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The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism

Edited by
Fiona de Londras and Josephine Doody

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The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism

Counter-terrorism law and policy has been prominent and widespread in the years following 9/11, touching on many areas of everyday life from policing and border control to financial transactions and internet governance. The European Union (EU) is a major actor in contemporary counter-terrorism, including through its development of counter-terrorism laws for application within the Union. This book undertakes a multi-disciplinary and empirically informed analysis of the impact, legitimacy and effectiveness of EU counter-terrorism.

Taking into account legal, societal, operational and democratic perspectives, this collection connects theoretical and practical perspectives to produce an interdisciplinary and multi-stakeholder study of how we might measure and understand the impact, legitimacy and effectiveness of EU counter-terrorism. Bringing together a select group of experts in the field, particular emphasis is placed on understanding the practical experience of implementing and assessing these measures gathered from and with end users, including law-makers, policy-makers, security services, industry partners and civil society.

This edited collection will be of great relevance to scholars and policy-makers with an interest in counter-terrorism law, EU law and security studies.

Fiona de Londras joined Durham Law School as Professor of Law and Co-Director of Durham Human Rights Centre in 2012. Her research and teaching are in the fields of human rights and comparative constitutional law.

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1 Introduction

The impact, legitimacy and effectiveness of EU counter-terrorism

Fiona de Londras and Josephine Doody

More than a decade after the attacks of 11 September 2001, we have entered a security age that is post 'war on terror' but nonetheless heavily concerned with the national and transnational threats posed by terrorism and terroristic violence. In this world, counter-terrorism laws and policies are prominent and widespread, touching on many areas of everyday life from policing to border control, to financial transactions and internet governance.[1] The European Union (EU) plays a significant role in contemporary counter-terrorism through its development of counter-terrorism laws for application within the Union, as well as in its capacity as an international security actor. While there are some studies on select EU counter-terrorism laws and policies,[2] a comprehensive, multi-disciplinary and empirically informed analysis of the impact, legitimacy and effectiveness of EU counter-terrorism within the Union itself is absent from the literature This collection fills that gap.

This book presents some findings from, but also goes beyond, a major FP7-funded study entitled SECILE (Securing Europe through Counter-Terrorism: Impact, Legitimacy and Effectiveness).[3] This research was undertaken by a consortium of Durham University, King's College London, the Supreme Court of Latvia, the Centre for Irish and European Studies, Statewatch, the National Maritime College of Ireland and the Peace Research Institute Oslo in 2013–14. Fundamentally, this study was concerned with understanding how we can ask – and how we can properly answer – three difficult questions about counter-terrorism in the EU context: 1.What are,

1 See for example E. Guild and F. Geyer (Eds.), *Security versus justice? Police and judicial cooperation in the European Union* (Ashgate, 2008); A. Baldaccini and E. Guild, *Terrorism and the foreigner: a decade of tension around the rule of law in Europe* (Brill Nijhoff, 2007); C. Eckes, *EU Counter-terrorist policies and due process: the case of individual sanctions* (Oxford University Press, 2009); F. Davis, N. McGarrity and G. Williams (Eds.), *Surveillance, counter-terrorism and comparative constitutionalism* (Routledge, 2014).

2 See for example C. Murphy, *EU counter-terrorism law: pre-emption and the rule of law* (Hart, 2012); R. Deibert, J. Palfrey, R. Rohozinski and J. Zittrain (Eds.), *Access controlled: the shaping of power, rights and rule in cyberspace* (MIT, 2010).

3 Full details are available online at www.secile.eu

and how can we assess, the impacts of EU counter-terrorism? 2. How can we assess whether or not counter-terrorist measures introduced by the European Union are legitimate? 3. How can we assess whether or not EU counter-terrorist measures are effective? In exploring the answers to these questions, the study also considered what the concepts of impact, legitimacy and effectiveness might be said to mean in the context of EU counter-terrorism.

Taking into account legal, societal, operational and democratic perspectives, this collection connects theoretical and practical approaches to produce an interdisciplinary and multi-stakeholder understanding of how we might understand and measure the impact, legitimacy and effectiveness of EU counter-terrorism. This is done through the use of both inter-disciplinary desk research and the presentation of results from concentrated engagement with practitioners, policy-makers and civil society undertaken as part of SECILE. Through this combination of theoretical and empirically informed work, we aim to bridge gaps in understanding between theoretical perspectives on the one hand, and operational and practical views on the other.

Although counter-terrorism law and policy is an active field of research across disciplines and jurisdictions,[4] there is a need to advance the state of knowledge in order to create a deeper, broader and more practicable body of work. This book contributes to that process. The state of knowledge as it currently stands is often defined by discipline, jurisdiction or measure. Thus, while there is a large amount of work on the concepts of legitimacy, impact and effectiveness in law, sociology and democratic theory, there is a dearth of work on these concepts as understood in a multi- and inter-disciplinary manner, where the insights from diverse disciplines are synthesized rather than merely presented alongside one another. Bearing in mind the existing literature, it is appropriate that a comprehensive, multi-level and multi-disciplinary understanding of the legitimacy, impact and effectiveness of EU counter-terrorism should be developed. The aim of this book is to develop such an understanding, taking into account multiple operative, theoretical, doctrinal and practical perspectives and empirical evidence as to the impact, legitimacy and effectiveness of EU counter-terrorism measures to date. Furthermore, while there is advanced inter-disciplinary research on particular counter-terrorist measures,[5] there is less research on counter-terrorist law and policy seen as a general and comprehensive phenomenon, particularly within the European Union. In addition, much of the research

4 Counter-terrorism is examined across a range of disciplines including, for example, criminology, mathematics and politics: M. Deflem, *Terrorism and counter-terrorism: criminological perspectives* (JAI Press Inc., 2004); V.S. Subrahmanian, *Handbook of computational approaches to counterterrorism* (Springerlink, 2013); L.K. Donohue, *The cost of counterterrorism: power, politics and liberty* (Cambridge University Press, 2008).

5 N. Keijzer and E. Van Sliedregt, *The European Arrest Warrant in Practice* (TMC Asser Press, 2009).

produced is academically driven and focuses entirely or substantively on advancing the theoretical and normative understandings of legitimacy, effectiveness and impact to the detriment of a practical and operable outlook. This book transcends these fragmentations by producing insights that are both normatively innovative and of practical utility. Ultimately, it is intended to present not only sophisticated and rigorous understandings of these concepts, but also workable and functioning tools through which these normative advances can be translated into practice by law- and policy-makers at the European level. By identifying best practice in the incorporation of human rights concerns in designing and implementing European security measures, the insights presented in this collection can help to ensure that future measures are not in contravention of human rights standards.

The focus of this book is EU, rather than national, counter-terrorism. This reflects both the particular nature of EU counter-terrorism and the relative lack of critical analysis of how EU counter-terrorism law and policy are made, applied, and reviewed. As a supranational body, the EU inevitably works in a somewhat different way to national law- and policy-making systems, not least as it may be unable to move quite as quickly as national systems can to introduce legally binding counter-terrorist measures in the wake of a particular attack. One can hardly imagine, for example, the passage of a new Directive in less than a week, whereas notorious and repressive national measures have been introduced in just such a timescale after terrorist attacks.[6] Thus, counter-terrorism by a supranational institution such as the EU, with its own particular constitutional and institutional arrangements, raises particular questions that require attention from scholars and civil society. The decision to focus on the EU alone is also motivated by the extraordinary growth of counter-terrorism law and policy in the Union since 2001. From a Union with essentially no counter-terrorism law in August 2001, the EU has developed a vast infrastructure of institutions, laws and policies concerned with countering terrorism.[7] Thus, given its relatively new nature as well as its rapid growth, the EU's system of counter-terrorism requires scholarly attention, not least as we enter into new phases of EU involvement in international security, including countering the threat posed from ISIS (the 'Islamic State of Iraq and the Levant') and developing Union-wide responses to the phenomenon of 'foreign terrorist fighters'.

Although the contributions to this collection focus on the EU, the insights presented have relevance beyond Europe for a number of reasons. These include the globalized nature of terrorist threats and security solutions and the development of legislative imperatives at UN level (recently reemphasized

6 For example, the UK's Prevention of Terrorism Act 1974 was introduced in less than a week after the Birmingham bombings.

7 B. Hayes and C. Jones, *Catalogue of EU counter-terrorism measures adopted since 11 September 2001* (SECILE Consortium, 2013).

by the passage of Security Council Resolution 2178 on foreign terrorist fighters), and the global application of new security technologies. Thus, this book presents Europe as a security innovator in theoretical and operational terms. This is of particular significance as responses to terroristic threats are increasingly undertaken on a regionalized basis such as, for example, regional responses to Boko Haram in Sub-Saharan Africa.[8]

The book is organized into three parts, which attempt to identify ways to ask key questions and to understand the relationship between the three concepts that can be applied in the real world when policy-makers are making and reviewing counter-terrorist measures. Part I establishes the doctrinal and theoretical framework by cataloguing existing measures and reviewing the institutional framework in place within Europe. Part II advances various disciplinary understandings of the key concepts by drawing on legal, societal and democratic approaches. Part III complements this with a fresh perspective from operational end-users and civil society across three case studies. Broadly speaking, impact relates to the effect or consequence a counter-terrorist measure has. It can be positive or negative, or it can be both simultaneously when considered across multiple referents. It is subject to change over time, depending on the context (periods of *de jure* emergency or normalcy, for example). Effectiveness relates broadly to the extent to which a measure achieves its intended outcomes. Measuring or assessing effectiveness from societal, legal and democratic perspectives poses particular challenges because of information deficits and/or monopolization, a failure to take second order effects into account, the conflation of compliance with effectiveness within official monitoring mechanisms, and institutional limitations. The third concept, legitimacy, is a nebulous term that can be said to comprise numerous different strands, including input legitimacy, process legitimacy, output legitimacy, outcome legitimacy, effective legitimacy, descriptive legitimacy and normative legitimacy. It is closely linked with effectiveness within the counter-terrorism context as measures that are deemed to be effective seem to enjoy enhanced legitimacy.

Part I EU counter-terrorism: its scope and institutions

In Chapter 2, Hayes and Jones base their findings on the first concerted attempt to catalogue all relevant EU counter-terrorism measures (CTMs) adopted since 11 September 2001 (neither EU institutions nor external evaluators have produced a comprehensive repository). The stock-take identified a surprisingly large body of counter-terrorism legislation: 238 specific EU measures, of which 88 – or 36 per cent – are legally binding (or 'hard

8 European Parliament, *Resolution on Nigeria – recent attacks by Boko Haram*, 2014/2729 (RSP). The EU imposed sanctions on Boko Haram including an arms embargo, asset freeze and travel ban in June 2014.

law') in the Member States, meaning that they have direct effect or require transposition by the Member States in the form of new national laws or practices. Further research identified three noteworthy trends that challenge conventional wisdom about the impact on EU Treaty obligations and the values and principles therein. First, transposition to domestic law without delay took place in only 2 per cent of cases. Not only were Member States frequently slow to implement EU CTMs, but in many cases they did not implement them at all until faced with legal action by the European Commission.[9] Second, the failings on the part of the Member States with regard to implementation of EU CTMs were compounded by a frequent failure on the part of the EU institutions to include provisions for review in the legislation itself.[10] These problems were exacerbated by systematic failures to conduct the reviews that were mandated, and by subsequent failures to make the findings of those reviews that did take place available and accessible to the public.[11] Third, despite the relatively wide range of consultative, legislative and review procedures at their disposal, the EU institutions have, at best, underutilized these resources and, at worst, applied them in a manner that ignores crucial issues of civil liberties and human rights, necessity and proportionality, and accountability and democratic control. All of this makes it extremely difficult for citizens, and even for specialist researchers, to understand what EU counter-terrorism policies exist, where they came from, how they relate to one another, what they seek to achieve, whether they have been properly and uniformly implemented, whether they are effective in achieving their aims, or whether there are other, unintended consequences. In this context, the prospects for addressing the democratic

9 Parliament and Council Directive 2001/97/EC amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering – Commission [second anti-money laundering Directive]; Parliament and Council Directive 2002/58/EC concerning the protection of personal data and the protection of privacy in the electronic communications sector [the 'e-Privacy Directive']; Council Directive 2004/80/EC relating to compensation to crime victims; Council Directive 2004/82/EC on the obligation of carrier to communicate passenger data [the 'API Directive']; Parliament and Council Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [Third anti-money laundering Directive]; Parliament and Council Directive 2005/65/EC on enhancing port security; Parliament and Council Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC; Parliament and Council Directive 2007/64/EC on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC; Commission Directive 2008/43/EC setting up, pursuant to Council Directive 93/15/EC, a system for the identification and traceability of explosives for civil uses; Council Directive 2008/114/EC on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection; Directive 2009/16/EC on port State control (Recast).

10 B. Hayes and C. Jones, *Report on how the EU assesses the impact, legitimacy and effectiveness of its counter-terrorism laws* (SECILE Consortium, 2013).

11 Ibid.

deficit long associated with EU decision-making – which is widely viewed as particularly acute in the area of security and counter-terrorism – appear remarkably constrained. The authors call for fundamental reforms to existing agenda-setting, decision-making and review processes.

Building on the legal framework outlined by Hayes and Jones, Doody presents a comprehensive account of the current EU counter-terrorism institutional framework in Chapter 3. She identifies the key actors and their roles in the process of securing Europe. Other works address the issue but, in the main, presuppose a pre-existing knowledge of the institutional labyrinth that is the EU.[12] This chapter adopts a descriptive approach. It asks a number of questions: 1. Who proposes EU counter-terrorism measures? 2. Who adopts them? 3. Who makes the decisions regarding legislation? 4. What groups contribute to this decision-making process? 5. Who oversees the implementation of the legislation? In this way it attempts to penetrate the institutional complexity that is the EU security architecture and provide an accessible overview of the existing actors and their roles. Third, it reflects upon the complexity identified by other authors and asks whether this situation has improved over time. Part I gives the reader a firm introduction to the current counter-terrorism measures in use in the EU institutions involved in their development, thereby enabling the reader to move on to Part II and to begin considering differing disciplinary perspectives on EU counter-terrorism.

Part II Disciplinary perspectives on EU counter-terrorism

In Part II, Vermeulen analyses the ways in which law – and especially public law, with an emphasis on human rights law – understands the concepts of impact, legitimacy and effectiveness in the context of counter-terrorism. Based on a wide-ranging comparative analysis, he argues that from a legal perspective 'impact' can be understood as the *negative* effect a counter-terrorism measure has on the protection of human rights. In this respect, an impact might be direct or indirect. A direct negative impact of a

12 D. Keohane, 'Special report 1: The EU and international terrorism', (European Policy Analyst, September 2005, The Economist Intelligence Unit Ltd. 2005); L. Lugna, 'Institutional framework of the European Union counter-terrorism policy setting' (2006) *Baltic Security and Defence Review* Vol. 8; D. Casale, 'EU institutional and legal counter-terrorism Framework' (2008) *Defence Against Terrorism Review* Vol. 1, No. 1; C. Kaunert and S. Léonard, 'Supranational governance and European Union security after the Lisbon Treaty – Exogenous shocks, policy entrepreneurs and 11 September 2001' (2012) *Cooperation and Conflict* Vol. 47, No. 4; J. Monar, *The external dimension of the EU's area of freedom, security and justice: progress, potential and limitations after the Treaty of Lisbon* (Swedish Institute for European Policy Studies, 2012); T. Renard, 'EU counterterrorism policies and institutions after the Lisbon Treaty' (2012) *Center on Global Counterterrorism Cooperation Policy Brief*; J. Argomaniz, 'Post 9/11 institutionalisation of European Union counter-terrorism: emergence, acceleration and inertia' (2009) *European Security* Vol. 18, No. 2; D. Bigo, P. Bondotti, L. Bonelli & C. Olsen 'Mapping the field of EU internal security agencies', Paper produced for the Changing Landscape of European Liberty and Security (CHALLENGE) Project of the Centre for European Studies (CEPS).

counter-terrorism measure results in decreased (often procedural) safeguards for terrorist suspects, while an indirect negative effect manifests itself over time so that safeguards are reduced in a general sense (not only for suspected terrorists) and there may therefore be a slow erosion of the rights-based protections that these safeguards provide for the population as a whole. Whereas impact can be understood as the negative human rights implication(s) of counter-terrorism measures, Vermeulen argues that a counter-terrorist measure is considered effective if it is successful in producing an intended, positive result (in the context of counter-terrorism, this is likely to be the improved prevention or prosecution of terrorism-related activities). Finally, counter-terrorism measures might be considered legitimate if their effectiveness and impact are assessed within a predetermined period of time by a public justificatory deliberation mechanism that has the capacity to change or discontinue the measure. These conclusions are based on a substantive comparative study of how law deals with counter-terrorism. Looking at the European Court of Human Rights, in particular, Vermeulen finds that it rarely comments on the indirect impact of counter-terrorism measures, but instead focuses on the direct impact of a specific counter-terrorism measure on the (procedural) dimension of a specific human right. Similarly, the European Court of Human Rights rarely discusses the effectiveness of a given counter-terrorism measure; nor does it take effectiveness explicitly into account when determining the legality, necessity or proportionality of a counter-terrorism measure. This reflects the fact that the Court is reluctant to second-guess governments' assessments of what might be the most prudent or expedient policy to combat terrorism, even if it is presented with statistical evidence that at least suggests that a measure is not particularly effective.[13] Instead of analysing the effectiveness of a particular counter-terrorism measure per se, Vermeulen argues that the Court tends to assess the effectiveness of the safeguards that accompany extraordinary counter-terrorism powers.

Approaching these questions from a societal security perspective, Martin-Mazé and Burgess point out that the impact of security measures on society must be contextualized by an understanding of society as the product of a long-term process of historical differentiation. It is thus crucial to recognize that measures taken in the name of security will play out differently across different social contexts, where economic well-being, political systems, and cultural traditions are unequally distributed in the first place. While security measures may have value added in one specific societal sector, they may also have a detrimental impact in others. This chapter aims to clarify the character and dynamic of the societal impact of security measures, the dependency upon the actual security 'added value' they produce, and the political and social legitimacy required to sustain them. In this respect, Burgess and Martin-Mazé argue that assessing the effectiveness of counter-terrorism

13 See for example, the use of stop and search powers under Section 44 of the UK Terrorism Act 2000.

measures requires attention to both the positive and negative benefits of such legislation, and to the fact that specific measures have consequences for both primary and secondary audiences.

Chistyakova considers the impact of counter-terrorism on EU democracy in Chapter 6. She begins by outlining different theoretical and disciplinary perspectives on democracy and security, with particular emphasis on the legitimacy and accountability of security policies. Then, she focuses on counter-terrorism policies in the EU, and considers the extent to which these decisions can be said to be democratically legitimate: can EU citizens see themselves as authors of counter-terrorist policies and can they hold decision-makers to account? Chistyakova establishes that, from cosmopolitan and liberal perspectives, EU institutions can provide the necessary mechanisms of accountability, thus making the line of authority and power more transparent and accessible to citizens. From a communitarian perspective, EU institutions suffer from a 'democratic deficit' and only nation-states can guarantee the true legitimacy and accountability of security policies. The chapter argues that neither of these two perspectives is sufficient in order to understand the legitimacy and impact of counter-terrorism on democracy in Europe. It is important to examine critically the discourses, institutions and practices of counter-terrorism at both national and supranational levels. Chistyakova asks whether less protection of fundamental rights, and lower standards of legitimacy and accountability, should be tolerated by European democracy in order to provide security to its citizens, or whether such exceptionalism undermines the legitimacy of democratic institutions. She concludes that more rational and informed debate is needed in order to challenge the normative foundations and assumptions that underpin the practices and institutions of counter-terrorism in Europe, and to be able to question the extent to which they are consistent with democracy.

In the final chapter of Part II, Oliveira Martins examines how the emergence of EU counter-terrorism policy in the aftermath of the terrorist attacks of 9/11 challenged some of the foundations of the Union. By expanding its security portfolio in the direction of counter-terrorism, the EU inevitably brought about debates on the relationship between security and justice, questions of privacy and data protection, and on the broader respect for fundamental rights more generally. In this process, the legitimacy and the social appropriateness of some of these counter-terrorism measures have been questioned, both at the societal level and in front of, or by, European institutions such as the European Parliament or the Court of Justice of the EU. This chapter argues that the constitutional foundations of the EU play a decisive role in granting legitimacy to EU counter-terrorism law and policy and to ensure its recognition as socially acceptable. Combining sociological institutionalist theory with insights from the New Haven school, namely its process-orientated conception for fostering legal order, it crosses legal and political science traditions to explore the ways that EU counter-terrorism law and policy acquire and maintain social appropriateness.