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The Legal and Political Implications of the Securitisation of Counter-Terrorism Measures across the Mediterranean

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Executive Summary

During the twelve years that have elapsed since the signing of the Barcelona Declaration, the concept of security has proven central to the debate between the Northern and Southern Mediterranean partners of the Barcelona Process. Yet this concept evolved as rapidly and profoundly as it has because the events of September 11, 2001 (and their aftermath) have clearly had a major impact on the theoretical discourse on security[1]. The terrorist attacks in the United States (September 11, 2001), Madrid (March 11, 2004) and London (July 7, 2005), demonstrated the seriousness of the globalised security threat posed by terrorism – such that both the European Union's threat assessment and approach to security have subsequently been transformed.

As a result of the impact of these events, the Union decided to take more determined concrete steps to deal with the issue of terrorism, and the concept itself has undergone a securitisation process. Consequently, terrorism is today considered one of the most serious global security threats to the European Union and it promises to be at the core of future developments in Europe's security strategy. In fact, some of the institutions and practices in operation within the Barcelona Process – the Euro-Mediterranean Partnership – had already contributed to the convergence of views between the Union and North Africa on security and democracy issues before the previously mentioned terrorist attacks had even taken place. In addition, ever since the Union has progressively incorporated the fight against terrorism into policies concerned with both its external relations and its security dimension, both the Common Foreign and Security Policy and measures developed within the framework of the Maastricht Third Pillar (originally called Justice and Home Affairs and now, because of its implications for external policy, Freedom, Security and Justice) have assumed a more prominent role.

This paper aims to examine whether – and, if relevant, to what extent – the "overreaction" generated by these politically violent incidents has led to a securitisation of policies and legislation within the European Union. It will first identify developments in European security (and particularly anti-terrorism) policy, in terms of the Union's declamatory policy and the establishment of new security institutions, as well as the application of externalisation and intensive trans-governmentalism to security policy across the Mediterranean. It will also pursue a parallel review of developments in the security dialogue between South Mediterranean partner states and European states, and briefly sketch the evolution of domestic security policies within chosen European countries and their South Mediterranean partners. Finally, the paper will draw some conclusions on the interaction between security and democracy discourses and their interactive relationship within the framework of the political and security basket of the Euro-Mediterranean Partnership.

1 A. Junemann, "Security building in the Mediterranean after September 11", in id. (ed.), Euro-Mediterranean relations after September 11. International, regional and domestic dynamics (London 2004), pp. 1-20.

The Conceptual Framework: The Securitisation Process

Securitisation theory is perhaps the most noteworthy of the constructivist perspectives on the issue of security approaches. Among the different approaches developed in the field, the Copenhagen School, for instance, defines security not as an objective condition, but as the outcome of a specific social process: a "move that takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics"[2]. The claimed special nature of security threats justifies the use of extraordinary measures to cope with them. According to the Copenhagen School's theory of securitisation, states or international organisations (the 'securitising actors') can adopt the language of security to convince an audience of the existential nature of the threat. Securitisation occurs when "a securitising actor use[s] a rhetoric of existential threat, and thereby takes an issue out of what under those conditions is 'normal politics' "[3]. In short, the issue of securitisation is one of language, where the subjectively perceived reality being addressed (e.g. migration) is rendered an objective threat.

The recent history of different European countries shows how political Islam has undergone a progressive securitisation process as a consequence of consecutive terrorist attacks[4]. In this context, 'securitising' means declaring that terrorism is an existential threat to national democracies. Thus, once successfully identified as a significant threat, international terrorism legitimises the use of emergency counter-terrorism measures. In particular, this process has led to the Union's 'securitisation' of the Maghrib – prioritising security concerns in its relations with North Africa. This situation has compromised the development of the rule-of-law, as well as the protection of human rights and democracy in the countries concerned, even though these objectives are internationally perceived as being crucial for security-building within countries on both shores of the Mediterranean, including in the European Union itself[5]. This paper seeks to analyse why this securitisation process has developed and what its consequences might be, in terms of the domestic situation inside European states, as well as in cross-Mediterranean cooperation in light of the Euro-Mediterranean Partnership and the European Neighbourhood Policy.

2 B. Buzan, O. Wæver, J. de Wilde, Security: A Framework for Analysis (CO and London 1998), p. 23.
3 Ibid.
4 F. Bicchi, M. Martin "Talking Tough of Talking Together? European Security Discourses towards the Mediterranean" (2006) 11(2) Mediterranean Politics, 189.
5 A. Junemann, cit.

Domestic Security Policies in European Countries

Europe is no stranger to terrorist violence and long ago developed security legislation that impinged on individual rights and civil liberties from the 1960s through to the 1990s. Thereafter, however, approaches changed as the threat was perceived to have diminished. After many years of harsh counter-terrorism policies and legislation, the improvement in the protection of such rights and liberties at the national level became a common trend in Europe towards the end of the 1990s. It is important to emphasise that, in countries confronted with the threat of domestic terrorism, derogation from the rule-of-law and the extensive curtailment of civil liberties was often deemed necessary in times of emergency from the 1960s up until the late 1980s. Such measures were, however, eventually the target of severe criticism by academic commentators and civil liberties associations, as well as, on occasion, by the legislators themselves. Indeed, once the threat level diminished in the late 1990s, national authorities also accepted that it was necessary to repeal these extraordinary measures[6]. Yet this easing of policy was to come to an abrupt end after September 11, 2001.

Legal and political responses to September 11, 2001

Although most Western European countries had experienced terrorism prior to 2001, and although the events of September 11th occurred in the United States, there was a fierce legislative (over-) reaction to these events throughout Europe, and this despite each country already having a legal framework for dealing with terrorist threats. Nonetheless, the severity of the attacks in the United States came as shock, and thus generated new anti-terrorism and immigration policies in most European states. In fact, many of these legislative initiatives were at the time already under consideration because of the worsening international environment, particularly along the southern European periphery, and governments therefore took advantage of the fearful public mood to rapidly pass legislation that might otherwise have been considered too controversial before the attacks took place. The terrorist attacks acted as a catalyst for the progressive establishment of a common response to a range of different issues such as terrorism, migration and asylum. In order to achieve a general consensus and the definition of a common solution, these issues had previously demanded lengthy discussion amongst national and European elites. The emotional reaction to September 11, 2001 allowed for agreement on simple solutions, which were accepted and adopted despite their numerous counterproductive effects and implications.

Interestingly, the response to this most recent wave of terrorism has been substantially more severe than had been the case during Europe's previous experience of the phenomenon. In fact, since September 11th, an implicit assumption seems to have developed throughout Europe, positing this current wave of terrorism as a new phenomenon. Yet, in reality, it is not the first time that liberal democracies find themselves challenged by terrorism as action. This rhetorical assertion of novelty has had significant legal implications because it justified the adoption of draconian measures to counter terrorism, regardless of past experience. As a result, security, immigration and anti-terrorism issues currently top the political agenda of most Western European countries.

In practical terms, European states seek to contain political violence by using their national law in similar ways. The recent legislation encompasses: the design of new criminal offences (definitions of terrorism and provisions for conspiracy); the creation of special provisions on sentencing; the use of administrative detention or long periods of pre-trial custody (for investigative or preventive purposes); the use of administrative exclusion and expulsion from the national territory; the enhancement of police powers (and the establishment of special investigative techniques and agencies); the establishment of specialised courts; and the modification of ordinary rules on criminal procedure and evidence (including special regimes to incentivise witnesses).

The definition of terrorism as a criminal offence remains a problematic and elusive concept. From a legal perspective, at the international level a common definition of terrorism does not exist[7]. The definitions adopted at the domestic level have progressively changed since the late 1960s. Criminal law evolved at a different pace in distinct European jurisdictions, under the influence of international and European instruments. Schematically, two steps are identifiable in this process: at first, provisions on terrorism took the form of a list of criminal offences (already existing in legal codes or in previous statutes) for which a special procedural regime was conceived[8]; subsequently, terrorism (at both the domestic and international level) became defined as a criminal offence in itself.

After September 11, 2001, the concept of terrorism became more precisely defined and terrorist acts were progressively criminalised, at least at the domestic level. Although this

6 French legal and political responses to terrorism represented an exception seeing as they anticipated the advantages and drawbacks of over-reaction that other countries were to manifest after September 11, 2001. Trans-national terrorism in France emerged during two specific periods – in the 1970s and 1980s, and then again from the early 1990s onwards. Both waves highlighted the lack of preparedness of the French intelligence services, the police and the political authorities. The French experience was unusual given that such terrorist violence was rooted in France's colonial past, the hurried dissolution of its empire, and more particularly in Algerian domestic politics after the war of independence between 1954 and 1962.

7 Since the late 1970s, the UN have attempted to draft a "Comprehensive Convention for the Prevention and Repression of Terrorism" that includes a definition of terrorism as an offence. However, the legal definition remains controversial given that it is influenced by divergent perceptions of the political phenomenon. Terrorism as a state of mind is seen as unacceptable by the victims, but at the same time, it represents a moral act for its perpetrators. The common refrain is "One man's terrorist is another man's freedom fighter!"

8 Such as the scheduled offences in Northern Ireland, and the offences resulting from the French 1986 Law.

represents a positive trend, permitting an effective prosecution of terrorists, the definition of terrorism as a criminal act, as opposed to something else, dissuades a critical consideration of its causes and could thus be considered a regressive step in political terms. Moreover, the scope of such a definition continues to be questionable. France[9] and the United Kingdom[10] exemplify these common trends and are discussed in detail in the appendix to this paper[11].

Causes for national securitisation of counter-terrorism

One possible reason for the ease with which European states have adopted such policies is the high level of risk-aversion typical of European citizens that predispose them to accept curtailments to personal liberty in the name of security, which is perceived to be more important. European countries seem to agree that the contemporary expression of terrorism is a somewhat new experience, with no links to its prior incarnations. This has resulted in tougher measures, assimilating terrorism into organised crime, which are being imposed and rendered palatable to public opinion despite the simultaneous erosion of personal freedoms.

The securitisation of counter-terrorism measures at the national level is a novel experience and has been brought about by a range of factors. In recent decades, European states have contradictorily sought to engage with Muslim minority communities, on the basis of multiculturalism, while also sustaining a popular belief in the linkage between Islam and violence. They have reacted by seeking to determine and, at times, to direct minority community responses, whilst at the same time introducing legislation that has a direct and deleterious effect on individual rights – all for the sake of securitisation. In addition, the increasing number of Muslims in European countries has certainly exacerbated many social tensions, especially since images of violence and oppression are commonly associated with Muslims, who do not usually receive the warmest of welcomes from locals. European populations have developed strong anti-immigrant sentiments that are often exploited by the media. Politicians cannot seem to agree on solutions promoting the integration of Muslim communities into European society in the long-term.

The tense security environment produced by the events of September 11, 2001 and the subsequent terrorist bombings throughout Europe, as well as in Northern African states, has significantly influenced popular interpretations of political Islam[12]. This situation has also contributed to the development of a diffuse Islamophobia among western European populations and a progressive securitisation of political Islam at the national level. After the bombings in Madrid and London, which revealed the vulnerability of European countries and brought the threat of terrorism closer to everyday European life, governments have increasingly stressed the need for emergency powers to counter the threat posed by religious radicals, even if this compromises civil liberties.

Legislation passed in various states since 2001 suggests a trend towards the assimilation of immigration with internal and external security in a way that will have long-term and negative impacts on the Muslim populations of Europe. Terrorism popularly and officially associated with Islam can neither be characterised as an entirely foreign assault, nor can it be treated simply as a domestic problem. It has thus simultaneously become an internal and external security problem, seeing as international terrorists based in foreign countries recruit among the disaffected minority populations of Europe and small groups spontaneously engage in violence, often stimulated and orchestrated through the internet. The security discourse is split between foreign-based security threats, such as terrorism originating in North Africa or the wider Arab World, and the perceived threat from radicalised indigenous populations. This is particularly the case in those European countries, such as Britain or France, with multicultural societies and large local communities of immigrants. As the attacks of September 11, 2001 showed, international terrorists are capable of exploiting weaknesses in the national management of immigrants and asylum seekers, whether legal or illegal. States have thus not only tightened regulations in these respects, but have also come to often categorise domestic Muslims as "foreign enemies", generally decreasing their level of legal and social rights and privileges.

Yet having said this, some countries have in fact sought to develop new methods of engagement with their minority communities. In Britain, for example, the London Metropolitan Police's 'Muslim Contact Unit' was created to counter the generalised tendency towards a straightforward securitisation of Islam in the UK and to fight the diffuse sense of Islamophobia that has developed in tandem. Having established contacts with local Muslim

9 Despite subsequent waves of debate within French academia, practitioners and public opinion argue for the evolution of criminal law and procedure towards greater respect for the rights of suspects and defendants. French legal and political responses anticipated the over-reaction that other countries experienced after September 11th.

10 The legislation adopted in the UK has had a strong impact, having been faithfully reproduced in other common law jurisdictions, such as Australia or New Zealand.

11 See annex.

12 See F. Bicchi, M. Martin, cit; F. Volpi, "Introduction: strategies for regional cooperation in the Mediterranean: rethink the parameters of the debate", ibid., 119.

communities and developed longstanding relationships with their leaders, the police force is now committed to identifying factors of radicalisation, including the wide-spread sense of political grievance, which have been exploited by terrorist groups for recruitment purposes. Although the work of this Unit may be effective and useful in the long run, it is also very controversial within the police community and the government, which consider this strategy to be perilous. Moreover, short-sighted governmental policies and associated legislation have had many counterproductive effects and have contributed significantly to Muslim rejection of the initiative.

The South Mediterranean

The purpose of this paper is not to discuss the situation in the South in detail. Nevertheless, the reaction and securitisation of policies noted in the Southern Mediterranean states also found resonance in the North after the events of September 11, 2001, and as such, a brief comment on these policies is appropriate here. The securitisation process present in Southern states reflects the reification of a longstanding rupture in the political discourse between the elite and the population-at-large, as well as reflecting, in many countries, the direct experience of political terrorism which has justified it. In effect, such policies underwent securitisation long before European states began to react in a similar way to the latest manifestation of trans-national terrorism.

The Maghrib has immediate relevance in this respect, given the civil war in Algeria and the recent growth of terrorist violence in Morocco. There is also the Libyan experience of the late 1990s and the current threat in Tunisia, not to speak of the government's reaction to the *an-Nahda* experience in 1991. Egypt has also experienced a low-level of violence stretching back to 1992, which triggered the repressive state reaction that is currently crushing civil society there. Quite apart from the Israeli-Arab conflict, Mediterranean countries in the Mashriq have shared similar experiences, from Turkey to Syria and Jordan.

In effect, the concerted state response to insecurity stimulated by the wave of radical dissidence dates from the expulsion of the Soviet Union from Afghanistan at the end of the 1980s, together with the Pakistani-induced expulsion and forced return of Arab *moujahidin* in the early 1990s. Arab states, some of which had quietly collaborated with the American and Saudi-organised recruitment of activists in the 1980s, reacted to these expulsions with horror, imprisoning the identifiable returnees and preparing to confront those who evaded their surveillance. Those who returned soon established contacts with local militants, particularly in Egypt, thus establishing the basis for anti-regime violence in Egypt, Algeria, and later Libya.

For the first half of the decade, states reacted individually to the problems they faced, introducing repressive policies that eventually neutralised violent groups and disassembled mass organisations, many of whose members then fled to Europe to seek asylum. Southern governments then reacted to such dispersion by complaining to their European Union counterparts that those being granted asylum were often activists dedicated to the transformation of Southern regimes, through violence if necessary – in other words, they did not deserve political asylum and represented an existential danger to Europe as well. At the time, it was not a discourse with which most European states, except for France, were prepared to engage.

Instead, European states ignored Southern complaints, justifying their attitude with reference to the internal political defects that individual European states, and the EU as a whole, claimed to be rampant in the South. In other words, only if South Mediterranean states were prepared to genuinely endorse the political objectives of the Barcelona Process, would European bodies take their complaints about trans-national violence seriously. It was this discordance between Northern and Southern perceptions that led to the widespread view across the South Mediterranean region that Europe was not committed to confronting the terrorist challenge. Britain was so remiss in Southern eyes that London soon earned the sobriquet of "Londonistan" for its willingness to accept, harbour and protect individuals and organisations that the Southern states saw as being profoundly dangerous.

South Mediterranean states themselves nonetheless sought to improve the securitisation of their domestic policies, introducing increasingly repressive national legislation during the 1990s to counter the perceived threats. Towards the end of the 1990s, both the Arab League and the Islamic Conference drew up treaties for the suppression of terrorism. In April 1998, the Arab Convention for the suppression of terrorism was signed in Cairo, and the following year, a similar convention was signed in Ouagadougou by Islamic conference states. The most important aspects of these conventions were the definition of terrorism adopted, as being "Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic…", and the establishment of a common extradition process that did not require the testing of evidence before extradition took place.

In short, it could be argued that Arab states had effectively securitised and harmonised their security policies, both at a national and a regional level, long before Europe – whether speaking of individual states or the Union itself – did so. In the aftermath of the events of September 11, 2001, when European states and the European Union dramatically accelerated their securitisation process, South Mediterranean states were finally able to point out

their prior warnings of the dangers associated to Europe's earlier approach, as well as the fact that they had already achieved what Europe now sought to construct. This has had several implications.

Firstly, the European Union's previous normative policies – designed to coerce South Mediterranean states into accepting normative patterns of political and social behaviour that had, in any case, been generally more honoured in the breach than in the observance – were effectively abandoned, except at the rhetorical level. These were replaced by an attempt to ensure a securitised conformity across the Mediterranean through the externalisation – and this was the second consequence – of Union policy on terrorism. Yet South Mediterranean states did not need to be persuaded of the value of policies that they had already adopted long ago! Indeed, it could be argued that the evolution of European policy was an example of "externalisation-in-reverse", rather than of the type of externalisation that the Union aimed at.

In effect, therefore, one of the consequences of the events of September 11, 2001 and of the subsequent events in Europe, more specifically in Madrid in March 2004 and in London in July 2005, has been to elide Northern Mediterranean and Southern Mediterranean policies in ways that were unimaginable before the dawn of this decade. The prime aspect of this has been the replacement in Europe of normative policies reflecting issues of governance and human liberties by securitised policies of collective protection that demonstrate the state's dominant role over the individual in achieving such outcomes. Quite apart from the domestic repercussions of such policies, one of the dominant consequences has been to ensure that the individual is manifestly less protected on both sides of the Mediterranean than was the case before September 11, 2001. The European Union is greatly responsible for this development given the decisions it has taken.

The Evolution of European Union Anti-terrorism Policies

Before the September 11th attacks, the Union's approach to the terrorism issue was progressively being developed under the Justice and Home Affairs pillar of the European project. Although terrorism was not a novel phenomenon to European states, it was only accorded a minor degree of attention[13]. After the Amsterdam Treaty was passed in 1997, and the issue of terrorism became included in the basic treaty of the Union, this then began to change.

The Amsterdam Treaty

Article 29 of the Treaty of the European Union refers to terrorism in Title VI of the 'Provisions on police and judicial cooperation on criminal matters'. The article aims to provide citizens 'with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters, and by preventing and combating racism and xenophobia'. According to the treaty, this objective is to be achieved through the prevention and repression of serious crimes such as, 'in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud'. It is worth noting that, whereas terrorism is today considered in the Union as the most significant threat to international and regional security, at that time it was only mentioned on par with other serious crimes, as an issue to be solely addressed within the framework of police and judicial cooperation[14].

Under the Treaty, the Union's competence in these fields is no longer limited to the negotiation of conventions, but can also determine the adoption of directly binding legal instruments[15]. It is worth underlining that these measures were initially conceived as part of the third pillar and thus had to be adopted by consensus, with the agreement of all member States[16] (although States are free to abstain to avoid voting against a particular measure).

The potential for the adoption of binding legal instruments under the auspices of the Justice and Home Affairs Council represented a significant step towards the progressive development of the Union's influence over national criminal law[17]. One of the most important type of measures in this field are the framework decisions, which are very similar to directives. They establish a common goal (the criminalisation of a particular conduct or the setting-up of a specific procedure in cross-border cooperation, for example) and allow the member-states certain discretion in their adoption of relevant legislation towards this end. The second tool in operation under the third pillar is the "decision" – a binding measure without direct effect, used for any purpose other than the approximation of law. This could involve, for instance, the establishment of common bodies or institutions.

The Amsterdam Treaty explicitly included provisions for the "harmonisation of legislations in sectors touching on organised or trans-national crime" – including the process of precise harmonisation of incriminatory provisions and sanctions regarding the free circulation of people – among the possible fields of cooperation (section VI). In the light of these provisions, framework decisions permitted the harmonisation of substantive and procedural criminal law in crucial areas concerned with the fight against organised crime[18].

In 1997, a European Union action plan was designed for the fight against organised crime and required the progressive adoption of a set of measures in different fields: the creation of a new offence for participation in a criminal organisation and money laundering; the design of more effective measures for the tracing of assets; the identification of best practice in mutual assistance; and closer cooperation with those countries that had recently applied for EU membership. Using an international team of experts, a system of mutual evaluation was established in order to assess each Member State's efficiency in dealing with particular issues. As part of the action plan, the European Judicial Network was then created to allow for direct contact and easier exchange of information among legal practitioners responsible for extradition, as well as mutual legal assistance that would progressively by-pass the traditional diplomatic channels.

The development of an area of "freedom, security and justice" was reaffirmed as a European priority at the European Council held in Tampere in October 1999[19]. Leaders at the summit concurred that a number of agreed policies, dealing with, for instance, migration, asylum, criminal and civil justice issues, stood as milestones for further progress in this field. These ideas and wider proposals assumed a more concrete form with the launch in March 2000 of an integrated Union strategy to prevent and control organised crime – the so-called Millennium Strategy.

13 To a certain extent, European-wide intergovernmental cooperation over issues of terrorism and internal security began as early as 1975 within the framework of the TREVI Group. This group was created by the European Council to coordinate anti-terrorism activities among European Union governments facing domestic terrorism threats. Its mandate was then progressively widened to deal not only with terrorism, but also with other forms of transnational organised crime, such as drug and arms trafficking and bank robberies. A number of working groups were later added to these original core activities, with Justice and Home Affairs issues slowly being introduced into the Union's agenda. See H. Wallace, W. Wallace, M.A Pollack (eds.), Policy-making in the European Union (Oxford 2005), pp. 457-483.

14 The Treaty describes instruments to cope with these crimes, including terrorism, through "closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol)" and "closer cooperation between judicial and other competent authorities of the Member States".

15 Article K.1, read in conjunction with Article K.3, of the Treaty of Maastricht, provides that, for the purposes of achieving the objectives of the Union (in particular the free movement of persons), the Union's Justice and Home Affairs Council may adopt joint positions, joint actions and conventions in the area of judicial co-operation in criminal matters. Since the entry-into-force of the Treaty of Amsterdam, Article 29, read in conjunction with Articles 31 and 34 of the Treaty on the European Union, specifies that in order to provide citizens with a high level of safety within an area of freedom, security and justice, the JHA Council may adopt common positions, framework decisions, decisions and conventions in the area of judicial co-operation in criminal matters.

16 Although it generates most proposals, the Commission theoretically shares with Member States the right to present initiatives leading to Union decisions. The decisions are then drafted in working groups consisting of representatives from different Member States and finally adopted by the Council of Ministers. For justice and home affairs, this Council is made up of the ministers of justice and internal affairs of each Member State. The European Parliament is consulted, but its views are not binding.

17 N. Walker, "In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey" in N. Walker (ed.), Europe's Area of Freedom, Security and Justice (Oxford 2004), pp. 3-40.

18 According to the Justice and Home Affairs Council, the following forms of crime should be considered priority areas in Member States' substantive criminal law: racism and xenophobia; high-tech crimes (computer fraud and offences committed through the Internet); drug trafficking related offences; trafficking in human beings (in particular the exploitation of women); terrorism related offences; financial crime (money laundering, corruption, Euro counterfeiting); tax fraud; the sexual exploitation of children; and environmental crimes. With regard to procedural criminal law, the following issues are concerned inter alia: the mutual recognition of judicial decisions to freeze assets; the possibility of mitigating the onus of proof regarding the source of assets of a person convicted for organised crime related offences; the possibility of confiscating assets regardless of the presence of the offender; the approximation of national legislation on criminal procedure governing investigative techniques, so as to make their use more compatible and to render investigations into organised crime more efficient; and the approximation of national legislation on the position and protection of witnesses and persons co-operating with the judicial system (including the adoption of an European Union model agreement on the matter, to be used on a bilateral basis).

19 Vd. C. Elsen, "L'esprit et les ambitions de Tampere: une ère nouvelle pour la coopération dans le domaine de la justice et des affaires intérieures?" (1999) 433 Revue du marché intérieure et de l'Union Européenne, p. 659; P. Rancé, Ol. De Baymost (eds.), Europe Judiciaire. Enjeux et perspectives (Paris 2001); G. De Kerchove, "L'Espace judiciaire pénal après Amsterdam et le sommet de Tampere" in G. De Kerchove et A. Weyembergh (eds.), Vers un espace pénal judiciaire européen (Bruxelles 2000), pp. 3-18.

European Union anti-terrorism policies after 2001

After September 11, 2001 – which, amongst other things, highlighted the vulnerability of a global superpower – European countries realised that "no single country is able to tackle today's complex problems on its own"[20]. Terrorism clearly posed a growing strategic threat to the whole of Europe given that "the more recent wave of terrorism is global in its scope"[21]. Countering terrorism therefore became a priority and subsequent terrorist attacks gave a major impulse to the further integration of criminal law and procedure on the continent[22].

Early initiatives

One of the consequences of the approach highlighted has been the gradual securitisation of the terrorism issue on a Union-wide basis. In addition, the shifting conception of security had important implications for Justice and Home Affairs cooperation within the European Union. Specific common measures in various fields have been progressively incorporated into this arena of common European action – now denominated 'Freedom, Security and Justice'[23]. Data-sharing has been encouraged, cross national border police and security co-operation has been intensified, security engagement in judicial affairs has increased and freedom of movement has been subjected to intensified control through a series of new institutions. Basic counter-terrorist legislation has also been harmonised, often at a cost as regards accountability and popular support.

The process detailed began when the extraordinary European Council of 21 September 2001 stated that it would fight terrorism in all its forms. Shortly afterwards, it issued an Action Plan against Terrorism[24]. With this, the Council created a 'road map' for the Union's fight against terrorism. It called for the Union to focus on main five areas: enhancing police and judicial cooperation; developing international legal instruments; putting an end to the funding of terrorism; strengthening air security; and coordinating the Union's global action.

The EU also released various documents designed to contribute towards a common definition of terrorism – a notoriously difficult task! The Council Framework Decision of 2002/475/JHA defined terrorist offences as "offences that must be committed with the aim of intimidating people and seriously altering or destroying the political, constitutional, economic or social structures of a country". In the European Security Strategy, terrorism is discussed as one of the key threats to European security, which are now "more diverse, less visible and less predictable". This document argues that 'terrorism puts lives at risk: it imposes large costs: it seeks to undermine the openness and tolerance of our societies and it poses a growing strategic threat to the whole of Europe. Increasingly, terrorist movements are well-resourced, connected by electronic networks, and are willing to use unlimited violence to cause massive casualties'.

Yet despite these attempts, the definition remains vague, depicting the concept of terrorism only in very general terms. However, although there is still no set definition of terrorism, this initial attempt does lay down some common characteristics. The decision thus represents an advancement towards a shared counter-strategy since it requires the progressive harmonisation of varied domestic provisions defining terrorist crimes.

Common action was not merely restricted to the process of definition, however. One of the first practical outcomes was the formal adoption of a European Arrest Warrant on 13 June 2002, after an extraordinarily short period of negotiation[25]. Its adoption was the first measure in the field of judicial co-operation in criminal matters to implement the principle of mutual recognition[26] and it marked a paradigm shift in international cooperation over criminal justice matters[27].

European arrest and evidence warrants

With the introduction of the European Arrest Warrant, the arrest process was simplified throughout Europe and therefore became more effective. It did not, however, require any harmonisation of substantive criminal law. Indeed, the institution of the new warrant exemplified many of the human rights concerns raised by opponents of legal harmonisation.

20 Vd. M. Den Boer, J. Monar, "Keynote article: 11 September and the challenge of Global Terrorism to the EU as a security actor" (2002) 40 JCMS, p. 12.
21 ESS, 2003.
22 Vd. J. Wouters, F. Naert, "Of arrest warrants, terrorist offences and extradition deals: an appraisal of the EU's main criminal law measures against terrorism after '11 September' " (2004) 41, Common Market Law Review 909.
23 See M. Anderson, J. Apap, Changing conceptions of security and their implications for EU Justice and Home Affairs cooperation, CEPS Policy Brief no. 26 (October 2002).
24 The Action Plan was revised at the June and December 2004 European Council summits. The EU Counter Terrorism Strategy of 1 December 2005 then provided the basis for its revision, which was finalised on 13 February 2006.
25 M. Den Boer, J. Monar, cit., pp. 20-24.
26 The mutual recognition principle only requires states to recognise the validity of specific laws in all states – and to enforce these through harmonisation, integration or unification – or rather reach an agreement to respect decisions and judgements made in another jurisdiction. It enables competent authorities to quickly secure evidence, seize assets and immobilise offenders, and makes the prosecution of transnational organised crime on the continent far easier. G. Stessens, "The principle of mutual confidence between judicial authorities in the area of freedom, justice and security", in G. De Kerchove, A.Weyembergh (eds.), Espace pénal européen (Bruxelles 2000), pp. 91-104; L. Harris, "Mutual recognition from a practical point of view: cosmetic or radical change ?", ibidem, pp.105-112.
27 National definitions of crimes have traditionally represented an obstacle to successful extradition and mutual assistance: instead, states founded their co-operation on elements such as the double criminality principle, the limits concerning political offences, and the refusal to extradite nationals. For a comment see S. Alegre, M. Leaf, "Mutual recognition in European Judicial cooperation: a step too far too soon? Case study- the European Arrest Warrant" (2004) 10(2) European Law Journal 200.

These concerns were primarily related to the widening gap between Union measures designed to facilitate prosecution and investigation across the European common space, and the very instruments intended to safeguard the rights of those subject to such measures[28].

If the introduction of the warrant has facilitated extradition procedures, the European Evidence Warrant, adopted in June 2006, might have a major impact on mutual legal assistance. On the basis of this new procedure, a court could request objects, documents or data – but not yet witnesses – found available in any other Member State. However, unlike other, similar measures adopted through the mutual recognition principle, the European Evidence Warrant does not take human rights protection sufficiently into account. In particular, the institution as proposed does not provide for the right to legal representation, interpreters or legal aid. A person targeted by such a warrant while abroad would not have the support of any financial, linguistic or technical facilities to challenge the foreign court's decision, and this, in turn, could influence the defendant's will to fight it. Without the establishment of adequate procedural safeguards for suspects and defendants in criminal proceedings, the efficacy of this measure will only emerge at the expense of the rights of the defence.

It is a remarkable fact that, in order to achieve a more effective collective repression of criminal action (particularly in relation to terrorism cases), the Union has progressively implemented common criminal procedures, even though there is a lack of harmonisation of criminal law at the national level and, consequently, uneven constitutional and legal protection of the rights of suspects and defendants. Opponents of these new common instruments have expressed concern that EU cooperation in the area of criminal justice stresses the law-and-order approach and is moving towards an ever more punitive criminal policy.

Thus, although mutual recognition has now been accepted as the cornerstone of judicial cooperation, this does not mean that all Member States are enthusiastic about expanding its scope. Overall, the mutual recognition principle could severely impinge upon individual rights. States have no discretion to refuse a foreign request and are hence forced to trust foreign decisions. Moreover, a State cannot question whether another State is more or less likely to respect the procedural rights of suspects and defendants in the same manner as these are treated in its domestic criminal justice system. The harmonisation of criminal law and procedure would at least allow for a minimal sharing of safeguards and provide a valuable basis for mutual trust.

The Hague Programme and the Prüm Treaty

As part of the 'Hague Programme' – the new Justice and Home Affairs multi-annual programme adopted in November 2004 – the European Council deemed the development of a coherent external dimension to the EU policy of freedom, security and justice to be a growing priority. On 10 May 2005, the European Commission launched its 5 year Action Plan for Freedom, Justice and Security, presenting detailed proposals for EU action on terrorism, migration management, visa policies, asylum, privacy and security, the fight against organised crime, and criminal justice. The Action Plan borrows the overall priorities for Freedom, Justice and Security set out in the Hague Programme and attempts to translate these into concrete actions, outlining a timetable for their adoption and implementation. This major policy initiative aims to act as a cornerstone of the Commission's Strategic Objectives for 2010.

In order to optimise information exchange between European agencies, following the adoption of the Hague Programme, Member States called for the implementation of the Principle of Availability[29]: by 1 January 2008, all agent states requiring some type of information from another Member State should be able to obtain it. Data exchange was considered an essential tool in the building of a shared European security strategy and in the progressive establishment of an Area of Freedom, Security and Justice[30].

Within this context, it is noteworthy that parts of the Prüm Treaty – agreed between Member States as an international accord – were also integrated into the legal framework of the Union at the Justice and Home Affairs Council, on 14-15 February 2007[31]. This created a new European-wide instrument to further police cooperation and data exchange. Aiming to simplify "the exchange of information and intelligence between law enforcement authorities of the Member States of the EU"[32], the Council decision transposed pivotal parts of the treaty into European practice: namely, "provisions designed to improve the exchange of information"; DNA; fingerprints and vehicle registration data; and provisions on "closer cooperation between police authorities, by means of joint security operations and cross-border intervention in the event of an immediate danger to life"[33].

28 Domestic Constitutional Courts' decisions highlighted the minimal consideration given during this process to the implications the arrest warrant would have for fundamental rights in specific Member States' criminal justice systems. Vd. J. Komárek, "European Constitutional Pluralism and the European Arrest Warrant: Contrapunctual Principles in Disharmony" (2007) 44 Common Market Law review 9.

29 For a comment and a tentative definition of this principle see D. Bigo et al., The principle of information availability (1 March 2007), available at www.libertysecurity.org.

30 Vd. H. Hijmans, The third pillar in practice: coping with inadequacies. Information sharing between Member States, Discussion paper for the meeting of the Netherlands Association for European Law (NVER) (24 November 2006).

31 The Member States' Delegations discussed an initiative aimed at "the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime", presented by 15 Member States, the 7 Prüm Contracting Parties, plus 8 other Member States that officially stated their will to adhere.

32 Council of the European Union, Note from the Presidency to Coreper/Council, doc. 6003/07 CRIMORG 26 ENFOPOL 17, Brussels, 5 February 2007, §4.

33 General Secretariat of the Council, Draft Council Decision 2007/.../JHA on the stepping up of cross-border cooperation, working document (Brussels, 19 January 2007), pp.3-4.

Discussions about the content of the Prüm Treaty mainly focused on controversial issues, such as the extent of data exchange, and on the inclusion of provisions covering first pillar issues such as immigration control. However, equally controversial were the "measures in the event of imminent danger" presented in a package of police cooperation measures that included provisions for "joint operations", "assistance in connection with major events, disaster and serious accidents" and "cooperation upon request". This package of measures enables police officials to cross borders in a wide range of cases, contravening most of the restrictions on 'hot pursuit' initiatives imposed in Article 41 of the 1990 Schengen Convention[34].

Because of their potential impact on civil liberties, such data exchange provisions have been subject to strong criticism. Given that the provisions of the Treaty of Prüm enable the trade of very sensitive data, such as DNA and fingerprints, this issue has raised several concerns amongst domestic data protection authorities. The management of biometrics data is particularly controversial because the Prüm data protection system does not specify specific legal rules for individual protection[35]. However, since the Union today considers that it is faced with a common terrorist threat, it is the view of most national officials that the right to privacy should be subordinated to the interests of collective security. A Data Protection Framework Decision is currently under discussion but it has been continuously postponed since its implementation would certainly limit the scope and consequent effectiveness of the Prüm data exchange system[36].

European security strategy

Terrorism has also played a prominent role in transforming the external dimension of Europe's security agenda. European security understanding has evolved in response to the changing security environment with its new-found emphasis on terrorism, and counter-terrorism has now become a crucial element of the Union's external relations. In the aftermath of the events of September 11, 2001, the fight against terrorism became a greater priority for the Union, resulting in intensified cross-pillar security regime-building. The securitisation of counter-terrorism, as well as the construction of new security institutions and mechanisms within the European Union[37], also contributed to the externalisation and intensive trans-governmentalism of security policy across the Mediterranean.

The idea of regional security regime-building was primarily rooted in the launching of the European Security Strategy, adopted by the European Council on 12 December 2003. This agreement highlighted the EU Member States' belief in the importance of the Union in structuring security throughout Europe. The European Security Strategy reflects Europe's concern in reinforcing a multidimensional and multilateral vision of regional and international security. In it, the Union explicitly identified, for the first time, key threats to its security and the way in which it intended to respond to these. The selection of threats reflected the Union's multidimensional concept of security – with poverty, pandemics and competition for resources appearing alongside terrorism, international organised crime, the proliferation of weapons of mass destruction and regional conflicts, such as the Middle East conflict.

The statement reveals that the Union's foreign policy tool-box is geared towards three key objectives in meeting contemporary security challenges: namely, extending the security zone along Europe's periphery; supporting the emergence of a stable and equitable international order, particularly an effective multilateral system; and seeking effective countermeasures to new and old threats[38]. Together with the prioritisation of the issue of terrorism, the understanding of security issues has also evolved. As a result, the Security Strategy emphasised the significance of comprehensive approaches to security issues that would incorporate multi-faceted instruments and solutions in dealing with the problem of, for example, terrorism.

The adoption of the European Security Strategy has thus strengthened the securitisation of the European agenda, implementing a number of significant agreements, especially in the aftermath of the terrorist attacks in Madrid and London. Although the main topic of the summit – held by the Council in Brussels after the Madrid bombings and at which the Strategy was adopted – was supposed to have been the revision of the Lisbon Strategy, which addresses European economic development, the fight against terrorism ended up being its central theme. In short, an agenda designed to ensure that the Union would become the most dynamic economic region in the world by 2010 was submerged under the issue of security, particularly terrorism!

34 Most importantly, according to art. 41: "Hot pursuit shall be carried out in accordance with one of the following procedures: (a) The pursuing officers shall not have the right to apprehend the pursued person; (b) If no request to cease the hot pursuit is made and if the competent local authorities are unable to intervene quickly enough, the pursuing officers may detain the person pursued until the officers of the Contracting Party in whose territory the pursuit is taking place, who must be informed immediately, are able to establish the person's identity or make an arrest [...]. Hot pursuit shall be carried out only under the following general conditions: (a) The pursuing officers ...must obey the instructions issued by the competent local authorities; (b) Pursuit shall be solely over land borders; (c) Entry into private homes and places not accessible to the public shall be prohibited; (d) The pursuing officers shall be easily identifiable, either by their uniform, by means of an armband or by accessories fitted to their vehicles. The use of civilian clothes combined with the use of unmarked vehicles without the aforementioned identification is prohibited. The pursuing officers must at all times be able to prove that they are acting in an official capacity; (e) The pursuing officers may carry their service weapons. Their use shall be prohibited save in cases of legitimate self-defence; (g) After each operation ... the pursuing officers shall appear before the competent local authorities of the Contracting Party in whose territory they were operating and shall report on their mission. At the request of those authorities, they shall remain at their disposal until the circumstances surrounding their action have been sufficiently clarified...; (h) The authorities of the Contracting Party from which the pursuing officers have come shall, when requested by the authorities of the Contracting Party in whose territory the hot pursuit took place, assist the enquiry subsequent to the operation in which they took part, including judicial proceedings."

35 Art.32 (1) of the Draft Council Decision states that information to data subject on the processing of its own data shall be supplied "at the request of the competent body under national law".

36 The Council claimed that the Prüm "cross-border data comparison should open up a new dimension in crime fighting". Para. 12 of Draft Council Decision (2007).

37 F. Pastore, Reconciling the Prince's two 'arms'. Internal-external security policy coordination in the European Union. Occasional Paper, Institute for Security Studies (Paris 2001); F. Charillon, "The EU as a Security Regime" (2005) 10 European Foreign Affairs Review 517.

38 ESS, pp. 7-14.

In effect, the Council's subsequent "Declaration on Combating Terrorism" (25 March 2004) gave a renewed political impetus to the Union's efforts among Members States to coordinate its struggle against terrorism. The document included a series of proposals, such as strengthening intelligence co-operation, and measures to render international policing more efficient, to improve capacity for freezing bank accounts linked to suspicious groups, and to prioritise the care of victims of extremism. The meeting also appointed Gijs de Vries as the European Counter-terrorism Coordinator, answering to Javier Solana, Head of the Common Foreign and Security Policy. In June 2004, Solana announced that internal security services should provide intelligence on terrorism to the Joint Situation Centre (SitCen), which is part of the Union's emerging military structure.

Given the immense difficulties that attended discussions of the proposed Constitutional Treaty, it is remarkable that Member States easily reached a consensus on issues related to the Union's common foreign and security policy. A solidarity clause was included in Article 42 of the draft Constitution, stating that: "the Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the victim of terrorist attack or of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to: prevent the terrorist threat in the territory of the Member States, protect democratic institutions and the civilian population from any terrorist attack, assist a Member State in its territory at the request of its political authorities in the event of a terrorist attack and assist a Member State in its territory at the request of its political authorities in the event of a disaster"[39].

Indeed, in December 2005, the European Union launched its first European Union Counter-Terrorism Strategy[40]. The Strategy aims to prevent any further recruitment into terrorism, improve the protection of potential targets, enhance the pursuit and investigation of members of existing networks, and increase the capability to respond to and manage the consequences of terrorist attacks. The strategy also seeks to expand the agenda, initially set out at the March 2004 European Council in the wake of the Madrid bombings, towards the next stage of development, although no concrete measures have been identified as of yet and the Union's security-building process remains vague and declamatory in nature.

The multiplication of counter-terrorism measures and the construction of new security institutions in the Union have recently been accompanied by the reinforcement of barriers to illegal immigration. During the Thessalonica Summit of June 2003, European leaders agreed on plans to reinforce the fight against illegal immigration through a system of visas, special agreements with countries-of-origin, and greater border controls. A new European Agency for the Management of External Borders (FRONTEX) was established in May 2005 with joint financing of actions to foster security along the Union's external borders[41]. The new agency will coordinate Member States' implementation of existing and future community measures concerning the management of Europe's external borders in order to facilitate cooperation in this field.

39 Treaty establishing a Constitution for Europe, Official Journal of the European Union, C 310, vol. 47 (16 December 2004).
40 The European Union Counter-Terrorism Strategy. Justice and Home Affairs Council meeting; Brussels: Council of the European Union (1 December 2005).
41 Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union of 26 October 2004,
(EC) No. 2004/2007, OJ L 349/1 (25 November 2004).

European Security Dialogue towards the Mediterranean

The transformation of the external dimension of the Union's security agenda following September 11, 2001 ran in parallel to the development of the security dialogue between South Mediterranean partner states and European states, together with the Commission. The security climate in the Mediterranean, which had already been deeply affected by the end of the Cold War, has changed yet again over the last few years. As mentioned above, the events of September 11th, and the consequent securitisation of terrorism, have given a new impetus – as was the case within the European Union – to dialogue and security cooperation between the Union, together with individual European countries, and the Maghrib states[42]. As a result of the subsequent progressive securitisation of counter-terrorism measures and security issues, new agencies and opportunities for partnership have multiplied. This has lent additional, unanticipated prominence to security within the Euro-Mediterranean Partnership and has also affected the Euro-Mediterranean dialogue as a whole.

Political and security dialogue before 2001

Since the early 1990s, the Mediterranean basin has represented one of the most important target areas for the Union in terms of foreign and security policy. Originally, the establishment of a political and security dialogue between the Union and the Maghrib countries was seen as a fundamental means for promoting political reforms and, eventually, guaranteeing stability and security in the region[43]. With the entering into force of the Maastricht Treaty in 1993 and the establishment of a European Common Foreign and Security Policy, the promotion of human rights and democratic practices became firmly enshrined as a cornerstone of Europe's external relations and as an integral part of its development and cooperation policies towards third countries[44]. In this context, most agreements with third countries have made the EU's financial assistance to and economic cooperation with third countries conditional on their respect for democratic practices and the establishment of institutions to support these.

Such policies have been enshrined in the Euro-Mediterranean Partnership since 1995. They adopt three main expressions: a political and security partnership emphasising the rule-of-law, together with respect for human rights and pluralism; an economic and financial partnership attaching importance to "sustainable and balanced economic and social development with a view to achieving the objective of creating an area of shared prosperity"; and finally, a partnership in social, cultural and human affairs. The latter has subsequently become associated with the rejection of the 'clash of civilisations' notion in favour of inter-cultural dialogue. Central to this initiative is the promotion of democracy and rule-of-law through a spreading of traditional electoral procedures, ensuring respect for individual rights, and implementing a market economy. The combination of these elements is designed to lead towards the creation of an area of stability, to the advantage of both the European Union and the countries on the southern shores of the Mediterranean, because the preservation of security in the latter area is – to European eyes at least – inevitably linked with democracy.

The concept of development evident in the Partnership's policies was not seen as an end in itself, but rather as being inextricably associated to building peace and stability[45]. In short, the Union attempted to export its own model of integration in a bid to achieve, through economic development and democratic change, similar outcomes in other regions, such as the South Mediterranean. The most detailed part of this process were the Euro-Mediterranean Association Agreements, which derived from the principles enunciated in the Barcelona Declaration, as well as being based on previous European policy towards the South Mediterranean region. The Association Agreements sought to design multi-dimensional frameworks linking economic, political, social, and security objectives to form a comprehensive whole, and thus supersede the previous bilateral and sectoral policies that the Union had created. As a result, respect for democratic principles and human rights, as well as the promotion of the rule-of-law, became integral components of development cooperation, designed to strengthen security and political partnership. The new generation of such agreements stemming from the Barcelona Declaration now clearly contain in Articles 2, 3, 4 and 5 provisions for the establishment of a political and security dialogue that has as its essential component the promotion and respect for democratic principles, human rights and the rule-of-law[46].

Increased cross-Mediterranean technical cooperation after 2001

Shortly after the events of September 11, 2001, the Mediterranean partner-states reaffirmed the importance of the Barcelona Process, agreeing to promote cultural understanding

42 A. Benantar, "NATO, Maghreb and Europe" (2006) 11(2) Mediterranean Politics 167.
43 Particularly, the EU (together with individual Member States) started to encourage political liberalisation and democratic norms and practices as a major element of its political and security cooperation with the Maghreb countries since the late 1980s, and increasingly so afterwards. E.g. respect for human rights, democratic principles and the rule of law were clearly introduced as a new element into the idea of the Euro-Maghreb Partnership (1992) between the EU and Algeria, Morocco and Tunisia.
44 A. Clapham, "Where is the EU's Human Rights Common Foreign Policy, and How is it Manifest in Multilateral Fora?" in P. Alston (ed.), The EU and Human Rights (Oxford 1999), pp. 632-653.
45 It is noteworthy that within the development community there was no agreement on this particular concept of development that prioritised security over other issues. In the long term, this lack of agreement ended up focusing more attention of Justice and Home Affairs issues, sometimes at the expense of other concerns.
46 Vd. L. Bartels, "A legal analysis of human rights clauses in the European Union's Euro-Mediterranean Association agreements" (2004) 9(3) Mediterranean Politics 368.

through the creation of the Euro-Med Foundation while also launching further regional co-operation in the area of Justice and Home Affairs[47]. In addition, the Valencia Action Plan, produced by the Union in 2002, included elements geared towards enhancing political and security cooperation between the EU and its Mediterranean partners. This plan encompassed cooperation aimed at reinforcing political dialogue, tackling terrorism, consolidating existing partnership-building measures, and working towards greater respect for human rights and democratic values. However, a number of significant proposals were blocked, rejected or ignored at the Valencia Euro-Mediterranean Partnership Summit. Most importantly, the Partners failed to reach a consensus regarding proposals for political reform and institutional innovation to establish a Euro-Mediterranean Parliamentary Assembly.

At the Thessaloniki European Council in June 2003, European leaders committed themselves to reinforcing shared values and promoting their common interests through new policies directed towards a wider Europe – the so-called New Neighbourhood, which includes states that are not members of the European Union. The Council then approved the European Neighbourhood Policy, which aims to enhance cross-border cooperation along the EU's external borders[48]. This decision coincided with efforts to further the Union's most ambitious enlargement process, at the time when the European Neighbourhood Policy officially sought to establish bilateral relationships with countries outside the Enlargement area in order to prevent cutting off the enlarged European Union from its neighbours. Given that the initiative is designed to create a space of stability shared by the EU and its neighbours, the fight against terrorism has unsurprisingly become a priority in each of the bilateral Action Plans through which this policy is to be articulated[49].

Attitudes have changed in the years following the attacks on London and Madrid. Although the official European discourse still insists on the need to promote multi-dimensional cooperation with the Union's Mediterranean partners, there has been a progressive prioritisation of security over democracy and human rights promotion. This was manifest in the European Security Strategy in 2003 and, indeed, in the European Neighbourhood Policy itself, after its formal launch in 2004. The measures proposed in the security strategy to deal with key threats, particularly terrorism, make Arab partner-states the Union's natural interlocutors on such issues. Furthermore, the EU no longer seems to consider the democratisation of its periphery as being the essential tool for shared security. Having already prioritised the fight against terrorism on the European continent, the Union now aims to promote security community practices along its borders[50], regardless of any issue concerning democracy and the rule-of-law amongst its Mediterranean partners[51]. For instance, the manner in which the European Neighbourhood Policy and its Action Plans are designed to improve bilateral cooperation in the fight against terrorism is sufficiently vague to allow for different interpretations of crucial issues such as legitimate and appropriate means of fighting terrorism in specific situations, or how to respond to an increasingly influential political wing of a terrorist organisation.

In this context, the tenth anniversary Barcelona conference of November 2005, which was intended as an important marker within the history of the Euro-Mediterranean Partnership, achieved limited success[52]. Despite an unexpectedly asymmetrical pattern of participation – only one head-of-state from the South attended – the Mediterranean partners agreed upon a Code of Conduct to Counter Terrorism and adopted a 5-year Work programme, but little else! For the first time ever, the partners also rallied together to condemn terrorism in all its forms and made practical commitments to draw up a comprehensive response to what they believed to be the common threat posed by terrorism. However, lack of agreement over the definition of terrorism[53] limited the impact of this Code of Conduct. Moreover, the question of what would qualify as a legitimate and proportionate act of self-defence against terrorism remained in dispute.

The adoption of a five-year Work Programme was nonetheless very significant. It addressed three main themes: education, economic reform, and political cooperation, coupled with good governance. A potentially useful section of the Work Programme was devoted to "Migration, Social Integration, Justice and Security". The inclusion of these other issues almost certainly reflected the alarming events that occurred at the border between Spain and Morocco, where migrants held in transit camps in Ceuta tried to breach border barriers, causing the death of at least one. The consensus reached on this section may however also reflect the renewed attention being given by policy-makers to the third basket of the Barcelona Declaration, which outlines plans for partnerships in social, cultural and human affairs[55]. In short, despite the securitisation process, new priorities have also emerged within the Euro-Mediterranean Partnership since September 11, 2001. These may imply, in the long-run, the re-fashioning of the Partnership based on a revival of the now-forgotten linkage between the first and the third chapters of the Barcelona Declaration[56].

47 Supra.
48 In particular, regional/transnational co-operation with Belarus, Ukraine, Moldova, the Southern Caucasus countries, as well as with all the countries on the southern and eastern shores of the Mediterranean: Morocco, Algeria, Tunisia, Libya, Egypt, Israel, Jordan, Lebanon, Syria and the Palestinian Authority.
49 In 2004, the first Action Plans were adopted with Israel, Jordan, Morocco, Moldova, the Palestinian Authority, Tunisia and Ukraine.
50 The European Neighbourhood Policy also encourages the EU's neighbouring countries to intensify co-operation towards preventing and combating common security threats, to enhance political involvement and practice in conflict prevention, as well as crisis management, and to promote human rights and democratic practices.
51 E. Johansson-Nogués, "A 'Ring of friends'? The Implication of the European Neighbourhood Policy for the Mediterranean" (2004) 9(2) Mediterranean Politics 240; F. Volpi, "Regional community-building and the transformation of international relations: the case of the Euro-Mediterranean Partnership", ibid., p. 145.
52 R. Gillespie, "Onward but not upward: the Barcelona Conference of 2005" (2006) 11(2) Mediterranean Politics 271.
53 A second problem that the Action Plans hide concerns the definition of terrorist organisations. For instance, many Euro-Mediterranean partner-states do not agree on the EU's definition of Hamas as a terrorist organisation.
55 R. Gillespie, cit.
56 R. Gillespie, "Reshaping the agenda? The internal politics of the Barcelona Process in the aftermath of September 11", in A. Jünemann, cit., pp. 21-36.

The lack of democracy, the perceived Islamist potential to fill the political vacuum, and the involvement of some North African nationals in terrorist activities allegedly related to al-Qa'ida (such as the Hamburg cell and the Casablanca bombings) have all underlined the urgent need to tackle issues of security and democracy in the Maghrib. The complexity of this agenda lies in the difficulty of finding a balance between the discourse on securitisation and that on democratisation. In fact, the Barcelona Process' extensive and, at times, contradictory list of objectives makes any interaction between the two discourses particularly difficult within the Euro-Mediterranean framework. It is thus unsurprising that many commentators have been disappointed with the limited results of the Barcelona Process, as far as its core objectives are concerned[57].

57 Vd. R. Youngs, "European Approaches to Security in the Mediterranean" (2003) 57(3) Middle East Journal 414.

Outcomes

The securitisation over recent years of terrorism and counter-terrorism measures has had a strong impact on the restructuring of domestic, European Union, and Euro-Mediterranean policy. In addition, the EU and its Euro-Mediterranean partners do not share a unified approach to radical Islamist groups, nor towards the concept of contemporary trans-national terrorism[58]. As a consequence of this fundamental divergence over security issues, current regional initiatives have been unable to prevent tensions in the region, let alone solve its long-lasting conflicts. In fact, despite the numerous measures taken to promote democracy and to 'de-securitise' the political situation in North Africa, and after more than a decade of political cooperation within the context of the Euro-Mediterranean Partnership, the Maghribi socio-political landscape has undergone no significant change. The underlying characteristics of the region's political regimes[59] remain in place and, in some cases, have even been strengthened.

Europeans identify the absence of real democratic opportunities and the lack of genuine multi-party political cultures or democratic institutions as major obstacles to the establishment of peace and stability in the region. However, the Union's own projects to promote democracy in the Maghrib remain limited in scope and do not enable qualitative and substantive reforms. European policy-makers believe they have a very clear understanding of what constitutes a security threat – namely political Islam – and as such they persist in privileging authoritarian governments and 'secular' opposition parties as their chosen interlocutors[60]. Given the continuous fear and uncertainty surrounding the ascent of Islamists groups towards political power, European aid is mostly provided through 'official' governmental channels. Hard security concerns take precedence over supporting the development of democratic states[61] and, consequently, the security situation in the region remains precarious.

In sum, after September 11, 2001, the European Union focused on the construction of a security regime and on the elaboration of corresponding security measures, leaving aside other important elements of the "freedom, security and justice" agenda[62]. European foreign policy, both within and outside the EU, has undergone a similar securitisation process in a bid to prioritise the fight against trans-national terrorism at the regional and global levels. However, if it is to be ultimately successful, the Union's efforts to develop strong security regimes should rebalance Justice and Home Affairs concerns with other elements of its external policy, on the basis of international law and respect for human rights. In any case, the multiplication of agencies and partnerships over the years – through which European securitisation has been expressed – has had a detrimental impact on the establishment of comprehensive regional structures. As a result, no coherent European agenda towards the Mediterranean exists at present.

Among the main shortcomings of the existing security framework is its adoption of a "self-help" approach to security. Although Europeans stress the importance of inter-Maghribi cooperation, the southern shores of the Mediterranean are far from reaching an adequate level of security regionalisation. In addition, the European Neighbourhood's action plans tend to reproduce a bilateral cooperation model, thus promoting a self-help approach within each North-African country[63]. This situation undermines the idea of a Maghribi, or broader Euro-Mediterranean security system.

September 11, 2001 certainly contributed to the rapprochement of the Maghrib and the European Union's security discourses, enhancing their cooperation in the field of Justice and Home Affairs. Furthermore, the regimes of the Maghrib used the September 11th attacks to condemn terrorism in general, and to highlight the EU's lack of understanding and appreciation of their own struggle against 'internal terrorism' over previous years. The resulting excessive securitisation of counter-terrorism measures in the Mediterranean also affected the Euro-Mediterranean dialogue as a whole. In particular, there are a number of inconsistencies and dilemmas that have not been properly addressed by the Euro-Mediterranean Partnership.

The political and security chapter of the Barcelona Process is the essential aspect distinguishing this policy from previous European initiatives for the Mediterranean. However, in contrast to the detailed content and working schedules outlined for the other two chapters, as regards the political and security agenda, Euro-Mediterranean Partners were only able to reach a general agreement on its objectives. The means by which these goals are to be attained remain ambiguous and are only specifically detailed in the texts of Association Agreements signed between the European Union and North African states. Indeed, on the whole, the events of September 11, 2001 might well have stimulated a rapprochement between the EU and North Africa on *what* constitutes a threat to security. This, however, does not necessarily mean that such agreement extends to *how* these security threats should be tackled and what practices need to be promoted in order to do so[64]. Secondly, while there

58 F. Bicchi, cit.
59 Good examples include political isolation and repression of opposition forces; exclusion or cooptation of Islamist forces to varying degrees throughout the region; constraints on the roles of civil society.
60 By contrast, effective democracy-promotion should have supported the opposition in its demands for political reform and should have denied legitimacy to the current authoritarian regimes, or at least maintained a certain 'distance' from the ruling elites
61 The Union's ambiguous approach to security and democracy promotion lends North African leaders the flexibility to limit the encouragement of democratic principles to the discursive level and to selectively adopt only changes that do not jeopardise, or even consolidate their position.
62 S. Douglas-Scott, "The rule of law in the European Union – putting the security into the 'area of freedom, security and justice' " (2004) 29(2) European Law Review 219.
63 A. Benantar, cit.
64 Especially following September 11th, EU discourse has often been exploited by less open governments, leading to the further suppression of political freedom and a delay in sensitive and genuine reforms, all in the name of the 'legitimised' pretext of the fight against terrorism.

is no reason why democracy, stability and security cannot be compatible, the actual measures proposed by the Euro-Mediterranean Partnership make the pursuit of these goals inevitably irreconcilable. These proposals clearly suggest that security must be prioritised over any other objective. Paradoxically, this focus on security is also hindering the Maghrib's complete political liberalisation and could actually jeopardise the very security goal that the policy itself seeks to achieve.

Ten years after the launch of the Euro-Mediterranean Partnership, its results have generally been deemed unsatisfactory as regards the developmental, democratic and security achievements of Partner Countries – a situation that has led many commentators to judge the Process a failure. The European Union correctly identified the lack of democracy and the persistence of poverty as central to the security challenges currently plaguing the North African region, with the key issues being increased migration – with its potential negative consequences resulting from social unrest – and trans-national terrorism. Yet the policies adopted by the EU to counter such threats privilege short-term interests[65] over the longer-term objectives related to true democratisation.

65 Such as the increased attention focused on building links with security and police services in Arab North-African countries.

Annex: The Security Regimes In Britain And France

France

Prior to September 11, 2001, the French response to terrorism revolved around two main pillars. The first was a secret government plan for the mobilisation of police, military and intelligence in response to terrorist attacks, known as '*Vigipirate*', which allowed for extensive cooperation between the various levels of security services. The second, involved the drafting of specific legislation – conceived as a structured and coherent body of legal regulation[66] – which was key to the organisation of an anti-terrorism regime.

Terrorism was defined as an act performed with the intent of seriously disrupting public order through intimidation or terror. The 1986 law and its subsequent modifications established a special court system for dealing with terrorist cases[67] through enhanced cooperation between the domestic French intelligence agency (*DST* – Direction de Surveillance du Territoire) and the judiciary[68]. Access to lawyers for terrorist suspects was restricted as compared to persons accused of other criminal offences. The police were permitted to seize individuals suspected of terrorism based on lower levels of evidence, hold them in custody for longer periods of time[69], and perform searches[70] and seizures using less restrictive warrants (for example, night searches are acceptable within the context of terrorism investigations).

Most importantly, in 1996 an additional offence of '*association de malfaiteurs*' (similar to the crime of conspiracy in English law, but more narrowly drawn) was established that was specifically applicable to the organisation of terrorist acts. This offence punished the mere agreement to act and did not require this intention to be coupled by subsequent actions of any kind. The creation of this offence of '*association de malfaiteurs*' was considered a major advance by investigating judges since it allowed them to better target the logistics networks that support terrorist activities. However, the provision has generated controversy and has been strongly condemned for its vagueness, seeing as it permits multiple waves of arrests and the indiscriminate detention of suspects. Furthermore, its criminalisation of participation in the preparation of an act, regardless of whether the person concerned has been involved in the actual commission of an offence, was considered very harsh.

After September 11, 2001, France immediately implemented its emergency plans. These consisted of '*Opération Vigipirate*', as mentioned above; a biological and chemical weapons protocol that provided for disaster planning and increased security measures; and a task force charged with intercepting financial flows related to terrorism. France began to freeze the assets of individuals and groups that it claimed were associated with international terrorism. The legislative response to September 11th first emerged in the Law on General Security, passed on November 15, 2001. This law established a wide range of functions, from improving technology and defining financial support of terrorism, to increased penalties for offences such as fare avoidance – only tangentially related to terrorism at best! As in other countries, many of these legislative proposals had already been under consideration before 2001.

The law has been particularly controversial given that it clearly extends far beyond the boundaries of what would normally be considered counter-terrorism. Along with relatively minor juvenile delinquency measures, police powers were substantially expanded. The stop-and-search of vehicles in the context of terrorism investigations became legal without the need for prior court approval. The potential abuse of this law is blatant. With its adoption, it became legal to search unoccupied premises at night with a warrant, but without notification of the owner, and previously private police records were made available to terrorism investigators. The most controversial feature has probably been the drive for far more extensive monitoring and recording of electronic transactions. Email can now be monitored more easily and the new law required that the records of tracked communications be kept. New laws were enacted in 2004 and 2006, broadening the measures contained in previous legislation. These encompass counter-terrorism measures, as well as other provisions to deal with organised crime – evidence of the progressive assimilation of the two phenomena mentioned.

Since 2001, the official French attitude has increasingly associated migrants with offences related to terrorism. French immigration policy is based on two broad principles: equality of treatment for all persons irrespective of origins and culture, and the expectation that immigrants will fully integrate into French society. As in many other European countries, up until the 1970s, immigration policy encouraged the acceptance of immigrants in order to support the national economy. But after the widespread economic crisis of the 1970's, immigrants became less welcome and France struck agreements with the main countries-of-origin to provide social and political services for migrants. It also developed policies to encourage the return to their countries-of-origin. Since these policies were not very effective, more restrictive laws were passed during the 1980s and 1990s to reduce and even reverse immigrant flows. In recent years however, many of these laws have been eased in response to new European policies on migration seeking to prevent discrimination.

66 The first anti-terrorism law (1986) had developed in response to each new major crisis by adding legislation that followed in line with the original assumptions. Political authorities chose to progressively adapt the criminal justice system rather than simply resort to extraordinary provisions – as the British and Italian governments were to do.

67 A small team of Juges d'Instruction (investigating judges) in the 14th Section of the Paris Court specialised in terrorism cases and operated a concurrent and parallel jurisdiction alongside local juges d'instruction and prosecutors. The establishment of this anti-terrorism section of the judiciary created a specialised body of counter-terrorism judges. Moreover, terrorist cases involving adult defendants were then tried in front of "special courts", consisting of seven professional judges, without the presence of a jury. Verdicts reached by a simple majority were also introduced.

68 Acting as both intelligence agency and judicial police force under the authority of the Juge d'instruction, the DST ensures the link between intelligence gathering and repressive action: the emphasis on a preventive strategy and on the importance of attacking logistical and financing networks at their source was considered essential.

69 The ordinary 48 hour period of garde à vue (detention before charge) can be prolonged for up to 96 hours.

70 Night searches are permitted in the context of terrorism investigations.

After September 11, 2001, the French government reversed its approach back towards more restrictive legislation on immigration. In 2003, a new law entered into force making it substantially easier to deport individuals who "have committed acts justifying a criminal trial" or whose behaviour "threatens public order". Earlier versions of this law gave police the power to deport foreigners for participating in political demonstrations. Increased penalties for illegal immigration were introduced, new limits on family reunification imposed, and more temporary detention centres were opened. Following the example of other governments, France also instituted a list of "safe countries" from where any asylum seekers would be immediately rejected[71].

The United Kingdom

Between 1960 and 2000 the United Kingdom faced numerous terrorist challenges at both the national and international level. These challenges have inevitably shaped the governmental response to the phenomenon of terrorism. However, the greatest threat to British internal security was the political violence connected with Northern Ireland affairs – a problem harking back to the late nineteenth century. Security legislation and its associated policies managed to contain terrorist activities and their casualties to a certain extent, yet they were never completely effective in eradicating the phenomenon. Statutory provisions were initially embodied in the Prevention of Terrorism (Temporary Provisions) Acts[72] (1974-1989) and in the Northern Ireland (Emergency Provisions) Acts (1973-88)[73]. Both were initially foreseen as temporary, but were successively re-enacted until they became engrained in the legal landscape. Unlike the situation in France, Britain's legislative reaction to political violence was not designed to be permanent – a feature that had a marked impact on the coherence of British anti-terrorism policy.

Alongside their legislative approach, successive British governments also sought cooperative solutions to the security problems stemming from the Northern Ireland issues. This sustained commitment to a diplomatic settlement led to the Good Friday Agreement in 1998, which sought to establish permanent peace in Northern Ireland[74]. Nonetheless, in parallel to this approach, the government also recognised that there remained the danger of a public emergency, and thus its legislative tools remained in force. This meant that the government continued to take advantage of its declaration under article 15 of the European Convention of Human Rights[75], and did not alter Britain's counter-terrorism policies in the short-term. Nonetheless, the diplomatic process did contribute towards a re-orientation of policy in the long run.

A general review of existing counter-terrorism legislation, conducted in 1996, concluded that ordinary criminal legislation and procedures were inadequate to cope with the new international threats posed by political violence, therefore justifying the introduction of broader legislation concerning terrorist offences, together with supplementary measures. As a result, the Terrorism Act (2000), which addressed both domestic and international terrorism, superseded the existing legislation and established a comprehensive and permanent anti-terrorism regime. The broad definition of terrorism introduced under the Act provided for an extension of the special measures applied, within the Northern Ireland context, to the entire country. It also encompassed terrorist actions carried out worldwide against any government or public, not just those in Britain. Terrorism was defined to include any action or threat of action intended to influence the government or intimidate the public for religious, political or ideological ends. It covered actions that involved serious violence against persons or serious damage to property. It also covered actions that endangered another's life, ones that posed a serious risk to public health or safety, as well as those designed to seriously hinder or interrupt an electronic system. The broad scope of these provisions allowed much flexibility in converting an action into a terrorist act.

The British Secretary of State was further permitted to designate groups that were believed, in the broadest sense, to be "concerned with terror". This designation did not require him to make a case in court. Association with those groups proscribed, including participation in forums in which these groups were also involved, became considered a criminal offence. These new definitions made it possible for any group, along with the individuals associated with it, to be criminalised outside the court system, and did not require the group in question to have actually committed any acts of violence, especially seeing as criminal offences now also included the vaguely defined offence of "instigation" of terrorism. The more specific enforcement powers were similar to provisions that already existed under English and Scottish law prior to the Act itself. Police were entitled to use powers of stop-and-search without a warrant for those considered terrorist suspects. Access to lawyers was restricted in comparison to the prosecution of other offences, and interrogation rules were relaxed. Laxer rules for determining association with a proscribed organisation were also reinstated.

71 Law of 10 December 2003.
72 Their provisions related to: proscribed organisations, exclusion orders, extended police stop-and-search powers, pre-trial detention, and special offences.
73 These Acts contained exceptional measures applicable to Northern Ireland alone, establishing special criminal procedures for the prosecution and trial of "scheduled offences".
74 Steps were taken towards a better protection of human rights and provisions were made for the release of prisoners convicted of scheduled offences.
75 Article 15(1) ECHR: "In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law".

Originally, virtually all of the proscribed domestic groups were linked to the conflict in Northern Ireland, although most of the international groups were to some degree associated with political Islam. With the decline of the danger posed by Northern Ireland and the increased threat from Islamic terrorism, the latter issue has now become the dominant concern, especially since September 11, 2001. Shortly after the terrorism attacks in the United States, Britain enacted the Anti-Terrorism, Crime and Security Act (2001). Largely aimed at addressing international terrorism, the Act differentiated between threats associated with Northern Ireland, and those associated with Islamic radicalism. Nonetheless, the new Act enshrined many of the provisions previously employed to tackle terrorism in Northern Ireland, even though it was designed to deal with a threat allegedly emanating from persons connected with immigration and political asylum movements.

Immigration and refugees have been problematic issues for the British government for longer than most other European governments. In absolute terms, Britain has accepted more asylum seekers than any other country in the world[76]. Asylum seekers have always been considered eligible for financial support, but in the last few years, restrictions[77] and tighter enforcement have had a serious impact on the health and well-being of asylum-seekers. Many are now judged ineligible for this support and their demands for asylum are often rejected[78]. Even for those who do gain asylum or immigrant-landed status, as well as for their descendents who are now British citizens, the Act presents some unique threats, not least that of indefinite detention of foreign nationals suspected of involvement with terrorism.

Part 4 of the 2001 Act included powers of indefinite detention for foreign suspected international terrorists who were liable to deportation but could not justifiably be deported to a place where they might be subject to torture, or inhuman or degrading treatment[79]. The certification of such status was left entirely to the Home Secretary, although it could be appealed to a Special Immigration Appeals Commission (SIAC). Further provisions allowed the freezing and confiscation of funds related to terrorism or proscribed groups, and limited the disclosure requirements for anti-terrorism investigations, giving discretion in such investigations to the prosecuting authorities. Individuals are required not only to refrain from association with suspected terrorists and proscribed organisations, but also to report any suspicions to the police. Those who do not comply with this, face criminal penalties. Legal authorities may detain and interrogate individuals in the anticipation of violence, rather than only in response to violent action. The state was given green light to compel communications companies to retain information regarding the activities of suspects. Further aspects of the Act concern the use and transportation of biological, chemical or nuclear weapons; new licensing requirements for the storage of pathogens or toxins; and increased penalties for crimes associated with aviation security.

The new powers concerning the indefinite detention of foreign nationals are generally considered the most important change introduced by the 2001 Act. These provisions aim at addressing the potential threat of radical Muslims resident in Britain who have not been directly associated with criminal acts. The measures have, of course, been challenged and, in *A. v. Secretary of State*[80], the House of Lords upheld by majority that the derogation from the European Convention of Human Rights, allowing for indefinite detention of foreigners suspected of terrorism, was unjustified[81] and that these provisions were incompatible with the Convention[82]. Moreover, by singling out foreign alleged international terrorists, the measures failed to deal with home-grown suspects.

As a result, the government enacted the Prevention of Terrorism Act 2005, which instead of establishing a detention regime, introduced 'control orders'[83], framed in a non-discriminatory way to satisfy the requirements of the House of Lords' decision. There are two kinds of control orders, classified according to their impact on the right to liberty under Article 5 of the Convention – namely, 'non-derogating' and 'derogating' control orders. Both kinds may impose whatever obligations the Secretary of State or, as the case may be, the court "considers necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity". They may prohibit or restrict a wide range of everyday activities, potentially significantly affecting the person's ability to lead a normal life (s. 1(4)-(7)). 'Terrorism-related activity' is broadly defined. The 'control order' regimes imply a degree of judicial review intended to better protect the suspect's rights. 'Non-derogating' control orders are emitted by the Secretary of State. However, if the order is made without the court's permission, the Secretary of State must immediately refer the case to court. 'Derogating' control orders are emitted by a court following a preliminary hearing held immediately after the Secretary of State has made an application. There must then be a full hearing to decide whether to confirm, revoke, or modify the order[84]. The suspect's right to appeal against a control order decision is significantly limited.

76 European Network Against Racism, United Kingdom Shadow Report (2003).
77 E.g. Section 55 of the Nationality, Immigration and Asylum Act (2002) now refuses financial support to asylum seekers who don't apply within three days of their entry into the country.
78 The Asylum and Immigration (Treatments and Claimants, etc) Act (2004) increases penalties for asylum seekers without proper papers, lends new police and enforcement powers to immigration officers, introduces electronic tagging for asylum seekers, extends the list of 'safe countries', and removes a number of appeal rights.
79 For the purposes of these provisions, the government had to once again derogate from Article 5 of the ECHR, pursuant to ECHR Article 15.
80 A. v. Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 WLR 87, HL. For a comment on this case and related issues: vd. D. Feldman (2005) Eur. Const. Law Rev. 531; M. Elliott, 'Detention without trial' (2006) 4(3) Int. J. Const. Law 553; D. Feldman, 'Human rights, terrorism and risk: the roles of politicians and judges' [2006] PL 364-384.
81 The Home Secretary had already made serious efforts to limit the legislation's negative impact on ECHR rights and to ensure that the measures were backed, as far as possible, by the appropriate procedures.
82 The provisions were said to discriminate against suspects as regards their right to be free from arbitrary deprivation of liberty under Article 5. By singling out foreign alleged international terrorists, the measures failed to deal with home-grown suspects. The differential treatment of foreign nationals could not be rationally justified as being related to the legitimate aim of preventing terrorist acts, and as such represented a violation of Article 14 of the Convention.
83 Control orders are defined in s. 1(1) as "an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism".
84 At the full hearing, the Secretary of State may apply to the court for the non-disclosure of evidence to the suspect and his lawyer. In this case, the suspect may only be represented by a special advocate. This procedure has been subject to strong criticism from civil libertarians.

Given that this law is associated with the threat of Islamic terrorism, the government has also included new penalties for religiously-motivated crimes of discrimination and bias. Previous laws had only covered racially-motivated violence. The inclusion of religion and the strengthening of associated penalties were meant to address the problems of prejudice and violence that British Muslims might face during the time of heightened social tensions that followed the events of September 11, 2001. There is, however, no clear definition in English law of the ideological or religious motives to which the Act refers. In addition, the new provisions can be applied to extreme fundamentalist religious groups, as well as to much less radical groups. Statistics suggest that these anti-terrorism measures have been employed mostly against Muslim defendants, although few arrests eventually led to convictions[85].

After the London bombings of July 2005, the government enacted the Terrorism Act 2006. The Act encompasses new criminal offences related to terrorism that are worthy of notice in what concerns civil liberties. In particular, the offence of 'encouraging terrorism', defined as "praise for, or celebration of, as well as acting encouragement to (not incitement to specific offence), glorification, or praise of terrorism related not just to terrorism campaigns currently underway, but any terrorist plan in the past or future", is controversial because of its vagueness and its dubious compatibility with the right to freedom of expression[86]. The offence of 'engaging in acts preparatory to an act of terrorism' is meant to allow the presentation of charges against suspected terrorists without having to wait for them to actually act. This offence attempts to reproduce the offence of 'association de malfaiteurs' in terrorist cases, enshrined in the French Criminal Code, and it is equally controversial due to its potential negative impact on civil liberties.

Further legislative proposals have been recently presented to parliament, and others remain under discussion, having so far failed to become enacted into law. They include: a proposal to introduce a 90-day pre-charge detention period for suspected terrorists, which would prolong the existing 28-day period; the likely introduction of ID cards in Britain; the more extensive use of CCTV cameras; and the eventual modification of criminal procedure to allow the use of intercept evidence in court.

85 Unsurprisingly, there has been a tendency towards extending the anti-terrorism laws to broadly cover criminal acts and immigration violations committed by Muslims. The increase in the number of Asians stopped and searched has also been disproportionately high. Kundnani, Arun, "Stop and Search: Police Step up Targeting of Blacks and Asi", IRR (March 26 2003).

86 Equally noteworthy, for the same reason, is the offence of 'incitement to religious hatred', inserted in the Public Order Act 1986 by the Racial and Religious Hatred Act 2006.

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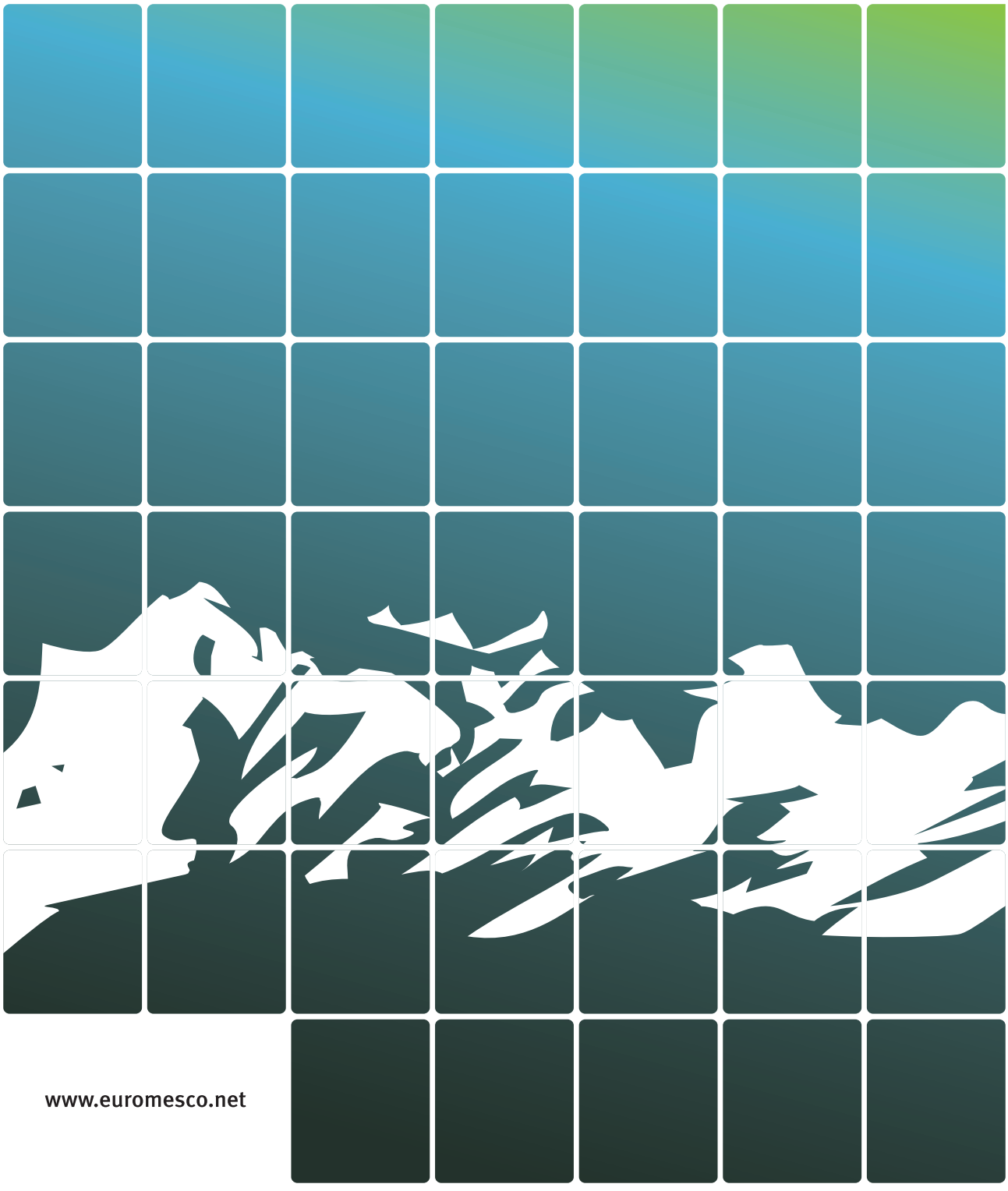

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