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European Union Security Landscape Post-9/11: Necessary Protection or Unjustified Expansion of a Security Regime?

Colby Mangels
Georgia Institute of Technology

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EUROPEAN UNION SECURITY LANDSCAPE POST-9/11: NECESSARY PROTECTION OR UNJUSTIFIED EXPANSION OF A SECURITY REGIME?

Colby Mangels

INTRODUCTION

Focusing on changes to the third-pillar of the EU legal structure following 9/11, this paper provides analysis into legislative and policy changes in the European Union arising out of the events of September 11th. Following the attacks of 9/11, an unprecedented expansion of the EU-level security capabilities took place within a relatively short amount of time (approximately 2002–2006). This change reflected long-standing desires of many member-states, as well as EU officials to further utilize the potential of the EU as a basis for counter-terrorism and crime prevention through data-sharing agreements, as well as further streamlining the justice systems of respective member-states. The events of 9/11 provided the necessary consensus within which individual member-states and EU legislators worked to develop and pass legislations and policies which allowed the EU to expand its powers in the counter-terrorism arena.

The ambiguity and speed with which some of these new laws and institutions were enacted calls for a closer examination of their effectiveness. This study proposes to view the manner in which the security apparatus of the EU post-9/11 has allowed the EU to reduce the perceived threat of terrorism. Has the EU been able to combat the underlying causes of terrorism, or does it remain hampered by problems of miscommunication across national borders? Has the streamlining of the EU security apparatus provided member states with increased abilities to track down and arrest terror-suspects? Finally, has this legislation resulted in higher conviction rates of terrorists, or are the wrong individuals being targeted?

The U.S. approach to intergovernmental cooperation in the ‘war on terror’ was comprised of two main categories. The first was the visible increase in U.S. requests for active participation by key European allies (namely the UK, Germany, France, Spain and Italy) in war zones such as Afghanistan. This was often negotiated on the side of NATO troop deployment figures, as U.S. officials believed certain actors were not committing troops to military actions in the same proportion as their relative economic size and political power

denotes¹. Such requests have continued to solicit repeated disagreements between the U.S. and certain allies, often resulting in very public outbursts on both sides².

The second aspect to the U.S. war on terror concerned the call for increased cooperation, which generally was met not on an individual basis of agreements between individual European states and the U.S. government as had previously been the case, but on the supranational level of the EU, where the ratification of cooperation treaties could be simpler and have a broad-reaching effect across all of the member states of the European Union³.

Paramount among the differences between U.S. and European conceptions of combating terrorism has remained the focus on conventional military vs. policing measures⁴. While the U.S. experience with terrorism, and perhaps speculatively, its reliance on conventional military tactics, have caused it to view terror as a military challenge that can be solved through traditional 'campaign-style' wars with counter-terror tactics, European forces have taken the approach of preferring to strengthen domestic and European Community security forces in order to prevent future attacks⁵. While it remains speculative in nature to determine the sole cause for these two strategies, two hard facts provide a starting point from which one can extrapolate. First, U.S. military budget expenditures, both as a proportion of the U.S. federal budget and in absolute terms, continue to dwarf all other developed nations⁶. U.S. conventional military technology also provides excellent advantages to U.S. forces in searching out and fighting terrorists worldwide⁷. Second, European nations remain constrained either politically, technologically, or financially to embark in global unilateral military campaigns against non-state actors⁸. European reliance on U.S. conventional militaries has dated back to the Cold War and the foundation of NATO. European forces have shown technical and managerial inadequacies during conflicts such as the Yugoslavian civil war and the Kosovo-Serbian conflicts. Furthermore, certain countries (such as Germany) either have constitutional restraints on foreign military campaigns⁹, or high levels of domestic opposition against foreign military interventions¹⁰.

It remains without question to conclude that U.S. policies and political negotiations had a noticeable effect on the development of European security policies post 9/11¹¹. However, it can be argued that U.S. pressure for compliance was to an extent constrained within

1 McGuire, Steven and Michael Smith. "The European Union and The United States." Palgrave Macmillan. 2008. 243.

2 <<http://www.cnn.com/2003/WORLD/europe/01/24/france.germany.rumsfeld/index.html>> <<http://www.cnn.com/2003/WORLD/meast/01/22/sprj.iqr.wrap/>>

3 Archick, Kristin. "U.S.-EU Cooperation Against Terrorism." Congressional Research Service Report for Congress. Order Code RS22030. August 2007.

4 Larrabee, Steven and Julian Lindley-French. "Revitalizing the Transatlantic Security Partnership: An Agenda for Action." Rand Corporation and Bertelsmann Stiftung. 2008, 33.

5 McGuire, Steven and Michael Smith. "The European Union and The United States." Palgrave Macmillan. 2008. 243-245.

6 CIA World Factbook, 2009.

7 McGuire, Steven and Michael Smith. "The European Union and The United States." Palgrave Macmillan. 2008. 239.

8 Menon, Anand. "Empowering Paradise? The ESDP at Ten." *International Affairs* 85:2. 2009. 230, 234.

9 "Basic Law for the Federal Republic of Germany." German Bundestag Administration. Berlin. 2008.

10 Menon, Anand. "Empowering Paradise? The ESDP at Ten." *International Affairs* 85:2. 2009. 236.

11 Archick, Kristin. "U.S.-EU Cooperation Against Terrorism." Congressional Research Service Report for Congress. Order Code RS22030. August 2007. 3.

a larger force of European integration and a search for identity¹². The ratification of the Maastricht Treaty developed the third pillar of Justice and Home Affairs within the EU. As the JHA developed itself following Maastricht, it was constrained by the wariness of member-states to transfer power regarding defense and security to the European Union. The developments of 9/11 provided JHA and the European Commission with the political capital needed to justify the expansion of a security apparatus on the supranational level. As the U.S. redefined its intergovernmental security and intelligence network in hopes of improved data sharing and cooperation, European security policy developed as a quest for cooperation across member-states themselves, as opposed to across governmental organizations, thereby paving the way for new institutions and policies.

While this security expansion represents the unique approach of the EU towards modern-day counter-terrorism and security, it raises numerous questions concerning its implications for civil and privacy rights of citizens, as well as its ability to remain effective in a rapidly changing security environment. Continued secrecy in negotiations between the EU and U.S. concerning data-sharing agreements has resulted in speculation about the types of information which could be transferred and viewed by the two partners¹³.

STREAMLINING THE SYSTEM

The impetus for a new, streamlined security apparatus came in short form following the terror attacks of 9/11, on September 21, 2001 when the European Union Council of Ministers met to declare their condemnation of the attacks¹⁴. Within this announcement lay the framework for future security establishments. On June 13, 2002 the Council of Ministers adopted a framework, which provided for the establishment of a common European Arrest Warrant as well as a common legal definition of terrorism and terrorist acts within the EU¹⁵. Adoption of the EAW was preceded by the establishment of EUROJUST in February 2002, which provided a means for justice systems across Europe to share information and collaborate on transnational court proceedings as well as international criminal proceedings¹⁶. The EU institution of Europol was given extensive powers to combat and monitor terrorism within the EU, and across member state borders¹⁷. These three expansions (the EAW, the establishment of EUROJUST and the expansion of Europol powers) created a framework within which the future expansion of EU-level security powers was made possible through increased EU capabilities to monitor and intervene in the justice systems of member states.

Furthermore, since September 23, 2001, the EU had been cooperating with the U.S. Treasury Department to transfer personal data from financial transactions linked to

12 McGuire, Steven and Michael Smith. "The European Union and The United States." Palgrave Macmillan. 2008. 244-245

13 <http://www.europolitics.info/ep-vote-against-swift-agreement-sparks-enthusiasm-and-anger-art262201-40.html>

14 Council Document 12019/01

15 Council Document 2002/584/JHA

16 Council Document 2002/187/JHA

17 Archick, Kristin. "U.S.-EU Cooperation Against Terrorism." Congressional Research Service Report for Congress. Order Code RS22030. August 2007. 2.

the Belgian corporation Society for Worldwide Inter-bank Financial Telecommunication (SWIFT)¹⁸. The agreement surrounding SWIFT was kept largely in secret following 9/11. The primary goal of the SWIFT agreement was to transfer personal data arising from trans-Atlantic financial transactions to the Treasury Department's Terrorist Finance Tracking Program. This information primarily included financial information such as account numbers and bank addresses, names, telephone numbers and personal addresses. TFTP officials have stated that data collected from SWIFT cannot be used to try persons unless the crime is linked to terrorism¹⁹. Upon the signature of a new SWIFT agreement in 2007, U.S. Treasury and EC authorities revealed that data received by the Treasury Department consisted of completed financial transaction messages and their adhering details. Since the beginning of its cooperation in 2001, civil rights groups as well as members of the European Parliament have repeatedly protested that the SWIFT data transfers do not conform to the Data Protection Directive, which specifically prohibits transfers of personal data from the EU to third countries²⁰. Furthermore, Working Party 29 (the independent advisory board to the Commission) declared that SWIFT had violated Data Protection Directive codes concerning the transfer of private information²¹. EC officials claim that it is very unlikely for such data to have been used in a manner that would have unnecessarily breached privacy and continue to defend the cooperation. The SWIFT agreement has undergone two revisions, one in 2007, following public disclosure due to press investigations, and one in 2009 following the Lisbon Reform. Following the ratification of the Lisbon Treaty, the EP disbanded the SWIFT agreement until further notice on February 11, 2010 by voting to disband the program²².

DATA RETENTION DIRECTIVE

With its establishment in March, 2006, the Data Retention Directive allowed for the Union to utilize new types of data to track and capture terrorists. Primarily, it requires each member-state to store electronic data in the form of "traffic data" arising from mobile phone communications. Data necessary to trace and identify the source of a communication by telephone is defined as the calling number and the address and name of the subscriber²³. Furthermore, data to determine the destination of a mobile phone communication is stored in the form of the numbers dialed and used, as well as the numbers of routed calls, and the name and address of the subscribed user on the receiving end of phone calls. This is accompanied with data required to identify the date, time and duration of a communication, the type of equipment used, and the physical location of the parties involved at the time of their

18 Council Documents 13689/02, 13996/02, 13696/02

19 Council Document 10741/1/07 Rev. 2

20 Peers, Steven. "The Exchange of Personal Data between Europol and the USA." Statewatch Analysis No. 15. 2002. <www.Statewatch.org>

21 Directive 95/46/EC, Article 8, October 24th, 1995

22 http://www.europarl.europa.eu/news/expert/infopress_page/019-68675-039-02-07-902-20100209IPR68674-08-02-2010-2010-false/default_en.htm

23 Council Directive L105/54, Article 5

communications.

The DRD further expands European security officials' ability to view data to include that of Internet communications. The scope of data collected is basically the same as for telecommunications, with the collection of log-in and log-out data, location, identification of users, and duration of communications permitted. It is important to note that none of the data stored within the DRD is allowed to pertain to the content of the message itself, merely the surrounding "traffic data". Data collected under the DRD is stored by member-states for a minimum of one year, and for a maximum of two years. While under state storage, the data is capable of being readily accessed by any member of a European security force²⁴.

Use of the DRD as a European standard for data collection and storage has expanded the powers of Eurojust in two major ways. First, within this new framework, Eurojust continues to maintain its position as facilitator of inter-EU communications. With expanded observation by each member-state, Eurojust is now responsible for the transfer and sharing of this data between member-states²⁵. This gives Eurojust the ability to view virtually all of the information collected within this agreement. Second, Eurojust is now the regulatory body, determining the effectiveness of each member-state. Effectiveness is based off of statistics each member-state collects according to the number and type of information collected.

RELATIONSHIP TO EUROJUST

In attempting to streamline the judicial process across member-state borders in the EU, the Data Exchange Policies Directive outlines data to be transferred from member-states to Eurojust for the support of criminal judiciary proceedings²⁶. Data to be transferred to Eurojust is comprised of: (1) data which identify the person, group or entity which is the focus of an investigation or prosecution, (2) the offence concerned and its specific circumstances, (3) information about final convictions for terrorist offenses and the specific circumstances surrounding the offenses, (4) links with other relevant cases, and (5) requests for judicial assistance.²⁷

Expanding upon the Data Exchange Policies Directive is the Terrorism Information Exchange Directive of December 2005²⁸. This directive outlines information to be transferred to Europol and Eurojust from member-states in the role of fighting terrorism. In relation to Eurojust, information to be transferred is generally that which surrounds instances of criminal acts of terror. Such data includes descriptions of types of crime, as well as all pertinent information and evidence to the criminal proceeding. Any evidence uncovered as the result of a criminal proceeding is required to be transferred to Eurojust.

Both of these directives relate back to the Data Retention Directive in their legal

24 Council Directive L105/54, Articles 6/7

25 Council Decision 2002/187/JHA

26 JHA Press Release 2626th Council Meeting, 2004

27 JHA Press Release 2626th Council Meeting, 2004, 16

28 Council Directive 2005/671/JHA

scope. By defining a broad range of criminal issues for which a transfer of all relevant data to Eurojust is necessary, the Data Exchange Policies Directive and the Terrorism Information Exchange Directive both specify a range of data to be sent to Eurojust that also relate to the DRD. As the DRD requires states to collect all data on telecommunications and Internet email communications for the primary purpose of preventing acts of terrorism and both of the above-mentioned directives require member-states to send all pertinent information regarding criminal acts to Eurojust, much of the information collected under the DRD can be interpreted to fall into the category of one of these other directives. Interpretations within this manner can allow for Eurojust to effectively utilize expansions pertaining to member-states' data collection regimens, in order to expand its own capabilities in the realm of data storage.

THE EUROPEAN ARREST WARRANT

The EAW has been able to streamline the inner-EU extradition system by providing a new method of transferring wanted criminals. Its adoption in June, 2002 by the Council of Ministers was generally viewed as a way to combat criminal activities which were increasingly becoming international in scope.²⁹ Based on new definitions of cross-border cooperation, member-states are now subject to carrying out an issued EAW unless the member-state in which the warrant is to be executed can find an objectionable grounds to it (i.e. if the state to which the wanted person is to be transferred still carries the death penalty). The EAW allows member-states to issue a single warrant for both the arrest and extradition of the wanted person (Articles 3 and 4). The EAW utilizes the integrated Schengen Information System in order to issue the warrant to another member-state, allowing for the rapid dispersal of the EAW across the Union.

The EAW has continued to play an important role not only in the arrest and extradition of individuals, but also in the abilities of member-states to cooperate through improved information-sharing and situational awareness. This cooperation has also been facilitated by Europol, which assists in issuing EAW warrants (if not possible in either the member-states or in the Schengen Information System). It also continues to supply member-states with a shared database through which information can be shared in a timely fashion.

SITCEN

Following the 2004 Madrid train bombings, the Commission set out to establish an institution which would be responsible for monitoring and preventing organized criminal threats to the Union. The result was the institution named Sitcen, which was placed under control of Europol in 2005 and was charged with monitoring and preventing threats through information gathering and intelligence. Often referred to in press reports as "the CIA of

²⁹ Council Decision 2002/584/JHA

the European Union”³⁰, Sitcen has faced multiple difficulties in effectively carrying out its surveillance, while respecting the fundamental rights of EU citizens.

By 2007 the Council had adopted 75 policy recommendations by Sitcen to further prevent perceived acts of terrorism³¹. These policy recommendations were supported by the findings of Terror Threat Assessment reports, produced by Europol. Europol uses data from individual member-states to support this type of data collection, reporting on the latest trends and arrests of terror suspects and groups within Europe. Sitcen then developed its reports and policy recommendations based off of the Europol-assembled data, and further used it to warrant future investigations. Among the recommendations made by Sitcen to the Council Working Group were those concerning reducing threats caused by Islamic terror networks using the Internet, reducing the threat of terrorism on plane traffic, as well as addressing the increase of North African terror networks within Europe. Many of these policy recommendations were then transferred into Council recommendations for member-states in order to reduce threats in these fields of competency.

While Sitcen remains primarily fixated on performing surveillance and analyzing data, it has also developed several research programs within the context of EUROPOL and Commission oversight. The project with perhaps the greatest number of implications for the European security scene is that of INDECT. The concept for INDECT relies upon constructing a new type of search engine, one that is capable of identifying what INDECT designers have determined as “abnormal behavior.”³² This new type of search engine combines direct searches of images and videos based on watermarked contents with the storage of meta-data in digital watermark form, thereby allowing for a system programmer to determine the specifications of the individual to be searched. By using a variety of informational sources such as Internet, video and audio files, INDECT plans to compare facial, voice, and sound recognition models to identify targets. This information can then be quickly relayed to other police agencies within the EU in order to determine likely suspects. Despite this apparent ability of INDECT to hone in on specific targets, the ramifications of its proposed use in the domestic police forces of Europe has raised a series of questions and concerns from privacy advocates.

It is particularly the ability of the INDECT system to observe citizens across the EU which continues to provide privacy advocates with support to their claims that INDECT violates their rights to privacy. The ability of Brussels-based technocrats to potentially wield the power of one of the greatest single-interfaced systems ever developed for the purpose of domestic surveillance has not been met with continual support across the Union member-states. Primary resistance and awareness has been based in Britain, as newspapers and maga-

30 <http://www.dailymail.co.uk/news/worldnews/article-1042491/Fears-Brussels-plans-European-CIA-force-Britain-share-security-secrets.html>

31 Council Directive 7261/07

32 <http://www.indect-project.eu/>

zines have published several investigative articles into the nature of the INDECT project.³³ Despite growing interest, Sitcen officials as well as INDECT developers have remained relatively reserved when it comes to describing the implications of the system. Sitcen continues to emphasize the trial nature of the project, as well as potential alterations to the system before the end of the grant period in 2014³⁴.

RESULTS ON COMBATting TERRORISM

With the formation of The Hague Program and the expansion of Europol in 2004 and 2005 came the first comprehensive attempt by the Council and Commission to develop regular reports on the threat of terrorism to Europe. Europol was charged with issuing regular reports on the threats of terrorism to the EU. These reports have been developed along with member-state cooperation and are based on figures of arrests, convictions and investigations within each member-state. While certain member-states have refrained from submitting all of the information requested of them by Europol, the reports nevertheless remain an integral part in determining current trends concerning terrorism in the Union³⁵.

Initial reports in 2007 and 2008 showed how the arrest rates of terrorism suspects had rapidly risen in relation to previous years. In 2007, 1,044 arrests of terrorism suspects were made, a 48% increase since 2006³⁶. 2008 also witnessed a large increase in terrorism related arrests compared to 2006 and prior years with 1,009 terror-related arrests³⁷. Member-states interviewed and surveyed by Europol reported that new legislation regarding data sharing and cross-border cooperation had improved the ability of police forces to pursue leads and make arrests.

While the rate of arrests of suspects of terror-related crimes increased in many member-states in recent years (especially in France and Spain), the conviction rates of many of these cases continue to fall. In 2007 and 2008, the majority of suspects arrested were accused of "membership in a terrorist organization." However, Europol officials and some scholars claim that while legislation until this point has greatly improved cross-border cooperation in ascertaining intelligence and investigating suspects, the ability of terrorists to operate in small, semi-independent cells has enabled them to continuously remain one step ahead of legislative acts, attempting to reign them in³⁸. As terrorists continue to operate in seemingly isolated groups, legislation of a previous standing nature remains inadequate to provide the needed scope for modern day trials. 2008 arrest records reflect a new approach to fighting terrorism: arresting suspects on charges of financing terrorism as opposed to charges of membership in the organization itself.

33 <http://www.telegraph.co.uk/news/uknews/6210255/EU-funding-Orwellian-artificial-intelligence-plan-to-monitor-public-for-abnormal-behaviour.html>

34 http://cordis.europa.eu/fetch?CALLER=FP7_PROJ_EN&ACTION=D&DOC=4&CAT=PROJ&QUERY=011f30e52539:b685:00e1e967&RCN=89374

35 "EU Terrorism Situation and Trend Report [2007, 2008, 2009]." Europol Corporate Communications. 2009. <<http://www.europol.europa.eu/index.asp?page=publications&language=>>

36 "EU Terrorism Situation and Trend Report 2008." Europol Corporate Communications. 2008. 42. <<http://www.europol.europa.eu/index.asp?page=publications&language=>>

37 "EU Terrorism Situation and Trend Report 2009." Europol Corporate Communications. 2009. 18. <<http://www.europol.europa.eu/index.asp?page=publications&language=>>

38 "EU Terrorism Situation and Trend Report 2009." Europol Corporate Communications. 2009. 14-16. <<http://www.europol.europa.eu/index.asp?page=publications&language=>>

Such changes in patterns of arrest reflect not only the need of law enforcement agencies in Europe to find new routes of investigation, but also the role of Europe in the global context of terrorist networks. Europol authorities in the previous two annual reports of the terrorist threat to Europe have claimed that the financing and radicalization within EU makes for a large “market” for terror networks³⁹. With high rates of second and third generation immigrants, Islamic terror networks have been increasingly targeting EU youths from their headquarters in other geographical regions. While all Internet traffic relating to terrorist recruitment has increased within the past five years, Islamic terror groups are now specifically residents of certain European countries. Whereas messages from terror groups and terrorist-sponsored websites only appeared in English or Arabic, video and audio messages conducted by terror groups are now available on the Internet in French and German.

CONCLUSION

Expansions of the security apparatus within the European Union have fostered new abilities to communicate and streamline the gathering of information between member-states. The Hague Program has illustrated how the Council and Commission have worked to increase abilities at the EU institutional level to move towards preventative measures of combating terrorism. Policies suggested under the guise of The Hague Program attempted to reduce the loss of speed brought about by legalistic missteps between member-states by simplifying and streamlining communication patterns. While advancing new legislation, the Commission and Council have worked to either strengthen crime-fighting institutions (Europol), or to develop entirely new institutions to facilitate the goals of further legal cooperation (Eurojust). In the case of Europol, the EU has witnessed the creation of an institution which allows the EU to act within new boundaries of the Union. With its police training college, standing body of officers, liaison officers placed in member-state and U.S. police headquarters (FBI), Europol is now able to work within its expanded legal jurisdiction with a permanent presence in many locations⁴⁰.

Eurojust has facilitated new methods of data transfer between member-states. By providing the necessary oversight, it has allowed for member-states to transfer judicial and pertinent law enforcement information in a manner which allows for quick, standardized evaluation among members of the legal and law enforcement agencies across the EU. This standardization allows for the minimization of missteps which could potentially divert limited resources. New legal tools such as the European Arrest Warrant provide for one-size-fits-all policy to rapidly facilitate the transfer of persons, evidence and documents from one member-state to another. However, member-states have conceded that this cooperation has placed rising financial burdens on their national judicial systems. With the increases in the number of cases prosecuted across member-states, international requirements of many cross border cases is becoming increasingly difficult for law enforcement and legal members within the judicial systems of member-states to carry out.

Financial burdens are not the only side effects of this new stream of legislation. While Eurojust and Europol have provided means for increased cooperation between member-states, they have also increased the powers of the EU in the realm of internal security. With the instances of the Data Retention Directive and the SWIFT agreements one can

39 “EU Terrorism Situation and Trend Report [2008, 2009].” Europol Corporate Communications. 2008–2009. <<http://www.europol.europa.eu/index.asp?page=publications&language=>>

40 Council Decision 2005/681/JHA

determine how the scope of new legislation allows for EU officials and member-states to monitor information in many of the daily activities of its citizens. The rapid pace at which these policies and agreements were designed has affected their often exceedingly broad legal scope. With agreements such as SWIFT, the Commission and Council did not take into account the breadth of the agreement which was designed, whereby citizens were potentially not able to control the transfer of their personal data from the EU to a third institution. This is revealed in the European Parliament's repeated opposition to the agreement as well as its vote on February 10, 2010 to disband the SWIFT treaty until it could be redefined to reflect fundamental EU rights. That such legislation could be carried out prior to the ratification of the Lisbon Treaty with minimal Parliamentary participation reveals a flaw in the previous EU institutional design. With minimal oversight, in extraordinary circumstances, the Commission and Council were willing and able to design and agree to legislation which is at least questionable in its respect of fundamental EU rights. If nothing else, these acts reveal the importance of the Lisbon Treaty, its reforms to the EU, and the respective calls for greater transparency.

With its move from an ESDP policy advisor, to internal security specialist, Sitcen has played a role in proposing new means of thwarting terrorist attacks that have been viewed as 'Orwellian' by many EU citizens. With its proposed implementation of Project INDECT into the police forces of individual member-states, Sitcen is offering a means of providing security measures that raise serious questions of privacy rights. With the ability to search out and direct the capture of suspects from a computer screen supported by CCTV cameras, INDECT could potentially violate a number of the civil rights of member-state citizens. Furthermore, the applicability of this project to preventing crimes cannot be determined, as it merely uses surveillance to enhance searches. Therefore questions can and perhaps should be raised as to its necessity within the current goals of The Hague Program framework.

Ultimately, the question remains as to the overall effectiveness of these new legislative acts. Have they worked to prevent crimes? Have they increased the abilities of member-states to apprehend suspects? Perhaps a definitive answer to these questions is not obtainable under any circumstances due to the fluid nature of terrorism and the seeming ease at which individuals can empower themselves. However there exists a recurring issue in the member-states' legal procedures against terror suspects. That issue is the increasing difficulty of courts to convict suspects on charges related to terrorism. While increased cooperation has undoubtedly led to the increase of the number of suspects arrested for terrorism⁴¹, the number of acquittals in cases of terrorism remains relatively high (30-35% in the years 2007-2008)⁴². According to Europol, this results primarily from the inability of judges and judicial officials to convict terrorists under existing laws. This relates to the rather ambiguous nature of charges of terrorism and the inabilities of member-state law enforcement members to collect sufficient evidence for conviction. While the ability of law enforcement officials to communicate between each other across member-state borders has improved, there remains the impossible barrier of the courtroom in bringing terrorists to justice. Furthermore, the question of targeting must be raised: if the acquittal rates in cases of terrorism are so high, are the 'bad guys' getting away, or are innocent individuals being targeted? These questions

41 "EU Terrorism Situation and Trend Report 2009." Europol Corporate Communications. 2009. 11. <<http://www.europol.europa.eu/index.asp?page=publications&language=>>

42 "EU Terrorism Situation and Trend Report 2009." Europol Corporate Communications. 2009. 16. <<http://www.europol.europa.eu/index.asp?page=publications&language=>>

will ultimately be answered only after the elapse of time has allowed for more data to be collected on cases operating within this new judicial regime.

Through the EU policy forum, member-states have moved from taking a reactive to a preemptive stance towards terrorism. With each occurrence of large-scale terrorism in Europe (9/11, Madrid train bombings 2004, London Underground bombings 2005) there exists a new call for ‘never again.’ These incidences have preceded increased expansions of the EU into the preemptive sphere of combating terrorism. This prescription of preemptive measures has led law enforcement agencies on both member-state and EU-levels to begin targeting ever more precise instances and aspects of terrorism. Whereas immediately following the 9/11 attacks the EU and member-states were primarily concerned with dismantling the relatively tangible ‘terror networks’ operating in Europe, their focus quickly moved to targeting the cells of these terror networks themselves. Currently, the forefront of the movement for preventative action has led European law enforcement to target the processes of recruitment and radicalization. Terror threat reports from Sitcen and Europol continue to cite the importance of striking the source of terrorism itself by sniffing out radicalization where it most often takes place in prisons, schools, homes, and religious institutions^{43 44}.

With the EU and member-states moving ever more towards combating the ‘roots’ of terrorism, pertinent questions remain to be asked as to how these goals should be achieved. While the concept of terrorism possesses varying degrees of clarity, targeting the areas of radicalization and recruitment can easily cross over into areas which infringe upon vital civil liberties. How do member-states plan to convict persons for such crimes? Is it possible to develop legal structures which can encompass the concepts of radicalization while respecting the cherished civil rights of democratic societies? Finally, is it even possible to prevent these crimes? Is terrorism perhaps something EU member-states must live with if they wish to maintain their democratic rights? As explained previously in this essay, even within a democratic, quasi-republican institution, there exists the potential for the development of legislation which stands in conflict with the fundamental right of its citizens.

By expanding its abilities to capture, share and transfer information the EU and its member-states have perhaps validated the saying that “the more one understands, the more ignorant one realizes he is.” Despite the vast amounts of knowledge and ability to coordinate across member-state borders, EU police forces remain unable to guarantee that they are able to prevent terrorism. However, the possibility of the claim that all terrorism is preventable remains to be validated. EU attempts to combat terrorism within the Union have thus far focused too much on apprehension and largely overlooked the practical, legal and financial constraints of individual member-states in trying and convicting the individuals. By further expanding a security regime that is already top heavy, the EU threatens to discredit its own legitimacy for being the highest institution of democracy with a respect for the fundamental rights of its common member-states. Improvements have undoubtedly been provided to inter member-state communication and data sharing in the law enforcement realm since the attacks of 9/11. However, before further expansion, the Union should develop a common consensus from *all* bodies of its institution as to the long-term goal of combating terrorism while keeping in mind that this is a highly fluid and dynamic concept, arising from various societal, religious and cultural factors. Any long-term plan should also take into account the

43 Council Directive 7261/07

44 “EU Terrorism Situation and Trend Report 2009.” Europol Corporate Communications. 2009. <<http://www.europol.europa.eu/index.asp?page=publications&language=>>

various ethnic and societal factors within Europe that cause it to be subject to terrorism, namely the large percentage of citizens with non-European backgrounds, and how best to rectify them. Although perhaps painful for many EU member-states, failure to view the divisions inherent within their own territory will lead to the recurrence of issues of terrorism. An approach which encompasses these points, as well as the societal consensus on the issue of terrorism, is ultimately necessary in order to provide the Union with an anti-terrorism policy which is both effective in apprehending and convicting suspects, and remains within bounds of the fundamental rights of the EU charter.

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Correspondence regarding this paper should be addressed to Colby W. Mangels, 337335 Georgia Tech Station, Atlanta, Ga. 30332. Email: Mangelscw@hotmail.com

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