European Union
Institute for Security Studies

THE EU-US SECURITY AND JUSTICE AGENDA IN ACTION

Edited by Patryk Pawlak

Chaillot Papers | December 2011

with a preface by Gilles de Kerchove

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Elaine Fahey, Eva Gross, Daniel Hamilton, Xymena Kurowska, Maria Grazia Porcedda, Mark Rhinard, Thorsten Wetzling, Sarah Wolff; edited by Patryk Pawlak

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Preface

The EU is critically dependent on the US for its security. In this context, close EU-US counterterrorism cooperation is crucial for both sides. Since 9/11, this cooperation across a wide range of issues has been strong. Many tools have been developed that help both the EU and the US to fight terrorism, such as the Mutual Legal Assistance and Extradition Agreements, Europol and Eurojust cooperation and liaison agreements, PNR, TFTP etc., in addition to the strong bilateral counterterrorism cooperation between the US and Member States. The Global Counter-Terrorism Forum launched by Secretary of State Clinton in September 2011 provides an excellent opportunity for further EU-US cooperation. The EU-US Working Group on Cyber-security has made it possible for the US and EU to deepen their cooperation in this area, including a joint exercise in November 2011. In 2009, the EU created a framework to help President Obama to close Guantanamo, on the basis of which EU Member States have accepted about two dozen ex-detainees. Cooperation on terrorist financing, aviation security, security of the supply chain and 1267 sanctions has also been strong.

Nevertheless, it has sometimes been a bumpy road: the EU disagreed with a number of policies adopted in the context of the 'war on terror', including the war paradigm as the legal framework for the fight against al-Qaeda, which has consequences for detention and targeting of terrorist suspects. However, a very productive in-depth dialogue about all these difficult issues was started in 2006 with State Department Legal Adviser John Bellinger, which continues with his successor Harold Koh. Transatlantic law enforcement and judicial cooperation has had a strong track record over the past decade and has to be maintained. No major counterterrorism investigation in Europe in recent years has been possible without significant US involvement. However, the current attempts in Congress to prohibit a law enforcement approach towards alien terrorist suspects linked to al-Qaeda would therefore have serious consequences for the EU. Data protection has been another difficult issue in the EU-US context. But we must not forget that the ultimate objective is data sharing. A level playing field and trust in data protection allows for more sharing.

In the future, the EU and US need to further deepen the cooperation. If the EU and the US agree among themselves, we will be able to set the standards worldwide. There is potential for much more cooperation:

- Operational cooperation between the US law enforcement agencies and Europol should be strengthened, including access for the US to Europol's analytical work files, both to submit and receive information. Obviously, reciprocal access by European actors would need to be ensured. The US law enforcement community is still divided as to whether to invest in Europol or to stick mainly to the bilateral channels with the Member States. Both can be complementary. US investment in Europol is in a way an act of faith – by providing information to the databases it can motivate EU Member States to provide more data and information to Europol and hence help to create a strong Europol, which is in the interest of both sides of the Atlantic, given that it would be able to 'connect dots' much better than purely bilateral channels can.

- Unlike NATO, the EU is a normative power. Hence, the EU and the US could explore establishing a code of conduct for cyberspace, to tackle cybersecurity.

- The EU and the US could work together much more on security and development to strengthen the criminal justice approach to terrorism, and to support each other in Security Sector Reform. Priority regions would be the Sahel, the Arab Spring countries and the Horn of Africa.

- Countering violent extremism: both sides have a lot to learn from each other and should continue to exchange best practices and experiences, for example in the context of workshops.

What is the **EU's added value** in the transatlantic counterterrorism relationship? How can the EU be relevant to the US, in addition to the bilateral relationships the US has with EU Member States? At his farewell press conference, when asked about his greatest regret, former Secretary of Homeland Security Tom Ridge said that it was not having discovered the EU earlier, given that there is so much the EU and the US can do together.

- The EU can adopt legally-binding regulations and directives in criminal law which apply to 27 Member States. It can enter into agreements with third countries which bring all 27 Member States on board: for example, the EU and the US have concluded Mutual Legal Assistance and Extradition Agreements which provide a modernised and upgraded framework for cooperation with all of the EU instead of a patchwork of 27 individual agreements.

- The EU provides operational platforms for cooperation with the 27 Member States: through cooperating with Europol, Eurojust, Frontex, CEPOL, and European Fusion Centre meetings, the US can reach out and work together operationally with all EU Member States. At Eurojust, for example, the US liaison officer can coordinate with all EU counterparts not only in the context of specific terrorism-related cases/investigations/prosecutions, but also on tactical and strategic issues.

- The EU also provides policy platforms for cooperation between the EU and all 27 Member States. Recently, the EU and the US have organised successful workshops on countering violent extremism (e.g. on Somalia, including the role of diasporas, with a workshop on Pakistan forthcoming) and on explosives. Through engagement with the new Radicalisation Awareness Network set up by Commissioner Malmström the US can interact with experts on countering violent extremism (CVE). from all over Europe. Senior US policy makers regularly address the EU's Political and Security Committee (PSC), hence reaching out to all Member States.

- The EU is the major donor to developing countries, hence, capacity building and security and development issues are an area where close EU-US coordination and cooperation is beneficial.

We should also revisit the **method for EU-US cooperation**:

- Do we need to set an ambitious goal or should we take a more pragmatic, project-driven approach? An ambitious common vision could be the creation of a 'Transatlantic Schengen'. It could include a common agency to deal with the asymmetric threats of terrorism and organised crime.

- There are also needs in terms of procedures: more contacts should be fostered at political level, in particular with the Secretary of Homeland Security and the JHA Council, as happened in Toledo in 2010. More contacts are needed between the European Parliament and Congress, and between the EU Council and Commission and Congress. I have engaged for example in a very fruitful dialogue with the Head of the Sub-Committee for Counterterrorism in the House recently. There needs to be more exchange between officials, for example between the National Counterterrorism Center (NCTC) and SitCen, the FBI and Europol, the Department of Justice and Eurojust. More videoconferences between top officials and a secure mail network would also be beneficial.

Overall, the EU and the US have made a lot of progress in counter-terrorism cooperation since 9/11, while at the same time being able to discuss difficult issues. I hope we can further deepen our cooperation over the next decade, while fully respecting human rights and international law.

Gilles de Kerchove,
EU Counter-terrorism Coordinator
Brussels, December 2011.

Executive Summary

The development of homeland security policies in the post 9/11 context has given rise to several interesting debates at the transatlantic level, the most important of which has focused on the balance between liberty and security. EU-US cooperation in this domain has resulted in a strengthening of the security dimension of numerous policy areas which in the view of civil liberty organisations and certain EU bodies and institutions has entailed an unacceptable intrusion into the private lives of citizens and limitation of their freedoms. The implementation of the commitments to 'work in partnership in a broad coalition to combat the evil of terrorism' and to 'vigorously pursue cooperation' adopted at the Joint EU-US Ministerial of 20 September 2001 has proven particularly difficult. While initial disagreements were mostly caused by the unilateralist approach of the United States and a lack of mutual trust and understanding on both sides of the Atlantic, the discussions have slowly evolved towards increasing consensus on substantive points leading to specific policy choices. Many of the objections expressed by the European Parliament and civil liberties organisations in Europe have concerned the increasing powers of government agencies and the diminishing rights of citizens. The debate has gradually become more heated, fuelled by press reports about the expanding use of personal information collected by private actors for commercial purposes (e.g. PNR, SWIFT) or the application of advanced technologies to protect the homeland (e.g. terrorist profiling and data mining). All this has positioned the transatlantic security dialogue between two poles: security and liberty.

The tenth anniversary of the 9/11 terrorist attacks in New York and Washington D.C. offers a good opportunity to re-examine this dichotomy. Security is not necessarily antithetical to freedom. On the contrary, a more secure environment should enhance the feeling of freedom. However, extreme circumstances where governments might seek to introduce repressive measures cannot be ruled out, which brings the justice dimension into the picture. In order to feel secure and free, citizens need to be convinced that their rights are respected and that their governments operate within the rule of law. At the same time, any transatlantic debate in this context tends to be dominated by two issues:

terrorism and privacy. The objective of this volume is to demonstrate that the EU-US security and justice agenda is much more extensive than that. Whereas the authors of the chapters collected in this volume recognise that the fight against terrorism has generated the impetus for EU-US cooperation, they also argue that the realm of transatlantic security is much broader and suggest issues that could provide the basis for a discussion about, for instance, a future 'Euro-Atlantic area of cooperation in the field of freedom, security and justice' with the United States as proposed by the Informal High Level Advisory Group on the Future of European Home Affairs Policy.

The chapters in this *Chaillot Paper* seek to place transatlantic security cooperation in a broader perspective and point to potentially new research and policy avenues worth exploring. While part one of the volume focuses clearly on bilateral EU-US cooperation at various levels (i.e. Member States-US, EU-US), part two provides an insight into how the transatlantic security agenda is implemented beyond the Euro-Atlantic territory.

Thorsten Wetzling opens this volume by examining the question of the compatibility of the extensive transatlantic security dialogue with the rule of law. The severity of rule-of-law violations that some transatlantic counterterrorism practices entail are seldom the subject of formal discussions, let alone official policy documents. His chapter argues that with the increasing number of actors involved in the implementation of certain policies (e.g. the transfers of SWIFT data, extraordinary renditions and capture-or-kill raids) there is a concomitantly higher risk of violations of the rule of law and potential damage to the joint counterterrorism efforts. The author concludes that, as the EU and the US move into another decade of intense counterterrorism cooperation, they would be well-advised to pay greater attention to the potentially serious negative ramifications of their policies.

Maria Grazia Porcedda analyses the contribution of the EU-US Working Group on Cyber-security and Cyber-crime (WGCC) to improving cooperation between executive branches and the implications it might have for the development of global regulation in this specific area. One of the objectives of the WGCC is to consider options for outreach to other regions or countries, to share approaches and related activities as well as to avoid duplication of effort. In other words, its mission is to shape the global debate on the question of cyber-security and cyber-crime. While such a development should be welcome given its transnational character, there remain distinct risks to be mindful of, in particular the lack of transparency over private-public partnerships, the risk of legitimisation of a culture of control, or ultimately the militarisation of the debate.

Elaine Fahey provides a timely insight into the role of the Court of Justice of the European Union. The case of EU-US cooperation on security issues potentially raises an extraordinary range of jurisdictional, constitutional, theoretical and procedural questions. This unusual matrix of factual and legal issues offers larger conceptual insights into the realm of high politics and judicial action in the EU. The chapter explores the concept of a political question doctrine and justiciability in EU constitutional law where it is largely embryonic, in contrast to US law where the doctrine is now in 'serious decline'. The impact of EU-US counterterrorism cooperation on individuals' rights and the complex and polycentric legal and political characteristics of EU-US relations renders them part of global governance law and problematic as a matter of justiciability. However, the chapter argues that an explicit methodology still needs to be adapted to take account of all appropriate concerns.

Daniel Hamilton and **Mark Rhinard** complete part one of this volume by analysing the untapped potential of transatlantic security cooperation. They argue that ten years after the 9/11 attacks both sides of the Atlantic remain vulnerable to further attacks on their citizens or infrastructures. This is because, despite the adoption of numerous sectoral agreements in the past few years, transatlantic resilience in a common area of freedom, security and justice is far from being achieved. In their view the existing institutional framework is not suitable to provide a more strategic approach based on shared assessment of key threats. To achieve that objective EU-US security relations should be restructured around a Transatlantic Solidarity Pledge that would ensure that transatlantic security cooperation receives higher-profile attention and is underpinned by a strong sense of mutual commitment.

The focus in part two of this *Chaillot Paper* is on the implementation of the EU-US internal security agenda through the actions taking place outside of the borders of the Euro-Atlantic Community. In the post-9/11 realm it became even more evident that ensuring the security of the homeland entails a broader range of considerations than the mere physical protection of the territory. The idea of 'pushing the borders out' and the growing importance of the internal-external security nexus provided a new dimension to the transatlantic debate.

Xymena Kurowska analyses transatlantic approaches to border reform in the EU's Eastern Neighbourhood and demonstrates how this aspect of security sector reform and, more broadly, externally-assisted state-building becomes a means of preventing and indirectly managing crises. The cooperation on border reform beyond the transatlantic borders expands the parameters of transatlantic security. Although the rationales of the partners differ, the overarching goals converge, and there has been 'a steady buildup of an *acquis atlantique* in the region'.

However, the successful division of labour in many areas is not to be conflated with harmony across the board. The chapter discusses areas of friction in the transatlantic take on border reform, alluding to broader contentious issues in externally assisted reform.

Eva Gross in her chapter about transatlantic involvement in security sector reform in Afghanistan addresses the issue of interlinkages between EU-US internal security and state failure, regional instability and organised crime and safe havens for terrorist groups. Despite certain enduring differences discussed in this chapter, both the EU and US have continuously adjusted their institutional and political approaches in the reconstruction efforts. The growing importance of civilian aspects of conflict prevention and crisis management, including in US foreign policy, has led to increased exchanges at the strategic and working levels of the reconstruction effort. This has led to greater compatibility in pursuit of common goals.

The final chapter by **Sarah Wolff** addresses the externalisation of EU and US homeland security concerns in the Middle East and North Africa. In her opinion the revolts in the Arab world and the ongoing transitions provide an opportunity for the EU and the US to re-think their primarily security-oriented agenda and instead promote a more normative approach. To achieve that a more comprehensive freedom, security and justice agenda is needed in the region. As the author argues, the challenge is to approach justice as an element of the security strategy and enhance the transatlantic dialogue on 'mutual security' so as to ensure that both the EU and US engage constructively with the transitions in North Africa and other Arab countries.

Introduction: Issues for the Euro-Atlantic Area of Freedom, Security and Justice

Patryk Pawlak

Over the last ten years the EU and US have developed a somewhat paradoxical relationship in the field of security characterised by progressively enhanced cooperation amidst numerous disagreements. Since 2001, the EU and US have strengthened their cooperation in numerous areas, including aviation security, border protection, maritime and customs security and law enforcement. Several EU-US agreements have been concluded on issues ranging from information exchange between Europol and the US law enforcement and intelligence agencies, mutual legal assistance or transfers of personal information for law enforcement purposes. In addition, numerous new political dialogues have been initiated to deal with issues like the security of travel documents, the use of biometric identifiers, visa policies, information sharing on lost and stolen passports and other border control and migration management issues. But in each of these areas we have also seen some of the most intense conflicts over data protection laws or respect for the rule of law. The increasing transatlantic integration has resulted in new patterns of interaction and policy instruments which have often been criticised for their limited transparency and accountability. One thing is clear: both sides of the Atlantic have engaged in a dialogue which has substantially changed the ways in which our societies think and interact with each other. The presence of radical Islam in the post 9/11 debates has brought religion to the forefront of discussions about security, while the unpredictability of future events and omnipresent threat has resulted in increased acceptance of surveillance technologies.[1]

The development of homeland security policies in the post 9/11 context has also given rise to several interesting debates at the transatlantic and global levels, the most important of which has focused on the balance between liberty and security. The implementation of the commitments to 'work in partnership in a broad coalition to combat the evil of terrorism' and to 'vigorously pursue cooperation' adopted at the Joint EU-US Ministerial of 20 September 2001 has proven particularly difficult. While initial disagreements were mostly caused by the unilateralist approach of the United States and a lack of mutual trust and understanding on

1. Patryk Pawlak, 'Homeland security in the making: American and European patterns of transformation' in Christian Kaunert, Sarah Leonard and Patryk Pawlak (eds.), *European Homeland Security: A European Strategy in the Making?* (London: Routledge, 2012).

both sides of the Atlantic, the discussions have slowly evolved towards increasing consensus on substantive points leading to specific policy choices. Many of the objections expressed by the European Parliament and civil liberties organisations in Europe have concerned the increasing powers of government agencies and the diminishing rights of citizens. The debate has gradually become more heated, fuelled by press reports about the expanding use of personal information collected by private actors for commercial purposes (e.g. PNR, SWIFT) or the application of advanced technologies to protect the homeland (e.g. terrorist profiling and data mining). All this has positioned the transatlantic security dialogue between two poles: security and liberty.

The tenth anniversary of the 9/11 terrorist attacks in New York and Washington D.C. offers a good opportunity to re-examine this dichotomy. Security is not necessarily antithetical to freedom. On the contrary, a more secure environment should enhance the feeling of freedom. However, extreme circumstances where governments might seek to introduce repressive measures cannot be ruled out, which brings the justice dimension into the picture. In order to feel secure and free, citizens need to be convinced that their rights are respected and that their governments operate within the rule of law. At the same time, any transatlantic debate in this context tends to be dominated by two issues: terrorism and privacy. The objective of this volume is to demonstrate that the EU-US security and justice agenda is much broader than that. Whereas the authors of the chapters collected in this *Chaillot Paper* recognise that the fight against terrorism has generated the impetus for EU-US cooperation, they also argue that the realm of transatlantic security is much more extensive and suggest issues that could provide the basis for a discussion about the emerging (although still far from formalised) 'Euro-Atlantic area of cooperation in the field of freedom, security and justice' with the United States as proposed by the Informal High Level Advisory Group on the Future of European Home Affairs Policy.

Improving the management of migration and mobility

Constraining the mobility of terrorists is one of the principal elements in the transatlantic counterterrorism efforts. According to the 9/11 Commission Report 'targeting travel is at least as powerful a weapon against terrorists as targeting their money'.[2] The doctrine of 'virtual borders' and the objective of 'pushing the borders out' which has dominated American thinking since 9/11 could not be implemented without extensive collaboration and exchange of information with

2. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (New York: W.W. Norton and Company, 2004).

other governments. The US National Strategy to Combat Terrorist Travel presented in May 2006 had a clear objective: to 'enhance US and foreign partner capabilities to constrain terrorist mobility' and to 'deny terrorists the ability to enter, exit, and travel within the United States'.[3] The European Union became one of the major partners in this endeavour. It has not only accepted a number of controversial measures originating from the US and difficult to defend domestically like the consecutive EU-US Passenger Name Record Agreements (PNR) or the Terrorist Financing Tracking Programme (TFTP) but has also changed its domestic legislation concerning the protection of borders and management of migration. In accordance with US expectations the EU Members States have adopted, *inter alia*, new counterterrorism laws, strengthened their identity and border management regimes by moving towards a universal application of biometric identifiers and approved other measures proposed in the so-called 'EU border package' – i.e. creation of a European Border Surveillance System (EUROSUR), strengthening the EU's border agency (Frontex), introduction of trusted traveller programmes, establishment of an entry-exit system for third country nationals, creation of the European Electronic System of Travel Authorisation.[4] Whereas most of these instruments are expected to have contributed to enhancing security, they seem to have done little to build up trust between both sides. Even quite pragmatic projects like the access to existing expedited air travel programmes (i.e. U.S. Global Entry), let alone the ambitious project of a 'Transatlantic Schengen' outlined by Gilles de Kerchove in his Preface to this volume, are far from materialising.[5] With the number of business and tourist travelers to the United States growing (see Figures 1 and 2 overleaf), developing joint programmes facilitating travel while at the same time upholding security should become a priority for the coming years. Such discussions should also include the expansion of the US visa waiver programme to the few remaining EU Member States excluded from it.[6]

3. National Counterterrorism Center, *National Strategy to Combat Terrorist Travel*, Washington, D.C., 2 May 2006.

4. For a more extensive elaboration of the EU-US border management collaboration see: Patryk Pawlak, 'Network politics in transatlantic homeland security cooperation' in Xymena Kurowska and Patryk Pawlak (eds.) *The Politics of European Security Policies* (London: Routledge, 2011).

5. An exception here are the citizens of the Netherlands who in 2009 gained access to the Global Entry programme.

6. Bulgaria, Cyprus, Poland and Romania are nor part of the programme and require a visa to enter US territory.

Figure 1: Non-immigrant admissions by region: fiscal years 2001 to 2010

Figure 2: Non-immigrant admissions to the United States from the EU by selected category of admission in 2010

Source: Author's compilation on the basis of DHS immigration data for years 2001-2010.

Strengthening rule of law and oversight

The progress in security cooperation did not take place without raising certain controversial and pressing questions about the nature of new security-enhancing instruments. Particular attention in the debates that followed was devoted to the potential violations of civil liberties and freedoms, and the right to privacy in particular. Many commentators have argued that new counterterrorism measures pose a serious threat to the very universal values (e.g. democratic and open institutions governed by the rule of law) which they claim to protect and undermine the EU's aspirations to be a normative power.[7] Actors ranging from non-governmental organisations to data protection authorities and the European Parliament remain concerned about the acceleration of proposals in this area, the lack of reliable evidence to support the need for more new systems paired with the lack of evaluation of existing tools, heavy reliance on biometrics or data mining and profiling – just to name a few. In addition, the fact that most of these decisions are taken behind closed doors by a limited group of people raises additional questions as to the transparency of the process.

Thorsten Wetzling (*Chapter One*) not only addresses some of these issues but discusses even more troubling instances of complicity in transatlantic counterterrorism practices: extraordinary renditions and capture-or-kill raids. Wetzling argues that with the increasing number of actors involved in the implementation of certain policies there is a concomitantly higher risk of violations of the rule of law and potential damage to the joint counterterrorism efforts. His chapter leaves no doubt that joint EU-US efforts in the future cannot disregard rule-of-law standards if they are to be generally accepted. To that aim, both sides should fully comply with the standards of international law. In that context, the 2009 EU-US Joint Statement on the closure of the Guantanamo Bay detention facility and President Obama's Executive Order 13491 banning torture and aiming at ensuring lawful interrogations are steps in the right direction. Elaine Fahey (*Chapter Three*) addresses in more detail the role of judicial bodies in providing oversight. She argues that the case of EU-US cooperation on personal data exchanges and security issues potentially raises an extraordinary range of jurisdictional, constitutional, theoretical and procedural questions. A quick look at numbers in Table 1 (see pages 20-21) confirms this observation. The issue of judicial and administrative oversight reflects on EU-US counterterrorism cooperation and as such needs to be addressed as a part of the transatlantic security and justice dialogue. It is not only a matter of guaranteeing that citizens can exercise their rights but also of establishing whether issues of national security can be subjected to judicial scrutiny and in what ways. For that to be clear, especially in the European context, an explicit methodology still needs to be developed.

7. See: Elena Aoun, 'The European Union and International Criminal Justice: Living up to its normative prefences?', *Journal of Common Market Studies*, vol. 50, no. 1, 2011, pp. 21-36; Patryk Pawlak, 'The unintentional development of the EU's security governance beyond borders', *European Foreign Affairs Review* (forthcoming 2012).

Table 1: Treatment of FOIA requests by

	2003	2004	2005	2006
Number of requests processed	**3886**	**4307**	**7879**	**7643**
Full grants	1473	2081	2275	2777
Partial grants/Partial denials	622	755	2510	2222
Full denials	1791	1471	3094	2644
Case-related grounds	294	272	338	422
No records	756	328	877	798
Referred to appropriate agency	227	391	961	621
Request withdrawn	88	93	126	233
Records not reasonably described	27	27	49	86
Not a proper FOIA/PA request	298	127	452	193
Not an agency record	9	29	47	71
Duplicate	15	42	46	103
Fee-related reason	71	55	198	117
Other	6	107	0	0
Exemptions				
Ex. 1: National defense and foreign relations information	1	0	4	0
Ex. 2: Protected by internal agency rules and practices	359	569	2355	1938
Ex. 3: Information that is prohibited from disclosure by another federal law	0	0	3	0
Ex. 4: Trade secrets and other confidential business information	157	113	84	123
Ex. 5: Protected inter-agency or intra-agency communications	162	240	190	266
Ex. 6: Information involving matters of personal privacy	88	236	257	526
Ex. 7(A): Information could interfere with enforcement proceedings	16	15	60	27
Ex. 7(B): Information would deprive a person of a right to a fair trial or an impartial adjudication	3	0	3	5
Ex. 7(C): Information could constitute an unwarranted invasion of personal privacy	403	506	1988	1660
Ex. 7(D): Information could disclose the identity of a confidential source	27	178	5	203
Ex. 7(E): Information would disclose techniques and procedures for law enforcement investigations or prosecutions	162	128	690	513

Source: Author's compilation on the basis of Annual Freedom of Information Act Reports to the Attorney General of the United States, 2003-2010.

US Customs and border protection

	2007	2008	2009	2010
Number of requests processed	**11578**	**8639**	**20484**	**18639**
Full grants	3103	1550	2555	1997
Partial grants/Partial denials	3198	1856	9554	8824
Full denials	7838	5233	8375	7818
Case-related grounds	446	461	109	76
No records	1782	1132	4938	3896
Referred to appropriate agency	779	764	182	1211
Request withdrawn	163	81	80	114
Records not reasonably described	35	75	10	76
Not a proper FOIA/PA request	1619	28	2577	2100
Not an Agency record	130	2382	225	154
Duplicate	103	200	39	99
Fee-related reason	95	93	182	60
Other	125	17	33	32
Exemptions				
Ex. 1: National defense and foreign relations information	0	4	0	0
Ex. 2: Protected by internal agency rules and practices	2835	1920	9450	8574
Ex. 3: Information that is prohibited from disclosure by another federal law	0	0	5	468
Ex. 4: Trade secrets and other confidential business information	187	59	170	129
Ex. 5: Protected inter-agency or intra-agency communications	307	45	150	48
Ex. 6: Information involving matters of personal privacy	312	1831	8904	8345
Ex. 7(A): Information could interfere with enforcement proceedings	142	47	43	58
Ex. 7(B): Information would deprive a person of a right to a fair trial or an impartial adjudication	12	6	0	0
Ex. 7(C): Information could constitute an unwarranted invasion of personal privacy	2400	1834	8947	8358
Ex. 7(D): Information could disclose the identity of a confidential source	242	11	12	19
Ex. 7(E): Information would disclose techniques and procedures for law enforcement investigations or prosecutions	872	470	5547	6322

Promoting the spirit of solidarity and cooperation

The evolving nature of threats facing the EU and the US calls for their strong solidarity and the exploration of new avenues for cooperation, both on human-made and non-human made disasters. There is no doubt that both sides have come to this realisation. The EU Commissioner for Home Affairs, Cecilia Malmström, has repeated on numerous occasions that European and American societies are interlinked to the extent where an attack on any US city would be as much an attack on Berlin or Brussels. In preventing this from happening, the EU and US have tightened their cooperation, in particular on aviation and air cargo security and maritime cargo screening. At the same time both sides have engaged in dialogue on the 'emerging' threats like violent radicalisation and home-grown terrorism, cybercrime and cybersecurity or critical infrastructure protection. To advance cooperation in those areas new channels have been put in place, including an informal EU-US counter-violent extremism action group, the EU-US Working Group on Cyber-security and Cyber-crime or the EU-US dialogue on migration and refugee issues. Furthermore, numerous seminars at transatlantic level have been organised on subjects like control of explosives or exchange of best practices in critical infrastructure protection.

Maria Grazia Porcedda (*Chapter Two*) sheds some light on the ways in which this cooperation unfolds in reality and puts it in a broader context of global governance of cybersecurity and cybercrime. The EU-US Working Group on Cyber-security and Cyber-crime (WGCC) was established, *inter alia*, to consider options for outreach to other regions or countries, to share approaches and related activities as well as to avoid duplication of effort. In other words, its mission is to shape the global debate on the question of cybersecurity and cybercrime. While such a development should be welcome given its transnational character, there remain distinct risks to be mindful of, in particular the lack of transparency over private-public partnerships, the risk of legitimisation of a culture of control, or ultimately the militarisation of the debate. The first joint EU-US cybersecurity exercise 'Cyber-Atlantic 2011', conducted on 3 November 2011 between the EU's cybersecurity agency ENISA and the US Department of Homeland Security, will be useful in identifying remaining challenges and priorities for advancing cooperation in this area.

Unfortunately, the efforts of the executive have not been matched by a similar intensity of relationship between the legislative branches. Despite more powers awarded to the European Parliament by the Treaty of Lisbon and the opening of the permanent liaison office with the US

Congress in Washington D.C., so far little change has been achieved in this respect. Any future form of transatlantic cooperation in the area of freedom, security and justice – institutionalised or not – will need to dedicate additional resources to this aspect and remedy the existing shortcomings by ensuring that high-level political attention is devoted to this project. Daniel Hamilton and Mark Rhinard (*Chapter Four*) focus specifically on the untapped potential of transatlantic security cooperation. They argue that despite the adoption of numerous sectoral agreements in the past few years, transatlantic resilience in a common area of freedom, security and justice is far from being achieved. In their view the existing institutional framework is not suitable to provide a more strategic approach based on shared assessment of key threats. To achieve that objective EU-US security relations should be restructured around a Transatlantic Solidarity Pledge that would ensure that transatlantic security cooperation receives higher-profile attention and is underpinned by a strong sense of mutual commitment.

Ensuring internal security through external action

The omnipresent terrorist threat has provided a major stimulus for the United States as 'a nation at war'. Understanding terrorism and terrorists as strategic actors has dominated homeland security efforts. Especially since agents of terror are groups operating globally, 'lurking in the shadows' with one important tactical advantage: '[t]hey are able to choose the time, place, and method of their attacks. As we [the US] reduce our vulnerabilities in one area, they can alter their plans and pursue more exposed targets'.[8] These arguments have shifted the thinking about internal security from being purely domestically oriented towards a more encompassing idea of an internal-external security nexus. In the post-9/11 environment it became even more evident that ensuring the security of the homeland entails a broader range of considerations than the mere physical protection of the territory.

The most obvious example of this reasoning is of course the involvement of the United States and European Union Member States in Afghanistan. As Eva Gross (*Chapter Six*) argues, transatlantic involvement in security sector reform in Afghanistan stems from the realisation of interlinkages between internal security on one hand and external challenges like state failure, regional instability and safe havens for terrorist groups on the other. The growing importance of civilian aspects of conflict prevention and crisis management, including in US foreign policy, has led to increased exchanges at the strategic and working levels of the reconstruction effort and eventually to a greater compatibility in pursuit of common

8. The White House, *National Strategy for Homeland Security* (Washington, D.C.: Office of Homeland Security, 2002).

goals. The need to make justice a crucial component of the transatlantic security and justice agenda not only internally but also in relations with third countries is clearly demonstrated by Sarah Wolff (*Chapter Seven*). Discussing the externalisation of EU and US homeland security concerns in the Middle East and North Africa, she is of the opinion that the revolts in the Arab world and the ongoing transitions provide an opportunity for the EU and the US to rethink their primarily security-oriented agenda and instead promote a more normative approach. The challenge will be however to approach justice as an element of the security strategy. But it would be naïve to assume that EU-US cooperation in these sensitive areas is happening without any friction. As Xymena Kurowska (*Chapter Five*) demonstrates, the successful division of labour in many areas is not to be conflated with harmony across the board. Her chapter discusses areas of friction in the transatlantic take on border reform, alluding to broader contentious issues in externally assisted reform. At the same time, however, she shows that although the rationales of the partners differ, the overarching goals converge, and there has been 'a steady build-up of an *acquis atlantique* in the region'. In this context she demonstrates that externally-assisted state-building becomes a means of preventing and indirectly managing crises. Such developments bear significant implications for the whole international community given their potential to rewrite the rules of the game.

The future priority: trust and confidence building

Cooperation with the United States has undeniably changed the European Union's approach to addressing security challenges. The number of policy initiatives and research projects developed in the last ten years is impressive and eloquently reflects the dynamic nature of this policy universe. But despite the ongoing extensive cooperation, several issues persist and undermine the full potential of the transatlantic enterprise. Overcoming them should be the priority of the EU-US agenda if this partnership is to remain substantive and influential.

As the practice of the last ten years has shown, the disputes over the transfer of PNR or SWIFT data cannot be resolved even with the most sophisticated legal instruments if mutual trust between the parties is lacking. The EU and US have engaged over the last few years in a very useful exercise of trust building – either through different institutionalised dialogues (i.e. on data protection) or through more informal personal relationships. But these solutions are usually subjected to political cycles which means that whole teams of people can disappear from office overnight, thus destroying the precious capital that has been created.

To overcome this obstacle and prevent a 'reinventing the wheel' scenario with every new Commission or Administration, the EU and US should establish a permanent group of experts who would not only carry the institutional memory but who could also offer more tangible resources like joint threat assessments or common vocabularies.

But confidence-building measures should not only concern the policymakers. Citizens on both sides of the Atlantic have the right to be fully informed about their governments' policies and their implications. Without this element, there is not only the risk of a growing divergence between the citizens and political elites but also a potential for radicalisation. To counter this phenomenon, the authorities need to work closely with stakeholders at all levels, including within their own structures. Just as the airport immigration counter is the last point where a criminal can be prevented from entering a country, so is the immigration officer the face of its country's commitment to fairness and the rule of law. The difference in how European and American citizens are treated at each other's respective border entrances is visible to anyone who has travelled across the Atlantic at least once. Consequently, it seems that there is a clear need for the exchange of practices and working methods between both sides of Atlantic. EU-US border security cooperation should not be about making sure that criminals have no place to hide but also about ensuring that their own citizens have faith in their country's institutions. The expertise of EU agencies like Frontex and the Fundamental Rights Agency or the European Data Protection Supervisor can prove extremely useful in broadening the scope of cooperation with the US Department of Homeland Security.

Finally, the issue of trust needs to be addressed in relations with third countries. The EU and US commitment to respecting human rights and international law is essential for upholding their integrity and moral leadership. This is particularly important given the dynamic changes taking place in other parts of the world, including in the Middle East but also in East Asia or Africa. The challenge of terrorism in the Sahel or in the Horn of Africa cannot be addressed without a broader engagement of the international community led by the transatlantic partnership. Therefore, the EU-US dialogue on security and justice issues needs to take place within a broader context of human security to which other policies like development or trade can contribute immensely. That of course means involving a broader number of experts from within the governments and institutions in the EU and the US but also ensuring that the existing international organisations are utilised.

Ultimately, however, whether a Euro-Atlantic area of freedom, security and justice will ever formally emerge, and in what form, will depend on the political will and motivation of European and American leaders. But it will be up to citizens around the globe to assess whether what will emerge is what they want for themselves.

Part One: The security and justice agenda in EU-US relations

Chapter 1

What role for what rule of law in EU-US counterterrorism cooperation?

Thorsten Wetzling

The default approach of assuming probity, good faith, constant self-discipline, and deference to formally accepted legal limits on the part of officials acting in secrecy undermines basic democratic principles, defies experience, and mocks the notion of human rights accountability.

Philip Alston

Introduction

Solemn celebrations and expressions of solidarity marked the tenth anniversary of 9/11. The terrorist attacks that occurred on that day killed nearly 3,000 innocent civilians and embodied a grave assault on the fabric of America's democratic life, notably, in the words of Jerzy Bucek, the 'respect for fundamental liberties, human dignity, religious pluralism and justice.'[1] The United States, the European Union and its Member States reacted swiftly to the challenge. 9/11 became a catalyst for the creation of vast homeland security infrastructures in the US and extensive counterterrorism cooperation practices across the Atlantic.

The tenth anniversary of 9/11 calls for a critical review of the anti-terrorist toolkit. This chapter focuses on the compatibility of EU-US counterterrorism practice with the rule of law. The chapter begins with a brief elaboration of the concept and the key norms, institutions and procedures commonly associated with it. It then sketches the current scope and organisation of transatlantic counterterrorism cooperation before arguing that the impressive web of security agencies and institutions now carries an increased risk of 'blowback': as various different actors now connect the dots across different jurisdictions, violations of the rule of law may also entangle a greater number of actors and thus cause greater total damage to the joint counterterrorism effort. Knowing how bureaucratic obstacles to transatlantic intelligence and data-sharing have been overcome or significantly reduced over the past ten years

1. Jerzy Buzek, President of the European Parliament, statement on tenth anniversary of the 9/11 attacks.

also means that the compatibility of EU-US counterterrorism with the rule of law can no longer be solely examined on the basis of the bilateral exchanges between these two entities. Hence, the analysis extends to counterterrorism efforts at the domestic, bilateral and multilateral levels. More concretely, the chapter provides three miniature case studies on selected rule-of-law concerns in current transatlantic counterterrorism practice. Each account documents the general incompatibility of a recent counterterrorism practice with the rule of law and discusses the negative repercussions that it either has already caused or will soon cause on both sides of the Atlantic. It also provides recommendations on the steps necessary to improve the actors' compliance with the rule of law.

What is the rule of law and how does it pertain to counterterrorism?

The term 'rule of law' remains essentially contested in theory and practice.[2] This chapter cannot account for, let alone debate, the salience of the various different interpretations of the term. Instead, it draws on the work of scholars who have studied the evolution of the term across different political contexts and who have managed to discern what may be called *sine-qua-non* conditions for the rule of law from this process. Important differences notwithstanding, notably between the traditional Anglo-American use of the term which emphasises the judicial process and the traditional continental European tradition which focuses more on the nature of the state,[3] three criteria are commonly invoked as the basic ontological foundation of the rule of law concept: a government of laws, the supremacy of the law and equality before the law.[4]

The following definition puts flesh on the bone of these basic criteria without adding unnecessary or contested ideological baggage. It defines the rule of law as:

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[5]

The mere existence of fair laws does, of course, not guarantee the rule of law. A specific set of institutions and procedures are also required

2. For an interesting overview, see Simon Chesterman, 'An International Rule of Law?', *American Journal of Comparative Law*, vol. 56, no. 2, Spring 2008, pp. 331-61.
3. Ibid., p. 336.
4. Ibid., p. 342.
5. 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', Report of the UN Secretary-General, doc. S/20041616, 3 August 2004.

to monitor adherence to the rule of law in political practice and the provision of effective remedy in case of its violation. The next paragraph summarises the basic processes and institutional architecture that this requires.[6]

First, the counterterrorism agencies ought to engage in internal control procedures themselves (e.g. through intra-agency abuse reporting mechanisms, *ad hoc* inquiries, legal training for individual agents in domestic constitutional law, international humanitarian law and international human rights law). Second, the executive's direction of individual counterterrorism agencies should include control instruments such as oversight boards and the allocation of sufficient funds and human resources for inspector general institutions and regular civil liberties outreach efforts. Third, parliament should consistently exercise independent oversight of counterterrorism practice (e.g. through the passing of laws that define and regulate each actor and its control, by adopting the corresponding budgetary appropriations, by questioning decision-makers on the legality and effectiveness of specific activities and by publishing regular accounts of its oversight activities and findings). Fourth, the judicative branch monitors the use of the special powers (such as surveillance and interrogation practices) of counterterrorism agencies and adjudicates wrongdoing and potential disputes between the different branches of government. Fifth, civil society organisations provide alternative views, disclose scandals and initiate complaints about alleged government malfeasance.

No single layer or institution can bear the sole responsibility for the rule of law in established democracies. Instead, all five layers ought to work simultaneously and proactively towards the defence of the rule of law.

On the scope of counterterrorism cooperation among the US, the EU and its Member States

Following the mantra that 'networked threats require a networked response',[7] the US, the EU Member States and the supporting EU institutions simultaneously pursue various modes of cooperation across different administrative levels throughout the transatlantic space. Many efforts are thoroughly institutionalised and codified in written agreements, others are more *ad hoc* in character and yet another set of activities hardly register on the public's radar screen. This chapter can only

6. See Hans Born and Ian Leigh, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies* (Oslo: Publishing House of the Parliament of Norway, 2005) for further details.

7. Anne-Marie Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks', *Government and Opposition*, vol. 39, no. 2, Spring 2004, pp. 159-90 (p. 160).

sketch the basic contours of present-day transatlantic counterterrorism cooperation.

The 2011 US National Strategy for Counterterrorism calls for 'a multidepartmental and multinational effort'.[8] Current transatlantic counterterrorism practice reflects this rather well. The following account is by no means exhaustive but it hopes to further illustrate the wide-ranging and profound levels of interaction across different sectors and jurisdictions.

The primary activity consists of data- and intelligence-sharing among law enforcement agencies,[9] internal security and intelligence agencies,[10] judicial authorities,[11] treasury and trade authorities,[12] border security and transportation authorities.[13] It addition, one could list regular consultations among diplomatic services to prepare and re-negotiate transatlantic agreements, resolve potential conflict of interests and the mutual exchange of seconded officers to their respective partner agencies on the other side of the Atlantic.[14] Next to the exchange of intelligence and human resources, transatlantic counterterrorism also includes joint operations aimed at the pursuit of identified terrorist networks. Here one can list the coordinated freezing of financial assets and the surveillance and partial or total disruption of their means of online communication.

Given that the main responsibility for the security of EU citizens still lies with the EU Member States and not with the EU's supporting agencies, whose *de facto* efficiency often 'depend[s] on the willingness of national services to provide it with information',[15] the bulk of transatlantic counterterrorism practice still evolves around the 'good existing bilateral relations between the FBI and CIA (among other agencies) and national police and intelligence services in EU member states'.[16] The current web of transatlantic counterterrorism practice may not constitute a full-blown network but the law enforcement, judicial, intelligence, diplomatic, financial and border security agencies of the US and EU Member States and its supporting EU agencies have come a long way to make joint operations and information sharing less cumbersome.

As documented in the next section, a more seamless interaction across different administrative levels and jurisdictions can also imply negative ramifications for a greater number of actors in case of serious deviations from the rule of law.

8. The document is available online at www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf.
9. For example, on the movements, assets, contacts of individuals and networks known to have perpetrated or assisted in terrorist attacks.
10. For example, on the movements, contacts, strategies and assets of a greater number of suspected terrorists and radicals.
11. For example, on information relevant for Mutual Legal Assistance (MLA) and extradition requests.
12. For example, on financial transactions, individual account numbers in accordance with the EU-US Agreement on the Terrorist Finance Tracking Programme (TFTP).
13. On passenger name records.
14. In addition, one could mention peer-review sessions and regular consultations with a broader group of academic and civil society experts to improve existing schemes, for example, on the de-radicalisation initiatives for at-risk youth and lessons for cybersecurity.
15. Kristin Archick, *US-EU Cooperation Against Terrorism*, US Congressional Research Service Report RS 22030, July 2011.
16. Ibid., p. 5.

Sources of concern for the rule of law

It is beyond the scope of this chapter to evaluate the quality of all pertinent counterterrorism laws and to assess the performance of the principal actors in each constitutive layer of the rule-of-law protection in the US, the EU Member States and the EU. Instead, the remainder of this chapter concentrates on three specific 'problem children' for rule-of-law protection in transatlantic counterterrorism. Naturally, given this selective focus, the text may only draw limited inferences from these specific cases to the broader spectrum of EU-US counterterrorism cooperation.

Having said this, it is instructive to recall David Cole's observation that 'the rule of law may be tenacious when it is supported, but violations of it that go unaccounted corrode its very foundation'.[17] Thus, while a more balanced depiction of 'compatible' and 'incompatible' counterterrorism practices may be required to substantiate broader claims, it is also true that a few severely misguided counterterrorism practices suffice to discredit the ever-present promise of 'full respect for our obligations under applicable international and domestic constitutional law'.[18] In the light of the potentially contagious effect of individual rule-of-law deviations on the entire collaborative effort, the actual percentage of incompatible practices among the grand total of transatlantic counterterrorism activities appears secondary.

Each selected case (see the overview table on the next page) focuses on one particular counterterrorism practice and highlights the most pressing rule-of-law issues commonly associated with it. Knowing that laws and conventions can only go so far to ensure the compatibility of political practice with the rule of law, the focus then extends to parliamentary oversight and judicial review. Each miniature study also briefly outlines a transatlantic partner's reaction to the rule-of-law defence or its forbearance across the pond.

17. David Cole, 'After September 11: What We Still Don't Know', *New York Review of Books*, 29 September 2011.

18. 'EU-US and Member States 2010 Declaration on Counterterrorism', 3 June 2010. Available online at: http://www.eu-un.europa.eu/articles/fr/article_9814_fr.htm.

Table 1: Overview of miniature case studies

Level	Practice	Issue	Rule of Law Defender Focus	Cooperation Partner Focus
EU – US CT	Exchange of European SWIFT data to US TFTP	Data Privacy	Europol JSB/ European Parliament	US Congress
EU MS – US CT	Extraordinary rendition	Prohibition of torture	British Parliament & High Court	US Govt
US CT	Capture-or-kill raids	Due Process Right to life	US Congress & US Courts	German Govt

Suppressing terrorist financing through the transmission of SWIFT data

This section concentrates on EU-US cooperation to suppress terrorist financing. More specifically, it looks at the implementation of the June 2010 agreement between the EU and the US on the processing and transfer of financial messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program (hereafter: TFTP Agreement). The TFTP agreement foresees that 'financial payment messaging and related data stored in the territory of the European Union by providers of international financial payment messaging services [...] are provided to the US Treasury Department for the exclusive purpose of the prevention, investigation, detection, or prosecution of terrorism or terrorist financing'.[19] The agreement attributes a specific role to Europol, namely to check whether requests from the US Treasury Department for SWIFT data comply with the terms of agreement.[20]

The transmission of sensitive financial data of individuals to foreign governments clearly constitutes an infringement of the right to privacy (Art. 8.1 ECHR and Art. 17.1 ICCPR). Domestic and international law permit derogations from this right only in exceptional circumstances. This may be justified, for example, in the interests of national security and public order. However, this presupposes safeguards to prevent situations where unsubstantiated national security concerns suffice to permit sweeping human right infringements. When drafting a law or contractual agreement, the contracting parties are advised to apply

19. Art. 1.a of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program.

20. This pertains especially to Art. 4.2 of the TFTP agreement: 'In particular, the requests [from the US Treasury Department] together with any supplemental documentation, shall: – identify as clearly as possible the data, including the specific categories of data requested, that are necessary for the purpose of the prevention, investigation, detection, or prosecution of terrorism or terrorist financing; clearly substantiate the necessity of the data; be tailored as narrowly as possible in order to minimise the amount of data requested [...]'.

the 'quality of law test'.[21] In case safeguards are not part of the law or agreement itself, then the text 'must at least set up the conditions and procedures for interference'.[22]

The TFTP agreement entails provisions on 'safeguards applicable to the processing of data' (Art. 5), the 'monitoring of safeguards and controls' (Art. 12), 'joint review' (Art. 13) and 'redress' (Art. 18) but the conditions and procedures for interference remain somewhat nebulous. Yet, as indicated, the rule of law cannot be guaranteed through laws only. The focus turns, therefore, to the institutions and procedures that monitor political practice. At the EU level, one such institution is Europol's Joint Supervisory Board (JSB). It is tasked to review 'the activities of Europol in order to ensure that the rights of the individual are not violated' (Art. 34.1 Europol Council Decision).[23]

In November 2010, the JSB carried out (with advance notice) an *in situ* inspection to 'check Europol's implementation of the TFTP Agreement'.[24] While the individual findings of the inspection and the JSB evaluation are classified, it is clear from the public summary of this report that the JSB criticised both the US Treasury Department for making SWIFT data requests that do not fully comply with the terms of the TFTP agreement (criticising especially its insistence on oral instead of written demands for data which precludes any meaningful audit) and Europol's apparent failure to insist on written requests. The transmittal of European SWIFT data to the US Treasury Department under such conditions is not commensurate with the rule of law.

It is due to the important work of the JSB (executive control) that Europol may soon have better policies in place to ensure that its verification of data requests comply with the terms of the TFTP agreement. The European Parliament (EP) should also be commended for its proactive oversight owing to which better privacy protections were included in the TFTP agreement. The EP first rejected the agreement in February 2010 and only agreed to a revised version, which among other additional caveats gave 'Europol the authority to approve or reject US Treasury Department requests for SWIFT data'.[25] In so doing, the EP has contributed to the defence of the rule of law in the fight against terrorism.

Whether or not Europeans can obtain effective judicial remedy in the US for unlawful infringements of their right to privacy following an unwarranted transmission of SWIFT data remains contested. 'The US government has long maintained that EU citizens may seek redress concerning US government handling of personal information through agency administrative redress or judicial redress through the US Freedom of Information Act',[26] but given the rather fervent application of the state secret privilege in comparable US proceedings, doubts can be raised about their likely success.

21. Using the case law of the European Court of Human Rights, the quality of a law can be determined by using the following criteria: laws 'must be adequately accessible and formulated with sufficient precision' (Sunday Times v UK, 2 EHRR 245, para 47), 'possess the essential characteristics of foreseeability' (Silvers and Others v UK, 5 EHRR 347, para 85) and 'the scope of a discretion must be indicated with reasonable certainty' (Ibid). See Ian Cameron, *National Security and the European Convention on Human Rights* (Stockholm: Iustus Forlag, 2000).

22. Klaas v FRG, No 5029/71, cited also in Born and Leigh, op. cit. in note 6, p. 20.

23. Available online at: http://ec.europa.eu/dgs/olaf/data/doc/Europol.pdf.

24. A short public version of the report is available online at: www.idpc.gov.mt/dbfile.aspx/TFTP2.pdf.

25. Kristin Archick, op. cit. in note 15, p. 7.

26. Ibid.

EU Member State complicity in US-led extraordinary rendition

Europol, Eurojust or Frontex are just one of several European counterterrorism partners for the US. Their effectiveness depends largely on the willingness of national European services to provide them with relevant information. The Treaty of Lisbon makes it also 'very clear that Member States of the European Union still have the main responsibility for the security of their citizens; the EU is only supporting its member states'.[27] Not surprisingly, several US decision-makers continue to hold the more established and more flexible security partnerships between the US and individual EU Member States in higher esteem.

Much ink has already been spilt over Europe's entanglement in the US-led practice of extraordinary rendition and secret detention of terrorist suspects.[28] Despite credible and egregious complicity allegations, few countries felt compelled to honour the rule-of-law principle through rigorous parliamentary and judicial scrutiny. While some countries have thus far failed altogether to formally address grave allegations of government malfeasance, even the more earnest parliamentary inquiries (e.g. Germany's *ad hoc* inquiry committee)[29] experienced incapacitating secrecy protection. Most overseers were also unduly credulous in their handling of government reporting and lacked the political will to ask probing questions. The performance of the British Intelligence and Security Committee (ISC) during its *ad hoc* renditions investigation helps to illustrate this point further.

The ISC investigated, among other cases, the allegations made by Binyam Mohamed against the British Security Service. Mr. Mohamed claims that 'he was held by the Pakistani authorities for a period of three months, during which time he was mistreated. He says he was interrogated by British officials'.[30] The question arose whether the British authorities knew about this UK resident's torture and whether they failed to come to this man's assistance. The ISC took evidence from the Director General of the British Secret Service and reported that when Mr. Mohamed was interrogated by a British officer in Karachi, the latter 'did not observe any abuse and no instances of abuse were mentioned by [Mr. Mohamed]'.[31] The report concluded that 'in the cases we have reviewed, the Agencies have taken action consistent with the policy of minimising the risks of torture or CIDT (and therefore "Extraordinary Rendition") based upon their knowledge and awareness of the CIA rendition programme at that time.'[32]

By contrast, consider the British High Court's finding on this matter: the Court held, *inter alia*, that Binyam Mohamed 'was transferred to a detention facility in which he was held incommunicado and without

27. Lisa Ginsborg, Martin Scheinin, Mathias Vermeulen, 'European and United States Counter-terrorism policies, the rule of law and human rights', *Policy Brief* 2011/2 of the European University Institute's Global Governance Programme.

28. For an important recent contribution, see the Council of Europe's Parliamentary Assembly's Draft Report and Conclusion, *Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, 7 September 2011. Available online at: www.assembly.coe.int/CommitteeDocs/2011/State%20secrecy_MartyE.pdf.

29. The Bundestag's *ad hoc* inquiry committee's report (1430 pages) is available in German at: http://dipbt.bundestag.de/dip21/btd/16/134/1613400.pdf.

30. Renditions Report of the Intelligence and Security Committee. Available at http://isc.independent.gov.uk/committee-reports/special-reports.

31. Ibid.

32. Ibid.

access to a lawyer, or review by a court or tribunal; that the UK Security Services were aware of this situation; that they continued to facilitate interviews by or on behalf of the United States despite being aware of this situation and that this involvement was far beyond that of a bystander or witness to the alleged wrongdoing'.[33]

Reviewing the instruments and mechanisms in defence of the rule of law, it is instructive to know why the British High Court (judicial review) and the British Intelligence and Security Committee (parliamentary oversight) came to such different conclusions. Interestingly, in defence of the unique structure of British intelligence oversight,[34] it is often emphasised that the committee's direct access to the intelligence community allows them to 'earn the trust of the agencies' and that this 'enables us to pursue our work more effectively'.[35] Redactions in the public version of the ISC report, it has been argued, show that 'we have seen the evidence, are looking at all the information and reaching our conclusion based on the full facts'.[36]

The Binyam Mohamed case reveals a systemic flaw in an oversight system that relies heavily on trust in the information holder's good faith. The ISC was effectively misled by the British intelligence community when it inquired about their knowledge about Binyam Mohamed's detention in Pakistan. The High Court, on the other hand, was able to establish that the security services were in possession of 42 classified US intelligence documents 'which made clear to anyone reading them that BM was being subjected to the treatment that we have described'.[37] Furthermore, it informed the general public about the fact 'that the 42 documents disclosed as a result of these proceedings were not made available to the ISC.'[38] Clearly, the ISC had every need to see these documents but failed to be sufficiently probing in terms of the questions it put to its interlocutors in this case. Philip Alston's warning (see the quotation at the beginning of this chapter) thus seems to apply to a broader set of rule-of-law defence mechanisms. Partly influenced by the new information that has come to light about the BM case, the UK government decided to pay him (and 15 other individuals) a considerable amount of compensation. In doing so, it did not admit liability but its assertion that 'there simply is no truth in the claims that the United Kingdom has been involved in rendition' appears even less convincing.[39]

In this case, the High Court stood up against considerable political pressures from the UK and US government (the latter threatening to review the special relationship between the two countries' intelligence communities) in its rightful defence of the rule of law.[40] The focus of this case study fell on the United Kingdom yet it is undeniable that other European executives 'permitted, protected and participated in CIA operations which violated fundamental tenets of our systems of

33. R (on the application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2008] EWHC 2048 (Admin) (21 August 2008), paragraphs 87-88.

34. See, for example, Peter Gill, 'Evaluating Intelligence Oversight Committees: the UK Intelligence and Security Committee and the "War on Terror"', *Intelligence and National Security*, vol. 22, no. 1, pp. 14-37 for a good introduction.

35. Personal interview with an ISC member.

36. Statement made by former UK Foreign Secretary and former Chair of the ISC, Margaret Beckett, during a parliamentary session on 17 July 2008 (Hansard: HC Deb, 17 July 2008, c467).

37. 'The treatment reported, if had been administered on behalf of the United Kingdom, would clearly have been in breach of the undertakings given by the United Kingdom in 1972 [*i.e. the UN Torture Convention*]. Although it is not necessary for us to categorise the treatment reported, it could readily be contended to be at the very least cruel, inhuman and degrading treatment by the United States authorities.' R v. Foreign Secretary, op. cit. in note 33.

38. Ibid.

39. Statement made by former Foreign Secretary Jack Straw before the House of Commons foreign affairs committee in December 2005.

40. According to the diplomatic cables released by Wikileaks, the US government politely asked the German, Italian and Spanish governments to consider the potential negative consequences that too vigorous national rule-of-law defences could have for their respective bilateral relations. See, for example: 'El Masri: CIA drohte dem Kanzleramt', *Berliner Zeitung*, 10 December 2010.

justice and human rights protection'.[41] Unfortunately, 'darkness still enshrouds those who authorised and ran the Black Sites on European territories'.[42]

The Obama administration 'looks forward and not backward' and faces hardly any credible opposition from the legislative or judicative branch.

Capture-or-kill raids and drone strikes

Most European counterterrorism partners rejoiced when the Obama administration abandoned the term 'war on terrorism'. The fight against terrorism, it seemed, would now be brought into closer proximity with the rule of law. Terrorists suspects are better 'investigated, prosecuted and convicted according to the rules of criminal law'[43] than captured, detained, tortured and killed according to unilateral interpretations of the law of war.

While President Obama deserves credit for having abolished the most controversial counterterrorism practice to date (i.e. the 'enhanced interrogation techniques' and the extraordinary rendition of terrorist suspects to secret and indefinite detention), his administration currently relies heavily on two practices that also bode rather poorly for the rule of law: capture-or-kill raids and drone strikes against suspected terrorists by poorly overseen CIA and JSOC operatives in various hotspots around the globe.

> 'The individuals targeted are alleged terrorists or others deemed dangerous, and their inclusion on what are known as kill-or-capture lists is based on undisclosed intelligence applied against secretive criteria.'[44]

This practice[45] raises severe doubts on the US's 'full respect for our obligations under applicable [...] domestic constitutional law'.[46] Philip Alston argues convincingly that the convergence of the CIA (intelligence) and JSOC (military) activities in these raids clearly undermines the effectiveness of the two separate oversight regimes for 'traditional military activities' (Title 10 US Code) and covert intelligence activities (Title 50 US code) in the US constitution. The 'extensive fluidity between the JSOC (DOD) special forces and their CIA counterparts' makes it 'virtually impossible for anyone outside the two agencies to know who is in fact responsible in any given context.'[47] While there is no room here to spell out the separate oversight regimes for the military and the intelligence services, it should be noted, however, that this intentional double-hatting of CIA and JSOC forces creates *de facto* accountability gaps. These activities often 'escape the scrutiny of the intelligence committees, and the congressional defense committees cannot be expected to exercise oversight outside of their jurisdiction'.[48]

41. Thomas Hammarberg (Council of Europe Commissioner), 'Ten years of "global war on terror" undermined human rights – also in Europe'. See: http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=172.

42. Thomas Hammarberg, 'Europeans must account for their complicity in CIA secret detention and torture'. See: http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=175.

43. Gilles de Kerchove, '10 years – 10 lessons: What our experiences since 9/11 can teach us for the future', *The Hill*, 8 September 2011.

44. Philip Alston, 'The CIA and Targeted Killings Beyond Borders', *Havard National Security Journal* (forthcoming), p. 3.

45. See Greg Miller and Julie Tate, 'CIA Shifts Focus to Killing Targets', *The Washington Post*, 1 September 2011; Charlie Savage, 'Secret US Memo Made Legal Case to Kill a Citizen', *The New York Times*, 8 October 2011; Eric Schmitt and Thom Shanker, *Counterstrike: The Untold Story of America's Secret Campaign Against Al Qaeda* (New York: MacMillan, 2011).

46. EU-US and Member States 2010 Declaration on Counterterrorism, op. cit. in note 18.

47. Philip Alston, op. cit. in note 44, p. 52.

48. Alfred Cumming, 'Covert Action: Legislative Background and Possible Policy Questions', *Congressional Research Service Report RL33715*, p. 9. See also: Marcy Wheeler, *The Gang of Four Doesn't Have Access to the Kill List*. See: www.emptywheel.net.

A ranking member of the US House of Representatives Permanent Select Committee on Intelligence, Dutch Ruppersberger, recently admitted that he did not 'really have access to that list'[49] (in fact, there are several different lists) of individuals, including American citizens, doomed to be 'taken out' by US special forces. The enormous secrecy surrounding the raids and their preparatory proceedings in the National Security Council not only debilitates effective oversight, it is also doubtful whether the inclusion of individuals on those capture/kill lists can be legally challenged and whether any effective judicial remedy can be obtained *ex post facto* (refer to Alston's concrete list of judicial obstacles). In short, this practice raises numerous questions as regards its compatibility with the basic transparency and accountability requirements required by both domestic and international law.

Naturally, this affects the broader practice of transatlantic counterterrorism, too. Following the lethal drone strike against a German citizen in Pakistan, the

> 'German Interior Ministry has issued new, more restrictive rules and has instructed the BfV [*Bundesverfassungsschutz – Germany's domestic intelligence agency*] to stop providing the Americans with current information that would make it possible to determine the location of German citizens in geographical contexts that may not be successfully defined as armed conflicts or war. [*e.g. the current night raids and drone strikes in Pakistan, Yemen and Somalia*]'[50]

Conclusion

Good laws do not suffice to guarantee the adherence to the rule of law in political practice. The three miniature case studies of this chapter cast doubt on the proposition that the respect for the rule of law is 'fundamental in the national and international effort in the fight against terrorism'.[51] The 2010 EU-US Declaration on Counterterrorism acknowledged 'the need to adopt measures to address [...] the absence of the rule of law'[52] but the unchallenged insistence on oral communications (first case), credulous deference to the security establishment (second case), and double-hatting practice (last case) demonstrate that good intentions will not suffice. At times even severe violations of the rule of law remain unchallenged.

Naturally, this poses a dilemma for the EU and its Member States. On the one hand, the EU benefits tremendously from its extensive counter-terrorism cooperation with the US and wishes to secure the smooth continuation of this cooperation. On the other hand, it has committed itself to a robust defence of the rule of law and knows that its power

49. Quoted in Marcy Wheeler, ibid.

50. Robert Chesney, '*Der Spiegel* Claims Germany Witholds Intel on Militants Who Might Be Drone Strike Targets'. Available at: www.lawfareblog.com/2011/05/der-spiegel-claims-germany-witholds-intel-on-militants-who-might-be-drone-strike-targets.

51. EU-US and Member States 2010 Declaration on Counterterrorism, op. cit. in note 18.

52. Ibid.

stems largely from the credibility of this defence. The latter is not a mere legal obligation, it also ensures vital support from domestic and international partners and helps to erode the ideological foundation of terrorist networks.

The dilemma is, of course, not entirely new but honest discussions about the conflicting interests and how to best address them in concrete political practice are rare.[53] The severity of rule-of-law violations that some transatlantic counterterrorism practices entail are seldom the subject of formal discussions, let alone official policy documents.

As the EU and the US move into another decade of intense counterterrorism cooperation, they are well advised to pay greater attention to the potentially grave negative ramifications that some of their misguided policies might have. For example, the current JSOC/CIA night raids and drone strike campaign outside of declared zones of conflict defies hard-earned provisions of international law and may thus cause a universal regression of this important international tool of conflict resolution. A thin-skinned or lukewarm defence of the rule of law by European national parliaments and courts can also have grave negative ramifications for the credibility of European Security Sector assistance in other parts of the world. Rather than apologising for the more assertive oversight role of the European parliament, the European partners should value the fact that this important layer of rule of law defence has not become entirely dysfunctional.

53. For an interesting discussion of the policy options for the EU, see Annegret Bendiek, 'An den Grenzen des Rechtsstaates: EU-USA Terrorismusbekämpfung', SWP *Studie* S 3, February 2011. Available online at: www.swp-berlin.org. Bendiek argues effectively for 'grey-zone management'.

Chapter 2

Transatlantic approaches to cybersecurity and cybercrime

Maria Grazia Porcedda

Introduction

This chapter addresses the revived cooperation between the European Union and the United States on cybercrime and cybersecurity, ten years after the Joint EC/US Task Force on Critical Infrastructure Protection.[1] On 20 November 2010, following the acknowledgement of the 'growing challenge of cyber-security and cyber-crime,'[2] the EU-US Working Group on Cyber-security and Cyber-crime (hereafter the WGCC) was set up. Despite its opaque character,[3] the WGCC has crucial objectives, among them 'consider(ing) options for outreach to other regions or countries addressing similar issues to share approaches and related activities and avoid duplication of effort.'[4] In other words, it aims to shape the global debate on the matter of cybersecurity and cybercrime.

This initiative is certainly welcome, as cybersecurity and cybercrime can no longer be addressed at the national level: states' interdependence is too high, and a global cybercrime industry has emerged, whose activities may cost $400 billion per year in the US alone.[5] At the same time, shaping the global debate presupposes that a transatlantic agreement is found over issues which may be tackled differently in the EU and the US, such as the priority areas and specific tasks assigned to the WGCC:[6]

- Advancing the Council of Europe Convention on Cyber-crime (hereafter the Convention),[7] the only binding international legal instrument adopted hitherto
- Increasing joint (and global) incident management response capabilities, in particular by carrying out a common exercise at the end of 2011

1. European Commission, 'Creating a Safer Information Society by Improving the Security of Information Infrastructures and Combating Computer-Related Crime', Communication to the European Parliament and Council, COM (2000) 890 final, 26 January 2001.
2. Council of the European Union, 'EU-US Summit Joint Statement', 16726/10 Presse 315, 20 November 2010, p. 3.
3. See Answer by Commissioner Malmström on behalf of the Commission to question by Marietje Schaake (ALDE) of 17 May 2011; available at: http://www.statewatch.org/whatsnew.htm.
4. Answer by Ms. Kroes on behalf of the Commission to question by Ernst Strasser (PPE) of 20 December 2010, 15 February 2011.
5. Nir Kshetri, *The Global Cybercrime Industry. Economic, Institutional and Strategic Perspectives* (New York: Springer, 2010).
6. Presidency Conclusions of the Cybercrime Conference, 'Budapest Conclusions', Budapest, 13 April 2011.
7. Council of Europe, 'Convention on Cybercrime', European Treaty Series (ETS) no. 185, Budapest, 23 September 2001.

- (A commitment to) increasing public-private partnership to share best practices, fight 'botnets',[8] enhance the security of industrial control systems and the resilience and stability of the internet
- Raising public awareness immediately
- Cooperating to remove child pornography from the internet, using domain name registrars and registers.

Close attention must be paid as to how each relevant issue will be addressed, as (global) counter-productive policy outcomes are far from inconceivable. The purpose of this chapter is therefore to analyse in detail the five priority areas and tasks listed above, and the policies in the EU and the US relating to them, keeping in mind the different policy approaches and institutional settings.

As for the policy approaches, unsurprisingly, attention to cybersecurity in the US, where the internet was developed,[9] began early. Under President Clinton, the interest in and governmental action towards cyber threats grew along with the (previously started) adoption of laws tackling computer security issues. As early as 1998, the 'Clinton Administration's Policy on Critical Infrastructure Protection: Presidential Decision Directive 63' was adopted. It envisaged a federal intervention in the field of cybersecurity, but only in the case of market failure.[10] In general, Clinton focused on government systems, leaving the market to self-regulation. Although this has been criticised, since around 98 percent of governmental systems may pass through the civilian network,[11] it seems consistent with the American fear of 'big government'[12] regulating the private sector.

In the EU, on the other hand, the then European Community's first approach to cyberspace hinged on its potential for the – regulated – development of the internal market. Both the 1993 White Paper on Growth[13] and the Bangemann Report[14] highlighted the need to address computer security, intellectual property and privacy rights, with the objective of removing all obstacles to the pursuit of a common e-market. Consequently, several legislative instruments were adopted in the (then) first pillar mostly, addressing cybercrime (such as child pornography), intellectual property, taxation and data protection.[15] Yet, and on the institutional side, the EU is quite a different entity to the US. Unsurprisingly, then, reaction to cybercrime and cybersecurity was slower *vis-à-vis* the US. The first law (harmonising and) explicitly criminalising certain cyber-offences, Council Framework Decision 2005/22/JHA,[16] was adopted in 2005.

Given its earlier start, and the ensuing longer-considered development of US policies in the field in contrast to the European Union, the US enjoys a 'first-mover' advantage position, and the winning model may

8. That is, the distributed network of virtually kidnapped personal computers (zombies) by criminal organisations/ individuals used to perpetrate large scale cyber-attacks, such as DDoS attacks, or spamming.
9. For an excellent account of the history of the internet, see Kate Hafner and Matthew Lyon, *Where Wizards Stay Up Late* (New York: Free Press Books, 2003).
10. Jerry Brito and Tate Watkins, 'Loving the Cyber Bomb? The Dangers of Threat Inflation in Cybersecurity Policy' Working Paper, Mercatus Center, George Mason University, 26 April 2011.
11. Eric Talbot Jensen, 'President Obama and the Changing Cyber Paradigm', *Journal of the National Security Forum*, January 2011.
12. Peter Sommer and Ian Brown, 'Reducing Systemic "Cybersecurity Risk"', OECD/IFP Project on 'Future Global Shocks', OECD, Paris, 14 January 2011.
13. Commission of the European Communities, 'Growth, Competitiveness, Employment. The Challenges and Ways forward into the 21st Century. White Paper', COM(93) 700, 5 December 1993.
14. 'Recommendations to the European Council. Europe and the global information society', *The Bangemann Report*, 26 May 1994.
15. European Commission, op. cit. in note 1.
16. Council Framework Decision 2005/222/JHA of 24 February 2005, *Official Journal*, L 69, 16/03/2005, p. 67.

be the American one. To what extent this constitutes something that should be welcomed, varies according to the priority areas, which are explored in the next section.

Promoting the adoption of the Convention on Cybercrime

One of the WGCC's foreseen advantages is that of fostering a joint approach in formal (and informal) international *fora* tackling cybercrime and cybersecurity in which both the EU and the US participate, such as the G-8, the OECD, the International Telecommunications Union (ITU), Interpol, NATO and the United Nations Office on Drugs and Crime (UNODC). Although the US is not a member of the Council of Europe (unlike the EU Member States) it took part in the drafting, and signed and ratified the Convention. The Convention establishes a number of procedural provisions to deal with cybercrime domestically, to resolve conflicts of jurisdiction, and to cooperate internationally, acting as a mutual legal assistance treaty in the absence of an agreement between the cooperating parties.

The Convention is undoubtedly valuable, since several countries lacked specific legislation on procedural aspects of cybercrime, for which there is a compelling need due to the volatility and vulnerability of electronic evidence (i.e. it can quickly disappear and be easily compromised). Indeed, the lack of common rules can impede international cooperation (fundamental given that evidence is often dispersed), as shown for instance by the 'Love letter' virus investigations,[17] and foster the proliferation of 'digital crime havens'.[18] Accordingly, states which are not members of the Council of Europe are using the Convention as a model framework.[19]

The difficulty of finding an agreement: whose rules?

Yet, the opposition to the Convention of two global powers such as China and Russia 'over concerns that police might acquire powers across national boundaries without consent from the local authorities,'[20] deeply undermines its efficacy. Indeed, to work properly, the Convention should be globally endorsed. The adoption of a more comprehensive international legal instrument on cybersecurity and cybercrime, though, may have so far been hindered by both the convenience of 'cyber weapons' for certain countries,[21] and the different ideological and cultural contexts which affect technical preferences.[22] Recently China, Russia, Tajikistan and Uzbekistan proposed in a letter to the UN Secretary General an

17. The US could not prosecute the Filipino hackers who authored the virus, since their deed was not a crime in the Philippines when it was committed. Fawzia Cassim, 'Formulating Specialised Legislation to Address the Growing Spectre of Cybercrime: a Comparative Study.' *P.E.R, Journal*, vol. 12, no. 4, 2009; Nir Kshetri, 'Information and Communication Technologies, Strategic Asymmetry and National Security', *Journal of International Management*, vol. 11, no. 4, 2005.

18. Victoria Nash and Malcolm Peltu, 'Rethinking Safety and Security in a Networked World: Reducing harm by Increasing Cooperation', Oxford Internet Institute, Forum Discussion Paper no. 6, November 2005.

19. Peter Sommer and Ian Brown, op. cit. in note 12. Nevertheless, while the Convention follows the tracks of the US legal framework, it does not offer a model legislation for countries to follow when implementing it. See Susan Brenner, 'The Council of Europe's Convention on Cybercrime' in Jack M. Balkin (ed.), *Cybercrime, Digital Cops in a Networked Environment* (New York University Press, 2007).

20. Peter Sommer and Ian Brown, op. cit. in note 12, p. 71.

21. Matthew C. Waxman, 'Cyber-attacks and the Use of Force – Back to the Future of Article 2(4)', *Columbia Law School Working Paper*, September 2010.

22. Busch in Victoria Nash and Malcolm Peltu, op. cit. in note 18.

international code of conduct for information security, which may open a new international approach to the matter.[23]

This is not the only defect of the Convention. On procedural matters, the rules on dual criminality[24] are of limited application. As a result, assistance (i.e. handing over information), may be due by the requested party to the requesting party, for an act which is not deemed as an offence in the former.[25] In addition, since safeguards and provisions attached to international cooperation procedures can be subject to reservations, states applying higher safeguards may not refuse cooperation on grounds of lower safeguards provided for by requesting parties. In many cases, this would mean transferring data, even when such a transfer does not pass the test of necessity, proportionality and appropriateness 'as required by Human Rights instruments implemented into constitutional and specific national law.'[26] The Convention, in fact, has been heavily criticised for its inadequate reference to the protection of human rights.[27]

Cybercrime: 'a term of hype'[28]

States must also provide assistance for offences other than those encompassed by the Convention in the substantive law section, which are grouped into four categories (articles 2-13):

1. offences against the confidentiality, integrity and availability of data (illegal access, illegal interception, data interference, system interference and misuse of devices)

2. computer-related offences (computer-related forgery and fraud)

3. content-related offences (child pornography)

4. and copyright infringement

5. The Additional Protocol to the Convention[29] criminalises racist and xenophobic speech.

This substantive choice has been widely criticised. The 2004 G-8 Conference on High-Tech Crime, for instance, recommended the adoption of a threat-focused classification, which distinguishes between 'computer infrastructure attack' and 'computer-assisted threats,'[30] and is more comprehensive than the Convention's taxonomy. These remarks illustrate two important aspects. On the one hand, the Convention does not cover all possible cyber-offences. It includes certain traditional crimes – fraud, child pornography and forgery – but not theft, extortion, stalking and terrorism.[31] It does not properly address large-scale cyber-attacks, which is the focus of the current cybersecurity debates (with

23. United Nations, 'Letter to the United Nations addressed to the Secretary General', General Assembly, A/66/359, 14 September 2011.

24. A cornerstone of extradition and mutual legal agreement treaties, whereby a crime must be recognised as such in both countries.

25. Susan Brenner, op. cit. in note 19.

26. The Article 29 Data Protection Working Party, 'Opinion 4/2001 On the Council of Europe's Draft Convention on Cybercrime', WP 41, 22 March 2001, p. 5.

27. Susan Brenner, op. cit. in note 19.

28. Susan Brenner and Bert-Jaap Koops (eds.), *Cybercrime and Jurisdiction, A Global Survey* (The Hague: TMC Asser Press, 2006), p. 9.

29. Council of Europe, 'Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems,' ETS no. 189, Strasbourg, 28 January 2003.

30. G-8 Government and Industry Conference on High-Tech Crime, 'Report of Workshop 3: Threat Assessment and Prevention', Tokyo, 22-24 May 2001..

31. Susan Brenner, op. cit. in note 19.

cyber-war being the extreme); a pertinent additional protocol on cyber-attacks may be in the pipeline.[32]

On the other hand, the remarks highlight a characteristic of the notion of cybercrime: it encompasses both 'online' and 'offline' crimes, i.e. crimes that would exist only online, and crimes that exist also in the off-line world, respectively.[33] So far, an agreement on the meaning of cybercrime, let alone a shared legal definition of the term, is missing. It may be true, as some have argued, that the development of such a shared definition is unrealistic.[34]

Yet this means that, when cybercrime is being addressed, as for example by the WGCC, an array of different offences is referred to. While the evidentiary techniques to investigate them are the same, prevention radically differs from offence to offence. One thing is to protect Supervisory Control and Data Acquisition (SCADA) computing systems, which assist in the provision of electricity, gas, water, and oil,[35] and whose newer versions apparently use internet protocols, sometimes over the public internet. Another thing is to prevent the distribution of child pornography online.

Beyond the Convention: cybersecurity as the policy protecting CII

The former is also a good example of a Critical Information Infrastructure (CII), or 'ICT systems that are critical infrastructures (CI) for themselves or that are essential for the operation of critical infrastructures (telecommunications, computers/software, Internet, satellites, etc.).'[36]

The importance of the protection of critical information infrastructure (CIIP) is clear, and the possible risks have been illustrated by the attacks suffered by Estonia (2007), and Georgia (2008). Indeed, cybersecurity proper refers to the policy tackling CIIP, whose specifications vary; for instance, for the US, cyber-security refers to:

> 'strategy, policy and standards regarding the security of and operations in cyberspace,[37] and encompasses the full range of [actions]… as they relate to the security and stability of the *global information and communications infrastructure*.'[38]

Cybersecurity, therefore, partly overlaps with the prevention of the offences in category 1, and to a lesser extent 2, of the Convention. The similarities and differences between cybersecurity and cybercrime, and the constellation of terms encompassed by the latter, are to be kept in mind when appraising the other tasks of the WGCC.

32. Council of the European Union, 'Summary of CATS- Council of Europe meeting', doc. 17498/10, Brussels, 9 December 2010.

33. Jonathan Clough, *Principles of Cybercrime* (Cambridge: Cambridge University Press, 2010).

34. Ibid. On the impact and significance of local cultures on policy approaches and technological choices, see Victoria Nash and Malcolm Peltu, op. cit. in note 18.

35. SCADA systems's security has been widely discussed after Stuxnet, the virus which allegedly delayed by two years the development of the Iranian nuclear programme. On this topic, see: http://www.enisa.europa.eu/media/press-releases/stuxnet-analysis and http://threatpost.com/en_us/blogs/dhs-thinks-some-scada-problems-are-too-big-call-bug-092611.

36. European Commission, 'Green Paper on a European Programme for Critical Infrastructure Protection', COM(2005) 576 final, 17 November 2005, p. 19; '(CI) includes those physical resources, services and information technology facilities, networks and infrastructure assets which, if disrupted or destroyed, would have a serious impact on the health, safety, security or economic well-being of citizens or the effective functioning of governments.' Ibid., p. 20.

37. It is more or less equivalent to CII and commonly 'refers to the virtual environment of information and interactions between people'. The White House, 'President's Cyberspace Policy Review: Assuring a Trusted and Resilient Information and Communications Infrastructure', 2009, p. 11.

38. Ibid., p. 12.

Public-private partnerships

The group intends to foster public-private partnerships for enforcement reasons, and to better tackle security. This is in line with what both the EU and the US are pursuing domestically. More specifically, the need to develop private-public partnerships was suggested by the 2003 White House National Strategy on Cyberspace and confirmed by subsequent policies, such as the 2008 Comprehensive National Cyber Security Initiative (CNCI),[39] which required the government to partner with the private sector to invest in high-risk and high pay-off solutions. As for the EU, private-public partnerships were suggested already in 2000,[40] and the need has been reiterated in subsequent policy documents.

Public-private cooperation is crucial both to tackle CIIP and the prosecution of cyber-crimes, yet a clear, binding framework on how to develop them should be provided, for at least two reasons. On the one hand, such a framework would help to relieve private parties of any liability,[41] and to allow law enforcement agencies (LEAs) to smoothly obtain the necessary evidence to investigate offences. Indeed, the Council of Europe recently issued guidelines exactly to support both LEAs and private actors, but they are not mandatory. Unfortunately, in the EU, the reiterated support to public-private partnerships is not accompanied by mandatory, practical rules.[42] Similarly, a 2007 joint Department of Homeland Security (DHS) and the Department of Defence (DoD) report acknowledged the insufficient regulation to carry out the impact assessments for private-public partnerships.[43]

This leads to the second good supporting reason for a more stringent framework, that is, increasing transparency, as some initiatives may raise concerns, for instance over liberties. Examples include the 'Enduring Security Framework,' made up of CEOs of ICTs and defence companies, the heads of the DHS, the DoD and the Office of the Director of National Intelligence,[44] and the partnership between Google and the National Security Agency (NSA) in 2010, negotiated after the attacks suffered by Gmail, to share information with a view to improving Google's (privately owned) networks' security.[45]

Increasing awareness

The WGCC rightly aims to raise public awareness; indeed, cybercrime is one of the most underreported crimes,[46] partly because of users' lack of awareness. Yet, two other elements contribute to this.

39. Declassified in March 2010. Adam R. Pearlman, 'Federal Cybersecurity Programs', *New Federal Initiatives Project*, 12 August 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1655105.

40. European Commission, op. cit. in note 1.

41. See European Commission, 'Proposal for a Directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA', COM(2010) 517, Brussels, 30 September 2010.

42. See: section on 'Operational cooperation' in European Commission, DG Home Affairs, 'Boosting Europe's defences against cyber attacks', available at: http://ec.europa.eu/home-affairs/policies/crime/crime_cybercrime_en.htm; European Commission, 'Delivering an Area of Freedom, Security and Justice for Europe's citizens – Action Plan Implementing the Stockholm Programme', Communication to the European Parliament and the Council, COM (2010) 171 final, Brussels, 20 April 2010.

43. Eric Talbot Jensen, op. cit. in note 11.

44. William J. Lynn III, 'Defending a New Domain: the Pentagon's Cyberstrategy', *Foreign Affairs*, vol. 89, no. 5, September/October 2010.

45. Peter Sommer and Ian Brown, op. cit. in note 12.

46. Nir Kshetri, op. cit. in note 5.

Firstly, businesses do not report security breaches either for fear of reputational loss or lack of legal obligations, which undermines the creation of incentives[47] to properly implement computer security (thus taking on some burden, beyond the benefits enjoyed).[48] In the US, although an obligation to notify security breaches at the Federal level does not exist, most States have developed one.[49] In the EU, a fierce fight around the mandatory notification of data breaches introduced by the 'Telecom Package,' limited its application, thus significantly reducing its beneficial effects.[50]

Secondly, police have long suffered from the lack of means and resources to investigate cybercrime,[51] with the exception of the US, probably the most responsive country *vis-à-vis* cybercrime. The FBI has created the Internet Crime Complaint Center, a tool for reporting cybercrimes which allows to better distinguish between isolated minor crimes and widespread, organised scams,[52] another best practice to follow. Raising users' awareness is important, but it can only be meaningful if coupled with appropriate incentives for businesses to implement security and mechanisms of reporting.

Joint exercises: civilian vs. national security attitudes

The WGCC aims at conducting common exercises to increase joint incident management response capabilities. Such training is welcome, as capabilities must be increased. However, this raises the question of who establishes priorities in the field. In fact, since 9/11, the attitude towards cybersecurity in the US appears to have been influenced predominantly by LEAs and national security issues.[53]

For instance, thanks to the Patriot Act's amendment to the National Information Infrastructure Protection Act (NIIPA), the FBI acquired jurisdiction over the cyber-offences perpetrated;[54] moreover, cyber-attacks became a form of terrorism punishable with up to 20 years of imprisonment. Not long after its creation, the DHS acquired cyber-security power for federal government security systems, and cyber-security spending increased. Placing spyware and keystroke monitoring programmes became a felony under the 2008 Former Vice President Protection Act,[55] which also expanded the definition of cyber-extortion, and (rightly) entitled the victims of identity theft to compensation for the harm suffered. The list could be longer.

47. See, *inter alia*, Kshetri, op. cit. in note 5; Ross Anderson and Tyler Moore, 'The Economics of Information Security', *Science*, vol. 314, no. 5759, 26 October 2006; Deirdre K. Mulligan and Fred B. Schneider, 'Doctrine for Cybersecurity', *Computing and Information Science Technical Reports*, 15 May 2011,

48. Many viruses exploit the errors in poorly tested software, which is the result of companies' rush to the market to release new products, thus enjoying a first mover advantage.

49. Fernando M. Pinguelo and Bradford W. Muller, 'Virtual Crimes – Real Damages: A Primer on Cybercrimes in the United States and Efforts to Combat Cybercriminals', *Virginia Journal for Law and Technology*, forthcoming.

50. Rosa Barcelò, 'EU: Revision of the ePrivacy Directive,' *Computer Law Review International*, vol. 156, no. 5, 2009, pp. 129-60.

51. Nir Kshetri, 'Information and Communication Technologies, Strategic Asymmetry and National Security', *Journal of International Management*, vol. 11, no. 4, 2005.

52. On top of this, in 2006 the US had 14 Regional Computer Forensic Laboratories, providing the police free forensic analysis. House of Lords, 'Personal Internet Security,' Science and Technology Committee, 5th Report of session 2006-07, 10 August 2007; see also Fawzia Cassim, op. cit. in note 17. In the EU, a CERT was created in June 2011 only.

53. Victoria Nash and Malcolm Peltu, op. cit. in note 18.

54. The same year, the well-known case of US v. Gorshov was decided. See Fawzia Cassim, op. cit. in note 17.

55. See Nir Kshetri, op. cit. in note 51; Eric Talbot Jensen, op. cit. in note 11; and Fawzia Cassim, op. cit. in note 17.

The EU is following this path, although it is only since the Stockholm Programme, and the subsequent Internal Security Strategy,[56] that cybercrime has reached the height of the political agenda, for the reasons already discussed. All documents, indeed, underline the necessity of adopting a policy and appropriate legal instruments as soon as possible. The Hungarian Presidency recognised the relevance of cybercrime and cybersecurity, and referred to the WGCC as a fundamental partnership in January 2011.

In practice, this securitisation may be the result of a shift of control from a technical community, to a more recent, institutional and national security-minded one.[57] These hold two different definitions of security – individual harms (damage to property, autonomy, privacy and productivity) vs. collective existential harms – paving the way towards different policy and technology outcomes, since technology can accommodate any needs.[58] The former responds with pre-emption reinforcing each node – the individual – while the latter proposes punishment and indiscriminate surveillance.

This trend brings about two emerging effects. First, the military is gaining more power in cybersecurity, with the contribution of the threat inflation produced by the media, sometimes silently supported by vested interests.[59] Secondly, actors in cybersecurity are multiplying, to the detriment of management response.

The increasing militarisation of cyber-security

In December 2008, the Centre for Strategic and International Studies' Commission on Cyber-security released what seems to have been quite an influential report,[60] inspiring increased spending and regulation. It portrayed cybersecurity as 'a major national security problem for the United States'[61] and urged action to avert this cyber-doom. Shortly after, President Obama began overhauling cybersecurity policy, and the DoD started reorganising its cyber-defence capabilities and developing a strategy, which increasingly equates cybersecurity to military security[62] and includes pre-emptive attacks.

In May 2010, Secretary Gates 'ordered the consolidation of the task forces into a single four-star command, the US Cyber Command,'[63] under the US Strategic Command, operational by October 2010, with three goals: day-to-day protection, marshalling cyber resources and working with partners inside and outside the government.[64] In reality, there are at least two impediments to a proper militarisation: most of the ICTs are civilian, i.e. privately owned (how could the military defend them?); moreover, attribution of attacks is not always feasible, for instance because of the use of botnets, which makes retaliation quite difficult.

56. 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens,' *Official Journal*, C 115/1, 4 May 2010; European Commission, 'The EU Internal Security Strategy in Action', Communication to the European Parliament and the Council, COM (2010) 673 final, Brussels, 22 November 2010.

57. Helen Nissenbaum, 'When Computer Security meets National Security' in Jack M. Balkin (ed.), *Cybercrime, Digital Cops in a Networked Environment* (New York University Press, 2007).

58. Lee Tien, 'Architectural Regulation and the Future of Social Norms' in Jack M. Balkin (ed.), *Cybercrime, Digital Cops in a Networked Environment* (New York University Press, 2007).

59. For different positions on the likelihood of cyber-wars, see: Richard. A. Clarke and Robert K. Knake, *Cyber War: The Next Threat to National Security and What to Do About It* (New York: Ecco, 2010); Peter Sommer and Ian Brown, op. cit. in note 12; Jerry Brito and Tate Watkins, op. cit. in note 10.

60. Stuart S. Malawer, 'Cyber Warfare: Law and Policy Proposals for U.S. and Global Governance', *Virginia Lawyer*, vol. 58, February 2010, p. 28, *GMU School of Public Policy Research Paper* no. 2009-11; Jerry Brito and Tate Watkins, op. cit. in note 10.

61. Jerry Brito and Tate Watkins, op. cit. in note 10, p. 7.

62. Matthew C. Waxman, op. cit. in note 21.

63. William J. Lynn III, op. cit. in note 44, p. 4.

64. Ibid.

Nevertheless, maintaining such level of alert may be convenient to the military, since increased cybersecurity spending could compensate for the budget cuts in other areas of defence, as well as be convenient to other governmental agencies, enabling them to gain more power. Representatives appear to be backing such an approach as cybersecurity represents a pork-barrel spending opportunity to create jobs and funds in their constituency.[65]

A military-industrial complex on cybersecurity seems to be emerging, possibly as a consequence of the interplay of such increased attention, and the privatisation of (cyber)warfare.[66] Defence contractors and consultancies joined the traditional information security providers to reap the benefits of the increased federal budget: the request for funding for the CNCI represented the single largest request for Fiscal Year 2009.[67] Some of the ten major ICT federal contractors include those providers who have reorganised themselves to provide cybersecurity solutions.[68]

As for the EU, the European Defence Agency has also started planning to develop capabilities in the field of cybersecurity, although its mandate and capabilities are not comparable to those of the Pentagon. Some Member States like the UK and France, though, are increasing their cyber-weaponry at a time when cuts are being made in more traditional areas of defence spending.

A proliferation of actors

The WGCC, which is divided into four sub-groups, is supposed to report progress within a year' to the EU-US Summit, but in each polity responsibility is dispersed. At the EU level, the Information Society and Media Commissioner is responsible for the cybersecurity aspects, whereas the Home Affairs Commissioner is responsible for the cybercrime aspects. Other EU institutions and bodies (i.e. the European Network and Information Security Agency, Europol and Eurojust), as well as experts from Member States, will be involved in the works of the WGCC, which 'will not deal with commercial matters.'[69] Commissioner Malmström (Home Affairs) has lamented the state of fragmentation of the cybersecurity policy.[70] The EU discounts the problem of its institutional setting, and in particular a misalignment between the area of Home Affairs (Freedom, Security and Justice) and that of the Common Foreign and Security Policy, despite the subject matter falling in an area of convergence, 'the external dimension of freedom, security and justice'.

In the US, the situation does not strike one as being better: responsibility is divided between the White House, the DoD, the DHS, the NSA and the Federal Communications Commission (FCC), not to mention

65. Jerry Brito and Tate Watkins, op. cit. in note 10.

66. Lucas Lixinski, 'Legal Implications of the Privatization of Cyber warfare', EUI Working Paper, Priv-war Project, AEL 2010/02 (Florence: EUI 2010).

67. Adam R. Pearlman, op. cit. in note 39.

68. Jerry Brito and Tate Watkins, op. cit. in note 10.

69. Commissioner Malmström, op. cit. in note 3.

70. The European Security Round-table, European Cyber-security Conference, Report, June 14 2011, Brussels.

the agencies and departments overseeing the WGCC.[71] In 2009, a Government Accountability Office (GAO) report highlighted the problems related to the DHS' duties on cyber-security. While the 2010 GAO 'Global Cyber-security Challenges' lamented the number of US agencies sharing responsibility for cyber-security, with little co-ordination and the lack of transparency in the linkages with the private sector,[72] the DoD announced it was seeking $3.2 billion for funding cyber-security initiatives by 2012. In addition, the budget availability seems to have triggered a turf war between governmental branches, representatives[73] and Congressional Committees.[74]

Fighting which type of cybercrime? The effects on liberties

Cooperation towards removing child pornography from the internet is very welcome, as issues affecting the victims, especially if children, rarely reach the level of high politics. In fact, cooperation on the subject is already quite advanced. The question arises, then, as to why only one of the several offences encompassed by the cybercrime umbrella has been explicitly mentioned.

Indeed, not only is there a cleavage between the technical and institutional community, it also seems that different cyber-threats, i.e. the threats against the security of ICT systems[75] and those against the safety of people[76] are tackled by two overlapping, but different, 'communities',[77] bearing distinctive cultures, and arguing for different measures.

For instance, the anti-child pornography lobby exercises vigorous social pressure for the introduction of default content filtering (that is, the curbing of net neutrality), usually carried out by Internet Service Providers;[78] the same is done by the intellectual property lobby, which possibly exercises an even stronger pressure to introduce measures to prevent infringement. While the topic is too complex to be developed here, it is important to stress that: (i) any control measure should be applied proportionally to avoid indiscriminate surveillance, and with the appropriate conditions and safeguards, to avoid infringements upon human rights, such as privacy and data protection; (ii) fostering a culture of control is partly at odds with the idea of raising users' awareness of the risks online.

The point is very important, for two reasons. First, strong disagreements on privacy and data protection, hinging on diverging conceptions, sparked the most contentious and debated EU-US cooperation programmes in

71. Concept paper, op. cit. in note 6.
72. Peter Sommers and Ian Brown, op. cit. in note 12.
73. Jerry Brito and Tate Watkins, op. cit. in note 10.
74. 'Cybersecurity – House Democrats Insist on Homeland Security Jurisdiction Over Cybersecurity Proposals', HSToday.US, 29 September 2011.
75. Indeed, not only is there a cleavage between the technical and institutional community, it also seems that different cyber-threats, i.e. the threats against the security of ICT systems and those against the safety of people, are tackled by two overlapping, but different, 'communities', bearing distinctive cultures, and arguing for different measures. See Victoria Nash and Malcolm Peltu, op. cit. in note 18, p. 7.
76. Ibid.
77. Ibid.
78. House of Lords, op. cit. in note 52. See also, European Data Protection Supervisor (EDPS), 'Opinion on Net Neutrality, Traffic Management and the Protection of Privacy and Personal Data', Brussels, 7 October 2011.

the area of Freedom, Security and Justice, notably the Passenger Name Record (PNR) and Terrorist Finance Tracking Program (TFTP).[79]

It can be helpful to recall that in the EU, privacy and data protection – partially overlapping, but nonetheless different concepts– are intended as fundamental rights.[80] In the US, a right to data protection is still questioned (but aspects of it fall under the notion of consumer protection under the aegis of the Federal Trade Commission) and the notion of privacy is more open-ended; regulation is fragmented,[81] but according to the Supreme Court, based on several provisions of the Bill of Rights, there is only a limited constitutional right to privacy.[82]

Such discrepancies emerged even before 9/11. Reportedly, the participation of the US in drafting the Convention has watered down the reference to privacy and data protection,[83] otherwise surprising for an instrument of the Council of Europe, which sponsored the first international agreement on the protection of personal data.[84]

Secondly, the respect of privacy and data protection can be instrumental to the pursuit of cybersecurity and the prevention of certain forms of cybercrime:

> 'Under the standard approach to privacy protection, good security is an essential fair information practice. Both privacy and security share a complementary goal – stopping unauthorized access, use, and disclosure of personal information. Good security, furthermore, does more than keep the intruders out. It creates audit trails…which allow an accounting over time of who has seen an individual's personal information. The existence of accounting mechanisms both deters wrongdoing and makes enforcement more effective in the event of such wrongdoing.'[85]

Quoting the European Commission, 'the implementation of security obligations following in particular from the EU data protection directives contributes to enhancing security of the networks and of data processing.'[86] Basically, for 'online' cybercrime prevention, data protection and privacy provisions are more a support than an obstacle. This is not to say that privacy and data protection are the key to solving the problems of cybercrime and cybersecurity – think of the double-edged nature of anonmity and cryptography.[87] Simply, by fostering a culture of privacy, and applying rules on privacy, certain forms of cyber offences are reduced and possibly prevented, from the spread of viruses through the creation of botnets to online fraud and identity theft.

Yet, such a view may be anathema to traditional national security circles, or groups focusing on offline cybercrime, who support policies based on punishment and traditional criminal tools, to the detriment of CIIP. The evidence is mixed.

79. For in-depth information on both cases, see at https://www.privacyinternational.org/article/european-union-privacy-profile.

80. Maria Grazia Porcedda, 'Law Enforcement Access to Data in the Cloud: is the Data Protection Legal Framework up to the task?' in Serge Gutwirth and Ronald Leenes (eds.), *European Data Protection: in Good Health?* (Springer, forthcoming). Available online at:http://www.springer.com/law/international/book/978-94-007-2902-5.

81. The Cyber-Space Policy called for the adoption of a legal framework for data preservation, privacy and prosecution of crimes.

82. Various authors, *Privacy and Human Rights. An International Survey of Privacy Laws and Developments*, Electronic Privacy Information Center and Privacy International Editors, 2006.

83. Susan Brenner, op. cit. in note 19.

84. The Article 29 Data Protection Working Party, op. cit. in note 26; Susan Brenner, op. cit. in note 19.

85. Peter Swire and Lauren Steinfeld, 'Security and Privacy After September 11: The Health Care Example', *Minnesota Law Review*, vol. 86, no. 11, December 2001, p. 6.

86. European Commission, op. cit. in note 1, p. 11.

87. See, for instance, Fawzia Cassim, op. cit. in note 17; Nir Kshetri, op. cit in note 5; Paul Rosenzweig, '10 Conservative Principles for Cybersecurity Policy', *Backgrounder*, no. 2513, The Heritage Foundation, 31 January 2011; Peter Sommer and Ian Brown, op. cit. in note 12.

On the one hand, in May 2009 President Obama guaranteed not to compromise net-neutrality.[88] In the 2011 International Strategy for Cyberspace, Obama stressed the US commitment to fundamental freedoms, privacy and the free flow of information, and declared that 'good cyber-security can enhance privacy.'[89] The WGCC partnership is explicitly founded on the common 'conviction that the respect for fundamental rights and freedoms and joint efforts to strengthen security cooperation are mutually reinforcing.'[90] Fundamental rights and freedoms notably encompass privacy and data protection, which were among the top thematic priorities of the Hungarian Presidency.[91]

On the other hand, the abovementioned CNCI's initiatives include two classified programmes: Einstein 2.0, whereby the network flow of information is analysed, and the unauthorised access and malicious content on federal systems is reported to the DHS's CERT; and Einstein 3.0, allowing the DHS and NSA to carry out deep-packet inspection on governmental networks, and report findings to the appropriate agency. According to the Office of the Legal Counsel, the former did not raise privacy concerns. It is doubtful, though, that Einstein 3.0 would pass the test.[92]

Along the same lines, the International Strategy for Cyberspace encourages commercial privacy protection only. Despite its more stringent rules on privacy and data protection, the EU may not be more protective *vis-à-vis* the US.[93] The last G-8 forum can be considered a good barometer as regards the orientation of some of the most influential Member States; several parties lamented the freedom-restrictive approach adopted, either for economic or political concerns.[94]

As for transatlantic cooperation, the follow-up to the EU-US High Level Contact Group on data protection and data sharing[95] provides a further negative example. The group was established to foster a common understanding of privacy and data protection, in order to prepare for a common comprehensive data exchange agreement. While the new TFTP agreement seemed to encourage some optimism – as opposed to the previous agreement – the recent leaks on the new PNR Agreement[96] cool down the enthusiasm: the document seems even more controversial than the previous ones, as it reduces the (already low) level of protection previously achieved.

88. Eric Talbot Jensen, op. cit. in note 11.

89. The White House, 'International Strategy for Cyberspace. Prosperity, Security, and Openness in a Networked World', May 2011, p. 5.

90. Eric Talbot Jensen, op. cit. in note 11.

91. Council of the European Union, 'External Relations in the Field of Justice and Home Affairs during the Hungarian Presidency', doc. 5149/11, Brussels, 11 January 2011.

92. Adam R. Pearlman, op. cit. in note 39.

93. On the topic, see Patryk Pawlak, 'The Unintentional Development of the EU's Security Governance and Beyond Borders', *European Foreign Affairs Review* (forthcoming March/April 2012).

94. For a list of the documents adopted, and the positions defended, see: http://www.edri.org/edrigram/number9.11/g8-internet-freedom.

95. Council of the European Union, 'EU-US High Level Contact Group on data protection and data sharing (HLCG),' doc. no. 14574/09, 16 October 2009.

96. Alan Travis, 'Air Passenger Data Plans in US-EU Agreement are Illegal, Say Lawyers', *The Guardian*, Monday 20 June 2011. See also at note 79.

Conclusion: what model for the global cyber agenda?

This chapter has hopefully shown that the US has a more developed policy in cybersecurity, which is bound to progress due to the considerable prospective investment in cybersecurity: $10.5 billion per year by 2015.[97] The EU's policy, if any, is less developed and fragmented. Given its level of advancement (and the history so far[98]), the US approach may prevail, and model the global policy approach. This is certainly welcome as far as its best practices are concerned, such as its crime reporting system, and the steps taken towards mandatory reporting of data breaches (which in the EU is a privacy issue). Yet, exporting other trends, such as the extreme securitisation pushed by vested interests and inflated media reports, as well as the soaring militarisation of the matter, may not be as beneficial. Einstein 2.0 and 3.0 recall too closely some programmes adopted in the aftermath of 9/11, such as Total Information Awareness, programmes which led to the disaster of the PNR Agreements.

Other risks are common to both approaches: the lack of transparency over private-public partnerships may undermine their efficacy, as well as leave room for collusive practices; the multiplication of responsible actors can be detrimental to a coherent policy; the importance given to certain types of crimes can lead to the legitimisation of a culture of control, to the detriment of a culture of privacy and data protection, which can be complementary to cybersecurity. While in some instances the classical 'balance-striking between security and rights' may be necessary, this should not be a default attitude, if sound policies are to be reached.

On the positive side, there is still time to avoid the diffusion of 'worst practices', and another PNR-style controversy. A few steps would help:

1. Promoting the Convention on Cybercrime is helpful to avoid data havens, but should be accompanied by a revision of some of its imperfections, especially on human rights;

2. The WGCC should foster public-private partnerships, nationally and internationally, developed with stringent guidelines and oversight;

3. The WGCC should endorse the US's single crime reporting system, and the introduction of data breaches notification; awareness campaigns should stress the positive value of privacy in preventing cyber offences;

97. Jerry Brito and Tate Watkins, op. cit. in note 10.

98. Patryk Pawlak, 'Transatlantic Homeland Security Cooperation: the Promise of New Modes of Governance in Global Affairs', *Journal of Transatlantic Studies*, vol. 8, no 2, June 2010, pp. 142-60.

4. The WGCC should certainly undertake efforts to ascertain current and emerging threats to CII. In doing so, more security-oriented approaches should not supersede more balanced, technically informed solutions, limiting as much as possible the role of the industrial defence complex. A stronger role of the military should be extensively discussed and assessed against possible drawbacks. The WGCC should avoid the multiplication of responsibilities, which would harm transparency and diminish control, especially on spending proposals, which should be closely scrutinised;

5. When developing policies and strategies addressing short- and long-term global risks, the WGCC should analyse all available technical choices in the light of their overall effects on the prevention and prosecution of each form of cybercrime and cybersecurity, based on clear evidence. Policies running counter to privacy and data protection should be thoroughly evaluated; criminalisation and prevention should be properly combined.

Cybersecurity and cybercrime constitute a complex, and daunting, subject. Addressing this topic will probably require a mix of policies – technical, regulatory, social – and most likely it will involve reappraising some of the features of the internet known so far, and altering attitudes to the use of the internet. However any technical and regulatory changes introduced in this regard should be thoroughly assessed and strictly monitored.

Chapter 3

Challenging EU-US PNR and SWIFT law before the Court of Justice of the European Union

Elaine Fahey

This chapter is based upon a lengthier research paper currently under review and which will be published as an Amsterdam Centre for European Law and Governance Working Paper.

Introduction

Despite the waning political importance of the EU to the US, transatlantic legal and administrative relations have intensified in recent times. While a growing number of EU institutional actors and agencies interact with US legal and administrative bodies, the Court of Justice of the European Union has only had limited involvement in this area so far and little opportunity to review the increasingly 'high politics' dimension of this EU-US juridical relationship. EU external relations law has in the main dealt with arcane and esoteric questions regarding exclusive or shared competences, legal bases and inter-pillar disputes.[1] However, the explosive character of the decision of the Court of Justice in *Kadi v. Council*,[2] where the Court pronounced upon the character of international law within the European Union, served as a reminder that the Court remains a provocative global governance actor. The case of EU-US relations potentially raises an extraordinary range of jurisdictional, constitutional, theoretical and procedural questions for the Court of Justice. This unusual matrix of factual and legal issues offers larger conceptual insights into the realm of high politics and judicial action in the EU. This chapter explores the concept of a political question doctrine and justiciability in EU constitutional law where it is largely embryonic, in contrast to US law where the doctrine is now in 'serious decline' or 'on the verge of dying'.[3] The doctrine nonetheless has been exported throughout the common law and civilian law world. This chapter considers EU-US data transfer law as a case study for the type of review that the Court can and should conduct post-Lisbon. Existing case law of the Court on EU-US relations in the area of data transfer demonstrates 'strong' judicial review. The application of justiciability principles to EU-US relations is advocated here as a useful methodological tool for judicial review of

1. Bruno De Witte, 'Too much Constitutional Law in the European Union's Foreign Relations?', in Bruno De Witte and Marise Cremona (eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford, UK and Portland, Oregon: Hart Publishing, 2008), pp. 3-15, at p. 11.

2. Cases C- 402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351.

3. Jesse Choper, 'Introduction' in Nada Mourtada-Sabbah and Bruce Cain (eds.), *The Political Question Doctrine and the Supreme Court of the United States* (Lanham, MD: Lexington Books, 2007) p. 1; Rachel Barkow, 'The Rise and Fall of the Political Question Doctrine', in ibid., pp. 23-46, at p. 23.

EU-US relations. While the final balance struck between security policy and individual rights will be for the Court to determine, the analytical means of arriving at such a balance is considered here.

The political question doctrine and non-justiciability in EU law

The political question doctrine has its origins in US constitutional law and provides for limitations on judicial review for prudential reasons to avoid a court taking decisions that are not in the national interest.[4] It seems apparent that currently there is no such thing as an explicit justiciability or political question doctrine in EU law *per se*. So the question remains, should there be one and why is there no such doctrine? The express exclusion of the Common Foreign and Security Policy (CFSP) from the jurisdiction of the Court of Justice, particularly after the Treaty of Lisbon, has led some to suggest that a political question doctrine exists in the EU, given this 'law-free' zone. 'The special status of CFSP within the EU legal order is, in other words, not uncommon and perhaps inevitable given the nature of foreign policy.'[5]

But if the doctrine is present at all in EU law, the Court has not enunciated its 'territory' or jurisdiction in these terms nor has it expounded any formal principles of self-restraint. This lack of formally explicit 'self-restraint' principles is complicated by restrictive standing rules that ordinary litigants face in EU law when seeking to litigate directly before the Court of Justice, which it has refused to relax.[6] In the land of its birth, the US, there seems to be a consensus that the political question doctrine is in 'serious decline' or perhaps even dead. Despite tracing its origins to no less than *Marbury v. Madison*,[7] the cornerstone of US judicial review jurisprudence, and the later and equally famous decision of the US Supreme Court in *Baker v. Carr*,[8] no mention of the doctrine may be found in one of the most controversial and 'political' decisions of the US Supreme Court of all time, *Bush v. Gore*.[9] It appeared then that if the US Supreme Court could determine a presidential election without it, US constitutional law could equally survive without it.

Nonetheless, the doctrine has spread throughout not merely the common law world but also Constitutional Courts of civilian law systems in a variety of forms.[10] So while there is much evidence that the political question doctrine has fallen out of favour within the US establishment, its 'cross-pollination' beyond the US indicates that it has some merit still in certain legal cultures and the 'cross-pollinated' jurisprudence is invariably dominated by *inter alia* war, foreign affairs and nuclear power. Wherever it has travelled, it is usually linked indelibly with

4. See generally Fritz Scharpf, 'Judicial Review and the Political Question: A Functional Analysis,' *Yale Law Journal*, vol. 75, 1966, pp. 517-46; Thomas Franck, *Political Questions. Judicial Answers. Does The Rule Of Law Apply To Foreign Affairs?* (Princeton: Princeton University Press, 1992); Zachary Vaughan, 'The Reach of the Writ: *Boumediene v. Bush* and the Political Question Doctrine', *Georgetown Law Journal*, vol. 99, 2011, pp. 869-900.

5. Peter Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation And Consistency', *Common Market Law Review*, vol. 47, 2010, pp. 987-1019, at p. 999. See also Piet Eeckhout, *Does Europe's Constitution stop at the water's edge?: Law and Policy in the EU's external relations* (Groningen: Europa Law, 2005) at p. 418.

6. See Michael Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts', *Common Market Law Review*, vol. 45, 2008, pp. 617-703, Section 8.3.

7. *Marbury v. Madison* 5 U.S. 137 (1803) at pp. 165-66. See, however, Lawrence Tribe, *American Constitutional Law* (New York: 3rd ed., vol. 1, Foundation Press) § 3-13 onwards, at p. 385, where he states '[t]here is, thus, a political question doctrine…'

8. *Baker v. Carr* 369 US 186 (1962).

9. *Bush v. Gore* 531 US 98 (2000). See Alan Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (New York: Oxford University Press, 2001) p. 94.

10. See for example, in Canada: *Operation Dismantle v. The Queen* [1985] 1 SCR 441; (1985) 18 DLR (4th) 481); *Re Secession of Quebec* (1998) 161 DLR (4th) 385; United Kingdom: *Council of Civil Service Unions v. Minister for the Civil Service* [1985] 1 AC 374.

what Mark Tushnet describes as the 'boringly familiar catalog' from *Baker v. Carr.*[11] The US Supreme Court held, per Brennan J., in deciding that the question was justiciable, that a political question resulted in non-justiciability where it involved six factors:

> 'a textually demonstrable constitutional commitment of the issue to a coordinate political department;
>
> or a lack of judicially discoverable and manageable standards for resolving it;
>
> or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;
>
> or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to the coordinate branches of government,
>
> or an unusual need for questioning adherence to a political decision already made;
>
> or the potentiality of embarrassment from multifarious pronouncements by various departments on one question…'[12]

Whatever its merits, the doctrine has served to minimalise bruising judicial interactions with the political branches and/or avoid certain types of review or explain failures to review. Some such as Chemerinksy make the case for dispensing with the doctrine in its entirety on account of the supremacy of the judicial branch.[13] Others contest its inherent compatibility with the rule of law. It is argued here that the 'meltdown' state of US law questioning the core elements of the doctrine for decades need not necessarily concern European observers, given the historical success of the doctrine outside the land of its birth, in contrast to its homeland. The word 'constitutional' was notably expunged from EU law by dictate of the European Council in the mandate to draft the Treaty of Lisbon, in an effort to 'de-constitutionalise' the failed Draft Constitutional Treaty. This mandate may never appear in the jurisprudence of the Court of Justice[14] but surely serves as a reminder of the fate that was not meant to be. So how does this impact upon the Court as an actor in the post-Lisbon matrix? It is contended here that the fate of 'de-constitutionalisation' pushes the Court in the direction of non-justiciability but not inexorably or unconditionally so. The doctrinal formalism of justiciability offers many advantages for the judicial authority, such as transparency and openness of decision-making, values that must be central to the consideration of EU-US legal relations. Its use is suggested here as a template or methodology to be followed and the three distinct legal instruments of EU-US data transfer law are considered in the next section.

11. See Mark Tushnet, 'Law and Prudence in the Law of Justiciability: the Transformation and Disappearance of the Political Question Doctrine' in Mourtada-Sabbah and Cain (eds.), op. cit in note 3, pp. 47-74, (at p. 50), .

12. *Baker v. Carr* 369 US 186 (1962).

13. Erwin Chemerinsky, 'Who Should Be the Authoritative Interpreter of the Constitution? Why There Should Not Be a Political Question Doctrine,' in Mortada-Sabbah and Cain (eds.), op. cit. in note 3, pp. 181-91, at p. 182.

14. But see the reference to this by the General Court in Case T-18/10 *Inuit Tapiriit Kanatami e.a. v Parliament and Council* [2011] ECR II-000, para. 49.

EU-US data transfer law – Passenger Name Records

Passenger Name Records (PNR) Agreements generated one of the singular instances of judicial review of EU-US relations in contemporary EU law and are accordingly of much significance here.[15] The EU-US PNR Agreement has its origins in US legisl ation passed in the wake of the 9/11 and European Madrid terrorist attacks requiring carriers to provide US authorities with passenger data under threat of sanction.[16] Such data has been exchanged for almost 60 years but only in recent times has the electronic exchange of this information become possible.[17] EU-US PNR first came to prominence as a matter of law in a decision of the Court in the *Passenger Name Records* decision of the Court.[18] This decision represents an isolated instance of review of the legality of EU-US relations, and an instance of 'strong' rather than 'weak' judicial review. There, the Parliament had sought to challenge the validity of Commission and Council decisions adopted pursuant to Directive 95/46/EC and the Court considered the legality of the agreements and the legal basis used in the form of Article 114 TFEU (ex Article 95 EC) for the agreement. The Court notably annulled the agreement on legal basis grounds only and the terse and obscure reasoning of the Court, with all of its consequences for EU-US relations, has been the subject of much critique.[19] No consideration of fundamental rights arose in the proceedings, resulting in much criticism thereof. Subsequently, according to De Witte, 'the EU had to beg the US to sign an identical agreement based this time on the correct legal base and in the interim the US used the opportunity to obtain even wider access to passenger data than in the original agreement.'[20] The annulled PNR Agreement was therefore replaced by an interim Agreement between the European Union and the USA of 19 October 2006 which expired on 31 July 2007 and was then replaced by a new long-term Agreement signed in July 2007.[21] The new Agreement was enacted pursuant to Articles 24 and 38 TEU (pre-Lisbon numbering) and included a filtering and deletion process for 'sensitive' data, a seven to eight-year retention period and the provision of data by carriers based upon a 'push' mechanism, whereby the responsibility to transmit rests with carriers without any decision-making discretion. A letter in the appendix to the 2007 Agreement from the US to the EU purposed to outline how 'administrative, civil, and criminal enforcement measures [were] available under US law for violations of US privacy rules and unauthorized disclosure of US records,'[22] but the reciprocal nature of this or its utility generally to EU citizens must be doubted. A proposal for a revised PNR scheme in 2010 was included in the European Council's Stockholm Programme.[23] The 2010 Draft Agreement resulting from this is considered in the next section.

15. 'Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security', Bureau of Customs and Border Protection, *Official Journal of the European Union* L 183, 20 May 2004, p. 83, and corrigendum at *Official Journal of the European Union*, L 255, 30 September 2005, p. 168..
16. Cf. The U.S. Aviation and Transportation Security Act of 19 November 2001.
17. European Commission, 'The Passenger Name Record (PNR)' MEMO/10/431, 21 September 2010.
18. C-317/04 *European Parliament v Council* [2006] ECR I-4721 (Passenger Name Records).
19. Gráinne Gilmore and Jorrit Rijpma, 'Annotation of Joined Cases C-317/04 and C-318/04, *European Parliament v. Council and Commission*, Judgment of the Grand Chamber of 30 May 2006', [2006] ECR I-4721, *Common Market Law Review*, vol. 44, 2007, pp. 1081-99.
20. De Witte, op. cit. in note 1, p. 12.
21. 'Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS)' [2007], *Official Journal of the European Union*, L 204/1, 1 September 2007.
22. *Official Journal of the European Union*, L 204, August 2007, p. 21.
23. European Council, 'The Stockholm Programme – an open and secure Europe serving and protecting Citizens', *Official Journal of the European Union*, C 115, 4 May 2010, pp. 11, 19.

Second generation PNR: The EU-US PNR Draft Agreement 2010[24]

After the enactment of the Treaty of Lisbon, on 5 May 2010, the European Parliament adopted a resolution on the launch of negotiations for 'Second Generation' Passenger Name Record agreements with the US, Australia and Canada, the latter having expired and the former two operating pursuant to provisional arrangements.[25] The Parliament in particular has gained much in the way of legal and political capital in this period with respect to these agreements. Thus the Parliament sought to postpone the vote on the request for consent on the agreements with the US and Australia until the Commission had explored the options for the arrangements which met the Parliament's concerns. Equally, addressing the Parliament's demands the Commission delivered a Communication on the global approach to transfers of Passenger Name Record resulting in it receiving a recommendation to authorise the opening of negotiations for Agreements. Yet the Executive-dominated and intergovernmental nature of EU-US relations remains a constant theme. The Presidency of the Council in September 2010 sought to prioritise negotiations with the US, signifying the importance of EU-US relations relative to other countries.[26]

However, a recent leaked opinion from the European Commission appears to indicate that it harbours significant reservations about the Agreement, suggesting that it is not compatible with fundamental rights. The Commission has suggested the Agreement in Article 4(b) defines serious crime overly broadly, including crimes which cannot be said to be serious. Moreover, Article 4(2) allows PNR to be used if ordered by a Court, which according to the Commission, would be without purposeful limitation and in violation of the Charter of Fundamental Rights.[27] Also, the use of PNR to ensure border security pursuant to Article 4(3) is suggested by the Commission to be in breach of the principles of proportionality. The retention period for data under the Agreement for up to 15 years is asserted by the Commission to be highly dubious given the belief expressed by the Council that a period of more than 2 years is questionable. No redress is *per se* guaranteed pursuant to Article 13, which the Commission sought to outline as problematic also. Moreover, the European Commission had doubts – albeit not very pronounced ones - about the administrative nature of redress which is made subject to US law at the discretion of the Department of Homeland Security. These concerns combine to damage the substance of the Agreement, pushing it towards justiciability and review by the Court.

The justiciability criteria applied to EU-US PNR

If the *Baker v. Carr* criteria are considered here, there are no textual commitments to other branches of 'government' or rather EU institutions as regards PNR – the powers are committed or transferred to other

24. The 'Second Generation' PNR 'terminology' is taken here from official EU documents: 'JHA External Relations Trio programme', 12004/11, 4 July 2011.

25. European Parliament resolution of 5 May 2010 on the launch of negotiations for Passenger Name Record (PNR) agreements with the United States, Australia and Canada, *Official Journal of the European Union*, C 81 E/12, 15 March 2011, p. 70.

26. Council of the European Union, 'EU External Strategy on Passenger Name Record (PNR) Data', doc. 13986/10, 27 September 2010, at p. 3.

27. Article 52 thereof.

agencies. The extensive discretion accorded to US authorities in the agreements is problematic, as are the lengthy retention periods. Equally, the availability of the data that the Court would have to review in litigation would then also be mired in security concerns, possibly impeding review. There exist possibly unmanageable standards, given the US-oriented and mandated security policies to be reviewed in any judicial challenge. There is the potential for a high degree of discomfiture in the event of the agreement being struck down, embarrassing all sides. PNR self-evidently raises questions such as the proportionality of obtaining and retaining data, the use of the data retained, the privacy rights of those who are the subject of data transfer, access to justice for citizens affected and the presumption of innocence. By contrast, the importance of national security and the prevention of terrorism would be defended resolutely by each and every Member State in litigation. Overtly, the application of *Baker v. Carr* criteria would suggest non-justiciability and the methodology seems weighted against the justiciability of security measures. By contrast, the existing case law of the Court on fundamental rights and data transfer and the importance of fundamental rights and fair procedures suggests justiciability is possible[28] and arguably certain case law suggests that PNR is on a looming collision course with EU fundamental rights law. Much depends, however, on the future relationship of the Court of Justice with the Strasbourg Court and the extent to which EU law will exceed standards set by the Strasbourg Court. However, the formula of review must be more nuanced and take account of (a) the Executive bias of EU-US relations and (b) the Executive dominance of the separation of powers post-Lisbon. It is contended here that a weaker and more nuanced form of *Baker v. Carr* can be readily transposed into EU law and that some loose formulation of these criteria can provide the mechanism to consider the competing interests here. Again, it is the methodology for review which is the focus of the analysis here, more than the result, and it is again argued here that these criteria be invoked to usefully weigh concerns arising in respect of the issues raised.

28. For example, the Court of Justice has held that the systematic surveillance or monitoring of EU citizens may infringe the right to non-discrimination and Directive 95/46: Case C-524/06 *Huber v. Germany* [2008] ECR I-9705. More generally, the Court has held that the principle of proportionality applies to data disseminated on the internet: Case C-92/09 *Volker & Schecke v. Land Hessen* and *C-93/09 Eifert v. Land Hessen* [2010] ECR I-000 and has also recently held that the independence of data supervisory authorities is now a key legal standard in EU law – Case C-518/07 *Commission v. Germany* [2010] ECR I-000. The Court has expressly exceeded ECHR standards in the area of family reunification: Case C-578/08 *Chakroun v. Minister van Buitenlandse Zaken* [2010] ECR I-000.

The terrorist financial tracking program agreement (TFTP or 'SWIFT')

One of the most controversial legal acts of EU-US legal relations is the Agreement between the EU and US on the processing and transfer of Financial Messaging data from the EU to the US (also known colloquially as the 'SWIFT' Agreement or more accurately as the Terrorism Financial Tracking Program (TFTP hereafter).[29] As is known, the programme monitors financial transactions, enabled now by the Global (but Belgian-based) Society for Worldwide Interbank Financial Telecommunications (SWIFT).

29. Agreement between the European Union and the United States of America on the Processing and Transfer of Financial Messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program [2010], *Official Journal of the European Union*, L 195, 27 July 2010, p. 5.

The TFTP has its origins in a US initiative adopted after the 9/11 attacks and purports to allow the US Department of the Treasury (hereafter the Treasury) to receive financial messaging data stored in the EU in order to allow targeted searches for counterterrorism investigations and their financing.[30] TFTP first fell within the rubric of EU 'soft' law in 2007, in the form of 'Representations' when they were published in the *Official Journal* to deal with the rising concerns about the absence of governing legal principles in either jurisdiction on SWIFT. [31] These Representations were followed by the agreement of the US to the appointment of an 'eminent European person' to review *inter alia* the use of the data.[32] The evolution to a 'hard' law agreement followed and an interim agreement of February 2010 was rejected by the European Parliament, using its veto powers pursuant to the Treaty of Lisbon,[33] on the grounds that it did not achieve appropriate balance between security and fundamental rights concerns.[34] But shortly after the enactment of the Agreement, the Parliament and Commission publicly began to express concerns at US plans to expand an anti-terrorism programme targeting financial transactions, rendering void the TFTP Agreement.[35] An interim independent overseer or reviewer was appointed in August 2010, whose name was kept confidential by the Commission, while a permanent TFTP overseer was sought. The European Parliament sought to query the legal basis for retaining the confidentiality of the identity of the EU public official (whether interim or permanent), indicating a power dynamic emerging where the Parliament fought for openness and accountability on the part of citizens, whereas the Commission appeared to 'cater' more closely to the interests of the Executive *qua* Member State. This emerging series of conflicts and tensions seems to be at the heart of institutional law and politics in contemporary EU-US legal relations. The TFTP Agreement was originally envisaged to run for five years, with automatic extensions for one-year periods.

The effectiveness and adequacy of the redress promised remains a major issue, particularly for EU citizens in the US who are excluded from litigating privacy-related complaints in the US by reason of the US Privacy Act.[36] The Agreement in Article 13 is expressly subject to regular 'joint review' exercises by the EU and US. It is provided therein that '[E]ach Party may include in its delegation for the review experts in security and data protection, as well as a person with judicial experience…' The discretionary nature of the judicial supervision is curious and vague – best practice would of course suggest that this is essential in security matters.[37] Other complaints that might be raised with regard to the Agreement may be summarised as to the judicial review powers therein to review data transfers, the application of the ECHR thereto and the prospective jurisdiction of the European Court of Human Rights, the implications of the Charter of Fundamental Rights after Lisbon and the definition of whether it is a 'regulatory act' for the purposes of non-privileged applicants' standing or *locus standi* in EU law and Article 263(4) TFEU, to challenge the operation of the TFTP

30. Europol clears all US requests for detailed personal financial data and thus is intrinsically important to the review process of these requests.

31. 'Terrorist Finance Tracking Program – Representations of the United States Department of the Treasury', *Official Journal*, C 166/09, C 166/18, 20 July 2007; See Marise Cremona, 'Justice and Home Affairs in a Globalised World: Ambitions and Reality in the tale of the EU-US SWIFT Agreement,' Working Paper no. 4/2011, Institute for European integration Research, pp. 11-13..

32. See Jean Louis Bruguière, 'Second report on the processing of EU-originating personal data by the United States Treasury Department for Counter Terrorism Purposes: Terrorist Finance Tracking programme', January 2010.

33. See the European Parliament Press release SWIFT, 'MEPs still concerned about data protection in interim agreement', 8 February 2010.

34. See Jorg Monar, 'The Rejection of the EU-US TFTP Interim Agreement by the European Parliament: A Historic Vote and Its Implications,' *European Foreign Affairs Review*, vol. 15, 2010, pp. 143-51.

35. 'MEPs demand explanation on US plan to monitor all money transfers', *EUObserver.com*, 28 September 2010; 'Money transfers could face anti-terrorism scrutiny', *Washington Post*, 27 September 2010.

36. 5 U.S.C. § 552a: '(a) Definitions: (2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence…'.

37. Martin Scheinin, 'Best Practice in Counter-Terrorism', in Lisa Ginsborg et al (eds.), *European and United States Counter-terrorism Policies, the Rule of Law and Human Rights*, RSCAS Policy Paper, EUI, Florence, June 2011..

Agreement. These wide-ranging concerns must be seen in light of the first reviews of TFTP, considered in the next section.

The first reviews of the TFTP agreement

The 70th Interparliamentary Meeting of the Transatlantic Legislators' Dialogue between the European Parliament and the US House of Representatives in 2011 sought to claim that the TFTP was a great success, a claim that must be viewed with some scepticism on account of the difficulty in empirically reviewing TFTP.[38] In this regard, despite its recent adoption, the TFTP agreement has been the subject of several recent formal (non-judicial) review processes since its inception. However, the nature of these review processes lends itself in turn to sceptical scrutiny. Firstly, a 'joint review' of TFTP was ostensibly conducted in February 2011, six months following the entry into force of the Agreement, by teams of EU and US officials pursuant to Article 13 of the Agreement.[39] Notably, for example, one member of the EU 'review' delegation was excluded from the review after having been denied security clearance, despite the composition of the '*joint*' review team being published in the Annex of the Report. Moreover, the review contains little substantive information about the practical implementation of TFTP, on the grounds of confidentiality, rendering an assessment of its substantive content more challenging for any observer. Equally, the review of requests made to Europol for data, considered by the review team, as to whether they met the requirement to be as narrowly formulated as possible as regards data requested and searches made, were of redacted documents only, limiting the comprehensiveness of the review. Cumulatively, the effectiveness of the review was based upon a particularly limited view of the operation and implementation of TFTP. Ultimately, however, TFTP in this review is not credited with preventing terrorism but rather as having provided 'leads'. In support of this thesis, the EU team also confirmed that Europol had derived benefit from these 'leads'. It is hard not to be struck by the one-sided and US-centred nature of the power dynamic in the relationship emerging here.

Secondly, a self-review process conducted by Europol of its role with regard to TFTP was also recently published in 2011.[40] These functions seem difficult to assess at this remove. Europol expressly states that it only classifies information when necessary to protect the legitimate interests of the Member States, Europol's cooperation partners or the organisation itself but significantly stated that it initially classified US requests for data as 'RESTREINT UE/EU RESTRICTED.' However, later it said that the US imposed a 'SECRET UE/EU SECRET' classification on it, resulting in routine classifications of secrets and requests being conveyed through 'secure' diplomatic channels. Third, this review process by Europol itself was in turn to be subjected to harsh criticism

38. 70th Interparliamentary Meeting of the Transatlantic Legislators' Dialogue, Budapest, 29 June-1 July 1 2011.

39. 'Commission Report on the joint review of the implementation of the agreement between the European Union and the United States of America on the processing and transfer of financial messaging data from the European Union to the United States for the purpose of the terrorist finance tracking program', Brussels, 17-18 February 2011 (16 March 2011).

40. Europol delivered a review opinion pursuant to Articles 4, 9 and 10 of the Terrorist Finance Tracking Programme (TFTP) Agreement: 'Europol Activities In Relation To The TFTP Agreement Information – Note To The European Parliament (1 August 2010-1 April 2011)', The Hague, 8 April 2011, File No. 2566-566, Europol Public Information.

by the Europol Joint Supervisory Body in March 2011, after it had conducted its first inspection.[41] Pursuant to the TFTP Agreement, the Joint Supervisory body (JSB) is charged with the task of assessing whether Europol respected the provisions of personal data protection in the TFTP Agreement when deciding the admissibility of US written requests to Europol. The JSB reported that certain data protection requirements were not being met and that the requests received by Europol were not specific enough to decide whether to approve them or not. They complained notably that the use by Europol of oral information prevented the JSB from checking whether Europol could rightly have come to its decision. Moreover, the JSB further stated that it was unable to make its report completely available due to Europol's classification of the information which was inspected by it. All in all, this independent report is extraordinarily brief, consisting of just one page, despite the content of its critique. The independent and objective nature of the verification in the report must be cast in doubt in light of the challenges posed by the actions of Europol.

The application of justiciability criteria

That the TFTP agreement can generate justiciable issues worthy of judicial consideration seems beyond dispute and so the precise distillation of the issues in a methodology renders the political question doctrine useful here. Undoubtedly there is a role for the Court to play as regards reviewing this Agreement. Whether weak or strong review attaches to this Agreement may constitute the more challenging question. Equally, its definition of a regulatory act may become constitutionally quite significant. If the Court was to find that the agreement was not a regulatory act for the purposes of Article 263(4) TFEU and thus individuals could not litigate its contents, major access to justice questions would ensue. However, as regards the *Baker v. Carr* criteria, there is a textual commitment to the US agencies to transfer data and much discretion accorded to EU agencies such as Europol. There are standards and policies to be considered relating to high-level security but of a most unusual nature. Whether the Court would be able to consider or reveal the documentation challenged is a major question. The potential for embarrassment is great in the event of documents being openly reviewed and published. The reviews conducted so far and the classified nature of the documentation on the subject of the exercise suggest that only a 'low intensity' of review would be appropriate to high-level security. On the other hand, major fundamental rights questions are posed by the operation of the agreement. Legal problems raised by the operation of TFTP similar to PNR include fair procedures, access to justice, fundamental rights, privacy and proportionality. Again, however, it seems likely that Member States would resolutely defend national security exceptions and the exceptional nature of the prevention of terrorism by way of defence. The application of formal justiciability criteria suggests that the Agreement should not

41. Report on the inspection of Europol's Implementation of the TFTP Agreement, conducted in November 2010, by the Europol Joint Supervisory Body Report no. JSB/Ins, 11-07, Brussels, 1 March 2011.

be justiciable. By contrast, meritorious fundamental rights complaints could go undetected otherwise. There are significant shortcomings potentially in relation to the actual operation of the Agreement. However, the Agreement and its security-oriented context is, as Cremona and de Goede state, particularly disposed towards US-led concerns.[42] While the present analysis does not proceed to weigh these concerns definitively, the need for a precise and detailed methodology to assess and review TFTP seems apparent, something which a justiciability doctrine or explicit justiciability methodology can achieve.

The EU-US General Data Protection Framework Agreement

The General EU-US Data Protection Framework Agreement[43] under negotiation currently would be a long-term, general agreement to govern and catch all data that had been transferred and processed in the context of police and judicial cooperation in criminal matters by EU institutions, bodies, offices and agencies, EU Member States to US public authorities, covering or applying to all existing Agreements. This Agreement would be based as a matter of law in Articles 16 and 216 TFEU, neither of which appears to capture the ground-breaking nature of these legal relations. The former Article allows the Union to enact rules relating to protection of personal data, while the latter permits the Union to conclude an agreement with one or more third countries. When read together, these two legal bases seem to fail to capture the enormity of the legal changes wrought by the proposed Agreement that impact on the daily lives, travel habits, personal histories and family relations of every EU citizen. A striking feature of this proposed Agreement is the explicit and central place of judicial redress in the courts in relation to the Agreement. In fact, the Article 29 Data Protection Working Party[44] expressed concerns back in November 2010 that it had not been consulted on the content of the negotiation mandate for the agreement and that it had to rely on publicly available information as opposed to any particular guidance from the European Commission. The Working Party also outlined in detail the concerns of many about the application of the Negotiation Mandate and Agreement to all existing EU-US agreements, the lack of clarity as a matter of law about retroactivity forming part of the basis and operation of the Agreement, the respect for the principle of proportionality, national security exceptions and the reviewability of the Agreement in the US. The Draft Mandate later adopted by the European Commission in May 2010 allegedly purported to 'ring fence' many of these concerns, but this remains to be seen.[45]

42. See Cremona, op. cit. in note 30, p. 27 and also generally de Goede, op. cit. in note 30.

43. 'EU-US Negotiations on an Agreement to protect personal information exchanged in the context of fighting crime and terrorism', MEMO/11/203 Brussels, 29 March 2011; COM(2010) 252/2, Annexe au Document COM(2010) 252 PO/2010/3091. 'Proposal for a Council Recommendation to authorise the opening of negotiations for an agreement between the European Union and the United States of America on protection of personal data when transferred and processed for the purpose of preventing, investigating, detecting or prosecuting criminal offences, including terrorism, in the framework of police cooperation and judicial cooperation in criminal matters'.

44. Working Party on the protection of individuals with regard to the processing of personal data set up by Article 29 of the Directive (Articles 29 and 30 of Directive 95/46/EC of the European Parliament and of the Council 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): D(2010) Ares(2010)837566, Brussels, 19 November 2010.

45. 'EU-US Data Protection Agreement Negotiations', Memo/10/216, 26 May 2010.

The reciprocity between the legal orders of the EU and US on the ostensibly central principle of legal redress remains especially curious – what of the EU citizen in the US who alleges a grievance in respect of their data and its use, who is unable to litigate the US Privacy Act of 1974, confined as it is to US citizens? Or the US citizen in the EU – are they to be included within the ambit of judicial redress in this context? This renders null or hollow at least the promise of judicial redress in EU-US relations, e.g. TFTP, and strikes at the heart of effective and transparent global governance. Notably, a US Senate Resolution from May 2011 sought to urge the Department of Homeland Security not to enter into any agreement that would impose European oversight structures on the US.[46] Such a level of resistance does not seem matched by statements of reports from the European institutions generally. Thus while the EU and US may purport to express their shared values in the form of freedom, democracy, the rule of law and human rights, the disparities between the EU and the US as to practical enforcement of these values remains large. US concerns as to US citizens being tracked online created a recent 'push' by the White House and US Senators to enact a 'Privacy Bill of Rights' or 'Commercial Privacy Bill of Rights Act 2011',[47] but with exemptions for Federal and State governments and law enforcement agencies. Yet these moves are solely directed towards and motivated by US domestic concerns and have little if anything to do with legal measures taking effect between the EU and US.[48] The inability of non-US citizens to rely on the provisions of the US Privacy Act creates a challenge for judicial authorities in the EU, which must feed into justiciability concerns and careful consideration of the need for justiciability.

The application of case law tests

While the precise details of the agreement are not yet apparent, entailing that the *Baker v. Carr* criteria are not easily applied here, a range of US and EU authorities could potentially enjoy a broad range of discretion on the basis of this agreement. The over-breadth of the scope of the agreement is of concern here, as is the broad-brush invocation of national security concerns. The likelihood of national security exceptions being invoked here by the Member States is immense and, accordingly, the possibility to embarrass governments by review remains significant. The availability of documents for review is furthermore a concern – would justiciability be rendered almost impossible or futile, in the light of the less than satisfactory and less than comprehensive reviews that have been conducted so far, pursuant to the terms of the Agreement itself? 'Low intensity' judicial review seems likely, in the event of formal justiciability being applied. On the other hand, a multiplicity of fundamental rights concerns is raised by this Agreement. Privacy and proportionality remain values affected greatly by the operation of the Agreement and these values could, just as has happened with PNR and

46. S2798 Congressional Record – Senate 9 May 2011, Senate Resolution 174.

47. Julia Angwin, 'Senators Offer Privacy Bill to Protect Personal Data', *Wall Street Journal*, 13 April 2011.

48. Jennifer Valentino-Devries and Emily Steel, 'White House To Push Privacy Bill', *Wall Street Journal*, 15 March 2011.

TFTP, place the Agreement in peril, only if the Court chose to position itself as a fundamental rights Court subsequent to ECHR accession which ultimately is likely to be the case and which will enhance the requirement for judicial review and meaningful redress. The Executive 'bias' of the agreement and the post-Lisbon developments are of relevance to the context for review here.

Conclusion: formulating a methodology of justiciability for EU-US relations

The polycentric legal and political characteristics of EU-US relations renders them part of a broader category of global governance law. However, their impact on individuals, often in a far-reaching fashion, entails that rudimentary rule-of-law concerns are far from irrelevant. This is problematic in terms of justiciability. It is essential that EU-US relations are not considered political questions or affected by any immunity from review, otherwise many violations of citizens' rights would go unnoticed, the EU would fail to satisfy elementary norms of ECHR and international law and this outcome generally would be contrary to the explosive character of the *Kadi* decision. Formalising its theoretical foundations does not automatically entail that the Court should refuse to review questions surrounding EU-US relations or that justiciability must be denied to any form of political question. The 'boringly familiar catalog' of a textual commitment to another branch of government, a lack of manageable standards, policy analysis and embarrassment cumulatively may be overly rigorous to be applied to EU law and its more modest and imperfect separation of powers. The crucial question remains how an explicit statement of judicial redress in EU-US agreements will influence justiciability. An explicit methodology needs to be adapted to weigh all appropriate concerns. It is suggested here that a less than rigorous form of the *Baker v. Carr* criteria should be loosely deployed. A less than rigorous approach is justifiable given the absence in the EU of a constitutional system with the same formally articulated separation of powers that exists in the US. Equally, a strict and rigorous review methodology would preclude review by the Court of Justice of EU-US relations and would deprive meritorious litigants of the possibility of review.

Chapter 4

All for one, one for all: towards a transatlantic solidarity pledge

Daniel Hamilton and Mark Rhinard

Introduction

The tenth anniversary of the attacks of 11 September 2001 gives pause for thought and an opportunity to reflect on the next steps for the transatlantic security relationship. The attacks on that fateful day did more than highlight the increasing complexities of terrorism. They also cast global interdependencies and a widening threat environment into sharp relief. The world's common arteries and infrastructures, which generate great prosperity in normal times, were used by a small group of agents to wreak havoc in one of the world's most powerful countries. This lesson was repeated in subsequent, less dramatic events – the insidious use of cyber attacks, the cascading effects of ash clouds, or the societal-wide impact of pandemic outbreaks – and justified the flurry of activities that were undertaken on both sides of the Atlantic to secure the US and EU 'homelands'.

Ten years later, the dense network of arteries supporting open societies on both sides of the Atlantic remains vulnerable to disruption. While the initial flurry of activity produced a number of low-profile arrangements, such efforts have not been guided towards what must be our ultimate goal: achieving transatlantic resilience in a common area of freedom, justice and security. That goal can be revived, but it must be undergirded by higher-profile attention and a strong sense of mutual commitment, framed by a Transatlantic Solidarity Pledge that generates political impetus and direction to practical initiatives that could restructure and reorient EU-US security relations for the next ten years.

Transatlantic relations in perspective

Few who remember the events of 11 September 2001 will forget Europe's immediate call for solidarity in response. The options of quiet support, silence or even *schadenfreude* were rejected in favour of solidarity,

demonstrating the depth of shared purpose between Europe and the US honed over decades – and a sense of common vulnerability exposed in the new millennium. For the first time in its history NATO invoked Article 5 of the North Atlantic Treaty, the alliance's mutual defence clause. In their respective spheres, the EU and US complemented NATO action by focusing on bolstering internal security, including reforms in law, institutions and operations. The US approved new security provisions, headlined by the Patriot Act; amalgamated various domestic agencies into the Department of Homeland Security; and took a tougher stance on security across the board through intensive and extensive screening at US borders and airports, the US Container Security Initiative, and such international efforts as the Proliferation Security Initiative. The EU, both at national and supranational levels, undertook judicial reforms, boosted police cooperation, enhanced safety and security cooperation across the EU's policy sectors, and improved intelligence cooperation. Each reached across the Atlantic to improve data sharing and operational cooperation, including two new treaties on extradition and mutual legal assistance, much of it done quietly and conscientiously by mid-level officials.

To be sure, the aftermath of 9/11 also led to fissures in the relationship. The launch of the Iraq war, which led first to fractures within Europe and then to transatlantic tension, confirmed that some US methods in pursuing terrorism diverged from European preferences. Nor did certain US practices in prosecuting alleged terrorists – including extraordinary rendition and the opening of the Guantanamo prison camp – receive a warm welcome among European societies with a strong preference for prioritising civil liberties. Policy debates at the EU level also provoked dissension, including the initial approach of the US towards the terrorist finance tracking programme (or 'SWIFT' agreement) and US moves away from the EU level in favour of bilateral agreements on passenger name record (PNR) sharing. But for the most part, these remained policy disputes rather than fundamental ruptures.

Indeed, in broader perspective and with the benefit of hindsight, the most lasting effect of 9/11 on the transatlantic relationship was to highlight, if not directly accentuate, pre-existing trends influencing security considerations for both sides of the Atlantic. One such trend was the increasing depth of critical interdependencies in the global system. A handful of transboundary arteries carrying people, ideas, money, energy, goods and services criss-cross modern societies and contribute significantly to economic growth and prosperity. They are essential sinews of the global economy and of daily communications. Yet they are also susceptible to disruption in several ways. The networks carrying these vital elements can be preyed upon directly by dangerous agents. Or these networks can be disrupted indirectly in unforeseen ways. As Charles Perrow argues, modern infrastructures (energy and communication, for

instance) inter-connect in intricate ways that are poorly understood even by the technicians operating those systems.[1] Complex interconnections represent vulnerabilities in the global system: intentional or accidental disruptions can bring down the ability of societies to function. Just as governments traditionally protect their territory, so too must they protect their connectedness – the networks that bind them and their citizens with the rest of the world.

The second trend is the increasing complexity and opacity of threat agents. The capability of a small, nebulous group of attackers, planning and mobilising attacks across state borders, was the calling card of September 11. But the same dynamics hold whether we speak of infrastructure breakdowns triggering transcontinental power outages, natural disasters shutting down air traffic, or a communicable disease undermining public order in multiple cities. In today's threat environment, problems 'out there' immediately affect populations 'in here'. Equally disconcerting, initial threats may be less lethal than their knock-on effects – demonstrating the mutual vulnerabilities free societies have engineered for themselves. The difficulties of predicting the onset of dangerous threats, and the fact that many threats originate and become manifest in either the US or EU, and then can be amplified through the dense weave of transatlantic arteries binding European and American societies, underscore the importance of working together to tackle complex threats.

A third trend was confirmed in the aftermath of September 11: shifts in relative power in the world order. The sense of vulnerability of the world's most powerful country exposed by the attacks was followed by a decade of US deployment of military power against a nebulous enemy – with varying degrees of success. While huge amounts of energy and resources were devoted to hunt for Osama bin Laden after September 11, 'the future was being written in Beijing, Delhi, Rio and beyond'.[2] Rising powers are clearly seeking influence commensurate with their growing presence in their respective regions and on the global stage. Whether they will challenge the prevailing order or accommodate themselves within it depends significantly on how Europe and the US engage, both with them but also with each other.

After all, the EU and US are at the centre of the dynamic, open Western networked order. The more united, integrated, and interconnected that order is, the more likely others will join and participate, rather than resist or stand apart. If a key strategy in a G-20 world is to protect and reinforce the institutional foundations of Western order, the EU-US relationship takes on a central importance. Being able to adopt common normative postures, when the normative identity of many rising powers is in flux, constitutes a comparative advantage in a world shaped by relative power.[3] This insight applies directly to issues related

1. Charles Perrow, *Normal Accidents: Living With High-Risk Technologies* (Princeton: Princeton University Press, 1984/1999).

2. Philip Stevens, 'No, 9/11 Did Not Change the World', *Financial Times*, 1 September 2011.

3. Giovanni Grevi and Richard Youngs, 'What Norms for a New-Order Transatlantic Relationship? European Perspectives,' in Daniel Hamilton and Kurt Volker (eds), *Transatlantic 2020: America and Europe in a Changing World* (Washington, DC: Center for Transatlantic Relations, 2011); G. John Ikenberry, 'The Rise of China and the Future of the West,' *Foreign Affairs*, January/February 2008; G. John Ikenberry, 'The Future of the Liberal World Order,' *Foreign Affairs*, May/June 2011.

to upholding open, common areas of freedom, security and justice. The rules of the road for the regulation of cyberspace, for instance, will prove a contentious issue, one on which autocratic and democratic societies will stake out different positions. If the US and Europe can agree on basic international norms and standards, such measures will likely provide the basis for global arrangements. If the US and Europe fail to agree or diverge in their approaches, however, in a world of diffuse power no such global standards are likely to emerge – or both sides could be faced with standards and norms set by others.[4]

The problems and promise of cooperation

These trends demand a reoriented approach to EU-US security cooperation in an unpredictable and shifting threat environment. This relationship, we argue below, is best directed toward the pursuit of transatlantic resilience in a common area of freedom, justice and security. Unfortunately, there is a growing mismatch between the nature of our challenges and the institutional frameworks, strategic-action capacity, and practical tools at our disposal to achieve this goal.

Europe and the US do not lack for institutional frameworks: transatlantic cooperation takes place amidst a veritable alphabet soup of mechanisms and institutions. Many observers focus first on NATO, which remains an essential transatlantic security institution and is busier than ever managing complex operations in places like Afghanistan and Libya – not least since it reframed its role in global security in its 2010 Strategic Concept. But NATO is neither equipped, nor the appropriate vehicle, to take the lead on building transatlantic resilience. Many areas of law enforcement, domestic intelligence, civil security and disaster response are well beyond NATO's area of competence, and are better handled in other venues. NATO could – and should – complement such efforts, for instance by helping (as it has already done) with security for mass public events, dealing with the consequences of various natural disasters, or coping with a catastrophic terrorist event, particularly one involving agents of mass destruction. But in most of these areas NATO would be at most a supporting player, not the lead actor.

The EU-US relationship is increasingly the vehicle for pursuing common goals related to 'homeland' security. That relationship, especially when seen to encompass the relations the US maintains with the EU's 27 Member States as well as its Brussels-based institutions, is among the most complex and multi-layered economic, diplomatic, societal and security relationship that either partner has. Not only does cooperation run broad and deep – a critical consideration when designing resilience-enhancing initiatives across the policy spectrum – but the two sides

4. For more on this issue, see Jason Healey, 'Breakthrough or Just Broken? China and Russia's UNGA Proposal on Cyber Norms'; UK Foreign Minister William Hague, 'Security and freedom in the cyber age – seeking the rules of the road,' Munich Security Conference, 4 February 2011; 'Nations call on UN to discuss cyber security,' *China Daily*, 14 September 2011.

are also enmeshed in security interdependencies. Add to this the fact that the EU is increasingly the institution that European governments use to coordinate their own security policies and action, and it is hard to deny that the EU will be America's essential partner in many of the areas beyond NATO's purview and capacities.

Yet the US-EU relationship has never been properly framed in strategic terms. The US has no link to European partners in the EU that is equivalent to its link through NATO, even though most of those partners are members of both organisations. There is insufficient understanding in many (but not all) Washington circles about the rising role of the EU not only in justice and home affairs matters but in protecting citizens and critical infrastructures more broadly. The EU shoulders some of the blame: the nature of its bureaucratic structures, and the division of national-supranational competences, makes strategic dialogue difficult. US Secretary of State Hillary Clinton touched upon this reality when she noted to her European colleagues, 'the system is designed so we can't have a strategic dialogue.'[5] A strategic partnership would encompass regular, shared assessments of key security threats, the ability to deal with the daily grind of immediate policy demands while pursuing long-term priorities related to ensuring security, prosperity and values, and the capacity to harness the full range of resources in building complementary responses to common challenges. Today, we do not have that relationship.[6]

Instead, the US-EU relationship is often pursued as a kind of technocratic exercise in which laundry lists of deliverables put forward by a range of agencies are heralded and then forgotten. There is little sense of urgency or overall direction, and issues seem to rise on the agenda in a disparate and unpredictable fashion. To be fair, there are instances of considerable success, such as when US and EU agencies share information, work together to counter the financing of terrorism, cooperate on customs procedures, and, in some cases, exchange liaison officers. But those issues tend to be caught up in high-profile, occasional dust-ups. In early 2010, new US-EU treaties on extradition and mutual legal assistance entered into force. Of course, each side has concerns which have hampered full cooperation, for instance European unease over data privacy[7] and treatment of US detainees; opposition to death penalty provisions in some US states, or congressionally-mandated provisions for 100 percent screening of US-bound cargo containers. US authorities, in turn, have been concerned that rendition-related criminal proceedings against US officials in some EU states could put vital counterterrorism cooperation at risk.

For the most part, however, the transatlantic homeland security agenda has fallen victim to *ad hoc*, reactive responses that are not commensurate with the challenges at hand or the depth of our interdependencies.

5. Cited in Daniel Hamilton, (ed.), *Shoulder to Shoulder – Forging a Strategic US-EU Partnership* (Washington, DC: Center for Transatlantic Relations, 2010).

6. Ibid.; see also Ronald D. Asmus, 'New Plumbing, New Purposes – Rebuilding the Transatlantic Alliance', *American Interest*, November/December 2008.

7. In early 2010, the European Parliament voted against final approval of the SWIFT agreement on the grounds that it did not sufficiently protect the privacy of citizens' personal data. The US and the EU subsequently re-negotiated the agreement with added safeguards, and the European Parliament approved the new version in July 2010. Some observers assert that a broader US-EU framework agreement on principles of privacy and data protection would help ease European concerns and promote closer cooperation.

Although we have plenty of transnational institutions at our disposal, we are not harnessing those institutions to forge cooperation across a range of polices. Although political attention is occasionally raised over transatlantic agreements, there is no overarching vision to guide and benchmark ongoing work between agencies and bureaucracies. And although we understand the thick web of functional interdependencies between us, we have limited tools at our disposal in only a scattered number of policy areas (e.g. container security, data exchange, terrorist financing). Considering the mutual damage that could be done if the vital arteries crossing the Atlantic were to be disrupted, more needs to be done.

We propose framing our joint efforts towards building transatlantic resilience in a common area of freedom, justice and security. The concept of resilience, gaining ground in policy debates and research environments on both sides of the Atlantic, is defined as the ability to regain functionality swiftly after a disturbance. Achieving resilience requires heterogeneity in systems, processes and responses and an improved understanding of how those systems work. It is not simply a matter of dealing with consequences; anticipation and pre-emption are crucial. A strategy of resilience seeks to ensure that the basic structures and critical functions of our interconnected societies remain strong and can continue even in the face of natural or man-made disasters.[8] This suggests advanced work to strengthen, and/or build redundancies, into transatlantic arteries operating at the technical, social and even political levels. Initiatives at each level must be integrated into a comprehensive strategy with a clearly identifiable goal: achieving transatlantic resilience in a common area of freedom, justice and security.

Recent developments in both the US and EU bode well for a resilience agenda. The US is more willing of late to contemplate shared vulnerabilities and shared responses. Chastened by poor international coordination following 9/11 and Hurricane Katrina, the US changed many traditional inward-looking approaches and procedures and has reached out to its neighbours and to other partners to improve joint prevention, preparation and response activities.[9] In November 2011, the US and EU conducted a joint readiness exercise using the scenario of a common cyber attack and signed a partnership agreement on cooperation towards disaster risk reduction and response.[10]

For its part, the EU has grown into a 'worthy partner' over the past ten years through an expanded role in protecting European citizens and critical infrastructures. Across the EU's many policy competences, security and safety measures as diverse as food contamination regulations and explosive substance controls are being adopted to flank the functional regulations of the internal market.[11] These initiatives have developed alongside more explicit security initiatives related to counterterrorism,

8. Mark Rhinard and Bengt Sundelius, 'The Limits of Self-Reliance: International Cooperation as a Source of Resilience', in Louise Comfort, Arjen Boin and Chris Demchak (eds.), *Designing Resilience: Preparing for Extreme Events* (Pittsburgh: Pittsburgh University Press, 2010); Arjen Boin, 'Enhancing Societal Security in the Face of Transboundary Crises: Pointers for Transatlantic Cooperation,' unpublished paper prepared for Center for Transatlantic Relations/ PACER, January 2009.

9. Anne C. Richard, *Role Reversal: Offers of Help from Other Countries in Response to Hurricane Katrina* (Washington, D.C.: Center for Transatlantic Relations, 2007).

10. For the cyber attack readiness exercise, see Commission Press Release IP/11/1305, 3 November 2011 ('Digital Agenda: EU & US conduct readiness tests for cyber attacks in "Cyber Atlantic 2011"'. EU-US cooperation on disaster risk reduction and response cooperation is reported in Commission Press Release IP/11/1365, 17 November 2011 ('Cooperation in disaster management: the European Union and the United States take a major step forward'). Although both efforts are a step in the right direction, they are emblematic of *ad hoc* approaches which, as we argue below, should be joined up in a more strategic framework.

11. Arjen Boin and Mark Rhinard, 'What Role for the European Union in Transboundary Crisis Management?', *International Studies Review*, vol. 10, no. 1, 2008, pp. 1-26.

air security, cybercrime, explosives, and borders (to name just a few). No less than four high-level strategic agreements have been put in place in recent years, including the External Security Strategy (2003), the Counter-Terrorism Strategy (2005), the Solidarity Clause (2009), and the Internal Security Strategy (2010). The treaty-level 'Solidarity Clause' (Art. 222, TFEU) is especially noteworthy, given that EU Member States have pledged mutual support in the face of a range of new threats. That clause obliges governments to jointly assess new threats, to coordinate themselves closely in the event of an attack, and to provide mutual assistance to a stricken state.[12] Taken together, these documents craft a vision of the EU's responsibilities in an increasingly complex global security environment and prioritise cooperation and multilateral solutions. While none of these initiatives will replace national prevention and response responsibilities in Europe, they are highly compatible with a resilience agenda.

Moving forward

European Commissioner Cecilia Malmström has made the case clearly and directly: 'an attack on Baltimore is as much an attack on Berlin or Brussels. Our societies are so open and interlinked that no matter if an attack occurs in Europe or the US we will both pay the price'.[13] We echo that sentiment and go one step further in calling for a Transatlantic Solidarity Pledge: a commitment by the EU and US to act in a spirit of solidarity – refusing to remain passive – if either is the object of an attack, the victim of disaster or exposed by a breakdown in critical infrastructure. Reflecting the orientation of the EU's Solidarity Clause, both sides would commit to mobilising all instruments at their disposal to:

- Prevent imminent threats;
- Protect democratic institutions and civilian populations from threat; and
- Assist one another at the request of the respective political leadership in the event of an attack, disaster or societal-wide breakdown.

Implementation of a Transatlantic Solidarity Pledge is predicated on a common threat assessment (such as the one required by the EU's Solidarity Clause) and would require EU and US officials to acknowledge, evaluate and prioritise threats to the shared arteries spanning the Atlantic. Threat assessment could be used as a guide for ongoing capacity building in the form of advanced planning and prevention in line with a resilience approach.[14] Yet the Pledge would also require

12. Sara Myrdal and Mark Rhinard, 'Empty Letter or Effective Tool? Implementing the EU's Solidarity Clause', *UI Occasional Paper* no. 2 (Stockholm: Swedish Institute of International Affairs, 2010).

13. Cecilia Malmström, 'The EU Internal Security Strategy – what does it mean for the United States?' Speech to the Center for Transatlantic Relations, Johns Hopkins University SAIS, 8 December 2010.

14. Transatlantic risk assessment could be grouped in terms of economic, geopolitical, technological, societal and environmental risks. Working under the 'first, do no harm' principle, officials in the EU and US must assess how such risks are likely to disrupt critical arteries, and what joint initiatives are necessary to improve resilience.

thinking through operational response requirements in the event of a major transatlantic breakdown.

A Transatlantic Solidarity Pledge would fill an important gap in the transatlantic community's deep and integrated relationship. At the moment, the only commitment Americans and Europeans have to each other is through NATO, and that commitment is defined in the North Atlantic Treaty as response to 'armed attack.' Yet the types of disruptive challenges we face today do not fall easily under traditional definitions of 'armed attack.' In addition, most of these challenges are more civilian than military. Moreover, the US and the EU have no equivalent commitment to each other. If the relationship is truly to be strategic and effective, the partners would also underpin their activities with a binding sense of common purpose.

Adopted by political leaders on both sides of the Atlantic, a pledge would signal an appreciation of the complexity of modern threats, the interconnectedness of European and American societies, and the willingness of the EU and US to stand together in a shifting world. It would signal mutual recognition of the need for democratic societies to complement traditional approaches geared to protecting territory with high-priority efforts to protect critical functions of society. More specifically, a Transatlantic Solidarity Pledge would create key preconditions for advancing overall resilience: political impetus, bureaucratic guidance and operational mechanisms towards that goal.

Although total political attention to a particular topic is never possible (or perhaps desirable), transatlantic attention to building a common area of freedom, security and justice has declined significantly. NATO has taken the latest initiative in reconstructing its strategic concept while EU-US relations across a much broader spectrum of issues have languished. This is unfortunate, since officials throughout government are at least partly influenced in their own work by high-level signals and priority-setting. Agreement on a Transatlantic Security Pledge would boost political impetus across the spectrum and recalibrate security cooperation towards a clear purpose: building resilience into transatlantic infrastructures. A high-profile pledge of this nature would help rebuild a sense of common cause across the Atlantic and set priorities to prevent or prepare for any future crisis. This impetus could carry over into diplomatic initiatives in the 'alphabet soup' of transatlantic cooperation frameworks directed at improving coherence through strategic direction.

At the bureaucratic level, a Transatlantic Solidarity Pledge could set the framework for improved technical cooperation among European and US agencies and departments. This level of cooperation, which currently takes place but needs new bearings, should focus on the

key transatlantic infrastructures most susceptible to attack and/or disruption. Our studies boil those infrastructures down to five key arteries carrying energy, people, money, goods and services, and data across the Atlantic upon which transatlantic societies rely.[15] Focus must be placed on the ways these arteries can be made not just more robust – but also more resilient – in the face of disruptions. A focus on these arteries – including how to enhance resilience and manage complicated cross-over disruptions – could guide work related to implementing a Transatlantic Solidarity Pledge.

Towards that end, a renewed focus on coordination could be placed on relations between EU and US operation centres – with the task of providing early warning, situational awareness and crisis coordination support. Such centres could include the DHS National Operations Center (NOC), FEMA's National Response Coordination Center (NRCC), the EU Monitoring and Information Centre (EU MIC) and the EU Situation Centre (SitCen) in Brussels. These objectives require regular exercises between EU and US officials to familiarise themselves with procedures and protocols in working together. Other needs include joint investigation teams, including Europol and Eurojust, to cooperate on cases that cross international borders; enhanced cooperation between the US Coast Guard and related agencies with Frontex, the EU border protection agency; collaboration on resilience-related research for instance between the European Security Research and Innovation Forum (ESRIF) and similar US efforts; and development of a EU-US Critical Vulnerabilities Security Action Plan to generate mutually supporting strategies to address their own critical foreign vulnerabilities.

Guidance for technical cooperation includes renewed focus on improving relations between public agencies and the private sector. The private sector owns most of these infrastructures – both actual facilities and networks – yet has its own views of protection that may differ from those of governments. For example, global movement systems are integrally linked in today's highly networked and interconnected global economy. The drive to improve efficiency has made these global movement systems more vulnerable not only to attack by terrorists, but to cybercrime and even natural disasters and extreme weather. A EU-US public-private Global Movement Management Initiative (GMMI) could offer an innovative governance framework to align security and resilience with commercial imperatives in global movement systems, including shipping, air transport, and even the internet.[16] And if the EU and US could achieve agreement, the norms and standards that would emerge could provide a framework for global arrangements. A Transatlantic Solidarity Pledge would generate new impetus for the public and private sectors to work together to advance overall resilience.

15. See, for instance, Anja Dalgaard-Nielsen and Daniel S. Hamilton, *Transatlantic Homeland Security* (London/New York: Routledge, 2006); Esther Brimmer (ed.), *Transforming Homeland Security: US and European Approaches* (Washington, DC: Center for Transatlantic Relations, 2006); Antonio Missiroli (ed.), 'Disasters, Diseases, Disruptions: a new D-drive for the EU', *Chaillot Paper* no. 83 (Paris: EU Institute for Security Studies, 2005); Robert Whalley, 'Improving International Co-ordination and Co-Operation on Homeland Security/Societal Security and Resilience Issues,' unpublished paper prepared for Center for Transatlantic Relations/PACER, January 2009; Jonathan M. Winer, 'An Initial International Cooperation Agenda on High Consequence Events for the Obama Administration,' unpublished paper prepared for Center for Transatlantic Relations/PACER, January 2009.

16. This idea is drawn from a report by IBM Global Business Services, 'Global Movement Management: Commerce, Security, and Resilience in Today's Networked World,' and a 2005 paper entitled 'Global Movement Management: Security the Global Economy,' available through www.ibm.com/gbs/government. See also Stephen E. Flynn and Daniel B. Prieto, *Neglected Defense: Mobilizing the Private Sector to Support Homeland Security* (New York: Council on Foreign Relations, 2006).

An EU-US Transatlantic Resilience Council – operating at a similar level as the Transatlantic Economic Council and the Transatlantic Energy Council – could be formed to operationalise this initiative, integrating the discussion on homeland security, justice and freedom across all sectors and serving as a cross-sector forum for strategic deliberations about threats, vulnerabilities, and response and recovery capacities that cut across sectors and borders. This group would complement existing professional work within established but bureaucratically fragmented fora, such as the Policy Dialogue on Borders and Transportation Security. Although we recognise that new institutions are not the first imperative for building resilience, we are convinced that some degree of structured oversight between both blocs is needed to provide strategic perspective on where EU-US cooperation is working and where more attention is needed.

In sum, a Transatlantic Solidarity Pledge, coupled to a concerted package of focused initiatives, would generate the necessary political attention, administrative direction, and operational mechanisms to bind the transatlantic relationship tighter in a time of increasing threat complexity and global flux. It would reaffirm the continued vibrancy of the transatlantic partnership, yet tune it to new times and new challenges. It would guide bureaucracies and balance the traditional focus on 'pursue and protect' strategies with a greater focus on prevention and response. The need to prepare for resilience in advance while being ready for effective, joint crisis response is the essence of the initiative and is unlikely to generate significant political opposition on either side of the Atlantic. It signals the need – and the pathway – for two historical partners to renew and reenergise their relationship for a new global context. Our ultimate goal should be a resilient Euro-Atlantic area of justice, freedom, and security that balances mobility and civil liberties with societal resilience.

International resilience efforts must be driven by the transatlantic community, because no two continents are as deeply connected as the two sides of the North Atlantic. The US and the EU are each enmeshed, of course, in a much broader web of inter-continental networks – but the transatlantic relationship is the thickest weave in the web. In terms of values and interests, economic interactions and human bonds, the EU and the US are closer to one another than either is to any other major international actor. And if the two actors who are most similar cannot organise themselves together to safeguard their deep connectedness, it is highly unlikely that either side would be able to be very successful doing the same with other systems much less like its own. Successful transatlantic efforts, on the other hand, can serve as the core of more effective global measures – based on norms and standards that can protect our people while reflecting our values.

Part Two: Implementing the transatlantic agenda globally

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Chapter 5

Transatlantic approaches to border reform in the EU's Eastern Neighbourhood

Xymena Kurowska

Introduction

Border-related reform constitutes part of security sector reform and, more broadly, externally-assisted state-building, often defined as the construction of effective governmental institutions in the recipient state. It is however also seen as 'milieu shaping' aimed at the projection of a system of governance which creates a favourable environment for an actor. It is to shape 'the other' in an attempt to protect 'the self'. The EU explicitly formulates such an approach in the European Internal Security Strategy, a document which urges the relevant actors to 'work with our neighbours and partners to address the root causes of the internal security problems faced by the EU'.[1] In this sense, border-related reform becomes a means of preventing and indirectly managing crises in the neighbourhood.

The EU and US have long engaged in such projections in the EU's Eastern Neighbourhood and broadly conceived border-related reform remains a top priority for both. The transatlantic partners also lend each other a hand and step in for one another to achieve common goals when high-profile engagement of the other is less welcome.[2] Although their rationale and focus differ as the ensuing sections describe, there has been a steady buildup of *acquis atlantique* in the region, in line with the 1995 New Transatlantic Agenda which calls for cooperation in the promotion of stability, democracy and development. There has emerged a distinct division of labour which reflects and accommodates the priorities of both parties regarding shaping the Eastern Neighbourhood 'milieu', the substantive merger of their agendas at the foreign policy level, and their posture towards Russia as an important player in the region.

1. Council of the European Union, *Internal Security Strategy for the European Union: Towards a European Security Model*, Publications Office of the European Union, Luxembourg, March 2010.

2. For a more elaborate argument on the EU-US division of labour in international crisis management, see Xymena Kurowska and Thomas Seitz, 'The role of the EU in international crisis management – innovative model or emulated script?', in Ana Juncos and Eva Gross (eds.), *EU Conflict Prevention and Crisis Management* (London: Routledge, 2011), pp. 29-43.

The transatlantic 'norm to reconstruct'[3] and the essential synergy in terms of border security paradigms have underpinned the consolidation of this cooperation. In the post- 9/11 environment, EU and US policy has increasingly been marked by a shared recognition that the defence of the domestic realm is not limited to the physical protection of their demarcated borders. The current paradigm aims at containing the spillover of perceived threats before they infiltrate domestic spaces. Externally assisted border-related reform, under the label of integrated border management (IBM)[4] within the EU's policy and border security within the context of US international assistance, is one strategy in this respect. It has come to constitute a significant aspect of interaction with countries in Eastern Europe, the South Caucasus and Central Asia.

The EU and US pursue similar goals in border-related reform and the operational cooperation has been generally smooth if usually not formally regulated.[5] Even if grey areas exist, the US predominantly caters for technical assistance, equipment procurement and the fight against the trafficking of nuclear material and the proliferation of WMD. The EU in turn aims at the systemic and comprehensive reform of Eastern European societies in its own image, with border reform constituting a vital element of this approach – and indeed one that is not just limited to actual borders. Such an approach supports the EU's well-articulated rationale. As Ilka Laitinen, the executive director of Frontex, puts it: 'Border management goes beyond the border line – it happens in third countries and consular posts, it happens across the border in the border zones, at the border itself and inland where migration authorities are executing their tasks.'[6]

Yet the synergy that informs transatlantic approaches to border reform is currently becoming strained as a result of the EU changing modes of providing assistance. The EU's commitment to the Paris Declaration on Aid Effectiveness, the shift away from project-based to sector-wide assistance[7] and the streamlining of assistance through direct budget support[8] unsettles the established operational parameters of cooperation. Thus far it has mainly unfolded at the operational level through the network of individuals involved in specific project implementation who coordinated their dealings in a direct manner, circumventing somewhat the formal channels of troublesome local bureaucracy. The principle of local ownership, which next to the limited impact of project-based aid features heavily in the EU's justification for the change, is questioned by the American interlocutors who see such reasons more in terms of 'good talking points'. Does this contentious issue expose a larger crack in transatlantic cooperation in international security sector reform? And, more specifically, has the low-level networked coordination been in fact about daily de-conflicting rather than synergising? An answer in the affirmative does not necessarily challenge the argument about the

3. Andrew Williams, 'The Bringing of Peace and Plenty of Occult Imperialism', *Global Society*, vol. 21, no 4, 2007, pp. 539-51.

4. IBM was first defined within the context of Community assistance for the Western Balkans. For further information about the programme, see: http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/cards/index_en.htm. For the updated concept of integrated border management, see 'Guidelines for Integrated Border Management in the Western Balkans', January 2007, available online at: http://ec.europa.eu/enlargement/pdf/financial_assistance/cards/publications/ibm_guidelines_en.pdf.

5. Such cooperation usually takes the form of non-institutionalised donors' meetings and informal briefings.

6. Intervention by Ilka Laitinen, 'EU Model Of Integrated Border Management Today' at the International Conference, 'Integrated Border Managements: Achievements and the Way Ahead', Kyiv, Ukraine, 14-15 April 2010.

7. The sector-wide approach aims to develop strategies that would tackle a systemic reform of a particular sector rather than pouring the funding into separate projects which may be rather uncoordinated overall.

8. See a recent Communication of the European Commission, 'The Future Approach to EU Budget Support to Third Countries', COM (2011) 638 final, Brussels, 13 October 2011.

overarching transatlantic convergence of goals. But it does demonstrate the contradiction-filled implementation of any model of reform.

To put these questions in context, this chapter first looks into the rationale and modes of engagement that the EU and US have developed in border reform assistance in the region. It examines several undertakings with various geometry of transatlantic input to illustrate different forms the transatlantic division of labour takes and the political climate within which it operates. They in principle demonstrate complementarity and the accommodation of different practices at the service of the higher calling of democracy promotion. The setup of the Border Support Team (BST) in Georgia where the EU's low-profile engagement attended to Russian sensitivities in the light of possible foreign deployment on the Russian-Georgian border is a good illustration. The intensive visibility campaign for EU Border Assistance Mission to Moldova and Ukraine (EUBAM) did not obstruct its inconspicuous yet rather effective attempts at improving the situation at the Moldovan-Ukrainian border, including the Transdnistrian section over which Moldova has no control. The comprehensive mandate of EUBAM[9] also shows the multifaceted character of border reform whose scope reaches beyond infrastructure building, training and equipment procurement. The HUREMAS projects geared towards comprehensive restructuring of the Ukrainian State Border Guard Service (SBGS) is a good example. It is furthermore a showcase of very strong transatlantic cooperation where the US State Department follow-on projects developed to foster Schengen-compliant standards in SBGS. The EU's visa-free dialogue with Ukraine and Moldova represents the most conditionality-based instrument of inducing reform in the area of freedom, security, and justice. The evident fragmentation of this landscape begs the question about synergy between wide-ranging initiatives that would go beyond the proverbial 'throwing a lot of mud at the wall in the hope that something sticks'.[10]

Frameworks for border reform in the Eastern Neighbourhood

US: Pragmatic pursuit of global border security

The Freedom Support Act passed by the Congress in October 1992 still organises much of security-related assistance for the former Soviet Union carried out in the interests of US national security,[11] strengthened by the impact of 9/11. Many of these activities are coordinated by the Defense Threat Reduction Agency within the Defense Department, tasked to counter WMD worldwide. Counter-proliferation activity remains the cornerstone of the US border-related assistance[12] yet the Bureau of

9. See the website: http://www.eubam.org/en/about/what_we_do for the current formulation of the mandate.

10. See a commentary on the EaP summit in September 2011: Patryk Pawlak and Xymena Kurowska, 'More for more or more of the same?', *EU Observer*, 5 October 2011. Available at: http://euobserver.com/7/113818.

11. John T. Woolley and Gerhard Peters, The American Presidency Project. Santa Barbara, CA. See: http://www.presidency.ucsb.edu/ws/?pid=21658.

12. Distinct channels include: (1) the Nuclear Smuggling Outreach Initiative coordinated by the Department of State works through building bilateral partnerships with key countries to combat the global threat of nuclear smuggling; (2) the Export Control and Related Border Security programme tasked to prevent the proliferation of WMD and advanced conventional weapons whose assistance is about providing training in customs, export control system, licensing, government-industry cooperation, and interagency cooperation coordination; (3) in the Department of Energy, the Office of Second Line of Defense works to prevent illicit trafficking in nuclear and radiological materials by securing international land borders, seaports and airports that may be used as smuggling routes for materials needed for a nuclear device or a radiological dispersal device.

International Narcotics and Law Enforcement Affairs (INL) in the US Department of State have the broadest agenda regarding justice and law enforcement reform. The explicit aim of INL projects in Ukraine is to harmonise Ukrainian justice and law enforcement systems with those of the EU. The US sees bringing Ukraine's laws and institutions in line with the EU's as a prerequisite for Ukraine's Euro-Atlantic integration and for the creation of credible Ukrainian law enforcement agencies. Achieving this goal is also regarded as strengthening US homeland security and anti-terrorism efforts as well as US efforts to combat transnational crime, including organised crime, drug trafficking, trafficking in persons, and corruption.[13] In Georgia, the US objectives are similarly to support close ties to Euro-Atlantic institutions. Subsequent to the post-Rose Revolution Georgian commitment to build American-style law enforcement and legal reform systems, the INL has been modernising the justice sector. This might result in conflicting reform priorities emphasised by the EU and US regarding concrete legal solutions. The debate over the introduction of plea bargaining and the jury system, endorsed by the American Bar Association and questioned (unsuccessfully) by EUJUST *Themis*, an EU rule-of-law mission to Georgia in 2004-5, brought this into sharp relief.[14] It was seen by *Themis* as a transposition of an American judicial practice which did not fit the conditions of the Georgian system, plagued by corruption and non-transparency.

In principle still the US explicitly aligns itself with the EU's goal of promoting IBM as part of pursuing global border security and it contributes extensively to projects aimed at bringing the Eastern Neigbourhood borders in line with European standards. It is also quite pragmatic about modes of implementation which mostly depend on whether the US brand can aggravate political sensitivities, including from Moscow, or whether it should rather increase the level of domestic political support. Much importance is assigned to implementation capacities of international organisations, mainly the International Organisation for Migration (IOM) and in the EU's case also the UNDP. The US pragmatic approach translates on the ground into hands-on emphasis on border security in the context of anti-proliferation activities, the physical building of border crossing points, infrastructure and the protection of the green border, and the procurement of the relevant equipment and the delivery of the corresponding training. This is not to say that the EU does not procure equipment, which in fact it does abundantly. If however for the US delivering equipment is an end in itself, a means by which to improve physical security of a border, for the EU it is a way of gaining credibility, a particular kind of buy-in and a foot in the door of border services which invariably state their priorities as a list of equipment to procure.[15] There exists something of a 'beauty contest' for the favours of the local border guards and the EU needs to adapt to the rules of the game.

13. See INL programme for Ukraine: http://www.state.gov/p/inl/rls/fs/113051.htm.

14. See for example the evaluation in Xymena Kurowska, 'More than a Balkan crisis manager. The EUJUST *Themis* in Georgia', in: Michael Merlingen and Rasa Ostrauskaite (eds.) *The European Security and Defence Policy: An Implementation Perspective* (London and New York: Routledge, 2008), pp. 97-110.

15. This was very clear in the bottom-up enlargement of EUBAM's mandate by creating a project, BOMMOLUK, concerned with technical assistance and equipment procurement.

The EU's strategy of reshaping the neighbourhood in its own image to pre-empt spillover

The geographic proximity of the Eastern Neighbourhood calls for a different *modus operandi* in the EU's case. Its specificity is informed by what gets defined as the externalisation of internal security concerns.[16] The threat associated with irregular border activity is to be neutralised before it reaches the EU border, *ideally* by systemic transformation of the neighbour in the EU's own image. Border-related reform has been an important means through which to achieve this. Ukraine has the longest regional record of cooperation with the EU in the field of freedom, security, and justice (FSJ), with the first EU-Ukraine Action Plan adopted in 2002. The European Neighbourhood Policy (ENP) launched in 2003 and the 2009 initiated Eastern Partnership (EaP) are designed to streamline the attempts at more efficient border management reform and sectoral integration. ENP Action Plans (APs) feature cooperation in FSJ whose one important focus is on border management and the management of irregular migration and one of the five flagship initiatives within the EaP concerns IBM. While political reform takes pride of place in ENP APs, FSJ continues to be the area of intensified activity. This has not translated into increased EU influence on decision-making in Ukraine, as the patchy record of reform indicates. Visa liberalisation dialogues containing the same provisions for border reform but based on direct conditionality may induce reform more effectively owing to the promise of tangible short-term political and practical benefits in obtaining Schengen visas for ordinary citizens.

While the European Commission has been the major actor in streamlining border-related reform, Frontex, an EU agency tasked with managing external borders, has gained ground as an endorser and operational partner for introducing IBM practices. It has signed cooperation agreements with Ukraine and Moldova, developed operational ties through joint operations which serve as training on-the-job and promoted the EU Core Curriculum for Border Guards. The IBM-driven rationale serves as an underlying principle for the series of HUREMAS projects in Ukraine, EUBAM and the assistance to drafting the Georgian strategy for border management reform (2005-11). These examples show goal convergence, complementarities and the division of labour in the transatlantic involvement in the area.

Variable geometry of projects

A series of HUREMAS projects (2006-10)[17] aimed at reforming human resources in the Ukrainian SBGS, improving IBM, and nudging the service towards a law enforcement agency rather than a military

16. See, for example, Wyn Rees, 'Inside out: the External Face of EU Internal Security Policy', *Journal of European Integration*, vol. 30, no. 1, 2008, pp. 97-111.

17. See e.g. http://www.iom.int/jahia/Jahia/pid/1979 for a brief backgrounder.

structure. Together with follow-ons, the projects reflect two characteristic phenomena. First, they exemplify the transatlantic merger of goals in the border reform. While HUREMAS was only marginally co-funded by the State Department, two spin-off projects, EU-compliant training standards and the development of European compliant risk assessment, have been entirely funded by the US Department of State and implemented by the IOM.

Second, HUREMAS brings out the role of new Member States in the introduction of the Schengen practices as culturally competent carriers of the experience of transition. HUREMAS was implemented based on the continued relationship between the SBGS, the Polish Border Guard (PBG), and the National Police of Hungary that IOM has *nurtured*.[18] The PBG proved particularly instrumental thanks to the cultural closeness and the experience of Schengen-related reform. Before the reform in the early 1990s, Polish border guards were educated in a similar fashion to the SBGS through a 4-year military academy. The similarities in terms of professional history helped in grasping the entrenchment of a particular institutional culture and gave hints on how to lobby for reform within it. The HUREMAS method was thus to streamline its work through an embedded expert who brought and accumulated over time enough social capital to lobby in the service, liaise with the internationalised domestic scene of donors, and resort to the networks at home for substantive input. The meticulous amicable advocacy and forging of trustful relationships within the service overcame the initial resistance towards the project and opened up same scope for action.

Both HUREMAS and the Border Support Team in Georgia benefited from the institutional continuity of the long-term leadership of the border guard service. Yet although a *modus operandi* based on continuous close contacts with the relevant stakeholders builds important leverage, it has its pitfalls. Changes in the domestic political landscape sever such ties and endanger the sustainability of reform. Explicit or tacit bargains with ruling elites turn international implementers into political actors on the domestic scene and can get in the way of building 'depersonalised' state institutions and broadening political representation, an otherwise primary goal of the liberal state model.

The blatant if passive resistance that HUREMAS encountered at the outset reflects the fact that the Ukrainian partners are less inclined towards change than their Moldovan or Georgian counterparts, which have been more open to reform. This does not mean that the reform is necessarily more sustainable in the latter two. Pervasive corruption and the constant turnover of staff typical for transitional societies takes its toll evenly across the region. What it does indicate however is that transatlantic partners should work out tailor-made plans for

18. The terminology used in official reporting for the project.

border reform rather than pursue a regional approach that glosses over domestic politics.

EUBAM has certainly experienced a variety of responses to its advice and guidance. Mandated to enhance the capacity of border and customs services in Ukraine and Moldova, the mission has been thrown into high and low politics from the outset both on the Brussels and local scenes as its deployment followed lengthy negotiations with Ukrainian authorities regarding mission's prerogatives.[19] Despite the insistence on its solely technical nature,[20] the mission needs to engage extensively in domestic politics and lobbying not only within one service but across four services in two countries (border guard and customs) with different institutional cultures, unaccustomed to cooperation with one another and displaying different levels of receptiveness to EUBAM's advice. The mission relies on daily 'bringing together relevant stakeholders' as a *modus operandi* in this context. It involves the services in creating and agreeing plans for the implementation of exchanges of information and the use of such information. It also oversees the production of monthly common border security assessment reports and helps align the services with Frontex activity, especially through the participation in joint operations which are an occasion to train on-the-job. It is hoped that such activities will build up a distinctive *esprit de corps*, the streamlining of procedures, and the promotion of particular values.

EUBAM might have found a less enthusiastic reception in the Ukrainian services, but it was still closely involved in drafting the Ukrainian Border Management Concept and its Action Plan. The mission has been more able to tap into the Moldovan services due to their openness and more pro-European orientation. It has been particularly instrumental in the drafting of the Moldovan National Strategy on Integrated State Border Management. The structure and contents of the strategy clearly reflect the IBM model as promoted by the EU. The strategy also envisages the training of border guards according to the curriculum developed by Frontex.[21] The quick adoption of EU-compliant regulations and speedy introduction of biometric passports made Moldova a much-needed success story of the EaP. The tendency for reform plans never to get beyond the drawing board in the region, together with post-Soviet administrative approaches, the EU's convoluted and fragmented channels of assistance, and Moldova's fragile capacities for governance should however breed more caution. More fundamentally, the tendency of the EU and other international implementers to draft templates of reforms does not only compromise the principle of local ownership, an ideal rather than a guide for action. Above all, it raises the question of how to implement such initiatives and integrate them into a broader social system.

This brief overview of EUBAM would not do it justice without mentioning its indirect input to stabilising the situation in Transdnistria. The form

19. For an account of the pre-launch and the early phases of EUBAM, see Xymena Kurowska and Benjamin Tallis, 'EU Border Assistance Mission to Ukraine and Moldova – Beyond Border Monitoring?', *European Foreign Affairs Review* vol. 14, no.1, 2009, pp. 47-64.

20. See in this context the continuing insistence that EUBAM is a technical project with no executive powers: http://www.eubam.org/en/about/what_we_do.

21. See The Government of the Republic of Moldova Decision No. 1212 from 27 December 2010 on approval of the National Strategy on Integrated State Border Management for the period of years 2011-2013, unofficial translation.

in which the mission was initially launched, a Commission project invested with technical and not executive powers, disappointed Moldovan authorities who hoped for a fully-fledged European Security and Defence Policy mission where Russian peacekeeping forces manifestly side with one party and American intervention is inconceivable. Most tangibly the mission's monitoring of the implementation of the Joint Declaration on the customs regime on the common border,[22] its continuous facilitation of contacts and more symbolically its mere presence, as some maintain, have clear positive effects on the situation.

Georgia shares with Moldova a disappointment in the failure of an ESDP deployment. In 2004 Georgia expressed interest in an ESDP mission on the Georgian-Russian border in the wake of the termination of the OSCE Border Monitoring Operation that had been running since 1999[23] and aware of the fact that any American involvement of this profile would provoke enormous animosities. The US has promoted Georgia's NATO's aspirations and its assistance to Georgian transition has been the largest in the post-Soviet space.[24] The US helped the Georgian government transform their law enforcement according to the US model, with the focus on Georgian police, together with physical reconstruction of police facilities, and substantial technical assistance to border services.[25] It also assisted in the formation of the Georgian Coast Guard.

The vacuum after the OSCE mission was however a sensitive political issue. The EU Member States did not reach a compromise allowing for an ESDP mission. Instead, in 2005 the EUSR's mandate was extended to include reporting on the border situation, facilitating confidence building between Georgia and Russia and assisting the Georgian government prepare a comprehensive reform strategy for its border guards.[26] A small Border Support Team assisted the Georgian National Security Council in drafting a comprehensive reform strategy for which the EU experts relied on the Guidelines for Integrated Border Management in the Western Balkans.[27] As the BST procured no equipment but provided conceptual and doctrinal input, the American delivery of equipment plus training and the building of infrastructure was crucial. The BST's focus and method was also embedded mentoring, as when the experts of the mobile team worked on the border to participate in the operational introduction of procedure. As with EUBAM, the question is whether this kind of indirect management of frozen conflict management by capacity building possibly pays off more than a high-level political intervention which may exacerbate political animosities. Many experts on the ground helping local communities would answer in the affirmative.

22. For the description and EUBAM's assessment, see http://www.eubam.org/en/glossary/j/joint_declaration.

23. See also 'Conflict Resolution in the South Caucasus: The EU's Role', *International Crisis Group Repor*t no. 173, 20 March 2006, pp. 24-5.

24. This has been channeled mainly through the largest initiative launched under the Freedom Support Act, i.e. the Georgia Border Security and Law Enforcement programme.

25. They helped in particular to introduce and equip a number of BCPs with Personal Identification and Registration System and donated technical equipment to run the Automated System for Customs Data software.

26. Article 2 of Council Joint Action 2005/582/CFSP of 28 July 2005. The same mandate was maintained in the new EUSR Joint Action. Article 3(g) of Council Joint Action 2006/121/CFSP [*OJ* L 49 of 21 February 2006, p.15]. It does not include the Abkhazian and Ossetian parts of Georgia's border with Russia.

27. The 'Georgian Border Management Strategy' was adopted by the President of Georgia in 2008, and a five year implementation plan, reviewed in 2010 by the BST, was also drafted.

Conclusion

The EU and US have persisted in instilling in the Eastern Neighbourhood the idea of the desirability of reforming border policies and strategies in accordance with the models prescribed within their systems of governance. Operating with different focus and specialising in different domains, at the meta-level the EU and the US have common goals regarding border management and security in the Eastern Neigbourhood and they pursue them in a cooperative manner. Although this does not eliminate lower-level competition, there has been a consolidation of what Andrew Williams calls the legitimacy of the American/European symbiosis to reconstruct transitional societies.[28] The arrangement wherein IOM, aligning with the EU's approach to migration management, implements a Department of State-sponsored project on the development of EU-compliant risk analysis systems and then employs Polish border guards to execute it in a manner that approximates Schengen standards, is a stark indicator of such ideational and operational symbiosis.

The successful projection of the idea is certainly not to be conflated with its smooth translation into policy design and implementation. Different forms of local resistance, the entrenchment of domestic turf battles, political instability and patronage, bureaucratic inertia and the lack of institutional 'absorption capacity' are typical reasons given for the disconnect. The self-serving character of many international projects, the inevitability of deconflicting rather than synergising, and the intrinsic contradictions of local ownership add to the list. On the ground, the successful projection becomes a contradiction-filled struggle among the parties rather than a linear sequence of cumulative or mutually reinforcing steps. This applies both to the coordination among the donors and the relationship with the local actors and reflects a typical situation of multi-layered sets of interdependencies where international actors are drawn into a game they hardly control.

In this context, the immediate question concerns the combined effects of transatlantic approaches and the coordination across the EU's substantially differentiated and differently linked initiatives which continue to receive generous funding. Disregard for cost-effectiveness and a tendency to use obscure political jargon have at times bewildered the US partners. Yet a more serious challenge for the EU-US consolidated partnership originates in the EU's claim that increasing direct budget support fosters local ownership. Surely, once the money is transferred into the Treasury of the recipient, there is no control over how the authorities choose to spend it. But in the practice of direct budget support local ownership remains an elusive quality. While local knowledge of the context is incorporated and thus strategic decisions are made in consultation with local partners, the rationale, mode of organisation and planning

28. Andrew Williams, 'The Bringing of Peace and Plenty of Occult Imperialism', *Global Society*, vol. 21, no. 4, 2007, pp. 539-51.

are predetermined if any transfers should take place at all.[29] The system of variable tranches, depending on the recipient reaching benchmarks designed in cooperation with external consultants, remains a tangible means of management as well. Ultimately, the EU seems caught in its own rhetoric of being the advocate of a home-grown reform agenda which may have little to do with needs on the ground.[30]

The EU's shift away from project-based assistance that changes the parameters of transatlantic cooperation in border reform in the Eastern Neighbourhood is not likely to rip apart an overarching convergence of agendas. The alignment to the current paradigm based on the interdependence of internal and external security remains commanding. Yet the question of the cumulative effects of the transatlantic cooperation for reform looms larger than before.

29. The EU-related methodology for direct budget support requires working within very particular parameters. An example from the border management sector proves the point. IOM relies on the Huremas-based report *Legal Reform in the SBGS in Line with EU Standards: Experience of New Member States* (compiled by Polish and Romanian experts) to help SBGS develop benchmark indicators and targets of EU Sector Budget Support in Border Management, which will then be used to assess the progress made by the SBGS.

30. E.g. direct budget support will affect the fate of irregular migrants returned to Ukraine in accordance with the Readmission Agreement concluded with the EU. The EU is busy building now redundant infrastructure as it promised in the agreement but the daily food ration of an irregular migrant is according to the Ukrainian legislation equal to the food ratio of a prisoner. The question is whether the Ukrainian authorities will design new budget lines to increase it. On the effects of EU's current policy of investing in infrastructure, see the report by the Jesuit Refugee Service Europe: 'No other option. Testimonies from refugees living in Ukraine' at: http://www.jrs.net/Assets/Regions/IOR/media/files/JRS_Europe_Asylum_Seekers_in_Ukraine_June2011.pdf.

Chapter 6

The EU, the US and Security Sector Reform in Afghanistan

Eva Gross

Introduction

Afghanistan has dominated the transatlantic agenda for the past decade. For both the EU and the US, successful Security Sector Reform (SSR) as a component of the broader international engagement in Afghanistan represents an indirect way to potentially increase their internal security by curbing state failure, regional instability, and by extension organised crime and safe havens for terrorist groups. Respective EU and US engagement illustrates enduring differences over the manner in which each partner approaches the challenges of security and post-conflict reconstruction. The EU, which focuses on institution building, the rule of law and other civilian contributions to post-conflict reconstruction, conceives of its contributions to the reconstruction of Afghanistan in these terms. The US, on the other hand, views its engagement in Afghanistan, including the civilian aspects of reconstruction, through the prism of its decade-long war against terror. Despite these enduring differences, which have informed the EU's and US's respective political and operational priorities, both partners have continuously adjusted their institutional and political approach towards the country. This in turn has lead to greater compatibility in pursuit of common goals.

Security Sector Reform (SSR) represents a crucial area of EU-US engagement in Afghanistan. The ongoing transition process, which foresees the Afghan National Security Forces (ANSF) taking over responsibility for security by the end of 2014, requires a functioning and capable security sector. This includes the army and police but also the judiciary. A sustainable transition also requires, however, institutional capacity and oversight mechanisms that can ensure accountability to Afghan citizens. Persistent levels of conflict and insecurity as well as weak governance and corruption present severe challenges to the success and the sustainability of the transition, and highlight the difficulties facing the transatlantic community in implementing its transition policy.

Both the EU and the US have extended significant resources in pursuit of aspects of SSR: the EU to police and justice reform through its police

mission EUPOL Afghanistan and its support to justice reform and the wider rule of law through the Commission (now the EEAS); and the US, bilaterally and through the NATO training mission NTM-A, in reforming the Afghan National Army (ANA) and the Afghan National Police (ANP). Given the US political lead in international engagement in Afghanistan the EU has, both in its political and operational contributions, played a complementary rather than a lead role in international approaches towards Afghanistan in general and SSR in particular. The inadequate levels of resources deployed, as well as institutional incoherence in the launch and implementation of EU SSR policies, have in the past led to transatlantic disillusionment over the nature and impact of EU contributions. But, in the light of the increasing emphasis placed on the civilian components of SSR, the US has come to increasingly value the specific contributions that the EU can provide, and this has positively impacted upon relations.

The following sections analyse respective US and EU approaches, and the strategic, political and operational contexts in which they have evolved. The chapter focuses in particular on police reform, an area where both the EU and the US have engaged and that captures the different approaches adopted by the two partners. The chapter then highlights improvements in coordination that have taken place over the past five years to formulate recommendations for future EU-US cooperation in Afghan SSR in the context of the ongoing transition process. In conclusion, the chapter extrapolates broader lessons from transatlantic engagement in Afghanistan for future EU-US security cooperation.

The context: implementing SSR in Afghanistan

Following the fall of the Taliban and the Bonn Agreement in 2001, the G-8 security donors' meeting in Geneva in the spring of 2002 set the agenda for SSR by adopting a 'lead nation' approach for individual policy areas. Consequently, Germany took on responsibility for reforming the ANP; Italy that for justice; the US for the ANA; the UK for counter-narcotics; and Japan for Disarmament, Demobilisation and Reintegration (DDR). The challenge of SSR had thus been addressed. However, as a result of this bilateral approach, individual parts of the security sector received different levels of resources. This affected the justice sector in particular. What is more, these bilateral efforts were not integrated into a coherent approach towards the task of SSR – with predictably negative consequences for collective reform efforts.

After five years of individual and sparsely coordinated bilateral efforts, SSR in Afghanistan began to receive significant attention after the 2006 rule-of-law conference in Rome, which entrusted police and justice reform to the EU. Consequently, in 2007, the EU launched its police mission EUPOL Afghanistan and took on added responsibilities in justice reform. For its part, the US also undertook and progressively increased its efforts in army and police reform. Apart from a vast resource gap – the US has significantly outspent the EU – the respective transatlantic approaches differed in implementation practices and conceptions but also prioritisation of the type of tasks the ANP was to carry out.

The US approach to ANP reform consists of basic, military-style training. This is spurred in part by the realisation that the ANP should play a crucial role in maintaining internal security as a first line of defence against a growing insurgency, and by the vast training gaps when it comes to ANP staff. At the same time, the exclusive focus on security and the militarisation of police training meant that US approaches for a long time did not fully conceptualise the police as an instrument in the service of the broader rule of law. The EU, in line with its own emerging practice of institutional reform through its civilian CSDP missions, has focused on civilian policing skills, including intelligence-led policing and criminal investigation; and this has contributed to filling the gap in US training efforts.

The Afghan security sector and the impact of transition

EU-US differences in approach towards police training have been exacerbated by the very low starting points – both in terms of quality and quantity – of the ANA and ANP at the start of international engagement in Afghanistan. Building the capacity of the ANSF entails strengthening institutional capacity and the ability to function in an insurgent environment. The overwhelming focus on basic training, without concomitant attention to institutional reform or accountability and oversight mechanisms, however, has created an imbalance that the international community has been challenged to redress.

Beyond a quantitative approach to ANSF training efforts, there is also an inbuilt imbalance between the different parts of the security sector; and between the envisaged size of the ANSF and the Afghan government's ability to maintain its security forces in the long run. Compared to the ANA and the ANP, the justice sector has received little attention. This includes the training of judges, prison reform and more generally the link between the police and justice sectors. The politicisation of the

judiciary, pervasive corruption and a low rate of trials and conviction show that justice reform requires political will and leadership on the part of the Afghan government; but also an emphasis on strengthening the justice sector and government legitimacy more broadly on the part of the international community. This highlights the need for civilian-led, long-term contribution to justice reform.

While commitments to justice reform continue to lag behind, the size of the ANP and ANA was progressively increased to prepare for the role of the ANSF post-2014. By October 2013 the ANA is forecast to reach 240,000 and the ANP 160,000 – up from 50,000 at the start of reform efforts in 2002. A high rate of attrition, lack of public trust, and at a very basic level persistently low literacy rates make training in civilian and criminal policing difficult. As a result, while 'these goals are quantitatively achievable (…) there are serious doubts about their competitiveness and sustainability in qualitative terms'.[1]

On the upside, a generally productive relationship with the Ministry of the Interior (MoI) has allowed both the EU and the US to streamline and adapt their reform efforts. Work on institution-building and structural reform has yielded results: the formulation of the 2010 Afghan National Police Strategy has gone some way to streamline and target reform efforts, dividing the ANP into five pillars: Afghan Civilian Police (ACP); Afghan Gendarmerie (ANCOP-AG); Afghan Border Police (ABP); Afghan Anti-Crime Police (AACP); and Afghan Public Protection Force (APPF).[2] Noticeably, the ANCOP-AG plays an explicit counter-insurgency role that is to take place in close cooperation with the ABP and the ANA; whereas the ACP mainly adopts an intelligence-led policing model to maintain the rule of law. As a consequence, training efforts on the part of the EU, the US and other actors engaged in police reform, can now be better targeted; and the MoI can take a more active role in steering reform efforts.

EU-US approaches to SSR: the war on terror meets the rule of law

While both Washington and Brussels have engaged significantly in aspects of SSR, their respective approaches differ in important aspects. Mainly this is because they are grounded in differing conceptions of the role of the police but also the nature and end goals of the US and EU's respective engagements in Afghanistan. In addition, institutional design and capabilities also result in different modes of implementation, the type of personnel required, but also the number of personnel deployed – and this can provide an additional explanation on why the

1. Luis Peral and Ashley J. Tellis, 'Afghanistan 2011-2014 and beyond: from support operations to sustainable peace', *Joint Report*, EU Institute for Security Studies, Paris and Carnegie Endowment for International Peace, Washington, DC., June 2011, p. 14.

2. See Islamic Republic of Afghanistan Ministry of the Interior, 'Afghan National Police Strategy', January 2010. Available at: http://info.publicintelligence.net/AfghanNationalPoliceStrategy.pdf.

two sides have found cooperation and coordination difficult at times. Given the imbalance in resources and political leadership, US efforts and approaches have overshadowed those of the EU – although over the course of the past two years there has been a gradual alignment of efforts. Differences remain, but EU/US approaches to SSR have become increasingly compatible.

The US

The US conceives of its engagement in Afghanistan, including SSR, as war. Hence, US efforts at police reform are conducted under the auspices of the Department of Defense; and military personnel, together with private contractors, administer training. The US views the police as fundamentally a security force. Consequently, unlike Germany and later the EU, Washington has focused its efforts on those parts of the police force that play a counter-insurgency role. This had implications for EU-US cooperation on SSR: the overwhelming US lead and militarised approach to Afghanistan in general rendered the civilian contribution of the EU of little interest to the US, which tended to dismiss European policing expertise, and the long-term reform effort it aimed for, as an at best secondary priority. The vast resource gap on transatlantic efforts in policy reform reinforced this negative perception.

Although the task of reforming the ANP had originally fallen to Germany, the US launched its own police reform programme, spurred in no small part by concerns that German reform efforts neglected the training of the lower ranks of the ANP. Berlin had focused its training exclusively on long-term training of senior police officials rather than training the rank and file. The US, perceiving a security gap, stepped up training efforts in 2004 in preparation for the Afghan presidential election.[3] This highlights US concern with increasing the quantity of police officers available for undertaking basic law and order tasks. Initially pursued by private contractors under the auspices of the State Department, by 2007 the Pentagon had taken on the task of ANP reform. An increase in funding for police reform further consolidated the militarisation of ANP reform in particular and SSR more generally. In principle, US training did not negate the German approach. However, lack of coordination and the mismatch of funds – the US had spent approximately €224 million by 2004, compared to €12 million spent annually by Berlin between 2002 and 2007 – meant that the US soon came to dominate police reform efforts.

The US, supported by other international stakeholders (and, since the launch of NTM-A, NATO), concentrates its efforts on the Focused District Development (FDD) Programme as a means to address training deficits. FDD provides eight weeks of training to an entire police unit in any given district at a Police Training Center. Police Mentor Teams

3. See Cornelius Friesendorf and Jörg Krempel, 'Militarized vs. Civilian Policing: Problems of Reforming the Afghan National Police', *PRIF-Report* no. 102, Frankfurt, Peace Research Institute Frankfurt, 2011.

(PMT) and Police Operational Mentoring and Liaison Teams (POMLT), to which the EU contributes, provide post-training support. These training courses emphasise basic, military skills such as weapons training, setting up roadblocks, or the identification of improvised explosive devices. Initially at least, the civilian component of these training courses were progressively reduced, and little emphasis was placed on community policing, domestic violence or women's rights. High rates of illiteracy additionally present a challenge: for instance, recognising false identity papers or writing a police report as part of a police investigation requires literacy. It also helps explain why ANP training has focused on basic, military elements.

The adoption of the US 2009 counterinsurgency strategy placed renewed focus on police reform in the sense that it emphasised protecting the civilian population and strengthening the Afghan state. As a result of renewed attention paid to civilian aspects of reconstruction as part of the 'clear-hold-build'strategy, civilian elements of policing have become more highly valued. The rethink on the part of the US, which included institutional reassessments and learning from the engagement in police reform to date, has yielded a more serious engagement with the potential value added of civilian contributions that have come to be included into ongoing training – including literacy training. The cooperation with the EU has improved as a result of this renewed focus. While this does not imply that the US has fundamentally changed its conception of its engagement in Afghanistan, the priority it assigns to providing security as a precondition for further civilian engagement, or its view of Europe not contributing sufficiently to transatlantic training efforts, these developments nevertheless reflect the fact that Washington has come to increasingly value civilian contributions to police reform – including that of the EU.

The EU

Unlike the US, the EU has adopted a long-term approach towards SSR that favours institution-building and structural change. Rather than conducting basic training, the EU has focused on the civilian aspects of reconstruction through a focus on the civilian aspects of police reform, and increasingly also on the linkages between the police and justice sectors. EU engagement takes place through its CSDP mission EUPOL Afghanistan and the EU Delegation.

The 2006 London Conference marked a turning point in EU engagement because it entrusted the EU with additional areas of engagement: reforming the police and justice sectors. The growing role for the EU in civilian reconstruction and governance through its police mission EUPOL Afghanistan resulted from efforts to consolidate international efforts in these areas, and the realisation that more would have to be

done in the area of police and justice, both of which lagged behind that of the reform of the ANA.

European engagement in Afghanistan thus became 'Europeanised' in an effort to both increase the EU's political profile in Afghanistan but also to better coordinate European contributions to the country's reconstruction. However, EUPOL Afghanistan, the mission launched in June 2007, got off to a slow start.[4] Beset by shortfalls in staffing, restrictions in reach caused by institutional blockage within the EU-NATO relationship, and an overly broad mission mandate, the mission's impact in the field was limited. Compared to the US's sizeable commitment to police reform (NTM-A has 1,500 to 2,000 staff), the EU contribution of up to 400 personnel gives limited political leverage or visibility to the EU's civilian contribution. The difference in financial commitment between the EU and the US (and NATO) is indeed staggering. EUPOL's budget for the period between 2010 and 2013 is €54.6 million; whereas the NATO training mission NTM-A, under which the US now operates, has an annual budget of $9.5 billion, of which $3.5 billion are devoted to reforming the ANP.

EUPOL Afghanistan's current mandate runs until 31 May 2013 and an extension until the end of 2014 has been agreed in principle.[5] Its mission tasks are 'to significantly contribute to the establishment under Afghan ownership of suitable and effective civilian policing arrangements, which will ensure appropriate interaction with the wider criminal justice system under Afghan ownership. The mission will support the reform process towards a trusted and efficient police service, which works in accordance with international standards, within the framework of the rule of law and respects human rights'.[6]

EUPOL Afghanistan's approach does not focus on training *per se* (although it engages in limited training activities) but rather seeks to contribute to specific reform objectives such as through the formulation of an anti-corruption strategy, intelligence-led policing, establishing the city police project in Kabul as well as its geographical expansion, and the introduction of community policing.[7] Structurally, EUPOL engages with the Afghan Civilian Police (ACP) and the Afghan Anti-Crime Police (AACP). With these contributions EUPOL occupies a niche function, but one that has come to be seen as increasingly valuable for overall police reform. At the same time, EUPOL continues to operate below the level of authorised staff, and continues to face difficulties in impacting the broader strategic field when it comes to police reform. When it comes to justice reform, an area where the European Commission (now the EEAS) is active, progress continues to be slow. EUPOL addresses some of the linkages between the police and justice sectors, but overall progress on this crucial reform element is limited, in part due to institutional structures less than able to absorb reform efforts and lacking political

4. See Sebastian Bloching, 'Policing in conflict – an overview of EUPOL Afghanistan. ESR', *Briefing* no. 7, Brussels, ISIS Europe, 12 July 2011.
5. See Council of the European Union, Council Conclusions on Afghanistan. 3124th Foreign Affairs Council meeting, Brussels, 14 November 2011
6. See European Union External Action Service, EU Police Mission to Afghanistan (EUPOL AFGHANISTAN), Brussels, 12 November 2011
7. Ibid.

will to pursue reforms more forcefully. Furthermore, justice reform efforts progress slowly, in part because of the low starting points in the justice sector that earlier sections have outlined.

Enduring differences – or growing commonalities?

The EU and the US pursue SSR policies that are grounded in different underlying philosophies on the role of the police. Respective efforts also differ when it comes to the personnel and financial commitments extended by the two partners that exacerbate the differences in approach towards international engagement in the country. However, the decade-long transatlantic engagement in Afghanistan has led to a gradual alignment in views – including policy elites but also public opinion – across the Atlantic in favour of troop withdrawal.[8] Underlying attitudes towards the use of force overall remain distinct. But a growing consensus on the reduction of troop levels reflects awareness on the part of the US that there is no military solution to the conflict. Political but also operational efforts towards a sustainable transition have implications for EU-US engagement. This also touches on cooperation in SSR, which remains a focal point of transatlantic engagement. Potential for further alignment – but also for enduring differences and obstacles to cooperation – rests on two aspects: conceptual underpinnings of engagement, including the role of civilian and military approaches; and the practices of EU-US implementation of SSR policies.

Civilian vs. military approaches

Respective strategies towards SSR in Afghanistan reflect differing priorities when it comes to the civilian aspects of post-conflict reconstruction. Significantly, however, both partners have over the course of the past five years made increasing efforts to align their activities in pursuit of joined-up approaches. This is in part the result of a greater commitment to the realisation of a comprehensive approach to reconstruction; persistent shortfalls in training capabilities across the board; but also the result of growing interest and recognition of the value of the civilian aspects of policing on the part of the US. EU-US approaches have now reached a point of complementarity that was previously absent.

For the US, civilian aspects of policing as well as long-term police training and mentoring of the type that the EU undertakes remain subordinated to a concern with security. This reflects the US's view of its engagement in Afghanistan as that of war rather than reconstruction, which has led to a militarisation of SSR. Given EUPOL's growing pains

8. See The German Marshall Fund of the United States, *Transatlantic Trends: Key Findings 2011*, 2011.

but also persistent levels of insecurity, the mission – and, by extension, the EU – had not only to streamline its activities, but also to identify and argue for the specific value added it could provide in Afghanistan. As a result, the EU has fought an uphill battle to assert its position in a crowded international field.

Low institutional starting points in Afghan SSR continue to challenge both partners to adjust their respective and joint approaches towards SSR. This is particularly important in view of the ongoing transition process and the Obama administration having begun to act upon its commitment towards the progressive reduction of military force. The changing strategic context, the implications of the current economic climate and waning commitment to Afghanistan further challenge both partners to consolidate their cooperation.

The transition process moves the tension between the dual aims of attaining security and stability while at the same time ensuring the protection of fundamental freedoms and human rights (which were, after all, invoked as a rationale for toppling the Taliban regime in the first place) into the forefront. The civilian aspect of SSR will in many ways be crucial for the long-term sustainability of transition: security forces and judicial institutions that are accountable to the Afghan population strengthen legitimacy and acceptance of Afghan state structures in the long run. While the importance of civilian contributions has been recognised, current security conditions in the country continue to lead to a privileging of the security contributions of the ANP. Timelines for the civilian aspects of SSR – from literacy training to civilian-led policing – by necessity proceed according to a different schedule than the basic training approach that is currently adopted by the international community. This continues to place the EU in a less visible but also a secondary position, and reinforces the focus on military contributions – but this also questions the extent to which current efforts contribute to sustainability.

Who trains: accounting for organisational difference

Beyond the different strategic starting points when it comes to the sequencing of civilian and military contributions as well as resulting emphasis on training components, EU-US approaches to SSR also differ in terms of *who* undertakes reconstruction efforts. The US has little institutional capability or experience in the sort of civilian tasks that the EU typically undertakes. This lack of experience, in addition to the overall militarisation of training efforts with little by way of expertise to contribute on the part of the EU, has further complicated the alignment of efforts.

As is customary in civilian EU missions, staff are seconded by Member States and normally drawn from their respective national ministries. This means that the expertise available to EU missions focuses on civilian policing aspects and judicial training, with some attention also given to reforming public administration. Missions are generally non-executive, and focus on advising and mentoring staff; and provide specialised training. In the case of EUPOL Afghanistan, this has meant an emphasis on intelligence-led policing, human rights, and a focus on the broader issue of rule of law such as joint police and prosecutor training. In short, EU contributions by necessity focus on quality over quantity, and local ownership.

By contrast, US training efforts to date have been undertaken by private contractors and by military trainers drawn from the US Department of Defense (DoD). This has reinforced an overwhelmingly military mindset for police training, and reinforces the premium paid to quantity – in line with the goal of raising the numbers of police forces to required levels.

The US engages in the basic training courses outlined earlier, which constitutes the bulk of police training. However, personnel lack specific *policing* expertise required for intelligence-led policing, which EUPOL possesses. Due to the institutional setting of most US SSR activities and the ability to call up personnel at short notice, Washington has not faced the same difficulties in staffing its mission that the EU has faced. As a result, it is not merely the personnel shortages experienced by EUPOL Afghanistan that added friction to joint EU-US engagement in Afghan SSR – but also the type of SSR that the EU engages in through CSDP that differs fundamentally from that pursued on the part of the US.

Bridging the differences: recommendations for action

EU-US approaches to SSR differ when it comes to their respective strategic objectives and implementation practices, but also their underlying assumptions as to the role of the police. The vast imbalance in resources deployed by Brussels and Washington in pursuit of SSR in general and police reform in particular magnifies these differences. Still, the past few years have witnessed a qualitative shift in cooperation that has led to a more compatible and increasingly streamlined approach.

There have since been increasing exchanges among EU and US personnel on both the strategic as well as the working level, informed in part by a greater engagement with civilian contributions to SSR in Afghanistan

– but also with a greater engagement with civilian aspects of conflict prevention and crisis management in US foreign policy more generally. These have gone some way towards alleviating the tensions that had arisen on account of EUPOL Afghanistan's start-up difficulties and the limited amount of resources deployed in pursuit of EU police reform efforts on the part of the EU and its Member States.

For its part, the US has fine-tuned its training efforts. Although the focus on basic training as a means to enable the ANP to play a security role continues, policing elements have been progressively included into training curricula. What is more, the ongoing transition process and the gradual withdrawal of US forces from Afghanistan suggest that US and therefore international engagement will gradually shift from a predominately militarised to a more political and diplomatic approach towards Afghanistan. For the EU, this means on the one hand a greater convergence of efforts, which could see the EU play a more prominent role. It also means a renewed focus on the EU and the quality and size of its contribution, and an opportunity to show its 'value added'. The opposite, however, could lead to a reinforcement of the negative views held by the US.

The experience of EU-US engagement in SSR in Afghanistan has thus resulted in several lessons for both partners: first, the need for institutional coherence and coordination with partners in the field. This extends not only to the coordination of individual contributions but also to an engagement with the nature and implementation structure of these contributions for more effective policy implementation. For the EU, this has meant a more coherent approach towards SSR through EUPOL Afghanistan, including the streamlining of mission objectives and engagement with Afghan partners. It has also led to an increasing engagement with justice reform.

These lessons, together with a greater recognition on the part of the US of the value of these civilian contributions despite their small size and specific output, have increased complementarity of approaches and resulted in a more coordinated division of labour in Afghan SSR. This also results, however, from an increased awareness of what each side can deliver – both in terms of the size but also the nature of contributions. On this basis, given changing security conditions globally and in Afghanistan, the two sides can cooperate more productively in the future.

To move cooperation forward, and to achieve results in Afghan SSR, which remains a challenging task, the EU and the US should:

- Maintain and increase their coordination and cooperation efforts. This entails both exchanges at the working level as well as the strategic and planning level.

- Complement ongoing effort by a greater emphasis on governance, including the role of civil society as a means to improve legitimacy and accountability of the Afghan government post-2014.

- Coordinate respective political messages and incentive structures *vis-à-vis* Afghan government stakeholders to work towards governance and accountability.

The current transition process adds another dimension to EU-US cooperation in Afghanistan. Besides reforming institutions, a key component of success or failure is the political component of transition: that is, both the task of reintegration of former Taliban as well as reconciliation in pursuit of a comprehensive peace agreement; and the challenge of governance and accountability as a means to preserve the gains made over the past decade. For the latter, SSR conceived of as a comprehensive task that includes justice and that emphasises control and accountability mechanisms, represents an important component in these aims.

When it comes to EU-US security cooperation in general, the Afghan case underlines that differing transatlantic conceptions of security can complicate setting priorities in post-conflict reconstruction and SSR as well as delivering the desired results. The same holds for framing a broader political approach under which joint and individual efforts on SSR are subsumed. The overall aim of EU-US engagement in Afghanistan, after all, is to devolve current engagement through contributing to a stable Afghanistan with a government that is, as far as possible, representative and respectful of the Constitution and human rights. While initial expectations had to be adjusted these aims, too, require further political and operational engagement on the part of the EU and the US.

Chapter 7

The Arab revolts: reconsidering EU-US strategies for freedom, security and justice

Sarah Wolff

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Introduction

Since the turn of the century, North Africa has become one the geographical laboratories for the externalisation of EU and US homeland security policies. For the EU, even though it remains fragmented and uncoordinated,[1] the conclusion of readmission agreements, counter-terrorism clauses and cooperation on border control has become part of the diplomats' toolbox when negotiating with North African countries. The US mainly relied on partners in the region to conduct secret renditions and deploy counterterrorism programmes in the Sahel.

Ten years after 9/11, the challenge is for transatlantic partners to find innovative ways to support freedom, security and justice in the Arab world, beyond the internal-external security divide. The revolts in the Arab world and the ongoing transitions provide a new geopolitical, strategic and decision-making landscape to test EU and US willingness and capacities to promote that normative agenda. The new approach taken by the Obama administration and the new setting of Justice and Home Affairs after Lisbon clearly demonstrate that transatlantic priorities are not limited to counterterrorism or illegal migration.

This chapter argues that the EU and US homeland security agendas are ill-equipped and too 'internal security'-focused to respond to the challenge posed by the wave of uprisings in the Arab world. A more comprehensive freedom, security and justice agenda is needed in the region. Taking stock of EU and US internal-external policies so far, the chapter looks at the ways transatlantic partners can support security sector reform and the judiciary at times of democratic transitions. The

1. See Introduction by Patryk Pawlak to this volume, pp. 15-25. See also Florian Trauner, 'The Internal-External Security Nexus: More Coherence Under Lisbon?' *Occasional Paper* no. 89, EUISS, Paris, March 2011.

transatlantic dialogue on 'mutual security' can contribute meaningfully to transitions in Arab countries.

The main recommendations of this paper include: overcoming the long-standing dilemma of stability vs. democratisation; putting citizens of the region back at the centre of EU and US strategies; supporting the reform of security sector actors and the independence of the judiciary. Last but not least, a comprehensive approach that combines security and development strategies in the Sahel region as well as towards migration are key parameters for a successful democratic transition and to ensure security for the citizens in the region.

Transatlantic homeland security policies and the Arab revolts: reaching the breaking point?

The transatlantic *rapprochement* on internal security objectives is striking if one compares the EU Internal Security Strategy to the US Homeland Security Strategy. In its fourth review of the US strategy, the Homeland Security Department identified five security missions: (i) preventing terrorism and enhancing security; (ii) securing and managing US borders: (iii) enforcing and administering US immigration laws; (iv) safeguarding and securing cyberspace, and (v) ensuring resilience to disasters.[2] The Internal Security Strategy, which aims at establishing a 'European Security Model', presents identical objectives, as well as combating serious and organised crime. These similarities attest the salience of internal security concerns in the foreign and development policies of both the EU and the US.

To prevent threats to US homeland security, it was decided that 'all instruments of national power and influence – diplomatic, information, military, economic, financial, intelligence, and law enforcement' were to be used.[3] In line with this strategy, the United States Agency for International Development (USAID) worked together with the Department of State to advance the National Security Strategy issued by the Bush administration in 2002.[4] It did so in the field of border security, visa policy and counterterrorism. The various agencies, including USAID, were asked to cooperate by helping partners to upgrade the security of transport, critical infrastructure networks and borders 'to enhance their security and ours'.[5] Strengthening the 'quality of their laws, and strength of their judicial/legal institutions' was identified as an important factor for the success of this strategy. Development aid also helped to train African (and North African) police officers in the fight against terrorism.[6] Accordingly,

2. US Department of Homeland Security, *Quadrennial Homeland Security Review Report: A Strategic Framework for a Secure Homeland*, February 2010.
3. Homeland Security Council, *National Strategy for Homeland Security*, October 2007, p. 13.
4. US Department of State and US Agency for International Development, 'Strategic Plan: Fiscal Years 2004-2009 – Aligning Diplomacy and Development Assistance', August 2003.
5. Ibid, p. 19.
6. Alice Hills. 'Trojan Horses? USAID, counterterrorism and Africa's police'. *Third World Quaterly*, vol. 27, no. 4, 2006, pp. 629-43.

this transformed USAID into a 'quasi-security agency' instead of focusing on its international development commitments such as the Millennium Development Goals to eradicate poverty.

On the European side, patrolling of the Mediterranean between France, Spain and Morocco has become common practice, while Frontex has intensively coordinated the patrolling missions of the Mediterranean Sea since its creation in 2004. Italy signed agreements with Libya in 2003 regarding the readmission of irregular migrants arrived in Lampedusa and in 2007 to put in place joint Italo-Libyan patrolling.[7] The EU was itself considering the challenge of 'jointly addressing' the migration question as a priority with regard to its relationship with Libya, before the 2011 rebellion.[8] Following the Libyan conflict, compromising documents for the Western intelligence services were found in the offices of the Ministry of Interior in Tripoli. Those documents confirmed the secret renditions by the CIA and the MI5 to Libya.[9] Such legacies have to be factored in by the transatlantic partners, if they want to establish trustful relationships with the military and police forces in transition that will appear legitimate to Tunisian, Egyptian or Libyan citizens.

But in the aftermath of the first free and fair elections in Tunisia and Egypt, opportunities to break away from those past practices have opened up. First in the EU, the reform of JHA governance ushered in by the Lisbon Treaty brings new prospects for improving the coordination between internal and external policies.[10] In addition, the inclusion in the EU legal structure of the Charter of Fundamental Rights, the expected human rights action plan for the external dimension of JHA, the Frontex fundamental rights strategy,[11] the appointment of a fundamental rights officer and creation of a consultative fundamental rights forum within Frontex,[12] are some of the innovations that tip the balance towards a possible reconciliation of the EU's internal security concerns and its normative aspirations as a foreign policy actor.[13]

Second, the US National Security Strategy of 2010 has evolved from 'a narrow vision of the national security toolbox' in 2002, focusing on military power, homeland security, intelligence and counterterrorism, to 'a broader smarter power' approach that involves all actors in the government, ranging from security to development and justice experts.[14] Long-standing transatlantic differences on counterterrorism have also lessened since the advent of the Obama administration, probably due to the fact that 'the Obama administration increasingly incorporates the civilian element in its military endeavours, and has re-introduced the rule of law with regard to many (though not all) terrorism detainees'.[15]

The fall of another iron curtain in the Arab world provides a momentum for transatlantic partners to shift from an agenda dominated by their

7. Anna Di Bartolomeo et al, 'Carim Migration Profile - Libya', EUI, Florence, p. 15.

8. See European Commission, 'European Neighbourhood and Partnership Instrument: Libya – Strategy Paper and National Indicative Programme 2011-2013', 2011.

9. Natalie Nougayrède, 'Paris minimise ses liens avec les services secrets du régime Kadhafi', *Le Monde*, 8 September 2011.

10. See Florian Trauner, op. cit. in note 1.

11. Frontex, 'Management Board Endorses Frontex Fundamental Rights Strategy', 4 April 2011.

12. European Commission, 'Proposal for a Regulation amending Council Regulation (EC) no. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)', COM (2010) 61 2010/0039/COD.

13. See Elspeth Guild et al, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies Frontex, Europol and the European Asylum Support Office', European Parliament, 2011.

14. See Heather A. Conley et al, 'The U.S. Case: 2002 and 2010 US National Security Strategy' in *EU-US Security Strategies: Comparative Scenarios and Recommendations* (Istituto Affari Internazionali, Swedish Institute of International Affairs, Fondation pour la Recherche Stratégique and Center for Strategic and International Studies, 2011).

15. Jonathan Laurence, 'The US-EU Counter-Terrorism Conversation: Acknowledging a Two-Way Threat', US-Europe Analysis Series no. 44, February 2010, Brookings Institution, p. 8.

own internal security concerns towards policies that reconsider the link between democratisation and security.

Going beyond the democratisation vs. stability dilemma

In spite of policy initiatives such as the Barcelona Process, the European Neighbourhood Policy (ENP) and the Broader Middle East and North Africa (B-MENA) initiative that sought to advance democratisation, the main impetus for the Arab revolts was genuinely domestic. One of the lessons that the EU and US should bear in mind when formulating future democratisation policies is the fact that in the past they constantly overlapped with Western governments' preference for what they regarded as stable regimes, with the results that today are all too plain to see.

US and EU democratisation programmes via USAID or the European Instrument for Democracy and Human Rights (EIDHR) have not been successful in reaching out to the citizens and organisations that most needed their support. In the case of USAID, 'the vast majority of USAID Democracy and Governance assistance goes to Government of Egypt-approved consensual, government-to-government projects.'[16] For the EIDHR micro-projects that were channeled over the period 2002-2006, most of the projects 'promoted human rights (and politically less controversial human rights in particular) more than democracy, and they did so in comparatively easier countries'.[17] Those findings seem to have been confirmed in more recent years.[18] Finally, the EU and its Member States have tended to adopt a piecemeal approach when it comes to the coordination of the EU and the Member States' democratisation policies.[19]

The democratic transitions provide a critical juncture to move from a low-cost strategy to full-speed democratisation and a fully-fledged human rights strategy. The latter needs to be devised in coordination with civil society actors, which are using new ways of mobilisation through social media. Such a strategy shall include ensuring the security of MENA citizens in a human security understanding. A positive development has been the proposal to establish a European Endowment for Democracy along with a Civil Society Facility, in the latest renewed European Neighbourhood Policy.[20] However even though the former recalls the US National Endowment for Democracy, its precise objectives, functioning and the independence of that institution still need to be clarified[21] and anchored in a strategic vision of the EU for the region.

16. Jeremy M. Scharp, 'Egypt in Transition', Congressional Research Service, Report for Congress no. 7-5700, 29 March 2011. p. 4.

17. Federica Bicchi, 'Democracy Assistance in the Mediterranean: An Overview'. *Mediterranean Politics*, vol. 14, no. 1, pp. 61-78.

18. An inventory of democratisation and human rights policies was done in 2007: see European Commission, DG External Relations, 'Furthering Human Rights and Democracy across the Globe' (2007). However it is worth pointing out that the documents listed on the Human Rights webpage of the EEAS pertain where there is no section on Democratisation.

19. Cristina Barrios, 'Assessing Democracy Assistance: the Democratic Republic of Congo', FRIDE, 2010.

20. Council of the EU, 'Council conclusions on the European Neighbourhood Policy', 3101st Foreign Affairs Council meeting, Luxembourg, 20 June 2011.

21. Roel van Meijenfeldt, 'A European Foundation for Democracy: what is needed', FRIDE Policy Brief no 93, September 2011.

So far, the US and the EU have favoured a stance of pragmatism and caution towards democratic transitions. The EU is taking a more political approach[22] that insists on an 'intelligent conditionality' which is based on the idea that the countries performing well will get support ('more for more') and the others will be sanctioned ('less for less').[23] It remains to be seen though to what extent the EU is willing to freeze money in countries where it would disagree with the way democratic transitions are conducted. Will the EU react if it disagrees with the policies pursued by Ennhada or if the Egyptian military steps out of its current role? Democratic transitions can be unpredictable and the EU's strength in applying conditionality is being rapidly tested.

On the EU side, a couple of steps have been taken. The Support to Partnership, Reform and Inclusive Growth (SPRING) programme was put in place, but seems for the moment to focus mainly on economic reforms.[24] At the time of writing, an EU-Tunisian task force has been set up to ensure a smooth coordination of the international support to the Tunisian transition comprising Lady Ashton, the Commissioner for Enlargement and the European Neighbourhood Policy Stefan Füle, the EU Special Representative for the Southern Mediterranean Region and the newly-appointed Tunisian authorities.[25] Support to civil society via the Anna Lindh Foundation is a positive endeavour, that should be replicated by further actions in the countries undergoing democratic transition, in order to reach out to those non-state actors that do not necessarily have the means to get organised to respond to EU offers of grants.

Mobility Partnerships have also been promised to Egypt, Tunisia and Libya. But the scale and the nature of the problem is different than is the case with the current 'laboratories' of Moldova and Cape Verde. Young Tunisians, Egyptians and Libyans have no jobs, labour markets need to be radically restructured, and migration patterns have been disrupted, involving also a sub-Saharan dimension. Faced with a diversity of potential scenarios and security challenges, the EU and the US will have to remain flexible in order to be able to respond to the local needs. In particular, the EU needs to move beyond trying to model the region via its own paradigms and instead start refocusing on bottom-up approaches. Strengthening the support to South-South economic and political regional integration across the Maghreb countries would help to bring about economic development and establish strong relations across the populations of countries that used to mistrust one other. The resolution of the Western Sahara should remain a priority.

So far, though the EU is still very much caught in a dilemma between its 'normative power' ambitions and *realpolitik*. In fact when the EU forgets about its normative ambitions, the *realpolitik* can backfire with potentially disastrous consequences. This was exactly what happened in

22. See Ruth Santini, 'The Transatlantic Relationship after the Arab Uprisings: Stronger in North Africa, Shakier in the Middle East?', Brookings Institution, June 2011.

23. European Commission, 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean'. Brussels, COM(2011) 200 final, 8 March 2011.

24. European Commission, EU response to the Arab Spring: the SPRING Programme, MEMO/11/636, 27 September 2011.

25. European Union, 'First meeting of EU/Tunisia Task Force to support transition to democracy and economic recovery', Brussels, 27 September 2011.

Libya, where Gaddafi used the migration issue to effectively blackmail the EU.[26] The *realpolitik* of the EU, driven by migration, energy and economic concerns, had devastating consequences for EU foreign policy. What happens in the coming months of transition in Libya will be telling as to whether the EU is able to become 'strategic about ideals and values'.[27]

President Obama's speech in Cairo in June 2009 demonstrated that a focus on counterterrorism was no longer the main element of US strategy towards the region. The ambition was to inaugurate a new era in the United States' relationship with Arab countries based on the principle that America and Islam 'share common principles – principles of justice and progress; tolerance and the dignity of all human beings.'[28] In the commitment to enhance transatlantic cooperation of October 2009, both partners stressed that their cooperation is 'inspired by the principles of liberty, democracy and justice' and that 'they are committed to working together internationally to foster these principles around the world'. In the coming years operational cooperation, cooperation with liaison officers or the promotion of UN conventions will be key in a partnership that aims to be 'more operational in maintaining security, facilitating legitimate movement, and protecting human rights and fundamental freedoms'.[29]

26. Sarah Wolff, 'Qaddafi, the EU's mirror', *European Voice*, 24 September 2010.

27. Richard Youngs, *Europe's Decline and Fall: The Struggle against Global Irrelevance* (London: Profile Books), p. 197.

28. The White House, Office of the Press Secretary. 'Remarks by the President on a New Beginning', Cairo University, Cairo, 4 June 2009.

29. Council of the European Union, 'EU-US Statement on "Enhancing transatlantic cooperation in the area of Justice, Freedom and Security"', doc. 15184/09 , Brussels, 29 October 2009.

30. Geoff Burt, 'US "SSR" Assistance in Egypt: what's in a name?', Security Sector Reform Resource Online, 17 February 2011.

31. The author would like to thank Megan Price for pointing this out. See also for instance Marc Cohen and Tara Gingerich, 'Protect and serve or train and equip? US security assistance and protection of civilians', Oxfam America, November 2009.

32. Global Facilitation Network for Security Sector Reform (GFN. SSR), 'A Beginner's Guide to Security Sector Reform (SSR)', December 2007.

Prioritising Security Sector Reform and an independent judiciary

Security Sector Reform

In the case of Security Sector Reform (SSR) again it seems that hitherto European and American support remained quite narrowly 'security'-oriented. The US delivered to Egypt an average of $2 billion of military aid every year under the label of 'SSR' without looking into reforming the military.[30] The US has mainly focused on 'train-and-equip' programmes that focused on counterterrorism or counter-insurgency for countries like Afghanistan and Iraq.[31] It is not sure whether this aid matches the definition of SSR that 'aims to create a secure environment that is conducive to development, poverty reduction, good governance and, in particular, the growth of democratic states and institutions based on the rule of law'.[32]

SSR has generated an impressive amount of consultancy reports as an answer to the problems of 'fragile' states and in an effort to forge national consensus to establish long-term peacebuilding. It is presented as 'a key condition to development and the promotion of

human rights'[33] and should be conducive to development, security and democracy. Successful and sustainable SSR requires broad-based local ownership (both government and non-state actors) as well as the active participation of civil society in the reform process. However, as rightly outlined by one commentator, this is more difficult in countries where the security sector and the regime are intimately linked.[34] There is therefore a constant tension between providing ownership to the local population and not encountering problems with a government that feels its interests are threatened. SSR is about finding the delicate balance between the two while being able to answer to the needs of each country, avoiding a 'one-size fits all approach'.

During the uprisings in Egypt and Tunisia, the military played a pivotal role in deciding to stop supporting the leader in place.[35] This is a crucial element of the current repression in Syria where the Alawi minority holds strategic military posts and remains loyal to the regime. [36] The Egyptian military's role in future economic reforms will also be closely scrutinised, given its stake in sectors like tourism or education. [37] It has also been the privileged interlocutor of the US, the latter providing one of the highest amounts of foreign military aid to Egypt. The military's position in the transition was also shaken by the second wave of demonstrations on Tahrir Square, which protested against the role of the Supreme Council of the Armed Forces (SCAF), a vestige of Mubarak's regime.[38]

Central to the reforms are the police forces. The secret police services, the 'mukhabarat', have a long history of repression of the political opposition. Along with corruption, the lack of freedom and economic opportunities, they concentrated the frustration of the Arab societies. Those difficult legacies and the sometimes ambivalent roles of the military and police forces need to be carefully taken into account when channelling support.

So far, though, except for the the EU Border Assistance Mission in Rafah, the EUJUST LEX mission in Irak and the EUPOL COPPS mission to reform the Palestinian police, the EU has not been significantly active in SSR in Arab countries. It seems rather that migration and the EU's internal security concerns have focalised attention in Brussels and the European capitals.[39] The US have been even less proactive in that field, preferring to provide military aid and counterterrorism assistance and becoming suspicious of SSR programmes.[40]

Establishing contacts with their new interlocutors in the region, and listening to the demands of both governments and civil society while supporting conditionality are some of the challenges facing the transatlantic partners. Multilateral cooperation with other regional actors such as the African Union or the Arab League, international

33. Mustapha S. Adib, Commentaries on the Report of the Secretary-General of the United Nations A/62/659-S/2008/39, 'Securing Peace and Development: the role of the United Nations in Supporting Security Sector Reform', 17-18 March, 2008.

34. Ibid, p.9.

35. See also Eduard Soler i Lecha, 'Security Forces and Arab Revolts', Arab Reform Initiative, 28 February 2011.

36. Elizabeth A. Kennedy, 'Syria's Military Appears Loyal to Government ahead of pro-democracy protests', *Huffington Post*, 4 June 2011.

37. Daniel Korski, 'Without military reform, Egypt cannot democratise', European Council on Foreign Relations, 5 July 2011.

38. See for more information Amnesty International, 'Broken Promises. Egypt's military rulers erode human rights', November 2011.

39. Yezid Sayigh, 'Security Sector Reform in the Arab Region: Challenges to Developing an Indigenous Agenda', Arab Reform Initiative, December 2007, p. 9.

40. Ibid.

organisations and neighbouring countries will help to legitimise support in the eyes of Arab public opinion.[41] The bottom line is to evolve towards a security sector that is accountable and provide security for the citizens of the respective countries.[42] Long-term and deep structural reforms are needed: short-term training and equipment does not constitute SSR. SSR involves much more than that.

An independent judiciary

Transitional justice is a key element of national reconciliation; in particular for the victims of authoritarian rule. International justice, building the capacities of national justice, but also non-judicial means such as *ad hoc* reconciliation commissions, will be supportive of democratic transitions.

Europeans and Americans can play an important role in supporting the independence of the judges throughout the transitions in Egypt and Tunisia. Strategies on how to support judiciaries where authoritarian governments and military courts are still in place in other countries of the region should also be quickly explored. It is time to move beyond short-term training programmes or modernisation of IT systems in courts, which would fall under 'good governance' aid, to programmes that support deep reforms pursuing the objective to have independent judiciaries. However to be truly successful they could envisage developing a regional approach on the rule of law and justice. As for SSR, involving regional partners is key. The UN-POGAR programmes in the field of rule of law have provided an interesting experiment in this domain. If such successful programmes could be put in place, it would also reinvigorate the exchange of best practices, cooperation and knowledge of each other's systems by other neighbouring countries. Programmes like EuroMed Justice could be revised in this perspective.

Judicial institutions will also ensure that rule of law will govern future constitutional architectures. This step is intimately linked to finding the terms of a new social contract within Arab societies whereby there is no arbitrary exercise of power and whereby people are the authors of the laws.[43] The judiciary has, in Egypt, been historically in constant conflict with the executive and managed to secure some civil rights, e.g. the possibility to establish trade unions or to form political parties, in spite of the authoritarian rule.[44] Even though the independence of the judiciary is ensured by Arab constitutions, in reality the executive has protected itself by creating special courts or by interfering with the oversight of judicial council bodies.[45]

41. Mohammed Khadry Said and Noha Bakr, 'Egypt Security Sector Reform', *ARI Thematic Studies*, January 2011., p.12.

42. Maria Christina Paciello, 'Egypt: Changes and Challenges of Political Transition', MEDPRO Technical Report no. 4, May 2011.

43. See also Sarah Wolff and Tim van de Ven, 'Building Mutual Trust in a European Rule of Law: A Bottom-up approach', *Clingendael Paper*, April 2011.

44. Sarah Wolff, 'Constraints on the promotion of the rule of law in Egypt: insights from the 2005 Judges' revolt', *Democratization*, vol. 16, no. 1, pp. 100-18.

45. Nathan J. Brown, 'Mechanisms of Accountability in Arab Governance: The Present and Future judiciaries and Parliaments in the Arab World', UNDP-POGAR, December 2001.

Balancing development, security and migration in the Sahel and North Africa

Last but not least, the revolutions in the Arab world highlight the continuing relevance of two security concerns for the EU and the US: the Sahel and migration.

The Sahel has been a region of concern for the transatlantic partners since 9/11. The US has been active via the Trans-Saharan Counter-Terrorism Initiative (TSCTI) where they have trained sub-Saharan military[46] to fight terrorism and improve exchange of information. The US have also gained access to 'bases in Mali and Algeria, [have] conclude[d] agreements to refuel its planes in Senegal and Uganda, and [have] initiate[d] programmes of military assistance and training'.[47] With funding amounting to roughly $100 million every year, this programme shall run until 2013. The TSCTI, which succeeded to the Pan-Sahel Initiative, is one of the many programmes that were developed following the establishment of the Africa Command (AFRICOM) in 2008. This unified US commandment for Africa failed to be hosted in one of the African countries due to the unpopularity of US policies in the region.[48] Back home, the creation of AFRICOM also resulted in some backlash from the State Department who perceived this entity as 'the latest move by the Pentagon to militarize US foreign policy'[49] that has deepened the gap between the US military and civilian agencies like USAID, which already observed that 'the funnelling of authorities and resources from civilian agencies to the military has rendered them less and less effective'.[50] Algeria has been heralded as a strategic partner of the US in that respect, especially given that the origins of al-Qaeda in the Islamic Maghreb (AQIM) are Algerian, and that Algeria is the fourth supplier of anti-coalition combatants in Iraq.[51] Via Algeria both the US and the EU can reach out to the African Union where Algeria plays a central role. Given the current contestation against the regime in Algeria, it is also likely that Algeria will continue to issue calls for beefing up security in the region.[52]

Such security concerns are also shared by Europeans whose direct interests are threatened in the region. In December 2011, the defence ministers of the 5+5 Maghreb countries and EU defence ministers met in Nouakchott to discuss the rising security concerns in the Sahel, among which AQIM, European hostages and the smuggling of weapons in the aftermath of the Libyan conflict.[53]

However in developing its security approach towards countries like Mauritania, Mali and Niger, the EU puts a stronger emphasis on development, compared to the US. Following the kidnapping of several Europeans, a joint fact-finding mission led to the drafting of a

46. The countries involved in the programme are Algeria, Morocco, Tunisia and the Sahel nations Chad, Mali, Mauritania, and Niger as well as Senegal and Nigeria.

47. Yahia Zoubir, 'The United States and Maghreb–Sahel security', *International Affairs*, vol. 85, no.5, September 2009, pp. 977–95.

48. Ibid, p. 991.

49. Colin Thomas-Jensen, 'Beyond AFRICOM: Towards a Comprehensive US Africa Policy', *Yale Journal of International Affairs*, Winter 2008.

50. Ibid, p. 34.

51. Alexis Arieff, 'Algeria, current issues', Congressional Research Service, 22 February 2011, p. 8.

52. In December 2011 Abdeliziz Bouteflika and his Mauritanian counterpart called for stepping up security in the region with the support of the EU and the US. See Agence France Presse, 'Algeria, Mauritania pledge to boost Sahel security', 13 December 2011.

53. BBC Monitoring Service, 'Al-Qa'idah threat focus of Maghreb-European defence meeting', 12 December 2011.

Commission and Council paper in 2010 that proposed a security and development strategy in the Sahel.[54] Initiated under the 2008 French presidency that sought to protect its citizens and business interests in the region, the strategy explicitly links up security threats as being detrimental to development aid. Similarly, the lack of development is identified as a source for increased insecurity.[55]

The strategy is structured around four axes. Strengthening state capacities and meeting development objectives such as education and the mitigation of the effects of climate change constitutes the first axis. The second axis involves adopting a regional approach to foster a common vision on security and development with North African countries but also African organisations such as ECOWAS and the African Union. The document nonetheless avoids mentioning the Western Sahara conflict, which poisons Northern African relations and has led to a lot of distrust at all levels. Strengthening the capacities of law-and-order authorities to fight terrorism and organised crime, within the principles of good governance, is the third axis.[56] This ambition to professionalise security sectors in West Africa is balanced by the fourth axis that aims at preventing violent extremism and radicalisation. To do so, development initiatives have been flagged up such as providing 'basic social services, economic and employment perspectives to the marginalised social groups, in particular the youth vulnerable to radicalisation; to support the states and legitimate non-state actors in designing and implementing strategies and activities aiming at countering these phenomena'.

While the EU endorses a comprehensive development strategy, some points remain unanswered at this stage. First, the strategy does not flag up indicators to monitor progress. Then, in the aftermath of the Libyan conflict, described by many as the next Somalia in the light of the number of light weapons circulating, the EU's internal security objectives for the moment are predominant. The strategy also links up to the European Pact on Drugs and the establishment of two cooperation platforms in Dakar and Ghana to combat drug trafficking from Latin America that transits through Western Africa. In 2011, the Commission reported that one of the main activities in the Sahel had been the financing in December 2010 of the 'first EU-sponsored counter-terrorism programme for the Sahel region, including Mali, Mauritania, and Niger'[57] with a budget of €4.5 million. Future developments in the Sahel will therefore be indicative of the future vision that the European External Action Service wants to develop on security and development.[58] For the moment €150 million have been earmarked to support Mauritania, Mali and Niger. Another mounting concern for US and EU development agencies will probably be how to act quickly on the food crisis that might endanger one million children in 2012 and cause further instability in the Sahel.[59]

54. European Union External Action Service, 'Strategy for Security and Development in the Sahel', 2011. Available at http://eeas.europa.eu/africa/docs/sahel_strategy_en.pdf.

55. Ibid, p. 2.

56. Ibid, p. 7.

57. European Commission, 'Annual Report 2011 on the European Union's development and external assistance policies and their implementation in 2010', (staff working paper), SEC(2011) 880 final. Brussels, 6 July 2011.

58. Andrew Sherriff, 'The EU Strategy for Security and Development in the Sahel – An indicator for the future of EU External Action?', ECDPM Talking Points, 23 September 2011. Available at: http://www.ecdpm-talkingpoints.org/eu-sahel-strategy/

59. Agence France Presse,'Africa's Sahel desert regions face major food crisis: UN', 9 December 2011.

Another point concerns migration management in sub-Saharan Africa and North Africa. While Europeans were debating on the impact of the influx of unwanted Tunisian and Libyan migrants on their southern shores, most of the migrants were actually heading to Tunisia, Egypt or other neighbouring countries. Overall, according to Philippe Fargues, only 5 percent of the total of migrants reached European shores.[60] The EU has proposed Mobility Partnerships to Tunisia and Egypt that are modelled on the Mobility Partnerships of Moldova and Cape Verde. Those partnerships however can only be successful if the right incentives (i.e. visas) and the inclusion of those countries' specific needs are taken into account. The US-EU Platform for Cooperation on Migration and Refugee Issues can act as a forum to involve international partners. Consultations with the IOM, the UNHCR and regional partners such as ECOWAS or the African Union would be fruitful. The UNHCR has for instance raised its concerns about the treatment by Libyan rebels of sub-Saharan migrants considered to be mercenaries of Gaddafi.[61] Migration dialogue should help in fostering a co-management of migration fluxes that also addresses issues of legal migration and not only illegal migration.

Conclusions and recommendations

The Arab revolts should act as a wake-up call for the transatlantic partners to refocus on democratisation as a solution towards achieving more stability and security in the region. Support to the security sector and the judiciaries as well as supporting development in the Sahel region would be successful strategies to follow. In the past, the normative agenda that both partners had promoted in the region was constrained by stability concerns driven by internal security considerations. Counterterrorism, migration and border control were the main issues that prevailed in the West's approach to the Arab world over the past decade.

The dominance of this narrow homeland security agenda had led to a 'security *rapprochement*',[62] with authoritarian governments putting forward their expertise in countering terrorism and their respect for the rule of law. This enabled leaders to justify the maintenance of emergency laws, for instance in Algeria, Egypt or Syria. The Arab revolts have demonstrated however that the link between homeland and security also encompasses democratisation, freedom and justice. Encouraging stability by propping up authoritarian governments does not necessarily contribute to security in the EU and US homelands in the medium and long term. Roberto Aliboni noted in 2010 that the debate on security in the Mediterranean had not taken place.[63] It is high time to get this debate started and to reflect upon democratisation strategies in the region.

60. Philippe Fargues, 'Voice after Exit: Revolution and Migration in the Arab World', Migration Information Source, May 2011.

61. United Nations High Commissioner for Refugees, 'UNHCR concerned as sub-Saharan Africans targeted in Libya', August 2011. Available at http://www.unhcr.org/4e57d1cb9.html.

62. Frédéric Volpi, 'Introduction: Strategies for Regional Cooperation in the Mediterranean. Rethinking the Parameters of the Debate', *Mediterranean Politics*, vol. 11, no. 2, 2006, pp. 119-35.

63. Roberto Aliboni and Abdallah Saaf, 'Human security: a new perspective for Euro-Mediterranean cooperation', EUISS and IEMeD, *10 Papers for Barcelona 2010*, February 2010, p. 23. Available at: http://www.iss.europa.eu/publications/detail/article/human-security-a-new-perspective-for-euro-mediterranean-cooperation.

A transatlantic focus on this is particularly welcome given that the geopolitics of the region is being reshuffled. It is important to stress that support to SSR and the judiciary by the US and the EU will only be successful where there will be local ownership. First, to be credible supporters, they will have to strive for support from regional organisations such as the Arab League, the African Union and the Gulf Cooperation Council. A second challenge is that so far SSR has been modelled on various guidelines and roadmaps agreed at national level. As rightly pointed out by one commentator, here the EU and the US should be modest and concentrate on giving support to democratic transition actors such as the newly elected governments and look for local ownership via civil society involvement.[64] It is up to those new governments to decide in what way they might rely on external support for their own transitions. At the time this publication goes to press, the EU-US summit of November 2011 looked promising in improving coordination in the Arab region. First, counting on their combined contribution amounting to 80 percent of official development assistance, the two partners reaffirmed their commitments to aid effectiveness, division of labour, accountability and country ownership as well as to the Millennium Development Goals via notably the Transatlantic Development Dialogue. Then, acknowledging the 'historic opportunity' that the revolts in Egypt, Tunisia and Libya constitute, the partners have reiterated their willingness to work together towards democratic reform.[65]

A transatlantic debate needs to take place in order to identify the points of convergence and divergence. A possible way to proceed would be to see whether some common strategies are foreseeable in the following areas:

- ***Embedding the internal security focus into a comprehensive foreign policy:*** this is not contradictory with EU and US normative goals. Reworking strategies for the MENA region where citizens are at the heart of EU and US actions would be welcomed. This is in line with calls to evolve from traditional diplomacy to 'social diplomacy' in the region, albeit on a case-by-case basis, taking into account the specificities of the region.[66]

- ***Supporting security sector reform***, both in countries undergoing transition and in countries not yet in transition. This means designing comprehensive training programmes that go beyond mere counterterrorism training and take into account the needs of the newly-elected governments. Local ownership will certainly provide the incentives for reform, together with teaming up with regional organisations such as the African Union.

- ***Rethinking rule-of-law support as an objective in itself*** in EU and US programmes, and not merely as a means. Transatlantic partners could

64. Mark Sedra, 'Security Sector Transformation in North Africa and the Middle East', United States Institute of Peace, Special Report, November 2011.

65. Council of the EU, EU-US Summit- Joint Statement, Document 17805/11 Presse 463, 28 November 2011.

66. Rianne van Doeveren, 'Engaging the Arab World through Social Diplomacy', *Clingendael Paper* no. 4, October 2011.

facilitate trans-regional exchange of best practices and experiences on transitional justice.

- ***Combining comprehensive development and security approaches*** in North Africa and the Sahel. Beyond the recently created Global Counter-Terrorism Forum, transatlantic partners need to support policies that put citizens in the region at the heart of their strategies. In that respect, the US-EU Dialogue on Development provides an appropriate platform to expand the development and security approach to the Sahel and North Africa.

- ***The US-EU Platform for Cooperation on Migration and Refugee Issues*** could be used to think about the implications of migration fluxes in the region and their implications for the transitions. It could involve international partners such as the IOM and the UNHCR and partners such as ECOWAS or the African Union. Exploring further the role of diasporas and remittances in democratic transitions as well as developing refugee policies and migration policies alongside labour market reforms will be crucial, especially for countries like Egypt and Tunisia, many of whose nationals working in Libya have been returning to their home countries.

Looking beyond their own internal security interests, the EU and the US will have to strike a delicate balance in supporting policies that are built on local ownership while pursuing their strategic interests together with their normative commitments. Such 'smart conditionality' as heralded in the latest EU policy documents will have to evolve in a context of shifting sands as democratic transitions can be quite unpredictable. Transatlantic partners will also have to take into account the new geopolitical realities of a regional power such as Turkey or the potential role that the Gulf countries could play.

Annexes

About the authors

Elaine Fahey joined the Amsterdam Centre for European Law and Governance in 2011 as a Postdoctoral Research Fellow, on the project of the Architecture of Postnational Rulemaking. She was previously a Lecturer in Law at the Dublin Institute of Technology, Ireland, and a Max Weber Postdoctoral Fellow at the European University Institute (2009-2010); Visiting Max Weber Fellow, European University Institute, Florence, Italy (2010-2011) Global Governance Programme, Robert Schuman Centre for Advanced Studies.

Eva Gross is Senior Fellow at the Institute for European Studies (IES), Vrije Universiteit Brussels. An expert on EU foreign and security policy, she has published widely on various aspects of European crisis management and the reconstruction of Afghanistan. Eva Gross holds a Ph.D from the London School of Economics, and in 2008 was a Visiting Fellow at the EUISS.

Daniel Hamilton is the Austrian Marshall Plan Foundation Professor and Director of the Center for Transatlantic Relations at the Paul H. Nitze School of Advanced International Studies (SAIS), Johns Hopkins University. He also serves as Executive Director of the American Consortium for EU Studies. He leads international policy work for the Johns Hopkins-led National Center for the Study of Preparedness and Catastrophic Event Response (PACER), and has held a variety of senior positions in the U.S. Department of State. Recent publications include *Transatlantic 2020: A Tale of Four Futures; and Europe 2020: Competitive or Complacent?*

Xymena Kurowska is an assistant professor of international relations and European studies at the Central European University in Budapest. She has researched and written about European security policies, in particular CSDP and border management in the Eastern neighbourhood. Her recent publications include: *Explaining the EU's Common Security and Defence Policy. Theory in Action* (co-edited with Fabian Breuer, Palgrave, 2012) and *The Politics of European Security Policies: Actors, Dynamics and Contentious Outcomes* (co-edited with Patryk Pawlak, Routledge, 2012).

Patryk Pawlak is Research Fellow at the EUISS where he deals with EU-US relations and US domestic and foreign policies. He holds a Ph.D in political science from the European University Institute of Florence. Prior to joining the EUISS, he was a visiting scholar at numerous research institutions, including the Center for Transatlantic Relations (Washington, D.C.), the Center for International Relations (Warsaw), Center for Peace and Security Studies at Georgetown University (Washington, D.C.) and the Centre for European Policy Studies (Brussels). He has published articles in numerous peer-reviewed journals and contributed to several collective research and publication projects.

Maria Grazia Porcedda is a researcher in law (LL.M.) at the European University Institute, where she researches cyber-security and the interplay between cybercrime and data protection. She previously worked at the Centre de Recherche Informatique et Droit on privacy and cloud computing, and as a trainee on privacy issues at both the OECD and the European Data Protection Supervisor (EDPS). She holds an MA in International Relations from the University of Bologna – where she was a member of Collegio Superiore – and a BA in Political Science from the University of Cagliari.

Mark Rhinard is a Senior Research Fellow and head of the Europe Research Program at the Swedish Institute of International Affairs (UI). He is also a senior advisor to the European Policy Centre in Brussels and an Associate Professor at Stockholm University. His research agenda focuses on European cooperation on transboundary security threats and the protection of European critical infrastructures. Recent publications include *Framing Europe: The Policy Shaping Strategies of the European Commission* (Nijhoff, 2010) and several peer-reviewed journal articles on the EU's evolving role in homeland security issues.

Thorsten Wetzling is a non-resident research fellow at the Center for Transatlantic Relations at the Paul H. Nitze School of Advanced International Studies (SAIS). His work focuses on contemporary European and North American security and intelligence governance, civil-military relations and the design and evaluation of accountability mechanisms.

Sarah Wolff is Teaching Fellow in EU Politics at University College London. She is also Senior Research Associate Fellow at the Netherlands Institute for International Relations. Her research focuses on the EU's external relations with the Arab world and Justice and Home Affairs. She follows closely EU migration and border practices with North African countries. She recently published *Freedom, Security and Justice after Lisbon and Stockholm* (T.M.C Asser Press, co-edited with F. Goudappel and J. de Zwaan).

Abbreviations

ABP	Afghan Border Police
ACP	Afghan Civilian Police
AFRICOM	Africa Command
ANA	Afghan National Army
ANCOP-AG	Afghan Gendarmerie
ANP	Afghan National Police
ANSF	Afghan National Security Forces
AP	Action Plan
AQIM	al-Qaeda in the Islamic Maghreb
BST	Border Support Team
CEO	Chief Executive Officer
CFSP	Common Foreign and Security Policy
CIA	Central Intelligence Agency
CIDT	Cruel, Inhuman or Degrading Treatment
CII	Critical Information Infrastructure
CIIP	Critical Information Infrastructure Protection
CSDP	Common Security and Defence Policy
CT	Counterterrorism
DDoS	Distributed Denial of Service
DDR	Disarmament, Demobilisation and Reintegration
DHS	Department of Homeland Security
DoD	Department of Defense
EaP	Eastern Partnership
EC	European Community
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECR	European Court Report
EEAS	European External Action Service
EHRR	European Hunan Rights Reports
EIDHR	European Instrument for Democracy and Human Rights
ENP	European Neighbourhood Policy
EP	European Parliament
ESDP	European Security and Defence Policy
EUBAM	EU Border Assistance Mission to Moldova and Ukraine
EUSR	EU Special Representative
FBI	Federal Bureau of Investigation
FDD	Focused District Development
FSJ	Freedom, Security and Justice
GAO	Government Accountability Office
IBM	Integrated Border Management
ICCPR	International Covenant on Civil and Political Rights

ICT	Information and Communications Technology
INL	Bureau of International Narcotics and Law Enforcement Affairs
IOM	International Organisation for Migration
ISC	Intelligence and Security Committee
IT	Information Technology
JHA	Justice and Home Affairs
JSB	Joint Supervisory Body
JSOC	Joint Special Operations Command
LEA	Law Enforcement Agency
MENA	Middle East and North Africa
MoI	Ministry of the Interior
NATO	North Atlantic Treaty Organisation
NCTC	National Counterterrorism Center
NGO	Non-governmental Organisation
NSA	National Security Agency
NTM-A	NATO Training Mission-Afghanistan
OECD	Organisation for Ecomomic Co-operation and Development
PBG	Polish Border Guard
PNR	Passenger Name Record
SBGS	State Border Guard Service
SitCen	Joint Situation Centre
SSR	Security Sector Reform
SWIFT	Society for Worldwide Interbank Financial Telecommunications
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TFTP	Terrorist Finance Tracking Program
TSCTI	Trans-Saharan Counter-Terrorism Initiative
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
USAID	United States Agency for International Development
WGCC	Working Group on Cyber-security and Cyber-crime
WMD	Weapons of Mass Destruction

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European Union
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Over the last ten years, several EU-US agreements have been concluded on issues like mutual legal assistance, personal data exchanges or transfers of financial data. The trend towards increasing transatlantic integration in the security domain has seen the emergence of new policy instruments which have often been criticised for their lack of transparency and accountability. This has given rise to a serious debate concerning data protection and civil liberties.

The transatlantic debate that has accompanied the development of homeland security policies in the post 9/11 context is therefore focused on the two poles of liberty and security, and how to achieve a balance between them. The tenth anniversary of the 9/11 terrorist attacks in New York and Washington D.C. offers a good opportunity to re-examine this dichotomy.

This *Chaillot Paper*, edited by Patryk Pawlak and with a preface by Gilles de Kerchove, examines transatlantic security cooperation in a broader context and highlights new policy avenues worth exploring. The contributions in part one of the volume focus on the extent of bilateral EU-US cooperation at various levels, while part two provides an insight into how the transatlantic security agenda is implemented beyond the Euro-Atlantic territory.

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43 avenue du Président Wilson
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phone: + 33 (0) 1 56 89 19 30
fax: + 33 (0) 1 56 89 19 31
e-mail: info@iss.europa.eu
www.iss.europa.eu