

Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation

Dr. Quirine Eijkman
Bart Schuurman, MA
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Abstract

As a result of the 9/11 terrorist attacks and the bombings in Madrid and London, a prevention focussed counter-terrorism approach has developed across the European Union (EU). While the majority of these laws, regulations and policies recognise the importance of the rule of law and human rights, it remains relevant to examine whether in theory and in practice certain security measures that were implemented have had disproportionate effects on ethnic and religious minorities and thereby violate non-discrimination standards. This study briefly discusses the concept of preventive counter-terrorism, after which it will go on to consider the use of preventive counter-terrorism measures in the EU as well as their potential discriminatory side-effects. A case study will be presented of two of the member states: the Netherlands and the UK. In the conclusion, the need for systematic evaluation of the effect of preventive counter-terrorism measures in relation to compliance to non-discrimination standards is discussed.

About the Authors

Dr. Quirine A. M. Eijkman is a Senior-Researcher and Lecturer at the Centre for Terrorism and Counterterrorism of Leiden University. Additionally, she is a consultant for Justice Q&A. Previously she worked for the Police and Human Rights Programme of Amnesty International, the Human Rights Committee of the Dutch Advisory Council on International Affairs, the Roosevelt Academy of Utrecht University, the Netherlands Institute of Human Rights (SIM) and at the International Humanitarian Law Department of the Netherlands Red Cross. In 2007, she defended her PhD thesis *We Are Here to Serve You!: Public Security, Police Reform and Human Rights Implementation in Costa Rica* at Utrecht University. Currently, she is a Member of the Board of Advisors of the Dutch Platform on Civil Rights and the Dutch Section of the International Commission of Jurists ('NJCM') of which between 2005 and 2011 she was the (vice-)President. She has published on the side-effects of security measures for human rights, police reform, and human rights mobilization. Her areas of interest include security and human rights, counter-terrorism, transitional justice and the sociology of law.

Bart Schuurman, MA is a junior researcher at the Centre for Terrorism and Counterterrorism of Leiden University. Additionally, he is working on his PhD thesis. His research is focused mainly on strategic negotiations between governmental and non-governmental organisations, the influence of public support on the outcome of terrorism-related conflict situations, the theories of military-strategist Carl von Clausewitz, and the obstacles encountered by western actors in so-called 'asymmetric' conflicts.

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Contact

ICCT – The Hague
Koningin Julianaplein 10
P.O. Box 13228
2501 EE, The Hague
The Netherlands

T +31 (0)70 800 9531

E info@icct.nl

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Introduction

As a result of the 9/11 terrorist attacks and the bombings in Madrid and London, a prevention focussed counter-terrorism approach has developed across the European Union (EU). Preventive counter-terrorism is appealing because it implies interventions that remove the ability or, better still, the motivation of potential terrorists to carry out their lethal designs. Member states such as the United Kingdom (UK) and The Netherlands that have primarily experience with addressing ‘home grown’ terrorism, have developed preventive counter-terrorism measures in response. The majority of these laws, regulations and policies recognise the importance of the rule of law and human rights. However, it remains relevant to examine whether in theory and in practice certain security measures that were implemented have had disproportionate effects on ethnic and religious minorities and thereby violate non-discrimination standards. For instance, a 2008 survey conducted by the European Fundamental Rights Agency showed that a considerable number of minorities in the EU feel that they are being stopped by law enforcement officials on the basis of their ethnicity or immigrant status.¹

When national intelligence and security services, law enforcement officials and other civil servants implement and execute counter-terrorism measures in a discriminatory fashion, they alienate the targeted group and thereby reduce opportunities for effective co-operation. This especially applies to preventive counter-terrorism measures including counter- and de-radicalisation policies, automatic border control, passenger name records data, alien deportation on the grounds of national security or public order, surveillance cameras, stop and search practices, and administrative measures including control orders. Strong claims are made by both supporters and critics of certain measures, with little supporting evidence and in highly charged political climates.² Notwithstanding the intensity of this debate, in most cases there has been little systematic evaluation of the effect of these particular counter-terrorism measures in terms of effectiveness in preventing terrorist crimes and/or of adverse results for human rights such as perceived or real discriminatory outcomes.

Despite serious methodological and empirical challenges including limited access to confidential data, mistrust and limited opportunities for the informed exchange of information, there is increasing research and advocacy from a human rights perspective on security and counter-terrorism measures in relation to non-discrimination standards. Given the EU and its member states’ commitment to addressing terror threats with full respect for the fundamental rights on which the Union is based, and the research evidence indicating that policies that are experienced and/or perceived as unfair and discriminatory are ineffective and possibly even counter-productive, it is important to give these questions serious consideration. The need for greater scrutiny of current efforts to prevent terrorism increases as European authorities seek to support improved understanding and exchange of good practices in preventing terrorism under the Stockholm Programme.³

The United Kingdom (UK) and the Netherlands have been longstanding pioneers in efforts to develop early interventions to identify individuals who may be on a path to violent radicalisation, and to use a range of police, judicial and administrative measures to intercede prior to an actual terrorist attack and, at times, well before there is any evidence of planning or material support for the execution of terrorist acts. While the need to prevent acts of terrorism and extremist violence is clear, it is important to use only those approaches that can be shown with a persuasive degree of assurance to be effective, and meet (inter-)national non-discrimination standards.⁴

1 European Union Agency for Fundamental Rights, *European Union Minorities and Discrimination Survey: Data in Focus Report 4: Police Stops and Minorities* (Vienna: FRA, 2010).

2 European Parliament Committee on Civil Liberties, Justice and Home Affairs Working Document 1 PE456.713v01-00 of 19 January 2011 on the EU Counter-Terrorism Policy: Main Achievements and Future Challenges, pp. 2-3.

3 The Stockholm Programme defines the EU’s framework for police, rescue services and customs cooperation, criminal and civil law cooperation, as well as asylum, migration and visa policy for the period of 2010-2014. For more information on the Stockholm Programme see: European Council, ‘The Stockholm Programme: an Open and Secure Europe Serving and Protecting Citizens’, *Official Journal of the European Union* (4 May 2010).

4 See among others Peter Neumann, ‘Prisons and Terrorism: Radicalisation and Deradicalisation in 15 Countries’ (The International Centre for the Study of Radicalisation and Political Violence (ICSR)/ The National Consortium for the Study of Terrorism and Response to Terrorism (START), 2010), pp. 1-68; Bob de Graaff, ‘Hoe Breed?: Contraterrorisme- en Radicaliseringsbeleid Onder de Loep’ [Counterterrorism and Counter-Radicalisation Policy Reviewed], in Jaap van

This study briefly discusses the concept of preventive counter-terrorism. Furthermore it will consider the use of preventive counter-terrorism measures in the EU as well as their potential discriminatory side-effects. Two member states, the Netherlands and the UK, serve as case studies. In the conclusion, the need for systematic evaluation of the effect of preventive counter-terrorism measures in relation to compliance to non-discrimination standards is discussed.

Preventive Counter-terrorism Measures

Counter-terrorism is a complex and multifaceted subject that encompasses a host of different strategies for dealing with violent extremism. Its central purpose can be described as ‘devising methods and policies to cause non state groups that employ [terrorism] to stop using violence to achieve their political objectives.’⁵ Paraphrasing Alex Schmid, it is possible to divide these methods and policies into two broad categories: namely, those efforts that fight the manifestations of terrorism and those that attempt to address the conditions conducive to the spread of terrorism. It is the latter category of preventive counter-terrorism measures that constitutes the focus of this report.⁶

While a preventive approach to counter-terrorism is to be lauded for its emphasis on averting violence rather than responding to it, the manner in which such policies are currently being implemented by various countries and international organisations raise significant questions related to the right to privacy, data protection, the presumption of innocence as well as the position of ethnic and religious minorities. For instance, what, if any, are the discriminatory side-effects of preventive counter-terrorism measures taken by the EU, the Netherlands and the UK, and how do these (unintended) consequences affect legislation and preventive policies? Before addressing these questions, the following section will briefly explore the concept of preventive counter-terrorism and its potential merits.

Why (not) focus on prevention?

The most obvious advantage of a counter-terrorism policy that focuses on prevention is its ability to avert the deaths and injuries of innocent civilians who might otherwise have fallen victim to a terrorist attack. Moreover, by forestalling the societal polarisation and calls for revenge that frequently follow terrorist acts and which in turn may lead to a vicious cycle of retaliation, preventive strategies⁷ can also have clear longer-term benefits.

However, policies that focus on preventing terrorism are not necessarily limited to averting an imminent attack. A broader or more fundamental form of preventive counter-terrorism attempts to remove the factors conducive to the spread of violent extremism. By engaging in dialogue with radicalising individuals or organisations and by addressing the grievances that engender an environment in which violent radicalisation may occur, governments can take steps towards the long-term resolution of a conflict and diminish the appeal to resort to terrorism. Such a focus on conciliation and mediation will certainly not yield results overnight, and politicians advocating this form of prevention must be prepared to be in it for the long haul. That said, removing

Donselaar, Peter Rodrigues (eds.), *Monitor Racisme & Extremisme: Achtste Rapportage* (Leiden/Amsterdam: University of Leiden/ Anne Frank Foundation, 2008), pp. 125-140.

⁵ Robert J. Art and Louise Richardson, ‘Introduction’, in Robert J. Art and Louise Richardson (eds.), *Democracy and Counterterrorism: Lessons from the Past* (Washington: United States Institute of Peace Press, 2007), p. 1.

⁶ Alex P. Schmid, ‘Prevention of Terrorism: Towards a Multi-Pronged Approach’, in Tore Bjørgo (ed.), *Root Causes of Terrorism: Myths, Reality and Ways Forward* (London: Routledge, 2005), p. 223.

⁷ Northern Ireland’s ‘Troubles’ and Italy’s experience with domestic terrorism both provide many examples of the reciprocal nature of terrorism-related violence. For example, see: Steve Bruce, *The Red Hand: Protestant Paramilitaries in Northern Ireland* (Oxford: Oxford University Press, 1992), pp. 31, 56, 136-138; Leonard Weinberg, ‘The Red Brigades’ in: Art and Richardson (eds.) (see note 4 above), pp. 30-31.

or reducing the sources of conflict between and within societies will likely offer the best chances for averting terrorism in the long run.⁸

From this perspective, preventive counter-terrorism measures have an impressive potential. As will become evident in this paper, on the other hand, implementing policies designed to prevent radicalisation or to identify possible suspects is considerably more difficult and their efficacy is hard to ascertain. It is also interesting to note that the very idea of preventing terrorism through tackling its root causes does not enjoy universal appeal. As Rik Coolsaet points out, the 'prevention paradigm' is far more commonplace and accepted in Europe than it is in the United States of America, where notions of 'evil' as the only explanation for terrorism are persistent.⁹ Perhaps it is partly because of this that Schmid states that the past decades have witnessed the dominance of counter-terrorism policies focused on fighting occurrences of terrorism rather than preventing such incidents from arising in the first place.¹⁰

Without downplaying the devastating effects terrorist attacks can have on individuals and societies, most European countries rarely experience such occurrences, and even those states that in the past have endured them on a frequent basis, such as Germany, Italy, Spain and the UK, can hardly be said to have been threatened by them on an existential level. The large amounts of time, human effort and capital being spent on preventive policies could be seen to derive from the increasing risk-aversion inherent to many Western societies. The problems stemming from this are two-fold; first of all, a risk-free society is an unobtainable illusion that may lead (or, depending on one's point of view, has led) to citizens demanding unrealistic levels of protection from their government.¹¹ The closely related second point is that the desire to minimise the risks posed by terrorism and crime can lead to the creation of 'surveillance societies' in which large amounts of citizens' biometric and personal data are stored, transferred, shared and otherwise processed on a daily basis. Not only does this raise the spectre of 1984-esque totalitarian government control, in a more immediate sense it poses concrete risks to citizens' rights to privacy, freedom of expression and association, the protection of personal data and the presumption of innocence. These infringements on human rights represent the shadow-side of the preventive counter-terrorism paradigm.¹²

Putting prevention into practice

Broadly put, what avenues for carrying out preventive counter-terrorism policies can be identified? According to Schmid, good governance, democracy, the rule of law and social justice are the four essential pillars which together form the basis for preventing terrorism. In societies with functional government institutions, where citizens' interests are represented by capable politicians who can be held accountable and where those same citizens also enjoy access to a fair and balanced judicial system, disputes and grievances can be addressed in a legal and non-violent manner, thereby significantly diminishing the number of people who would turn to political violence to express their dissent.¹³

In such liberal democracies, government representatives have access to various preventive instruments. Engaging in dialogue with radical individuals and groups before they turn to violence and using negotiations or concessions to remove the sources of contention could be seen as the political strand of prevention. In the sphere of economic and social measures, Schmid argues in favour of suppressing the financing of terrorist groups and avoiding a high rate of joblessness among relatively highly-educated young people, a demographic he identifies as

8 Schmid (see note 6 above), 223; Harmonie Toros, "'We Don't Negotiate with Terrorists!': Legitimacy and Complexity in Terrorist Conflicts', *Security Dialogue*, vol. 39, no. 4, 2008, pp. 407-426; Gus Martin, *Understanding Terrorism: Challenges, Perspectives, and Issues* (Thousand Oaks: Sage Publications, 2003), p. 367.

9 Rik Coolsaet, 'EU Counterterrorism Strategy: Value Added or Chimera?', *International Affairs*, vol. 86, no. 4, 2010, p. 860.

10 Schmid (see note 6 above), p. 223.

11 Ulrich Beck, *Risikogesellschaft: Auf dem Weg in eine Andere Moderne* [Risk Society: Towards a New Modernity] (Frankfurt am Mainz: Suhrkamp, 1986); Maartje van der Woude, 'Brede Benadering Terrorismebestrijding' [The Broad Approach to Counterterrorism], *Openbaar Bestuur*, vol. 11, no. 11, 2009, p. 2.

12 David Marukami Wood (ed.) et al., 'A Report on the Surveillance Society', (Surveillance Studies Network, September 2006), pp. 1-102. http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/02_11_06_surveillance.pdf. Retrieved 2 February 2011; Raf Jespers, *Big Brother in Europa* (Berchem: EPO 2010), pp. 305-326.

13 Schmid (see note 6 above), pp. 226-227.

being especially prone to radicalisation.¹⁴ Governments can also develop a ‘strategic narrative’ to diminish the appeal of the terrorists’ message while winning support for its own, and timely and accurate intelligence is another crucially important aspect of detecting and preventing terrorist plots. Finally, there are a host of judicial measures that politicians can enact to increase the power of the executive and the judiciary vis-à-vis terrorist organisations.¹⁵

Preventing Terrorism in the European Union, the Netherlands and the United Kingdom

States’ abilities to implement preventive laws and policies in the fields outlined above are most effective within their own national borders. Yet many of today’s terrorist threats have an international or transnational character; operatives planning attacks in Western countries have frequently visited training camps in failed or failing states, may receive planning advice and instructions from handlers in foreign countries or are supported logistically and financially by an international network. How can efforts to address root causes be fruitful in this context? As this section will show, while states are aware of these concerns and committed to addressing them on paper, the difficulties of actually doing so may explain why in practice preventive counter-terrorism has a strong domestic focus aimed at identifying and removing radicalising individuals and groups before they have an opportunity to strike.¹⁶

A preventive focus shared by the EU, the Netherlands and the UK aims at halting the financing of terrorist organisations and individuals. After the fateful attacks of 9/11, the United Nations (UN) Security Council adopted a binding resolution calling on its members to fight terrorist financing by freezing the assets of organisations and individuals who have committed, or are likely to commit, terrorist attacks. This UN Security Council resolution 1373 has since formed an important basis for cooperation on counter-terrorism among EU member states.¹⁷

The EU’s counter-terrorism strategy consists of four strands; prevent, protect, pursue and respond. The preventive aspect of this strategy is in turn divided into three segments; disrupting radicalisation and terrorist recruitment, ensuring mainstream opinion prevails over extremist views and promoting with a strong third country dimension security, justice, democracy and equal opportunity.¹⁸ This latter aspect would appear to be the most suited to addressing the conditions conducive to the spread of violent radicalisation and terrorism, but on how to actually achieve this outside of the EU’s borders, the Union is somewhat vague. ‘Outside Europe, we must promote good governance, human rights, democracy, as well as education and economic prosperity, through our political dialogue, assistance - and responsible media programmes. And we must work to resolve conflict.’¹⁹

Due to the international character of contemporary terrorism, the Dutch government attaches considerable significance to international cooperation as a means of preventing attacks.²⁰ This policy focus corresponds with the preventive portion of the UN’s global counter-terrorism strategy, which emphasises increased cooperation between states within the framework of existing international law that outlaw terrorism-

14 Ibid., pp. 228-229.

15 Ibid., pp. 226-234; Lawrence Freedman, *The Transformation of Strategic Affairs*. Adelphi Paper 379 (Abingdon: Routledge, 2006).

16 Schmid (see note 6 above), p. 227; Europol, *TE-SAT 2010: EU Terrorism Situation and Trend Report* (The Hague: Europol, 2010), pp. 7, 20, 22-26, 98; National Coordinator for Counterterrorism (NCTb), ‘Actueel Dreigingsniveau’ (NCTb, 2011). http://www.nctb.nl/onderwerpen/Actueel_dreigingsniveau/index.aspx. Retrieved 27 January 2011; House of Commons, *Prevent Strategy* (London: The Stationary Office, 2011).

17 Committee on the Evaluation of Counterterrorism Policy (Suyver Committee) Report IBIS-13171 of May 2009 on An Integrated Evaluation of Counterterrorism Policies [Naar een Integrale Evaluatie van Antiterrorisme Maatregelen], pp. 41-42; Council of Europe Committee of Experts on Terrorism Profiles on Counter-Terrorist Capacity of April 2007 on the United Kingdom, p. 3.

18 Council of the European Union Note 15893/1/10 of 17 January 2011 on the EU Action Plan On Combating Terrorism; Council of the European Union Note 15443/07 of 23 November 2007 on the European Union Strategy for Combating Radicalisation and Recruitment to Terrorism, p. 3.

19 Ibid. 2007, p. 5; Ibid. 2011, pp. 6-7.

20 National Coordinator for Counterterrorism (NCTb), ‘Nationale Contraterrorismestrategie 2011-2015’ (NCTb, 2011). <http://www.nctb.nl/Actueel/persberichten/2011/persbericht-110414.aspx>. Retrieved 19 April 2011), pp.30-31, 76-78; House of Representatives of the States General, *Terrorismbestrijding: Brief van de Ministers van Justitie en van Binnenlandse Zaken en Koninkrijksrelaties*, [Counterterrorism: Letter from the Ministers of Justice and of the Interior and Kingdom Relations] Parliamentary Papers 2003-2004, 29745, no. 1, 10 September 2004, p. 18.

related violence. Specific attention is paid to such topics as increasing cooperation under existing international treaties, bringing terrorists to justice, strengthening international judicial cooperation, extradition programmes and the intensification of information sharing on terrorism-related subjects between states.²¹ The Dutch government recognises that failed and failing states are enablers of international terrorism, and that countries without the capacity to detect terrorist organizations operating within their borders are also grounds for concern. While it acknowledges that the effects of policies geared towards preventing or containing failed states will only become apparent in the long-run, the Dutch government believes that helping the latter category of states improve their counter-terrorism capabilities can yield short-term benefits.

The UK's counter-terrorism strategy, 'Contest', also emphasises the international nature of contemporary terrorism and cites the importance of addressing the root causes that can lead to violent extremism.²² Overseas capacity building, international outreach to Muslim communities, poverty alleviation, development aid and peace operations are designated as important elements of the UK's counter-terrorism strategy, even if they are not directly part of Contest but the work of, for example, the Foreign and Commonwealth Office.²³ Although there is a lack of evidence for a causal relationship between poverty and terrorism, the British government is to be lauded for its attention to terrorism's enabling factors.²⁴ These are long-term goals and progress towards them is hard to measure.²⁵ Furthermore, with no clear end in sight for the conflicts in Afghanistan, Iraq and Israel – subjects the British recognise as key grievances fuelling terrorism – these efforts to reduce extremism and political violence abroad may be of limited utility.²⁶

In a more general sense, addressing the conditions conducive to the spread of terrorism abroad will require at least some degree of engagement with organisations many voters and politicians consider morally reprehensible. There must be sufficient willingness to 'talk to terrorists' among politicians and sufficient domestic support for such controversial courses of action. With many such organisations blacklisted even if they represent considerable constituencies (as is evident in the case of Hamas), and with the struggle against terrorism until recently considered a 'war' by the world's foremost power, it is hard to conceive of a sizeable and effective international strategy to prevent terrorism taking shape any time soon.²⁷

Addressing the factors conducive to a complex phenomenon such as (international) terrorism is a very difficult undertaking. Add to this the strong incentive for governments to be seen to deal with terrorism and the moral and political difficulties of negotiating with terrorists and a possible explanation arises for the emphasis that the EU, the Netherlands and the UK place on a more narrow and immediate interpretation of prevention.²⁸ An interpretation that focuses on the early identification of individuals who may be radicalising and the use of a range of policing, judicial and administrative instruments to intercede prior to a terror attack, sometimes even before there is any evidence of planning or material support for acts of terror. An interpretation of prevention, finally, that is primarily concerned with threats as they occur within a country's borders.

There are of course also very good reasons for focusing on the domestic terrorist threat that have little to do with public pressure and limited abilities to alter the internal affairs of far-away states. As the 2004 bombing of the Madrid railway station and the 2005 attacks on London's public transport made apparent, European states may be most immediately at risk from 'home-grown' terrorism, rather than the international networks and organisations directly associated with al Qaeda and its cohorts. Indeed, as Coolsaet argues, these attacks 'firmly

21 United Nations General Assembly Resolution A/RES/60/288 of 20 September 2006 on the United Nations Global Counterterrorism Strategy, p. 5.

22 British Government (see note 16 above), pp. 46, 50, 54, 56, 80

23 Ibid., pp. 68, 85, 92, 96-99.

24 See, for example: James A. Piazza, 'Rooted in Poverty?: Terrorism, Poor Economic Development, and Social Cleavages', *Terrorism and Political Violence*, vol. 18, no. 1, 2006, pp. 159-177; Schmid (see note 6 above), p. 227.

25 British Government (see note 16 above), pp. 59, 96,

26 Ibid., pp. 43-44.

27 Isabelle Duyvesteyn and Bart Schuurman, 'Dialogo en Onderhandeling met Terroristische Organisaties: Voorbeelden en Lessen uit de Westerse en Niet-Westerse Wereld (1945-2009)' [Dialogue and Negotiation with Terrorist Organizations: Examples and Lessons from the Western and Non-Western World], (Research and Documentation Centre (WODC), June 2010) pp. 1-101.

28 Duyvesteyn and Schuurman (see note 27 above), pp. 28-35; Beatrice de Graaf, *Waar zijn wij Bang voor? Veiligheidsdenken en de Angst voor de Ander* [What are We Afraid Of? Security and the Fear of the Other] (Rotterdam: Guys & Godoy, 2011), pp. 20-25.

anchored radicalisation, intertwined with the so-called ‘home-grown dimension’, at the heart of EU counter-terrorism endeavours.²⁹

The preceding has touched upon the concept of preventive counter-terrorism in a general sense and has attempted to indicate that it is a difficult concept for states to put into practice beyond their own borders. This paper now turns to the way in which the EU, the Netherlands and the UK have attempted to implement preventive policies at home.

Preventive counter-terrorism in the European Union

The EU’s response to terrorism has been partly event-driven.³⁰ Following the attacks of 9/11, international terrorism immediately became a key concern for the Union and led to the formulation of a counter-terrorism action plan. This plan has since undergone several modifications and currently lists details of how the various strands (prevent, protect, pursue and respond) of the EU’s Counter-terrorism Strategy are to be put into practice.³¹ Another key measure that was taken following the September 11 attacks was the 2002 Framework decision on combating terrorism, which will be outlined in more detail below.³²

The March 2004 terrorist attacks in Madrid similarly led to a flurry of counter-terrorism measures in the Union. The EU’s counter-terrorism action plan was modified to incorporate joint investigation teams (JITs) that would enable member states to more effectively tackle this transnational phenomenon, to allow greater cooperation and effectiveness regarding the exchange of terrorism-related information, to create a specialised counter-terrorism unit within Europol and to strengthen EU-US cooperation on counter-terrorism-related matters.³³

The 7/7/2005 terrorist attacks in London initiated another wave of counter-terrorism legislation and policies. The Madrid and London attacks had made it clear to policy makers that the terrorist threat had taken on a new dimension; that of home-grown terrorist groups with little or no direct links to al Qaeda and its affiliates. This realisation triggered an increased interest in the pathways that led to radicalisation; why would EU citizens wish to take up arms against their own states and what measures could be taken to prevent this from occurring in the future? Besides various counter-terrorism measures aimed at restricting terrorists’ ability to operate, for example through the implementation of European Arrest Warrants, the 2005 bombings also led to the adoption of the EU’s current Counter-terrorism Strategy and its four separate strands.³⁴

According to Coolsaet, the EU’s ‘domestic’ approach to fighting terrorism has always focused on devising measures and institutions to complement member states’ own counter-terrorism initiatives and abilities with a strong focus on criminalising terrorism.³⁵ Such is indeed the approach taken by the 2005 strategy. With regard to the ‘prevent’ strand, the document states that the EU ‘can provide an important framework to help co-ordinate national policies, share information and determine good practice.’³⁶ Key elements of the prevent strand are combating radicalisation and recruitment into terrorism, empowering mainstream opinion and promoting security, justice and democracy.³⁷

Yet despite the prevent strand having been labelled as the EU’s foremost counter-terrorism pillar, many of the most important countermeasures adopted in the decade since 9/11 do not seem to fit this category.³⁸ At least, not if prevention is seen as addressing the factors conducive to the spread of terrorism. Instead, the EU

29 Coolsaet (see note 9 above), p. 869.

30 European Parliament Committee on Civil Liberties, Justice and Home Affairs (see note 2 above), p.3; Coolsaet (see note 9 above), p. 858.

31 Council of the European Union (see note 18 above), pp.3-8.; Council of the European Union Note 5771/1/06 of 13 February 2006 on the EU Action Plan on Combating Terrorism.

32 Council of the European Union Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism; David Casale, ‘EU Institutional and Legal Counter-Terrorism Framework’, *Defence Against Terrorism Review*, vol. 1, no. 1, 2008, p. 52.

33 Casale (see note 32 above), p. 52.

34 *Ibid.*, pp. 52-53; Coolsaet (see note 9 above), pp. 867-869.

35 Coolsaet (see note 9 above), pp. 871-872.

36 Council of the European Union Note 14469/4/05 of 30 November 2005 on the European Union Counterterrorism Strategy, p. 8.

37 *Ibid.*, pp. 7-9; Council of the European Union (see note 18 above), pp.3-8.

38 Coolsaet (see note 9 above), p. 866.

seems to have concentrated most of its ‘prevention’ efforts on creating and strengthening the aforementioned framework, particularly with regard to streamlining member states’ judicial responses to terrorism and collecting, retaining, processing and cross-sharing large amounts of personal data, a practice which can undermine the presumption of innocence by making people who have not committed any offense the subject of an investigation.³⁹

On the subject of these judicial responses to terrorism it is instructive to remark upon the so-called ‘Framework decisions’. These powerful legal tools were used by the Council of the EU to align member states’ laws under the EU’s third pillar of Police and Judicial Cooperation in Criminal Matters (PJC). In 2002 and 2008 such Framework decisions led to the adoption of specific counter-terrorism legislation across EU member states.⁴⁰

The 2002 Framework decision on combating terrorism called for a harmonisation of counter-terrorism legislation amongst member states and advocated creating specific laws against terrorism-related offences where these did not exist while attaching suitably high penalties to such infractions. This Framework decision defined terrorist offences as crimes aimed at seriously intimidating a population, compelling a government or international organisation to perform or abstain from a certain act, and/or destabilising or destroying the political, economic or social structures of a government or international organisation.⁴¹ Furthermore, leading a terrorist organisation, being a member of such an entity or (indirectly) aiding or abetting such a group also became offences after the implementation of the 2002 Framework decision on combating terrorism.⁴²

Reflecting on the increased importance of the internet for terrorist groups, the European Council adopted a second Framework decision on counter-terrorism in November 2008. This piece of legislation amended the 2002 Framework decision so that public provocation to commit a terrorist offence, recruitment for terrorism and (assisting with the) training for terrorism came to be seen as specific offences.⁴³ For the European Commission, the strengthened 2008 Framework decision was not just about increasing the ability of member states to punish individuals involved directly and indirectly in terrorism, it ‘was amended to deal more specifically with prevention.’⁴⁴ But the ability to level heavier sentences against individuals involved in terrorism-related activities is more reactive than proactive and therefore a very narrow interpretation of preventive counter-terrorism measures.

Following the adoption of the Lisbon Treaty in December 2009, which streamlined EU treaties and institutions, the EU’s pillar structure was disbanded and the legal framework of framework decisions, directives, regulations and decisions was simplified. One of the results of this change has been that the barriers between external and internal security matters have largely disappeared, making a far more integrated EU counter-terrorism approach feasible by increasing the cooperation of agencies formerly situated under the pillar of Common Foreign and Security Policy (CFSP) with their PJC counterparts. The Lisbon treaty has also restructured the legal framework into ordinary and special legislative procedures, emphasised the equality of the law-making position of the Council and the Parliament and increased the EU’s authority with regard to police and judicial cooperation.⁴⁵ Whereas formerly decisions relevant to these subject areas were reached by unanimous agreement between the member states, today qualified majority voting has significantly expanded the power of the EU’s institutions to generate and implement such policy on their own.⁴⁶ Last but not least, although the

39 Open Society Institute, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory* (New York: Open Society Institute, 2009), pp. 57-118.

40 Framework Decision 2002/475/JHA (see note 32 above); Council of the European Union Framework Decision 2008/919/JHA of 28 November 2008 on Amending Framework Decision 2002/475/JHA on Combating Terrorism.

41 Framework Decision 2002/475/JHA (see note 32 above), p. 2.

42 *Ibid.*, pp. 2-3.

43 Framework Decision 2008/919/JHA (see note 40 above).

44 European Commission Communication COM(2010)386 of 20 July 2010 on the EU Counterterrorism Policy: Main Achievements and Future Challenges, p. 3.

45 Articles 289 and 294 Treaty of Lisbon; Steve Peers, ‘Guide to EU Decision-making and Justice and Home Affairs after the Treaty of Lisbon’ (Statewatch, 2010). Retrieved 24 March 2011

46 Council of the European Union Note 15359/1/09 of 26 November 2009 on EU Counterterrorism Strategy – Discussion Paper; General Secretariat of the Council of the European Union, ‘The Lisbon Treaty’s Impact on the Justice and Home Affairs (JHA) Council: more Co-Decision and New Working Structures’, (Council of the European Union, December 2009) pp. 1-4; Jespers (see note 12 above), pp. 242-243, 254-255.

European Commission continues to propose the majority of legislation, the European Parliament, Member States and other bodies can now initiate legislative procedures too.⁴⁷

Although not yet completely part of the EU's legal framework, the 2005 Prüm Convention has also played an important role in increasing EU member states' cooperation with regard to transnational crime, terrorism and illegal immigration. Originally drawn up and signed by Belgium, Germany, France, Luxemburg, The Netherlands, Austria and Spain, this convention's success has attracted the attention of other European states as well as the EU itself, which in 2007 proposed to partly incorporate the treaty. The convention calls for closer cooperation and increased interoperability on such topics as DNA information and fingerprints, vehicle registration and police work.⁴⁸

There are a plethora of EU institutions which concern themselves in one way or another with the Union's internal and external security and thereby have a role to play in implementing its counter-terrorism strategy. The increased authority and expanded opportunities for cooperation that the Lisbon treaty offers these institutions has in many instances given an impetus to plans for building, expanding, or increasing inter-agency access to databases that contain extensive biographical and biometric information on EU citizens and foreign nationals. Databases that are used, *inter alia*, for security and immigration policy. Such databases are used to identify individuals who may pose a security risk, enabling the relevant authorities to launch an investigation to assess the actual level of risk. In theory, such profiling techniques enable a pro-active and preventive response to serious crime and terrorism; removing likely offenders from the general public before they are able to carry out or complete their criminal designs.⁴⁹

Europol is a prime example of such an institution, a core EU agency tasked with improving the cooperation of and coordination between member states' law enforcement agencies in order to more effectively tackle transnational crime and terrorism. The Europol Information System contains extensive personal information on individuals who could have the intention to commit a criminal offence. Such a broad criterion for inclusion in this database potentially allows for biographic and biometric information on virtually anyone to be recorded, which raises a number of concerns related to the presumption of innocence, privacy and data protection. Furthermore, Europol has the ambition to integrate this system with similar databases operated by other EU institutions and member states, creating a vast pool of information that is accessible by a veritable host of institutions, countries and agencies. In fact, Europol also wishes to make possible the free exchange of personal data and biometric information with partner agencies in the United States of America, making data on EU citizens accessible transatlantically.⁵⁰

Another EU agency that focuses on pooling large amounts of information on potentially unwanted individuals is Frontex, the EU's External Border Agency, which is tasked with protecting the Union's borders, primarily from illegal immigrants. It strives to establish an integrated border security system that utilises biometric information as well as data garnered from satellites, unmanned drone aircraft and high-tech detection and border-surveillance technology.⁵¹ Neither Frontex nor Europol is exclusively tasked with counter-terrorism, yet both institutions have a role to play in implementing EU policy in this area and the data that they gather can be directly used for the purposes of preventing terrorism by identifying possible perpetrators.⁵²

Numerous large-scale databases containing personal data and biometric information on EU citizens and foreign nationals already exist, and are being developed, within the EU. Among them the Visa Information System (VIS), which was expanded to include biometric information following the 9/11 attacks specifically, though not exclusively, to contribute to 'internal security and fighting terrorism.'⁵³ The Schengen Information System (SIS I

47 Articles 76 Treaty of Lisbon; Peers (see note 45 above), p.3.

48 *Verdrag van Prüm* [Treaty of Prüm], Stb. 2008, 25, entered into force 17 January 2008.

49 Jespers (see note 12 above), pp. 259-275; Open Society Institute (see note 40 above), p. 68.

50 Valentina Pop, 'MEPs Decry "Breach of Trust" in EU-US Data Deal', *EUObserver.com* (16 March 2011); Françoise Gehring, 'Europol Accord Sparks Data Protection Fears', *Swissinfo* (20 September 2004); Jespers (see note 12 above), pp. 261-265.

51 Jespers (see note 12 above), pp. 272-273.

52 Casale (see note 32 above), pp. 53-54.

53 *Ibid.*, p. 66.

and SIS II): a very large database that contains ‘immense lists of wanted and unwanted persons and objects’⁵⁴ and information, which is distributed among the member states for border security and law enforcement purposes.⁵⁵ Furthermore, the European Commission put forward a new legislative proposal to use Passenger Name Record (PNR) data to among other prevent terrorist offences.

In 2007, the Council of the EU launched an initiative to create the European Criminal Records Information System (ECRIS), a project that, when completed, will ease the sharing of information on convicted criminals between member states.⁵⁶ There is also Eurodac, a ‘fingerprint system created to coordinate asylum applications across EU member states.’⁵⁷ Lastly, to conclude this (not exhaustive) overview, it is worthwhile to point out that EU also allows information on European citizens who travel to the US to be transferred to American authorities as part of the Passenger Name Record Data Transfer Agreement and the Electronic System for Travel Authorization (ESTA). Currently, the European Commission has proposed a new draft for EU Passenger Name Record legislation, which intends to fight terrorism and serious crime by sharing personal flight information collected airlines with other nations.⁵⁸

What all of the aforementioned institutions, databases and agreements have in common is the desire to collect, store and share increasing amounts of personal data and biometric information on EU citizens and foreign visitors. One of the main goals of such systems and institutions is to increase the Union’s ability to fight crime and terrorism and to pre-emptively investigate or arrest individuals who might pose a security threat. Even if it is implicit, prevention is at the heart of these endeavours. But with few, if any, oversight mechanisms in place and plentiful problems with data protection and privacy issues, these databases constitute a key concern for civil liberties and human rights advocates and have even attracted the concern of the EU’s own Agency for Fundamental Rights (FRA).⁵⁹

The FRA is tasked with monitoring, investigating and reporting on the development of fundamental rights in the EU. It is one of the agencies particularly concerned with the use of personal data and biometric data for the large-scale profiling of potential terrorist suspects, a practice which has become one of the main thrusts of post-9/11 terrorism prevention but one that has a very poor track record, with few ‘real’ threats being identified and many innocent civilians being subjected to discrimination and stigmatisation on the basis of such broad indicators as place of birth and religious convictions.⁶⁰

The desire to streamline member states’ and EU agencies’ ability to access each other’s databases, to create new data storage facilities and programmes and to further the cooperation and coordination between member states’ judicial systems, police forces and intelligence agencies is of central importance to the EU’s 2010-2014’s Stockholm Programme. This five year strategic approach was approved by the Council in December 2009 and aims to develop what the EU calls its ‘area of freedom, security and justice’.⁶¹ Together with the Europe 2020 Strategy, a ten-year plan for reviving the European economy, ‘Stockholm’ is a major element of the EU’s long-term planning.⁶²

Although it claims to put citizens’ interests first, the Stockholm Programme has attracted criticism, among others from the FRA and Amnesty International, on account of its weak stance on non-discrimination and its

54 House of Lords European Union Committee Report #9 2006/2007 of 2 March 2007 on the Schengen Information System II (SIS II), p. 8.

55 Open Society Institute (see note 39 above), p. 165.

56 Association Européenne pour la Défense des Droits de l’Homme, ‘The European Criminal Records Information System (ECRIS) Creates New Risks for the Protection of Personal data’ (Brussels: AEDH, October 2008), pp. 1-2; Martha L. Arias, ‘Internet Law – The European Union Will Have a Criminal Record Information System’ (Internet Business Law Services, 29 March 2010).

57 Open Society Institute (see note 39 above), p. 166.

58 Proposal for a Directive of the European Parliament and the Council 2011/32 (COM) of 2 February 2011 on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime; Teri Schultz, ‘A Transatlantic Tourism Tax?’, *Global Post* (27 September 2010).

59 Ibid.; Open Society Institute (see note 39 above), pp. 58-69; European Union Agency for Fundamental Rights, *Towards More Effective Policing, Understanding and Preventing Discriminatory Ethnic Profiling: a Guide* (Luxembourg: Publications Office of the European Union, 2010), pp. 9-10.

60 Ibid., European Agency for Fundamental Rights; Open Society Institute (see note 39 above), pp. 58-71; Peter Gill, ‘Security Intelligence and Human Rights: Illuminating the “Heart of Darkness”’, *Intelligence and National Security*, vol. 24, no. 1, 2009, p. 91.

61 European Council, (see note 3 above).

62 European Commission Communication COM (2010)171 of 22 April 2010 on Delivering an Area of Freedom, Security and Justice for Europe’s Citizens.

doubtful protection of the rights to privacy and data protection.⁶³ Within the realm of counter-terrorism, the Programme has expanded the definition of terrorism to encompass radicalisation and extremism, thereby significantly enlarging the pool of potential suspects and raising the spectre of citizens who practice their right to protest becoming the victims of restrictive and repressive ‘counter-terrorism’ policies.⁶⁴ Some, like Investigative Journalist Tony Bunyan, warn that ‘there is an emerging picture across the EU that demonstrations and the democratic right to protest are among the next to be targeted to enforce “internal security”’.⁶⁵

Lastly, the EU has introduced a number of administrative and organisational initiatives. Perhaps the most notable of such undertakings has been the creation of the office of Counter-terrorism Coordinator. This office, which has received criticism for being a paper tiger, is responsible for improving EU cooperation on Counter-terrorism and coordinating the various programmes and efforts that are already in place.⁶⁶ Furthermore, efforts are currently underway to simplify the management of the EU’s extensive databases by establishing an Agency for the operational management of large-scale IT systems within the next few years. Equally deserving of attention are the plans to create a Joint Situation Center (SitCen), in effect an effort to coordinate member states’ civil and military intelligence agencies. SitCen would function as the EU’s own intelligence agency and cooperate closely with Europol and Eurojust. As with many of the institutions and information systems that concern themselves with the EU’s internal and external security, critics worry that democratic control of this new institution is lacking.⁶⁷

Finally, the EU has also commissioned a considerable amount of research on fighting terrorism and countering radicalisation and has convened expert meetings between academics and counter-terrorism practitioners to develop best-practices. In the 2011 EU Action Plan on countering terrorism, reference among others is made to Member State cooperation in relation to monitoring websites, community policing projects, developing long-term disengagement and de-radicalisation tools targeted at youngsters and cooperation with third countries.⁶⁸

Preventive counter-terrorism in the Netherlands

On a national level, the Dutch government employs what it refers to as a ‘broad approach’, aimed at addressing both the effects of terrorist violence and preventing such incidents from occurring by early intervention and countering violent radicalisation.⁶⁹ The General Intelligence and Security Service (AIVD) plays a central role in the preventive part of this counter-terrorism strategy, using its considerable resources to map ‘trends’ in radicalisation and to pinpoint individuals and organisations who could pose a threat to Dutch society. The Office of The Netherlands National Coordinator for Counter-terrorism (NCTb) is primarily concerned with streamlining Dutch counter-terrorism policies and efforts, but also conducts threat level assessments of its own.⁷⁰

The Dutch government’s pre-emptive approach to counter-terrorism has also led to several important legal and policy reforms. Some of these reforms were undertaken in order to implement EU Framework decisions while others were the products of domestic politics. Such legislation has consistently viewed terrorism as a criminal act, consequently strengthening the ability of law enforcement and public prosecutors to deal with it. Of

63 European Agency for Fundamental Rights, ‘The Stockholm Programme: a Chance to Put Fundamental Rights Protection Right in the Centre of the European Agenda’, (Vienna: EU Agency for Fundamental Rights, July 2009) pp. 1-14; Amnesty International, ‘Amnesty International Briefing on the Future Stockholm Programme’, (Brussels: Amnesty International EU Office, July 2009) pp. 1-15.

64 Jespers (see note 12 above), pp. 305-326.

65 Tony Bunyan, ‘Protests in the EU: “Troublemakers” and “travelling violent offenders” to be recorded on database and targeted’, (Londen: Statewatch, April 2010), p. 8.

66 Council of the European Union, ‘EU Counterterrorism Co-Ordinator’ (Council of the European Union). <http://www.consilium.europa.eu/showPage.aspx?id=1344&lang=EN>. Retrieved 4 March 2011; Oldrich Bures, *EU Counter-Terrorism Policy: A paper tiger?*, (Prague: Metropolitan University, 2011) pp.137-148/245-251.

67 Jespers (see note 12 above), pp. 275-276; Casale (see note 32 above), p. 54.

68 Coolsaet (see note 9 above), p. 870; European Commission Communication (see note 44 above), p.5; Council of the European Union (see note 18 above), pp.3-8.

69 National Coordinator for Counterterrorism (NCTb), ‘Terrorisme’ (NCTb, 2011). http://www.nctb.nl/onderwerpen/wat_is_terrorisme/wat_is_terrorisme.aspx. Retrieved 3 March 2011; NCTb (see note 20 above), pp.62-79.

70 Ibid.

particular interest is the 2004 Crimes of Terrorism Act ('Terrorism Act').⁷¹ Enacted to implement a 2002 EU Framework decision that would make suspects convicted of terrorism-related crimes eligible for more severe punishment, this law was modified beyond the original EU requirements to incorporate terrorist recruitment and conspiracy to commit terrorist acts as distinct offences.⁷²

Another legal reform that falls within the preventive counter-terrorism category is the 2006 Act on Shielded Witnesses⁷³ which broadens courts' abilities to hear intelligence officers as witnesses, thus increasing prosecutors' ability to use intelligence reports as evidence against suspects.⁷⁴ In that same year, the Dutch government also enacted legislation to amend the criminal procedural code, the 2006 Act on expanding the scope for investigating and prosecuting terrorist crimes. This Act allows the police to search suspects without requiring concrete suspicion of a crime, broadened their ability to utilise 'special investigative powers' and made it possible for people suspected of terrorism-related offences to be held in custody for up to 27 months.⁷⁵ A key concept of the amendments to the criminal procedural code was that the police no longer required 'suspicions of a terrorist crime' but could act upon '*indications* of a terrorist crime', a considerably lower threshold standard of evidence.⁷⁶

The Dutch counter-terrorism strategy also includes various institutional reforms as well as administrative policies. Following the 2004 Madrid attacks, the decision was taken to establish the so-called Counter-terrorism-Infobox (CT-Infobox).⁷⁷ This initiative has brought together a host of security, police and intelligence related institutions, such as the AIVD, the NCTb, the National Police Services Agency (KLPD), the military intelligence agency (MIVD), the Ministry of Security and Justice and the Immigration and Naturalisation Service (IND). The goal of the CT-Infobox is to integrate information on networks and individuals who might be involved in terrorism-related activities or subject to radicalisation, thus enabling a timely response by the institution best suited to the particular task.⁷⁸

Since 2004, criminal law, immigration law, administrative measures or a combination of these instruments have been used against individuals who according to the CT-Infobox posed a threat to national security.⁷⁹ Furthermore, the 2000 general Alien's Act has a special provision on aliens posing a threat to national security or public order.⁸⁰ This can be used in the case of alleged involvement in terrorism and may be used instead of the criminal justice track. Thus, for example, 'aliens against whom evidence was lacking, or who were acquitted in a criminal procedure, have subsequently been successfully declared an 'undesirable alien' (a prohibition to enter the territory for an unlimited period of time).⁸¹ An assessment that a person constitutes a threat to the national security is made on the basis of an individual report from the AIVD. This report is not shared with the subject of the report. Only the immigration judge assigned the case may review the file and request further information from the intelligence officer or others; this review takes place behind closed doors at AIVD headquarters. It is not known by any of the actors interviewed for these purposes how much of the dossier is made available to the judge, or for that matter how often judges have requested further background information on the file.⁸²

71 *Wet Terroristische Misdrijven*, Stb. 2004, 290, entered into force 10 August 2004.

72 Framework Decision 2002/475/JHA (see note 32 above).

73 *Wet Afgeschermde Getuigen*, Stb. 2006, 460, entered into force 28 September 2006. In English also known as 'Act amending the Code of Criminal Procedure in connection with the hearing of witnesses and other matters' (Witness Identity Protection Act).

74 Suyver Committee (see note 17 above), pp. 23-27.

75 *Wet Ter Verruiming van de Mogelijkheden tot Opsporing en Vervolg van Terroristische Misdrijven*, Stb. 2006, 580, entered into force 1 February 2007. In English also known as the 'Investigation and Prosecution of Terrorist Offences (Extension of Powers) Act'.

76 Suyver Committee (see note 17 above), pp. 28-33.

77 House of Representatives of the States General, *Terrorismbestrijding: Brief van de Minister van Binnenlandse Zaken en Koninkrijksrelaties*, [Counterterrorism: Letter from the Minister of the Interior and Kingdom Relations] Parliamentary Papers 2004-2005, 29754, no. 21, 18 March 2005, p. 1.

78 Suyver Committee (see note 17 above), pp. 15-16.

79 Dutch Government Report 04126-6359 of January 2011 on Counterterrorism Measures in the Netherlands in the First Decade of the 21st Century [Antiterrorisme Maatregelen in Nederland in het Eerste Decennium van de 21ste Eeuw], pp. 87, 91.

80 *Vreemdelingen Wet 2000*, Stb. 2000. Entered into force 23 November 2000.

81 Nederlands Juristen Comité voor de Mensenrechten, 'Terrorism, Counter-Terrorism Measures and Human Rights in the Netherlands' (Leiden: NJCM, July 2007), pp.15-16.

82 Suyver Committee (see note 17 above), pp. 23-27.

Furthermore, the draft Bill on Administrative Measures for National Security enabled a variety of preventive security measures in relation to natural persons.⁸³ This could imply a restriction on the freedom of movement or association and would codify so-called disturbance or interference orders, which would justify law enforcement officials (at the behest of the mayor) to disturb suspects on an almost daily basis. Even though the Bill was recently withdrawn while pending before the Senate,⁸⁴ it codified practises that are to a certain extent were already in use and have to some extent been dealt with by new administrative and criminal legislation.⁸⁵ Among other these new preventive powers enable the authorities to take temporary measures exclusion orders (forbidding persons from entering a particular area), restraining orders (forbidding them from going near a particular person), a requirement to report to the police at set times. Under these new provisions, when several conditions are fulfilled (necessity and a person's behaviour), individuals may be subjected to these preventive measures by order of the mayor, the public prosecutor or a judge for a limited period of time.⁸⁶

According to the National Counter-terrorism Strategy 2011-2015, personal disturbance as well as early intervention will continue to play a key role in future policies to prevent terrorism.⁸⁷ Early intervention is executed among others through initiatives designed to counter radicalisation. Using both 'hard' and 'soft' measures, this broad approach aims to recognise such radicalisation processes at an early stage in their development and abort them using 'specific intervention strategies'.⁸⁸ They appear to include administrative, financial, communicative and immigration-law related measures.⁸⁹ One of the most concrete counter-radicalisation measures is the person-oriented intervention or disturbance, whereby individuals suspected of radicalisation are among other made to understand that law enforcement personnel is following their every move.⁹⁰

Taking a broader look at this subject brings into view a wider variety of programmes that appear to be predominantly concerned with improving the social integration of minorities. Examples include efforts to counteract discrimination in the labour market, increasing the chances young people have of finding employment by way of apprenticeship programmes and improving intercultural understanding, for example via sports events. In addition, Dutch counter-radicalisation initiatives focus on developing strong communities and improving youngsters' understanding of Islam.⁹¹ While this study is not the place to provide a full overview, it should be noted that there exist programmes aimed at de-radicalising right-wing extremists as well as (potential) Islamist fanatics.⁹² Somewhat remarkable, however, a 2009 evaluation of Dutch counter-terrorism measures implies that numerous government officials feel that counter-radicalisation instruments are under-utilised, with most counter-terrorism measures focusing on situations in which radicalisation had already occurred.⁹³

Preventive counter-terrorism in the United Kingdom

In order to prevent terrorism the British government has relied on the extension of powers of intelligence and security services as well as specific policies. Its counter-terrorism strategy is called Contest and consists of four

83 *Wetsvoorstel Bestuurlijke Maatregelen*, Kamerstukken II 2005/06, 30566, nrs. 1-5, Kamerstukken II 2006/07, 30566, nrs. 6-13 and Kamerstukken I 2006/07, 30566, nrs. A-B (parliamentary documents), passed House of Representatives in March 2007, withdrawn in June 2011 while pending before Senate.

84 Dutch Government (see note 79 above), p. 115.

85 For example articles 38v-38ij Criminal Code; articles 366a, 509hh and 558 Criminal Procedural Code; Articles 172a/b Municipal Act

86 *Ibid.*; The Act Measures to Combat Football Hooliganism and Serious Public Nuisance (see House of Representatives of the States General, 'Amendment of the Municipalities Act, the Code of Criminal Procedure and the Criminal Code regulating the power of the mayor and the power of the public prosecutor to take measures to combat football hooliganism, severe public nuisance or serious damaging behaviour in relation to persons or goods (measures to combat football hooliganism and serious public nuisance)', Parliamentary Papers 2010, 31467, no. 20, 31 August 2010.

87 NCTb (see note 20 above), pp. 62-76.

88 Suyver Committee (see note 17 above), p. 15; NCTb (see note 20 above), pp. 69-74.

89 National Coordinator for Counterterrorism (NCTb), 'Radicalisering'. <http://www.nctb.nl/onderwerpen/terrorismebestrijding/radicalisering>. Retrieved 17 March 2011.

90 NCTb (see note 20 above), pp. 62-76; National Coordinator for Counterterrorism (NCTb) letter to the House of Representatives of the States General 5486478/07/NCTb of 22 August 2007 on Person-Oriented Intervention.

91 Council of Europe Committee of Experts on Terrorism Profiles on Counter-Terrorist Capacity of November 2008 on the Netherlands, p. 3.

92 Froukje Demant *et al.*, 'Teruggang en Uittreding: Processen van Deradicalisering Ontleed' [Processes of Deradicalisation Dissected] (IMES 2008), pp. 160, 168-169.

93 Suyver Committee (see note 17 above), p. 80.

strands; pursue, prevent, protect and prepare. Contest was launched in 2003 and has undergone a renewal in 2009. Responsibility for putting the various programmes that make up Contest into practice rests with the Office for Security and Counter-terrorism (OSCT), which was founded in 2007.⁹⁴ According to the British government that re-focused the prevent strategy in 2011, efforts are intended to respond to the ideological challenges of terrorism, identify and support vulnerable individuals and cooperate with institutions and organisations where there are risks of radicalisation.⁹⁵ In the independent oversight of the prevent review and strategy, it is stressed that the policy should be free of discrimination and that support for extremism is often associated with a perception of discrimination.⁹⁶ In the equality impact assessment of the prevent strategy stakeholders emphasized that the previous strategy had had a disproportionate impact on belief, religion and race. There might be a perception among young man that this practice continues.⁹⁷

Over the course of the following paragraphs an attempt will be made to clarify how the UK has tried to accomplish these aims. To illustrate, according to the West Midlands Police, 'prevent' is a key element of Contest and one that focuses on building relationships with local communities with an eye to preventing radicalisation and addressing the conditions conducive to the spread of terrorism. More specifically, this entails challenging violent or extremist rhetoric and supporting mainstream opinion, disrupting those who spread messages of violence, supporting individuals vulnerable to terrorist recruitment, increasing the resilience of communities to extremist propaganda and addressing the grievances which may make individuals and communities vulnerable to such exploitation.⁹⁸ On paper at least, the focus on addressing the root-causes of radicalisation and the desire to intervene before individuals turn from extremism to violence is very reminiscent of the Dutch and European counter-terrorism programmes.

Pre-charge detention of terrorist suspects is one such measure that has extended the powers of the executive to thwart potential terrorist plots. As determined by the Terrorism Act 2006 suspects could be detained for up to 28 days before having to be charged with a particular offence. In a January 2011 review of British counter-terrorism policies, a report written by Lord Ken Macdonald, the ability to hold suspects for such an extended period of time was criticised and a recommendation was issued to reduce the maximum time of detention to 14 days.⁹⁹ As of the 25th of January 2011, pre-charge detention in the UK was indeed reduced to a maximum of 14 days when the order which allowed a 28 day limit was not renewed.¹⁰⁰

Other preventive counter-terrorism measures that focus on removing possible suspects, and in this case also suspicious objects, from public life are stop and searches without reasonable suspicion and the use of surveillance cameras. Stop and searches by law enforcement officials on the street, at airports or ports allows individuals and their property, such as cars, to be subjected to a search without a specific indication that the individual in question has committed an offence. The Macdonald Review has supported the 2010 European Court of Human Rights ruling that this measure is unlawful in its current form and recommends that limitations in time and place be attached to the practice.¹⁰¹ Both detentions without trial and 'stop and search' powers are granted by the Terrorism Act 2000. In 2010, 'stop and search' powers were restricted: except for airports and ports British law enforcement officials are now require reasonable suspicion that a person is a terrorist before being allowed to exercise it. As a 2011 investigation has indicated that people from ethnic minorities are far more likely to be

94 House of Commons, 'Project CONTEST: the Government's Counterterrorism Strategy', (British Government, 2009).

95 House of Commons, 'Prevent Strategy', (London: British Government, 2011).

96 Alex Carlile, *Report to the Home Secretary of Independent Oversight of Prevent Review and Strategy* (London: British Government, 2011), p. 4.

97 House of Commons, *Prevent Strategy: Equality Impact Assessment* (British Government, 2011), pp.5-6.

98 West Midlands Police, 'What We Do' (West Midlands Police, 2011). <http://www.west-midlands.police.uk/crime-reduction/tackling-terrorism/index.asp>. Retrieved 18 March 2011.

99 Ken Macdonald, *Review of Counterterrorism and Security Powers* (London: The Stationary Office, 2011), p. 4.

100 Liberty, 'Extended Pre-Charge Detention' (Liberty, 2011). <http://www.liberty-human-rights.org.uk/human-rights/terrorism/extended-pre-charge-detention/index.php>. Retrieved 14 April 2011.

101 Macdonald (see note 99 above), pp. 4-5; European Court of Human Rights, Gillian and Quinton v the United Kingdom, Application no 4158/05, Judgment of 12 January 2010, sections 57, 63, 80-86; Terrorism Act 2000, Part V and Schedule 7; 'Rules on Stop and Search Changed', *BBC News* (8 July 2010).

targeted at airports and ports, there are still significant human rights concerns.¹⁰² Surveillance cameras are used to deal with reducing crime, anti-social behaviour and countering terrorism. However, in addition to invading on people's privacy surveillance cameras may also contribute to the stigmatisation of minorities and particular areas. For instance, impact research in Birmingham shows that surveillance cameras, which had been deployed in areas with significant Muslims populations, strained the relations between the police and local communities.¹⁰³

A further powerful piece of legislation is the 2000 Regulation of Investigatory Powers Act (RIPA), which specifies when and how local authorities may use covert surveillance techniques such as wire-tapping, informants or undercover officers, and the monitoring of digital communications such as email.¹⁰⁴ There has been a lot of concern in the UK that local authorities have abused these powers to investigate citizens for minor infractions instead of using them to fight and prevent serious crime including terrorism, and that use of the Act has not been subjected to the appropriate judicial review.¹⁰⁵

Under the Terrorism Act 2000, the UK government can also proscribe organisations that openly espouse racial or religious hatred or incite their followers to violence, if these organisations can be ascribed a terrorist motive. The Macdonald Report argues that such a practice is illiberal and disproportionate and proposes a more measured response that targets the specific individuals guilty of incitement rather than entire groups or organisations.¹⁰⁶ The Act also prohibits the gathering of information (often taken to mean photographs) which could be used for terrorism-related purposes. In combination with the stop and search powers, this prohibition has resulted in the use of counter-terrorism legislation against citizens taking harmless photographs.¹⁰⁷

Another preventive counter-terrorism measure employed by the British has focused on preventing the financing of terrorism. Under the Terrorism Act 2000 several distinct offences have come into being that prohibit raising funds for terrorism-related purposes, directly or indirectly using money or property for purposes of terrorism as well as any activities aimed at 'facilitating the retention or control of terrorist property in any way'.¹⁰⁸ In accordance with UN Security Council Resolution 1373 of 2001, the UK also freezes the assets of individuals and organisations suspected of involvement in (international) terrorism.¹⁰⁹

The list of preventive counter-terrorism measures in use by the British government does not stop there. However, similar to the Dutch, the British have used the deportation of foreign nationals and so-called control orders for ostensibly pre-emptive purposes. The Macdonald Report makes clear that deportations are only acceptable when the deportee will not be subjected to torture or mistreatment in their countries of origin.¹¹⁰ The ability to use control orders is granted by the 2005 Prevention of Terrorism Act.¹¹¹ This measure allows the British government to place a variety of restraints upon individuals suspected of involvement in terrorism-related activities but against whom there is insufficient evidence to initiate criminal proceedings.¹¹² Control orders have attracted considerable criticism on account of their alleged unlawfulness and because, by essentially placing suspects under house arrest, no further evidence can be gathered to confirm or deny their alleged involvement in terrorism.¹¹³

The introduction of the Terrorism Act 2006, which, further adds as an offense the encouragement of terrorism, for example by glorifying events such as the 9/11 attacks or by directly inciting others to carry out acts

102 'Asian People 42 Times More Likely to Be Held under Terror Law', *The Guardian* (23 May 2011). For more information see also Tufyal Choudhury and Helen Fenwick, *The Impact of Counter-terrorism Measures on Muslim Communities*, Equality and Human Rights Commission Research Report Series nr.72 (Manchester: Equality and Human Rights Commission, 2011), pp.18-28.

103 Ibid. 2011, pp.36-38.

104 'Regulation of Investigatory Powers Act 2000', *The Guardian* (19 January 2009).

105 'Extent of Council Spying Revealed', *BBC News* (26 March 2009); Macdonald (see note 99 above), pp. 6-7; 'Hidden Cameras in Parts of Birmingham "Will Be Removed"', *BBC News* (5 July 2010).

106 Macdonald (see note 99 above), pp. 7-8.

107 Ibid., pp. 5-6.

108 Council of Europe Committee of Experts on Terrorism Profiles on Counter-Terrorist Capacity of April 2007 on the United Kingdom, p. 2.

109 Ibid., p. 3.

110 Macdonald (see note 99 above), pp. 8.

111 Committee of Experts on Terrorism (see note 108 above), p. 3.

112 Liberty, 'Control Orders' (Liberty 2011). <http://www.liberty-human-rights.org.uk/human-rights/terrorism/control-orders/index.php>. Retrieved 24 March 2011; Dominic Casciani, 'Q&A: Control Orders', *BBC News* (3 January 2011).

113 Macdonald (see note 99 above), pp. 9-15.

of terrorism. The 2006 Act also outlaws the distribution of terrorist material such as pamphlets, video's and digital material. Finally, it makes it an offense to train or otherwise prepare for terrorism or to provide such assistance to others.¹¹⁴

Preliminary Conclusion

Succinctly put, it appears that the desire to prevent terrorism and serious crime is leading the EU and states such as The Netherlands and the UK to design and adopt counter-terrorism measures, which affect human rights compliance. For instance, the presumption of innocence is pressured by (preventive) stop and searches and personal disturbance and the rights to privacy and data protection are infringed by mass covert surveillance. Likewise, when authorities implement and execute preventive counter-terrorism measures in a discriminatory fashion, they also alienate the targeted group, which are often ethnic or religious minorities, and thereby may reduce opportunities for dialogue and co-operation. Even though both supporters and human rights advocates make strong claims, in most cases the effect of these particular counter-terrorism measures in terms of effectiveness in preventing terrorist crimes and/or perceived or real discriminatory outcomes are undetermined. Therefore the following section of this report seeks to contribute to a clearer understanding of the issues at stake.

Preventive Counter-terrorism Measures and Non-discrimination

Many politicians and citizens in the EU feel that in exceptional circumstances curtailing the rights and liberties of minorities associated with terrorism is justified. Most people recognise that absolute human rights such as the right to life should be respected, but in order to fight terrorism adequately, particular rights including the discrimination prohibition as well as the right to equality may need to be limited. For instance, significant effort is being put into fighting - violent - extremism in British Muslim communities, but less in far-Right communities is discriminatory.¹¹⁵ This point of view has been described as the balance (and/or) proportionality response thesis.¹¹⁶ Since 9/11, numerous governments as well as influential scholars such as Micheal Ignatieff have supported it.¹¹⁷ The basic assumption holds that in order to protect security, public interest must be weighed against human rights. If this means that the rights and liberties of minorities are limited than this is an unfortunate side-effect of counter-terrorism measures, which is tolerated by the majority population. Other scholars, such as for instance Daniel Moeckli, argue that the balancing metaphor is misleading and that for legal, practical and public legitimacy reasons the right to non-discrimination and equality in the 'War on Terror' should be upheld.¹¹⁸ Additionally, human rights advocates such as The Eminent Jurists Panel, in its report on Terrorism, Counter-terrorism and Human Rights, recommend that (preventive) counter-terrorism measures should respect the rights of minority communities and be fully non-discriminatory.¹¹⁹

Increasingly, human rights and civil rights organisations and community groups who stress the relevance of assessing the discriminatory side-effects of counter-terrorism efforts are being heard by (inter-)national bodies. For instance, in his 2010 European Counter-terrorism Strategy discussion paper, the European Counter-terrorism Coordinator acknowledges the relevance of assessing the impact that counter-terrorism measures have on minority groups.¹²⁰ Also, although the majority of official evaluations on the impact of counter-terrorism do not

114 Committee of Experts on Terrorism (see note 108 above), p. 4.

115 Arun, Kundani, *Spooked: How not to prevent violent extremism* (London: Institute of Race Relations 2009), pp.23-24. Even though the new prevent strategy was recently re-focused and recognized the issue, it may in practise remain problematic (House of Commons (see note 95), pp.4-5/13-17).

116 Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights', in B.J Goold and L. Lazarus (eds). *Security and Human Rights* (Oxford: Hart Publishing, 2007), pp.207-209, 224.

117 Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton: Princeton University Press, 2004), p.46.

118 Daniel Moeckli, *Human Rights and Non-Discrimination in the 'War on Terror'*, (Oxford: Oxford University Press, 2007), pp. 234-237.

119 International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counterterrorism and Human Rights* (Geneva: International Commission of Jurists, 2009), pp. 116, 165.

120 Council of the European Union Note 15894/1/10 of 29 November 2010 on EU Counter-Terrorism Strategy – Discussion Paper, pp. 10-11.

explicitly discuss the (potential) discriminatory effect, a few, such as the 2011 British review on Counter-terrorism and Security Powers, address it.¹²¹ Despite these significant developments, the effect of most counter-terrorism efforts on the rights and liberties of minorities is uncertain. This can be primarily attributed to the fact that discriminatory side-effects are usually related to other human rights infringement, including fair trial, the right to privacy, data protection and freedom of movement and expression. Therefore in this section the existing reviews on preventive counter-terrorism measures are considered. This discussion is preceded by an introduction of the (inter-)national standards on equality and the ban on discrimination.

Non-discrimination Standards in the European Union

In the EU the right to equal treatment and the ban on discrimination are fundamental human rights. Discrimination between individuals on the basis of race, ethnic origin, religion, sex, sexual orientation, nationality, language etc. is prohibited by several international conventions that are directly or indirectly applicable.¹²² These include almost all UN human rights conventions¹²³ and the Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)¹²⁴, especially Article 14, and the Twelfth Protocol to the ECHR¹²⁵. The EU legal framework that affects equal treatment and the prohibition of discrimination includes the EU Race Directive, Anti-discrimination Directive,¹²⁶ Privacy Directives,¹²⁷ Lisbon Treaty, and Charter of Fundamental Rights.¹²⁸ The EU Race Directive, which seeks to curb discrimination on the basis of race or ethnic origin, deals solely with equal treatment in the supply of goods and services and not with nationality and the Lisbon Treaty, which prohibits discrimination on the basis of nationality, applies this prohibition only to EU citizens.¹²⁹

Like other EU Member States, The Netherlands and the UK are party to most international human rights conventions and subjected to the EU's legal framework. Discrimination between individuals on the basis of race, ethnicity, religion, sex, nationality, language etc. is prohibited by international conventions that are directly applicable in the Kingdom of The Netherlands, as well as by the Dutch Constitution, the Equal Treatment Act, and a number of provisions of criminal and administrative law.¹³⁰ Article 1 of the Dutch Constitution, for instance enshrines both a principle of universal equality and a ban on discrimination.¹³¹ Some of these statutory provisions relate to institutional policy and the actions of police, security, immigration and customs officials. The Dutch Equal

121 House of Commons, *Review of Counter-Terrorism and Security Powers: Equality Impact Assessment* (London: British Government, 2011).

122 For more information see European Union Agency for Fundamental Rights, *Handbook on European Non-discrimination Law* (Vienna: FRA, 2011).

123 Among others the International Covenant on Civil and Political Rights (ICCPR), especially Article 26 and the United Nations Race Convention,

124 Where the ECHR is concerned, it should be noted that Article 14 provides protection from discrimination only in combination with one of the other rights, such as the right to liberty and security of person.

125 Article 1, paragraph 2 of the Twelfth Protocol to the ECHR prohibits discrimination by any public authority. The Netherlands ratified this Protocol on 1 April 2005.

126 European Commission Proposal for a Council Directive 2008/0140 (CNS) of 2 July 2008 on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual orientation. This directive supplements earlier directives, including European Parliament and the Council of the European Union Directive 2000/43/EC of 29 June 2000 on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin. At the same time, Article 10 of the Lisbon Treaty states that 'in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

127 European Parliament and Council of Europe Directive 1995/46/EC of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of such Data; European Parliament and the Council of European Union Directive 2002/58/EU of 12 July 2002 on Privacy and Electronic Communication. On 28 January 2010, EU Justice Commissioner Reding announced that she would be proposing amendments to modernise the EU privacy regulations on the basis of the Data Protection Directive and the specific rules applicable to telecommunication and the internet (e-Privacy rules).

128 The Charter of Fundamental Rights of the European Union (7 December 2000, amended 12 December 2007 Strasbourg) is not part of the Lisbon Treaty (2007/C306/01), which modernised and reformed the Treaty on European Union and the Treaty establishing the European Community, but EU institutions and national states that implement EU legislation are obliged to observe these fundamental rights and the principle of subsidiarity applies to the obligations of the member states.

129 Under the terms of Article 3, paragraph 2 of this Directive, the prohibition does not include difference of treatment based on nationality, and non-EU residents cannot derive any rights from it; Article 18, Lisbon Treaty.

130 The Netherlands adheres to a monistic system in which international conventions and the decisions of organisations established under international law are self-executing and do not have to be transposed into national legislation. See articles 93 and 94, Constitution of the Kingdom of the Netherlands, 12 September 1840 (Bulletin of Acts and Decrees 1840, 54);

131 Article 1 *Grondwet*, 12 September 1840 (Bulletin of Acts and Decrees 1840, 54).

Treatment Commission, which is about to transform into the Netherlands Institute for Human Rights, is a specialised body that promotes and monitors compliance with equal treatment laws.¹³²

As the UK is the birthplace of Common Law, which predominantly depends on judicial precedents, the doctrine of *stare decisis*, there is no written law apart from some special acts, administrative guidelines and practise directions. Hence, there is no constitution, and international law only becomes directly applicable due to special acts. For example, the ECHR was implemented with the 1998 Human Rights Act. Similarly EU legislation is adopted and then transposed into national law.¹³³ Discrimination between individuals on the basis of race, religion and belief, sex, sexual orientation, age, disability, gender reassignment and pregnancy and maternity is prohibited by the Equality Act as well as a number of criminal (for example the Crime and Disorder Act) and administrative acts. Furthermore, there is a general equality duty, which focuses on the elimination of unlawful discrimination, the integration of equality and good relations in the everyday business, especially of public authorities, and the Equality and Human Rights Commission is responsible for consultation and engagement, monitoring and data collection as well as equality impact assessment.¹³⁴

Despite this significant legal framework applicant in the EU, the effect of most counter-terrorism efforts on non-discrimination standards has received modest attention. Among other explanations this can be attributed to the fact that even though according to international law non-discrimination is a non-derogable right, counter-terrorism reviews, following the European Convention of Human Rights regime, have tended to focus on the infringements on the primary human right, for example the torture prohibition, fair trial or freedom of movement, rather than non-discrimination norms as such.¹³⁵ Furthermore, even though expert opinion differs when it comes to the absolute protection the prohibition of discrimination and the principle of equality, there is a consensus that it is legitimate to draw distinctions on the basis of specific scrutiny tests, including proportionality, effectiveness and necessity.¹³⁶ This is clear from the case law of the European Court of Human Rights and the Data Protection Convention of the Council of Europe.¹³⁷ Goldschmidt and Rodrigues, for instance, maintain that whenever there is a breach of human rights, law enforcement officials must ask themselves whether the advantages of profiling outweigh the disadvantages, and whether the objective cannot be attained in some less extreme way.¹³⁸

Non-discrimination reviews

Even though in debates about preventive counter-terrorism measures the right to equality and the prohibition of discrimination are receiving ever increasing attention, the issue of non-discrimination remains ambiguous due to legal, political and social factors. The UK government's counter-terrorism strategy reflects this ambiguity as, although there is no explicit mention of a specific focus on the Muslim community at a national level, it is implicit in many of the programmes.¹³⁹ Combined with the fact that the website of a specific police force does make such a focus explicit, this might be seen as indicative of how the terrorist threat is perceived by elements of the UK

132 For more information see Dutch Equal Treatment Commission, 'Homepage' (CGB, 2011). <http://www.cgb.nl/english>. Retrieved 4 March 2011; Dutch Human Rights Institute, 'Home' (CGB, 2011). <http://www.naarenmensenrechteninstituut.nl/>. Retrieved 4 March 2011.

133 Neil Davidson, *Davidson Review: Implementation of EU Legislation* (London: The Stationary Office, 2006), p.12.

134 Equality and Human Rights Commission, Public Sector Duty, <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/introduction-to-the-equality-duty/>. Retrieved 7 April 2011; Equality Act, 2010, Section 149. For more information see the website of the Equality and Human Rights Commission, Retrieved 4 April 2011.

135 Among others FRA (see note 122 above).

136 European Network Against Racism (ENAR), 'Factsheet 40: Ethnic Profiling', (ENAR, June 2009), p 5; Council of Europe European Commission Against Racism and Intolerance (ECRI) General Policy Recommendation No 11 CRI(2007)39 of 29 June 2007 on Combating Racism and Racial Discrimination in Policing, p 9.

137 European Court of Human Rights, *Timishev v Russia*, Application no. 55762/00, 55974/00, Judgment of 13 December 2005, sections 56-58; Council of Europe Convention 1981/108 of 28 January 1981 on the Protection of Individuals with regard to Automatic Processing of Personal Data.

138 Jenny Goldschmidt and Peter Rodrigues, 'Het Gebruik van Etnische en Religieuze Profielen bij het Voorkomen en Opsporen van Strafbare Feiten die een Bedreiging Vormen voor de Openbare Orde en Veiligheid' [The Use of Ethnic and Religious Profiles in Preventing and Investigating Criminal Offences that pose a Threat to Public Order and Security], in Jaap van Donselaar and Peter Rodrigues (eds.), *Monitor Racisme & Extremisme: Zevende Rapportage* (pp. 40-60. In J van Donselaar and PR Rodrigues (2006) (eds), *Monitor Racisme & Extremisme: Zevende rapportage* (Amsterdam / Leiden: Anne Frank Foundation / University of Leiden), p. 40.

139 Kundani (see note 115 above), pp.23-24.

government.¹⁴⁰ The EU also appears to make an effort to stress that ‘the threat comes not only from Islamist terrorism, but also from separatist and anarchist terrorists.’¹⁴¹ The Dutch government, more specifically the NCTb and AIVD, states that it does not specifically focus its ‘broad approach’ on a certain group or ideology, but at the same time does imply quite clearly that in the 21st century the terrorist threat derives mostly from Islamist groups and individuals.¹⁴²

Some preventive counter-terrorism measures distinguish by their very nature. For instance, restrictive measures on admission or travel bans in the EU are focused on persons and entities involved in terrorist acts.¹⁴³ They therefore distinguish between immigrants who are believed to be associated with terrorism and those that are not. To a certain extent, the discriminatory side effects of preventive security measures are tolerated by society at large. The majority population in several EU member states may not be aware of or concerned with for example the fact that the minorities who personally or as part of their household own a car have a higher likelihood to be stopped by law enforcement officials.¹⁴⁴ Additionally, many EU citizens do not know that minority groups are generally less aware of anti-discrimination legislation compared the majority population and therefore rarely issue complaints.¹⁴⁵

Furthermore, discrimination usually occurs in combination with an infringement on other rights such as the freedom of movement. For instance, police stops in theory affect the entire population, but in practice may sometimes be implemented selectively against one ethnic or religious group (‘ethnic profiling’).¹⁴⁶ Last but not least, notwithstanding a number of official evaluations, there are few empirical studies that independently substantiate different treatment in the EU, The Netherlands and the UK. In the subsequent section, a number of existent reviews of (preventive) counter-terrorism measures and references to non-discrimination are considered.

Reports about the European Union

International human rights committees and civil society organisations have stressed the risk of the negative impact of EU counter-terrorism measures on minorities and immigrants for a number of years. Common side-effects concerns relating to preventive counter-terrorism measures include the violation of the presumption of innocence, the privacy of individuals and personal data protection, as well as the stigmatisation of entire or ethnic or religious groups and the presumption of the existence of collective sins by, for instance, coupling ‘terrorism’ to ‘Islam’ in a nations collective memory.¹⁴⁷ Security measures such as the aforementioned personal databases and detection and identification technologies have a tendency to become permanent, thereby normalising the exception. The European Data Protection Supervisor has expressed his concern about the (mis)use of personal data, which in combination with the broad powers of national authorities could lead to discrimination and stigmatisation.¹⁴⁸

Also, it is not just a question of whether or not people with a minority and immigrant status in the EU are disproportionately affected by preventive counter-terrorism measures, the very fact that they experience or perceive being treated differently creates anxiety, mistrust, resentment and disengagement.¹⁴⁹ For example,

140 West Midlands Police (see note 98 above).

141 European Commission (see note 44 above), p. 2.

142 NCTb (see note 20 above); General Intelligence and Security Service (AIVD), ‘Jaarverslag 2010’ [Annual Report 2009] (AIVD, April 2011), p. 1.

143 European External Action Service (EEAS), ‘Sanctions or Restrictive Measures’ (EEAS, 2011). http://eeas.europa.eu/cfsp/sanctions/index_en.htm. Retrieved 14 April 2011.

144 European Union Agency for Fundamental Rights (FRA) (see note 1, above), p.11

145 European Union Agency for Fundamental Rights (FRA), *European Union Minorities and Discrimination Survey: Data in Focus Report 3: Rights Awareness* (Vienna: FRA, 2010), pp.8-10.

146 Open Society Institute (see note 39 above); European Union Agency for Fundamental Rights see note 58 above); Quirine A.M. Eijkman. ‘Has the Genie Been Let out of the Bottle?: Ethnic Profiling in the Netherlands’, *Public Space: the Journal of Law and Social Justice*, vol.5, no. 2, 2010, pp. 1-21; Frank Bovenkerk, *Wie is de Terrorist: Zin en Onzin van Ethnic Profiling* [Who is the Terrorist? Sense and Nonsense of Ethnic Profiling] (Rotterdam: Ger Guijs, 2009).

147 Agnes Hankiss ‘Cornerstones of the EU’s Counter-Terrorism Strategy’ (Hungarian Civic Union in the European Parliament, July 2010); ENAR (see note 136 above), pp.8-9; Open Society Institute (see note 39 above); Office of the High Commissioner of Human Rights (OHCHR), *Human Rights, Terrorism and Counter-Terrorism: Factsheet No.32* (Geneva: OHCHR, 2008), pp.37-38.

148 European Economic and Social Committee, Soc/388-CESE 1570/2010 of 31 March 2011 on the EU Counter-Terrorism Policy, p.7.

149 Open Society Institute (see note 39 above), pp.83-84, 98.

149 Ibid., pp. 98-108.

significant numbers of European Muslims *feel* that since 9/11 they are under surveillance and experience this as a form of stigmatisation. Therefore any potential benefits that this practice offers from a counter-terrorism perspective must be weighed against the increased alienation and stigmatisation that it engenders. As the effectiveness of preventive counter-terrorism measures is hard to judge, one wonders when their implementation is justified and when it can be counterproductive: could these measures mobilise the very individuals and groups they are supposed to prevent from turning to political violence?¹⁵⁰

Even though during the last decade civil society has sometimes had difficulties in having its cases heard and systematic evaluations of counter-terrorism measures in terms of effectiveness and their impact on human rights have been modest, there are signs that EU politicians and policymakers are becoming more receptive towards the issue of non-discrimination and equality.¹⁵¹ The EU Agency for Fundamental Rights has conducted several studies in relation to discrimination after 9/11 and has published reports on ethnic profiling.¹⁵² Furthermore, in his 2010 European Counter-terrorism strategy discussion paper, the European Counter-terrorism Coordinator acknowledges the relevance of assessing the impact on minority groups, both in the context of radicalisation as well as recruitment.¹⁵³ Moreover, the European Parliament has expressed interest in evaluating the side-effects of preventive counter-terrorism policies.¹⁵⁴

Reports about The Netherlands

In relation to (preventive) counter-terrorism measures non-discrimination concerns are not widespread in Dutch political and public discourse. A January 2011 government evaluation of Dutch counter-terrorism measures concludes that there are no grounds to assume they violate basic human rights standards as set by the European Convention on Human Rights.¹⁵⁵ In addition to the fact that this conclusion is based on the government's own evaluation and not that of the European Court of Human Rights (ECHR), assessments by international human rights committees present a slightly different point of view. A 2009 Council of Europe report on The Netherlands expressed concern with the legislative and administrative counter-terrorism measures enacted by the Dutch government. For example, it argued that terrorism was too broadly defined in Dutch law, thus running the risk that far-reaching investigative measures and severe penalties can be used too widely and indiscriminately.¹⁵⁶ That same year, the UN Human Rights Committee published its Concluding Observations on The Netherlands, in which it expressed similar concerns, citing *inter-alia* the lack of judicial oversight on the use of exclusion and disturbance orders and the relatively indiscriminate use of telephone taps.¹⁵⁷

Although the Dutch government does not acknowledge the need for specific evaluation in relation to non-discrimination, some evaluations of preventive security measures such as of the compulsory identification and preventive searches mention it. In 2005, the legal obligation to permanently carry ID documentation was introduced as a preventive (security) measure, which automatically abolished the requirement that no one could be asked to produce his or her ID unless suspected of a specific offence.¹⁵⁸ According to the Minister of Justice, the requirement that police personnel stick to the 'reasonable exercise of one's duties' constituted a sufficient

150 Gill (see note 60 above), pp. 98-108.

151 European Parliament Committee on Civil Liberties, Justice and Home Affairs (see note 2 above), pp. 2-3; Open Society Institute (see note 39 above); ENAR (see note 136 above), pp.6-7; European Economic and Social Committee SOC(2011)388 of 31 March 2011 on the EU Counter-Terrorism Policy, pp.4-6.

152 European Union Agency for Fundamental Rights see note 63 above); European Union Agency for Fundamental Rights, *European Union Minorities and Discrimination Surveys*. (Vienna: EU Agency for Fundamental Rights, 2009/2010);

153 Council of the European Union note (see note 120 above).

154 European Parliament Committee on Civil Liberties, Justice and Home Affairs Working Document 2 PE456.714v01-00 of 19 January 2011 on the EU Counter-Terrorism Policy: Main Achievements and Future Challenges, pp. 4-5.

155 Dutch Government (see note 79 above), pp.10.

156 Council of Europe Report CommDH(2009)2 of 11 March 2009 on the Commissioner for Human Rights Mr. Thomas Hammarbergs's visit to the Netherlands, pp.37-40.

157 United Nations Human Rights Committee CCPR/C/NLD/CO/4 of 25 August 2009 on Concluding Observations of the Human Rights Committee on the Netherlands, pp.8-10.

158 Section 1, Compulsory Identification Act; section 8a, subsection 1, Police Act; section 2, Special Investigative Services Act. This is also compulsory at the request of a supervisory official (section 5:16a, General Administrative Law Act); Public Prosecution Service, *Aanwijzing uitbreiding identificatieplicht* ('Directive on the expansion of compulsory identification'), 1 January 2010 to 31 December 2013.

safeguard against the indiscriminate use of this measure.¹⁵⁹ However, evaluation has shown that compulsory identification is relatively ineffective, that it was (initially) applied too widely, and that contrary to what had been feared within civil society, there is no evidence of an increase in discrimination.¹⁶⁰ It should be noted, however, that this latter conclusion was substantiated using information from investigating officers and supervisory officials; scholars have drawn attention to the risk of prejudice in this matter.¹⁶¹ Another consequence of compulsory identification is that the increased checks on aliens are impeded by the absence of valid identity documents or residence permits.¹⁶²

Since 2002 anyone within a designated 'security risk zone' during a set period of time may be subjected to a 'preventive search' by law enforcement officials in The Netherlands. This instrument was introduced at municipal level as an additional means of maintaining public order or searching for weapons. These powers are vested in the mayor by means of a by-law, which is passed by the municipal council after consultations between the mayor and the public prosecutor.¹⁶³ A number of permanent security risk zones have been designated in order to facilitate investigations relating to crimes of terrorism.¹⁶⁴ The instrument of preventive searches has implications for the presumption of innocence, the freedom of movement and the right to privacy, and may lead to ethnic profiling. Although preventive searches enjoy political and public support and there exists a draft Act that would extend the occasions on which they could be used, various stakeholders feel that this measure could be applied selectively.¹⁶⁵ Partly due to this criticism the Dutch National Ombudsman is currently investigating this power.¹⁶⁶ Several evaluations, among others in Rotterdam and Amsterdam, have shown that it is unclear whether preventive searches are effective.¹⁶⁷

Even though Dutch civil society advocates on an equality platform, it has not been extremely vocal about discrimination and equality in relation to (preventive) counter-terrorism measures. For instance, when in 2010, just before Christmas, 12 Somalis were arrested for possibly being involved in a terror plot, there was a lot of media coverage. However apart from a few Somali minority organisations civil society did not react significantly.¹⁶⁸ Some awareness-raising and advocacy has been conducted in relation to data collection, storage,

159 House of Representatives of the States General, 'Amendment and supplement to the Compulsory Identification Act, the Criminal Code, the General Administrative Law Act, the Police Act 1993 and a number of other acts of parliament in relation to the introduction of compulsory identification for members of the public in relation to officers appointed by the police to perform police duties and supervisory officials (Compulsory Identification (Extended Scope) Act); List of questions and answers on the scope of the evaluation study to be performed by the Research and Documentation Centre (WODC)'. Parliamentary Papers 2004-2005, 29218, no 23, 10 May 2005.

160 It emerges from the interviews that supervisory officials and special investigative officials are often accused of discrimination, but that this is not necessarily attributable to compulsory identification; Hayke Everwijn, Wouter Jongebreur and Pieter Lolkema, *Het Functioneren van de WUID in de Praktijk: Evaluatie van de Wet op de Uitgebreide Identificatieplicht* [How the Law on Identification Functions in Practice] (The Hague: Research and Documentation Centre (WODC) /Significant, 2009), pp. 43-44, 148.

161 Karin Meerschaut and Paul de Hert, 'Identiteitscontroles in Rechtsvergelijkend Perspectief: Moet Controle op Kleur worden Gemeten?' [Identity Checks in the Perspective of Comparative Law], *De Orde van de Dag*, no. 40, 1997, pp. 11-10.

162 Section 9, Aliens Act; National Ombudsman Report 2007/060 of 28 March 2007 on the Issuing of Identification Documents (W2) by the Immigration and Naturalisation Service [Bewijs Maar Wie Je Bent: de Afgifte van Identiteitsdocumenten (W2) door de Immigratie- en Naturalisatiedienst], pp. 1-30.

163 Section 151b, Municipalities Act; Municipal by-laws lay down the rules that apply to everyone within a municipality. For more information, see Buro Jansen and Jansen, 'Preventief Fouilleren' [Preventive Searches] (Buro Jansen and Jansen). <http://www.preventieffouilleren.nl/>. Retrieved 21 March 2011.

164 The Houses of Parliament (Binnenhof), all airports, the train stations of the four major cities, the Media Park in Hilversum, and the nuclear power station in Borssele (Investigation of Crimes of Terrorism Decree, 21 December 2006; articles 126 zq-zs, Code of Criminal Procedure).

165 Overheid.nl, 'Consultatie Wetsvoorstel Verruiming Fouilleerbevoegdheden' [Consultation on the Draft Legislative Proposal to Expand Preventive Searches] (Overheid.nl, 2011). <http://www.internetconsultatie.nl/fouilleren>. Retrieved 14 April 2011.

166 Binnenlands Bestuur, 'Ombudsmannen Onderzoeken Preventief Fouilleren' [Ombudsmen Investigate Preventive Searches], (Binnenlands Bestuur, 17 January 2011). <http://www.binnenlandsbestuur.nl/ombudsmannen-onderzoeken-preventief-fouilleren.635906.lynx>. Retrieved 14 April 2011; 'Handen op het Dak!' [Hands on the Roof!] (Nationale Ombudsman, 22 January 2011). <http://www.nationaleombudsman.nl/handen-op-het-dak>. Retrieved 15 April 2011.

167 A decline in registered crime figures, including those for illegal ownership of weapons or robberies in security risk zones, may be attributable to preventive search activities, but this is not necessarily the case. It is difficult to demonstrate a causal relationship. See also Monique Bruinsma, 'Evaluatie Preventief Fouilleren Gemeente Amsterdam' [Evaluation of the Preventive Search Instrument in Amsterdam], (Tilburg: IVA, 2009); Institute for Safety, Security and Crisis Management (COT), 'Preventief Fouilleren in Rotterdam; Maatschappelijk draagvlak, opbrengsten en effecten' [The preventive search instrument in Rotterdam: Public support, results and effects'], (The Hague: COT, 2007); Buro Jansen and Jansen, 'Amsterdam: De Zoveelste Ronde Preventief Fouilleren: Knockout' [Preventive Searches in Amsterdam, the Umpteenth Round: Knockout], (Buro Jansen and Jansen, June 2009).

168 'Netherlands Somali Community – Terrorist breeding ground?' (Radio Netherlands Worldwide, 28 December 2010). <http://www.rnw.nl/english/article/somalian-terrorists>. Retrieved 15 April 2011.

and mining¹⁶⁹, migrants in the EU¹⁷⁰ as well as ethnic profiling¹⁷¹. Furthermore, the Dutch government perceives the role of civil society in relation to (preventive) counter-terrorism as rather instrumental. For example, the national counter-terrorism strategy 2011-2015 states that civil society can contribute to a realistic and positive perspective about The Netherlands abroad, but civil society as such was not actively consulted in its design.¹⁷²

Reports about the United Kingdom

With the attacks on New York, Madrid and London still well-entrenched in European citizens' collective memories, a focus on Jihadist extremism is to be expected in the UK. Yet, through a (perceived) exclusive focus of preventive counter-terrorism measures on the Muslim community, states including the UK run the risk of discriminating and isolating precisely those citizens whose support and cooperation is deemed essential to detect, prevent and halt radicalisation and terrorism. British Muslim and human rights organisations have expressed grave concerns with the government's 'prevent-strand'.¹⁷³ According to these organisations, a prime ground for concern is that the government deals with the Muslim community from a counter-terrorism point of view, treating all its members as potential terrorists. Not only does this stigmatise and alienate an entire community, undermining the trust that is essential for real progress on preventing radicalisation to be made, it also fans the flames of the growing Islamophobia in the UK.¹⁷⁴ Furthermore, in 2010 the UN Human Rights Committee published its Concluding Observations on the UK in which it expressed concerns, citing inter-alia the lack of judicial oversight on the use disturbance orders and exclusion orders.¹⁷⁵

Local authorities in the UK have been criticised for their use of covert surveillance. It appears that some municipalities have abused these powers to investigate citizens for minor infractions instead of using them to fight and prevent serious crime and terrorism, and that use of the Act has not been subjected to the appropriate judicial review.¹⁷⁶ In fact, the clandestine gathering of intelligence on individuals belonging to the Muslim community is one of the key criticisms that the British human rights organisation Liberty puts forward in its review of the 'prevent strand' of Contest.¹⁷⁷ Although it is not clear from the Liberty report whether these activities are undertaken on the basis of the 2000 Regulation of Investigatory Powers Act mentioned earlier, their consequences appear to have been counterproductive. For example, by using community service providers such as teachers as first-line intelligence gatherers for the security services, the trust that is essential for successfully carrying out such occupations has been undermined. Without this trust, community service providers will be hard pressed to gain the level of engagement, particularly with the young, necessary for 'challenging extreme views which may lead to violence'.¹⁷⁸

Furthermore, 'prevent' has embedded police officers in Muslim organisations in order to improve the governments' awareness of local developments. But through such practices, the credibility of these organisations has been undermined and British Muslims have started to feel stigmatised by what appears to be round-the-clock surveillance motivated by little else than their religious convictions.¹⁷⁹ There is a true danger here, for 'if

169 Bart W. Schermer, 'The Limits of Privacy in Automated Profiling and Data Mining', *Computer Law & Security Report*, vol. 27, no. 7, 2011, pp. 46-47. For more information see NWO project Datamining without Discrimination <http://www.onderzoekinformatie.nl/en/oi/nod/onderzoek/OND1337064/>; Marthe Lot Vermeulen and Eelke Altena, 'Rechtsbescherming op de Helling - Effecten van Anti-Terrorwetgeving Opgeteld' [Legal Rights under Strain - Effects of Antiterrorism Legislation Reviewed], (Utrecht: Aim For Human Rights, November 2005), pp. 20-21.

170 Nederlands Juristen Comité voor de Mensenrechten, 'Terrorism, Counter-Terrorism Measures and Human Rights in the Netherlands', (Leiden: NJCM, July 2007) pp.15-16.

171 Eijkman (see note 146 above); Bovenkerk (see note 146 above); De Graaff, (see note 4 above), pp. 125-140.

172 NCTb (see note 20 above), pp.74-75.

173 An-Nisa Society, 'An-Nisa Society's Initial Response to Contests 2's Prevent Strategy' (An-Nisa Society, April 2009), pp 1-2.; Kundani (see note 115 above); Rachel Robinson, 'Liberty's Response to the Home Office Consultation on the Prevent Strand of the UK Counter-Terrorism Strategy' (London: Liberty, December 2010).

174 Ibid.

175 United Nations Human Rights Committee (see note 157 above).

176 'Extent of Council Spying Revealed', *BBC News* (26 March 2009); Macdonald (see note 96 above), pp. 6-7; 'Hidden Cameras in Parts of Birmingham "Will Be Removed"', *BBC News* (5 July 2010).

177 Liberty (see note 100 above); Liberty (see note 112 above).

178 Robinson (see note 173 above), p.6.

179 Ibid., pp. 4-6.

discrimination that specifically targets Muslims is not taken seriously, it negates one of the government's own intentions to address grievances that terrorists can exploit.'¹⁸⁰ In fact, an 'equality impact assessment' undertaken by the British government to complement its counter-terrorism measures review states that 'it is likely that the majority of those arrested under counter-terrorism legislation since 2005 would describe themselves as Muslims.'¹⁸¹

Preliminary Conclusion

The threat of terrorism and serious crime is leading the EU and member states such as The Netherlands and the UK to design and adopt prevent counter-terrorism measures, which affect human rights compliance. Existing national and international human rights frameworks prohibit discrimination in all of its forms, yet some preventive measures as practiced by the EU, the UK and The Netherlands have in the past led to or could in the future lead to the stigmatisation of entire ethnic and religious communities, most notably by stressing an implicit general connection between Islam and terrorism. Despite a lack empirical based studies and evaluations, academics and civil society organisations have been drawing attention to the potential for discrimination inherent in such counter-terrorism instruments. Perhaps the most telling indicator is the finding that minority communities in Europe feel that they are unduly targeted by the authorities as potential suspects, purely on the basis of their religion or appearance. Even if this is sometimes mere perception, it nonetheless influences polarisation and distrust versus the government. Henceforth state compliance with non-discrimination standards may contribute to legitimising preventive counter-terrorism laws and policies throughout society, and not just among the majority population.

Reflections

This study discusses the prevention focused approach to counter-terrorism by European authorities and whether its (possible) discriminatory side-effects require systematic evaluation. The need for greater scrutiny of counter-terrorism legislation and policies increases as the European Union (EU) and its member states seek to support improved understanding and exchange of good practices in preventing terrorism under the Stockholm Programme. At present few independent assessments of (preventive) counter-terrorism measures in the EU and The Netherlands and to lesser extent the UK exist. Recalling the issues which are at stake, this is a shortcoming which deserves to be addressed forthwith. Therefore, this research paper calls for a coherent and systematic evaluation of (preventive) counter-terrorism legislation and policies in the EU as well as its member states.

Preventive counter-terrorism measures are appealing because they imply interventions that remove the ability or, better still, the motivation of potential terrorists to carry out their lethal designs. On paper, the Dutch and British governments, as well as the EU, underline their dedication to preventing terrorism by addressing the factors conducive to the spread of violent extremism, through intervening early to disrupt radicalisation processes and via introducing a range of special measures such as for example stop and search practices. But the difficulties associated with actually addressing these highly complex problems at the international level and the more pressing necessity of being seen to prevent terrorist attacks on the home front seems to have led the EU, the UK and The Netherlands towards a more limited form of preventive counter-terrorism that focuses mainly on domestic threats.

Yet as this preliminary study has shown, it is debatable whether this limited domestic focus is truly preventive in the sense of seeking to remove the factors that could contribute to the choice of individuals or

¹⁸⁰ An-Nisa Society (see note 173 above), p. 1.

¹⁸¹ House of Commons (see note 121), p. 8.

groups to turn to political violence. Although the EU, UK and The Netherlands are ostensibly committed to such policies, in the day-to-day reality this commitment is sometimes seen to get pushed to the background by a more reactive desire to sentence, disrupt or collect information on individuals of whom there already exists a strong suspicion that they are involved with terrorism-related activities. 'Prevention' thus becomes much more narrowly focused on stopping potential suspects from committing a terrorist act rather than attempting to remove such individuals' motivation for taking up arms against the government and its citizens.

Of course, a government's duty to protect its citizens and maintain national security warrants such a more restrictive form of prevention. But as this research paper has indicated, the problem with such an approach is not just its limited dedication to addressing the actual grievances that may inspire terrorism. Various legal reforms in the UK and The Netherlands have strengthened the power of the executive branch of government to an extent that could be considered, disproportionate and unnecessary, restricting human rights of Europeans and immigrants in the name of countering terrorism. The collection of large amounts of personal data breaches the presumption of innocence by indiscriminately gathering information regardless of whether or not the person in question is actually suspected of involvement in a crime. Coupled with the use of profiling techniques that target very broad segments of society such as Muslims and foreign nationals breaches (inter-)national non-discrimination standards. Furthermore, ethnic profiling has proven quite ineffective - and sometimes even counterproductive - in actually combating terrorism.

One of the side effects of the preventive approach to counter-terrorism is that it may breach non-discrimination standards. Thus, while prevention in the narrower sense of, for example, disrupting existing terrorist networks or stopping imminent attacks is certainly legitimate, there are two specific grounds for concern. The first regards proportionality and necessity; arguably, many of the preventive counter-terrorism measures outlined in this research present risks to (democratic) oversight procedures and human rights compliance that exceed their potential benefits as counter-terrorism instruments. Henceforth any non-discrimination or equality impact assessment should incorporate both integral as well as per (preventive) counter-terrorism law or policy whether the measure was (and still is) necessary and proportional. This assessment should be transparent and conducted on the basis of involvement and consultation with external and internal stakeholders. Furthermore, (independent) research and collecting qualitative and quantitative data is a pre-condition for a thorough evaluation. The second concern is that the efficacy of these (preventive) counter-terrorism measures ranges from uncertain to distinctly counterproductive, as is the case with data mining and ethnic profiling techniques. This makes it all the more important to critically assess the desirability of adopting stringent counter-terrorism legislation, administrative measures and the creation of ever-larger and interconnected databases containing personal data. Preventive counter-terrorism legislation and policies that sort little effect and discriminate delegitimize counter-terrorism efforts of European authorities and may alienate minorities.

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