaration attached to Article 20.
[56] Article 12 of the EU Convention on Mutual Assistance in Criminal Matters 2000.
[57] Article 40 Schengen Convention 1990.
[58] Article 13 of the EU Convention on Mutual Assistance in Criminal Matters 2000.
[59] Article 14 of the EU Convention on Mutual Assistance in Criminal Matters 2000.
[60] Article 7.1 of Council Framework Decision 2002/629/JHA.
[61] Articles 13 to 16 of Directive 2011/36/EU.
[62] Article 13.2 of Directive 2011/36/EU.
[63] Article 13.1 of Directive 2011/36/EU.
[64] Article 14.2 of Directive 2011/36/EU.
[65] Article 15 of Directive 2011/36/EU.
[66] Article 16 of Directive 2011/36/EU.

Assistance is to include "the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate".[67] Victims with special needs also need to be provided for, for example, those who are pregnant, have health issues, "a disability, a mental or psychological disorder, […] or a serious form of psychological, physical or sexual violence [which] they have suffered".[68] As the UK has stated, this makes "mandatory some measures which are currently good practice." [69] If these support services are to be provided, to the standard expected by this legislation, substantial planning and investment will be required, with the focus of, at least the uniform police operation, changing, to a certain extent, from law enforcement to victim support. The bringing in to the THB investigation of "serious and organised crime" policing is also clearly provided for.[70] The putting into practice of these provisions will have a substantial impact on both under cover and uniformed police operations, and the development of an effective interaction between the two. This will have a significant impact on police organisational structures as, it is arguable, that the working relationship between covert and uniformed policing will have to be tighter than might traditionally be the case, say, during a drug trafficking operation. These developments will also have a nock on effect on the policing of what would appear at first sight to be low level street crime, the role of most uniformed police officers on the beat.

Legal support, to include witness protection programmes, designed on the basis of "individual risk assessment," is separately provided for.[71] If there are existing schemes for the compensation of "victims of violent crimes of intent," then THB victims should have access to these schemes.[72] Provisions are also made for the avoidance of secondary victimisation due to the investigation or prosecution process.[73] In addition the earlier Police and Judicial Cooperation in Criminal Matters (PJCCM) provisions on the standing of victims in criminal proceedings[74] also continues to be relied on. To complete the mix, EU and national frameworks on bribery and corruption would have to be added to the law relevant to this crime area.

Establishing the exact extent of the crime is key to the allocation of the necessary policing and victim support resources. This has been highly problematic to date.[75]. The ongoing issue of measuring, at least to some level of effectiveness, of the crime of THB within a particular jurisdiction, will be very important. At a strategic policy level, national rapporteurs, or equivalent, should be appointed, to "carry out assessments of trends" in this area and to measures the "results of anti-trafficking actions", to include the gathering of statistics.[76] These details need to be transmitted to the EU's newly appointed anti-trafficking coordinator (ATC), whose work is to be facilitated by the member states, with the ATC tasked with reporting every two years on progress to the Commission.[77] This final provision should provide comparable databases in order to facilitate an informed debate as to the exact extend of reported THB in any particular jurisdiction.

[67] Article 11.5 of Directive 2011/36/EU.
[68] Article 11.7 of Directive 2011/36/EU.
[69] Op. cit. footnote no. 3, at page 112.
[70] Paragraph 15 of the preamble to Directive 2011/36/EU.
[71] Article 12 of Directive 2011/36/EU.
[72] Article 17 of Directive 2011/36/EU.
[73] Article 12.4 of Directive 2011/36/EU.
[74] Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82, p. 1.
[75] See in particular Lee, M. "Introduction: Understanding human trafficking", Chapter 1 in Lee, M. (ed.) Human Trafficking, Willan Publishing, 2007, page 2, where she speaks of shoddy research and wobbly statistics.
[76] Article 19 of Directive 2011/36/EU.
[77] Article 20 of Directive 2011/36/EU.

The UK's legal and operational framework for THB

Effective policing of a crime requires a clear legal framework of what the crime is, and how it is to be tackled. The new EU directive will require a coherent implementation throughout the EU. This will then need to be followed up with effective and efficient police policy and practice in order to make the system work effectively. In the UK the mandatory provisions on victim support will be new. In addition, the definition of the crime, and the policing structure that will need to evolve to meet the requirements of the directive, in all of the devolved policing jurisdictions of the UK, will have to be adjusted. Two contrasting types of policing, uniformed and covert policing, have already been highlighted as being relevant to enforcing the law under this particular directive. The UK will also be challenged by the very large number of relevant police forces and agencies which will be required to enforce and operate the new laws.

The complexity in the UK Human Trafficking law enforcement structure is reflected in the legal framework which has been set up to regulate this particular crime area. It is arguable the new THB directive provides an opportunity for not only law reform but also a streamlining of both the legal framework and its supporting law enforcement structure. The current law is scattered among different legislative provisions, which in itself does not encourage a coherent law enforcement or victim support structure to emerge.

The modern crime of the international traffic in prostitution only arrived on the UK statute books in 2002,[78] although the earlier Sexual Offences Act 1956, although "not specifically [using] the terms of 'traffic' or 'trafficking' [did] cover some aspects of the phenomenon." [79] The 2002 law has now been repealed[80] and replaced by the Sexual Offences Act 2003. The current crime of trafficking for sexual exploitation is covered by the Sexual Offences Act 2003[81] for England & Wales, Northern Ireland and Scotland, with counterpart measures being enacted for Scotland in the Criminal Justice (Scotland) Act 2003.[82] Both these provisions cover both trafficking into the UK,[83] and within, [84] with the Sexual Offences Act 2003 dealing with THB out of the UK.[85] It was not until the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004,[86] (a UK reserved matter, therefore applicable to the whole of the UK) that the offence of trafficking of persons for non-sexual exploitation was legislated for.

Children are additionally protected from sexual exploitation in Scotland by the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005,[87] which is supplemented, generally, by the Sexual Offences (Scotland) Act 2009. The purchase and sale of human tissues are equally prohibited for England & Wales, by the Human Tissue Act 2004,[88] and in Scotland by the Human Tissue (Scotland) Act 2006.[89] In addition the

[78] Section 145 of Nationality, Immigration and Asylum Act 2002 introduced the modern crime of Traffic in prostitution into UK law.
[79] Obokata, T.; *Trafficking of Human Beings from a Human Rights Perspective; Towards a Holistic Approach*, Martinus Nijhoff Publishers, Leiden, 2006, at page 69.
[80] By way of Schedule 7, para. 1 of the Sexual Offences Act 2003.
[81] The Sexual Offences Act 2003, Section 57 Trafficking into the UK for sexual exploitation, section 58 of the Sexual Offences Act 2002, for Trafficking within the UK for sexual exploitation, and section 59 Trafficking out of the UK for sexual exploitation.
[82] Section 22 of the Criminal Justice (Scotland) Act 2003 deals with Traffic in prostitution etc.
[83] Section 57 of the Sexual Offences Act 2003, and Section 22.1 of the Criminal Justice (Scotland) Act 2003.
[84] Section 58 of the Sexual Offences Act 2003, and Section 22.1 of the Criminal Justice (Scotland) Act 2003.
[85] Section 59 of the Sexual Offences Act 2003.
[86] Sections 4 & 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.
[87] Section 9 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act deals with the Paying for sexual services of a child.
[88] Section 32 of the Human Tissue Act 2004 deals with the Prohibition of commercial dealings in human material for transplantation.

provisions of the Proceeds of Crime Act 2002 would cover the proceeds of THB, leading to police financial intelligence units being able to proceed against the proceeds of human trafficking offences.[90] The (UK) Crime (International Co-operation Act) 2003 provides a potential model for the enactment of the new directive in the UK. In that case, while criminal law and law enforcement provisions are devolved matters within the UK, the Scottish Executive authorised the UK government to enact one piece of legislation covering cross-border law enforcement provisions in order to ensure that "no gaps and loopholes are left" in the legal framework.

Of interest is the fact that the Sexual Offences Act 2003 speaks of a penalty of "imprisonment for a term not exceeding 6 month or a fine not exceeding the statutory minimum" for summary conviction, and "imprisonment for a term not exceeding 14 years" for "conviction on indictment".[91] The Asylum and Immigration (Treatment of Claimants) Act 2004, which deals with trafficking for non-sexual purposes for the whole of the UK, border control remaining a UK reserved matter, speaks of "imprisonment for a term not exceeding twelve months [or] a fine not exceeding the statutory maximum or to both" for a summary conviction, and "imprisonment for a term not exceeding 14 years, to a fine or to both" for "conviction on indictment".[92] In contrast, the new directive provides for a minimum of "at least five years of imprisonment",[93] for all types of trafficking, with the aggravated offence now to be a maximum of 10 years imprisonment.[94] This substantially changes the nature of the offence under UK law. The breath of the directives definition of aggravated offence is not echoed in the current UK provisions, although there is some acknowledgement of the need to deal with child trafficking with "the full force of the law" in the attached Government explanatory notes annexed to the relevant sections of the Sexual Offences Act 2003. The reference to organised crime in the directive is, surprisingly, not reflected in the UK legal provisions. A major conceptual shift, not only on victim support, but on the nature of the criminality, and its policing response, will be required in the UK in the implementation of the provisions of the new directive into UK law.

In addition to the above, THB becomes a UK Borders Agency issue under section 31 of the UK Borders Act 2007,[95] and, as mentioned above, cross border law enforcement operations are facilitated by the (UK) Crime (International Co-operation Act) 2003.[96] This latter act provides that foreign police and customs officers in pursuit of Schengen Convention crimes, which include THB, may maintain, pursuant to Section 76A of the now revised Regulation of Investigatory Powers Act 2000, and subject to its conditions, their surveillance operations within the UK. It would be expected that such an incoming operation would be immediately notified to the Serious Organised Crime Agency (SOCA), or its successor,[97] Multilateral/ International office for co-ordination and local support.

Despite the UK being comprised of a variety of legal jurisdictions, and law enforcement accountability structures,[98] the UK, prior to the enactment of the new directive, had

[89] Section 20 of Human Tissue (Scotland) Act 2006 which deals with the Prohibition of commercial dealings in parts of a human body for transplantation.
[90] UK Action Plan on Tackling Human Trafficking, March 2007 from the Home Office and the Scottish Minister for Justice, on behalf of the Scottish Executive, at page 16.
[91] Section 57.2, 58.2 and 59.2 of the Sexual Offences Act 2003.
[92] Section 4.5 of the Asylum and Immigration (Treatment of Claimants) Act 2004.
[93] Article 4.1 of Directive 2011/36/EU.
[94] Article 4.2 of Directive 2011/36/EU.
[95] Section 31 of the UK Borders Act 2007 deals with people trafficking.
[96] Section 83 of the Crime (International Co-operation) Act 2003 provides for foreign surveillance operations.
[97] Home Office; The National Crime Agency; A plan for the creation of a national crime-fighting capability, June 2011, available on-line at www.homeoffice.gov.uk , accessed on 28 July 2011.
[98] See further O'Neill M.; 'EU Cross-Border Policing Provisions, the View from One of the Schengen Opt-out States,' *European Journal of Crime, Criminal Law and Criminal Justice 18* (2010) 73–89.

adopted a unitary Action Plan on Tackling Human Trafficking, in 2007,[99] together with the 2009 Update to the UK Action Pan,[100] which covered the issue of human trafficking "throughout the UK"[101] from a variety of perspectives.

The 2007 THB strategy document recognised "the need to keep the legislation under review to ensure its continued effectiveness", [102] and some of the above mentioned pieces of legislation are, at the time of writing, currently subject to UK proposals for revision. In addition there is a proposal for the conversion of SOCA into a National Crime Agency, which will incorporate a border policing function.[103] It is to be hoped that the revisions to the UK legal framework for THB, bringing it in line with the new EU directive, will avail of the opportunity to bring in some streamlining of the legal provisions, and the underlying law enforcement structure. In addition the UK Action Plan on Tackling Human Trafficking will have to be rewritten to take into account the changes required by the new EU directive.

The UK Human Trafficking Centre (UKHTC) was originally tasked with leading on tackling THB at a UK level, initially in co-operation with SOCA,[104] but since the 1st April 2010 it has become part of SOCA structure. Law enforcement was "intelligence led".[105] Intelligence led policing has a particular meaning within the UK, reflecting a particular law enforcement practice.[106] While difficult to pin down, intelligence led policing has been described as being "operationally the antithesis of community policing".[107] Rather than reacting to reported offences as they happen, which remains the focus of community policing, intelligence led policing "focuses enforcement activities on prolific and serious offenders", using "crime intelligence to objectively direct police resource decisions".[108] Crime intelligence can be derived from a number of sources, both open and covert, and it "places greater emphasis on information sharing and collaborative, strategic solutions to crime problems".[109] While the UK had acknowledged the seriousness of the crime of THB in the establishment of the UKHTC, it could be argued that there was insufficient focus on the crime across all of the forces of the UK, and insufficient, relative to the requirements of the new directive, allocation of law enforcement resources, as well as the already indicated lack of formal and legally enacted victim support structures that are now required.

While there is a UK wide National Intelligence Model,[110] and in Scotland one Scottish Intelligence Data Base,[111] there is no comparative unitary intelligence data base in England & Wales. Presumably the Association of Chief Police Officers (ACPO)[112] Regional

[99] http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/UK_Action_Plan_to_Combat_Human_Trafficking_en.pdf, accessed on 26 July 2011.
[100] Home Office and Scottish Executive; Update to the UK Action Plan on Tackling Human Trafficking October 2009, http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/Update_to_the_UK_Action_Plan_on_Tackling_Human_Trafficking_en_2009.pdf accessed on 26 July 2011.
[101] Op. cit. footnote no. 90, at page 12.
[102] Ibid. at page 8.
[103] Op. cit. footnote no. 97.
[104] Op. cit. footnote no. 90, at page 21.
[105] Ibid. at page 9.
[106] Ratcliffe, J.; *Intelligence-Led Policing*, Willan, 2008.
[107] Ibid. at page 87.
[108] Ibid.
[109] Ibid. at page 85.
[110] Ibid. at page 101/102.
[111] Run by the Scottish Police Services Authority.
[112] An England and Wales organisation of chief police officers. The Association of Chief Police Officers in Scotland is the Scottish counterpart to ACPO.

Intelligence Units network[113] manages to provide a bridge between separate data bases. Of concern, however, is the 2007 Action plan's recognition of the "need to improve our knowledge base in the area of trafficking for forced labour." The plan stated that while the UK had "more detailed information on some areas such as victim nationality, employment sectors and the nature of exploitation," that there was "a fundamental lack of information concerning the scale of the problem".[114] The UKHTC National Referral Mechanism Statistical Data for April 2009 to March 2010 have since been published.[115]

As reported in the UK context, one of the "greatest challenges" in this area is the "initial difficulty of gathering actionable intelligence" especially "in communities that are in effect 'closed' to routine policing" due to language barriers "or mistrust of the authorities".[116] This may arise from communities experience of the authorities in their state of origin. UK reports have been made that "most of the victims and suspected victims encountered by police fled before initial interviews could be conducted or shortly afterwards".[117] Of course police files verifying these reports are not available for inspection by the public due to both data protection and data security regulations. An intelligence led policing approach should be able to construct evidence from surveillance etc. sufficient to bring a suspected criminal to trial, separate from victim witness testimony, which is understandably difficult to obtain in this crime area. The victim support measures in the new directive may also provide an incentive for any suspected victims to remain contactable, thereby increasing the probability of, and possibly the opportunity for, the police obtaining relevant evidence from the victim. In order to obtain a warrant intelligence needs to be "gleaned by surveillance, first-hand observation or reliable third-party sources," all of which "require intense and costly resourcing."[118] It is this additional intense and costly resourcing that is now anticipated by the new directive.

SOCA,[119] as the successor to both National Criminal Intelligence Service (NCIS) and the National Crime Squad (NCS), both of whom were active in the area of human trafficking, [120] and which is now itself currently subject to proposals for reform,[121] covers a number of different law enforcement programmes, which are to be "complementary" to each other.[122] These include the "organised immigration crime programmes," the "exploitation of illegal migrants in the UK" and the "trafficking of people, in particular women and children for the vice trade." [123] This approach would be in line with the increasing evidence of the "involvement of organised criminal groups in trafficking" in the UK, with these organised crime groups being "highly structured, large in size and [having] many members and associates all around the world.[124] The UK, while being "a typical State of destination for trafficked people,"[125] also "services as a transit state."[126] In addition, it is worth noting that a large number of "children have been trafficked" into the UK, "not only for sexual exploitation, but also for credit card fraud, drug trafficking, and domestic service."[127] Many of SOCA's capabilities are operated north of the Scottish-English border

[113] Op. cit. footnote no. 100, at page 8.
[114] Op. cit. footnote no. 90, at page 5.
[115] Available from SOCA at http://www.soca.gov.uk, accessed on 29 August 2011.
[116] Lebov, K.; Human Trafficking in Scotland, 2010 7: 77 *European Journal of Criminology,* at page 88.
[117] Ibid.
[118] Ibid. at page 85.
[119] Established pursuant to s. 1 of the Serious Organised Crime and Police Act 2005, as an "Executive Non-Departmental Public Body (NDPB) of the Home Office", http://www.soca.gov.uk/about-soca/how-we-are-run.
[120] Op. cit. footnote no. 79, at page 72.
[121] Op. cit. footnote no. 97.
[122] Op. cit. footnote no. 90, at page 10.
[123] Ibid.
[124] Op. cit. footnote no. 79, at page 46.
[125] Ibid. at page 41.
[126] Ibid. at page 39.
[127] Ibid. at page 41.

by the Scottish Crime and Drug Enforcement Agency (SCDEA).[128] Completing the UK's law enforcement picture in this area are the Child Exploitation Online Protection Centre (CEOP),[129] and the Gangmasters Licensing Authority (GLA).[130]

The 2007 UK Action Plan described the UKHTC as being "a multi-agency centre" which forges "closes links between the immigration service and law enforcement."[131] These tasks continued after the UKHTC became part of SOCA. As well as to obvious role of the UK Borders Agency,[132] all of the vice and organised crime squads located in the 52[133] territorial forces throughout the UK[134] are required to be added to the mix in order to complete the picture. Even in the highly cohesive context of the Scottish territorial forces, different approaches have been taken in structuring the force in order to deal with human trafficking. The Glasgow based Strathclyde police, according to the 2009 review, have "established a Vice and Anti-Trafficking Unit," while the equally city focused Edinburgh based force, Lothian and Borders Police, has tasked its Serious Organised Crime Unit with the role of combating THB.[135] This all makes for a highly complex UK Human Trafficking law enforcement structure, even before the multi-faceted aspects of THB, such as victim support, and the role of standard community policing units, often the first responders to an incident, and who encounter low level street criminality during routine patrols, are taken into the picture.

At a territorial force level, or as described earlier, the level of first responder, "language is another barrier" to performance,[136] not just for the NGO's who provide support in this area, but also for the police. In addition "officers receive insufficient training on foreign languages, identification of false travel documents and visas, treatment of victims of trafficking, and other issues related to the phenomenon."[137] Problems have similarly arisen at the level of immigration officers, who may also be the first responders in this crime area, "who may lack adequate knowledge of refugee laws and of human rights situations in the States of origin".[138] If the immediate response is that of "arrest and deportation of illegal migrants",[139] because victims "are often seen as a threat to internal security because of their connection with criminal activities and organisations",[140] the consequence is that "few traffickers [are] being prosecuted and punished in reality,"[141] allowing them to continue in business, and try again. This is not an effective way to tackle either organised crime or organised criminals.

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[128] Established pursuant to s. 12 of the Public Order and Criminal Justice (Scotland) Act 2006, "established as a non-departmental public body" and being "part of the Scottish Police Services Authority (SPSA)", http://www.sdea.police.uk/About-Us/aboutus.htm.
[129] CEOP is affiliated to SOCA.
[130] Set up pursuant to Section 1 of the Gangmasters (Licensing) Act 2004 as a Non-Departmental Government Body of Department of the Environment, Food and Rural Affairs (DEFRA).
[131] Op. cit. footnote no. 90, at page 5.
[132] Section 48 of UK Borders Act 2007 created a Border and Immigration Inspectorate, known as the UK Borders Agency, which is an agency of the UK Home Office. http://www.ukba.homeoffice.gov.uk/aboutus/.
[133] At the time of writing there are 43 standard territorial forces in England & Wales, 8 in Scotland, and 1 in Northern Ireland. In addition there are police forces on the UK offshore islands, namely the Jersey Police Force, the salaried police force of the Island of Guernsey and the Isle of Man Constabulary. There are also 4 special police forces; the Ministry of Defence Police, the British Transport Police Force, the Civil Nuclear Constabulary, and the Scottish Crime and Drug Enforcement Agency. In addition the Serious Organised Crime Agency, which is not classified as a police force under UK law, but is so classified for the purposes of EU law.
[134] With police chiefs answerable "to their [normally local] political masters." Op. cit. footnote no. 69, at page 102.
[135] Op. cit. footnote no. 100, page 12.
[136] Op. cit. footnote no. 79, at page 82.
[137] Ibid. at page 74, citing Lord Wiblerforce, Hansard, H.L, Vol. 632, Col. 899.
[138] Ibid. at page 74.
[139] Ibid. at page 80.
[140] Ibid. at page 153.
[141] Ibid. at page 80.

The new directive's focus on victim support will hamper any traditional "arrest and deportation of illegal immigrants" approach when THB is suspected. The lack of clear and useable laws and structures, both at a national and transnational and international level are likely to be a contributing factor to the low conviction level for THB. It is to be hoped that the new EU directive will be a first step in addressing some of these issues. The new directive's standardisation of the definition of THB, together with its new reporting structures should assist in bringing clarity to this crime area. However, the variety of policing techniques required, together with the complexity of the UK's own internal legal and police operational framework is adding complexity to an already complex area.

The proposed replacement of SOCA, the National Crime Agency, will be tasked with tackling not only organised crime, but also "networks of organised criminals",[142] thereby neatly sidestepping the lengthy academic and practitioner arguments as to what exactly is "organised crime".[143] The police in the UK have two distinct roles, arrest and prosecution of criminals, and ensuring that "criminals and networks of organised criminals are disrupted and prevented from operating."[144] The apprehension of the offender is therefore not always the first priority. The Border Policing Command of the new National Crime Agency will be tasked, *inter alia*, with trafficking of people.[145] While this approach may have a certain logic, the THB within the UK, to include those numbers of victims who never cross national borders, must also be encompassed in the new National Crime Agency's activities.

The UK's interaction with the EU and third countries

The largest amount of THB activity involves criminal activity across borders, both within and outside the EU. At an EU level a new momentum has been added to the development of cross-border policing provisions due to the coming into force of the Lisbon Treaty in December 2009. The Lisbon Treaty has transferred the previous third pillar of the EU, PJCCM, into the new unitary EU pillar. It will therefore benefit from the more effective legal framework which has been in use by the more commercially focused pre-Lisbon EC. This brings with it the principles of supremacy and direct effect, and the legal tools of regulation, directive and decision. With the Commission now being tasked with more authority in this area, more comprehensive and effective strategies should follow than was previously been the case under the Council. The more legally focused Commission should also be more effective in delivering the freedom and justice aspects to the Area of Freedom Security and Justice. Criticism of the AFSJ in the third pillar arose due to the more extensive development of the security measures not being counter-balanced by similar advances being made on due process and fundamental rights issues.

The Stockholm Programme,[146] the EU's policy document for this area of co-operation for the next five to ten years, was also signed off in December 2009. It had a number of major proposals for reform of the area of THB, many of which are now in place. For example, the Stockholm Programme proposed the establishment of an EU Anti-Trafficking Coordinator (ATC),[147] (now appointed), in order to bring together all of the relevant strands in order to develop "a well coordinated and consolidated EU policy against trafficking".[148] In addition,

[142] Op. cit. footnote no. 97, at page 5.
[143] E.g. Mc Redmond, P. Defining Organised Crime in the Context of Human Trafficking, Chapter 12 in Wylie G. and Mc Redmond P.; Human Trafficking in Europe (Palgrave 2010).
[144] Op. cit. footnote no. 97, at page 7.
[145] Ibid. at page 19.
[146] The Stockholm Programme – An open and secure Europe serving and protecting the citizens, Brussels, 2 December 2009, 17024/09.
[147] Ms Myria Vassiliadou was appointed to this post on 14 December 2010.
[148] Op. cit. footnote no. 146, at 4.4.2. Trafficking in human beings, fourth paragraph.

the new Standing Committee on Internal Security (COSI),[149] set up pursuant to Article 71 TFEU, is to monitor progress in this area and is to be "regularly informed of coordination and cooperation against trafficking".[150]

The Stockholm Programme also has a clear focus on the development of the EU's external relations with its neighbours in many aspects of the AFSJ, to include THB. This external focus will raise new questions and challenges for the EU's law enforcement communities. For example, the Russian authorities have realised "that they face an acute demographic problem" with a substantial loss of women of child bearing age in some regions, and "are focusing on human trafficking as a threat to national security".[151] The question of whether the EU, and when appropriate, the UK policing authorities are fully geared up to deal with the Russian security services, either directly, or indirectly via the Russian police, in the context of THB, is a question only they can answer. Equally, the additionally that the EU can bring to the area of cross border law enforcement, through not only the work of the Council and Commission, but also Europol and Eurojust, will be key in the development of unified processes and procedures for the development of effective external links with third states. As pointed out by Cornell, "criminal networks have learned to exploit differences between various countries in terms of judicial systems, taxation, technological advances, and law enforcement".[152] These differences are not only within the EU, but in the context of THB, with third states which may be the state of origin and transit for THB. Transnational law enforcement mechanisms, to include those provided by the EU, are therefore key to dealing with these issues in a Western European context.

Focusing on internal law enforcement, in addition for calling for what is now the new directive on THB,[153] the European Council, in the Stockholm Programme, called for further engagement with Europol[154] and Eurojust.[155] A high level of engagement and awareness of the activities of Europol and, to a certain extent, Eurojust, has developed over the years amongst organised crime and drug enforcement officers. Given the earlier discussion as to the allocation of the anti-trafficking role in the UK, sometimes to the organised crime unit (Lothian & Borders police), and sometimes to the vice unit (Strathclyde police), it has to be understood that the responsible officers in many forces will not have had a traditional working knowledge, or even awareness, of the EU law enforcement structures. For example, one of the legal and operation tools available, cross border controlled deliveries, are "normally be undertaken and managed by specialist agencies or units and the procedural paths will have been well trodden"[156] by those specialist agencies. Vice units would not be "those specialist agencies." In addition, if controlled deliveries are to "involve the transportation of people, for instance," not only might the structure of the units leading the investigation differ, i.e. vice units rather than drugs/ organised crime units, but also "the humanitarian and human rights element of the cargo [will be] of utmost concern".[157] The increased "use of joint investigation teams" in dealing with THB has also

[149] Council Decision 2010/131/EU of 25 February 2010 on setting up the Standing Committee on operational cooperation on internal security, OJ L 52, 3.3.2010, p. 50–50.
[150] Op. cit. footnote no. 146, at 4.4.2 Trafficking in human beings, third paragraph.
[151] Shelly, L. 'Human Security and Human Trafficking, in Jonsson' A. (Ed.) *Human Trafficking and Human Security*, Routledge Transnational Crime and Corruption, 2009, at page 21.
[152] Cornell, S.E.; 'The interaction of drug smuggling, human trafficking, and terrorism,' in Jonsson A. (Ed.) *Human Trafficking and Human Security*, Routledge Transnational Crime and Corruption, 2009, at page 55.
[153] Op. cit. footnote no. 146, at 4.4.2 Trafficking in human beings, fifth paragraph, first indent.
[154] Ibid. at 4.4.2 Trafficking in human beings, fifth paragraph, third indent.
[155] Ibid. at 4.4.2 Trafficking in human beings, fifth paragraph, fourth indent.
[156] Brown, S.B.; 'Controlled deliveries,' chapter 14, in Brown, S.B.(ed.); *Combating International Crime; The Longer Arm of the Law,* Routledge, 2008, at page 202.
[157] Ibid. at page 201.

been called for by the EU's expert group on THB.[158] The UK is going to have to put its own house in order, pursuant to the new THB directive, before it can effectively interact with cross EU, and extra- EU law enforcement operations in this area.

In addition, while the UK has in place the "dedicated national" unit specialising in THB anticipated by the 2010 Group of Experts opinion,[159] it to be remembered that it is not, the dedicated national unit, the UK Human Trafficking Centre, which will be the first responder, and the force preparing and developing the case for prosecution. Gathering the intelligence and arresting the offenders will be dealt with by the various territorial forces located across the UK. THB may well be encountered by the standard uniformed police patrol, which will be required to refer the matter to the specialist THB unit that has been set up in the relevant police force. The THB unit will then need to coordinate operations both nationally, and through the UKHTC unit, now in SOCA, but soon to be in the proposed National Crime Agency, internationally. Equally the money laundering/ proceeds of crime units within the each of the territorial forcers will also need to be fully involved in these developments.[160] As pointed out in the Stockholm Programme, a particular concern will be the "reversing trafficking in human beings from a low risk-high profit criminal activity into a low profit-high risk activity".[161]

In the context of the UK's interaction with the EU's law enforcement framework in the context of THB, the UK authorities need to be able to fully interact with their counterparts across the EU, and beyond. While identical cross border policing provisions operate across the EU, an anomaly arises due to the non membership of Frontex[162] by the UK. Given that THB is often closely allied with the crime of smuggling of illegal immigrants, the non access by UK to Frontex intelligence products may hamper THB intelligence analysis of relevance to the UK. This has resulted in what is now a developing line of case law where the UK challenges decisions by the Council which develop further the Schengen *acquis*, but which leaves the UK out of these developments on the basis that they are developments of the visas and immigration *acquis*, even though they have an effect on cross border policing.[163] This was very much the point underlying Case C-482/08 *United Kingdom* v. *Council*.[164] Worth noting, however, is that co-operation by Frontex with the UK and Ireland had always been envisaged, as set out in Article 12 of Council Regulation 2007/2004.[165] In addition Article 2.2 of the regulation provides that "without prejudice to the competencies of the agency, Member States [of Frontex] may continue cooperation at

[158] Opinion of the Experts Group on Trafficking in Human Beings of the European Commission on the revision of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, *(International Journal of Refugee Law)* I.J.R.L. 2009, 21(3), 508-514, at page 513.
[159] Opinion No 7/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission; Proposal for a European Strategy and Priority Actions on combating and preventing trafficking in human beings (THB) and protecting the rights of trafficked and exploited persons, at page 26, Main concerns, fourth paragraph, available on line on the Europa web site. http://ec.europa.eu/home-affairs/policies/crime/crime_human_trafficking_en.htm, accessed on 29 September 2011.
[160] Ibid. at page 24, Law Enforcement, introduction, second paragraph.
[161] Opinion of the Experts Group on Trafficking in Human Beings of the European Commission on the revision of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, *(International Journal of Refugee Law)* I.J.R.L. 2009, 21(3), 508-514, at page 513.
[162] Which was set up pursuant to Council Regulation 2007/2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25/11/2004 p. 1.
[163] Case C-482/08 *United Kingdom* v. *Council* OJ 2010 C346/6, Case- 137/05 *United Kingdom* v. *Council*, [2007] ECR I-11593, and Case C-77/05 *United Kingdom* v. *Council*, [2007] ECR I-11459.
[164] Case C-482/08 *United Kingdom* v. *Council* OJ 2010 C346/6.
[165] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25/11/2004 p. 1.

an operational level with other Member States and/ or third countries at external borders[166] where such cooperation complements the action of the Agency".

The issue of access by the UK to Frontex's intelligence products may well have been fully addressed, following a complicated legal document trail, by Council Decision 2008/633/JHA.[167] This council decision deals with the "prevention, detection and investigation of terrorist offences and of other serious criminal offences". While it builds on the Schengen *acquis*, which the UK is not part of, on the basis of the pre Lisbon Pillar III legal provisions, which do fully involve the UK,[168] "information contained in the VIS[169] can be provided to the UK and Ireland by the competent authorities of the Member States whose designated authorities have access to the VIS pursuant to this Decision."[170] Equally UK and Irish national visa register data can be "provided to the competent law enforcement authorities of the other Member States." A similar solution may be embedded in Council Decision 2008/633/JHA, with regard to UK and Ireland's access to the VIS, as Article 7.3 of that decision provides that "Europol shall designate a specialist unit for the purpose of this Decision with duly empowered Europol officials to act as the central access point to access the VIS for consultation."[171]

Conclusion

There has been lengthy, and often very complex, debate over the crime of trafficking in human beings for many years. Not only do the victims need support, but the criminals need either to be disrupted in a way that they can no longer act, or be brought to justice. The police have been tasked with this role in the UK. In order for the police to act they need clarity as to what the law is, and how serious the legislature views the particular crime. In addition, they require clear and coherent policing structures. The issue of adequate resourcing and training will necessarily follow. In order for cross border law enforcement to be effective it is necessary to have a shared definition as to what is THB, and how to tackle it, with fellow EU member states, and beyond. The new directive, whatever its flaws, brings clarity to the nature of the crime, and gives clear indications as to how it is to be tackled by the EU and partner third states. No doubt the effectiveness of this approach will be the subject of much academic analysis in the years ahead. There are some major conceptual shifts from the earlier framework decision to the new directive. In addition, the UK will have to shift its thinking and approach to meet the requirements of the new directive, which, unlike its predecessor, benefits from the principles of supremacy and direct effect. In examining the UK's legal and policing framework in light of the provisions of the new directive, it is also necessary to widen the internal UK examination to ask whether the pre-existing provisions are sufficiently clear and coherent in themselves to be workable, or whether a full review of the UK provisions is now also merited. The complete picture will also require an analysis of the UK's illegal immigration laws and

[166] It is unclear whether these "external borders" are those of "Schengen land", i.e. the members of Frontex, or of the EU.
[167] Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, OJ L 218, 13/08/2008 p. 12.
[168] Specifically Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ L 386, 18.12.2006, p. 89.
[169] Visa Information System
[170] Paragraph 15 of the preamble to Council Decision 2008/633/JHA, OJ L 218, 13/08/2008 p. 12.
[171] Article 7.3 of Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, OJ L 218, 13/08/2008 p. 12.

practice, a subject matter which is outside the scope of this article. It is the argument of this article that the UK's legal and policing provisions were piecemeal, and not sufficiently joined up to adequately tackle the crime of THB, even during the time of the framework decision. The need to revise the UK's law and policy on THB in light of the new directive provides an opportunity for the UK to engage in a full critical examination of the UK's provisions, and to bring greater clarity to this area.

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Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border

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Abstract

This paper deals with policing the external borders of the European Union (EU), an issue that recently has witnessed significant developments in connection with the externalisation of the fight against undocumented migration. After a presentation of the conceptual elements underpinning the research (1), the paper presents the EU agency Frontex and its origin, tasks and responsibilities (2). The next section will focus on Frontex-led operations carried out at the southern maritime border (3), in order to critically look at issues arising in this context (4), with reference to their legal framework. The results of my analysis will be discussed in connection with the externalisation of migration policies, arguing that the EU and Member States (MSs) have engaged into a multiple exercise of venue shopping, to conclude with a (hopeful) outlook on the future, with the Lisbon Treaty providing new possibilities to fix current problems (5).

Keywords

External borders; Externalisation; Frontex; Rule of law

THIS INTRODUCTION AIMS TO PROVIDE A FRAMEWORK FOR UNDERSTANDING POLICING the external borders in the European Union (EU), by unpacking the topics under exam into their fundamentals, *i.e.* policing, (external) borders and persons.

The first conceptual element underpinning my article is policing. The main tasks of policing consist, first, of tackling crime (crime fighting and crime prevention) as the most salient expression of law enforcement, and, secondly, order maintenance. In order to fulfil

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Available at: http://www.jcer.net/ojs/index.php/jcer/article/view/379/305

these core missions, police actors are traditionally entrusted some powers, such as the legitimate use of force and information gathering.[1]

The EU treaties indeed have formalised cooperation on policing since Maastricht (1992); later (1995), the EU has established a dedicated agency, Europol.[2] With the EU growing as a multi-level governance system, we witness a shift of sovereignty beyond the state:[3] this broader process has an impact also on policing: European integration added a transnational dimension to policing.[4] Policing semantically refers to police, the main actor performing policing tasks, a concept which has traditionally - since modern history - evoked the state. The transnational dimension of policing, at EU level, is shifting it toward operational cooperation across police actors' networks[5], as well as information exchange, enhanced by technologies available nowadays; the latest practices of policing as carried out in transnational networks have been conceptualised as policing at a distance, remote controls, and also externalisation of policing.[6] In this paper I will investigate specifically these recently emerging phenomena of externalisation of policing, as the activity of controlling and securing law enforcement in a given domain, in my case external borders. I will present actors and operations. The analysis will then move on to the legal problems arising in this framework.

The second fundamental element of this paper is external borders. The physical borders of a state define its territory, which is normally the area over which a state exercises its sovereignty, the limits for its jurisdiction.[7] Also in this context, the influence of European integration has been enormous. Europe has been displaying deep changes on frontiers, thanks to the internal market project and its freedom of movement *rationale*: borders among MSs have lost most of their meanings with the enforcement of freedoms of movement. Lately, the Schengen process has achieved the removal of internal frontiers and the strengthening of external borders.[8] The ambitious project of the Area of Freedom, Security and Justice (AFSJ), "without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border control, asylum, immigration, and the prevention and combating of crime"[9] have consolidated these milestones into something that aims at developing into something more coherent: the *status quo* however is often perceived as problematic, unbalancing (internal) security and freedoms, focusing on cooperation among state authorities and undermining traditional guarantees such as individuals' rights. All these developments

[1] See the paper by Stephen Rozée, "*The European Union as a Comprehensive Police Actor*", presented at the 2nd UACES conference "Policing the Frontier in Post-Stockholm Europe", held at the University of Abertay Dundee (UK), 25 February 2011.
[2] Earlier MSs established informal cooperation in specific areas, like terrorism and domestic and non domestic threats to internal security: the TREVI group is the best known example. See Trybus and White (eds.), *European Security Law* (OUP, 2007); see also E. Baker and C. Harding, 'From past imperfect to future perfect? A longitudinal study of the Third Pillar', (2009) 34 *European Law Review* 25.
[3] N. Walker (ed.), *Sovereignty in Transition* (Hart, 2003), but also N. Walker (ed.), *Relocating Sovereignty* (Ashgate, 2006).
[4] N. Walker, 'The pattern of transnational policing', in T. Newburn (ed.), *Handbook of Policing* (Devon: Willan Publishing, 2003).
[5] D. Bigo, *Polices en réseaux: l'expérience européenne* (Presses de Sciences Po, 1996).
[6] See E. Guild and D. Bigo, 'The Transformation of European Border Controls', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control. Legal Challenges* (Leiden-Boston, 2010), p. 258-259.
[7] Being extraterritorial jurisdiction as something relatively exceptional, but definitely a possibility: see states' responsibilities for actions carried out outside their borders under the ECvHR. Cf. E. Brouwer, 'Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control*, cit., p. 206-207; A. Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control*, cit., p. 233.
[8] See E. Guild, *Moving the Borders of Europe*, inaugural lecture, available at www.jur.ru.nl/cmr/docs/oratie.eg.pdf; K. Groenendijk, E. Guild and P. Minderhoud (eds.), *In Search of Europe's Borders* (Kluwer, 2003).
[9] Article 3(2) TEU.

have an impact on the way states exercise their jurisdiction and thus manifest their sovereignty, and, consequently, on the way they frame the relation between state powers and individuals.

In a broader perspective we cannot escape the question of the meaning of borders in a globalised world: what do borders stand for nowadays? Can borders still function as a gate for the movement of persons across the world, and if so, to which extent? How can state authorities legitimise their attempts to control migration phenomena? Europe is no less touched by these questions: in particular borders represent for Europe a test to assess EU's practical adherence to its founding values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, just to mention some from Article 2 TEU. Technology brings in also a number of ethical issues arising from the "promise" of smart border management.

The third core element underlying this paper concerns persons, as stakeholders affected by the activity of policing borders. As a result of developments in infrastructures and transports having occurred in recent times, of the (political implications of the) fall of the Berlin wall and more broadly for demographic changes at global level, mobility has increased significantly in the last decades, determining a metamorphosis of migration phenomena. "Access to Europe", "the fortress", is a sensitive political issue for the EU and MSs' governments nowadays. Persistent poverty, made more acute by the economic crisis that has occurred in the last years, is exasperating this situation.[10] The recent political instabilities in the North African countries can be interpreted as the top of this iceberg. The interests and aspirations of persons willing to come to Europe (for many different purposes) force us to reconsider the way we frame the relation between person and territory and also between *us*, Europeans, and *the others*, persons coming from the rest of the world, technically called 'third country nationals' (TCNs). In this perspective non-European persons seeking access to Europe are stakeholders: in some circumstances as holders of rights (*e.g.* legal migrants entitled to come to Europe maybe because they are highly skilled), other times as objects of other people's (non-legal) interests and activities. I herewith refer to the phenomena of facilitating undocumented migration, smuggling of migrants and human trafficking.[11] Though the focus of this paper will remain on policing external borders, one should nevertheless be aware that the way of framing access to the territory of a country has implications on the freedom of other persons, on the notion of person as holder of rights, and eventually on the very basic idea of human being.[12]

Having sketched the conceptual elements underpinning the research, the paper will continue by presenting the EU agency Frontex and its origin, tasks and responsibilities (2). A next section will focus on Frontex-led operations carried out at the southern maritime border (3), in order to critically look at issues arising in this context (4), with special attention to the rule of law and respect for fundamental rights. The results of my analysis

[10] G. Sapelli, 'Disoccupazione, rivolte e immigrazione', in *Corriere della Sera*, 19.2.2011.
[11] The Trafficking Protocol defines at Article 3 trafficking in persons as: "The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. The consent of a victim of trafficking in persons to the intended exploitation set forth [above] shall be irrelevant where any of the means set forth [above] have been used". Source: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; United Nations, *Treaty Series*, vol. 2237, p. 319; Doc. A/55/383, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en.
[12] See E. Guild and D. Bigo, The Transformation of European Border Controls, in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control*, cit., p. 257-261.

will be discussed in connection with the externalisation of migration policies, arguing that the EU and MSs have engaged into a multiple exercise of venue shopping, to conclude with a (hopeful) outlook on the future, with the Lisbon Treaty and a recent legislative reform providing new possibilities to fix current problems (5). The next paragraph will focus on analysing the set-up of Frontex, in order to look then at its activities in a specific domain, *i.e.* maritime borders.

Frontex: its establishment, its mandate, its powers

Origins and purpose

Frontières extérieures lays at the origin of the name Frontex. The European Borders Agency (Frontex) has been set up in 2004[13] and reformed in 2007;[14] another reform has been passed while this article went to press.[15] Its birth as a Community agency[16] on the legal basis of the old Treaty of the European Community (TEC), namely Article 62(2)(a) and Article 66 TEC, was possible according to the consolidated case law on implied powers.[17] Those provisions granted the EC powers to adopt measures on the crossing of the external borders, by establishing standards and procedures to be followed by MSs in carrying out checks on persons at such borders and measures to ensure cooperation between the relevant departments of the administrations of the MSs and between Commission and MSs.

In a policy perspective, setting up a regulatory agency is part of a consolidated trend that has witnessed the development of a plethora of agencies not only at (formerly) EC level, but also in the AFSJ: I refer at Europol and Eurojust as the two main agencies in the field. In its White Paper on European Governance,[18] the Commission envisaged better application of EU rules through regulatory agencies: "the advantage of agencies is often their ability to draw on highly technical, sectoral know-how, the increased visibility they give for the sectors concerned (and sometimes the public) and the cost-savings that they offer to business. For the Commission the creation of agencies is also a useful way of ensuring it focuses resources on core tasks".[19]

Frontex is based on the experience of the fragmented External Borders' Practitioners Common Unit,[20] which gathered together the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), a Council Working Party, plus the heads of national border

[13] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/1; hereinafter: Frontex Regulation.
[14] Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers; OJ L199/30.
[15] See Regulation (EU) 2011/1168 amending Council Regulation (EC) No 2007/2004 of 26 October 2004, in OJ L 304 22.11.2011, p. 0001. For a survey on the preparation of the new Regulation, see COM (2010) 61 final: Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex).
[16] D. Curtin, *Executive Power of the European Union. Law, Practices, and the Living Constitution*, (OUP, 2009), p. 146-147, describes agencies as the 'satellite executive power'.
[17] The reference is of course to the seminal ECJ's case *AETR*: case 22/70, Commission v. Council (AETR) [1971] ECR 263. See also J.J. Rijpma and M. Cremona, 'The Extra-Territorialisation of EU Migration Policies and the Rule of Law', *EUI Working Papers LAW* 2007/01, quoting readmission agreements adopted on the legal basis of Article 63(3)(b) TEC as an example of act adopted by the EC without an express treaty reference to such instruments (p. 10-11).
[18] COM (2001) 428 final, p. 24.
[19] *Ibidem*. See also S. Leonard, 'The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy', 5 *Journal of Contemporary European Research*, 2009, pp. 371-388.
[20] See Frontex Regulation, Recital 13.

control services (SCIFA+).[21] It consolidates in one institution the network of domestic administrative actors: "Europe's new administrative order does not replace former orders; instead it tends to be layered around already existing orders", in the words of Curtin and Egeberg;[22] this is valid also for the agency dealing with external borders. Frontex represents a compromise between Commission, Council and MSs: though the Commission was oriented toward a supranational agency,[23] inspired by the proposal of 'European Border Police',[24] it had to accept the solution put forward by the Council,[25] acknowledging the need to increase cooperation, coordination, convergence and consistency between borders' practitioners in the EU MSs, and pushing for the creation of a number of pilot projects and national contact points, within the framework of the mentioned External Borders' Practitioners Common Unit. This typically European compromise between supranationalism and intergovernmentalism is also visible in the structure of Frontex: created as a Community agency in the (Treaty of) Amsterdam era, with its consolidation of the Schengen *acquis* and the partial communitarisation of the former third pillar, in particular of migration and visa policies, Frontex presents nevertheless intergovernmental features: its management board is composed by two Commission officials and the heads of national border guard services.[26]

Besides a regulatory dimension, Frontex is coordinating agency, part of a broader network, and thus one of its aims is putting domestic border guard agents in a network. The coordinating and network function fulfilled by the agency should reinforce the exchange of information and the establishment of contacts: two important pre-conditions for the development of mutual trust.[27] In Curtin's words,[28] with Frontex (and other agencies), we witness a "Europeanization of the functions of the administrations of the MSs rather than the delegation of powers of the Commission authorities as such". Actually in the case of Frontex the Council did not delegate its own powers, or Commission's powers, but tasks so far largely fulfilled by MSs authorities. This is clearly reflected in the composition of the Management Board.

If MSs' political will can, within the European Union's legal framework, legitimately decide the creation of a new agency like Frontex,[29] its mandate and its powers are nevertheless bound by the treaties: therefore Frontex's mandate should be placed *within the legal limits* of "measures" establishing "standards and procedures to be followed by Member States in carrying out checks on persons" at the external borders, and of "measures to ensure cooperation between the (…) administrations of the Member States (…), as well as

[21] See A. Neal, 'Securitization and Risk at the EU Border: The Origin of Frontex', (2009) 47 *Journal of Common Market Studies*, 333, 341.
[22] D. Curtin and M. Egeberg, 'Tradition and Innovation: Europe's accumulated executive order', (2008) 31 *Western European Politic*, 640.
[23] Commission's Communication – Toward integrated management of the external borders of the Member States of the European Union, COM(2002)233 final, p. 12, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0233:FIN:EN:PDF .
[24] The reference is to the feasibility study on a 'European Border Police', initiated by Belgium, France, Germany, Italy and Spain. See A. Neal, 'Securitization and Risk', cit., 340.
[25] Council of the European Union: 'Plan for the management of the external borders of the EU', Council Doc. 10019/02, 14 June 2002; available at http://ec.europa.eu/justice/funding/2004_2007/doc/plan_management_external_borders.pdf
[26] A. Neal, 'Securitization and Risk', cit., 343.
[27] J. Rijpma, *Building Borders: the Regulatory Framework for the Management of the External Borders of the European Union*, EUI PhD thesis 2009, 259.
[28] D. Curtin, *Executive Power of the European Union*, cit., 165.
[29] "(…) for each of them, the decision to create them is motivated by the need to correspond to the particular circumstances of the moment. In certain cases the occurrence of a crisis that has aroused public sensitivity is the basis of the decision to create the agency", so one reads in the Report by the Working Group "Establishing a framework for Decision making Regulatory Agencies", in preparation of Commission White paper on European Governance. Quoted by D. Curtin, *Executive Power of the European Union*, cit., 148.

between those departments and the Commission":[30] this remit should be also visible in the Frontex Regulation, to which we now turn.

Article 1 states that Frontex is established with the mission of "improving the integrated management of the external borders of the Member States (…)", a concept defined by a Council document of 2006[31] and endorsed by the European Council of 4-5 December 2006.[32] Integrated border management comprises:

1) Border control (checks and surveillance);

2) Detection and investigation of cross border crime;

3) The four-tier access control model, comprising measures in third countries (TC), cooperation with neighboring countries, border control, control measures within the area of movements, including return;

4) Inter-agency cooperation;

5) Coordination and coherence on actions at EU level.

It appears that integrated border management goes beyond border checks and surveillance, and embraces also investigation of cross border crime and cooperation with TC.[33] The former, in particular, was not a Community task, but definitively falling under the cooperation structure put in place with the former third pillar.

The legal text regulating the internal and external border management, the Schengen Border Code (SBC),[34] was also adopted only in 2006, more than one year after Frontex became operational.[35]

Frontex's main tasks and responsibilities

According to the Frontex Regulation, the Agency's main tasks are:

- coordinate operational cooperation between Member States in the management of external borders of the EU;[36]
- assist them in circumstances requiring increased technical and operational assistance at external borders;[37]
- provide them the necessary support in organizing joint return operations.[38]

Besides this core operational dimension, the other mains tasks include:

- assist Member States on training of national border guards, including the establishment of common training standards,
- carry out risk analyses;

[30] See Treaty provisions quoted above, note 16.
[31] Council document No 14202/06, draft Council conclusions on integrated border management. The concept has been previously referred at in Commission's Communication -Toward integrated management of the external borders of the Member States of the European Union, COM(2002)233 final, cit.
[32] Council Conclusions on Justice and Home Affairs Council, Brussels, 4-5 December 2006.
[33] See A. Baldaccini, 'Extraterritorial Border Controls in the EU', cit., 233.
[34] Regulation (EC) No 562/2006 of the European Parliament and of the Council, OJ L 105/01.
[35] E. Guild and D. Bigo, 'The Transformation of European Border Controls', cit., 268.
[36] Article 2(1) letter a).
[37] *Ibidem*, letter e).
[38] *Ibidem*, letter f).

- follow up on the development of relevant research for the control and surveillance of external borders.[39]

Providing a rapid crisis-response capability available to all Member States, through so-called Rapid Border Intervention Teams (RABITs), is the additional mission of Frontex, the tool to be used when risk analysis and intelligence activities (also by Frontex) fail to predict risks or events MSs want to react to.[40]

The core provisions of the Regulation disciplines more in detail the organisation and realisation of the main tasks presented above. Other provisions of the Frontex Regulation, such as Articles 13 and 14, reveal the broad scope of the action they allow to the Agency, the first one enabling Frontex to conclude working arrangements with other EU agencies and the second one with TC and their authorities. Though this second type of working arrangements have not been considered as binding international agreements, they nevertheless reveal operational autonomy.[41]

Another interesting legal question surrounding Frontex concerns the responsibility for its operations; one could ironically say that the 'border of responsibilities' between Frontex and EU's MSs looks fuzzy.

On one side, recital 4 and Article 1(2) of the Frontex Regulation limit clearly the Agency's responsibilities: "while considering that the responsibility for the control and surveillance of external borders lies with the Member States, the Agency shall facilitate and render more effective the application of existing and future" Community measures on the management of external borders.[42] On the other side, Baldaccini[43] has underlined that "Frontex effectively initiates the coordination it engages in", by carrying out risk analyses that eventually will be the basis for Frontex joint operations.[44] Article 3 of the Frontex Regulation also provides that Frontex itself may launch initiatives for joint operations, in agreement with MSs, operations that it will eventually assess in order to enhance quality, coherence and efficacy. Bearing this in mind, and considering as well the relevant action carried out by Frontex regarding intelligence and information gathering, one has to be aware that Frontex' coordinating function should not be underestimated. It definitively cannot be interpreted as a body with mere coadjutor functions. One can thus conclude that there is a gap between Frontex's role and function, considering the remit and scope of its interventions, which is way more complex than neutral cooperation, and the actor(s) bearing the final responsibility for those activities.

Analysing Frontex competences, the first assessment to be made is that the core focus of the Agency is put on operational aspects: coordinating MSs' operational cooperation and providing assistance to MSs' authorities are the main tasks of the agency, as established in the Frontex Regulation.[45] The operational nature of the tasks performed by Frontex has

[39] Article 2(1) letters b), c), d) respectively.
[40] Regulation No 863/2007/EC.
[42] See Article 1(2) Frontex Regulation. See also E. Brouwer, 'Extraterritorial Migration Control and Human Rights', cit., 206-207.
[43] COWI Evaluation report, 15.1.2009, see Frontex website. See also A. Baldaccini, 'Extraterritorial Border Controls in the EU', cit., 233.
[44] *Ex* Article 2(1), letter c), Frontex Regulation.
[45] So one can read in Frontex Press release: 'Frontex - facts and myths' (available at www.frontex.europa.eu), by Ilkka Laitinen: "Summing up I would like to remind that Frontex activities are supplementary to those undertaken by the Member States. Frontex doesn't have any monopole on border protection and is not omnipotent. It is a coordinator of the operational cooperation in which the Member States show their volition. If some of our critics think it is not enough they should fix their eyes on decision takers, as Frontex only executes its duties described in the Regulation 2007/2004." In J. Rijpma, *Building Borders*, cit. See also the Commission Communication on European Agencies – The Way Forward COM (2008)135, p. 7, where Frontex is classified as an agency "in charge of operational activities", like Eurojust, Europol and CEPOL: "Agencies can be classified in different ways. One useful way is to try to look at the key functions they perform. Although

been strong since its establishment and the reform of 2007 has confirmed this trend, strengthening the tasks and powers of officers participating in Frontex operations:[46] there seems to be a stable evolution stressing Agency's operational dimension,[47] corresponding also to the way the Agency profiles itself. Its reports are written in a very technocratic jargon, stressing cooperation aspects, co-ordination function and management logics applied to external borders. All this is purposely meant to evocate knowledge- and expertise-based legitimacy, and output legitimacy, with the view to strengthen the credibility of its activities.

However, in spite of this apparently limited, and thus clearly defined, set of competences, scholars as Curtin have considered Frontex as an example of the third wave of agencies, *i.e.* "agencies with more overtly regulatory and far-reaching tasks in many instances",[48] confirming the analysis proposed by scholars like Baldaccini, who devoted considerable attention to Frontex' operations.

After having analyzed Frontex's main regulatory framework, the next paragraph will focus indeed on its activities and operations, and the legal issues they create within the AFSJ. The scope of the analysis has been limited to operations conducted at sea.

Frontex operations at sea

Some facts and figures about what happens at sea

Since the beginning of its functioning, the number of sea border joint operations Frontex is carrying out is increasing every year, as well as the number of participating states.[49] The trend is also reflected in the annual budgets, increased in a significant manner: in 2008, 31,1 MEUR out of 50,635, representing 62% of the total budget is devoted to sea borders control and operations, whereas the second voice (13% of the budget) is represented by training (of border guards).[50]

This is due to the pressure coming from southern maritime borders countries (Spain, Italy, Malta, Greece), faced with the problem of migrants approaching their costs from the sea. The lack of controls at internal frontiers coupled with the establishment of a common external border - the main axes of the Schengen *acquis* - pushed those countries to require the EU and (thus) other MSs to join their efforts in policing the external borders. 'Sharing a burden' otherwise not proportionate is the argument often referred at by those MSs to ask for the financial solidarity from other MSs. In spite of this constant political pressure, a counterargument often referred by academics is that figures show that irregular migration at maritime borders does not represent a significant *ratio* of the whole phenomenon, and that the successful effects of operations at sea is not clear.[51] This element requires attention because it can undermine the political desirability of these operations and questions the proportionality of the resources involved with the results achieved. Recent political instabilities in the North African States have made the problem more acute in 2011.[52]

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agencies often perform a number of different roles, an analysis of the centre of gravity of agencies' activities suggests the following categories: (*omissis*)".

[46] See Article 6 and 7, Regulation (EC) No 863/2007, cited above.

[47] See JHA Council of 5-6 June 2008; Commission COM (2009) 262 p.18; earlier: COM (2008) 67 p. 5.

[48] D. Curtin, *Executive Power of the European Union*, cit., 148.

[49] See Frontex Press Pack, available at www.frontex.europa.eu

[50] COWI report, cit., p. 25.

[51] COWI report, cit., and A. Baldaccini, 'Extraterritorial Border Controls in the EU', cit., 239.

[52] "Maroni: 'Rischi umanitari e terrorismo'. L'Italia chiede missione davanti alla Tunisia", at http://www.repubblica.it/cronaca/2011/02/11/news/maroni_problema_tunisia-12329395/ ; "Emergenza

Frontex has carried out several activities at sea in the near past: we will present Joint Operations (JO) Hera and Nautilus that were carried out in the southern maritime border of Europe, respectively at its western and central part. JO Poseidon concerned southern eastern both land (between Greece and Turkey, Greece and Bulgaria and Albania) and maritime borders. Considering the focus of this article on sea operations and the better availability of information on the first two JO, the latter will not be examined in this analysis, though recently the land part of Poseidon 2011 has received media's attention and criticism, especially in connection with the situation in the Greek region of Evros, close to the Turkish border.[53] While JO Hera and Nautilus are not so recent, the problems they beg are still not resolved: also in 2011, an estimate of about 2,000 people are reported as dead or disappeared at sea in the Mediterranean. In the words of the Dutch MP Tineke Strik, Rapporteur for the Parliamentary Assembly of the Council of Europe (PACE) currently investigating on these accidents, "this means that precisely in the year the Mediterranean region was subject to the most surveillance, the largest amount of deaths or disappearances were recorded".[54]

Looking at JO Hera, one must observe that the trend has been the following: in the first phase (Hera I) experts have been deployed to Canary Island to assist with 'identification' (of nationality) of undocumented migrants. In a second phase (Hera II) the operation shifted toward joint sea surveillance operations, by dissuading small boats (*pateras* and *cayucos*) to sail off from African states: if boats were found at sea but within 24 nautical miles off the coast, the objective was to intercept them and divert them back to the country of embarkation, *i.e.* Senegal, Mauritania or Cape Verde; if they were intercepted in the high seas, they were escorted to Canary Islands. The third phase (Hera III) consisted also in joint aerial and naval patrols, to intercept and divert boats, in cooperation with Senegalese and Mauritanian authorities. In a Frontex News Release on JO Hera, one can read that the Agency detected vessels setting off toward Canary Islands, and diverted them back to Senegal and Mauritania,[55] on the basis of secret bilateral agreements between Spain and Senegal and between Spain and Mauritania.

The questions here are: under which legal basis is it possible for Frontex to cooperate to these operations? Frontex self was not part to those agreements. Secondly, within Frontex joint patrols, MSs' officials other than the Spanish ones are also involved; the fact that Frontex cooperates in missions without a clear legal framework represent a serious problem also for those officials, besides the Agency self.[56]

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sbarchi, scontro Ue-Maroni. La Tunisia: no alla polizia italiana", at http://www.repubblica.it/cronaca/2011/02/13/news/maroni_emergenza-12402756/

[53] See the Human Right Watch Report "The EU's Dirty Hands. Frontex Involvement of Ill-Treatment of Migrant Detainees in Greece", 2011, available at http://www.hrw.org, accessed 12.12.2011.

[54] ECRE (European Council for Refugees and Exiles) Interview with Tineke Strik (9.12.2011), member of the PACE: its Migration Committee is currently investigating on 2011 accidents in the Mediterranean. The interview is available at http://migrantsatsea.wordpress.com/2011/12/12/ecre-interview-with-tineke-strik-regarding-pace-investigation-into-migrants-deaths-in-mediterranean/, accessed 12.12.2011.

[55] "Based on their bilateral agreements with Spain, Senegal and Mauritania were also involved with their assets and staff. The main aim of this joint effort was to detect vessels setting off towards the Canary Islands and to divert them back to their point of departure thus reducing the number of lives lost at sea. During the course of the operation more than 3,500 migrants were stopped from this dangerous endeavour close to African coast". News Release "Longest Frontex coordinated operation – Hera, the Canary Islands" of 19-12-2006, available at http://www.frontex.europa.eu/newsroom/news_releases/art8.html . For figures, see the statistic published on Frontex's webpage.

[56] S. Trevisanut, 'The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection', in A. von Bogdandy and R. Wolfrum (eds.), (2008) 12 *Max Planck Yearbook of United Nations Law*, (Brill, 2008), 205, 245; S. Trevisanut, 'Maritime Border Control and the Protection of Asylum Seekers in the European Union', (2009) 12 *Touro International Law Review*, 157, 159.

This triggers further questions of whether acts of Frontex are sufficiently underpinned by a sound legal framework, and whether the interpretation of those acts is within the boundaries of correct interpretation techniques, and does not threaten rule of law.

The second series of operations considered is JO Nautilus, stopped because of the disagreement of Malta as to the sharing of responsibility for migrants saved at sea, and later reorganised as JO Chronos.[57] In the several stages of JO Nautilus (2006, 2007, 2008, 2009), there is uncertainty of information as to what has happened. There is little or no official information on Frontex's website on Nautilus IV (2009), nor on JO Chronos, for example. In the 2006 and 2007 operations, Frontex statements declare that about 3000 migrants were intercepted, one third within the operational area, two thirds outside it.[58] In 2008 operations, Frontex declared that no migrant was diverted back or deterred; instead some 15 facilitators were arrested. Frontex statistics for Nautilus 2008 tell that 16098 migrants arrived to Italy, whereas 2321 to Malta.

NGO's and academic sources tell another story. About Nautilus II one can read that Maltese state secretaries from Ministry of Interior reported that 700 irregular migrants were brought back to Libya, whereas several maritime squadrons denied this ever happened.[59] Furthermore, one can learn that the Schengen Border Code was not applied because Malta was not yet a member of the Schengen Agreement. The legal basis of those operations was unclear, and how to intercept migrants and where and how to take them were discussed on an *ad hoc* basis by military and security officials, thus "reinforcing (…) [their] discretion".[60]

According to the NGO Human Rights Watch[61], Nautilus operation IV (April-October 2009)" resulted in the interdiction and push back of migrants in the central Mediterranean Sea to Libya", with the cooperation of a German helicopter and under the coordination of the Italian coast guard. The boat was carrying 75 migrants and has been "handed over" to a Libyan patrol boat, which "took them" to Tripoli, where they were assigned to a military unit. The Human Rights Watch report quotes also a declaration of Frontex Vice-Director, Mr Gil Arias-Fernandez, who commented favourably this operation: "Based on our statistics, we are able to say that the agreements [between Libya and Italy] have had a positive impact. On the humanitarian level, fewer lives have been put at risk, due to fewer departures. But our agency does not have the ability to confirm if the right to request asylum as well as other human rights are being respected in Libya."

According to other sources,[62] Frontex Director denied the involvement of the Agency in such operation, and clarified that the Italian push-back operations took place outside Frontex's operational area.[63] Now, a question remains: where is the truth? Even accepting that diversion operations have been carried out by Italy on the basis of the Treaty of Friendship, Partnership and Cooperation with Libya,[64] how can someone accept that there was no overlap among operational areas if Frontex operational plans remain secret? As

[57] M. Tondini, '*Fishers of Men?* The Interception of Migrants in the Mediterranean Sea and Their Forced Return to Libya', *INEX Paper*, October 2010, at www.inexproject.eu , 16.
[58] This means that Frontex knows what happens also outside the operational areas of its JO.
[59] S. Klepp, 'A Contested Asylum System: the European Union between Refugee Protection and Border Control in the Mediterranean Sea', (2010)12 *European Journal of Migration and Law*, 1, 16.
[60] S. Klepp, 'A Contested Asylum System', cit., 17.
[61] See Human Rights Watch Report "Pushed Back, Pushed Around", available at http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0, p. 37.
[62] M. Tondini, '*Fishers of Men?*', cit., 16.
[63] M. Tondini, '*Fishers of Men?*', cit., 17.
[64] Signed in Bengasi on 30 August 2008. For a comment see "Il trattato Italia-Libia di amicizia, partenariato e cooperazione", dossier n. 108/2009, under the direction of N. Ronzitti, available at http://www.iai.it/pdf/Oss_Transatlantico/108.pdf . Additional Technical-Operational Protocol of 4 February 2009, not publicly available.

observed by Moreno Lax,[65] one has to recognise at least some extent of complementarity among Frontex operations and Italian 'push-back' operations: if Frontex claims that a massive displacement of migration flows from sea to land is the consequence of the "effectiveness of Frontex activities at the sea borders" as well as "national bilateral agreements in these areas", Frontex should rightly be considered among the victims of its own success.

A (tentative) assessment of Frontex operations

Considering that all these maritime operations take place at sea, one has to observe that it is relatively difficult for independent media to have access to information on what happens in remote areas: "On what happens on the high seas there is no direct information, and there will never be"[66], so stated a *Guardia di Finanza* Colonel, in the audio-documentary *Krieg Im Mittelmeer* by Roman Herzog.[67] This complicates also the work of scholars: here more than in other areas, part of the task is also to try to find out a plausible version of reality, which is journalistic ability. Only in a second moment, one can try and conduct a legal analysis on the overall picture as resulting from this process of elaboration on facts, taken from a variety of conflicting, and somehow also biased, sources.

This objective scarcity of sources need to be confronted with another obstacle: the information available on Frontex's operations at sea is presenting different, sometimes conflicting, pictures: if Frontex (scarce and well-controlled) reports depict operational missions delivering nothing but outputs technically measurable (number of persons intercepted, facilitators arrested, persons saved, etc..), the same reports do not tell or explain what has happened in reality to migrants and how; in contrast academic research and NGOs' reports focus on the migration dimension of these operations.[68] While some sources seem to argue that migrants even benefit from these operations, as they perceive the level of security of their desperate journeys is increased,[69] most of the independent information and analysis attribute to those operations disruptive effective on migration routes, and regularly report severe accidents where massive numbers of human lives are lost. Without engaging here into sociological investigations, this paragraph will nevertheless try to qualify these operations in legal terms and, consequently, to analyze their legality, both with reference to the respect of the rule of law and with EU's commitment to respect fundamental human rights.

As to the conceptualisation in legal terms of operations coordinated by Frontex, one needs to go beyond the rhetoric of Frontex reports, stressing the management dimension of its operations at borders: some of those operations (such as Hera II, III) are actual interdiction programs against migrants, a practice that has developed alongside the right to visit as stated in the law of the seas.[70] If the actual role of Frontex is unclear in operations

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[65] V. Moreno Lax, Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea, International Journal of Refugee Law 23 (2011), 174-220.

[66] "Su quello che veramente accade in mare non ci sono informazioni dirette e mai ci saranno", statement from Colonel Manozzi of the *Guardia di Finanza*; my translation from Italian.

[67] Audio-documentary available at http://fortresseurope.blogspot.com/2006/01/frontex-krieg-im-mittelmeer.html . See also M. Tondini, '*Fishers of Men?*', cit., 3, footnote 1. See also A. Baldaccini, 'Extraterritorial Border Controls in the EU', cit., p. 242.

[68] See for example the reports of Statewatch, the weblog Migrants At Sea, http://migrantsatsea.wordpress.com , Human Rights Watch, the RefWorld tool of UNHCR http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain

[69] COWI report, cit.

[70] The reference is to Art. 110 of the United Nations Convention on the Law of the Seas (UNCLOS), establishing a right to visit. The general principles are set in Article 87, freedom of the high seas, and Article 90, right of navigation. The UN Convention is available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf (accessed 12.7.2011). See also S. Trevisanut, 'Maritime Border Control', cit., 158. On interdiction programs and arms control policies, see M. Knights, 'Maritime Interdiction in the Gulf: Developing a Culture of Focused Interdiction Using Existing

such as Nautilus IV of 2009 and parallel Italian-led interceptions,[71] it remains nevertheless undisputed that *in occasion of* or *alongside* a Frontex-coordinated operation a single member state, Italy, has been sending back migrants to Libya. This also amounts to maritime interdiction or interception practices, carried out in both cases by semi-military agencies.[72] In the Hera II and III operations we count respectively 1243 people and more than 1,167 (Hera III in 2007) and 5,969 migrants (Hera 2008) diverted to the country of departure in the West African coast[73] and in the case of the Italian push-back it is about 'at least 900 people', as reported by UNHCR.[74]

While there is no definition of maritime interception in international law, the phenomenon comprises a variety of practices carried out by several states, from the US to Australia.[75] The UNHCR has described this as "measures applied by States outside their national boundaries which prevent, interrupt or stop the movement of people without the necessary immigration documentation from crossing the borders by sea…".[76] Interception takes place in a variety of forms and is pushed by different reasons. If Spain has practiced interception, among others, for purposes of drug trafficking, Italy has tried to react to incoming wages of migrants leaving Albania toward the coasts of Apulia since the '90.[77]

The purpose of the next section is to analyse those operations with reference to their legal framework, with the aim to assess their compliance with the rule of law principle and with fundamental rights.

Legal issues arising from Frontex operations at sea, with special attention to the rule of law and fundamental rights

This paragraph tries to explore some of the numerous legal problems arising from Frontex's operations at sea: the legal framework governing interception operations is intertwined between international law, be it the law of the seas (UNCLOS), treaty law on search and rescue at sea (SAR Convention and SOLAS Convention) or refugee and human rights law, in which we count the law stemming from the European Convention of Human Rights (ECvHR), as interpreted by the Strasbourg Court, which has since decades 'inspired'

International Conventions', 3, available at http://www.npec-web.org/article_file/050620IranKnightsMaritimeInterdictionintheGulf_010211_0658.pdf (accessed 12.7.2011).

[71] See also the request for explanation on the relation between operations carried out on the basis of the bilateral agreements between Italy and Libya and the activity of Frontex from the ECtHR to the Italian State, defendant in the case Hirsi and Others v. Italy, request no. 27765/09: "Il est enfin invité à expliquer à la Cour le rapport existant entre les opérations prévues par les accords bilatéraux avec la Libye et l'activité de l' «Agence européenne pour la gestion de la coopération opérationnelle aux frontières extérieures des États membres de l'Union européenne (Frontex)»."

[72] *I.e. Guardia Civil*, for Spain (JO Hera) and *Guardia di Finanza*, Italy (JO Nautilus).

[73] Frontex Press Release' Hera III Operation', 13 April 2007, and Frontex Reports on Hera and Nautilus 2008, at http://www.frontex.europa.eu/newsroom/news_releases/art40.html

[74] UNHCR Press Release: 'UNHRC deeply concerned over returns from Italy to Libya', 7 May 2009.

[75] The reference is to the US interdiction and return program toward Haitian migrants, who reached the US Supreme Court. See also B. Miltner, Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception, 30 *Fordham International Law Journal*, 2006, p. 75; S.H. Legomsky, "The USA and the Caribbean Interdiction Program", 18 *International Journal of Refugee Law*, 2006, 677. On the Australian interdiction program, known as Operation Relex, and its most known and academically debated case, the Tampa accident, see J. Howard, "To deter and deny: Australia and the interdiction of asylum seekers", 21 *Refuge*, 2003.

[76] See Executive Committee of the High Commissioner's Programme, Standing Committee, 18th meeting: "Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach" (EC/50/SC/CRP.17) of 9 June 2000, available at http://www.unhcr.org/refworld/docid/49997afa1a.html accessed 12.12.2011. The same definition is also referred at in the Report of the Committee on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe "The interception and rescue at sea of asylum seekers, refugees and irregular migrants", Doc. 12628, 1 June 2011, p. 9.

[77] See the judgement of the ECtHR, *Xhavara et al. v. Italy and Albania*, No. 39473/98, 11.1.2001.

also the European Court of Justice; and last but not least, we should mention the ever growing bulk of European migration rules, which comprises also European asylum law.

Trying to elaborate a complete picture of this articulated legal framework would be beyond the remit of this article. A survey of legal literature shows that most of the areas mentioned above have been covered.[78] My aim is to elaborate on the legality of those operations with reference to the rule of law and to the duty of protection of fundamental rights. Both are core principles of the European constitutional order as it did emerge and develop in the last decades of European integration. More recently, the Treaty of Lisbon has certainly enhanced their 'visibility' and, most importantly, their legal enforceability thanks to the EU Charter of Fundamental Rights (EUCFR), the accession of the EU to the ECvHR and the strengthening of control functions by the European Parliament and the Court of Justice.

The first issue to be examined is whether Frontex' operations respects the rule of law; this means looking at the legality of Frontex operations, *i.e.* the legal bases covering them.

Frontex Regulation states that the mission of Frontex is improving the integrated border management, and it shall facilitate and render more effective the application of Community measures on the management of external borders. The first instrument regulating Frontex operations is the Schengen Borders Code (SBC), which has been adopted in 2006, with the aim of replacing the *acquis* represented by the Convention Implementing the Schengen Agreement (CISA) –relevant provisions- and the so-called 'Common Manual'.[79]

Though the territorial scope of the SBC has been disputed, the author believes that extra-territorial activities by Frontex fall within the scope of the SBC. In particular the Code foresees "border surveillance" as "surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks". Furthermore, its Article 12 provides that the main purpose of border surveillance is to "prevent unauthorized border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally" and "to prevent and discourage persons from circumventing the checks at border crossing points". Lastly, it says that "[s]urveillance shall be carried out by stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to apprehend individuals crossing the border illegally".

From this, it appears that there is no strict territorial limitation to Frontex' action. Other provisions in the annexes indicate that Frontex' activities might take place also outside the EU territory.[80]

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[78] The legal literature has covered many substantive areas: on the law of the seas and the non refoulement principle, see E. Papastavridis, 'Fortress Europe' and Frontex: Within or Without International Law?, *Nordic Journal of International Law* (79) 2010, 75-111, 89; on the principle of non refoulement, see S. Trevisanut, 'The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection', in A. von Bogdandy and R. Wolfrum (eds.), (2008) 12 *Max Planck Yearbook of United Nations Law*, (Brill, 2008), p. 205 ff.; on S.A.R. obligations: S. Trevisanut, Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?, The International Journal of Marine and Coastal Law 25 (2010) 523–542; on international human rights and refugee law, see Fischer-Lescano, Löhr & Tohidipur (2009). Border controls at sea: Requirements under international human rights and refugee law, *International Journal of Refugee Law, 21* (2) 2009, 256-296, 295; *ex multis*, see the overall reconstruction by V. Moreno Lax, Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea, *International Journal of Refugee Law* 23 (2011), 174-220.

[79] See recital 3 of the Preamble of the SBC.

[80] The reference is to the Schengen Borders Code, Annex VI laying down "Specific Rules for the various types of border and the various means of transport used for crossing the Member States' external borders". In

This triggers important consequences on the applicability of the SBC, which grants – at Article 3- priority for the rights of refugees and persons requesting international protection, in particular against *non-refoulement*. Secondly, this implies that Frontex activities, though carried out extraterritorially, will remain subject to the general principles of EU law, *i.e.* the fundamental rights provisions and other principles, as recognised in the case law, such as legal certainty and transparency.

While looking more precisely at Frontex JO constituting in the substance diversion operations, one should observe that they are not explicitly mentioned in the SBC: this seems to suggest that no clear (European law) legal basis can be found for the first Hera operations, in particular for Frontex and for MS other than the one hosting the JO, in that case Spain. As to Nautilus IV, if we consider them as been carried out outside the Frontex JO operational area, the question remains as to the clarification of the role of Frontex. Currently the European Court of Human Rights (ECtHR) is indeed adjudicating a complaint against Italy, where the role of Frontex is subject to clarification.[81]

Considering the uncertain legal basis for Frontex' operations in European law, one should consider whether the legality of Frontex operations can be justified on other legal instruments, for example on the basis of bilateral agreements among the Member State hosting the Frontex mission and third states. This alternative has been put forward by Frontex self for JO Hera. This would also trigger the question of whether these agreements can cover also other (non hosting) MSs' participation to the same JOs.

If those agreements can cover the host State's (Spain) participation and Article 8 of the Frontex Regulation authorises the Spanish request of assistance to Frontex, the remaining issue that can be reproached to Frontex is the scarce transparency it has displayed while justifying its participation into the operation.

As to the participating MSs, I like to refer to the thesis put forward by Papastavridis, consider those bilateral agreements as *res inter alios acta* that cannot justify other MSs' involvement, lacking any specific provision on the right to be exercised by those States.[82]

Persistent criticism had led the Council to adopt recently a Decision 2010/252/EU covering the surveillance of sea borders for operations coordinated by Frontex, on a proposal of the Commission.[83]

While the decision has been 'justified' as providing for 'additional rules' on borders surveillance,[84] and therefore 'not modifying the essential provisions' of the SBC, the

particular, Section 3.1.1. "Checks on ships shall be carried out at the port of arrival or departure, on board ship or in an area set aside for the purpose, located in the immediate vicinity of the vessel. However, in accordance with the agreements reached on the matter, checks may also be carried out during crossings or, upon the ship's arrival or departure, in the territory of a third country." This leads to the interpretation that checks are possible also outside the territory of the EU. See also M. den Heijer, Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control, in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control. Legal Challenges* (Leiden-Boston, 2010), p. 169, at 176 ff.

[81] Case Hirsi and Others v. Italy, request no. 27765/09, pending before the ECtHR.

[82] E. Papastavridis, 'Fortress Europe' and Frontex: Within or Without International Law?, *Nordic Journal of International Law* (79) 2010, 75-111, 89.

[83] Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 111, p. 20.

[84] See Article 12, paragraph 5, "Additional rules governing surveillance may be adopted in accordance with the procedure referred to in Article 33(2)", which refers to the so-called 'Comitology Decision', Decision 1999/468/EC, namely its Articles 5 and 7, "having regard to the provisions of Article 8 thereof and provided that the implementing measures adopted in accordance with this procedure do not modify the essential provisions of this Regulation".

European Parliament did not agree on such qualification, bringing this Decision before the EUCJ for annulment, as adopted on a wrong legal basis and in violation of its legislative prerogatives.[85] In particular, the EP argues that the rules on "interception", "rescue at sea" and "disembarkation" are different concepts from borders surveillance, as defined by the SBC.[86] These rules modify the SBC and therefore should have been adopted with legislative procedure.

The Decision is actually comprising of two different parts, one binding, adopting Rules (Annex, part I) and one non-binding, providing for Guidelines (Annex, part 2), which shall form part of the operational plan for Frontex operations.[87] Pending proceedings before the EUCJ, the Decision is still in force: however, the legal action of the European Parliament to the EUCJ constitutes *per se* evidence of the controversial nature of the conformity of operations carried out by Frontex with reference to their respect of the rule of law, in a twofold way: first, enacting European *ad hoc* rules for interception operations sounds like an implicit statement and recognition that current Frontex operations are not underpinned by an adequate legal basis, and thus, not fully legitimate with reference to the rule of law. Second, the fact that the Decision has been litigated by the democratic institution is symptomatic of the latter's disagreement as to its compliance with the current legal framework. The EP asks indeed that a legislative piece is passed according to the ordinary legislative procedure.

Therefore, clarifying the legal framework will be beneficial for the legality of Frontex coordinated operations, and, more generally, for the sake of the rule of law in the European Union level.[88]

To sum up, the arguments presented above show that, so far, Frontex operations at sea were not carried out with a clear European legal framework. This triggers consequences, especially for participating MSs, whose international liability can be called upon, for example, before the ECtHR.[89] The second point I wish to make concerns the possible breach of fundamental rights: the current situation falls short of many legal obligations, of different nature but at the same time clearly intertwined. Literature has ascertained that diversion operations, as carried out by MSs and Frontex during JO Hera and in occasion or alongside JO Nautilus violate several legal frameworks: interceptions and push-back constitute *refoulement* and therefore are in breach of the international refugee law, as they have the effect of sending persons back to the place of departure. In particular, potential refugees have been sent back to countries (Senegal, Libya) which are known for not having arranged a legal and institutional system that can protect refugees: Libya in particular did not sign the Geneva Convention of 1951. This is done without an assessment of a person's individual case. In the SBC, for example, provisions of international and asylum law are supposed to prime on rules concerning entry and stay of TCN.[90] Secondly, diversion operations are not legitimised either by the law of the sea, because the right to visit against flagless ships does not imply the right to seizure *tout court*. Thirdly, we should mention the issue of compliance of these operations with search and rescue duties of boats in distress in the high sea. If we consider that the number of people disappeared at sea is increasing together with the surveillance of the Mediterranean, there is a

[85] OJ C 246 (11.9.2010), p. 34. The Commission has been granted intervention in the case.
[86] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, p. 1.
[87] See Article 1 of the mentioned Decision.
[88] See also A. Baldaccini, 'Extraterritorial Border Controls in the EU', cit., 255.
[89] This might also be the reason why JO Nautilus and Italian diversion operations took place probably into different operational areas.
[90] See A. Baldaccini, 'Extraterritorial Border Controls in the EU', cit., 245, who argues for the extraterritorial applicability of the Schengen Border Code (SBC).

macroscopic problem of breach of search and rescue duties bearing on MSs. Fourthly, the ECvHR is violated as well: the case law of the ECtHR, has interpreting the European Convention obligations as 'following' contracting states in all the situations where they exercise their jurisdiction, which happens also if they operate outside their territory, like in TC (*e.g.* Libyan) territorial waters.[91]

If this is in broad lines the *status quo* concerning the substantive legal frameworks applicable as sketched by the literature, the next step is to look at the actions taken by Frontex to tackle the problem.

In the attempt to clarify some of these questions, in June 2008 Frontex has established with the United Nations High Commissioner for Refugees (UNHCR) a working agreement providing the framework for cooperation on training of border guards, on international refugee laws. The aim is to try to avoid conflicts between integrated border management and international human rights standards through training, (best) practices and exchange of expertise.

Another step taken by Frontex is the adoption of a Fundamental Rights (FR) Strategy.[92] This document represents certainly a step forward on the way to ensure the respect of fundamental rights in all the activities coordinated by Frontex. Among the points to be presented, I wish to draw the attention on the operationalisation part of this strategy, stressing that joint operations, and the risk analyses underpinning them, shall take into account the "particular situation of persons seeking international protection, and the particular circumstances of vulnerable individuals or groups in need of protection or special care"; Frontex' operational plans shall be elaborated in "strict conformity with the relevant international standards and applicable European and national laws". Frontex "might terminate a JO" if the respect for fundamental rights is no longer assured. This engagement is enforced by a reporting system which should be the basis of a monitoring of all its operations, including forced return operations, which requires also that MSs can guarantee that they can provide for such a monitoring system.

Among other aspects, I will mention Frontex' Code of Conduct, which collects generally accepted standards of soft law and promotes professional values based on the principles of the rule of law and respect of fundamental rights, together with the Action Plan, that will become the main implementation tool for Frontex' FR Strategy, and which should also be properly reflected in the Frontex Programme of Work.

Working on transparency and credibility, Frontex will convey periodically a consultative forum, gathering together external third parties, namely civil society representatives.

While, on the one hand, one should recognise that this effort represents a step ahead if compared to the previous situations marked by a lack of transparency, on the other hand, one should notice that we nevertheless talk about soft law and commitments which need as well the active cooperation of MSs' officials in order to be effective.

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[91] ECtHR, *Xhavara et al. v. Italy and Albania*, No. 39473/98, 11.1.2001. For more references, see, *mutatis mutandis*, the case law of the ECtHR quoted in E. Brouwer, 'Extraterritorial Migration Control and Human Rights', cit., 206-207.

[92] Endorsed by the Frontex Management Board on 31 March 2011, the document is available at www.frontex.europa.eu , last accessed 12.12.2011.

2011 represented a significant year because the recast of the Frontex Regulation has recently been approved. This witnesses the awareness of the need of find a *legislative* remedy to a *political* problem which became acute.[93]

Also this reform represents in my understanding an implicit recognition of the problems discussed in this contribution.[94] At the same time, this recast increases the powers of Frontex and therefore requires for a more solid underpinning of its actions on a clear legal framework.

I wish to draw the attention to two main points: the first one could be labeled as specific fundamental rights actions, whereas the second one is about general provisions meant to ensure the respect of fundamental rights duties, including international law obligations, such as refugee law. As to the first point, we indicate the further development of Frontex FR Strategy, the Consultative Forum already envisaged in this former document, and the FR Officer. This last one, designated by the Management Board, shall be independent in the performance of his/her duties, and shall report directly to the Management Board and the Consultative Forum and contribute to the mechanism for monitoring fundamental rights.[95] Under the second point, several provisions should be mentioned. Lacking time and space for a complete overview, I would nevertheless present, among others,[96] the 9th and the 29th recitals of the Preamble; the former indicates that the mandate of the Agency should be revised in order to strengthen its operational capabilities "while ensuring that all measures taken (…) fully respect fundamental rights and the rights of refugees and asylum seekers, including in particular the prohibition of *refoulement*." The latter puts forward that the Regulation respects the fundamental rights and observes the principles recognised by the TFEU and the EUCFR (…).

Among the legal provisions, we draw the attention on the text of new Article 1(2), which reads as follows:

"While considering that the responsibility for the control and surveillance of external borders lies with the Member States, the Agency (…) shall facilitate and render more effective the application of existing and future Union measures relating to the management of external borders, in particular the Schengen Borders Code (…)".

"The Agency shall fulfil its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights (…); the relevant international law, including the [Geneva Convention]; obligations related to access to international protection, in particular the principle of *non refoulement*; and fundamental rights, and taking into account the reports of the Consultative Forum referred to in Article 26a of this Regulation."

Article 2, with the new paragraph 1a, prohibits disembarkation in a TC "in contravention of the principle of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle. The special needs of children, victims of trafficking, persons in need of medical assistance persons in need of medical protections

[93] See Regulation (EU) 2011/1168 amending Council Regulation (EC) No 2007/2004 of 26 October 2004, in OJ L 304 22.11.2011, p. 1.
[94] See European Commission's proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), COM(2010)61 final, p. 7 and UNHCR's observations on the European Commission's proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), COM(2010)61 final.
[95] New Article 26a, "Fundamental Rights Strategy".
[96] I refer at recitals 1, 9, 16, 18, 20, 21, 22.

and other vulnerable persons shall be addressed in accordance with Union and international law."

The reformed provision on return cooperation requires that agreements with MSs granting financial support are made conditional upon the full respect for the EUCFR, shall ensure respect of such obligations in the Code of Conduct, and be effectively monitored.[97]

Other provisions refer to the Code of Conduct, to be developed in cooperation with the Consultative Forum,[98] to the training of European Border Guards Teams,[99] and to the cooperation with other Union bodies, such as the European Asylum Support Office (EASO), the Fundamental Rights Agency (FRA), and international organisations.[100]

The recast of the Frontex Regulation is certainly more than a step in the right direction, which should lead to more transparency on Frontex coordinating role of external borders policing operations.

Beside the rhetoric of the merely operational function performed by Frontex, being coordination of MSs' operations its main task, the *status quo* so far presented many critical problems, which undermined the overall legality of the activity of the Agency.

Secondly, MSs cooperating to a JO are in a difficult situation as well: in international law concerted actions among several states does not relieve participating states from responsibility.[101] If the MS hosting a JO breaches international obligations, the supporting MS cannot enjoy exemption.

The relevance of these questions became more serious after the entry into force of the Lisbon Treaty: the legally binding status of the Charter of Fundamental Rights, with its many references to international law instruments, would have made the problem more acute. The higher degree of political and legal accountability makes more likely that current shortcomings will be scrutinised, for example by the EUCJ.

Frontex and the externalisation of migration controls: a multiple exercise of venue shopping?

This paragraph aims at putting Frontex in a broader perspective. It is here suggested that Frontex is not only an agency dealing with external borders management, but rather a piece of the broader puzzle of EU's response to the migratory phenomenon. More precisely, in the past years, the control of migration has been developing in the direction of EU's external relations. Since 2001 indeed the Commission established the need to integrate migration issues in EU's relations with third countries:[102] this contributed to the

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[97] New Article 9.
[98] New Article 2a.
[99] New Article 3b.
[100] New Article 13.
[101] See the codification work of the International Law Commission: Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, at Article *6:*
"Conduct of organs placed at the disposal of a State by another State
The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed."
See also, *mutatis mutandis*, the case law of the ECtHR quoted in E. Brouwer, 'Extraterritorial Migration Control and Human Rights', cit., 206-207.
[102] Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration, COM (2001) 672 final, of 15.11.2001, namely points 3.3 and 4.3.2. See also the Commission's Communication on integrating migration issues in the European Union's relations with third countries, COM (2002)703 final, of 3.12.2002. Both documents are available on the European Commission's website.

development of an external dimension of the AFSJ. Secondly, the EU and MSs established practices and policies involving also private actors (*e.g.* aerial companies), aimed at screening migrants before they are inside European borders, thus "moving" those borders, as argued by Elspeth Guild.[103] Political scientists explain this as a form of 'outsourcing' or 'externalizing' migration policies. Thirdly, migration policy and migration controls have been brought increasingly under the framework of policing activities: Bigo defined it as 'normalisation of policing migration', which means that the extension of police and policing into the migration controls has been accompanied by a criminalisation of migration, beforehand considered an administrative discipline. This linkage of border controls to police and policing means that there is a presumption that movement of people is an illicit activity.[104]

The trend of developing an external dimension of the policies falling within the context of the AFSJ has been encouraged since the Tampere multi-annual programme, in order to support the achievement of the AFSJ's goals by tackling threats perceived coming from outside, but also in order to favor coherence of EU's external relations. In practice, the external development of the AFSJ seems to confirm the naturally inward-looking perspective of the AFSJ. Is this the simple logical consequence of the development of an external action on the basis of some (internal) policies, or is it something more?

In my understanding the externalisation of migration is determined by the research for more convenient legal venues in order to achieve desired policy target(s). In particular, I argue that Frontex-led JO at EU's external maritime borders (Atlantic and Mediterranean) which resulted in or supported interdiction practices, should be explained as a *multiple exercise* of 'venue shopping' by MSs' governments for the benefit of their police and quasi-military law enforcement actors. According to this theory "actors seek new venues when they need to adapt to institutional constraints in a changing environment".[105] It is here argued that the policing of external borders through Frontex is the result of the research of a more convenient venue for several reasons: first, there is an accent on the operational dimension, enabled by linking police actors into cooperation networks. The role of Frontex as coordinator of operations carried out by cooperating MSs corresponds to the limited responsibility it bears, responsibility lying eventually on MSs. Second, the main actors involved in these operations are police actors, often also having a semi-military status. Thirdly, there is an exercise of venue shopping also in policing pre-borders areas (high seas and TC territorial waters), instead of policing migration within the borders (MSs' territorial waters/contiguous zone). Though the territorial scope of international refugee law, namely the territorial scope of the prohibition of *refoulement*, might be disputed,[106] it is clear that 'off-shore venues' bear, even only *de facto*, an advantage for some actors and a disadvantage for others. To be a vulnerable individual in a precarious boat in the middle of the sea, even if protected by international law obligations, means that one is precluded access to a legal and administrative system apt to assess her/his entitlement to the status of refugee or not, and to have a decision scrutinised by a judicial instance.[107] This last aspect touches upon human dignity and the very nature of human beings as part of mankind.

By way of conclusion, the article has demonstrated that recent practices of policing external borders put in place by MSs under the coordination of Frontex present several

[103] E. Guild, 'Moving the Borders of Europe', cit.
[104] D. Bigo, "Frontier Controls in the European Union: Who is in Control?", in D. Bigo and E. Guild (eds), *Controlling Frontiers: Free Movement into and within Europe*, Farnham: Ashgate Publishing, 2005, pp. 49-99.
[105] V. Guiraudon, 'European Integration and Migration Policy: Vertical Policy-making as Venue Shopping', (2000) 38 *Journal of Common Market Studies*, p. 251, at 258.
[106] See M. den Heijer, Europe beyond its Borders, cit., p. 169, at 180 ff.
[107] S. Kneebone, Refugees, Asylum Seekers and the Rule of Law, Cambridge University Press, Cambridge, UK, (2009).

problems: this contribution has focused on the respect of the rule of law and on the protection of fundamental rights. With such operations the EU and its MSs threaten the very idea of rule of law and display little consideration for human dignity. The Lisbon Treaty together with the recent reform of the Frontex Regulation offer nevertheless the possibility to fix these problems; the former provided the EU of an improved constitutional environment, with a more effective framework for fundamental rights' protection,[108] and better instances for legal and political accountability.[109] The latter represents a step in the direction of making the activities of Frontex more transparent and more clearly bound by the respect of fundamental rights obligations.

On the other side, the new legal architecture presents (positive) threats and opportunities: the de-pillarisation deriving from the unification of the legal and procedural framework now characterizing the AFSJ within the new Title V of the TFEU, and the reform of the decision-making procedures might favor an increase of legislative production in this field. However the dimension of control and guarantees is also strengthened by the Treaty of Lisbon, thanks to the further expansion of the remit of the EUCJ and to the incorporation of the Charter of Fundamental Rights, not to mention the accession to the ECvHR.

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[108] Art. 6 TEU: Charter of FR and possibility to accede the ECHR; Article 18 and 19 Charter of FR: non refoulement and protection in the event of removal, expulsion or extradition. Status of ECHR into EU law as per consolidated case law and treaties.

[109] See the full scrutiny of the EUCJ on agencies, which includes examining the legality of their acts intended to produce legal effects toward third parties: Article 263 TFEU. See also Fischer-Lescano, Löhr & Tohidipur (2009), Border controls at sea: Requirements under international human rights and refugee law, *International Journal of Refugee Law, 21* (2) 2009, 256-296, 295.

The Adoption of 'Targeted Sanctions' and the Potential for Inter-institutional Litigation after Lisbon

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Abstract

This article analyses the post-Lisbon legal framework for the adoption of restrictive measures against individuals or non-State entities – so-called 'targeted sanctions' or 'smart sanctions'. It is argued that the procedural differences to adopt targeted sanctions in the framework of the EU's counter-terrorism activities (Art. 75 TFEU) and with regard to the implementation of the Common Foreign and Security Policy (Art. 215 TFEU) increase the potential for inter-institutional litigation. This is particularly the case because the boundaries between the EU's competences in the Area of Freedom, Security and Justice (AFSJ) and the Common Foreign and Security Policy (CFSP) are blurred. This is illustrated with the discussions surrounding the adoption of amendments to Regulation 881/2002 imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban after the entry into force of the Treaty of Lisbon. The European Parliament contests the adoption of those amendments on the basis of Art. 215 (2) TFEU and argues that only Art. 75 TFEU is the appropriate legal basis given the counter-terrorism objective of the measure at stake. This article discusses the different options to find an appropriate solution for this inter-institutional competence battle and argues that the Court's new possibilities to rule on the duty of consistency may help find a way out.

Keywords

CFSP; Coherence; Lisbon Treaty; Sanctions

IN AN ATTEMPT TO MITIGATE THE NEGATIVE HUMANITARIAN CONSEQUENCES OF traditional trade sanctions against third states, the United Nations Security Council decided in the 1990s to focus more on so-called "targeted" or "smart" sanctions. The latter include specific measures designed to tackle certain sectors or people rather than the entire economy and population of a state.[1] They typically include measures such as arms embargoes, visa bans and the freezing of financial assets. The global fight against terrorism after the 2001 attacks in New York further increased the need to adopt restrictive sanctions against individuals or non-state actors. The European Union could not escape this trend.[2] In 2003, the Council embarked upon an examination of its sanctions practice

[1] D. Cortright, G. A. Lopez and E. S. Rogers, "Targeted Financial Sanctions: Smart Sanctions that do work", in: D. Cortright and G.A. Lopez, *Smart Sanctions. Targeting Economic Statecraft* (Oxford, Rowan and Littlefield, 2002), p. 23.
[2] A. W. de Vries and H. Hazelzet, "The EU as a New Actor on the Sanctions Scene", in: P. Wallenstein and C. Staibano, *International Sanctions. Between Words and Wars in the Global System* (London and New York, Frank Cass, 2005), pp. 95-107.

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and policy, which resulted in the adoption of "guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (CFSP)"[3] as well as a document presenting the "basic principles on the use of restrictive measures (sanctions)".[4]

The application of the EU's sanctions regime in practice, either with regard to the implementation of UN Security Council resolutions or in the pursuit of an autonomous counter-terrorism policy of the Union, quickly revealed a number of significant challenges.[5] First, targeted sanctions require close cooperation between the United Nations, the EU and its Member States and raise questions about the relationship between international law and European law. Second, the protection of fundamental rights and, in particular, the right to effective judicial review for individuals targeted by restrictive measures constitutes a major issue for a Union based on the rule of law. Third, the sanctions regime cuts across the horizontal (between EU institutions) and vertical (between the EU and the Member States) division of competences. Depending on the exact nature of the restrictive measures and the areas or targets covered by them, different decision-making procedures and legal instruments apply. For instance, restrictions on admission (visa or travel bans) instituted within the framework of the CFSP are enforced on the basis of Member States' legislation on admission of non-nationals. Sanctions providing for the reduction or interruption of economic relations, on the other hand, are implemented on the basis of Union (previously Community) regulations.[6]

The anti-terrorist cases before the Court of First Instance (now the General Court) and the Court of Justice, in particular the seminal *Kadi* and *Al Barakaat* judgments, tackled many of the above mentioned fundamental questions. The scope and importance of the issues at stake explains the countless number of academic comments and reflections on the consequences of the Court's approach.[7] However, whereas the scholarly debate essentially focused on the protection of individual rights versus the effectiveness of the international fight against terrorism, the competence question received far less attention.[8] In an influential article on economic sanctions and individual rights, Halberstam and Stein even suggested that the legal base aspect of *Kadi* may be nothing more than "a tempest in a teapot".[9]

It is true that the discussions about the legal basis for the adoption of restrictive measures against individuals may, at first sight, look somewhat artificial. After all, the Court of First

[3] Council of the European Union, 15579/03, 3 December 2003; later updated on the basis of document 15114/05, 2 December 2005.
[4] Council of the European Union, 10198/1/04, 7 June 2004.
[5] M. Nettesheim, "UN Sanctions against Individuals. A Challenge to the Architecture of European Union Governance", 44 *CML Rev.* (2007), pp. 567-600.
[6] For a recent practical illustration of the implementation of targeted sanctions on the basis of Member State and EU action, see Council Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya, *OJ* (2011) L 58/53. Articles 4 and 5 of this CFSP Decision instruct the Member States to take the necessary measures for the inspection of cargo to and from Libya in their territory and to prevent the entry into, or transit through, their territories of persons linked with the Libyan regime. The EU, on the other hand, implemented Article 6 of the same Decision relating to the freezing of all funds, financial assets and economic resources of the persons concerned by adopting Council Regulation 204/2011 of 2 March 2011, OJ (2011) L 58/1.
[7] S. Poli and M. Tzanau, "The Kadi Rulings: A Survey of the Literature", *Yearbook of European Law* (2009), pp. 533-558.
[8] Exceptions are: M. Cremona, "EC Competence, 'Smart Sanctions' and the *Kadi* Case", *Yearbook of European Law* (2009), pp. 559-592; A.D. Casterleiro, "The Implementation of Targeted Sanctions in the European Union", in: A.D. Casterleiro and M. Spernbauer, *Security Aspects in EU External Policies*, EUI Working Papers (2009) 1, pp; 39-50; T. Tridimas, "Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order", 34 *ELRev.* (2009), p. 103; C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights. The Case of Individual Sanctions* (Oxford, Oxford University Press, 2009), pp. 78-126.
[9] D. Halberstam and E. Stein, "The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order" 46 *CML Rev.* (2009), p. 36.

Instance, the Advocate General and the Court of Justice in *Kadi and Al Barakaat* did not disagree on the competence to act at the EU level but rather on the interpretation of the relevant treaty provisions and their respective objectives and limitations. Nevertheless, the importance of this issue cannot be underestimated. In the pre-Lisbon constellation, the Court's judgment clarified the complicated "constitutional architecture" of the Union's pillar structure, based upon "the coexistence of the Union and the Community as integrated but separated legal orders".[10] Taking into account the formal abolition of the pillar structure and the introduction of a single legal personality for the Union, the question arises how the Treaty of Lisbon affects the findings of the Court in *Kadi and Al Barakaat*.

Of particular significance is the introduction of a specific legal basis for the adoption of restrictive sanctions against individuals in the framework of the EU's counter-terrorism activities (Art. 75 TFEU) and for the implementation of the CFSP (Art. 215 TFEU). The relationship between both provisions is far from clear and illustrates the more fundamental question about the balance between delimitation and consistency of the EU's external action after the collapse of the pillar structure.[11] In order to tackle this issue, the legal framework of the EU's sanctions regime before the entry into force of the Treaty of Lisbon (II) will be compared with the Lisbon provisions concerning the adoption of restrictive sanctions (III). In order to clarify the link between Articles 75 and 215 TFEU, the new legal framework for the EU's external action will be analyzed (IV) in the light of the pending inter-institutional conflict between the European Parliament and the Council concerning the adoption of amendments to Regulation 881/2002 imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (V).[12]

The adoption of restrictive sanctions against individuals in the pre-Lisbon legal context: a pragmatic approach

Before the entry into force of the Treaty of Lisbon on 1 December 2009, the primary legal framework of the EU did not include any explicit provisions for the adoption of sanctions against individuals. Hence, the Union's sanctions regime developed in practice on the basis of an expansionist use of the provisions regarding economic sanctions against third states. Pursuant to old Article 301 EC, the interruption or reduction, in part or completely, of economic sanctions with one or more third countries required a prior Common Position or Joint Action adopted under the CFSP and was to be decided by the Council on the basis of qualified majority voting and on a proposal from the European Commission. In addition, Article 60 (1) EC provided for a specific legal basis allowing the Council to adopt "in the cases envisaged in Article 301 […] the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned". Hence, the EU's pre-Lisbon sanctions regime implied a two-stage process, starting with the adoption of a CFSP act and, depending on the nature of the measure and the division of competences, implementation on the part of the Member States and/or the European Community. Issues such as travel restrictions, diplomatic sanctions and arms embargoes[13] required direct Member State action whereas import and export restrictions, a ban on financial and

[10] ECJ, Joint Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, [2008] ECR I-6351, para. 202.
[11] P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure: In Search of a new Balance between Delimitation and Consistency", 47 *CML Rev.* (2010), pp. 987-1019.
[12] Action brought on 11 March 2010 – *European Parliament* v. *Council*, Case C-130/10. At the time of writing, the opinion of the Advocate General and the judgment of the court were still pending.
[13] On the basis of Article 346 TFEU (ex Art. 296 TEC), Member States may take adopt measures which are connected with the production of or trade in arms, munitions and war material.

technical assistance, asset freezes and a ban on investment and credit, implied the adoption of a Community regulation on the joint legal basis of Articles 301 and 60 EC.[14]

The EU's restrictive measures against the Milosevic regime in the Federal Republic of Yugoslavia (FYR) at the end of the 1990s perfectly illustrate the Council's liberal interpretation of the relevant EC Treaty provisions. In response to the use of force against the Kosovar Albanian community in Kosovo and the unacceptable violation of human rights, the EU imposed economic and financial sanctions as well as a visa ban for senior FYR and Serbian representatives.[15] Significantly, a Council Regulation implementing the freezing of funds in relation to Mr. Milosevic and his associates remained in force even after the change of government on the ground that those persons continued to represent a threat to the consolidation of democracy in the FYR.[16] Hence, even though Articles 301 and 60 EC only referred to "third countries", this did not prevent the Council to adopt targeted sanctions against individuals. In the *Minin* case, an associate of former Liberian president Charles Taylor opposed this practice and argued that Articles 301 and 60 EC could "not constitute an adequate legal basis for the purposes of adopting punitive or preventative measures affecting individuals and producing direct effect on them".[17] The Court of First Instance, however, concluded that the restrictive measures adopted against Charles Taylor and his associates had "a sufficient link with the territory or the rulers of Liberia" to be regarded as "seeking to interrupt or reduce, in part or completely, economic relations with a […] third country".[18] Also in later judgments, both the Court of First Instance and the Court of Justice accepted that "the adoption of measures against a third country may include the rulers of such a country and the individuals and entities associated with them or controlled by them, directly or indirectly".[19] Even a bank can fall within this definition when there is a link with the aim to put pressure on a third state. This was, for instance, the case with sanctions against Iran, which included the freezing of funds of banks suspected of providing financial and technical assistance for the nuclear and missile-development programme of this country.[20]

The limits of this far-reaching interpretation of the notion "economic sanctions against a third state" became obvious in the context of the EU's counter-terrorism policy. The revision of sanctions against persons and entities associated with Usama bin Laden, Al-Qaida, and the Taliban, following the fall of the Taliban regime in Afghanistan in 2002, no longer provided for a link with the governing regime of a third country.[21] In the absence of a specific legal basis for this new type of targeted sanctions, the Council adopted the amended regulation on the joint legal basis of Articles 60, 301 and 308 EC. The addition of the "flexible legal basis" or "supplementary competence" of Article 308 EC (now Art. 352 TFEU), turned out to be particularly controversial. The use of this provision was a popular solution to complement the limited express provisions on the external relations of the

[14] A good example of the EU's sanctions regime in the pre-Lisbon period concerns the restrictive measures adopted against Burma/Myanmar in 2006/2007. See: Cremona, *supra* note 8, p. 565.
[15] Common Position of 19 March 1998 on restrictive measures against the Federal Republic of Yugoslavia, OJ (1998) L 95/1 and Common Position of 7 May 1998 concerning the freezing of funds held abroad by the Federal Republic of Yugoslavia (FRY) and Serbian Governments, OJ (1998) L 143/1.
[16] Council Regulation (EC) No 2488/2000 of 10 November 2000 maintaining a freeze of funds in relation to Mr. Milosevic and those persons associated with him and repealing Regulations (EC) Nos 1294/1999 and 607/2000 and Article 2 of Regulation (EC) No 926/98, OJ (2000) L 287/19.
[17] CFI, Case T-362/04, *Leonid Minin* v. *Commission* [2007] ECR II-2003, para. 59.
[18] *Ibid.*, para. 72.
[19] *Supra* note 10, para. 61.
[20] Joined Cases T-246/08 and T-332/08, *Melli Bank plc* v. *Council*, [2009] ECR II-2629, para. 69.
[21] Significantly, the initial UN resolutions requiring all States to freeze funds and other assets owned by the Taliban, Usama bin Laden and the Al-Qaeda organisation were implemented in the EU by means of CFSP Common Positions and EC Regulations based on Articles 301 and 60 (1) EC. See: Common Position (CFSP) 1999/727, *OJ* (1999) L 294/1 and Council Regulation (EC) 337/2000, *OJ* (2000) L 43/1 and Common Position (CFSP) 2001/154, *OJ* (2001) L 57/1 and Council Regulation (EC) 467/2001, *OJ* (2001) L 67/1.

European Economic Community in the early stages of the European integration process. In the pre-Maastricht period, its combination with ex Article 113 EEC (now 207 TFEU) on common commercial policy was particularly fruitful for the conclusion of economic and co-operation agreements with third countries.[22] However, the use of this provision is not without limitations. It can only be used when no other articles of the Treaty give the institutions the necessary powers to adopt the measure at stake and when Community action proved necessary to attain, in the course of the operation of the common market, one of the objectives of the Community. The latter preconditions complicated its use for the adoption of restrictive measures against individuals. This was clearly illustrated In *Kadi*, where the Court of First Instance, the Advocate General and the Court of Justice all came to different conclusions about the legal basis for adopting smart sanctions against non-state actors.

According the CFI, Article 308 EC could, in itself, not be used to pursue the safeguarding of international peace and security, i.e. an objective of the European Union and not of the European Community. However, in combination with Articles 60 and 301 EC this was deemed to be possible. Despite the coexistence of the Union and the Community as "integrated but separate legal orders", the explicit bridge between the two foreseen in Articles 60 and 301 EC was, in the opinion of the CFI, sufficient to use Article 308 EC in order to extend the scope of application of the latter provisions.[23] The Advocate General, for his part, suggested a broad interpretation of Articles 60 and 301 EC alone as a sufficient basis for all types of economic sanctions.[24] The ECJ, however, ruled out this option by referring to the text of those provisions and by pointing out that the "essential purpose and object" of the contested regulation was the fight against terrorism and not the adoption of economic sanctions against a third state.[25] It also rejected the reasoning of the CFI that Article 308 EC could be used in combination with Articles 60 and 301 EC to achieve CFSP objectives derived from the EU Treaty. Nevertheless, it accepted that this combination of legal grounds was possible for other reasons. The objective to ensure the efficient use of a Community instrument to implement restrictive measures of an economic nature as well as the link of those measures with the operation of the common market explained, in the view of the ECJ, why the *Al-Qaida* Regulation was adopted on the correct legal basis of Articles 60, 301 and 308 EC together.

The combination of Articles 301, 60 and 308 EC provided a pragmatic solution to the absence of a specific competence for the adoption of sanctions against private individuals but could not avoid the impression that this practice went beyond the clear wording and objectives of those provisions. In particular, the reasoning of the ECJ that targeted sanctions affect the operation of the internal market – and therefore fall within the scope of ex Art. 308 EC (Art. 352 TFEU) – is at least somewhat artificial.[26]

A specific problem in the pre-Lisbon context concerned the lack of Community competences to adopt restrictive measures against individuals and terrorist organisations whose activities are wholly internal to the EU (so-called 'home terrorists').[27] The latter do not fall within the scope of CFSP and, therefore, the EU institutions could not rely on the bridge between Community and Union competences to adopt implementing measures

[22] See: M. Maresceau, "Bilateral Agreements Concluded by the European Community", *The Hague Academy of International Law Recueil des Cours* 309 (2004), p. 187.
[23] CFI, T-315/01, *Kadi* v. *Council and Commission*, [2005] ECR II-3649, para. 123-125.
[24] AG Maduro in Case C-402/05 P, *Kadi* v. *Council and Commission*, para. 11-16.
[25] ECJ, Joint Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, [2008] ECR I-6351, para. 169.
[26] For a critical analysis of the Court's approach, see: C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights. The Case of Individual Sanctions* (Oxford, Oxford University Press, 2009), pp. 78-126; T. Tridimas, "Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order", 34 *ELRev.* (2009), pp. 107-108.
[27] A clear example is that of *Segi*, an alleged terrorist organisation fighting for Basque independence. See: Case C-355/04, *Segi and others* v. *Council* ECR [2007] I-1657.

on the basis of a Community regulation. In relation to 'home terrorists', the Council could only rely on third pillar instruments (police and judicial cooperation in criminal matters) without having a possibility to introduce direct legal consequences such as the freezing of assets and bank accounts. This type of action remained a competence of the individual Member States.[28] In other words, the EU's pillar structure significantly complicated the efficient implementation of targeted sanctions in the pre-Lisbon period.

A double explicit legal basis for the adoption of restrictive measures against individuals after Lisbon

In an attempt to update the treaties to the new practice of smart sanctions, the Treaty of Lisbon explicitly foresees in the adoption of restrictive measures against individuals and non-State actors in Articles 75 TFEU (ex Art. 60 EC) and 215 (2) TFEU (ex. 301 EC). In contrast to Articles 60 and 301 EC, new Articles 75 TFEU and 215 TFEU no longer include any cross-reference. To the contrary, both provisions have a different aim and function within the legal framework of the Union. Article 75 TFEU allows for the adoption of measures necessary to achieve the objectives of the Area of Freedom, Security and Justice (AFSJ), as regards preventing and combating terrorism and related activities. It provides an explicit legal basis 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". In other words, it is a legal basis of its own right, which remedies the former impossibility to adopt autonomous financial sanctions against EU-internal terrorists (cf. *supra*). Article 215 TFEU, on the other hand, belongs to Part V of the TFEU on the Union's external action and allows for the implementation of CFSP decisions providing for the interruption or reduction of economic and financial relations with one or more third countries. Significantly, Article 215 (2) TFEU explicitly provides for a possibility to adopt restrictive measures against natural or legal persons and groups or non-State entities.

Of particular importance are the procedural differences for the adoption of smart sanctions under the respective provisions. With regard to Article 215 (2) TFEU, a unanimously adopted CFSP decision is implemented by qualified majority in the Council on a joint proposal from the High Representative and the Commission. The European Parliament only has to be informed about the adopted measures. The situation is different under Article 75 TFEU where the Council and the European Parliament act in accordance with the ordinary legislative procedure, and without a prior CFSP decision.[29]

The legal complexities resulting from the ambiguous relationship between Articles 75 and 215 (2) TFEU became obvious in the context of the amendments to Regulation 881/2002/EC imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban. In the wake of the *Kadi* judgment of the ECJ, the Commission proposed to adopt those amendments on the basis of Articles 60, 301 and 308 EC.[30] Following the entry into force of the Treaty of Lisbon, the Commission announced that the proposal was to be adopted on the single legal basis of Article 215 (2) TFEU implying that the European Parliament was no longer to be

[28] E. Spaventa, "Fundamental Rights and the Interface between the Second and Third Pillar", in: A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape* (Cambridge, CUP, 2008), p. 132.
[29] The ordinary legislative procedure is laid down in Article 294 TFEU and principally implies that the Council and the European Parliament co-decide on a proposal from the Commission.
[30] Proposal for a Council Regulation amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al Qaida network and the Taliban, COM (2009) 187 final, 22 April 2009.

consulted on the adoption of sanctions that relate to individuals.[31] Immediately, the Committee on Legal Affairs of the European Parliament contested this course of events and suggested Article 75 TFEU as the proper legal basis for the proposed regulation "since the objective is preventing and combating terrorism and related activities by non-State entities".[32] This position was later confirmed in a European Parliament resolution[33] and resulted, after the adoption of Council Regulation No 1286/2009 on the basis of Article 215 (2) TFEU,[34] in an action for annulment before the Court of Justice.[35] Before entering into the discussion about the potential solution to this type of inter-institutional conflict, it is necessary to analyse the new legal framework of EU external action after Lisbon.

EU external action after the collapse of the pillar structure[36]

In an attempt to increase the coherence and consistency of its policies, the Treaty of Lisbon introduced a number of significant innovations such as the formal abolition of the pillar structure (Art. 1 TEU), a single legal personality for the Union (Art. 47 TEU), a single set of foreign policy objectives (Art. 21 TEU) and new institutional actors (President of the European Council, High Representative for Foreign Affairs and Security Policy, External Action Service). Perhaps even more important than the institutional adaptations to increase the coherence of the EU's external action is the introduction of a new delimitation rule to distinguish between CFSP and non-CFSP external actions of the Union. Article 40 TEU lays down that the implementation of the CFSP shall not affect the application of the other EU competences and *vice versa.*

This new rule stands in stark contrast to the hierarchic relationship between the pillars under the old treaty regime, where, inspired by a fear of intergovernmental contamination of supranational decision-making, several provisions underlined the primacy of EC competences.[37] Former Article 47 EU in particular aimed to protect the *acquis communautaire* against any encroachment on the part of the EU Treaty.[38] In the *ECOWAS* judgment, the ECJ found that for measures pursuing two aims which are inextricably linked without one being incidental to the other – in this case development cooperation and CFSP – priority should be given to the non-CFSP legal basis. Whenever an act could be adopted on the basis of the EC Treaty it turned out impossible to adopt an act with a

[31] Communication from the European Commission to the European Parliament and the Council, "Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures", COM (2009) 665 final, 2 December 2009.
[32] European Parliament Committee on Legal Affairs, Opinion on the legal basis of the proposal for a Council Regulation amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban, JURI_AL(2009)430917, 4 December 2009, p. 8.
[33] European Parliament resolution of 19 December 2009 on restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, in respect of Zimbabwe and in view of the situation in Somalia, OJ (2010) C 286 E/5.
[34] Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban, O.J. 2009, L 346/42.
[35] Action brought on 11 March 2010 – *European Parliament* v. *Council*, Case C-130/10.
[36] For a more detailed analysis, see: P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure: In Search of a new Balance between Delimitation and Consistency", 47 *CML Rev.* (2010), pp. 987-1019.
[37] See ex Article 47 EU in conjunction with ex Art. 1 (3) and 2 EU.
[38] Case C-91/05, *Commission* v. *Council* (ECOWAS), [2008] ECR I-3651, para. 31-33; Dashwood, "Article 47 TEU and the relationship between first and second pillar competences" in Dashwood and Maresceau (Eds.), *Law and Practice of EU External Relations* (Cambridge, 2008), pp. 70-103.

similar content on the basis of the EU Treaty, irrespective the nature of the Community competences.[39]

The new provisions on EU external action, introduced with the Treaty of Lisbon, have far-reaching implications for the existing case law and significantly affect the previous delimitation rules. First, the presumption in favour of using non-CFSP powers whenever possible is no longer valid. The CFSP is elevated to an equal level of protection as a result of Article 40 TEU in combination with Article 1 (3) TEU. Second, as a result of competence overlaps and the intertwined character of different foreign policy areas, the Court's traditional analysis of the 'aim and content' of a measure is not well-suited to distinguish between CFSP and non-CFSP actions. The interconnection between the EU's external policies is emphasised in Article 21 TEU, which includes a comprehensive list of objectives for the entire range of EU external action, and in Article 23 TEU, which states that the EU's activities in the field of CFSP are guided by the general principles and objectives of EU external action as a whole. In line with this approach, Article 24 (1) (ex 11, as amended) TEU no longer includes any references to CFSP objectives. Accordingly, it seems particularly difficult to apply a centre of gravity test. Hence, the question is how the Court can delineate between CFSP and non-CFSP external action in disputes such as the one between the European Parliament and the Council on the correct legal basis for the adoption of restrictive sanctions against individuals linked with Al-Qaida, the Taliban and Usama bin Laden. In other words, do those measures essentially belong to the EU's counter-terrorism policy in order to establish an AFSJ or do they mainly aim to promote international peace and security as part of the CFSP?

Potential solutions to inter-institutional conflicts about the legal basis for the adoption of restrictive sanctions against individuals

Possible criteria to distinguish between the AFSJ and the CFSP

One option to solve the above mentioned dilemma is to apply the more general rule (*lex generalis*) only when action under a more specific provision (*lex specialis*) is not possible.[40] Taking into account that the scope of Article 75 TFEU is more defined, relating to administrative measures restricting capital movements and payments of individuals in order to prevent and combat terrorism, whereas Article 215 TFEU provides for all types of restrictive measures and also measures against third countries, this model suggests that Article 75 TFEU and not Article 215 (2) TFEU is the appropriate legal basis for amending Regulation 881/2002 EC. This argument is reinforced by the finding of the Court in *Kadi* that "the essential purpose and object of the contested regulation is to combat international terrorism [...] and not to affect economic relations between the Community and each of the third countries where those persons or entities are."[41] However, the application of Article 75 TFEU is confined to achieve the EU's internal security objectives laid down in Article 67 TFEU. It is, in other words, questionable whether a broad definition of the EU's counter-terrorism competences can include sanctions against individuals operating outside the EU's borders without affecting the Union's CFSP competences protected under Article 40 (2) TEU. This is particularly the case when those sanctions are adopted to implement UN Security Council resolutions.

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[39] Case C-91/05, *supra* note 38 , para 58-62; Van Elsuwege, "On the Boundaries between the European Union's First Pillar and Second Pillar: A Comment on the ECOWAS judgment of the European Court of Justice", 15 *Columbia Journal of European Law* (2008), 531-548.

[40] M. Cremona, "Defining Competence in EU External Relations: Lessons From the Treaty Reform Process" in Dashwood and Maresceau (Eds.), *Law and Practice of EU External Relations* (Cambridge, 2008), p. 46.

[41] ECJ, Joint Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, [2008] ECR I-6351, para. 169.

Proceeding from the perspective that the AFSJ and the CFSP represent the EU's internal and external security policies, it may well be argued that Article 215 TFEU, as part of the EU's external action, is used as a legal basis for sanctions against third states and persons engaged in activities outside the EU whereas Article 75 TFEU can be used exclusively for adopting measures against persons who are active inside the EU. This distinction reflects the old differentiation between sanctions adopted under the second and third pillar respectively (cf. *supra*). In practice, however, it appears very difficult if not impossible to distinguish between internal and external aspects of security. Terrorist organisations do not stop at the borders of the Union or its Member States and often have links all around the globe. The *Al Qaida* network and its alleged links with terrorist attacks in Spain and the United Kingdom provide a perfect example. At the least, it is arguable that terrorist organisations operating from outside the Union not only threaten the international peace and security but also the internal area of freedom, security and justice. Hence, any distinction on the basis of the internal or external dimensions of the targeted sanctions appears somewhat artificial. Moreover, this would be contrary to the comprehensive approach to counter-terrorism laid down in the European security strategy[42] and the Stockholm Programme on the implementation of the AFSJ.[43]

A more appropriate solution could be to distinguish between two types of sanctions against individuals suspected of terrorist activities. In this scenario, Article 75 TFEU serves as the legal basis for sanctions adopted in the context of the EU's autonomous counter-terrorism strategy whereas Article 215 TFEU would apply for financial sanctions based on UN-lists.[44] This option has the advantage of clarity but nothing in the wording of Article 215 TFEU restricts its application to the implementation of UN Security Council resolutions. Hence, it is perfectly possible to adopt autonomous sanctions in addition to UN sanctions in one and the same legal instrument.[45] The only precondition is the prior adoption of a decision falling within the scope of CFSP. Taking into account the rather general definition of CFSP, including "all areas of foreign policy and all questions relating to the Union's security",[46] a link with UN Security Council resolutions may in itself be regarded as sufficient to trigger the application of Article 215 TFEU. Moreover, autonomous EU actions against terrorists operating outside the EU's borders automatically have a foreign policy link that bring them at least potentially within the scope of Article 215 TFEU. This would limit the use of Article 75 TFEU to autonomous financial sanctions against EU-internal terrorists.

Based upon a comparison of the scope *rationae materiae* of Articles 75 and 215 TFEU, it may also be argued that not the source of the terrorist threat (internal vs. external) or the initiator of the sanctions (EU vs. UN) but the type of sanctions (counter-terrorist vs. foreign policy) determines the choice of legal basis. This would imply the use of Article 75 TFEU for counter-terrorist sanctions and Article 215 TFEU when restrictive measures are connected to the political situation in a third country. This interpretation suggests that Article 215 (2) TFEU codifies the Minin line of case law allowing for sanctions against persons having a sufficient link with the territory or the rulers of a given country (cf. *supra*). From this perspective, Articles 75 and 215 TFEU are complementary in nature. The latter includes a general rule applicable in respect to a well-defined geographical area outside the EU

[42] A Secure Europe in a Better World, European Security Strategy, Brussels, 12 December 2003, http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf.
[43] European Council, "Stockholm programme – an open and secure Europe serving and protecting citizens", *OJ* (2010) C 115/ 6.
[44] Eckes, *supra* note **Error! Bookmark not defined.**, p. 123.
[45] A good example are the sanctions adopted against the Ghadaffi regime in Libya, which included in separate annexes those entities and persons designated by the UN Security Council or the UN Sanctions Committee and the persons and entities subject to the EU's autonomous sanctions policy. See: Council Regulation (EU) No. 204/2011 of 2 March 2011 concerning restrictive measures in view of the situation in Libya, OJ (2011) L 58/1.
[46] Art. 24 (1) TEU

territory. Article 75 TFEU, on the other hand, allows for the adoption of financial sanctions against individuals involved in terrorist activities which potentially affect the EU's internal security and this irrespective whether the anti-terrorist measures are adopted autonomously by the Union or for the implementation of UN Security Council resolutions. The observation that the European Parliament challenges only the sanctions against the *Al-Qaida* network but not Council Regulation 356/2010 imposing restrictive sanctions against certain natural and legal persons, entities and bodies in Somalia, reflects this approach. Taking into account that the application of Article 75 TFEU is limited to the prevention and combating of terrorism in order to establish an AFSJ, this distinction appears logical.

However, a division between general foreign policy sanctions based on Article 215 TFEU and specific counter-terrorism sanctions under Article 75 TFEU cannot conceal the continued existence of certain grey zones. After all, terrorism is a volatile concept. For instance, the persons and entities listed in the EU sanctions Regulation against Somalia are all related to *Al-Shabaab,* which has recently been designated as a 'terrorist organisation' in many countries and which is suspected of close links with *Al Qaida*.[47] Or, to give another example, the Taliban used to belong to the official government of Afghanistan but are now linked together with Usama bin Laden and Al Qaida in the context of the EU's counter-terrorism strategy. In other words, the borderline between terrorist activities and other acts threatening the (international) peace and security is not always very clear and may evolve. As a result, the borderline between Articles 75 and 215 TFEU can never be straightforward.

The option of a double legal basis and the consistency of the EU's external action

Proceeding from the interconnection between terrorism and security and between the internal and external dimensions of security, it is at least arguable that the restrictive sanctions against persons linked with Usama bin Laden, Al Qaida and the Taliban pursue both the objectives of the AFSJ and of the CFSP. Because both dimensions appear to be equally important and cannot be separated in practice, the question is whether recourse to a dual legal basis might be an appropriate solution. According to the Court's established case law, recourse to a dual legal basis can exceptionally provide a way out on the condition that procedures laid down for the respective legal bases are not incompatible and do not undermine the rights of the European Parliament.[48] Whereas a combination between qualified majority voting and unanimity in the Council appears to be excluded,[49] the Court's conclusions in *Opinion 1/08* and *International Fund for Ireland* reveal that this rule is not absolute.[50] Taking into account the very unusual provision of Article 40 TEU, which prescribes a balance between the procedural and institutional characteristics of the EU's CFSP and non-CFSP external competences as well as the duty of consistency (Art. 7 TFEU), a compromise solution of a double legal basis including CFSP and non-CFSP provisions seems, therefore, not by definition excluded. Such a compromise would, on the one hand, respect the external competences of the European Parliament and, on the other hand, confirm the principle of unanimous decision-making in the Council.

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[47] *Al-Shabaab* is designated as a terrorist organisation in the United States, Australia, Canada and the United Kingdom. See: http://www.nctc.gov/site/groups/al_shabaab.html.
[48] Case C-300/89, *Titanium dioxide* [1991] ECR I-2867, para. 17-21; Case C-178/03 *Commission* v. *Parliament and Council* [2006] ECR I-107, para. 57.
[49] Case C-338/01, *Commission* v. *Council* [2004] ECR I-4829, para. 58.
[50] S. Adam and N. Lavranos, Case note on Opinion 1/08, 47 CML Rev. (2010), p. 1535; Case C-166/07, *European Parliament* v. *Council of the European Union* [2009] ECR I-7135, with case not of T. Corthaut, "Institutional Pragmatism or Constitutional Mayhem?", *CMLRev.* (2011), pp. 1271-1296.

The different roles of the European Parliament in the decision-making process (co-decision with the Council in the context of Article 75 TFEU and only a right of information under Article 215 TFEU) are not problematic either. On several occasions, the Court confirmed that a legal basis providing for a limited or even no formal role for the Parliament is compatible with the co-decision procedure.[51] The Court argued that such a combination reinforces the democratic legitimacy of decision-making and ignored the implications for the Council, which is deprived of its exclusive legislative competence.[52] Recourse to a double legal basis would at least have the advantage of respecting the envisaged balance between the EU's CFSP and non-CFSP competences as laid down in Article 40 TEU. Moreover, any other solution, i.e. the adoption of the restrictive measures on the single legal basis of either Article 75 TFEU or Article 215 TFEU, seems to be based on artificial criteria which are difficult to reconcile with the objective of policy coherence in the EU's external action. The latter is expressly mentioned in Article 21 (3) TEU and is reflected in the EU's institutional practice after Lisbon.[53] First, EU sanctions implementing CFSP decisions are adopted on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission.[54] Second, the Court of Justice is given jurisdiction to adjudicate on the duty of consistency. Until the entry into force of the Lisbon Treaty, respect for this obligation was basically entrusted to the political institutions with the Court's role confined to protecting the *acquis communautaire* against any encroachment from intergovernmental influences.[55] Hence, a certain bias in favour of division of competence questions rather than to concerns of consistency could be observed.[56] The new treaty rules may help to rebalance this situation, potentially leading to an increased acceptance of a dual legal basis as a compromise solution to inter-institutional conflicts. In contrast to the pre-Lisbon situation, when the triple legal basis of Articles 60, 301 and 308 EC appeared problematic due to the Court's unconvincing reasoning (cf. *supra*), a combination of Articles 75 and 215 (2) TFEU seems less problematic in light of the increased attention to the duty of consistency.

Conclusion

The rules for the adoption of restrictive sanctions against individuals or non-State actors clearly illustrate the constitutional complexities of the European Union. In the pre-Lisbon period, the implementation of the Union's counter-terrorism strategy and UN Security Council resolutions required actions under the three pillars and from the Member States depending upon the specific nature of the sanctions at stake. Economic sanctions, in particular, turned out to cut across the Union's pillar structure requiring a combination of Member State, EU and Community measures. The evolution towards a practice of targeted sanctions against individuals and non-State actors required pragmatic solutions. In this respect, the Court of Justice played a crucial role in clarifying the division of competences between the different institutional actors. First, based upon a purposive interpretation of the provisions on economic sanctions against third states, the Court accepted that also measures against the rulers of those states as well as individuals and entities associated with them or controlled by them could be adopted. Second, in *Kadi and Al Barakaat*, the

[51] Case C-178/03, *Commission* v. *Parliament and Council* [2006] ECR I-107, para. 59; Case C-155/07, *Parliament* v. *Council* [2008] ECR I-8103, para. 77-79.
[52] See in this respect Opinion of Advocate General Kokott in Case C-178/03, para. 61 and Case C-155/07, para. 89.
[53] On the notions of consistency and coherence in the EU's external action, see: C. Hillion, "Tous pour un, un pour tous! Coherence in the External Relations of the European Union", in Cremona (Ed.), *Developments in EU External Relations Law* (Oxford, 2008), pp. 10-36.
[54] According to Art. 18 (4) TEU, the High Representative "shall ensure the consistency of the Union's external action."
[55] Ex Art. 3 EU juncto Art. ex 46 EU and 47 EU.
[56] C. Hillion and R. Wessel, "Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?", 46 CML Rev. (2009), p. 581.

ECJ clarified that also measures against non-State actors could be adopted by making use of the so-called flexible legal basis (ex Art. 308 EC) in combination with the rules on economic sanctions against third states (ex Art. 60 and 301 EC). Third, for sanctions against non-State actors operating inside the Union, the competences on police and judicial cooperation formed the appropriate legal basis even though the treaties did not allow for any legislative action in this area and thus required action by the Member States.

For a number of reasons, the pre-Lisbon pragmatic approach turned out to be unsatisfactory. In particular, the absence of a specific legal basis to target non-State actors constituted an important hurdle for the effective implementation of UN Security Council Regulations. The exceptional use of a triple legal basis made the adoption of the required measures possible but nevertheless seriously complicated the decision-making procedure[57] and raised questions about the legitimacy of the EU's actions.[58] Moreover, the distinct procedures for the adoption of sanctions within the framework of the Union's CFSP, implemented on the basis of binding Community instruments, and within the context of the EU's autonomous strategy against internal terrorist groups, which required implementation at the Member State level, were difficult to justify in terms of policy coherence.

In order to remedy the identified problems, the Treaty of Lisbon introduced a specific legal basis for the adoption of restrictive measures against individuals under both the chapter on the AFSJ (Art. 75 TFEU) and for the implementation of the CFSP (Art. 215 (2) TFEU). Whereas this was a logical evolution in order to provide the Union with the necessary powers for an effective implementation of its counter-terrorism policy, on the one hand, and for the implementation of UN Security Council resolutions, on the other hand, the different decision-making procedures under both policy areas raise new challenges of coherence. In particular, the absence of a formal role for the European Parliament in the area of CFSP in comparison to its position as a co-legislator with regard to the AFSJ increases the potential for inter-institutional litigation after Lisbon. This is clearly illustrated with the dispute about the legal basis for the amendment of Regulation 881/2002/EC imposing restrictive sanctions against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban.

A comparison of the wording and scope of Articles 75 and 215 TFEU reveals that both provisions allow for the adoption of restrictive sanctions against individuals, either in the context of the AFSJ or with regard to the implementation of CFSP decisions. Obviously, a certain overlap between both provisions is unavoidable. Actions of international terrorist networks such as *Al Qaida* threaten both the internal and external security of the Union. Nevertheless, it may be possible to apply the more specific provision of Article 75 TFEU in case of counter-terrorism measures and to reserve Article 215 TFEU for sanctions related to the political situation in a given third country. Whether or not the sanctions result from an autonomous EU decision or from the implementation of UN resolutions would then be regarded as a formal distinction which does not as such affect the choice of legal basis. According to the Court's settled case law, the latter essentially depends on the aim and content of the measure at stake.[59] Nevertheless, the use of a double legal basis as a compromise solution to solve inter-institutional conflicts may not be excluded in light of the increased attention to the consistency of the EU's external action.

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[57] Under former Articles 60 and 301 EC, the Council could adopt sanctions by qualified majority voting whereas the addition of Article 308 EC implied a unanimity requirement.
[58] See, in particular, Eckes and Tridimas, *supra* notes **Error! Bookmark not defined.** and 26.
[59] See e.g. Case C-295/90, *Parliament* vs. *Council* [1992] ECR I-4193, para. 13.

Guarding EU-wide Counter-terrorism Policing: The Struggle for Sound Parliamentary Scrutiny of Europol

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Abstract

Since the terrorist attacks in New York and Washington, DC (2001), Madrid (2004) and London (2005), the European Union (EU) has stepped up its efforts to develop new instruments and reinforce existing ones to fight terrorism jointly. One of the key aspects of the EU-wide fight against terrorism and serious crime is the facilitation and enforcement of information and intelligence exchange among law enforcement authorities and, to a limited extent, security and intelligence services. This article examines how far the EU's commitment to democracy, accountability and transparency is actually fulfilled with respect to its efforts at fighting terrorism by drawing on the example of the activities of the European Police Office (Europol). Taking the European Parliament (EP) and National Parliaments (NPs), but also inter-parliamentary forums, into account, the article analyses how, and to what extent, mechanisms of democratic accountability and, in particular, parliamentary scrutiny are in place to hold EU-wide counter-terrorism actors, such as Europol, to account. This is a particularly timely question given that Europol's parliamentary scrutiny procedures are currently subject to considerable changes due to the change in its legal mandate as of 1 January 2010 and the entry into force of the Lisbon Treaty.

Keywords

Europol; Counter-terrorism; EU internal security; Parliamentary scrutiny; Democratic accountability; Rendition

IN ITS RECENTLY ADOPTED INTERNAL SECURITY STRATEGY (ISS), THE EUROPEAN UNION (EU) re-emphasised its strong commitment to fighting terrorism within its territory (Council of the European Union 2010a). Indeed, counter-terrorism practices are not a purely domestic task anymore. In the aftermath of the terrorist attacks on New York and Washington, DC on 11 September 2001 and subsequent terrorist incidents on European territory, "police institutions across the globe have proliferated their counterterrorism strategies, both domestically and abroad, while international police have likewise stepped up their campaigns" (Deflem 2006a: 241). As a regional actor, the EU quickly identified terrorism as one of the key common threats its member states have to face in the current world (Council of the European Union 2003, 2010a).[1] The transnational nature of the threat and the realisation that "Europe is both a target and a base for […] terrorism" (Council of the European Union 2003: 3) are continuously referred to as justifications for increasing counter-terrorism activities at the EU level (for example, Europol 2008: 5). Key features of

[1] This article refers to terrorism as defined in Article 1 of the Council Framework Decision of 13 June 2002 on combating terrorism (see Council of the European Union 2002a).

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the EU's fight against terrorism are, for example, anti-radicalisation measures, instruments to combat the financing of terrorism, as well as the strengthening and facilitation of information and intelligence sharing between not only police authorities, but also other security providers, such as intelligence services (Spence 2007; Howorth 2008).[2]

While the EU swiftly pushed its counter-terrorism agenda and provided for institutional and mandatory changes, concerns have been raised by parliamentary actors, human rights bodies and a few academic scholars that this development has not been sufficiently accompanied by thorough democratic monitoring and scrutiny of the activities. This article will investigate this claim, focusing on the efforts of the European Police Office (Europol) at fighting terrorism. Europol is well suited for this purpose as it is the only EU-wide law enforcement body and it has experienced both an extension of its remits over the years, as well as an increase in financial and personnel resources (see Europol's Annual Reports; House of Commons, Home Affairs Committee 2007: para. 88). Originally set up as an intergovernmental body outside the EU framework, Europol became an EU agency on 1 January 2010. The article will examine how far the EU's continuous emphasis on its commitment to democracy, accountability and transparency in its security policies is actually fulfilled with respect to Europol and EU-wide counter-terrorism policing.[3] In the context of transnational policing, the EU remains an understudied actor. This article will shed some light on how, and to what extent, mechanisms of democratic accountability and, in particular, parliamentary scrutiny are in place to hold EU-wide counter-terrorism actors, such as Europol, to account. This is a particularly timely question given the recent institutional and quasi-constitutional challenges the EU experienced under the Lisbon Treaty.

The article proceeds as follows. The first section will outline the extent to which the EU, and, in particular, Europol are now involved in activities aimed at fighting terrorism. Based on this exploration, the second section will briefly discuss the need for mechanisms of democratic accountability, and parliamentary scrutiny in particular, with respect to EU-wide counter-terrorism policing. To explore the challenges of democratic scrutiny in depth, sections three and four will analyse current forms and tools of parliamentary scrutiny available to the European Parliament (EP) and National Parliaments (NPs) respectively with a particular focus on counter-terrorism policing at the EU level. Completing the picture of the parliamentary scrutiny mosaic, the final section will explore recent debates concerning strengthened inter-parliamentary co-operation in this field.

Europol and EU counter-terrorism policing

In July 2001, the EP's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (2001) regretted in a Report the EU's "slowness in responding to the terrorist threat and the fact that there is as yet no coherent and legally binding set of coordinated measures". Two months later, the events of 9/11 had a considerable impact not only on national policing strategies and powers in many EU Member States, but also on the EU. Immediately afterwards, the then Presidency of the European Council (2001) stated that the fight against terrorism ought to become a major policy objective of the Union. The 2010 ISS emphasised that terrorism remains the main common threat to the EU (Council of the European Union 2010a).

[2] In this article, the term 'intelligence services' refers to both domestic security services and foreign intelligence services, unless stated otherwise.

[3] Recent references to such values can be found in official documents, such as the Lisbon Treaty, the ISS and the Stockholm Programme (European Council 2010).

The EU's agenda on counter-terrorism has been rightly described as event-driven (see, for example, Coolsaet 2010). The9/11 attacks provoked the EU to prioritise the fight against terrorism as a policy objective. It led, for example, to an EU-wide agreement on a common definition on the term 'terrorism' and the proliferation of initiatives and institutional changes as well as the expansion of functions and mandates of institutions in the area of Justice and Home Affairs (JHA). To tackle terrorism, the European Security Strategy (ESS) called for a broad response to terrorism suggesting "a mixture of intelligence, police, judicial, military and other means" (Council of the European Union 2003: 7). Yet, it was only after the Madrid bombings that the EU's counter-terrorism efforts really "began to come together" (Howorth 2008: 96). The bombings were followed by a Declaration on Combating Terrorism of 15 March 2004, providing for a long-term EU strategy to combat terrorism with a particular focus on the root causes of terrorism. Notably, the Declaration also provided for the expansion of Europol's competences and the establishment of the Joint Situation Centre (SitCen), an intelligence unit which is now part of the European External Action Service. The 2005 EU Counter-Terrorism Strategy finally became the main point of reference for the EU's counter-terrorism efforts, identifying four key areas in which the EU was to become more proactive: 'Prevent' (radicalisation and recruitment), 'Protect' (people and infrastructure from terrorist attacks), 'Pursue' (terrorists) and 'Respond' (to a terrorist attack) (Council of the European Union 2005a).

Given that the EU prioritises a law enforcement approach to terrorism, most of its efforts are located in the field of police and judicial co-operation in criminal matters (PJCC).[4] Certainly, "large chunks of counterterrorism endeavours in Europe remain principally within the confines of national decision-making" (Coolsaet 2010: 858). That refers, in particular, to sensitive operational matters. There is nevertheless an increasing pressure on security providers to adopt an approach of 'need to share', rather than maintain the traditional approach of 'need to know'. This has become visible in the form of national fusion centres, such as the UK's Joint Terrorism Analysis Centre, where operational intelligence concerning terrorism is collected, analysed and distributed. Yet the 'need to share' does not only refer to the domestic framework, but also to the international realm (Gill and Phythian 2006; Andreas and Nadelmann 2006). Concerning counter-terrorism, logistical, financial and administrative efforts have been made to facilitate such international collaboration.

The EU broadly focuses on the enhancement of communication between counter-terrorist actors at various policy levels. In the operational fields of policing and intelligence, the term communication mainly refers to information and intelligence sharing. For example, the so-called Swedish Framework Decision of 2006 called on national law enforcement authorities to improve their information sharing; and the aim of a 2005 Council Decision was to strengthen the exchange of information concerning terrorist offences (Council of the European Union 2005b, 2006). Collecting and analysing information about suspicious individuals and behaviour is widely understood to be of utmost relevance for detecting terrorist suspects and intervening before the actual criminal offence. Disrupting terrorist networks often depends on "low-level, factual and fragmented" (Gibson 2009: 923) information, including foreign phone numbers, travel records or credit card transactions.

The EU-wide institutional provisions in this field vary immensely. For example, the 2008 Council Decisions concerning the stepping up of cross-border co-operation with a particular focus on counter-terrorism and cross-border crime, based on an international treaty between the governments of Germany, Austria, Belgium, The Netherlands and Spain ('Treaty of Prüm'), allow for the sharing of data among national law enforcement

[4] In addition, the EU implemented preventive administrative measures to fight terrorism proactively. Key examples are the establishment of terrorist watch lists, the exchange of Passenger Name Records (PNR) with countries such as the United States (US) as well as the EU's efforts to freeze terrorist assets.

authorities including fingerprints, deoxyribonucleic acid (DNA) samples and vehicle registrations (Council of the European Union 2008a, 2008b). Other forms of bi- as well as multilateral co-operation are more informal and partly take place outside the EU framework (see Den Boer *et al.* 2008).The most formal example for strengthened co-operation in the field of law enforcement, and counter-terrorism as well, is Europol, the central European-wide law enforcement body based in The Hague.

Europol aims to facilitate the exchange of information and criminal intelligence in the field of law enforcement. The body is bestunderstood as a formal network due to its elaborated liaison system including Europol Liaison Officers (ELOs) seconded from national authorities of the EU Member States but also from non-EU countries and international organisations, such as Interpol.[5] Europol's central secretariat is located in The Hague and was staffed with 662 people in 2009, including ELOs and personnel directly employed by Europol (Council of the European Union 2010b). In addition to police officers, staff of other law enforcement authorities, customs and intelligence services work at Europol's premises. Europol's budget has been increased from €68.5 million for 2009 to €92.6 million for 2010 – which included €12.5 million to allow for a smooth transition to become an EU agency (Council of the European Union 2010b).

According to its mandate, Europol's overall objective is"to support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating organised crime, terrorism and other forms of serious crime affecting two or more Member States" (Council of the European Union 2009a: Art. 3).[6] To fulfil its mandate, Europol focuses on investigative and analytical intelligence, collects and analyses data from national police agencies and other security authorities and transfers information and intelligence to designated national authorities or EU bodies if necessary. According to its Annual Report covering 2008, Europol (2009) annually supports around "15,000 international investigations into the most significant criminal networks in the EU".

As a network of information exchange, it has only limited capacities to gather information on its own and needs to be provided with data from national agencies (Monar 2006: 503). It nevertheless has its own analysis capabilities – most obviously in form of the criminal intelligence databases titled Analysis Work Files (AWFs), two of which – 'Hydra' and 'Dolphin' - are designated for counter-terrorism. The results of such strategic analyses on different types of crime, including terrorism, are then circulated to EU bodies and national police forces. This also includes the possibility to assist national criminal investigations by the means of information analysis.

Europol's Counter Terrorism Unit, which used to be part of its Serious Crime Department, is now part of Europol's recently established Operations Department (O4). The Unit comprises the areas ofterrorism, illicit trafficking in nuclear and radioactive substances, illicit trafficking in arms, ammunition and explosives as well as racism and xenophobia (Council of the European Union 2005c). Operational and strategic analysis, support to operational investigations at the national level and training of police officials are the main tasks of the Unit. More specifically, it provides a range of analytical products (terrorism threat assessments, 'missing links for ongoing international investigations'); it facilitates information exchange and access to Europol's databases and exchange systems; it can provide expertise 'on-the-spot' through its mobile office and hosts and it maintains several analysis initiatives (Council of the European Union 2010b: point 3.1). The 2009 data for

[5] Laurence O'Toole (1997: 445) refers to networks as "structures of interdependence involving multiple organisations. They exhibit some structural stability and include, but extend beyond, formal linkages alone". See also Gerspacher and Dupont (2007) and Deflem (2006b).
[6] The mandate was expressed in a similar manner in Europol's previous mandate, the so-called 'Europol Convention'.

Europol's secure network suggests that 7 per cent of the new cases were related to terrorism (Council of the European Union 2010b: point 2.4). In recent years, it has increasingly developed "more strategic instruments, such as the European Bomb Database and the Early Warning System for explosives and CBRN material" (Council of the European Union 2010a: 8).

Due to the limits that Member States imposed on Europol, it does not have executive police powers.[7] In the last couple of years, however, various steps have been made towards a more active and operational role of Europol, which led to a discussion about Europol's potential move towards a European Federal Bureau of Investigation (FBI; see Occhipinti 2003; Jeffrey-Jones 2007). Smaller countries such as Austria and Belgium have indeed suggested the establishment of an FBI-like European Police Office, but this was not followed up on (European Report 2005). Nevertheless, there are indications that Europol is slowly transforming into a more operational body and there has been an expansion of its powers. For example, Europol staff can participate in so-called joint investigation teams (JITs) alongside national authorities and it can request individual states to initiate or conduct investigations in specific cases (Council of the European Union 2002b).To improve the EU-wide fight against terrorism, Europol also gained access to other databases of the EU, such as the Schengen Information System (SIS) and the Visa Information System (VIS) database (Council of the European Union 2005d, 2008c).

There is also an external dimension of Europol's co-operative network. Europol can establish and maintain relations with bodies from third countries. The negotiations with the United States (US) after the 9/11 attacks were the most extensive between Europol and a third country so far. They concluded in an agreement in December 2001 on the exchange of both strategic and technical information in the fight against a broad range of serious forms of international crime and the exchange of liaison officers followed by an additional agreement on exchange of data on persons in December 2002 (Europol 2001, 2002). This co-operation was further intensified through a formal liaison arrangement with US law-enforcement agencies.[8] More recently, as part of the EU-US Terrorism Finance Tracking Programme (TFTP) Europol has become the EU agency responsible for verifying the legality of requests from American counterparts concerning financial data from the SWIFT banking network.

Europol's secure communication channels are also used for other multilateral counter-terrorism activities. One example for this is the Atlas group, a grouping of special anti-terrorism teams from all 27 EU member states, including the British Special Air Service (SAS) and the French *Groupe d'Intervention de la Gendarmerie Nationale* (GIGN). While there is little information publicly available about the group, its key aim is to foster co-operation of national counter-terrorist forces, also in order for those forces to be able to support each other in the context of a terrorist incident (European Commission 2007: 9). The forces are meant to strengthen their co-operation "where necessary through organisational and operational arrangements, between Police, Customs, Security Services and Special Forces in the Crisis Management of terrorist incidents" (European Commission 2007: 9).

To conclude, this section has demonstrated the emergence of counter-terrorism policies of the EU over the last decade. Europol continuously strives for a strengthened role in counter-terrorism activities, despite its remaining lack of operational and arrest powers. As Europol's Director recently emphasised in a media interview, that Europol ensured an

[7] Article 72 of the TFEU maintains that the ultimate responsibility for the maintenance of law and order and the safeguarding of internal security lies with the Member States.
[8] The Europol-US agreements are examples of the growing external dimension of the AFSJ. In this dimension, the fight against terrorism is also one of the priority areas (see European Commission 2005).

important role in the transatlantic TFTP ought to be understood as yet another indicator that it moves further into "frontline counterterrorist work" (Fidler 2011).

Means of counter-terrorism potentially touch on civil rights and individual freedoms, however. It is therefore a highly political decision to fight terrorism by certain means and not by others, if at all. According to standards of democratic security governance, debates and negotiations about this should not be left to executive, technocratic bodies meeting 'behind closed doors', but such decisions require transparent debates and scrutiny procedures in public forums, such as parliaments (see also Elvins 2006: 36). The following section will therefore explore in how far Europol's counter-terrorism activities have been accompanied by mechanisms of democratic accountability and, in particular, parliamentary scrutiny.

A vacuum of democratic accountability?

To ensure democratic accountability, parliaments are often understood as the most important accountability holders in democratic regimes (*e.g.* Bovens 2007). Parliamentary scrutiny ensures the accountability "to a body the majority of whose members are democratically elected and capable of determining the broad direction of policy" (Morgan and Newburn 1997: 80). In general, parliaments are mandated to check the executive and debate and pass laws and therewith "confer democratic legitimacy upon the binding rules that govern the demos" (Tsakatika 2007: 549). They can hold governmental actors to account and provide overall guidance for them. By holding policing bodies to account, parliaments also provide voters with information that allows them to judge the performance of the institution in question. Finally, parliaments also provide the forum to discuss, and decide, what kinds of conduct a society wishes "to declare off-limits" (Peirce 2009).

A lack of sound democratic scrutiny concerning counter-terrorism actors and their performance would appear to be particularly severe, as the activities are of a very sensitive issue and debates about them are intermingled with questions of human rights and individual freedoms. That networks under the EU's umbrella focus on information exchange and data analysis rather than executive functions does not mean that such freedoms and rights cannot be hurt by their work. False or misinterpreted information can impinge on an individual directly. For example, the individuals listed on the EU's so-called terrorist list are directly affected by this administrative act of 'listing' as their financial assets are frozen and they are subject to travel restrictions (Guild 2008). Moreover, information distributed via networks, such as Europol, have been gathered somewhere and their origin, and the means by which they have been gathered, are not always transparent to other network participants. To put it in a nutshell, counter-terrorism might affect human rights and individual freedoms and it is therefore supposed to be governed by strict rules and norms of democratic control.

The experiences of terrorism in various European countries in the late 1960s and throughout the 1970s encouraged co-operation at the European level under the umbrella of the TREVI group in 1975.[9] The creation of TREVI was the starting point for increasing co-operation with regard to policing, judicial cooperation and mutual assistance in civil and criminal law, formally framed in Title VI ('Police and judicial cooperation in criminal matters') of the Treaty on European Union (TEU) which became effective on 1 November 1993. Since then, the area has been characterised by a "restless institutional dynamic" (Walker 2004: 14), further pushed by the Treaty of Amsterdam in 1997 calling for the creation of the AFSJ. The area grew in impressively short time both in terms of functions

[9] TREVI refers to *'Terrorisme, Radicalisme, Extremisme, Violence Internationale'*.

and in terms of institutional capacity, comprising diverse policy aspects and institutions. As a consequence, the AFSJ is understood as being complex, ambiguous and opaque (Guild and Carrera 2005: 2).

Article 67of the Treaty on the Functioning of the European Union (TFEU) maintains an explicit mandate for the EU to provide a high level of security for its citizenry. The tools of providing security through information-sharing networks such as Europol raise concerns, however, about the relationship between the citizens – for whom security is provided – and the networks as the security providers. It appears that the bonding between the citizens and the practices of transnational counter-terrorism policing is a fragile and barely existing one. The Third Pillar was of an intergovernmental nature, *i.e.* the decision-making processes remained in the hands of member-states' governments. While the Lisbon Treaty merged the *acquis* of the Third Pillar with that of the Community and therefore provides for ordinary supranational EU decision-making procedures with respect to most matters of JHA, operational police co-operation is one of the issues that remain subject to the unanimity in the Council and where the EP has only to be consulted (General Secretariat of the Council of the EU 2009). In addition, the Treaty allows for enhanced co-operation with respect to police work. Due to the strong role of the executive in this policy field, citizens have only limited and rarely direct impact on the field. This is intensified by the general problem that transnational policing has only "low public visibility" (Loader 2002).It is therefore likely that accountability and transparency in this field remain problematic under the Lisbon Treaty. Certainly, this is in sharp contrast to the original idea of the creation of the AFSJ which "was to be based upon the principles of transparency and democratic control, as well as upon an open dialogue with civil society in order to strengthen the acceptance and support of citizens" (Eder and Trenz 2003: 113; European Council 1999). Moreover, the Third Pillar has been well-known for its technocratic policy-making approach "whereby decisions are de-politicised through being placed in the hands of law enforcement 'experts' to develop ideas and legitimising discourse for political elites. Such bodies do not have to justify either the basis of those decisions, or their implications, to national democratic structures" (Elvins 2006: 36-37). With respect to Europol, this approach became in particular obvious in the debate about the Europol-USA agreements on the exchange of data and liaison officers.

The following two sections will explore the parliamentary scrutiny of Europol, and the EU's counter-terrorism activities more broadly, focusing on the EP (section 3) as well as the role of NPs (section 4). The sections will analyse the struggle for sound parliamentary scrutiny of Europol over time, taking into account the recent changes caused by the transfer of Europol from a body based on an international treaty to an EU agency. While Europol remains politically accountable to the Council, and Europol's Director is accountable to Europol's Management Board comprising one representative from each Member State, and the Commission, the arrangements of parliamentary scrutiny are far more complex.

Scrutinising Europol at the EU level: the role of the European Parliament

Given Europol's mandate and range of activities, scrutiny through the EP appears to be a crucial feature of its oversight system. Yet, the EP's powers were strictly limited with respect to policing before the entry-into-force of the Lisbon Treaty. Overall, "European internal security cooperation [was] characterised by the disinclination of the Union's interior ministers and their officials to subject themselves to robust parliamentary input" (McGinley and Parkes 2007: 245). The TEU excluded the EP, but also its national counterparts, from any serious role concerning matters of policing. Although the Treaty of Amsterdam provided the EP with a few more competencies concerning the Third Pillar, the Council continued to hold most of the power in this area. The case of Europol was no exception (Occhipinti 2003: 68; Anderson 1995: 254). Moreover, the EP had merely

consultative powers with respect to the implementation process of the EU's emerging counter-terrorism policy (Monar 2005: 450). It was also completely excluded from the two agreements between the EU and the US on extradition and mutual legal assistance in criminal matters on 25 June 2003 (Monar 2004: 406). The governments of the EU Member States kept their sovereignty in this area as much as possible.

Despite the fact that the lack of parliamentary scrutiny had long been criticised by civil rights activists, parliamentarians and others, the national governments - in form of the Council of Ministers –were deeply reluctant to allow a stronger role for parliaments in this area. The key reason was their desire to keep full control over this area. Consequently, the Council, but also the European Commission, used to involve the EP only when absolutely necessary. Article 39 of the TEU required the Council to *consult* the EP before the adoption of any legally binding measures in this field (*e.g.* decisions, framework decisions and conventions). That included, for example, decisions regarding the development of Europol, but it excluded any priority setting. Moreover, such a consultation procedure had no binding effects for the Council "whereas parliaments in the Member States must approve rules governing the functioning of national agencies" (Apap 2006: 3). Even when it came to the adoption of the Council Act of November 2002 regarding the crucial Protocol to amend the Europol Convention and the Protocol on the privileges and immunities of Europol, the members of its organisations, the deputy directors and the employees, a lack of consultation was stated by MEPs. All in all, at least three key challenges to parliaments can be identified in the specific context of Europol's work: there is a lack of regular reports on police cooperation between national authorities, the reports provided by Europol contain insufficient information to assess effectiveness and appropriateness of its activities and there is no independent assessment of Europol's operations (Peers 2005: 202).

Given these serious limitations of parliamentary scrutiny with respect to Europol, several academic scholars, policy-makers and police practitioners suggested improvements concerning the democratic control of Europol in general and its parliamentary oversight in particular (see, for example, Bruggeman 2006; House of Lords 2003; Apap 2006; Puntscher Riekmann 2008). Some of these have been included into the Lisbon Treaty which, overall, strengthens Europol's parliamentary scrutiny. However, that the national governments were keen on keeping the EP excluded from decision-making with respect to Europol for as long as possible became apparent briefly before the Lisbon Treaty took effect. The Treaty would abolish the EU's pillar system and, constituting one single legal framework, provide for co-decisive and consent powers for the EP.[10] According to Article 68 TFEU, the European Council could set "strategic guidelines for legislative and operational planning", but the EP was nevertheless to be involved in the legislation process. Therefore, at a time when the Treaty of Lisbon was agreed on but not yet ratified fully, the governments of the Member States ratified and implemented some important protocols which were necessary in order to agree on a Decision replacing the Europol Convention. If they would not have found an agreement and the Treaty of Lisbon would have entered into force quickly, such a regulation would have had to be negotiated with the EP (see also Monar 2008: 121).

A similar situation emerged in late 2009. On 25 November 2009, the EP rejected four proposals concerning Europol which had been tabled by the Council with regard to Europol's AWFs, the confidentiality of its information, its exchange of personal data with partners and its agreements with third countries. Again, the timing is crucial to understand the Council's attempts to avoid parliamentary involvement in matters of policing. By the time the Council presented the proposals to the EP, the provisions of the TEU required the

[10] There are severe limitations to the EP's role given special provisions on several issues concerning police and judicial co-operation. In particular, operational co-operation among national law enforcement authorities is an area in which the EP will continue to have a consultative role only.

Council only to take the opinion of the EP into account (which in practice meant that it could ignore it). Had the proposals been tabled only one week later, the Lisbon Treaty would have been entered into force and the EP would have had the powers of full co-decision making on these issues. The EP criticised the Council's rush of the decisions sharply (European Parliament 2009). Nevertheless, the JHA Council ignored this criticism and adopted the four proposals during a meeting on 30 November – one day before the Lisbon Treaty became effective (Council of the European Union 2009b, 2009c, 2009d, 2009e).

Yet the EP has not been entirely 'toothless' in the field of PJCC. For example, the EP increased its influence in these matters over time through so-called issue linkages. Since the Parliament's approbation was necessary for First Pillar legislation, it sometimes agreed on a legal instrument only under the condition that its opinion would be considered seriously with respect to a certain Third Pillar measures. Such was the case concerning the debate about the VIS, for example (McGinley and Parkes 2007: 248).

Also, the investigation into the European involvement in the CIA's extraordinary rendition programme must be understood as a counter-terrorism feature where the EP acted as a substitute at a time when NPs were not sufficiently safeguarding their role as accountability holders (Hillebrand 2009). Following an investigation by the Council of Europe into the involvement of European countries in cases of extraordinary rendition, the EP used its powers to set up aTemporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners (TDIP) (European Parliament, TDIP 2007; see also Council of Europe Parliamentary Assembly 2006, 2007). The collection of information appeared to be a challenging task, partly because some EU bodies were reluctant to assist the work of the TDIP Committee. As a consequence, the final report bluntly criticised the lack of co-operation of individual EU officials and institutions in the investigation, including the refusal of the then Director of Europol, Max-Peter Ratzel, to appear before the Committee.

Given the limited role of the EP in the intergovernmental decision-making processes within the Third Pillar and with respect to Europol in particular, it pushed initiatives to change Europol's legal basis for some time. Most notably, in a 2003 Resolution on Europol's Future Developments it suggested to replace the existing Europol Convention with a Council decision so that decisions relating to Europol would no longer be taken by the Council acting unanimously but would need to be adopted by qualified majority and by co-decision with the EP (European Parliament 2003). The EP also required to be "provided with the legal means and institutional framework to enable it in the future to exercise genuine democratic control" (Apap 2006: 4).

The transfer from an intergovernmental institution to an EU agency also meant that Europol would lose autonomy and that its (semi-)operational powers could be easier expanded at the same time. This led the 2006 Finnish EU-Presidency to table the improvement of Europol's legal framework, and the JHA Council on 4-5 December 2006 agreed to replace the Europol Convention by a Council Decision. The Commission quickly provided a draft decision, but a consensus on the final wording of the Council decision establishing Europol was only reached some 15 months later at a Meeting of the JHA Council on 18 April 2008 (see Amici 2010: 82-83). The final Decision was adopted on 6 April 2009 and has been effective as of 1 January 2010 (Council 2009a).

This 2009 Council Decision includes substantial changes concerning Europol's mandate and its powers. Up to the end of the year 2009, Europol operated outside the EU Treaty, but the Council Decision transferred Europol into an entity of the EU. That implies that European Community action rules now apply to Europol. Crucially, the EP is now involved in controlling and overseeing Europol's budget (Art. 43(6), (9) and (10) Council Decision).

This change had an impact on the EP's powers to gather more information directly from Europol, as "Europol is also obliged to submit to the EP, at the latter's request, any information required for the smooth application of the discharge procedure for the financial year in question" (European Commission 2010: 7).

The new Council Decision also maintains that the adaption of the Council Decision strengthens the role of the EP with respect to Europol's scrutiny, as the Parliament has the general right to be heard in respect to all implementing measures based on a Council decision. More explicitly, Article 88 of the TFEU maintains that the EP will now "determine Europol's structure, field of action and tasks" in co-decision with the Council.

So far, however, practices appear not to have changed substantially. Over time, the EP as a whole and in particular members of its LIBE Committee have pointed out again and again the marginalisation of the EP with respect to EU security matters. For example, in the context of developing and implementing the ISS a recent working document of the LIBE Committee criticised the "disregard shown to date by the Commission and Council for the role of the European Parliament and national parliaments in drawing up this strategy. […] Incredible as it may appear, the principal strategic documents adopted to date by the European Council, the Council and the Commission seem to ignore the existence of the European Parliament altogether" (European Parliament, LIBE Committee 2011: 4). Crucially, the Commission was criticised for effectively delaying the 'Lisbonisation' of Europol, despite the EP's clearly signalised priority of this matter (European Parliament, LIBE Committee 2011).

While the EP remains struggling to ensure a stronger position within Europol's oversight system, the Commission, in contrast, continuously emphasised that "the opportunities for scrutiny of Europol by the European Parliament are 'legally appropriate'" and that it "would not support deeper involvement by, for example, including provision in a future Regulation for the European Parliament to designate members of Europol's Management Board or to participate in the appointment of Europol's Director" (European Commission 2010b: point 10.11). The Commission justified that decision with the limited powers and autonomy of Europol. National executives tend to support the Commission's stance. For example, the UK Minister of Crime Prevention argued that "in order to protect Europol's political independence, there should be no role for the European Parliament on Europol's Management Board or in appointing Europol's Director" (House of Commons, EU Committee 2011).

While it appears that the recent changes of Europol's legal footing and institutional role within the EU have brought about several improvements concerning the EP's scrutiny powers with respect to Europol and, overall, strengthened the parliamentary scrutiny at EU level, the following section will draw the attention to parliamentary scrutiny procedures at the national level.

Scrutinising Europol at the national level: the role of national parliaments

The network perspective on Europol, suggested at the beginning of this article, refers to strong linkages between Europol's central secretariat and national law enforcement authorities in the Member States – most notably through Europol's liaison system. This structure calls for a crucial involvement of all NPs in Europol's parliamentary scrutiny landscape. From a perspective of democratic governance, scrutiny through NPs is important as it directly links the elected parliaments with the EU system (Guild and Carrera 2005: 4). In Europe, police and intelligence authorities and their activities are overseen and controlled within the domestic framework. Since they are bodies with executive functions, the scrutiny of the governments through their national parliaments is a key mechanism.

Parliamentary scrutiny is also one element of the traditional checks on executive law enforcement powers in terrorism investigations. Finally, some authors argue that the main problems with regard to the EU's overall democratic legitimacy remain at the national level and should therefore be tackled at that level as well (*e.g.* Muller-Wille 2006).

Detailed comparative information about the ways in which NPs scrutinise matters of EU-wide police co-operation is hard to find. A rare exception is the questionnaire that the Secretariat of the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) circulated in 2008 among NPs to inquire into their scrutiny procedures of the Schengen process (*i.e.* the measures included in the Schengen Agreement, as well as the enlargement of the Schengen Area) (COSAC 2008: Annex). The questionnaire was driven by the question as to whether the particular sensitivity of the issues, which were touching on questions of asylum, security and individual freedoms, had pushed the NPs to reinforce their general scrutiny procedures of EU policies in this particular area (COSAC 2008: ch. 4 and Annex). The result was that most NPs continued to use their normal scrutiny procedures, which are usually not binding for the government in question. Several parliaments have strengthened their monitoring efforts concerning matters related to the AFSJ. In the German Bundestag, for example, "the scrutiny of EU-documents relating to the Schengen area is firstly scrutinised by the Internal Affairs Committee, then the European Affairs Committee and finally in the plenary. The Federal government has to report before and after the meetings of the Justice and Home Affairs Council to the Internal Affairs Committee on the different aspects of the Schengen *acquis* and on the enlargement of the Schengen area"(COSAC 2008: 39). Few countries have substituted their normal scrutiny procedures by special arrangements for Schengen issues (for example, Italy created a bicameral committee on Schengen and Europol).

Despite such provisions, the role of NPs in the field of European police co-operation is criticised from various sides. One problem is that decision-making at EU level tends to exclude NPs in the early stage of policy-shaping and decision-making.[11] Concerning procedures of parliamentary scrutiny, Monar (2008: 120) argued that there is a "problem of ineffective national parliamentary scrutiny procedures that have difficulties to cope with the increasing volume of JHA legislation". That leads to delays in ratifying regulations which have been agreed at EU level. Another problem was raised by an MEP in an anonymous interview with the author in March 2008. Asked about the co-operation between the EP and NPs concerning the AFSJ, they criticised that the NPs are very much focused on national matters and would not feel responsible for the scrutiny of the EU's (then) Third Pillar (Interview A). An expert in the field of data protection in the Third Pillar also expressed their impression that NPs have no time, do not take the time, have no interest or do not prioritise the area of police co-operation (Interview B). Given such limitations and restrictions, the general role of the NPs concerning police co-operation has been described as a 'non-role' (Lodge, 2007). Other observers have, however, argued that, in contrast to the EP, NPs often "had better opportunities to influence the legislation processes in the third pillar, due to the unanimity requirement" (Lummer 2008).

Concerning Europol, NPs used to be involved in the ratification process concerning the proposals to amend the Europol Convention and the Protocols thereto. Such a national ratification process could push the involvement of NPs to explore Europol's work (Peers 2005: 203). Moreover, NPs have the powers to oversee their national representatives on Europol's Management Board. These representatives do not report directly to their Parliament, however, but to their respective Government Minister and, as the collective board, to the Justice and Home Affairs Council. The national ministers are then answerable to their parliaments.

[11] For the problem of 'de-parliamentarisation' in general see Börzel (2000).

Up to the entry into force of the Europol Council Decision, the role of NPs concerning issues related to Europol was not clearly regulated. Art. 34 §3 of the Europol Convention only pointed to the fact that the Member States' governments should deal with the parliamentary role individually. As a consequence, NPs were usually not involved in any of the agreements that Europol negotiated with third parties (such as the two Europol-USA agreements discussed above). Their involvement was limited to the ratification process of proposals for amending the Europol Convention and the Protocols thereto. In this process, they did not have an impact on the text, but only decide whether or not they want to ratify the amendment. For example, when the Europol Convention – Europol's previous legal base - was originally established, neither the EP nor the NPs were consulted in the negotiations or the process of the drafting of the Convention. When questioned about the involvement of parliament in drafting and approving the Convention in the British House of Commons on 11 January 1996, the then British Home Secretary, Michael Howard, replied in writing as follows: "The final text of the Europol convention was published, and laid before Parliament, on 8 December last year. Drafts of the convention were not public documents and therefore were not published nor made generally available" (House of Commons 1996). Tellingly, he added that "[t]he police service were closely consulted throughout the negotiation of the convention through police representative organisations" (House of Commons 1996). Thus, while parliaments and the wider public were not involved in the negotiations at all, executive authorities were much more so. Moreover, the ratification process of the Europol Convention provided the NPs with no power to amend the text. This is a crucial basic problem with respect to Europol since, as Aden (2001: 112) stated, "[o]nce established, international bureaucratic institutions such as Europol will leave little scope to be reshaped by democratic institutions".

In 2002, the Dutch Parliament circulated a questionnaire among the parliaments of the then EU Member-States to understand how other NPs dealt with the subject of Europol (Fijnaut 2002). Though few countries replied, it became clear that at that point "Europol [was] usually only discussed in meetings – plenary sessions or meetings of special committees – concerning the European Union or the Third Pillar in general" (Fijnaut 2002: 18). Also, it appeared that parliamentary chambers found it difficult to assess Europol's work. However, several NPs across Europe had mechanisms in place to examine Europol's budget and the protocols, which amend the Convention (see COSAC 2005: 89-94).

Up to today, NPs primarily examine Europol's performance "through their control over their respective governments, in accordance with the constitutional rules of each Member State" (European Commission 2010: 8). Crucially, NPs supervise the work of the minister responsible for policing, and therefore also Europol. However, the recent transfer of the Europol Convention by a secondary EU law act in 2009 carries the danger that NPs might no longer be directly involved in future changes to Europol's legal framework. Future amendments to the Europol Council Decision only require a qualified majority voting in the Council. This appears to be a considerable loss of powers for NPs as the ratification process of changes to Europol's statutory footing was one of the few ways through which NPs were involved in Europol's scrutiny (Lavranos 2003: 261). This way NPs were able to "influence decisions at EU level by pressuring their governments to veto a certain law" (Lummer 2008). The involvement of parliaments should not be limited to the approval of a convention anyway, however. Instead, they should already be engaged during the preparation process so they could have an impact on the content of agreements. In a similar vein, a report on Europol by the House of Lords (2003) pledged for a strong role of the NPs in the accountability procedure of Europol.

Paradoxically, certain aspects of the TFEU suggest a potentially strengthened role for NPs. In general, NPs are called on to "contribute actively to the good functioning of the Union" (Art. 12 TFEU). More specifically, the Treaty explicitly calls for NPs to engage with issues

concerning the AFSJ (for example, by ensuring that EU legislation in this area respects the principle of subsidiarity). With respect to Europol, NPs are to be involved in the "political monitoring" (Art. 12(c) TFEU) of its activities. However, the wording of the TFEU in this respect is vague and it remains to be seen which mechanisms NPs will use to fulfil their new mandate. Moreover, under the Lisbon Treaty, NPs receive from the Commission any draft legislative act at the same time as it is transmitted to the EP and the Council. They are asked to verify the latter's compliance with the principle of subsidiarity and, depending on the national constitutional procedures, have the right to state an opinion (Art. 12 TEU; European Commission 2010: 20-21).

What remains a particular concern are intergovernmental arrangements concerning counter-terrorism policing outside the EU framework. Guild and Geyer (2006) argued, for example, that NPs "are not able to guarantee democratic control over purely intergovernmental agreements." A crucial example was the ratification procedure of the Prüm Treaty in the German Bundestag in May 2006. The government did not give the Bundestag a fair chance to influence the outcome as it granted only "some weeks for parliamentary scrutiny – including committee work" (Guild and Geyer 2006).[12] Similarly, the external dimension of Europol's network raises concerns. The two Europol-US Agreements of 2001 and 2002 - referred to earlier in this article - became directly binding law, but they did not involve the EP or NPs in any meaningful sense. Consequently, the UK House of Lords Select Committee (2003: 17) criticised the second EU-US Agreement for having "in effect been settled with the United States authorities before it was deposited for scrutiny."

As the scrutiny performance of the EP and, in particular, the NPs remains unsatisfactory on many accounts, some called for the parliaments to pool their powers and resources or to, at least, co-ordinate their work in this context better. To complete the picture, the final section will briefly explore the main discussion points.

Towards a combined effort?

The remaining shortcomings of parliamentary scrutiny led several observers to call for increased co-operation between NPs and the EP in order to ensure a high degree of scrutiny of Europol. A close co-operation between NPs and the EP has also to be welcomed from a network perspective, given the interwoven structure of Europol's various 'nodes'.

While there have been early attempts to establish a joint committee previously (*e.g.* European Commission 2002), such an option is dramatically facilitated by regulations under the Lisbon Treaty. In particular, Article 88(2) TFEU calls for co-ordination between the EP and NPs in scrutinising Europol. In principle, three institutional arrangements are on the table. Firstly, a strengthened role for an existing inter-parliamentary body, namely COSAC, which already has some experience with respect to matters related to the AFSJ. Secondly, a more informal option would be the use of existing inter-parliamentary meetings of MEPs as well as national MPs. And finally, a third option would be to create a new Joint Committee comprising of representatives of the EP and the NPs (possibly drawn from existing specialist committees).

Interestingly, the Commission has taken a strong stance in favour of the third option. In late 2010, the Commission circulated a Communication on the procedures for the parliamentary scrutiny of Europol's activities (European Commission 2010b). In it, the

[12] See also the criticism of the lack of time and influence concerning the first Europol-US Agreement on the transmission of personal data in the 2003 House of Lords Report on Europol.

Commission expressed dissatisfaction with the existing arrangements and called for the creation of a joint body or inter-parliamentary forum, comprising the relevant members of NPs and the EP, which would meet on a regular basis. Doing so would ensure "unifying parliamentary control at European Union level (without prejudice to national parliamentary procedures)" (European Commission 2010b: 15). It would also enable a smoother information transfer on Europol to NPs.

A few NPs have quickly raised concerns about the proposal. The Commission Communication was discussed by the EU Select Committee of the House of Commons in February 2011, for example. It came to the conclusion that the suggested joint Committee would operate on a European, rather than the national level, and "would cover aspects of Europol's strategic planning and activities" which the House of Commons' Committee "would not routinely consider" (House of Commons, EU Committee 2011). It also emphasised that "any views expressed within the framework of inter-parliamentary cooperation should not bind national parliaments or prejudge their positions" (House of Commons, EU Committee 2011). Moreover, the UK Minister for Crime Prevention, James Brokenshire rejected the idea, not seeing any additional value of such a body (House of Commons, EU Committee 2011). He pointed to the 2008 report by the House of Lords European Union Committee which maintained that such a joint Committee comprising representatives of 27 member states would be likely to be unworkable.

The Commission's course of action in this matter hit a sensitive spot for parliamentary actors, threatening their self-understanding of independent authorities. As the House of Commons EU Committee (2011) explicitly stated, "it is for the European Parliament and national parliaments to determine together how to organise and promote effective and regular inter-parliamentary cooperation." This is in accordance with Art. 9 of the Protocol (No 1) to the new Treaties on the role of NPs, which maintains that the EP and NPs "shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union."

The idea of a joint committee, or strengthened inter-parliamentary scrutiny mechanisms, crucially depends on the willingness of the parliamentarians in question to engage with each other. As the discussion by the EU Committee above suggests, NPs might fear a power drain from the national to the EU level. As a consequence, NPs appear to slowly wake up to the need of becoming more actively involved in the discussion. At a recent meeting of the speakers of the NPs, the representatives also discussed the 'Role of the Parliaments in the Monitoring of the European Freedom, Security and Justice'. For example, they discussed plans for the creation of a database which would allow parliamentary committees to exchange information concerning parliamentary oversight of the security and intelligence services (Federal Parliament of Belgium 2011). The creation of a 'European Network of National Intelligence Reviewers' by setting up a website was supported by the participants. More specifically, the speakers discussed the existing parliamentary mechanisms to monitor Europol's activities in the light of the Commission's communication. They considered the current forms of scrutiny to be insufficient and suggested "that scrutiny should be exerted by an interparliamentary body within which representatives of the national parliaments and the European Parliament would meet on a regular basis" (Federal Parliament of Belgium 2011). While details of form, mandate and structure of such co-operation remained unclear, it was suggested to organise the scrutiny "within the framework of the existing interparliamentary structures" (Federal Parliament of Belgium 2011).

While strengthened co-operation concerning the parliamentary scrutiny of Europol will remain the subject of discussions for some time, the Commission provided a clear timeframe, as it aims to integrate detailed mechanisms of parliamentary scrutiny into a new legal framework for Europol (expected to be based on an EU Regulation) in 2013.

Conclusion

In most European countries, counter-terrorism activities are now regulated by special legislations which provide both police and intelligence authorities with special powers and means. At the same time, current counter-terrorism activities include procedures of information gathering and sharing across borders. The EU is an emerging actor in the field of counter-terrorism policing, though its powers are still very limited in comparison to national authorities. Yet, transnational threats, and the networked response by security providers, "put into question the foundations of a security system based on the norms of national sovereignty and a state monopoly of the legitimate use of violence" (Krahmann 2005: 204). This development also causes challenges with respect to the democratic scrutiny of current transnational forms of security provision. This article was concerned with policing efforts via EU-wide networks in the field of counter-terrorism, which are tasked with the facilitation and enhancement of information and intelligence sharing, focusing on the case of Europol.

The analysis of the responsibilities and powers of parliaments scrutinising Europol provided above provides a complex picture of the existing accountability and oversight landscape. At the time of writing this article, Europol's legal framework and scrutiny procedures are still "the subject of an ongoing reflection" (European Commission 2010b: 5). The article demonstrated that the scrutiny mechanisms have been changed several times since the creation of Europol, but the recent changes under the Lisbon Treaty as well as due to Europol's new legal framework are the most dramatic ones. The analysis demonstrated that the EP has come a long way from a consultative body to a co-legislator in this field. The Parliament's scrutiny powers have been strengthened, overall. The picture is more blurred when it comes to the role of the NPs, in particular due to changes in Europol's ratification procedures. Neither the EP nor the NPs have been able to make full use of their new powers and rights so far, however, and currently seem to be in the process of 'soul-searching' in this respect. In general, it will remain difficult for parliamentary scrutiny bodies in this field to "show their muscle as the voice and guardian of the people" (Lodge 2004: 254). Any engagement in the field of police co-operation is hampered by various factors. In particular, the network-like transnational structure, the multitude of actors involved and the overall secrecy of the field pose crucial challenges.

An important improvement would be an improved co-operation among parliamentary actors at both the EU and the national level. While the final section of the article outlined the challenges of creating any inter-parliamentary forum, such a body would allow parliamentary actors to compare their 'best practices' and problems in this field and to pool their investigative efforts with respect to EU-wide policing, and Europol in particular. At a time when internal security has become a fully-fledged policy matter under the Lisbon Treaty, the EU has confirmed its commitment to values such as democracy, transparency and accountability. However, as ongoing debates about the new ISS suggest, there remains a mismatch of those normative claims and the EU's everyday practices (House of Lords, European Union Committee 2011). Taking on an active role in negotiating their scrutiny rights and procedures, the NPs could make a constructive contribution to a strengthened democratic accountability of the EU in this field.

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On 'a Continuum with Expansion'? Intelligence Co-operation in Europe in the Early Twenty-first Century

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Abstract

This article argues that during the early twenty-first century, generally we have witnessed greater intelligence co-operation in Europe. Indeed, we can even appropriately discuss the increased 'regionalisation of intelligence'. Effectively reflecting 'uneven and combined development', persistently these co-operative intelligence trends appear to be occurring haphazardly, non-uniformly and at several different rates at the different levels of relations in the various 'pockets' of European intelligence co-operation. This article concludes by arguing that overall there is the development of an ever-more complex web consisting of a plethora of various overlapping international intelligence liaison arrangements that collectively provide a form of regional intelligence coverage in Europe. How they overlap is important, accounting for the connections, and notably the 'disconnects', that publicly come to our attention.

Keywords

Information sharing; Intelligence co-operation; Liaison; Law Enforcement; Policing; CFSP; CDSP; EUROPOL; EUROJUST

IN THIS ARTICLE, SEVERAL INTERCONNECTED PROPOSITIONS ARE PRESENTED FOR THEIR consideration. Adopting a broad approach that intends to comprehensively survey the highly complex and dynamic terrain of contemporary European intelligence co-operation - and other closely associated activities, which essentially involve any form of critical information flows -, many timely insights seek to be provided. In its main, this article argues that during the early twenty-first century, generally we have witnessed greater intelligence co-operation in Europe. Indeed, when examining wider trends, we can even appropriately discuss the increased '*regionalisation of intelligence*'.

The enhanced intelligence co-operation in Europe has been most focussed on the issue of counter-terrorism. This was catalysed especially in the wake of high-profile terrorist atrocities - notably the 11 March 2004 Madrid attacks and the 7 July 2005 London bombings.[1] Other issues that have spurred closer regional intelligence and security co-operation, such as confronting transnational 'organised crime', civil protection and crisis

[1] T. Wetzling, 'European counterterrorism intelligence liaisons' in S. Farson, P. Gill, M. Pythian and S. Shpiro (eds), *PSI Handbook of Global Security and Intelligence: National Approaches (vol. 2)* (Westport, CT: Praeger, 2008), pp.498-532; T. Wetzling, 'Intelligence Cooperation: Dimensions, Activities and Actors', *Issues & Challenges of Intelligence Accountability in Democratic Societies* (Geneva: 10-12 December 2007); R.J. Aldrich, 'International intelligence cooperation in practice', ch. 2 of H. Born, I. Leigh and A. Wills (eds), *International Intelligence Cooperation and Accountability* (London: Routledge, 2011).

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management concerns, have also formed important priorities. These factors equally should not be more overlooked.[2] This is an approach that also largely chimes, but not exclusively, with the 'Copenhagen School' in security studies; particularly where there is an emphasis on 'widening' conceptual lenses so that analysis goes beyond merely focussing on 'traditional/classical', strongly 'Cold War era-associated', and solely 'military-orientated' security concerns.[3]

When taken together, persistently the co-operative intelligence trends (known in the parlance of the intelligence world as 'liaison') effectively reflect the condition of 'uneven and combined development'. They are occurring non-uniformly, and in their work, along with their evolution, they are underway at several different rates of development. This is particularly marked at the different 'levels' of relations in the various 'pockets' of European co-operative intelligence activity. High complexity is manifest.[4]

Ultimately, this article concludes by arguing that overall in Europe there is the development of an ever-more complex web consisting of a plethora of variously overlapping international intelligence liaison arrangements. Collectively, these provide a form of regional intelligence coverage and intelligence and security reach, resulting in the delivery and production of *effects and outcomes* that can, in turn, today, be regarded as being generally satisfactory. How the arrangements and their associated networks overlap and complement one another is important, accounting for the connections, and notably the 'disconnects', that publicly come to our attention. Room for tidying remains.

The developments are essentially on 'a continuum with expansion'. But as ever when working in the 'sensitive' and slightly 'fenced-off' intelligence world, and indeed when researching it, important caveats remain. Distinct operational parameters and limitations therefore continue to feature in a dominant manner, but essentially they do not overwhelm practically.

Examining this subject

A wider concern can be readily articulated. This consideration especially accounts for why the subject under-examination in this article has much contemporary relevance and why it

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[2] See, e.g., 'A Secure Europe in a Better World', *European Security Strategy (ESS)* (Brussels: European Union, 12 December 2003); 'Providing Security in a Changing World', *Report on the Implementation of the European Security Strategy - S407/08* (Brussels: EU, 11 December 2008); 'sub-strategies', e.g., 'Fight against the proliferation of weapons of mass destruction', *EU strategy against proliferation of Weapons of Mass Destruction* (Brussels: 10 December 2003); *The European Union Counter-Terrorism Strategy* (Brussels: European Union, 30 November 2005); *EU Internal Security Strategy* (Brussels: EU, 25 February 2010); 'Commission presents a new set of EU measures to better protect European citizens', *EU Press Release*, and 'The EU Internal Security Strategy in Action: Five steps towards a more secure Europe', *EU Communication from The Commission to The European Parliament and The Council* (22 November 2010); see also the essays in B. Giegerich (ed.), *Europe and Global Security* (London: IISS/Routledge, 2010). For the developing concept of 'Societal Security' in Europe, see the work of the 'European Societal Security Research Group', via their website: <http://www.societalsecurity.eu/> (accessed: 5/12/2010); see also 'The Stockholm Programme', *EU* (Last updated: 16 March 2010); 'Understanding Civilian Protection: Concepts and Practices' and 'Exploring Civilian Protection', *Brookings/United States Institute for Peace* (14 September 2010); J.P. Burgess, 'Non-Military Security Challenges', ch. 4 in C.A. Snyder (ed.), *Contemporary Security and Strategy* (Basingstoke: Palgrave, 2008 [2ed.]), pp.60-78.

[3] See, e.g. references in P. Hough, *Understanding Global Security* (London: Routledge, 2008 [2ed.]); see also B. Buzan, J. De Wilde and O. Wæver, *Security: A New Framework for Analysis* (Boulder, CO: Lynne Riemmer, 1998); B. Buzan and L. Hansen, *The Evolution of International Security Studies* (Cambridge: Cambridge University Press, 2009), esp. from p.212.

[4] On different 'levels' of intelligence liaison relations and their dynamics, A.D.M. Svendsen, *Intelligence Cooperation and the War on Terror: Anglo-American Security Relations after 9/11* (London: Routledge, 2010), pp.167-73; A.D.M. Svendsen, 'Painting rather than photography: Exploring spy fiction as a legitimate source concerning UK-US intelligence co-operation', *Journal of Transatlantic Studies*, 7, 1 (March 2009), pp.1-22.

deserves being opened up to at least a degree of closer and further scrutiny. In terms of scholarship and our understanding, although being increasingly addressed over time, we start from a comparatively and relatively 'low-base'. Both generally, on a global basis, and more specifically with regard to regions, such as Europe, studying international intelligence co-operation is especially important today. This is because during the so-called 'War on Terror' and 'Long War' (c.2001-09), and continuing during the subsequent years since, international intelligence co-operation has expanded exponentially. Including extending into 'globalisation realms', it now effectively represents the most significant dimension of intelligence.[5]

Hand-in-glove has been a similarly burgeoning accountability and oversight deficit.[6] This is concerning and matters to us all, whatever our exact status. Indeed, 'profound implications'[7] have been starkly witnessed during the early twenty-first century. For example, prominent episodes of US 'extraordinary renditions', 'intensive interrogations', and 'torture' allegations have emerged publicly, and their 'fallout' has had a significant and ongoing impact in several individual European countries, as well as regionally, across Europe as a whole.[8]

Furthermore, while over recent years much scholarship has been undertaken concentrating on the broader and closely overlapping theme of '*security* co-operation' in

[5] See, e.g., J.E. Sims, 'Foreign Intelligence Liaison: Devils, Deals, and Details', *International Journal of Intelligence and CounterIntelligence*, 19 (Summer, 2006), p.195; Leader, 'Reforming the intelligence services: The spy game', *The Economist* (19 March 2005), p.12; 'International intelligence networks' in 'Opaque Networks', ch. 6 in A.S. Roberts, *Blacked Out: Government Secrecy in the Information Age* (Cambridge: CUP, 2006), pp.135-138. In the military operation context, 'Information Sharing' in Sqn Ldr S. Gardner, 'Operation IRAQI FREEDOM – Coalition Operations', *Royal Air Force Historical Society Journal*, 36 (2006), p.30; 'Globalising homeland security', *Jane's Intelligence Digest* (6 October 2006); A. Svendsen, 'The globalization of intelligence since 9/11: frameworks and operational parameters', *Cambridge Review of International Affairs*, 21, 1 (March 2008), pp.129-144; A.D.M. Svendsen, 'The globalization of intelligence since 9/11: The optimization of intelligence liaison arrangements', *International Journal of Intelligence and CounterIntelligence*, 21, 4 (2008), pp.661-678; R.J. Aldrich, 'Beyond the vigilant state: globalisation and intelligence', *Review of International Studies*, 35, 4 (October 2009), pp.889-902; R.J. Aldrich, '"A Profoundly Disruptive Force": The CIA, Historiography and the Perils of Globalization', *Intelligence and National Security*, 26, 2 & 3 (2011); A.D.M. Svendsen, *Understanding the 'Globalization of Intelligence'* (Basingstoke: Palgrave Macmillan, forthcoming).

[6] See, e.g., Roberts, *Blacked Out*, p.139; R.J. Aldrich, 'Global Intelligence Co-operation versus Accountability: New Facets to an Old Problem', *Intelligence and National Security*, 24, 1 (February 2009), pp.26-56; Born, Leigh, Wills (eds), *International Intelligence Cooperation and Accountability*; B. Müller-Wille, 'Improving the democratic accountability of EU intelligence', *Intelligence and National Security*, 21, 1 (2006), pp.100-128.

[7] M. Rudner, 'The globalisation of terrorism: Canada's intelligence response to the post-September 11 threat environment', *Canadian Issues* (September, 2002).

[8] Many issues can be cited here: S. Grey, 'The corrosion of secrecy – the CIA's policy of covert renditions', *Chatham House Meeting* (26 October 2006); A. Roberts, 'Review Essay: Torture and Incompetence in the "War on Terror"', *Survival*, 49, 1 (Spring 2007), pp.199-212; J. Egeland and M. Aguirre, 'Torture: America's policy, Europe's shame', *OpenDemocracy.net* (17 June 2009); T. Porteous and N. Inkster, 'Intelligence Cooperation and Torture', *International Law Discussion Group Meeting Chatham House* (5 July 2010); R. Brody, 'Europe must come clean on its involvement in CIA torture', *EuropeanVoice* (24 September 2009); A. Kingsbury, 'Milan's Botched CIA Caper and the War on Terrorism', *US News & World Report* (11 November 2010); J. Stein, 'Spanish prosecutors want 13 CIA agents arrested', *The Washington Post* (13 May 2010); S. Bengali, 'Other countries probe Bush-era torture, not U.S.', *McClatchy* (18 August 2010); S. Swann, 'What happened in Europe's secret CIA prisons?', *BBC* (6 October 2010); M. McKee, 'Europe rights court to review Macedonia role in CIA extraordinary rendition', *Jurist* (14 October 2010); 'CIA rendition flights did land in Ireland: Ahern', *BelfastTelegraph* (17 December 2010); 'Amnesty says EU "failing" over CIA renditions', *BBC* (15 November 2010); 'Swedish ire stopped CIA "terror flights"', *The Local - Sweden*, and J. Nylander, 'CIA rendition flights stopped by Swedish military', *SwedishWire* (5 December 2010); 'Senator Marty explains opposition to blacklists', *Swissinfo.ch* (21 December 2010); 'Former top US diplomat questions DK govt. claims', *Politiken.dk* (12 January 2011); R. Norton-Taylor, 'Ministry of Defence ordered to disclose involvement in US-led rendition', *The Guardian* (19 April 2011); 'More Afghan detainee data must be released – judge', *BBC* (18 April 2011); 'UK judges say they cannot free Afghanistan detainee', *BBC* (29 July 2011); I. Cobain and R. Norton-Taylor, 'Lawyers to boycott UK torture inquiry as rights groups label it a sham', *The Guardian*, and S. Swann, 'Spy chiefs to give public evidence at rendition inquiry', *BBC* (6 July 2011); 'Campaigners to shun UK inquiry into detainee "torture"', *BBC* (4 August 2011); 'Polish officials may face charges over secret CIA prisons', *Warsaw Business Journal* (1 June 2011).

Europe, particularly with a strong emphasis on 'governance' concerns, considerably less has been written about the main focus of this article, namely the more specific area of '*intelligence* co-operation' in Europe.[9] Different approaches to the 'problems' encountered also exist, such as the contrastable law enforcement/security-dominated methodology of 'see and strike' and the intelligence methodology of 'wait and watch'.[10]

With the analysis advanced below, this article now aims to better contribute towards more fully addressing this observed 'paucity' in the overall subject literature. This is together with better highlighting some of the analytical complexities involved in, and during the course of, that addressing. In summary, building on the foundations of the existing scholarship, this article aims to perform the reflective functional role of being a comprehensive 'introduction' to this subject, with the analysis it presents being primarily connective and explorative in nature. Enduring reference utility similarly intends to be advanced.

Accordingly, as it seeks to better bridge discernible 'gaps', comprehensive observation is one of the main tasks undertaken throughout this article. Beginning with an exploration of the theme of 'intelligence *and* Europe' and its witnessed increased 'regionalisation' (and what is meant by that process), this article continues to examine the vexing question of how recent intelligence co-operation in Europe can be best evaluated, with the key structures facilitating contemporary European intelligence co-operation then being unpacked in-depth.

Following the presentation of this analysis, how wider European intelligence co-operation *trends* can be best captured is then discussed. Finally, several overall conclusions are presented, demonstrating that, extending into the future, many pressing challenges still remain within this domain of intelligence activity. At the least, these need their continued consideration for constantly maintaining the fashioning of the most advantageous effects and outcomes.

Advancing an increasingly enhanced understanding of this subject, as it continues to unfold in our contemporary context, can be most useful. Not least, this occurs as an ever-more sophisticated response is required in an ever-more timely manner in our 'just-in-time' society. Notably, operational through to strategy/policy-orientated 'ends' and 'missions' can be most effectively accomplished by applying the helpful 'tool' and 'mechanism' of intelligence co-operation, as a 'means' and as an ongoing issue management 'solution'. This emerges as being in much demand in order to effectively navigate and address the multiple regional(-ised) to global(-ised) intelligence and security concerns that are currently confronted in Europe and in closely linked theatres beyond.[11] We begin with the 'higher-level' constructs involved.

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[9] See, e.g., the essays under 'Part 1: Europe' in E.J. Kirchner and J. Sperling (eds), *Global Security Governance: Competing Perceptions of Security in the 21st Century* (London: Routledge, 2007); see also M.E. Smith, *Europe's Foreign and Security Policy: The Institutionalization of Cooperation* (Cambridge: CUP, 2003); S.G. Jones, *The Rise of European Security Cooperation* (Cambridge: CUP, 2007), as well as some of the other sources focussed on this theme cited throughout this article, e.g., Giegerich (ed.), *Europe and Global Security*.

[10] Svendsen, *Intelligence Cooperation and the War on Terror*, p.34.

[11] A.D.M. Svendsen, 'Intelligence Liaison: An essential navigation tool', ch. in J. Schroefl, B.M. Rajaee and D. Muhr (eds), *Hybrid and Cyber War as Consequences of the Asymmetry* (Frankfurt a.M.: Peter Lang Intl., 2011). This observation also ties into the overlapping arguments essentially that 'global', 'social' and 'public goods' exist, and these constructs are not disconnected from being closely linked to intelligence, see, e.g., *IISS Strategic Survey 2009* (London: IISS/Routledge, 2009), p.387; J.S. Nye, Jr., 'The American National Interest and Global Public Goods', *International Affairs*, 78, 2 (2002), pp.233-244; H. Altinay (ed.), *Global Civics* (Washington, DC: Brookings, 2011).

Exploring the increased 'regionalisation' of intelligence in Europe

The issue of intelligence in Europe has increasingly emerged. Not all comfortably, it has acquired a higher public profile, and it has become a subject of much concern and debate. This has in part been fuelled by the experience of the US and the subsequent European homeland terror attacks, as well as the responses to them.[12] Greater contextualisation is necessary.

Alongside the prominent terrorism concerns, further law enforcement and intelligence liaison driving factors in Europe, and more generally in the increasingly globalised context in international affairs, have featured. These include key security issues that extend from being regional-to-global (even 'glocal') in their impact, such as: Weapons of Mass Destruction (WMD) proliferation, increased organised crime, illegal immigration, people and drugs (narcotics) trafficking, as well as fulfilling the demands of peacemaking, peacekeeping and other humanitarian, civil protection and crisis management operations.[13]

A brief literature survey suggests that earlier, around the end of the twentieth century, the issue of intelligence *vis-à-vis* Europe was arguably more overlooked.[14] It was also more understudied - albeit an imbalance beginning to be addressed more seriously around 2000.[15] During 2000-01, there were also several debates surrounding the controversial European Parliamentary Inquiry into the UKUSA arrangement's ECHELON system.[16] By 2011, the subject of 'intelligence and Europe' is now being more effectively addressed in the literature. The trend of closely following behind the curve of developments and events occurring in the 'real-world' continues.[17]

These developments can be readily characterised. Generally we are witnessing greater intelligence co-operation - even if admittedly that intelligence co-operation is mixed, and can be regarded as emerging haphazardly and incrementally in places.[18] Indeed, today,

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[12] See, e.g., as already discussed above; see also 'Norway PM Jens Stoltenberg warns against "witch hunt"', *BBC* (1 August 2011).

[13] On these issues, F.B. Adamson, 'Crossing Borders: International Migration and National Security', *International Security*, 31, 1 (Summer 2006), pp.165-199; 'MPs warn over Turkey migrant risk to EU', *BBC* (1 August 2011); T. Farrell, 'Humanitarian Intervention and Peace Operations', ch. 15 in J. Baylis, *et al.* (eds), *Strategy in the Contemporary World* (Oxford: OUP, 2010 [3ed.]), pp.308-332; A. Vines, 'Rhetoric from Brussels and reality on the ground: the EU and security in Africa', *International Affairs*, 86, 5 (September 2010), pp.1091-1108; 'EU Ministers Call for WMD Readiness', *Global Security Newswire* (8 November 2010); 'UK decides to opt in to EU-wide cyber security plan', *BBC* (3 February 2011). On the negative fallout from overall globalisation, see, e.g., S. Weber, N. Barma, M. Kroenig, E. Ratner, 'How Globalization Went Bad', *Foreign Policy* (January/February 2007); J.A. Scholte, 'Globalization and (In)Security', ch. 9 in *Globalization: A critical introduction* (London: Palgrave Macmillan, 2005 [2ed.]), pp.279-315.

[14] As an exception, see, e.g., N. Gal-Or, *International Cooperation to Suppress Terrorism* (London: T&F, 1985), pp.74-76.

[15] See, e.g., C. Baker, 'The search for a European intelligence policy' (c.2001), *Federation of American Scientists (FAS) e-print*; O.R. Villadsen, 'Prospects for a European Common Intelligence Policy', *CIA Studies in Intelligence*, 9 (Summer 2000); K. O'Brien, 'Europe weighs up intelligence options', *Jane's Intelligence Review* (1 March 2001).

[16] J. Richelson, 'Desperately seeking signals', *Bulletin of the Atomic Scientists* (March/April 2000); P.R. Keefe, *Chatter* (London: Random House, 2005), pp.288-89; 'Echelon: An Anglo-Saxon Conspiracy Claim', *The Economist* (29 April-5 May 2000); 'Spying on or for Europe', *Jane's Foreign Report* (4 May 2000).

[17] See, e.g., the literature cited throughout this article; B. Müller-Wille, 'For Our Eyes Only?: Shaping an Intelligence Community Within the EU' (Paris: Institute for Security Studies, EU, 2004); J.I. Walsh, 'Intelligence-Sharing in the European Union: Institutions Are Not Enough', *Journal of Common Market Studies*, 44, 3 (2006), pp.625-43 and ch. 4 in his *The International Politics of Intelligence Sharing* (NY: Columbia UP, 2010), pp.88-109; B. Fägersten, 'European Intelligence Cooperation: Drivers, Interests and Institutions', *SIIA Working Paper No. 6* (Stockholm: Swedish Institute of International Affairs, 2008); J.I. Walsh, 'Security Policy and Intelligence Cooperation in the European Union', *Paper prepared for the biennial meeting of the European Union Studies Association, Los Angeles* (April 2009).

[18] For the 'incremental' dimension, A. Daun and T. Jäger, 'Geheimdienstkooperation in Europa', *Welt Trends*, Nummer 51, Jahrgang 14 (Sommer 2006).

collectively this greater intelligence co-operation is taking place on a sizeable enough scale in Europe to allow the discussion of trends pertaining to the increased *regionalisation* of intelligence. A form of regional intelligence coverage exists for all participants.

Several relevant insights can equally be drawn from other closely related bodies of scholarship. This includes from the literature focussed on the themes of 'regionalism' and 'regionalisation' in the overlapping security context, as well as from the literature concentrating on the broader theme of (general) 'international co-operation'. These more generally concerned sources offer added value in further helping us to extend our understanding of the developments undergone in this more specific realm, namely, in this article, in relation to the co-operative intelligence interactions underway in Europe.[19]

Indeed, Swedish scholar Björn Hettne's 'new regional theory' is most instructive. This is particularly where Australian scholar Craig A. Snyder summarises it as arguing that 'the development of regionalism is dependent on the support of the regional great power(s), the extent of reciprocity that exists in the relations of the states in the region, and the level of strategic reassurance that exists among these states.'[20]

Preliminary observations soon emerge. Unsurprisingly, particularly in the wake of the deeply shocking 11 September 2001 (9/11) terrorist attacks in the United States, the intelligence co-operation in and beyond Europe in the early twenty-first century has mostly been focussed on the issue of counter-terrorism.[21] In Europe, this co-operation was then essentially catalysed substantially further, particularly internally, in the wake of the 11 March 2004 Madrid attacks, in which 191 people were killed.

Most immediately, the Madrid attacks resulted in widespread demands for increased and more effective sharing of counter-terrorism-related intelligence within Europe. These movements were to be accomplished within the region both *geographically* as well as *organisationally* within the *EU framework*, for example with the enhancement of the Joint Situation Centre (SitCen).[22] This call resonated strongly as discoveries were made during the course of the *post facto* investigations that the perpetrators of the Madrid attacks had substantive connections to a number of European countries.[23] The 7 July 2005 bombings

[19] See C.A. Snyder, 'Regional Security and Regional Conflict', ch. 13 in his (ed.), *Contemporary Security and Strategy*, pp.227-242; 'Regionalism' in M. Griffiths and T. O'Callaghan, *International Relations: The Key Concepts* (London: Routledge, 2002), pp.273-275; J. Bergenäs, 'Fighting Security Challenges With Regional Cooperation', *World Politics Review* (8 December 2010); 'Enhanced diplomacy, regional organizations key to countering terrorism, OSCE expert tells security conference', *Organization for Security and Co-operation in Europe* (18 February 2009); 'Co-ordinated UN, OSCE action key to addressing regional security challenges', *OSCE* (15 February 2011); also, e.g., I.W. Zartman and S. Touval (eds), *International Cooperation* (Cambridge: CUP, 2010); B. Mendelsohn, 'International Cooperation in the War on Terrorism', *ISN Insights* (28 June 2010); C. Norrlof, *America's Global Advantage* (Cambridge: CUP, 2010).

[20] Snyder, 'Regional Security and Regional Conflict', p.227.

[21] See, e.g., W. Rees, *Transatlantic Counter-terrorism Cooperation* (London: Routledge, 2006); '15th ASEAN-EC Joint Cooperation Committee (JCC) Joint Press Release, Jakarta', *ASEAN website* (26 February 2005); 'ASEAN, a key partner for Europe', *EU website* (undated).

[22] See, e.g., the distinctions outlined below, and the changes the EU SitCen underwent in 2004-5, detailed below.

[23] Much literature can be cited here - see, e.g., J. Lichfield, *et al.*, 'Madrid: The Aftermath: Europe must share terror intelligence', *The Independent* (17 March 2004); B. Waterfield, '"Enhanced intelligence" high on EU anti-terror agenda', *theparliament.com* (16 March 2004); B. Waterfield, 'Madrid meeting to assess EU terror threat', *theparliament.com* (22 March 2004); B. Waterfield and N. Smith, 'Special Report: "Combating terror" in the EU', *theparliament.com* (25 March 2004); R. Norton-Taylor and R. Cowan, 'Madrid bomb suspect linked to UK extremists', *The Guardian* (17 March 2004); 'European anti-terror body urged', *BBC* (21 March 2004); M. Ranstorp and J. Cozzens (Centre for the Study of Terrorism and Political Violence, St. Andrews University, UK), 'The European terror challenge', *BBC* (24 March 2004); T. Ország-Land, 'EUROPE – EU appoints "anti-terrorism Tsar"', *Jane's Terrorism & Security Monitor* (1 April 2004).

in London similarly spurred some close UK intelligence interactions with both their European and other international intelligence liaison partners.[24]

The important impact of the broader context in which these co-operative intelligence activities are embedded and taking place is likewise demonstrable. Multiple and mutually shared terrorist threats to Europe regionally, to specific European countries, and to their close partners beyond, such as, most notably, to the US, Canada and Australia, have also continued to be manifested since.[25] In the wake of the horrific attacks in Norway on 22 July 2011, with the bombing in Oslo and the shooting on the island of Utøya, in which 77 people are reported to have died, Norwegian Intelligence co-operated widely with their European and international partners as part of their *post facto* investigations, firmly demonstrating that mode of activity remains a valuable tool.[26]

Evaluating intelligence co-operation in Europe

As the mini-analysis undertaken above so far demonstrates, several complexities within this domain of activity evidently begin to quickly and increasingly emerge. Enhanced introspection into this area of research and analysis, and how those processes are conducted in this context, is now helpful. How and where to begin evaluating intelligence co-operation in Europe are more moot points. Unfortunately, analyses are highly prone to a substantial array of shortcomings; therefore undertaking some methodological reflection is essential.

Many areas need addressing. Considerations such as: (i) how 'Europe' is conceptualised; (ii) which units of analysis or actors are selected for examination; and (iii) which precise levels of experience and activity are focussed upon; as well as (iv) which approach is adopted – such as how far in-depth (macro to micro) the analysis is followed through - can all contribute towards differing interpretations.

Mindful of these considerations, this article tries to establish some clear operational parameters for its analysis. Firstly, 'Europe' is conceptualised as a geographic entity, extending from the Atlantic to the Urals.[27] Then, secondly, a macro 'structural' analysis

[24] I. Cobain, 'Police call in foreign terror experts', *The Guardian* (12 July 2005); E. Sciolino and D. Van Natta, Jr., 'With No Leads, British Consult Allies on Blasts', *The New York Times* (11 July 2005).

[25] Several sources can be cited here: 'US links al-Qaeda to recent Europe terror plot – report', *BBC* (1 October 2010); P. Finn and G. Miller, 'New focus on Europeans who have traveled to Pakistan to train at militant camps', *The Washington Post* (30 September 2010); F.J. Cilluffo, J.B. Cozzens and M. Ranstorp, *Foreign Fighters: Trends, Trajectories & Conflict Zones* (Washington, DC: HSPI, George Washington University & CATS, Swedish National Defence College (FHS), Stockholm, 1 October 2010); W. Maclean, 'Analysis: Terrorism alerts reflect evolving militant threat', *Reuters*, and R. Norton-Taylor, 'British intelligence denies US terror warnings sparked by new info', *The Guardian* (3 October 2010); W. Maclean, 'European firms vigilant but call U.S. alert vague', *Reuters* (4 October 2010); W. Maclean, 'Analysis: Europe, U.S. juggle divergent tolerance of risk', *Reuters* (5 October 2010); A. Nicoll (ed.), 'Terrorist threats in Europe: hype or reality?', *IISS Strategic Comments*, 16, 35 (October 2010); 'Editorial: Sweden's Near Miss', *The New York Times* (13 December 2010); C. Bryan-Low, 'Fears of Extremism Widen to Scandinavia', *The Wall Street Journal* (16 December 2010); 'Germany "bomb plotters under al-Qaeda orders"', *BBC* (30 April 2011); 'Sweden terror threat stands despite bin Laden death', *The Local - Sweden* (3 May 2011); 'Osama bin Laden death: Met boss's terror threat warning', *BBC* (4 May 2011); J. Madslien, 'Norway's far right not a spent force', *BBC* (23 July 2011); W. Englund and M. Birnbaum, 'Norway attacks: Shaken nation sees hint of Oklahoma City', *The Washington Post* (24 July 2011); 'Norway holds memorial services…', *Associated Press* (29 July 2011); T. Hyland, 'Wolves at our door? What we can learn from Norway's horror', *Sydney Morning Herald* (31 July 2011); A.D.M. Svendsen, 'Re-fashioning risk: Comparing UK, US and Canadian security and intelligence efforts against terrorism', *Defence Studies*, 10, 3 (September 2010), pp.307-335.

[26] 'PM says Norway coopertaing [*sic*.] with foreign intelligence', *Reuters* (23 July 2011); 'Norway attacks: "Breivik acted alone"', *BBC* (27 July 2011); D. Barrett, 'Norway massacre: British traders helped supply Breivik's arsenal of weapons', *Daily Telegraph* (30 July 2011).

[27] For the importance of 'geography' and 'geographical' considerations, see, e.g., H. de Blij, *The Power of Place* (Oxford: OUP, 2009); P. Porter, 'Geography, Strategy and the National Interest: The Maps are too Small', *The World Today* (May 2010), pp.4-6; C. Gallaher, *et al.*, *Key Concepts in Political Geography* (London: Sage, 2009).

(MSA) approach is adopted. This is done in order to try and better capture the overall, underlying and longer-term trends.

Insofar as it can be physically located *per se*, European intelligence co-operation is recognised as occurring in several different areas of activity. For instructive illustrative purposes, some of the main different intelligence co-operation structures that can be found in Europe will next be highlighted in turn.

Structures facilitating European intelligence co-operation

To keep the analysis undertaken in this article within clear boundaries, three main categories are focussed upon. Into these, the variously overlapping different intelligence liaison arrangements in Europe can be placed more or less appropriately.[28] Simultaneously, some informed insights into their significant connections are offered. By, first, better understanding the 'structures' participating, a greater understanding of the intelligence dynamics, and the more 'cultural' aspects involved in the European intelligence interactions, can then be valuably communicated:[29]

Firstly, there is a plethora of **bilateral relationships** traversing Europe.[30] These are the oldest (most traditional) arrangements and, in their comparatively well-tried and tested forms - especially where 'standards' and 'best practices' in the interactions have become most operationalised for facilitating trust - they represent the most 'exclusive' intelligence liaison relationships that exist in Europe. They thereby usually facilitate the greatest and speediest qualitative and quantitative exchange of 'secret intelligence'. This product figures in the 'purer' form of operationally viable ('actionable' or 'serious') intelligence, present in its myriad of different forms (tactical through to strategic), including the exchange of some 'rawer' (or less 'sanitised'/'diluted') product.

With reference to widespread counter-intelligence and security anxieties that exist in the European context, these bilateral intelligence liaison arrangements are also most likely to be preferred by intelligence practitioners.[31] As the UK Intelligence and Security Committee's (ISC) 2006 *Annual Report* noted when evaluating 'European Co-operation', the familiar sources and methods protection considerations were important: 'Co-operation on operational matters is primarily bilateral, to ensure that intelligence is shared where necessary and to protect operational sources and information-gathering techniques.'[32] Adopting network terminology, the intelligence and security services, concentrated in the 'hubs' of national European capital cities, then strive to form 'nodes' - for instance, joining up their different bilateral European intelligence liaison partner relationships in their

[28] See also the arrangements listed on 'Foreign authorities', *Politiets Efterretningstjeneste (PET)/Danish Security and Intelligence Service website* (2009).
[29] On 'culture' in the context of intelligence liaison, A.D.M. Svendsen, 'Connecting intelligence and theory: Intelligence Liaison and International Relations', *Intelligence and National Security*, 24, 5 (October 2009), pp.723-725; W. Rees and R.J. Aldrich, 'Contending cultures of counterterrorism: transatlantic divergence or convergence?', *International Affairs*, 81, 5 (October 2005), pp.905-923.
[30] See, e.g., S. Hess, 'Intelligence Cooperation in Europe 1990 to the Present', *Journal of Intelligence History*, 3, 1 (Summer 2003); 'Europe' in Sir Stephen Lander, 'International intelligence cooperation: an inside perspective', *Cambridge Review of International Affairs*, 17, 3 (October 2004), pp.481-493; 'French-Spanish co-operation quells terrorist threat', *Jane's Intelligence Digest* (12 May 2009); 'Juan Carlos: Basque arrested over Spain "murder plot"', *BBC* (7 July 2011).
[31] See, e.g., where in the NATO context it is observed that bilateral intelligence sharing continued to be 'preferred' and was judged to be the 'more effective route', in R.N. McDermott, *Countering global terrorism: developing the anti-terrorist capabilities of the Central Asian Militaries* (February, 2004), p.8; see also T. Espiner, 'European Commission suffers "serious" cyberattack', *ZDNet* (24 March 2011).
[32] UK ISC, 'European Co-operation', *Annual Report 2005-2006* (June 2006), p.28, para.99.

headquarters, alongside engagement with 'privatised' and 'outsourced'[33] dimensions of intelligence activity.[34]

Secondly, there are various **multilateral Europe-region-centred** intelligence liaison arrangements. These developed most markedly from around the early to mid-1990s, after the Cold War thaw and the dismantling of the 'Iron Curtain' in Europe. Again, each of these arrangements involves different combinations of parties. Most significantly, they include: the *Club of Bern* (CoB),[35] which consists of the European Union (EU) Member States' security services, and also those of Switzerland and Norway; the *Counter Terrorist Group* (CTG), which is essentially the counter-terrorism intelligence-focussed subgroup of the CoB (formed after 9/11 in September 2001);[36] the *Middle European Conference* (MEC), which consists of '16 intelligence services of 13 states of Western and Central Europe'[37]; as well as, perhaps more peripherally, the more recent 'War on Terror'-associated and more operationally-focussed arrangements. These in turn include 'Alliance Base' in Paris, which involves some European countries - notably the UK, Germany and France – with the US Central Intelligence Agency (CIA).[38] With more of a law enforcement focus, the Police Working Group on Terrorism (PWGT) likewise features.[39]

In this category - within the CTG, for instance - discussions are generally more concerned with higher and macro level considerations and strategic issues. As the UK ISC report noted: 'All of the [UK intelligence] Agencies contributed to discussions which resulted in the formulation of the EU Counter-Terrorism Action Plan, which draws strongly on the UK's CONTEST model' (the UK's 2003 counter-terrorism strategy).[40]

More peripherally, transatlantic-spanning arrangements, in which several European countries are involved, perhaps could also be argued to be sitting at least on the fringe of this category.[41] These latter arrangements include: the North Atlantic Treaty Organisation (NATO) and its own plethora of variously overlapping intelligence-associated

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[33] On contemporary intelligence 'privatization' trends, see, e.g., J.R. Bennett, 'Private intel, the new gold rush', *ISN Security Watch* (1 July 2008); P.R. Keefe, 'Privatized Spying: The Emerging Intelligence Industry', ch. 18 in L.K. Johnson (ed.), *The Oxford Handbook of National Security Intelligence* (Oxford: Oxford University Press, 2010), from p.296.

[34] J. Arquilla and D. Ronfeldt (eds), *Networks and Netwars* (Santa Monica, CA: RAND, 2001); W.K. Wark, 'Introduction: "Learning to live with intelligence"', *Intelligence and National Security*, 18, 4 (Winter, 2003), p.2.

[35] N.B.: This group is sometimes referred to with the alternative spelling of 'Club of/de Berne'.

[36] L. Lugna, 'Institutional Framework of the European Union Counter-Terrorism Policy Setting', *Baltic Security and Defence Review*, 8 (2006), p.126; '"Club de Berne" meeting in Switzerland', *Press Release - Federal Office of Police*, Switzerland (28 April 2004).

[37] 'History of the SIS', *Official Slovak Information Service (Slovenská informačná služba) website* (accessed: 28/03/2007).

[38] D. Priest, 'Secret Anti-Terrorism Unit Pairs CIA, Europeans', *The Washington Post* (7 April 2005). On transatlantic intelligence co-operation, G.M. Segell, 'Intelligence Agency Relations Between the European Union and the U.S.', *International Journal of Intelligence and CounterIntelligence*, 17, 1 (2004), pp.81-96; W. Rosenau, 'Liaisons Dangereuses?: Transatlantic Intelligence Cooperation and the Global War on Terrorism', ch. 4 in D. Hansén and M. Ranstorp (eds), *Cooperating Against Terrorism: EU-US Relations Post September 11: Conference Proceedings* (Stockholm, Sweden: National Defence College, 2006), pp.31-40; R.J. Aldrich, 'US–European Intelligence Co-operation on Counter-Terrorism: Low Politics and Compulsion', *British Journal of Politics and International Relations*, 11, 1 (February 2009), pp.122-139; 'Europe says Americans slow in sharing intelligence from Osama bin Laden cache in Pakistan', *Associated Press* (13 May 2011); for some sharing, R. Winnett and D. Gardham, 'Osama bin Laden planned Easter bomb campaign, files seized in US raid show', *Daily Telegraph* (20 May 2011).

[39] On 'law enforcement' focussed arrangements, M. Deflem, 'Europol and the Policing of International Terrorism: Counter-Terrorism in a Global Perspective', *Justice Quarterly*, 23, 3 (September 2006), pp.336-359.

[40] UK ISC, 'European Co-operation', pp.28-9, para.101.

[41] By 2007, NATO-EU security and defence co-operation was also burgeoning - see e.g., 'NATO and the EU: Time for a New Chapter', *NATO* (29 January 2007); 'NATO-EU: a strategic partnership', *NATO* (27 October 2010); see also refs to the US-led 'Proliferation Security Initiative' (PSI) in Svendsen, *Understanding the 'Globalization of Intelligence'*, and to the US-led 'Container Security Initiative' (CSI), e.g., Svendsen, *Intelligence Cooperation and the War on Terror*, p.21, p.58; 'Full container screening "not best" move: US security chief', *AFP* (22 June 2011).

arrangements - including, with NATO members participating to different extents, the NATO Special Committee, the US Joint Analysis Center (JAC) and the NATO-supporting 'Intelligence Fusion Centre', based at US EUCOM (European Command) at RAF Molesworth in Cambridgeshire, UK[42] - and then there is the International Special Training Centre (ISTC) for Special Operations Forces, located in Germany.[43]

Open source intelligence (OSINT) partnerships also exist, such as the 'International Open Source Working Group' (IOSWG), which includes several European nations, notably: Germany, Denmark, the Netherlands, the UK, Italy, Austria, Sweden, Norway, France and Belgium, as well as there being more 'exclusive' European OSINT partnerships, including the 'Budapest Club', established in 2007.[44]

Together with all of these arrangements, operating alongside are the increasingly internationally connected European countries' national terrorism threat analysis centres, including: the Joint Terrorism Analysis Centre (JTAC) in the UK, the 'Centre for Terrorism Analysis' in Denmark, and the 'Coordination Center' in Germany, which act as intelligence 'fusion centres'.[45]

Furthermore, as Dutch intelligence scholar Cees Wiebes has reportedly observed, in parallel there exists a degree of burgeoning intra-European signals intelligence (SIGINT) co-operation, occurring at least amongst some select countries: 'Since the end of the 1990s … co-operation between the monitoring services of France, Germany and the Netherlands has grown and the countries exchange "Sigint" daily. Together with Denmark and Belgium, a "Group of Five" is slowly taking shape.'[46] Meanwhile, focussed on issues such as money laundering, the 'Egmont Group', an 'international law enforcement financial intelligence exchange network', might also be cited within this category.[47]

Thirdly, there are the **European Union (EU) intelligence arrangements**. Developed from around the late-1990s onwards, these again contribute to varying degrees. These arrangements essentially act as specialist intelligence liaison 'pockets' within the EU framework as a whole, namely as part of the EU's Common Foreign and Security Policy

[42] See, e.g., 'NATO Special Committee', *NATO* (2006); 'New NATO intelligence centre opens in Britain', *UK Ministry of Defence* and 'Global Intelligence Assesment [*sic*.] for NATO Countries', *NATO SHAPE* (16 October 2006); 'Intelligence fusion centre initial operational capability (IOC) ceremony', *NATO SHAPE* (12 October 2006); B. Tigner, 'NATO seeks more than a quick fix to its rapid-reaction command structure', *Jane's International Defence Review* (8 January 2009); 'Situation Centre (SITCEN)', *NATO* (2 December 2010); 'NATO nations deepen cooperation on intelligence, surveillance and reconnaissance', *NATO* (17 March 2011).

[43] 'The International Special Training Centre (ISTC) Exhibiting at Defendory International', *MarketWatch* (7 October 2008). For the activities of various European countries' Special Operations Forces in theatre, e.g., in Afghanistan: A. Finlan, *Special Forces, Strategy and the War on Terror* (London: Routledge, 2009), p.131, and Svendsen, *Intelligence Cooperation and the War on Terror*, p.79, p.83, p.90.

[44] 'International Partnerships' panel at the *US Office of the Director of National Intelligence (ODNI) Open Source Conference* (Washington, DC: 16-17 July 2007); A. Dyèvre, 'Intelligence cooperation: The OSINT option', *Europolitics* (28 October 2008); A. Rettman, 'EU intelligence services opening up to collaboration', *EUObserver* (18 January 2011).

[45] Denmark's 'Centre for Terrorism Analysis' in K. Tebbit, *Benchmarking of the Danish Defence Intelligence Service: Introduction and Summary* (Copenhagen: April 2006), pp.iii-iv, paras.11-12; for the German 'Coordination Center', F.T. Miko and C. Froehlich, 'Germany's Role in Fighting Terrorism: Implications for U.S. Policy', *Congressional Research Service* (27 December 2004), pp.7-9; 'Germany minister now warns of terror attack threat', *Reuters* (6 November 2010); see also 'Poland's anti-terrorist center gears up to protect Euro 2012', *Associated Press* (17 May 2011); for Sweden's National Centre for Terrorist Threat Assessment (NCT), 'Suicide attack could happen again: prosecutor', *The Local - Sweden* (3 June 2011).

[46] S. Fidler, 'The human factor', *Financial Times* (7 July 2004); M. Rudner, 'Britain betwixt and between: UK SIGINT alliance strategy's transatlantic and European connections', *Intelligence and National Security*, 19, 4 (2004); E. Cody, 'Europe's antiterrorism agencies favor human intelligence over technology', *The Washington Post* (12 May 2010); On Swedish SIGINT developments, D. Nohrstedt, 'Shifting Resources and Venues Producing Policy Change in Contested Subsystems: A Case Study of Swedish Signals Intelligence Policy', *Policy Studies Journal*, 39, 3 (August 2011), pp.461-484; 'Signals intelligence', *Sweden.gov.se* (24 August 2009).

[47] 'Serbia cleans up its act on money laundering', *Jane's Intelligence Digest* (16 February 2009).

(CFSP) and, as of 2010, the Common Security and Defence Policy (CSDP) (previously the European Security and Defence Policy - ESDP).[48]

As Björn Müller-Wille has elaborated, the types of intelligence arrangements in this third category include: 'the EU Satellite Centre [(SatCen)], the Joint Situation Centre [(SitCen)[49]] and the Intelligence Division of the European Military Staff… [which] are responsible [for] providing the "strategic" intelligence support needed for the decisions that fall within the Council's competencies… [including] issues such as the launching and preparation of an EU peace support operation (PSO)'[50], in the process also extending European intelligence arrangements partially into the wider realm of peacekeeping intelligence (PKI).[51] Simultaneously overlapping are initiatives, such as the EU Terrorism Working Group (TWG) and MONEYVAL, the Council of Europe's anti-money laundering arrangement.[52]

In this EU intelligence arrangement category, law enforcement intelligence liaison contributions from EUROPOL on the issue of terrorism, together with EUROJUST initiatives, can be included.[53] Notably, as Lauri Lugna from the Estonian Ministry of the Interior has noted: 'EUROPOL is charged with building and maintaining a database of information supplied by the Member States, and using this data to analyse crimes, conduct specific investigations at the request of national law enforcement authorities, and request that the latter launch such investigations.'[54] By 2006, further strengthened internal EU co-operation between EUROPOL and the SitCen also appeared to be emerging.[55]

But, within this domain of activity, further challenging complexities clearly exist. The 'structural' considerations are not the only ones that are encountered. The *type* of intelligence product being interacted over during the conduct of liaison in these contexts similarly has an important role to perform. This factor now needs to be better brought into

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[48] See later discussion below; see also, e.g., 'Conceptual Framework on the European Security and Defence Policy (ESDP) Dimension of the fight against terrorism', *European Union* (?c.2005), p.6; Maj. Gen. João Nuno Jorge Vaz Antunes, European Union Military Staff's Intelligence Division, 'Developing an Intelligence Capability: The European Union', *CIA Studies in Intelligence*, 49, 4 (2005); A. Podolski, 'European Intelligence Co-operation – Failing Part of the CFSP and ESDP?', *Centrum Stosunków Międzynarodowych, Center for International Relations (Poland) Reports & Analyses 6/04/A* (2004).

[49] On the 'SitCen', 'Written answers: Home Department – SitCen', *Hansard* (Monday, 27 June 2005); 'Examination of Witnesses (Questions 92-99): Mr Johnny Engell-Hansen (Head of Operations Unit, SitCen)', *Civil Protection and Crisis Management in the European Union - European Union Committee, UK House of Lords* (21 January 2009); 'William Shapcott - director of EU SitCen', *Jane's Intelligence Review* (18 August 2009); 'French diplomat to head EU intelligence agency', *AFP/EUbusiness* (July 2010) – Shapcott retired during the summer of 2010, with Ilkka Salmi from Finland becoming appointed head of the SitCen in December 2010.

[50] B. Müller-Wille, 'Rethinking European intelligence cooperation', *YES Danmark* (c.2005), via URL: <http://www.yes-dk.dk/> (accessed: 26/01/2007).

[51] On PKI, see B. de Jong, W. Platje and R.D. Steele (eds), *Peacekeeping Intelligence: Emerging Concepts for the Future* (Oakton, VA: OSS, 2003); D. Carment and M. Rudner (eds), *Peacekeeping Intelligence: New Players, Extended Boundaries* (London: Routledge, 2006); A.W. Dorn, 'United Nations Peacekeeping Intelligence', ch. 17 in Johnson (ed.), *The Oxford Handbook of National Security Intelligence*; J.A. Ravndal, 'Developing Intelligence Capabilities in Support of UN Peace Operations', *NUPI Report* (Oslo: 22 December 2009).

[52] 'National and international cooperation', *Säkerhetspolisen (Säpo - Swedish Security Service) website* (December 2009); '"Hire non-Swedes for sensitive posts": Säpo', *The Local - Sweden* (7 December 2009); 'Serbia cleans up its act on money laundering'; see also references to the 'European Expert Network on Terrorism Issues (ENER)' as cited in fn. 48 of Cilluffo, Cozzens and Ranstorp, *Foreign Fighters*, p.19; on the theme of tackling the financing of terrorism, V. Pop, 'Commission to propose new EU anti-terrorism tool', *EUObserver* (12 July 2011).

[53] 'Europe's anti-terror capacity', *BBC* (16 August 2006); B. Fägersten, 'Bureaucratic Resistance to International Intelligence Cooperation - The Case of Europol', *Intelligence and National Security*, 25, 4 (August 2010), pp.500-520; Lugna, 'Institutional Framework of the European Union Counter-Terrorism Policy Setting', p.125.

[54] *ibid.*, p.124; see also the Gijs de Vries citation, below; M. Deflem, *The Policing of Terrorism* (London: Routledge, 2010), from p.127; focussed on organised crime, e.g., 'Irish rhino horn racket uncovered by Europol', *BBC* (7 July 2011); see also V. Dodd and M. Taylor, 'Scotland Yard called in over Breivik's claims he met "mentor" in UK', *The Guardian* (25 July 2011).

[55] 'Subject: Implementation of the Action Plan to Combat Terrorism', *Council of the European Union* (Brussels: 19 May 2006).

the overall analytical narrative being presented. This is so that several of the main intelligence dynamics involved can be better understood. The 'intelligence' that features in the EU is essentially *strategic*, rather than *tactical* and *operational*, and can be characterised in its composition as being all-source-based assessments-*derived*. An important analytical distinction emerges, which can also extend more widely into the other somewhat overlapping European region and geographic arrangements.

Defined intelligence controls persist. Due to all the prevailing security and counter-intelligence anxieties concerning the protection of sources and methods that exist in such multilateral contexts (see as discussed above), for greater comfort, the intelligence supplied to the EU is based on 'sanitised' strategic, finished and processed intelligence. This is packaged and delivered to the SitCen instead more as diluted *information* input from EU Member States' intelligence communities.[56] For example, according to the UK ISC: 'The UK (in particular the JIC [UK Joint Intelligence Committee] and JTAC) is one of the biggest providers of *information* to SitCen papers'[57], revealing the nature, as well as the form, of the UK's contribution.[58]

In the EU context, this 'information' arguably then *becomes* 'intelligence' when 'loaded' in a 'purposeful manner'. For instance, this occurs *within* the SitCen during the conduct of its own analysis, and *when* it generates its own product ready for dissemination amongst its own select customers, including EU Commissioner Baroness Catherine Ashton, the High Representative of the European Union for Foreign Affairs and Security Policy, and head of the recently created (July 2010) European External Action Service (EEAS).[59]

However, a criticism can be raised that it is still just essentially *information* rather than more serious *intelligence* that is being handled in the EU context. Other distinct limits with these EU intelligence arrangements can be highlighted. Notably, limited resources, such as small staff sizes, can be cited (with the SitCen in 2010 consisting of around 100 personnel[60]), suggesting the need for the strict prioritisation of tasks. These considerations in turn raise many questions, including regarding the impact of bureaucratic factors, such as the issue of 'time-lags', during day-to-day business processes.[61] This is not least as wider, concerning events, such as those rapidly occurring in their multitude in international affairs, are meanwhile frequently unfolding in high-tempo and condensed-space operating environments.[62]

Further developments can be implemented. The concerns identified here naturally suggests that intelligence and information arrangements under the umbrella of the EU have plenty of scope for their gradual expansion and extension into the future. Indeed, during the summer of 2008, there were attempts by various European countries to better improve SitCen's intelligence capabilities, as well as to extend 'standardisation' processes

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[56] M. Seiff, 'MI5 Chief won't share all secrets with EU', *UPI* (14 September 2005).
[57] UK ISC, 'European Co-operation', p.29, para.102 (emphasis added).
[58] See also 'Report on Support from Member States Security and Intelligence Services to SITCEN', *EU* (21 November 2005 [declassified: 10 June 2011]); R. Jeffreys-Jones, 'Rise, Fall and Regeneration: From CIA to EU', *Intelligence and National Security*, 24, 1 (2009), pp.103-118.
[59] M.K.D. Cross, 'EU Intelligence Sharing & The Joint Situation Centre: A Glass Half-Full', *Paper prepared for delivery at the 2011 Meeting of the European Union Studies Association* (3-5 March 2011).
[60] N. Gros-Verheyde, 'L'Europe a aussi ses propres agents secrets', *ouest-france.fr* (21 février 2010).
[61] For limits, Müller-Wille, 'Rethinking European intelligence cooperation'; J. Stevenson, 'Law Enforcement and Intelligence Capabilities', ch. 2 in *Adelphi Paper*, 44, 367 (London: IISS, November 2004), p.55; B. Tigner, 'EU struggles to define coherent response to Libyan crisis', *Jane's Defence Weekly* (25 February 2011); B. Tigner, 'NATO takes tougher approach to cyber security', *Jane's Defence Weekly* (28 February 2011); F. Bicchi and C. Carta, 'Arab Uprisings Test EU Architecture', *ISN Insights* (7 March 2011).
[62] For these 'events', see, e.g., J. Healy, 'Popular Rage Is Met With Violence in Mideast', *The New York Times* (17 February 2011); e.g. for an EU public announcement on an 'event', A.D.M. Svendsen, 'Strategy and disproportionality in contemporary conflicts', *Journal of Strategic Studies*, 33, 3 (June 2010), p.376.

within its framework – most critically including trying to work around operational obstacles.[63]

According to *The Guardian* newspaper, evaluating the internal EU report seen during August 2008: 'While cooperation between national police forces in the EU was advancing, the report conceded that the sharing of espionage and intelligence material was a "considerable challenge" as it clashed with the "principle of confidentiality" [(or the 'third party rule', known interchangeably as the 'control principle', which is intended to preserve the confidentiality of secret exchanges between different parties during intelligence liaison)] that is the basis for successful exchanges.'[64]

For improved intelligence sharing within the EU context, there needs to be the continued further addressing of the ever-present secrecy-sharing dilemma that exists with regard to multilateral arrangements.[65] Moreover, this addressing requires being undertaken adopting a cultural (including a philosophical), as well as a structural, approach towards facilitating sharing activities.[66]

Whether into the future there is a greater centralisation of intelligence and information liaison arrangements in the EU context still remains to be seen.[67] Although the SitCen evolves over time, a distinct 'EU CIA' is probably going to remain highly unlikely, while an 'EU NIC' - that is: undertaking higher and more strategic level monitoring work, more akin to the research-based/dominated activities of the US National Intelligence Council (NIC), for instance with its in-depth future 'global scenarios' development (but on more of a 'regional' basis) - is a much more realistic model on which to focus attention.[68] Within this domain of activity, there are certainly not going to be any rapid or dramatic movements, with trends continuing, as witnessed previously, on a gradual, evolutionary path.[69]

During November 2008, the UK House of Lords reportedly 'warned' that 'intelligence on terrorism, drug trafficking and serious fraud is not being routinely shared with Europol… over fears of leaks', with the UK Serious Organised Crime Agency (SOCA)'s exchange with EUROPOL being particularly criticised. Generally, therefore, political-to-policy and strategy-orientated drivers still appear stronger than more regularised operational movements.

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[63] 'MI5 forced to share intelligence with EU', *politics.co.uk* (7 August 2008).
[64] I. Traynor, 'Secret EU security draft risks uproar with call to pool policing and give US personal data', *The Guardian* (7 August 2008).
[65] See, e.g., R.J. Aldrich, 'Transatlantic Intelligence and Security Cooperation', *International Affairs*, 80, 4 (2004), p.732.
[66] See, e.g., the methodologies of 'need-to-know', 'need-to-share/pool', and 'need-to-use' as referenced in S.R. Atkinson, 'Returning Science To The Social (Making Sense Of Confusion: A Case For Honest Reflection)', *The Shrivenham Papers*, 10 (Shrivenham: UK Defence Academy, July 2010), p.iv.
[67] See, e.g., J.M. Nomikos, 'The European Union's Proposed Intelligence Service', *Power and Interest News Report (PINR)* (17 June 2005); J.M. Nomikos, 'A European Union Intelligence Service for Confronting Terrorism', *International Journal of Intelligence and CounterIntelligence*, 18, 2 (2005), pp.191-203; J. Rüter, *European External Intelligence Co-operation* (Saarbrücken, Germany: VDM Verlag Dr. Mueller e.K., 2007).
[68] US National Intelligence Council (NIC), http://www.dni.gov/nic/NIC_home.html (accessed: 3/02/2007); NIC *2020 Project*, http://www.dni.gov/nic/NIC_2020_project.html (accessed: 3/02/2007); 'Global Trends 2025', *ODNI* (November 2008); T. Fingar and M. Burrows, 'Press Briefing', *ODNI* (20 November 2008); M. Burrows, 'Press Briefing', *ODNI* (21 November 2008); *Global Trends 2025: A Transformed World* (Washington, DC: NIC/ODNI, November 2008); US NIC and EU Institute for Security Studies (ISS), *Global Governance 2025: At a Critical Juncture* (September 2010); A. Rettman, 'EU intelligence bureau sent officers to Libya', *EUObserver* (12 April 2011).
[69] See also Gros-Verheyde, 'L'Europe a aussi ses propres agents secrets'; J. Richards, 'Intelligence centres – The EU mulls a strategic intelligence rethink', *Jane's Intelligence Review* (12 November 2010).

These last aspects seem to take longer to 'catch-up', preferring to proceed more cautiously on more protected, specific and detailed individual (*ad hoc*) case-by-case bases.[70]

However, despite their imperfections, these EU intelligence arrangements and initiatives are rightly recognised as being important in the EU context and beyond. This is particularly when dealing with pressing transnational issues, such as, most prominently, counter-terrorism.[71] In 2005, with still-relevant initiative-driving aspirations clearly apparent, the EU's Counter-Terrorism Co-ordinator remarked:

> Timely and accurate information - its collection, analysis and dissemination - is essential to prevent acts of terrorism and to bring terrorist suspects to justice. Progress is being made in implementing the decisions of the Council to improve the exchange of terrorism related information. Last year [2004] the Council decided to stimulate co-operation among Europe's security and intelligence services by reinforcing the Situation Centre (SitCen) in the Council Secretariat.

He continued:

> As a result, SitCen now provides the Council with strategic analysis of the terrorist threat based on intelligence from Member States' security and intelligence services and, where appropriate, on information provided by Europol. Meanwhile, Europol is also strengthening its counter-terrorism task force. Eurojust is playing an increasingly prominent role in helping national prosecutors and investigating judges to co-operate across borders.[72]

Ultimately, whatever is generally thought of the 'intelligence' material handled in the EU - and its usefulness, especially at the lower and micro levels of experience and activities, such as operationally and tactically - the EU intelligence arrangements clearly continue to have substantial and sufficient relevance. They are certainly worth the effort of sustaining into the future.[73] In recent years, important EU efforts have also been witnessed concerning the addressing of pressing 'radicalisation' issues.[74]

As the implementation of the EU Lisbon Treaty increasingly gathers momentum, especially with the creation of the European External Action Service (EEAS) during July

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[70] '"Cops Fear Sharing Information"', *Sky News* (12 November 2008); Fägersten, 'Bureaucratic Resistance to International Intelligence Cooperation - The Case of Europol'; D. Casciani, 'UK opts-in to plan to share evidence between EU police', *BBC* (27 July 2010).

[71] However, these initiatives have not been universally popular – see, e.g., 'EU : «Anti-terrorism» legitimises sweeping new «internal security» complex', *Statewatch* (28 January 2005); T. Bunyan, 'The EU state gears up for action: Internal Security Strategy & the Standing Committee on Internal Security (COSI)', *Statewatch* (12 February 2010); see also 'The European Union: New Purpose, Old Methods?', ch. 4 in P. Todd and J. Bloch, *Global Intelligence: The World's Secret Services Today* (London: Zed, 2003), pp.101-133.

[72] 'Exchange of Information' in *Address by Mr Gijs de Vries, European Union Counter-Terrorism Coordinator, to the EUROMED Meeting* (Brussels: 18 May 2005), p.3; G. de Vries, 'The European Union's Role in the Fight Against Terrorism', *Irish Studies in International Affairs*, 16 (2005), pp.3-9; G. de Vries, 'Towards a European Area of Freedom, Security and Justice?', *Challenge Europe, Issue 14, European Policy Centre website* (16 September 2005); for an overview, E.R. Hertzberger, 'Counter-Terrorism Intelligence Cooperation in the European Union', *UNICRI Report* (July 2007); R. Gowan and S. Batmanglich, 'Too Many Institutions? European Security Cooperation after the Cold War', ch. 5 in B.D. Jones, S. Forman and R. Gowan (eds), *Cooperating for Peace and Security* (Cambridge: CUP, 2010), pp.80-97.

[73] B. Glick, 'European data sharing system to help police track weapons', *Computing.co.uk* (27 November 2008).

[74] K. Haahr, 'Europe's emerging solutions to radical Islam', *Jane's Islamic Affairs Analyst* (18 December 2009); A. Wilner, 'From Radicalization to Terrorism', *ISN Insights* (8 June 2011); 'EU says radicalization is gravest threat', *United Press International* (13 July 2011); L. Vidino, *Radicalization, Linkage, and Diversity: Current Trends in Terrorism in Europe* (Santa Monica, CA: RAND, 2011); M. Goodwin, 'Norway attacks: We can no longer ignore the far-right threat', and A.S. Myhre, 'Norway attacks: Norway's tragedy must shake Europe into acting on extremism', *The Guardian* (24 July 2011); G. Hewitt, 'Norway and the politics of hate', *BBC*, and B. Riedel, 'Oslo's Clash of Civilizations', *Brookings* (25 July 2011); see also 'Sweden advances plan to combat extremism', *The Local - Sweden* (5 August 2011).

2010, and with the ESDP becoming re-branded as the CSDP, interest remains keen as 2011 progresses to see what are the fullest implications of these changes both for the SitCen (which became part of the EEAS in late 2010[75]), and for the overall process of multi-functional information-sharing in the EU, over the longer-term.[76]

Shorter-term impact is already clearer. Consisting of three units, essentially the 'Operations Unit', the 'Analysis Unit' and the 'Consular Unit', in detail,

> the SITCEN contributes […] by:
>
> - providing all-source assessment on CFSP issues and assessment of the terrorist threat to the Union and its Member States;
> - providing 24/7 support for the day-to-day conduct of CSDP crisis management operations;
> - providing support for the functioning of the EU-Crisis Coordination Arrangements;
> - operating the secure communications networks linking the foreign affairs, defence, intelligence and security communities of the Member States and the Institutions.[77]

Ultimately, the value of sustained co-operative intelligence efforts in the EU context is starkly obvious. This is demonstrably the case if we work from the simple basis that the lack of these initiatives and arrangements altogether would engender worse scenarios, resulting in counter-productive ignorance concerning especially the key issue area of counter-terrorism within the EU zone.[78] Moreover, European intelligence co-operation clearly extends further than merely the 'components' just examined. Wider trends also demonstrate significance.[79]

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[75] A. Rettman, 'Competition heating up for EU intelligence chief job', *EUObserver* (14 September 2010); A. Rettman, 'EU diplomats to benefit from new intelligence hub', *EUObserver* (22 February 2010); 'EU Situation Centre (EU SITCEN)' in J. Rehrl and H. Weisserth (eds), *Handbook on CSDP* (Brussels/Vienna: European Security and Defence College/Austrian Ministry of Defence and Sport, 2010), p.47. For a wider survey/overview of recent European security developments, see 'Europe's Evolving Security Architecture' in A. Nicoll (ed.), *Strategic Survey 2010* (London: Routledge/IISS, 2010), pp.64-81, esp. 'European Union: making Lisbon work', pp.75-77; A. Rettman, 'Ashton picks Finn to be EU "spymaster"', *EUObserver* (17 December 2010).

[76] Of note, see B. Waterfield, 'EU security proposals are "dangerously authoritarian"', *The Daily Telegraph* (10 June 2009); H. Brady, 'Intelligence, emergencies and foreign policy: The EU's role in counter-terrorism', *Centre for European Reform Essay* (July 2009); ISIS Europe, 'The Setting Up of the European External Action Service (EEAS): Laying the Basis for a More Coherent EU Foreign Policy?', *European Security Review*, 47 (December 2009), p.5, col.2; G. Gya, ISIS Europe, 'Breaking the EU silos in CFSP', *European Security Review*, 49 (May 2010); 'Council establishes the European External Action Service', *Council of the EU* (26 July 2010); A. Rettman, 'Ashton eyes October for decision on top jobs', *EUObserver* (16 July 2010); N. Meo, 'Baroness Ashton's new European Union diplomatic service faces £45m cost overrun', *The Daily Telegraph* (18 July 2010); C. Brand, 'EU member states cling to crisis-management powers', *European Voice* (22 July 2010); C. Wendling, 'Explaining the Emergence of Different European Union Crisis and Emergency Management Structures', *Journal of Contingencies and Crisis Management*, 18, 2 (June 2010), pp.74-82; 'WEU report warns EU on foreign and security policy', *Jane's Defence Weekly* (12 May 2011); C. Carta, 'The EEAS: One for All, or One Among Many?', *ISN Insights* (25 May 2011); A. Menon, 'European Defence Policy from Lisbon to Libya', *Survival*, 53, 3 (2011), pp.75-90..

[77] 'EU Situation Centre (EU SITCEN)' in Rehrl and Weisserth (eds), *Handbook on CSDP*, p.47.

[78] B. Müller-Wille, 'The Effect of International Terrorism on EU Intelligence Co-operation', *Journal of Common Market Studies*, 46, 1 (2008), pp.49-73; M. Den Boer, C. Hillebrand and A. Nölke, 'Legitimacy under Pressure: The European Web of Counter-Terrorism Networks', in *ibid.*, pp.101-124; R. Coolsaet, 'EU Counterterrorism strategy: value added or chimera?', *International Affairs*, 86, 4 (June 2010), pp.857-873.

[79] See also, e.g., 'NATO head worried about low European defense spending, calls on allies to reduce US reliance', *Associated Press* (16 June 2011); B. Tigner, 'Europe must pool defence resources, senior politicians

Capturing wider European intelligence co-operation trends

Along the lines presented above, the overall prevailing wider trends concerning intelligence co-operation in Europe collectively point towards the increased 'regionalisation of intelligence'.[80] This is despite, within that regional framework, the overlapping international intelligence liaison developments over time occurring in a mixed manner, in both their operation and evolution, and varying in their 'specialness'. This mixture effectively spans the full-spectrum of being, at times, more haphazard and *ad hoc* (for instance, work being conducted more case-by-case), as well as, at other times, being more regularised, and with developments occurring more systematically and incrementally (for example, as seen with the EU SitCen).[81] Variations in nature exist.

Borrowing the reported words of the former Director General of the British Security Service (MI5), Dame Eliza Manningham-Buller (2002-07), the discernible overall regionalisation trends can be evaluated as being essentially on 'a continuum with expansion'.[82] This assessment stands even if you adopt a sceptic's stance.

Admittedly, over time, due to the potent mixture of factors involved, these trends have not had a smooth development, and unevenness therefore continues to be effectively reflected. For instance, time-consuming and problematic trade-offs have been evident - including the 'secrecy-sharing dilemma' and the 'constraints' somewhat imposed by the ever-present counter-intelligence and security anxieties, shown where strictly sanitised 'information' rather than 'intelligence' *per se* features (as discussed with regard to the EU, above).

Moreover, due to their differing natures, the intelligence liaison relationships in Europe are also clearly of varying degrees of 'exclusivity'. At times, they are somewhat differently focussed, together with handling different types of intelligence according to their different operating parameters. Stemming from these considerations, these arrangements then operate to what can be regarded as varying degrees of effectiveness in terms of their outcomes, as seen frequently depending upon information and communications security (INFOSEC/COMSEC) and Information Assurance (IA)-associated factors, such as which (who) and how many parties are involved.[83] Questions and worries about maintaining the *momentum* of counter-terrorism initiatives have also figured, especially as the immediacy of terrorist threats essentially ebb as time progresses between shocks.[84]

Evidently, further advances have still yet to be made. This conclusion extends to applying in several different areas, in many different directions, and to many different extents. However, this situation of overall and underlying trends on the whole tending to be on 'a continuum with expansion' is discernible, especially if those developments are: (i) referred

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warn', *Jane's Defence Weekly* (30 June 2011); J. Hale, 'Dutch Call on EU To Pool, Share Capabilities', *DefenseNews* (29 June 2011); 'Weimar Triangle countries join forces in EU combat group', *Jane's Intelligence Review* (15 July 2011).

[80] See, e.g., the general literature on 'regionalism' and 'regionalisation' as discussed above.

[81] For other general trends involved: On 'problem-solving', see, e.g., C.E. Lindblom, 'The Science of "Muddling Through"', *Public Administration Review*, 19 (Spring, 1959), pp.79-88; C.E. Lindblom, 'Still Muddling, Not Yet Through', *Public Administration Review*, 39 (1979), pp.517-26. On the 'risk management' dimension see, e.g., S.D. Gibson, 'In the Eye of the Perfect Storm: Re-imagining, Reforming and Refocusing Intelligence for Risk, Globalisation and Changing Societal Expectation', *Risk Management: An International Journal*, 7, 4 (2005), pp.23-41; M.V. Rasmussen, *The Risk Society at War* (Cambridge: CUP, 2006); C. Coker, *War in an Age of Risk* (Cambridge: Polity, 2009).

[82] UK ISC, 'Policy: International Co-operation on Terrorism', *Annual Report 2003-2004* (June 2004), p.22, para.74.

[83] For details of variations, see, e.g., as charted in Lugna, 'Institutional Framework of the European Union Counter-Terrorism Policy Setting', pp.111-139.

[84] G. Corera, 'Seeking a united front against terrorism', *BBC* (9 March 2005); 'EU anti-terror plans may "peter out"', *BBC* (2 April 2004); B. Müller-Wille, 'Building a European Intelligence Community in response to terrorism', *European Security Review*, 22 (ISIS, Europe, April 2003); Nicoll (ed.), 'Terrorist threats in Europe: hype or reality?'.

to collectively; (ii) examined over the longer-term (for example, traced over the years from 2000 to 2011); and also (iii) if the literature on this subject is comprehensively explored.[85]

Also, equally, there is evidently sufficient room for substantial overlap in terms of both intelligence targeting concerns and requirements (or topics of interest), and in at least elements of the intelligence/information product that is handled. This is most apparent where, for instance regarding the EU SitCen:

> On the basis of open source and classified information coming from Member States and the European institutions, SITCEN monitors and assesses international events 24 hours a day, 7 days a week. The focus lies on sensitive geographical areas, terrorism and the proliferation of weapons of mass destruction. The information and evaluations provided by EU SITCEN are of a civilian and military nature, covering all aspects of EU crisis management.[86]

Meanwhile, intelligence liaison sceptics and critics are more likely to query the *extent* of the observed wider trends. This is as well as those critics disputing their prevalence and effectiveness, especially if the minutiae and low and micro levels involved in intelligence activities are particularly highlighted over general trends, and above the generally prevailing incentives for enhanced co-operation.[87]

This last point starkly suggests the involvement of further complexities. For instance, particularly when thinking in terms of counter-terrorism intelligence, the *quality* of the intelligence, as well as the *quantity* (or volume) of intelligence exchanged, is another worthy factor.[88] Moreover, generally, human intelligence (HUMINT) is shared differently from signals intelligence (SIGINT), and differently again from imagery intelligence (IMINT), and from the other 'collection disciplines' or 'INTs' that exist.[89] Also in some circumstances, rather than intelligence sharing *per se* taking place, merely 'access' to intelligence is granted, for example provided in Secure Compartmentalised Information Facilities (SCIFs), as evident in NATO.[90] Assessment difficulties persist as generalisability limits are rapidly encountered.

Further analytic efforts, therefore, need their extension. Indeed, when attempting to evaluate intelligence co-operation and its associated trends, it is most helpful if an awareness of these further cascading levels of multiple complexities is effectively communicated, for instance through being explicitly conveyed and then being better taken into account. This is especially when that analysis is trying to be undertaken in a comprehensive manner at the macro level. Again, this communication can be done most expeditiously through engaging in some extended methodological reflection. This observation now brings us to overall conclusions.

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[85] For an earlier account, see, e.g., B. Müller-Wille, 'EU intelligence cooperation: A Critical Analysis', *Contemporary Security Policy*, 23, 2 (August 2002); F. Gregory, 'The EU's role in the war on terror', *Jane's Intelligence Review* (1 January 2003); T. Makarenko, 'Europe adapts to new terrorist threats', *Jane's Intelligence Review* (1 August 2003). For later surveys, see UK ISC, 'European Co-operation', pp.28-9, paras.98-103; G. Lindstrom, 'OPINION – Europe seeks unity on homeland security', *Jane's Defence Weekly* (7 June 2006).

[86] 'EU Situation Centre (EU SITCEN)' in Rehrl and Weisserth (eds), *Handbook on CSDP*, p.47.

[87] For an example of a 'sceptical perspective' regarding intelligence liaison, see, e.g., M. Smith, 'Intelligence-sharing failures hamper war on terrorism', *Jane's Intelligence Review* (1 July 2005); 'Bureaucracy blocks EU terror fight', *UPI* (1 August 2005).

[88] See as discussed above with regard to the 'bilateral arrangements'.

[89] For the different 'INTs', see Svendsen, *Intelligence Cooperation and the War on Terror*, pp.11-12.

[90] See the itemisation of these complexities in *ibid.*, pp.41-42.

Conclusion

Much can be deduced. Overall in Europe there is the discernible development of an ever-more complex web consisting of a plethora of various overlapping international intelligence liaison arrangements. Essentially, the three broad 'categories' detailed above capture these, and, in their overall mosaic-like arrangement, they collectively provide a form of regional intelligence coverage in Europe.

Unpacking the three categories in-depth allows us several valuable insights not only into the European co-operative intelligence entities that exist, but also into the intelligence dynamics and interactions that occur (and equally not!) both within and between them. These entities clearly operate to varying degrees of speed and effectiveness, depending upon the constraints and limits, even operational obstacles, they encounter, and likewise they develop at different rates. Overall, similar processes, for not too dissimilar reasons, occur over time both *within* and *across* the three different categories.

In our contemporary era, this discernible mode of regional intelligence co-operation has been focussed mainly on the key issue of counter-terrorism - although other regionalised-to-globalised security concerns, such as organised crime and WMD proliferation, together with peacekeeping and crisis management considerations, are simultaneously present to a considerable extent. This occurs primarily due to regional intelligence and security reach continuing to be extended into 'newer' realms of activity as demands, requirements, and strategic and operational remits all become widened.[91]

Closely associated with broader globalisation trends apparent in international affairs, the 'regionalisation of intelligence' developments charted throughout this article are essentially on 'a continuum with expansion'. Moreover, notwithstanding the observation that details and specifics - as well as the low and micro levels of experience and activity - matter significantly in the intelligence world, the overall trends are not ambiguous.[92]

However, as seen when generalising, while the trends may not be ambiguous in themselves - especially in terms of more tangible *widening* and *structural* developments - how far they precisely extend and endure – particularly in terms of less-tangible *deepening* and *cultural* (including philosophical) developments - are more debatable issues. Concerns such as these will continue to be hotly contested into the future, and no easy answers present themselves. A 'complex co-existence plurality' of developments is encountered.

Further conclusions are apparent. While significant caveats remain, suggesting that distinct operational parameters and limitations for all the arrangements continue to feature, the important overlap of the various arrangements in Europe allows them to perform in a more empowering than hindering manner. The limitations do not overwhelm the whole 'system'. Intelligence co-operation trends within Europe can therefore be generally evaluated positively as being essentially on an upward trajectory, even if that trajectory is caveated.[93]

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[91] Technically, these have just become more prominent issues in recent years, e.g., due to all the globalisation developments undergone. See, historically, e.g., M.J. van Duin, 'Emerging European Experience with Crisis Management', *Journal of Contingencies and Crisis Management*, 1, 1 (March 1993), pp.57-60; see also A. Boin, *et al.*, *The Politics of Crisis Management* (Cambridge: CUP, 2005).
[92] Svendsen, 'The globalization of intelligence since 9/11: frameworks and operational parameters'; Svendsen, 'The globalization of intelligence since 9/11: The optimization of intelligence liaison arrangements'; Aldrich, 'Global Intelligence Co-operation versus Accountability: New Facets to an Old Problem'; Aldrich, 'Beyond the vigilant state: globalisation and intelligence'.
[93] *IISS Strategic Survey 2009*, pp.35-36.

The essence is that the whole is greater than the sum of its parts, and generally the overall 'system' that does currently exist appears to work substantially on that basis. Already present, at their least, as a reasonably adequate starting foundation on which further European intelligence co-operation developments can be built, these trends now need to continue to be better harnessed into the future. Seizing and maintaining a 'forward'-driving initiative continues to be required in an increasingly timely fashion. This is in order to have an appropriately continuing transformative effect on wider developments in Europe and beyond as time progresses.[94] Opportunities also figure.

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[94] A. Boin and M. Ekengren, 'Preparing for the World Risk Society: Towards a New Security Paradigm for the European Union', *Journal of Contingencies and Crisis Management*, 17, 4 (December 2009), pp.285-294; P. Muncaster, 'European Commission talks tough on security', *V3.co.uk*, and W. Maclean, 'Europe must do more to counter plots -EU official', *Reuters* (1 October 2010).

Contracting out Support Services in Future Expeditionary Operations: Learning from the Afghan Experience

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Abstract

As with the US led Coalition war in Iraq, the war in Afghanistan has seen an unprecedented number of private contractors being utilised in support of military operations in the country. In the case of the United States government for example, over half of its personnel in Afghanistan and Iraq are contract employees, while the same figure in the UK stands at 30 per cent and is set to increase in the coming years. This level of contractor involvement in the 'War on Terror' is not inconsequential. Indeed, their contribution to military operations is so large they are now able to influence NATO's counter-insurgency operations and thus its overall strategy for fighting the Taliban and Al-Qaeda. Importantly, such involvement can be both beneficial and/or detrimental. This article first sets out to explore how NATO came to rely on so many contractors in Afghanistan and the risks this involves for the 'War on Terror'.

Keywords

Private contractors; Afghanistan; War on Terror

AS THE US MILITARY OPERATION IN IRAQ BEGAN TO SCALE BACK IN THE RUN-UP TO THE departure of the last US troops at the end of 2011, military contractors turned their attention to Afghanistan. Even though there still is considerable business in Iraq, for example an estimated 5,000 private security guards for US diplomats in the country, Afghanistan is seen as the next major market by contractors willing to operate in conflict zones (Bowman 2011). In fact, contractors have been engaged in Afghanistan since 2001 and the start of Operation 'Enduring Freedom', which overthrew the Taliban. However, public interest in their activities in the country was quickly overshadowed by the Bush administration's decision to invade Iraq in 2003. Of the two countries, Iraq was always going to be the priority for the Administration in its fight against "global terrorism", while Afghanistan became a secondary concern. With the troop drawdown in Iraq though, this has changed. Afghanistan has taken on a new degree of urgency, especially in terms of the level of manpower and resources that are now being committed to the country.

As the title suggests, this article examines the problems that need tending to before future expeditionary operations from the experience of contracting out support services in

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Afghanistan.[1] Why Afghanistan? First, it is currently seen as the centre of gravity in the "War on Terror" of which contractors are a part through their support to military operations. Second, as a percentage of the workforce in recent NATO operations, there are more contractors supporting NATO troops in Afghanistan than any other NATO operations (Schwartz, 29 March 2011: 2). Moreover, contracting in Afghanistan is under-researched in comparison to Iraq. Also, given this publication's focus on European countries, the war in Afghanistan involves more European countries than the war in Iraq, in particular Germany and France. Thus, the lessons to be learnt come from these European countries' own experiences of contracting out, which may furthermore be more representative (in terms of scale) than the US history of contracting. Also, importantly, Afghanistan is likely to be a primary focus for NATO forces[2] for some time to come. Since the article is concerned with the impact of the market on future expeditionary operations and how it might shape strategy, the focus on Afghanistan makes sense as the war there is ongoing with a high ratio of contractors in the overall military force, so that the findings of this article are particularly and directly relevant to the future of this conflict, as well as future ones.

The article will be structured as follows. First it will briefly discuss the conceptual framework applied here. In so doing, it will justify the focus on outsourced support services. It will present and historically contextualise "counterinsurgency" warfare theory, the self-sufficient military, and present the conceptualisation of a "core-competency" military. It will do so not least by pointing out key political decisions regarding military force structures among others.

The article will then discuss the contracting experience in Afghanistan with a view to its relevance for "counterinsurgency" warfare, security of development projects, and the military supply chains. Despite the focus on European countries it will be necessary to also draw on evidence from the US military, partly because some contracts are jointly operated by the US and other militaries or jointly through NATO, and partly because the US provides the most empirical evidence.

The final section will conclude by systematically drawing together the preceding analyses and findings and from there attempt an outlook at what remains to be improved in outsourcing policy and how contractors should feature in future expeditionary operations. The article will draw these conclusions from the premise that no major political shifts take place in the near future which would make outsourcing obsolete. It acknowledges however the vigorous debates and activism which aim at ending outsourcing altogether.[3]

Conceptual framework and historical background

Justifying the focus on support services – the links between supply, operations, tactics and strategy

Clausewitz defines the conduct of war as "the formation and conduct of […] fighting." Fighting, furthermore, is made up of combats, which in turn are internally organised and then conducted by tactics, and which are tied together for the overall war by strategy (Clausewitz 1997: 74). As he puts it more succinctly, "tactics is *the theory of the use of military forces in combat,* strategy is *the theory of the use of combats for the object of the War*" (Clausewitz 1997: 75, emphasis in the original). Military operations, or the operational

[1] The argument put forward in this article draws on a previous publication by one of the authors on contractors and war. See Kinsey 2010.
[2] For details of how many European countries contribute, see ISAF, 06 June 2011.
[3] An argument from within the US military worth reading is Stiens and Turley 2010.

level which will be studied in this article, is the practical combat on the battlefield, *i.e.* the implementation of tactics on the ground.

Martin Van Creveld, following his historical survey of logistics in a series of wars, stresses the significance of the link between logistics and strategy in his seminal work "Supplying War". He asserts that logistics is a determining factor in strategy:

> Strategy, like politics, is said to be the art of the possible; but surely what is possible is determined not merely by numerical strengths, doctrine, intelligence, arms and tactics, but in the first place, by the hardest facts of all: those concerning requirements, supplies available and expected, organisation and administration, transportation and arteries of communication (Van Creveld 1986: 1).

If Van Creveld's point about logistics being a determining factor in strategy is correct, then this also applies to the role of contractors that supply strategy. This should be especially so in the case of NATO forces, as contractors are now a key component in their logistical process. As the quoted figures show, the number of contractors working in Afghanistan means they now represent a sizable part of the US military's force structure delivering a significant slice of its support services to its operation, while the picture is similar for the military forces of France,[4] Germany,[5] and the UK.[6] In the case of Afghanistan, for example, NATO countries have been able to increase the number of combat troops without increasing the overall size of their troop numbers – thereby avoiding politically costly controversies – by using contractors for non-core functions.

Therefore, the choice to focus on the lessons of outsourcing support services becomes clear. If the decision to outsource responsibilities to the market is taken, for military operations to be conducted as efficiently as possible, namely making maximum use of available potentials, and thus as successfully as possible, contractor support has to figure in considerations on all three levels: strategy, which requires knowledge and awareness of the overall capabilities and capacities available; tactics, which must be able to assess feasible courses of action; and operations, which must implement these on the ground and relies heavily on contractor support. Leaving out any element of this chain risks operational problems or even failure, and many of the problems mentioned in the remainder of this article are a result of such a lack of coordination between the three levels and contractor support.

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[4] According to Lt Col Entraygues, Headquarters Training Centre, Head of the Afghanistan Unit 2008-2010, in its five military locations in Afghanistan, the French military hires between five and ten French contractors as well as between 45 and 60 local contractors. Such outsourcing is done by the *Economat des Armées*, which is owned by the French government and started supporting French troops in Germany in the early 1950s. When French troops pulled out of Germany in the early 1990s it started to support French troops in Western Africa and the Balkans. In Afghanistan it supplies all cooks for the French military, none of whom are French. It is also responsible for all housing and accommodation for the French in Afghanistan, and it supplies them with all their translators. All these functions have been outsourced using local contractors where appropriate to employ local civilians. Personal correspondence of the authors. See also http://economat-armees.com, date accessed 01 October 2011, which however gives almost no details on its work. It is near impossible to access open source information on French military contracting.

[5] Several requests to the German MoD and Foreign Office were unsuccessful in learning about the number of contractors working for the German ISAF contingent, as both claim that the other ministry is responsible. The MoD stated however, that only catering is provided by a private company in Afghanistan. Furthermore, consistent with what the German government source told us, repairs may, according to the MoD, be contracted out on an *ad hoc* basis. Personal correspondence of the authors, August-September 2011.

[6] In the case of the British military approximately 30 percent of UK personnel deployed in Iraq and Afghanistan are contractors. See Mackey 2009: 19. See also Uttley 2004, for an overview of the British contracting experience.

"Counterinsurgency" and expeditionary operations since 9/11

Research on "counterinsurgency" warfare, now fashionably called "COIN", experienced a revival following the wars in Afghanistan and Iraq. Until 9/11, mainstream military thought regarding conventional warfare expected ground combat to have become a thing of the past. Kilcullen's discussion of the history of thought at the time reveals that Chinese and other thinkers already pointed to the possibility, that by claiming and indeed holding a total dominance of conventional ground combat (understood as war between states) the West and in particular the United States had forced potential opponents to employ "principles of addition" which combine military and non-military, state and non-state as well as various other techniques and mechanisms when confronting 'the West' – in essence what he calls "hybrid warfare" (Kilcullen 2009: 3-5). The COIN 'bible', US Army Field Manual 3-24 takes the same standpoint:

> The recent success of U.S. military forces in major combat operations undoubtedly will lead many future opponents to pursue asymmetric approaches. Because the United States retains significant advantages in fires and technical surveillance, a thinking enemy is unlikely to choose to fight U.S. forces in open battle. Some opponents have attempted to do so, such as in Panama in 1989 and Iraq in 1991 and 2003. They were defeated in conflicts measured in hours or days. Conversely, other opponents have offset America's fires and surveillance advantages by operating close to civilians, as Somali clans did in 1993 and insurgents in Iraq have done since mid-2003; these enemies have been more successful in achieving their aims (US Army 2006: 2).

Insurgency was therefore only regarded as a strategic threat after 9/11 and the ensuing wars (Metz 2007-2008: 21). However, it is generally accepted that the reintroduction of COIN into military training was highly inadequate. Metz writes that "Americans now viewed counterinsurgency as a variant of war. […] This perception was always problematic, leading the United States to pursue military solutions to threats that could only be solved politically. This disconnect is even more dangerous today, largely because twenty-first century insurgencies have diverged significantly from their forebears. [… Contemporary] insurgencies flow from systemic failures in the political, economic, and social realms" (Metz 2007-2008: 22). In his discussion of contemporary insurgencies, Metz (2007-2008: 26) reminds the reader that "not all armed conflict is war".

Of central importance to COIN is the merger of military and non-military, economic, social, and political grievances which have to be addressed, rather than "only" a military threat or opponent who is to be confronted. Contemporary insurgencies, such as those which are being called "Islamic" insurgencies, illustrate a further differentiating characteristic in comparison to historical precedents, namely the linkage between globalised narratives and localised insurgencies. In essence, global groups such as al-Qaida exploit local groups' grievances, incite military operations in the region by provoking the national or international community through violent attacks. This intervention in turn pits the local group against the intervener, turning them into "accidental guerrillas" (the title of his book). 9/11, according to him, falls into al-Qaida's strategy of provocation, in that it successfully provoked the US to retaliate in Muslim countries (Kilcullen 2009: 30). Furthermore, it catapulted militarily insignificant groups such as al-Qaida or most of the opposition fighters in Afghanistan to prominence and influence unwarranted by their conventional numbers and capabilities, which in turn gave them a stronger stand in the local communities where they operate (Kilcullen 2009: 236).

In order to combat a "globalized insurgency", Kilcullen (2009: 15) asserts "that an indirect, highly localized approach […] would probably be much more successful than a policy of direct U.S. intervention." However, as he lays out, lacking Western understanding of nuances within 'the' Muslim world and the intervention in intra-Muslim conflicts resulted

in a military confrontation pitting Western countries against virtually all Muslim actors wherever the West perceives 'terrorism' to exist (Kilcullen 2009: 21).[7] Consequently, besides in warfare, "[a]nother key aspect of asymmetry is the mismatch between military and nonmilitary elements of U.S. national power. United States military capability not only overshadows the capabilities of all other world militaries combined, it also dwarfs U.S. civilian capabilities." He cites statistics that DoD employs 210 times as many people as USAID and the State Department combined, and that the defence budget multiplies even to 350 of the other two. Comparability of employee numbers aside, the mismatch – at least the budgetary one – is quite telling and underlines what Bacevich called the "new American militarism" (Kilcullen 2009: 26; see also Bacevich 2005). A similar mismatch as that between civilian and military capabilities in US policy exists within the military. Kilcullen (2009: 26) points out the relative weakness of those capabilities and capacities required for contemporary counterinsurgency or stability operations.

In sum, the US opted for a heavily military response to the insurgent threats it perceived or stoked by its presence in Afghanistan, Iraq or the Arab Peninsula, although less military and ideally non-foreign approaches are more likely to succeed. At the same time, it lacked sufficient numbers of qualified military personnel for COIN warfare, fought the war in Afghanistan with minimum resources,[8] and by opting for geographically wide-stretching confrontation overloaded its military systems. Simultaneously, vastly inferior resources were committed for the civilian portion of the mission in Afghanistan.

It follows that "counterinsurgency" warfare in expeditionary operations will remain the most likely type of war fought by the countries under consideration here, at least for as long as 'the West' maintains its conventional military dominance, as long as inter-state wars remain rare, and as long as insurgency, as pointed out in the quote from FM 3-24 above, remains the most promising strategy for potential opponents to the US and other Western states.

The self-sufficient military of the Cold War: a rare model of military organisation

The self-sufficient military associated with two World Wars and the Cold War was highly different from the manner in which military forces organised their war supplies throughout history. Part of the reason governments chose to ensure their military forces were as self-sufficient as possible during this period (military forces throughout history have never been truly self-sufficient) was because they could no longer depend on civilian support to deliver some of the tasks required for success on the battlefield. This was because civilians were under no legal/moral obligation to stay if the risks became too high. At the same time, the fear that the Cold War may turn hot made it easy for politicians and the military to convince the general population of its vital importance to the security of the state. It was not until the arrival of Thatcher and Reagan that this assumption was eventually challenged.

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[7] Kilcullen points out the current counterinsurgency-insurgency cycle: "they fight Westerners primarily because we are intruding into their space. Ironically, it is partly our pursuit of terrorists that has brought us into sustained contact with traditional nonstate societal hierarchies […] whose geographical and demographic terrain interests Western governments mainly because terrorists hide (or are believed to hide) in it." That is the West perceives threats and enters for example Afghanistan, where it soon faces the local "accidental guerrilla" which also spreads to neighbouring countries, so that elsewhere, for example Pakistan, military strikes become "necessary". See Kilcullen 2009: xiv.

[8] Kilcullen quotes Admiral Michael Mullen as testifying to the US Congress in December 2007 that essentially the war in Afghanistan is run with minimal effort and supplies, while Iraq receives all resources the military operation requires. See Kilcullen 2009: 43.

Consequently, there is nothing new about relying on contractor support in war. Such support includes a variety of services other than combat, in particular logistics, base construction and management, and supplying military forces. Throughout much history, contractor support to militaries was an ordinary occurrence. In the case of Europe, contractors are older than the Continent's modern armies. As Fernyhough notes in the case of the British Army, "there were Master Generals and Boards of Ordnance before there were Secretaries for War or Commanders-in-Chiefs" (Fernyhough 1980: 7). With respect to France, "[…] supplying the [F]rench Army was a considerable business in eighteenth-century France, and private contractors were in charge of the supply of muskets as well as of nearly everything else soldiers needed" (McNeill 1984: 182). The US military, on the other hand, has been reliant on private contractors ever since the American Revolution. Indeed, as the diagram below shows, contractors have been part of the US way of war ever since it won its independence from Great Britain (Commission on Wartime Contracting, June 2009: 21).

A further prominent example is the appointment of Sir Eric Geddes, a civilian, to General Haig's staff in the First World War to sort out the British Expeditionary Force's transportation system (Brown 1998: 142). Governments today might try to ignore contractors, but they do so at their peril when they simultaneously enforce force structures and sizes which cannot meet the requirements for example of a "global" war such as the "War on Terror". Haig realised this when he emphasised the fact that it was not always necessary, or even advisable, for the military to perform all the functions associated with war. The General's words are worth repeating in some length here:

> There is a good deal of criticism apparently being made at the appointment of a civilian like Geddes to an important post on the Headquarters of an Army in the Field. These critics seem to fail to realize the size of this Army and the amount of work which the Army requires of a civilian nature. The working of the railways, the upkeep of the roads, even the baking of bread, and a thousand other industries go on in peace as well as in war! So with the whole nation at war our object should be to employ men on the same work in war as they are accustomed to do in peace. […] To put soldiers who have no practical experience of these matters into such positions merely because they are generals and colonels, must result in utter failure (Brown 1998: 142).

While outsourcing, then, was a recurring theme throughout history, what is different today is the high ratio of contractors to uniformed personnel giving direct support to military forces. Nowhere is this more evident today than in the cases of the UK and the US.[9] Two factors are primarily responsible for this situation. First, the increasing use of technology on the battlefield means that fewer soldiers are necessary to conduct military operations. Second many contractors working for the military are involved with nation building and therefore involved with winning over the hearts and minds of the local population. These tasks were not expected to be executed by the military even when it was self-sufficient; this could be called a kind of militarisation driven by civilians in that politicians expect the (now smaller) military to deliver more (civilian) services than ever before. Given the continued political drive to outsource military responsibilities, as noted above, the overall capacities of uniformed personnel were stretched thin and therefore supplemented with contractors.

[9] It is generally accepted as fact that the US military cannot go to war without contractor support, while Germany and the UK are also very dependent on private contractors to support their operations. This is particularly so in the German case with respect to strategic airlift and logistical support to troops in theatre. In the case of Germany, see Germany Federal Ministry of Defence 2006.

That militaries for most of time could not do without contractors suggests that the relationship between the two actors may be more than one of convenience, but is structural in that it is the result of how society, particularly Western society, organises war. This should be kept in mind, regardless of someone's political standpoint towards outsourcing, when the self-sufficient model is evoked as a sort of gold standard as if it had been a historical norm. Accordingly, while there are highly important debates being held regarding how states should organise their militaries and consequently whether any responsibilities should be outsourced (Stiens and Turley 2010), this article will be based on the assumption that no major policy shift will take place in the near future. Any substantial shift would take considerable time to implement and face strong opposition from the industry and political advocates of privatisation, making doctrinal shifts unlikely. In this article therefore, the issue is not whether the military should rely on contractors in Afghanistan, but how to manage their presence in the battle-space so they do not undermine military operations and perform as they are hired to.

Therefore, although it is not yet well established in academic and political debates, the evidence presented in this article suggests that the military core-competency model is an accurate description of most militaries involved in Afghanistan. Importantly, from a theoretical perspective the model goes some way to explaining the reality on the ground in Afghanistan regarding how and why NATO forces may have structured themselves in this way as well as why NATO forces focused on counterinsurgency warfare while certain responsibilities were outsourced to the market. Such an organisation of military forces, however, is not without its problems as the remainder of this article explains.

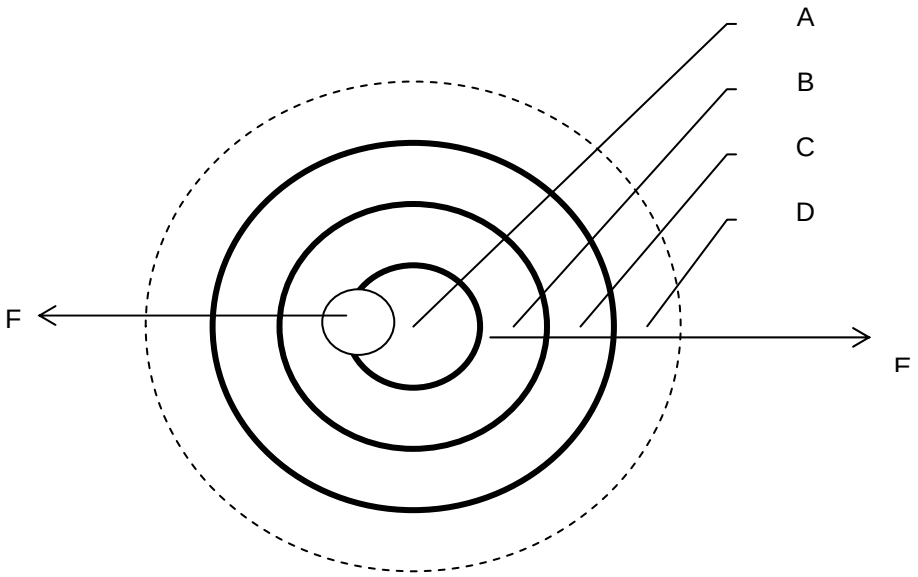
A new model of military organisation: core-competency

Only after the end of the Cold War and with the expectancy of a peace dividend and the onset of a new peaceful age was the self-sufficient, comprehensive, and large-scale military gradually replaced by one that increasingly resembles the core-competency model laid out here. As will be pointed out throughout this article, the determination to continue outsourcing growing proportions of military responsibilities despite the rapid onset of armed conflicts throughout the world, many of which resembled counterinsurgency or other low-intensity warfare and in many of which Western powers intervened or participated, clearly indicates the role of political decision-makers in the determination of a military's force structure beyond functional requirements or constraints.

As a result of these policies, the force structures of the militaries under consideration in this article have undergone considerable modifications. As the model by Christopher Kinsey below explains, future counterinsurgency operations are likely to be conducted using a small fighting force supported by contractors, who may even outnumber their military counterparts in certain cases.[10] The reality is that contractor support is no longer a marginal activity. Indeed, the option as to whether or not to rely on contractors for some activities no longer exists unless political decisions are made to adapt the force structure for it to become more self-sufficient again. What this means is that contractors of every type are now a permanent feature of the military's force structure and must for now be taken into account when planning operations.

[10] The model was first presented in Kinsey 2009.

Figure 1: Military core-competency model



The innermost circle (A) represents the military's core function(s), their *raison d'être*. These functions include combat operations and the combat portions of counterinsurgency, counterterrorist, peace enforcement, and classic peacekeeping operations and Military Aid to the Civil Authority (MACA). It is possible that some of these functions could be outsourced if government chose to change its policy and allow the market access to this area of responsibility, though this is unlikely at the moment. A major reason for this is because only the military have the requisite knowledge and skill sets to be able to undertake these functions efficiently and with a high probability of success – much like it had regarding the support responsibilities in the past which now have been outsourced to the market. Furthermore, militaries are unique organisations in terms of training, equipment, and doctrine and are thus able to support the political/strategic aims of states much more easily in executing the above functions than private sector actors. Finally, a military force can draw on the resources of the state in a time of great peril whereas a commercial organisation only has the market to draw on. Taken together, it is easy to understand why the military see these as core functions that should remain their responsibility.

The next inner circle (B) is concerned with core-close activities. These activities are directly linked to the core activities undertaken by the military. Such activities may include, for example, technical support to intelligence, surveillance, target acquisition, and reconnaissance (ISTAR) capabilities or technical support to command, control, communication, coordination, and intelligence (C4I). Contractors are frequently involved in these activities normally working alongside uniformed personnel. They typically give technical support, while the activities, themselves, remain under the direct control of the military. This is necessary because they provide direct support to the military's core function(s). Failure to perform, or only partially perform, a core-close activity can have a serious impact on operations. There may also be legal issues that prevent these activities from being outsourced. It might also be necessary to retain control of these activities to ensure there is continuity between the different aspects of an operation.

The two outer circles represent core-distant activities (C) and disposable activities (D). In each case, these activities can be easily purchased from the market. In the case of core-distant activities the military may, for example, purchase storage space for its equipment, logistical support and vehicle maintenance from a commercial provider, while disposable activities include estate management to home bases along with catering, cleaning and laundry facilities.

As the diagram highlights, the privatisation/outsourcing of activities cuts across all the circles (E) except A, suggesting the military is now concentrating its efforts on its core activities. There are, however, exceptions in the form of mission critical activities (F). These are activities that can have a direct impact on core activities influencing the nature of strategy, tactics, and operations. Importantly, they are critical because they can determine battlefield success or failure even though they may not be a core military function.

The demise of the self-sufficiency military model suggests a return to the organisation of militaries and war which prevailed throughout most of history, particularly in the West. There certainly appear to be similarities between the core-competence model and what went before the self-sufficiency model regarding the means and arrangements that are necessary when planning for war. Such means and arrangements are the responsibility of the logistician. Clausewitz sums up this situation by arguing that "in a wider sense, all activities that have their existence on the account of war, therefore the whole creation of troops, arming them, equipping them, belong to the art of war", though he makes no mention of contractors (Clausewitz 1997: 74). He does, however, point out that the maintenance of troops in camp or quarters includes activities that should not involve the employment of the military, such as the construction of huts, pitching of tents and subsistence, and are therefore neither strategy nor tactics (Clausewitz 1997: 78). A similar situation exists in Afghanistan with contractors taking over responsibility for the type of activities Clausewitz talks about.

Contracting out support services in Afghanistan

The reasons for large-scale contractor engagement in Afghanistan

The urgent need to gain the initiative in the (military) "counterinsurgency" operation in Afghanistan was apparent from Obama's decision on February 17 2009 to approve an additional 34,000 troops for the "counterinsurgency" effort (US Department of Defense, 17 February 2009). This very significant move within his first year in office saw troop levels increase to the present number of 90,000 soldiers now serving in the country (ISAF Troop Numbers USA). Over the same period the total number of contractors averaged out at 70,000. There was a nine per cent increase (from 68,000 to 74,000) in contractor personnel compared to the second quarter fiscal year (FY) 2009 census due to increased operational tempo (US Department of Defense, Office of the Deputy Assistant Secretary of Defense, August 2009). In a newspaper article published in September 2009, it was hinted at that "US officials are planning to add as many as 14,000 combat troops to the American force in Afghanistan by sending home support units and replacing them with *trigger-pullers*" (Barnes, 2 September 2009). This raises the likelihood of further increases in contractor support as such a move is designed to increase the size of the combat force in the country without raising the overall numbers of uniformed personnel beyond the cap set by the US Congress.[11] In short, uniformed non-combat personnel are replaced with contractors,

[11] Capping the number of troops for a contingency operation is common practice among NATO countries. In Germany, for example, the Chief of Defence Staff proposes the number of troops needed to the Ministry of Defence. The government then places the proposal before Parliament (Bundestag) and if it receives a majority vote the proposal is accepted. This mandate is then binding for the military. The mandate is normally renewed on an annual basis. See German Bundestag 2011.

while the uniformed contingent is then filled up with combat troops. The plan according to Barnes was "a key step in the Obama administration's drive to counter Taliban gains and demonstrate progress in the war nearly eight years after it began" (Barnes, 2 September 2009).

The scope of outsourced responsibilities and numbers of contractors in Afghanistan

The first point, which needs explaining, is that contractors working for the US military in Afghanistan do not take a direct part in offensive operations (they are prohibited from doing so by US and various other laws) but only support them.[12] The US Central Intelligence Agency (CIA) has also used contractors to support intelligence work.[13] Other European militaries have so far avoided using armed contractors to a large extent, but they do employ contractors to provide and protect logistical support.

Support services

Support services include base support, construction, translator/interpreter, transportation, and communication among others. The profile of the contractors supporting DOD's operations in Afghanistan as of July 2011 is detailed in Table 1.

What is interesting about contracted personnel outlined in the table is the large number of locally employed contractors working for DOD. They made up 76 per cent of the contractor personnel in March 2009, or 51,776 of a total of 68,197. As of June 2011, following the surge which was – as anticipated – followed by increased numbers of contractor personnel, they accounted for only 47.4 per cent according to the figures below, declining primarily in relation to non-locals rather than in total numbers.[14] Their generally high ratio (especially when compared to Iraq) is worth noting because of the central importance "counterinsurgency" warfare assigns to the relationship to and winning over of the local population. This is commonly seen as easier to accomplish when the occupying military employs locals especially for tasks which involve direct interactions with the civilian population. In short, the reasoning goes that by employing in particular young men, the occupying force generates wealth in the host country while the young men tend not to join armed opposition forces. This is but one instance where support services and overall strategy are closely interlinked.

[12] The Federal Activities Inventory Reform Act of 1998 (FAIR) and guidance provided by the Office of Management and Budget calls for roles classified as "inherently governmental" to be carried out by government employees. Inherently governmental roles are those that are so intimately connected to the public interest as to only authorise performance by government employees. Warfighting missions would fall under the 'inherently governmental' label. See US Congress, 1998, Section 5, Definitions.

[13] The US Central Intelligence Agency (CIA) is known to have employed contractors in Afghanistan. Although the numbers employed there are not clear, it is known that overall in some of the major US intelligence agencies the numerical majority of employees are contractors; see *e.g.* T. Shorrock, 2007. A Human Rights First report mentioned that David Passaro, a former Special Forces Soldier, worked on a contract directly for the CIA for six months in 2003. Passaro was assigned to the US Army forward operating base (FOB) in Asadabad to work with a team of US Special Forces and CIA personnel responsible for capturing and interrogating suspected terrorists. Human Rights First 2008: 29. Also see S. Chesterman, 2008, for an academic account of the issue, and S. Gorman, 8 February 2008, for a news report. Finally, the blog *The Spy Who Billed Me*, run by R. J. Hillhouse, also hosts extensive reports and commentary on private intelligence.

[14] In Iraq support functions and construction represented 77% of the total DOD contractor workforce. See Schwartz, 17 December 2008.

Table 1: DOD Contractor Personnel in Afghanistan[15]

	Total Contractors	U.S. Citizens	Third Country Nationals	Local/Host Country Nationals
Number	93,118	23,294	25,666	44,158*
Percent of Total	---	25%	27.6%	47.4%

Source: US CENTCOM Quarterly Contractor Census Reports, 3rd Quarter, FY 2011

The main area of their employment is in base support functions and construction. Support functions primarily consist of activities such as catering, laundry, waste management, postal services, truck driving, and specialist maintenance. These functions are not seen as controversial although US legislators have raised concerns over contract fraud and waste (Commission on Wartime Contracting 2011). Carrying out these functions usually requires little formal education from the workforce while training is often given on the job. Most Western citizens involved in these functions are blue-collar supervisors/technicians. In the past, military personnel performed these functions. However, with fewer people volunteering for military service and the high cost of training soldiers, using contractors in this way is, according to Cancian, an attractive option (Cancian 2008: 63). After all, it furthers the core-competency military and increases its 'firepower'. These outsourced supply functions are delivered to the US Army under an enabling contract called LOGCAP (Logistics Civil Augmentation Program),[16] while the UK military also use an enabling contract for the same purpose called CONLOG (Contractor Logistics).[17] Germany, though, still adopts an *ad hoc* approach entering into contracts if or when they have to. Furthermore, Germany is still some way behind the US and UK militaries in developing a contingency contracting capability similar to LOGCAP and CONLOG.[18]

Counterinsurgency operations always also require interpreters so that the expeditionary force can communicate with the local population. While militaries are usually able to find some in their ranks who are able to speak the local language it is never in sufficient numbers for large-scale operations such as Afghanistan. In such circumstances the bulk of the resources required will come from local and other private contractors (Chesterman 2008; Shorrock, 1 June 2007).

[15] The total numbers are taken from US Department of Defense, Office of the Assistant Secretary of Defense, July 2011: 1. The total was given as 90,000 at ISAF Troop Numbers and Contributions.
[16] LOGCAP was created by the US Army in 1985. Its purpose is to pre-plan for the use of contractor support in contingencies and crises and to utilise existing resources in the US and overseas to augment active and reserve forces. See Kinsey 2009: 76-79.
[17] The CONLOG Contract is a non-exclusive, 7 year contract with Kellogg Brown and Root (KBR) which provides the Chief of Joint Operations (CJO) with a more efficient and cohesive contractor logistic planning capability jointly using military and embedded KBR staff. It gives CJO an ability to let non tendered, enabling contracts for operations and exercises at short notice to meet complex requirements against changing planning assumptions and increased operational tempo utilising KBR as a sole prime contractor. Kinsey, 11 September 2008, Interview with Lt Colonel Andrew Preston. It should be noted here, that such an arrangement provides the prime contractor with a private monopoly on logistical services, which runs counter to outsourcing theory which is concerned with ending (public) monopolies in service provision. See for example Hartley 2011: 233-235.
[18] The UK MoD is the only European military to sign an enabling contract, Contract for Logistical Support (CONLOG), which provides the planning capability and procedures for UK Permanent Joint Head Quarters (PJHQ) to secure the support services that are needed for military operations and exercises worldwide. For details see KBR Projects, 'CONLOG'.

Security for support service contractors

So far, many support service contractors are only protected by the military while inside military bases. In these cases, the provision of their security adds another layer of contractor involvement in the theatre of war. Security in general is the most controversial activity being outsourced to the market in the most recent armed conflicts around the world. Eclectic legislation, enforcement of existing laws, and understandings and pursuit of accountability in addition to the well publicised problems of governmental oversight over contracting in general and security contractors in particular have made this aspect of outsourcing – despite its being the vast minority of existing contracts and contractors – appear as the epitome of military outsourcing. It has also contributed to what Abrahamsen and Williams call the 'mercenary misconception' (Abrahamsen and Williams 2011).

It is difficult to gauge the total number of armed contractors working in Afghanistan. We do know, however, that their clients include the British Foreign and Commonwealth Office (FCO), the DOD, the Department of State and other European governments and EU organisations.[19] In other words, they are hired not only by the military or the defence agencies, but also by those political and other actors (such as NGOs) who represent the foreign element of the country's reconstruction effort. The DOD began counting security contractors but stopped providing these numbers after the May 2010 census. Until then DOD provided the only reliable figures on the number of private security contractors working in the country; see Table 2 below for the latest total numbers of PSCs in Afghanistan. A 2009 newspaper article by David Zucchino put the number of security guards working in Afghanistan at 70,000 (Zucchino, 13 August 2009), while Aunohita Mojumdar noted that there may at the time have been as many as 3,000 former Afghan militia fighters directly employed by the US military (Mojumdar, 7 July 2009).

Table 2: DOD Private Security Contractor Personnel in Afghanistan

	Total**	U.S. Citizens	Third Country National	Local/Host Country National
DoD PSCs in Afghanistan*	15,305	693	1,282	13,330

Source: US Department of Defense, Office of the Deputy Assistant Secretary of Defense, July 2011: 1.

These numbers should include most subcontractors and service contractors hired by prime contractors under DOD contracts. For comparison, in May 2010 (the last census that differentiated between armed and unarmed DoD PSCs) total DoD PSCs in Afghanistan numbered 16,733, with only 140 of them US citizens and 980 third country nationals, while

[19] For the UK see for example UK Parliament, 26 July 2010, Column 671W, where the cost for private security 'contracts [which] provide services to other Government Departments' are compiled. As the answer to a Freedom of Information request by Kinsey in June 2011 has shown, all contracts awarded to private security companies in Afghanistan by the British Foreign Office were signed with G4S. Details other than the purpose (for example, static security) about these contracts, such as values or numbers of contractors, were not given as this would have requested "disproportionate cost". Personal document of the authors. On the US State Department see hearing transcript of Commission on Wartime Contracting in Iraq and Afghanistan, 6 June 2011. According to a report of the House of Lords, the European Union Police (EUPOL) Mission in Afghanistan receives its own protection from PSCs, see UK House of Lords, 1 February 2011.

the vast majority was armed (US Department of Defense, Office of the Assistant Secretary of Defense, May 2010: 2).

Recent concern over the impact of private security companies (PSCs) on the local population and how their behaviour may be undermining coalition attempts to win them over has resulted in the US military looking into the possibility of implementing an overarching contract to control PSCs. The idea came from Iraq, where the US military implemented a similar overarching contract in May 2004 to coordinate the movement of PSCs in the country.[20] However, nothing appears to have come of the idea yet.[21]

Implications and Lessons

Force structure

According to Van Creveld, adopting a different strategy usually demands new means to carry it into practice (Van Creveld 1977: 40). In the case of Afghanistan, the new strategy is counterinsurgency operations instead of conventional warfare, and the new means by which it is being carried into practice revolves heavily around contractors.

In pursuit of a military resembling the core-competency model outlined above, by capping the number of NATO troops in Afghanistan, in effect the military has to focus on combat and military logistical core functions, for example combat logistical patrols (CLP), while the majority of support activities are outsourced.[22] What is more, as noted earlier, changing the force structure in this way, namely by making the military rely on contractors for non-critical functions, is intended to maximise the use of combat troops in theatre.

The operational level: supplying the forces in theatre, and risk in operational planning

This change carries additional operational risk for the commander. Failure on the part of a contractor to perform an activity in theatre might jeopardise a whole operation. This is especially so as the military no longer has certain capacities, sometimes even capabilities, and therefore cannot take over if the contractor fails to deliver on a contract. A pressing concern, then, remains the ability of contractors to provide the services expected of them in such dangerous environments. As British Lt Col Mike Caldicott told to us, throughout 2008 and 2009 "the winterisation of UK Forward Operating Bases (FOBs) fell behind because the contractors could not deliver sufficient aggregate past insurgent operating areas and the military did not have the capacity to take the task on".[23]

Accordingly, one of the advantages, if not the major advantage, of the military undertaking logistical activities over the employment of contractors is that it removes the risk to the military of a contractor not performing an activity at a critical moment and of keeping under immediate control the supply of his troops in theatre. After all, unlike contractors, military personnel can be ordered to perform an activity where as a contractor cannot. For the commander on the ground therefore, relying on contractors can increase

[20] The contract was held by then newly-founded British company Aegis for 293 million US Dollars over two years at the time. See Kinsey 2009: 79-87. According to Aegis' website the contract has evolved to include various other security tasks and is now worth over 500 million US Dollars.
[21] The Commission on Wartime Contracting in Iraq and Afghanistan, Final Report, was published on 31 August 2011 and contains several policy recommendations. It remains to be seen whether and how they will be transformed into policy.
[22] For a brief account of what is meant by the term combat logistical patrol see Chambers 2009.
[23] Lt Col Mike Caldicott pointed out to us the concern with contractor ability to provide services and the example of winterisation. Personal correspondence, August 2011.

the level of operational risk he perceives he would face in comparison to if his own troops performed the activity instead. The commander could therefore reduce the ambition of his plan in anticipation of lower contractor performance and ultimately not make use of the entire military potential at his disposal. This situation can have a harmful impact on strategy as well as tactics in that strategy and tactics can become the hostage to a contractor's fickle behaviour. Consequently, it may become necessary for the military and its industrial partners to develop a risk model that will enable informed judgements about the future delivery of activities by contractors.[24] Ultimately though, commanders may decide simply to be more cautious, rather than choosing to adopt the robust approach to operations that is sometimes needed.[25]

Strategy

For the military commander on the ground, reliance on so many contractors can thus have a significant impact on his operational planning or even his wider strategy. The use of more contractors may see commanders reassess or even change their strategy to take account of this change to the operational environment. The decision to redirect part of the supply route via a new northern route through Russia, Kazakhstan, and Uzbekistan is evidence of this already happening (Harding, 30 March 2009). Militant attacks on the overland supply route from Pakistan had grown in number and intensity over the last few years, destroying material and trucks and killing contractors.[26] As foreign militaries cannot step in to protect the supply routes in Pakistan, the question of whether more troops should be deployed to protect convoys was necessarily answered in the negative, so that the military searched for safer supply routes. Furthermore, redeploying troops to protect supply routes would have led to a reduction in the number available for combat operations, which as shown above runs counter to the foundations of the current military and outsourcing strategy.

Another illustration of the impact of outsourcing on overall strategy is pointed out regarding Afghanistan by Caldicott. "High-bar and policy-compliant contractors" often refuse to take on contracts when they are liable to health and safety litigation. The alternative, "low-bar and policy non-compliant contractors" are typically (but not exclusively) those making the headlines with violent misbehaviour. A report by the US Congress furthermore criticised the widespread occurrence of corruption and extortion along the supply chain for the forces in Afghanistan, much of which funds the "insurgency" which the "counterinsurgency" operations are fighting elsewhere and harms the trustworthiness of ISAF as the money spent in its name fuels corruption and extortion in the country.[27]

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[24] This issue was discussed at a meeting with the National Defence Industry Council (NDIC) Contractor Support Operations (CSO) Working Group held on 1 April 2009. At the meeting it was felt that what was needed was a common understanding between the military and industry of the application of a process of due diligence to assist with determining acceptable and non-acceptable risk to contractor's employees in the operational theatre.

[25] No research about this has been conducted so far, so no direct evidence is available as of now. This conclusion can however be inferred from some of the existing literature. Higginson 2010: 17, for example, criticises that the UK so far has been reactive in its employment of contractor capabilities, has failed to integrate them into the total deployed force, and consequently both the MoD and the industry have not exploited the full available potential.

[26] Wikileaks reveals that the majority of leaked incidents involving contractors were reports of attacks on supply trucks for the ISAF militaries. According to an anonymous British government official, logistics contractors suffer about 180 casualties per year in Afghanistan. An official though more conservative estimate is given by Higginson 2010: 16. He estimates, following his own research, that from 2003 until 2010 over 500 contractors hired by MoD in Iraq and Afghanistan were killed.

[27] According to Lt Col Mike Caldicott, Royal Logistics Corps, 'high-bar' contractors are those who comply with UK Contractor Support to Operations (CSO) policy guidelines, who refuse to take on high risk contracts for fear

All such problems on the operational level harm the overall strategy of the "counterinsurgency" operation in Afghanistan. Part of this is the making of policy: besides the policy of not providing security for contractors or not ensuring standards of behaviour and security are implemented by contractors, it should be stressed, that this situation was also the result of the (political rather than military) decision to cap troop numbers while keeping spending on civilian engagement at a low level as was noted earlier.

Logistics, strategy, and the political-military working relationship

It must also be asked whether strategy was becoming an appendage of logistics or supply services as a consequence of employing contractors. This is a much harder question to answer, notably because of the limited research into the subject. As was just noted, military commanders may opt for a strategy or course of action that demands less from the contractor but means that the commander does not utilise his military force to the maximum possible.

The military's use of contractors to perform certain tasks has reshaped the nature of the relationship between the commander on the ground and ministers, senior officers and civil servants responsible for implementing government defence policy. Today, it is much easier for ministers to influence the contracts that support operations than was the case during the Cold War. Importantly, such influence must surely affect how commanders think about strategy given the intimate linkages of both domains.

In the case of Afghanistan, the shortage of Chinook helicopters, which are able to carry large numbers of men and equipment over long distances, for example, appears to be the result of political dithering on the part of ministers who failed to realise the mammoth task facing British troops in Afghanistan. A group of MPs who visited the country "were told repeatedly about the deleterious effect the lack of helicopters continues to have on the military's ability to prosecute operations there" (Doxford, 2 August 2009). The shortage of helicopters has meant troops having to move by road making them vulnerable to roadside bombs leading to a significant number of troops killed as a result of the Taliban using powerful roadside bombs to deadly effect (Baker, 13 July 2009). Signing further contracts with industry to enhance air capability must be weighed up against the additional cost of the improvement to the taxpayer. At this point the government can choose to do nothing, delay enhancement, choose another less expensive option, or give the troops exactly the air capability they demand. It is the government's input into the decision making process that allows politicians and their advisors to influence strategy. The commander's war plan, on the other hand, is dependent on the choices made by the politicians. This has in effect led to a political/technical revolution in military logistics, while its impact on strategy and tactics is not yet realised. Future research should address this link.

Similarly, the German mission relies almost entirely on commercial transport and supply capacities. As an anonymous German government source pointed out, even with the A-400M transport aircraft, militaries relying on it would not fulfil NATO's transportation capability standards (Anonymous German Government Official 2011).

These are not the only logistical problems facing commanders in Afghanistan. As the article argues, expeditionary operations have become the most regular form of military operation for Western militaries in the first decade of the 21st Century, while it is

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of litigation. Thus, what he calls 'low-bar' CSO non-compliant contractors take on these contracts at potentially high strategic cost to the overall operation, for example due to the higher occurrence of misconduct resulting in civilian casualties which ultimately harms the core of counterinsurgency strategy, namely winning over the civilian population. See Caldicott 2011: 22, 28. See also US Congress 2010.

anticipated that contractors will comprise a significant part of the total expeditionary force structure (the ratio of soldiers to contractors in Afghanistan is 1:1, see diagram above).[28] While contracting has become part of operational planning, commanders are still being educated in the importance of contractors to their operations. Simultaneously, tactical planning still almost fails to consider the contractor workforce (Anonymous British Government Official, August 2011). Without strong leadership, supported by a robust strategy able to cope with increasing contractor support, commanders are likely to face similar, if not the same problems that commanders faced in Iraq, which have led to criminal investigations of contract fraud and mismanagement and contracts not being fulfilled because of inadequate overall planning and working environments.[29]

The triangular relationship between the military, government, and contractors

As with Iraq, Afghanistan has highlighted the struggle the military is having adjusting to the challenges of receiving and cooperating with timely, efficient, and effective contracting support to operational theatres. Certainly in the case of the US and UK militaries the increase in contractor numbers has not been matched by sufficiently trained military contracting officers with the tools and resources to adequately support contracting activities in theatre.[30] Part of the problem is the drive to downsize the public workforce in government departments.[31] Another part of the problem is to do with military culture. In the case of the US military, for example, the Army appears for a long time not to have sufficiently valued or recognised the importance of contracting, contract management, and contractors on expeditionary operations (US Army, Commission on Army Acquisition and Program Management in Expeditionary Operations, October 2007). Worse still, poor contract practice can damage military professionalism and thereby in theory undermine military operations (Latham 2009).

[28] For an account of the importance the UK military place on contractors support to operations see UK Ministry of Defence Working Group Contractor Support to Operations, 16 March 2010.

[29] Erinys, for example, was hired to train a force to protect oil pipelines in Iraq. Their work was however hampered by unclear lines of communication, unrealistic expectations, and the lack of inclusion into the wider reconstruction agenda among others. See Kinsey 2009: 79-82. See also the Commission on Wartime Contracting in the US, whose founding was motivated by such misconduct and waste of taxpayer funds.

[30] In the United States, among other measures DoD has begun to increase its oversight personnel already before the Commission on Wartime Contracting issued its final report. See Garamone, 31 August 2011. For more detailed information, see the hearings of the Commission on Wartime Contracting which addressed issues of oversight, for example those from 14 September 2009 and 19 April 2010.
Regarding the UK, David Shouesmith, Maj. Gen. (Retd) and Senior Vice President of PRTM in London, regards it as unlikely that the increase in contractor numbers has been matched by sufficiently trained contracting officers. According to him, "certainly there has been a lag between the explosion of contractors and our ability to manage them. The US set up a contracting command - UK didn't. There have been efforts to improve the training of RLC officers to improve their skills and while this addresses the tactical level and broadens the skill base there is a broader educational point about understanding contractor skills, limitations and risks for all staff officers, which I don't see happening." Personal correspondence of the authors, September 2011.
As the German government source pointed out, the concerns in the German military are much more about *how* responsibilities were being outsourced rather than *which* or how strong oversight was. The source stressed that it was much about internal or cosmetic politics (for example reducing the number of uniformed personnel by shifting soldiers to newly constituted, government-owned corporations which are awarded contracts for maintenance, clothing and so on); the source did not mention oversight or contract management as primary concerns. It remains to be seen how this will change once the end of conscription has made its full impact on the Bundeswehr (the German military), that is whether and how hurriedly larger swaths of military responsibilities will be outsourced to the market. The German defence minister recently pointed out, that a core-responsibility policy would be implemented which, it appears feasible to assume, may well have as a corollary a restructuring of the Bundeswehr to something resembling the core-competency model outlined above. See Wittke and Möhle, 3 September 2011.

[31] See Krahmann 2010, regarding the force of neoliberal ideology in the political decisions made in the US and the UK in particular.

The idea of drawing up a contract for the provision of certain activities also changes the nature of the relationship between the military commander and the government whose policy he is there to implement. Under a contractual arrangement it is easier for politicians to interfere with strategy through involving themselves with the drawing up of contracts for logistical support activities. Worse, in this situation strategy can become an appendage of logistics when logistics should be an integral part of strategy.

To what extent, then, are contractors included in military doctrine and strategy?[32] In the case of Iraq, contractors were seen as a bolt-on to the deployed military force. This in turn led to tensions emerging between the two sides. The causes of such tensions were many, though a contributing factor was usually the feeling from contractors that their efforts were being undervalued by the military, while members of the military are sometimes put off by the significant pay gap.[33]

Any plan aiming to alleviate such problems will need to recognise the contribution made by contractors, that they are currently an integral part of the military force structure, and by performing non-combat activities they release uniformed personnel to perform combat missions – their core-competency. Crucially, the market can usually respond faster than the military to develop an internal capability. This is a very important consideration in counterinsurgency operations, where reaction time to changes on the ground is critical to operational success. What gives contractors an advantage over uniformed personnel is their ability to draw on a global network of technical and service providers to enable them to quickly deploy to give critical support capability when called upon to do so. They can also provide expertise in specialised fields that the military may no longer possess. In essence, the limits imposed on national militaries (capped numbers on deployed operations, core-competency models and so on), which have been addressed in this article, do not apply to contractors to a similar degree. By contracting out support services, national militaries, then, are able to both deploy on a global scale while being under-staffed and to reduce the 'uniformed' military footprint. In other words, contractors become force multipliers at a time when militaries are being downsized, when they are demanded to operate on a global scale and in complex environments, and when simultaneously contractors are not accounted for in long-term planning or doctrine as was noted earlier. The inherent contradiction at the defence-political level is manifest.

So far, Afghanistan has managed to avoid the extremes in contractor behaviour that Iraq experienced. The most important lesson Iraq can offer commanders is to include contractors at every stage of operational planning in order to avoid undermining the military's legitimacy in counterinsurgency operations. Contractors require clear guidance from military commanders concerning what capabilities and services the military need from them to operate effectively on the ground. Failure by a contractor to perform not only risks undermining the military's ability to conduct operations, but can ultimately damage its legitimacy in the eyes of the local population (which is of critical importance in "counterinsurgency" warfare) if it cannot do what it says it will do for them. Such a move also needs to include better oversight and control to prevent wasteful spending by contractors, a problem that has beset the operation in Iraq in particular. Such behaviour simply diverts limited resources away from critical areas. Ultimately, commanders need to address within their plans the use of contractors on operations including improving the level of coordination of contractors working across all the services and government agencies in the theatre of operation.

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[32] In the case of the US military, mention is made of contractors on operations in US Army, 2006. The UK military has produced some doctrine on the subject. See UK Military, December 2001.
[33] Tyson 2005 quotes former US Special Forces member Frank Antenori as saying: "You can stay in the military if you are patriotic, but then your ideals are outweighing your pocketbook." As quoted in Krahmann 2010: 219.

Yet again, these assessments points out among others the very clear yet under-debated phenomenon of an apparent mismatch of foreign and security political commitments and the resources their implementation would require on the one hand, and the military force structure (which to a large extent is also the result of political decision-making) which is incapable of serving the political commitments without contractor support on the other hand.

Conclusions and outlook: avoiding pitfalls before future expeditionary operations

Contractors have supplied militaries with the means to wage war for hundreds, if not thousands of years, making some degree of outsourcing a regular recurrence throughout most of history. Similarly, the war in Afghanistan has clearly revealed the extent of contractor involvement in supplying military operations. The role of contractors is to enhance the military's performance by taking over responsibility for the provision of partly mundane services, which in turn allows the military to concentrate on its core functions. Contractors also bring to operations a pool of knowledge combined with many years of experience, usually in a technical field such as communications, which is simply no longer available within the military's own ranks.

However, it was not always this way. During the Cold War commanders knew exactly the equipment and capability they had to fight with. Militaries at the time also had the expertise and experience of the full breadth of military technologies and responsibilities. Forging a strategy was thus far simpler. Crucially, strategy was not subordinate to the military's supply chain. This situation appears no longer to exist. Today, the military's reliance on contractors has changed the nature of the risks facing commanders in the field. Furthermore, this article's findings suggest that strategy may no longer be determined by military necessity as it should be, but by political expediency that may well have little to do with strategy.

As the article has shown, the appropriate force structure, the tactical and operational levels being subordinate to rather than hurting the overall strategy, the doctrinal accounting for contractors into an overall framework, and the possibly unintended consequences of political decisions on all of these aspects are the main issues that need to be taken into account in future expeditionary operations which rely on private contractors.

That contractors deliver more and more support capability in theatre suggests that contractors are now strategic assets the military now needs to manage. But this can only happen if the military recognises them as such. Until very recently, the military saw contractors as a bolt-on asset they could utilise in an *ad hoc* fashion when it suited their purpose, instead of as an integral part of their force structure. Some changes in attitude in the military have however come about, while more remains to be done. Crucially, until they accept contractors as strategic assets they will struggle to concentrate on their core-business, warfighting, as otherwise much time and energy is necessarily lost to managing a non-standardised military-contractor relationship (US Army, Commission on Army Acquisition and Program Management in Expeditionary Operations, October 2007). Similarly, all the political and military levels must be synchronised in terms of their doctrinal understandings of how to pursue military operations. An addition to the recent Tiger Team Report in the UK, for example, expects that up to 60 per cent of the future workforce will be drawn from the market (Tiger Team Report, 'Total Support Force').

However, contractors as part of the overall force structure were not accounted for in the UK's most recent Strategic Defence and Security Review in 2010.[34]

If counterinsurgency operations, such as those being conducted in Afghanistan, become the most regular kind of warfare in the coming decades, the military's force structure will in all probability resemble the core-competency model. By allowing contractors to take over large swaths of responsibility from the military, the military will in turn be able to concentrate its efforts on warfighting activities in mostly low-interest conflicts. Such a move though raises serious questions not only about whose interests are followed in the planning process, but also, as was argued in this article, about the commander's ability to decide on his own strategy based on military necessity and on secured supply services and not political expediency or even political will. The worry is that the introduction of contractors onto the battlefield will make the latter far easier, and that could harm military operations.

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Book Review

Wyn Rees (2011)
The US-EU Security Relationship
Basingstoke: Palgrave Macmillan

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Security cooperation between the United States (US) and the European Union (EU) has fundamentally changed twice in recent times, first after the end of the Cold War and again after the terrorist attacks of 9/11. The way in which these changes have impacted on the relationship between the US and the EU in matters of security - accordingly defined more narrowly as matters involving the use of force - is the theme of this book. It is part of the European Union Series by Palgrave Macmillan, which has established itself as one of the leading textbook series on European Union politics. The target audience is thus mainly undergraduate students of politics and international relations as well as generally interested readers and practitioners.

While NATO has often provided the first point of reference on the US-EU security agenda, the book takes a more comprehensive approach in line with its temporal focus by extending the analytical scope to also include bilateral relationships between the US and individual European countries, cooperation at the United Nations, the development of the Common Security and Defence Policy (CSDP), enlargement issues in both the EU and NATO, states of concern, nuclear non-proliferation and homeland security cooperation. These specific areas of security cooperation are used as individual case studies in order to demonstrate the validity of five general core arguments: First, the security interests of the US and the EU have been diverging since the end of the Cold War; second, the security focus of the US has shifted away from Europe; third, this shift has seen the prioritisation of global security issues; fourth, the US and the EU have disagreed over the appropriate means to address new security challenges; and fifth, divergences between the two actors in some areas of the security agenda have been accompanied by convergences in other areas.

The first chapter is central insofar as it lays out the conceptual foundations on which the majority of the conclusions in all following chapters are based. It delineates what type of actor the US and the EU have come to represent in consequence of their peculiar histories, the norms and values they have developed in this connection, and how these factors have combined in predisposing them towards one way of behaviour or another. Robert Kagan's metaphorical distinction between Mars and Venus serves as the recurrent theme of the book in this regard. The self-image of the US as an exceptional nation with a duty to domesticate the international, if necessary through the use of force, and of the EU as a group of war-weary nations with a new-found preference for soft power lies behind many of the divergences in the examined areas. Notwithstanding its clear inclination for positive incentives, the book argues further, the EU has come to recognise the importance of improving its military capabilities, not only to prevent a recurrence of impotence in the face of war on the continent, but also to meet its aspiration to act globally, as in the cases

of the completed operation EUFOR Congo and the ongoing operation EU NAVFOR Somalia.

With regards to the development of the EU's CSDP, the core argument of the book is that rather than as a competitor of NATO, the US should view the CSDP as a complementary framework within which new security challenges that NATO may not prioritise under US leadership can be effectively addressed. The risk of a toothless EU is seen as far outweighing the risk of a weakened NATO in consequence of increasing neglect on the part of the Europeans. The improvement of its military capabilities and the required necessary political reforms to make them available, however, has represented one of the most formidable tasks for the EU in the years to come.

While the CSDP has enjoyed limited achievements from the perspective of transatlantic security cooperation, the enlargement processes that allowed ten Central and East European states to accede to the EU and NATO are portrayed in the book as relative success stories. One of the main reasons for why enlargement is considered successful may be the relatively low profile of the issue when compared to other areas of the transatlantic security agenda. For the most part, joint coordination of the processes was largely lacking despite previous agreements by the two actors to the contrary. It comes as no surprise then to see divergences between the US and the EU having resurfaced in relation to the latter's approach towards the western Balkans and Turkey. As a result, the book remains sceptical about the future of transatlantic relations in this context since "no common agenda towards enlargement between the two organizations" exists (p.104).

While preceding chapters emphasise the differences in the approaches of the US and the EU towards new security challenges and the occasional irritations these have caused on either side, the area of homeland security that has emerged following the terrorist attacks of 9/11 shows a new quality of cooperation in which both actors have developed "the sense of shared vulnerabilities" (p.172). Although the US perceives the threat of terrorism in terms of a war rather than the Europeans who frame it in terms of a crime, the intensity of cooperation on judicial matters, border security and data-sharing has been unprecedented and will most certainly become more important in the future.

Overall, the book is a clearly written introduction to the field of transatlantic security cooperation. However, at times its structure sits somewhat uneasily between an informative textbook and an argumentative research monograph. The theoretical background provided in the first chapter forms a sufficient basis for the reader's interpretation of the following case studies, but it remains relatively unconnected to them in the text. As a general introduction with the aim to provide a concise overview of recent developments in the field, however, the book is highly recommended for a second or third year undergraduate course in politics or international relations.

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Book Review

Dimitrios Triantaphyllou, ed. (2010) *The Security Context in the Black Sea Region*

London: Routledge

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Dimitrios Triantaphyllou presents a cross-section of substantive research on the Black Sea Region (BSR) and its relationship with its neighbors. Examining the positions of the United States (US), North Atlantic Treaty Organisation (NATO), the European Union (EU), Russia Federation, and Turkey, among others, the analysts contributing to this volume delve deeply into the trends of security, energy and energy security, regionalism, and governance dynamics that greatly impact this hotly contested locale. Though much of the literature surrounding the study of the BSR is directed toward the oft-times symbiotic relationship between the EU and the Russian Federation, the editor and contributors of this volume bring to the surface a range of paradoxes and interplay of many more nuanced and intricate forces that are seen as ones in constant flux.

Triantaphyllou, the Director General of the International Centre for Black Sea Studies (ICBSS) in Athens, and Assistant Professor of International Relations at the University of the Aegean, Rhodes, Greece, has invested an extensive measure of his career to the study of the flowing body of research on BSR. He sees the international order as one having "[…] entered a new era that is characterized by dramatic changes in terms of both structure and process, resulting in the emergence of a precarious new world balance" (p. 3). No longer wrestling predominantly with Cold War attitudes and mentality, Triantaphyllou perceives the BSR as one now home to a surfeit of "[…] vestigial attitudes and ideological divides […]" rendering it full-to-the-brim and overflowing with great power (neorealist) politics, strained by a fragile house of cards comprised of relatively "[…] weak states that seek or need protectors, anchors or hegemons […] (p. 9).

The Security Context in the Black Sea Region presents ten faultlessly researched and methodologically sound chapters that cautiously traverse the fault lines perilously weakening the foundation on which the region rests. These danger zones include, in particular, regional and subregional governance, cooperation versus power politics, competing neighborhood policies, security partnerships and the dialectic of regional and EU security, post-Cold War paradigm shifts, soft- and hard-power applications, and issues of projected and supposed neutrality and belligerence. Of particular interest to readers of this work should be the injection of US strategic interests, chiefly as they relate to the administration of President Barack Obama, which runs the gamut of issues encompassing elements of democratic and market reform, energy and commerce, security architecture, institutionalism, strategic rivalry, historical animosity and ethnic conflict.

Following Triantaphyllou's introductory chapter, which illustrates the "[…] interplay between economic growth/subregionalism versus ethnonationalism/security dilemmas

and the 'neighborhood perception paradox'" (p. xii), Yannis Tsantoulis, in chapter two, explores the troubled power triangle in the Black Sea. Tsantoulis analyses the interrelated terms of geopolitics, subregionalism and discourse via an assessment of the significance of the geography of the region, the role of hegemon(s), the interplay of regional organisations, the impact of history and identity, and the policies implemented by the US, Russia, and the EU.

Chapter three, written by Oksana Antonenko, traces the regional framework existing in the BSR in the aftermath of the Russia-Georgia war. Antonenko plunges into the prospects that exist for establishing a comprehensive cooperative security community in the region. The author, while noting considerable obstacles that hinder the process, grasps the existence of drivers of regional cooperation to an extent that might stridently redefine the role of the BSR's more prominent and region-centered states such as Turkey and Russia.

Great power security is the dominant feature of Mustafa Aydin's following chapter, which presents the argument that dividends are not necessarily paid through increased attention of major actors that include the US, EU, and Russia. Rather than highlighting some of the region's prospects for cooperation and partnership, Aydin exemplifies the potential for creating a greater frequency of clashes (pp. 50-52). The lens of analysis is narrowed in the subsequent chapter, contributed by Nadia Alexandrova-Arbatova, who illustrates the impact of the Caucasus crisis with respect to regional and European security. Alexandra-Arbatova contends that security in the European periphery is not an achievable end so long as rushes headlong into the geopolitical interests of policy-makers in Moscow. The Russian Federation, according to Alexandra-Arbatova, "[…] should learn to actively create collective positions within the scope of international cooperation, because no single country can throw down a challenge to the whole world" (p. viii).

F. Stephen Larrabee turns the lens over to the US and its interests in the Black Sea zone, showing that US officials are at a point of increased interest and awareness regarding the events that have and continue to transpire there. Larrabee underscores the role that Russian-induced events can have on the US in trying to advance a coherent policy toward the perilous region. He stresses that institutional reform, energy, and security have "[…] thrust the Black Sea region onto US policy agenda and given it a new visibility" (p. 80).

Chapters seven, eight, and nine, written by Andrews Wilson and Nicu Popescu, Sabine Fischer, and Sergii Glebov, respectively, bring the focus of this volume to bear on the turbulent relationship between the grand players of the European chessboard: the EU and Russia. They cast diagnostic light on the neighbourhood policies of both Russia and the EU, the nature of the EU's security policies toward the region in a post-Georgian crisis era, and the protracted threats pitched further afield as a consequence of the August War reinforcing the need for strengthening greater military security in the region.

The final chapter, authored by Jeffrey Simon, brings Ukraine into the picture vis-à-vis the question of strategic alignment for a country suffering from "political schizophrenia" (p. 147). The entrenchment of Ukraine's political future in the European Union is mirrored by its historical envelopment by the Soviet Union, and its current immersion in Russian political and economic ambitions. Simon postulates that the growing need for Ukraine to, in spite of its even split between the EU and Russian blocs, realise that it will no longer be afforded the luxury of having its cake and eating it too. Pressing upon readers the increasingly precarious situation in which Ukraine find itself, Simon asserts that, "[…] many Europeans find Ukraine less appealing as a potential (NATO-EU) integration partner" (p. ix). Notwithstanding the growing need for Ukraine to pick a team, Simon postulates that, "[b]uilding political stability has become even more difficult and complicated because Ukraine's increased strategic importance as a natural gas bridge has raised the stakes for all concerned" (p. 155). The analysis leads one to consider that Ukraine might not have

long to enjoy its forged position of privilege on the fence before either the EU or Russia (or the competition between the two blocs) knocks it to the ground.

The analyses presented in this volume are highly praiseworthy, not least because of the holistic perspective assumed consistently throughout. The contributing authors make appreciable use of both primary and secondary sources of information and data, including policy briefs, governments documents, reports, interviews with EU officials, diplomats, and political representatives from Moldova, Georgia, the Czech Republic, among others, as well as news reports from Russia, Ukraine, the EU, and the US. The sweeping range of source information is subsequently processed through constructivist, institutional, and neorealist instruments of analyses, and ultimately blends with both empirical and qualitative points of view.

Encyclopedic and profound, this volume compresses a great deal of information in a relative concise framework. The product of the efforts of each author delivers overall a sprawling reference piece for practitioners and scholars alike. Although a highly praiseworthy work for its comprehensiveness, the title indicates a far broader range of examination than is currently featured within the book's 168 pages. Either the ambitious scope of this volume or the foci of the works presented within it necessitate restructuring to present what is actually an exploration of specific issues along the geopolitical spectrum of the BSR or a broader examination of the region as the title suggests.

In spite of this, Triantaphyllou's volume is a commendable effort to make sense of the many dynamics and paradoxes cast across the BSR, and are ultimately shown to spawn implications for states beyond the normative boundaries of the BSR and with it the numerous states that are intricately and unequivocally correlated.

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Book Review

Eva Gross and Ana E. Juncos, eds (2011)

EU Conflict Prevention and Crisis Management: Roles, Institutions and Policies

London: Routledge

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After the entry into force of the Lisbon Treaty, the European Union (EU) is still consolidating its existing instruments and institutions, producing results which may vary according to the sensitiveness of policies. Eva Gross and Ana Juncos explore EU conflict prevention and crisis management, challenging the current research and aiming at pushing scholars to advance the level of the present analysis. Their volume collects articles presented during events promoted within the UACES-funded Student Forum Specialist Group on European Union Conflict Prevention and Crisis Management. Therefore, it offers a wide range of perspectives and ideas, while maintaining a homogenous theoretical background, based on International Relations and European Studies.

The book begins by clarifying the aims and methodology. The main point is that, over the years, the EU has turned its initial role, based on aid and assistance, into a more structured and politicised strategic role, as witnessed by the 25 peace missions deployed even outside the EU. This can be seen particularly through two main aspects that contributed to enhance the EU crisis management capacity: firstly, the coherence of policy instruments used by member states; secondly, the increasing linkages with other international organisations, in the context of multilateralism, and the necessity for coordination on the ground for avoiding overlapping and duplications. The book is organised around three themes: the roles, conceived as "a pattern of expected or appropriate behaviour determined both by an actor's self-image and the role of expectations of other actors" (p. 8) to analyse the nature of the EU as an international player; the institutions, in order to examine the EU foreign policy as "process rather than substance" (p. 10); the policies, aiming at stressing how the EU uses "different policy instruments in different geographical scenarios" (p. 12). As a whole, the book proposes an enriching platform for debates and improvements.

The first theme includes two chapters, discussing the EU identity as international actor and its capacity to promote effective multilateralism. Kurowska and Seitz (chap. 2) use a heuristic perspective for studying the role played by the EU towards other actors. They first explore the role approach, focusing on the expectations made by other actors; then introduce the concept of multilateralism, which has changed the meaning of cooperation into a structured set of shared norms, principles and practices. This led the two authors to

consolidate their assumption that the EU and other actors (the UN, but essentially the US) have different roles and agree on a division of labour. Since there are many fields dealing with state-building in which the EU and the US show significantly different approaches, the problem here is understanding whether the division of labour can be best established and how the EU can manage to balance the imperialistic view, which is still present in any external intervention.

Stewart (chap. 3) continues in analysing the cooperation with European security organisations, namely OSCE and NATO. Given the fact that the EU conflict management capacity has been shaped by internal and external factors, the authors analyse both relations and appear very pessimistic about final outcomes. The EU-NATO cooperation is too military-based and lacks a long-term strategy, while the EU-OSCE dialogue is more focused on civilian tasks, but fails in being pragmatic. A reorientation of both relations towards a more prominent role of the EU as a security provider could enhance conflict prevention in the whole pan-european area.

The second part presents three chapters that emphasise the importance of institutions: based on a strong institutionalist perspective, they all affirm that institutions matter and are essential for understanding the EU security policies. Petrov (chap. 4) adopts an historical perspective for explaining how the EU foreign policy has been characterised by institutionalist change and path dependency implications. Also, he envisages some specific critical moments and junctures, like the Maastricht Treaty and the St. Malo Declaration, which contributed to create strong opportunities for policy change. By using this perspective, the Lisbon Treaty is expected to be another turning point, even though it is still not clear how the institutions could manage new mandates. Klein (chap. 5) uses rational choice for clarifying the impact of institutions on EU civil-military coordination. Based on principal-agent and agent-agent relationships, her analysis demonstrates that it is the result of the interplay between member states and the Council Secretariat and the Commission as agents. Also, through this model, she adds that the level of delegated authority and the structure of competences are influential in the formulation of civil-military practices, by producing bureaucratic competition and overlapping or duplication, both in Brussels and in the field. Lastly, Juncos (chap. 6) espouses sociological institutionalism for describing how institutions shaped military missions deployed by the EU. She affirms that institutional isomorphism, organisational routine, and a socialisation process are the factors that mostly contributed to the preparation and performance of interventions. By using the case study of EUFOR Althea, deployed in Bosnia, she describes how institutions fail in being effective because they may differ from original mandates and mission designs. Therefore, the institutionalist environment, in which other actors like epistemic communities are involved, appears to be extremely important.

The third part of the book focuses on policies and affirms that different tools are used in different geographical scenarios. Gilbert (chap. 7) shows one more time that, in Africa, the EU has developed a quantitative set of policies, based more on aid and assistance than on effective diplomacy. Some enhancements appeared through the first peace missions deployed in the continent, but "the EU remains an essentially developmental actor in Africa" (p. 114). In Afghanistan, as described by Gross (chap. 7), the EU had to share competencies and responsibilities with other actors – mainly the US – and this limited its visible impact on the global level. However, the potential contribution in post-conflict reconstruction had been recognised, also at the transatlantic level. The more the EU is involved in conflicts outside Europe, the greater the challenge which should be managed. In the last chapter of this part, Bosse analyses the Georgian case (chapter 8). In this area, there are additional troubles provided by the presence of other actors, mainly Russia, and by expectations regarding regional policies, like the European Neighbourhood Policy, already concerning this country. As the author suggests, the EU is still working on topics

included in the Action Plan and obtained a good result in promptly replying to the last conflict, but it still lacks a coherent and long-term strategy and depends on "ad hoc commitment of the member states" (p. 144).

In the conclusions, the two editors confirm the will to enhance the discussion on these topics and particularly on the concept of global actorness. The EU should undoubtedly continue to work on its own presence in the world, provided that it should be more effective, more multilateral and more turned towards a grand strategy in humanitarian action.

The book tackles a topic on which scholars and policy-makers have already expressed several and sometimes opposite opinions. Therefore, it has the merit to launch and renew some research questions which still need a serious debate concerning both theoretical assumptions and practical implications.

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Book Review

Donnacha Ó Beacháin and Abel Polese, eds (2010)

The Colour Revolutions in the Former Soviet Republics: Successes and Failures

London: Routledge

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A wide range of scholars have contributed differently to make this book colourful. The paperback begins with an excellent foreword by Stephen White and James Bryce arguing that the transformations that happened in the former Soviet republics during and after the independence period (1991) were no more than cosmetic changes. The edited volume vividly takes a course of seeking the causes and effects of the revolutions, why they happened in Georgia, Ukraine and Kyrgyzstan, but not in other countries (most likely in Azerbaijan and Belarus) despite the existing favorable conditions. It provides insightful analysis by explaining the dynamics behind the disruptions with domestic and external factors prevailing. The authors systematically discuss the factors that have contributed to the success and failure of the colour revolutions.

A chapter on Georgia tells us how a revolution that started initially successfully brought uncertainty into the country afterwards by providing a multifaceted study. With unnecessary military conflict in August 2008, as the author puts it correctly, President Saakashvili rather became a victim of Russian provocations, which indicated his inexperience in political affairs. However, one possible explanation for this might be the fact that he was the youngest national president in Europe when elected in 2004, so inaccuracies were inevitable. Although it was a political flaw of Saakashvili, it should not keep the positive changes that he brought to Georgia in the shadow. With all its drawbacks, the chapter productively discusses how he managed to tackle corruption, succeeded in the withdrawal of Russian military bases, made a set of fundamental reforms (government, police force, education), which are still considerably painful in neighbouring Armenia and Azerbaijan. However, what the author failed to provide is a possible outlook on what Georgia might experience after 2013 when Saakashvili's subsequent presidential term comes to an end, which is also critically important to assess his democratic/autocratic image. Moreover, the chapter concludes with some speculative and provocative remarks, which could have been avoided or developed with some firm arguments in the middle of the chapter. Accordingly, it might have been useful to examine the origins of those beliefs more thoroughly. This neglect is therefore somewhat surprising. To describe briefly, history recorded it as an example of a successful colour revolution and the change that Saakashvili brought to Georgia after the Rose Revolution was not cosmetic, but rather colourful with ups and downs.

Apart from the external conditions, which obviously were crucial, every single country had its own path with its own story towards a revolution, but the outcomes were relatively and surprisingly identical - in terms of disappointment and disillusion. Not less important is the fact that a real challenge begins after the revolution. A post-revolutionary period is a testing period for each revolution-tasted country. A revolution itself needs to be evolutionary. A revolution must be in the brains, the people must change in order to overcome the typical Soviet-style obstacles. As President Saakashvili in his speech at the United Nations General Assembly mentioned, "[m]odernization without freedom is not sustainable. Computers are not enough, if you don't have free minds to use them. So let us free our minds from our common Soviet past in order to build a common future". Ukraine in this regard was not an exception. The Orange Revolution, according to the author's stimulating observations, was a non-violent transfer of power from an unpopular government to an opposition through elections. The chapter addresses critical issues before and during the post-revolutionary period with some interesting findings. The Russian rivalry with the West and the loss of much of its face resulting in political embarrassment for Russia was particularly attention-grabbing. The chapter further examines how the Orange Revolution essentially replaced one part of the Ukrainian post-Soviet elite with another. Perhaps the recent Arab uprising in Egypt deserves to be mentioned when one demonstrator made it clear that "it would be a good lesson for the new government, before they do wrong things they will remember this mass protests here in Tahrir square". This is very much valid for Ukraine as well, as the author aptly provides that what has been achieved was the will of the Ukrainian people to cast their vote in a free and transparent election and their desire to live in a better-governed society. Even though the pro-Russian candidate Yanukovich won the presidential race, the elections, keeping Russia in mind, were largely fair and reflected the will of most Ukrainians by keeping a democratic trace behind. From this perspective, the author partly succeeds in his mission. Yet, what is largely missing is the absence of the influence of the Georgian Rose Revolution on Ukraine. No single word has been said regarding this, although it has at least a timeframe influence over the mass protests in Kiev's Maidan square in 2004.

Next, the volume provides the reader with an insight into the internal complexities of Moldova. This was the first country in the former Communist bloc to democratically elect an unreformed Communist party to power. Although it has many characteristics similar to the countries that underwent revolutions, it has experienced a different outcome. The same can be said of Belarus, which, despite having the highest level of political repression among the countries that have experienced the colour revolutions, has stayed out of the revolutionary wave. In this regard, a mostly divided or weak opposition was a common feature of the failed revolutions. Political repression, media obstruction and a popular government were also key elements for the failure. Another strong argument in the volume is a thesis that many of the colour revolutions were about cyclical, rather than transformational, change, referring to the typical example of Kyrgyzstan.

The book continues with the case of Azerbaijan, regarding which a comprehensive analysis has been made. Two major arguments deserve to be mentioned. According to the author, the strategy and the timing of the revolution were badly chosen with a two year-delay. It effectively provides pragmatic solutions and superior alternatives. It further explains that the Azeri opposition prepared for a colour revolution based on enthusiasm under the influence of the Georgian and Ukrainian successes, rather than as a result of their internal political life, so that it could not but fail. This is a novel approach to the problem and therefore is a welcome addition. However, embarrassingly, the author refers to the chairman of the Azerbaijan Popular Front Party Ali Kerimli, whose name is misspelled.

A chapter on Tajikistan highlights that the absence of revolution-like protests can be mostly understood by the unwillingness to face the prospect of another civil war. The fear

of a civil war made the people choose autocratic stability over uncertain change. For that reason, Tajikistan was a case where domestic conditions and historical experience matter. The book further benefits from the unique case of Turkmenistan, where a president for life, as described by the author, ultimately was brought down not by a strong civil society, but by a weak heart, calling it a very Turkmen coup.

Overall, through analysis, it can be concluded that Russia remains and will for a longer period remain a promoter of an authoritarian trend in the troubled post-Soviet space. It is revealed how Russia was using hot conflict points as a weapon of control and its continuous export of "Made in Russia" authoritarian products in order to prevent the possible revolution-like scenarios. After all, the Russian interventionist factor has always been dominant in the region by making it ubiquitous. Consequently, the book showed us that there is an apparent clash between authoritarianism aroused by the post-Soviet legacy and the liberal values nourished in the West. On the other hand, it is also shown how the EU attitudes towards human rights were determined by the size of a country's energy reserves, as it discovered its double-standard policies towards energy-rich authoritarian states.

As the research unveiled, the strategies and technologies of the colour revolutions disoriented many post-Soviet dictatorships. It is also revealed that the learning process is multi-dimensional, referring to the fact that not only have opposition activists learnt from each other, but autocrats have also observed the colour revolution and learnt from its successes and failures for how to deal with non-violent protests. The cases of Russia and Azerbaijan clearly demonstrate how the ruling regime can emulate tactics previously employed by colour revolutionaries and use them to bolster the regime (the establishment of the pro-government youth movements, "Наши" and "İr•li", in the respective countries). Literally, it shows that those governments certainly know that they are wrong-doers - a clear reflection of the fear that is pushing them to take anti-revolutionary measures. Indeed, as previously mentioned, the cosmetic changes are distinctive for the most, if not for all authoritarian states in the post-Soviet space. Another consistent factor in the post-Soviet 'colour revolutions' has been an outgoing president seeking to develop a succession strategy (Russia, Azerbaijan).

By and large, the book contains a good source of information with thrilling analysis. However, the quality of the book is blemished by poor editing. A major drawback in the volume is where an interesting in-depth analysis of Uzbekistan is obscured by an unfinished chapter, which is embarrassing. Apart from the above-mentioned reservations, this insightful paperback can be highly recommended to researchers in the field of post-Soviet politics.

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Book Review

Gillian Wylie and Penelope McRedmond, eds (2010) *Human Trafficking in Europe: Character, Causes and Consequences*

Basingstoke: Palgrave Macmillan

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Gillian Wylie and Penelope McRedmond have edited a highly accessible volume on human trafficking in Europe for labour and sexual exploitation – a problem that stretches across Europe, and one requiring legislative, political, and social responses. Unlike others who might see human trafficking as a problem that may be addressed through unilateral means, Wylie and McRedmond argue that it should be incumbent on transnational political institutions to act in concert with one another in order to adequately meet the challenge confronting all European states.

The editors of this volume have spent considerable attention to this field in their careers. Wylie is a lecturer in international politics and gender, and war and peace at Trinity College Dublin, and McRedmond is a solicitor and legal research and training consultant with many years' experience researching and developing training programs in the field of human trafficking. Both argue that, "while it is not the first time that both the issue of tackling contemporary forms of slavery has generated international policy concern […] the near universal acknowledgment that trafficking in persons constitutes an international crisis requiring worldwide response is unprecedented" (p. 1).

This comparably short volume is comprised of fourteen chapters including the introduction and conclusion. The first introduces human trafficking as a hotly contested issue, particular responses to which have been "criticized for the weakness of [their] victims' rights and protection measures" (p. 3). From the very beginning, according to Wylie and McRedmond, "the issue of human trafficking was seen […] from the perspective of law enforcement, and in many initiatives as being crime-based, and more particularly organized crime-based" (p. 3). Assessing the various causes of human trafficking in Europe and the many incoherent attempts at abating the growing problem, it is appropriate to make the *j'accuse* that no single approach alone can formulate a definitive answer to the burgeoning problem of trafficking in all corridors of Europe. "The narrow focus on prostitution regimes," for example, "leads campaigners to [remain] unmindful of the role that states themselves play in constructing the prostitution labor market through the range of economic, social, geographical, ideological, legal and political factors that shape the market" [p. 10].

A major theme within this volume and one predominantly informing the content of each contribution is the general ambiguity revolving around this egregious challenge. "[W]e […]

remain in a situation," assert Wylie and McRedmond, "where uncertainty persists about what exactly is going on in terms of the nature and extent of human trafficking into and through Europe, and how responses should be framed" (p. 10). The editors explain that sufficient overlap existed among the various chapters to avoid dividing this volume into specific sections. This format further serves an exploitative purpose in that particular methodological approaches and theories can properly serve as structural mechanisms for all of the contributors' works. The first several chapters address the history of and longstanding impact of human trafficking in Europe, followed by the book's middle chapters, which tackle empirical accounts of trafficking in humans within a state-specific context. The latter part of the book presents an examination of European legislative and policy responses.

In chapter two, Ronaldo Munck unearths the forces fuelling human trafficking, revealing that global inequalities and societal dislocations are chief among them. He challenges archaic assumptions regarding slavery, maintaining that contemporary forms of slavery are actually inevitable products, mechanisms, and *modus operandi* of the modern economy. Lorena Arocha dissects the meaning of slavery in chapter three, exposing the currents of this age-old practice to new modes of thought, arguing that, "we are moving towards the consolidation of 'contemporary forms of slavery' as the new preferable labor arrangement" (p. 11). In chapter four, Daria Davitti delves into a detailed analysis of child trafficking from Afghanistan to the United Kingdom (UK), showing the correlation between the practice of trafficking in children and Western military interventionism.

Chapters five to ten present case studies from various regions of Europe, and launch a rigorous examination of the policy questions and obstacles that emerge from this domain. In chapter five, Marcin Wiśniewski addresses the Polish dimension of trafficking for sexual and labor exploitation by looking at such factors as the "estimated number of victims of trafficking, cases brought to trial and convictions under the Polish Penal Code" (p. 11). In chapter six, Caitlin Deighan traces the shape of trafficking in women from Russia and Ukraine. She highlights the role of government and non-governmental organizations (NGOs) in responding to crimes of this nature, arguing that, "the trade in women and children is not a new phenomenon in Russia or Ukraine, though, due to globalization, these crimes have acquired a new, transnational dimension" (p. 94).

In chapter seven, Imelda Poole explores sexual and labour exploitation in the Albanian case, drawing on her own personal experience in Albania during her work with an NGO. These roles of women and children are reflected upon in chapter eight by Eilís Ward and Gillian Wylie, who present their findings on the exploitation of women and children in Ireland. Ward and Wylie debate the corollary between the demand in the sex industry and trafficking in the sex trade as well as "trafficking for sexual exploitation by examining the phenomena of lap dancing as part of the 'red light milieu'" (p. 108). Maria Papendreou and Torsten Moritz reveal the customer side of the prostitution industry in chapter nine through case studies of Greece, Cyprus, and Germany. Their research places an emphasis on the factor of demand, which previously been seen as a neglected facet within this field of scholarship. In chapter ten, Cezara Nanu casts the analytic lens over trafficking issues as they relate to Moldova. Beginning with an explanation of the factors that caused Moldova to emerge as a nation of trafficking in women for sexual and labour exploitation, the author questions whether "current approaches to trafficking prevention are in any way fruitful" (p. 12).

In chapter eleven, the investigative lens is narrowed as Alison Jobe explores the experiences of 23 trafficked women into the UK. She argues that the government's inability to adequately address this problem lies in the very foundation of its approach, given that the UK has traditionally viewed trafficking as "a migration rather than as a human rights problems" and as a result, "policies and actions have tended to focus on the

prosecution of traffickers and migration control rather than on the protection and needs of victims/survivors" (p. 165). In chapter twelve, Penelope McRedmond explores the reasons why so little is known about human trafficking by examining the role of organized crime. She argues that there is a need to "effectively and appropriately define organized crime within the context of human trafficking" (p. 13). Ina Farka looks at the case of Albanian children trafficked into Greece in chapter thirteen. The argument is made that the government of Albania must accept a responsibility to protect its own citizens, particularly Albanian children, not merely within its own borders. Farka identifies the core of the war against human trafficking as "[t]he need for effective extra-territorial jurisdiction" (p. 198). The final chapter concludes this volume by looking at when the issue of human trafficking was first detected in the European space. Addressing the nature of trafficking and the various policy responses implemented to combat its destructive devices, the editors contend that exploitation in this context should not necessary be considered an aberrant force but "as pat of the norm in a globalized capitalist economy" (p. 222).

This volume raises two main questions regarding the contemporary debate on human trafficking. The first asks "how much do we know about the extent and nature of human trafficking in Europe today?" (p. 216). The second question centered on "how states and Europe's international bodies should respond in their policy choices to the issue of human trafficking" (p. 216). The contributions to this work show that the perversity of this issue is a product of policy actions by the very states seeking an end to the problem they contribute to. *Human Trafficking in Europe: Character, Causes and Consequences* is a provocation, and casts a critical calling for policy-makers and academics alike to widen the interpretive lens on this problem in order to formulate more practical and 21st century-appropriate responses to it.

The contributors courageously traverse the contentious landscape of political and gender correctness to mirror the persistence showed by those willing to support the trafficking of nearly 2.4 million persons each year. Since no single collection can adequately cover this vast topic, certain empirical gaps appear throughout this book. For example, the numbers presenting in terms of children are covered in certain regions of Europe but not others. While an admirable attempt is made to navigate the various regions of Europe, some regions are omitted altogether from the overall analysis. Thus, researchers and practitioners interested in gaining insight into the goings on of human trafficking in Nordic countries will need to search elsewhere. Accordingly, this concise book cannot be considered a complete authority on the issue but it is, however, a lurid uncovering of the true nature and impact of human trafficking in the European dimension with respect to some of Europe's trafficking flashpoints. The salient observations and assertions made throughout this book should be considered as vital foundations to future research and approaches in this field. In nearly every way the chapters have been faultlessly researched, and based on a commendable range of both primary and secondary sources. It might well be seen as vexing to traditional approaches to crimes against humanity that are now seen as comparably ineffectual in their grasp of the poisonous effect of human trafficking.

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