

The Jean Monnet Seminar Series
Tahditiet Jean Monnet

THE EU'S FIGHT
AGAINST TERRORISM:
DISAPPOINTMENT
THUS FAR? PROSPECTS
FOR THE FUTURE?

Malta
European
Studies
Association

Mark Harwood

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The Jean Monnet Seminars

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THE EU'S FIGHT AGAINST TERRORISM: DISSAPPOINTMENT THUS FAR? PROSPECTS FOR THE FUTURE?

Mark Harwood

How the EU intends to target terrorists

Politicians would have us believe that 2004 represents a watershed in how the European Union and its member states deal with an increasingly potent threat, that of the mega terrorist. This claim marks an increasing awareness of Europe's status as a possible target, the need for states to establish cross-border cooperation to tackle these cross-border criminals as well as a realisation of the EU's growing competence in an area that used to be a closely guarded area of national competence. But, the EU's track record in this area has been far from impressive and it is questionable to what degree recent changes in the area of combating terrorism merit the rhetoric that politicians have used.

One of the principal obstacles to coordinating an effective European-level response to terrorism has been the unwillingness of many European states to move with the times and upgrade their definition and threat assessment of what constitutes modern-day terrorism. This is hardly surprising because many European states had long dealt with their own internal terrorists groups and, in the process, established well coordinated domestic networks to deal with them. Thus, one of the earliest challenges was the need for Europe to fully realise that terrorism had moved from the more traditional, classical groups, Rapoport's third wave of terrorism, into a fourth, more radical and deadly wave, a new threat that many have labelled the era of the mega terrorist¹.

¹ David Rapoport. *The Four Waves of Rebel Terror and September 11*. *Anthropoetics* 8, (UCLA), No. 1, Spring /Summer 2002. <http://www.anthropoetics.ucla.edu/ap0801/terror.htm>

The new breed of terrorism, the need for an EU response

Many European states have a long and chequered history of dealing with their own, internal terrorist groups. Almost all the larger European states experienced violent political unrest in the 1960s and 1970s, from leftist revolutionary groups in Italy, West Germany and Greece to regional separatists groups in France, Spain and the United Kingdom. But these 'classical' terrorist groups were very much a domestic issue with a domestic agenda. The groups were considered to be largely rational and, thus, containable. Their stated aims, whether political or ethnic, were directed towards a political change in the state's make up with independence or autonomy for separatist groups and political change for radical leftist groups. This meant that the groups were open to mediation and possible resolution of their stated grievances. They had a stake in ensuring that their resort to violence was focused, direct and minimal. Excessive violence could result in harsh counter measures, which could easily obliterate their operations and create a backlash in public opinion amongst their supporters. This form of 'rational' terrorist group meant that many European states viewed their own internal conflicts as a 'workable war' on a domestic front with little need for interference from outside, whether from the European or the international level. It was this ingrained approach that had to change in the 1990s.

During the 1980s and 1990s a new wave of terrorism started to gain in prominence, with deadly consequences. Its principal manifestation was as religious based extremist groups. As the number of violent, religious extremist groups increased in the 1980s and 1990s, it became increasingly evident that the number of acts of terrorism was decreasing while the overall number of casualties stemming from these attacks was increasing. While not all groups were Muslim based, many European states became increasingly concerned with the rise of Islamic extremists in Mediterranean countries near to mainland Europe, countries which had sizeable minorities in many European states.

These Islamic fundamentalist groups were seen to pose a significant and real threat to Europe. The groups were deadlier with no limit to the number of casualties they could inflict. The scope for reasoning based on political aims and political dialogue was replaced by the logic that all actions were for God and permissible by God, God's will being subjectively assessed

by the groups themselves. As the groups operated from countries far from Europe, they did not have to fear extreme counter measures or negative public opinion, again giving them free reign in their number of targets. Europe also came high on the list of these groups, as a possible target. Europe had been vilified along with the US for its 'indifference' in the Yugoslav civil war, French involvement in Algeria, Spanish enclaves in North Africa as well as British endorsement of US policies. Coupled with the fact that these new terrorists operated within a network of funding and infrastructure reliant on large Muslim communities, of which Europe has many, made it clear that Europe's many potential targets were at risk. All this considered, many European states woke up to the new terrorist threat in the 1990s and realised that a more co-operative response was needed.

How the EU responded

Before the Maastricht treaty, the European Community had only lightly dipped its toe into the murky pool of terrorism. The EC member states had established the Trevi group in December 1975, with an aim to better cooperate in combating terrorism. The 1970s had seen increased cross-border movement by terrorist groups in Europe, especially the leftist extremists in West Germany and Italy as well as the increased operation of the PLO in Europe. The Trevi group had established its first working group in 1977, to deal with anti-terrorist cooperation. But as with European Political Cooperation, these loose forums for intergovernmental cooperation bore few real results.

The treaty developments of the 1990s provided for European cooperation in the area of Justice and Home Affairs. With this in mind, it was more than likely, based on the long European experience of 'classical' terrorist groups and the emerging threat of mega-terrorists, especially stemming from Algeria in the early 1990s², that the EU would tackle the subject at some point. In 1995, at the Madrid European Council, the conclusion established that terrorism, due to its trans-national nature, could not be dealt with effectively by isolated action or by one state using its own

² Therese Delpach. *International Terrorism and Europe*. Chaillot Papers (Institute for Security Studies), No. 56. December 2002. pp. 8.

resources.³ While the EU viewed terrorism as another form of 'serious crime' it consolidated its cooperation in JHA with the establishment of Europol⁴ and the signing of the convention on a simplified extradition procedure⁵ in the same year. In 1999, at the Tampere European Summit in Finland, the EU leaders took a formal decision to increase judicial cooperation amongst themselves in order to fight crime, including terrorism. At the turn of the century, the EU also took steps to establish a Judicial Cooperation Unit, Eurojust⁶, as well establishing a convention on mutual assistance in criminal matters⁷ and a programme of measures to implement the principle of mutual recognition of decisions in criminal matters⁸. All this was a reflection of increased awareness of the threat of mega terrorism but also the EU's increased competence in the area of criminal matters.

But the EU's attempts at dealing with terrorism were not confined simply to the third pillar. The EU had pursued its counter-terrorism policy within each of its three "pillars" by generating new tools as well as exercising those already extant. In terms of economic affairs, the European Commission had participated in the OECD's Financial Action Task Force. Before September 11th, the EU was also well on track in its formulation of a list of terrorist organisations and individuals whose assets were to be targeted, a list that was eventually released in December 2001. This list contained names of individuals and organisations that were not even considered as a prime threat by the United States at the time. Furthermore, the European Parliament blocked a €18.7m grant to the Palestinian

³ Conclusions adopted by the European Council Summit, Madrid, 15-16th December, 1995. (bulletin of the European Communities, No. 12/1995)

⁴ Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention). OJ C 316, 27/11/1995. pp 0001-0032

⁵ Convention on simplified extradition procedure between the Member States of the European Union. OJ C 078, 30/03/1995. pp 0001-0010

⁶ Council Decision of 14 December 2000 setting up a Provisional Judicial Cooperation Unit.

OJ L 324 , 21/12/2000 P. 0002 - 0003

⁷ Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union. OJ C 197 , 12/07/2000 P. 0003 - 0023

⁸ Programme of measures to implement the principle of mutual recognition of decisions in criminal matters. OJ C 012 , 15/01/2001 P. 0010 - 0022

Authority after the Union came in for criticism for helping the Authority at a time when it was accused of tacitly supporting terrorism. The grant was blocked with the condition that the Palestinian leadership offer the EU a budget to show where the money would be allocated.

In terms of foreign and security affairs, the EU had also accommodated its anti-terrorist policy within its second pillar policies, by stepping up its commitment in some areas, albeit in a much more limited way that had not included new powers or institutions. The EU was particularly active through its external assistance programmes. Beyond these internal issues, JHA also was given an external dimension with a commitment made towards political dialogue with third countries to improve their counter-terrorism capabilities while funding under PHARE, TACIS and MEDA was directed towards providing JHA assistance to help in border management, police cooperation and the fight against terrorist financing.

The EU's approach to terrorism, while highly modest and piecemeal, was to be seriously shaken by the events of September 11th in the United States. The shock created by the use of civilian aircraft against the infrastructure of a western state, the religious significance of the attack and its apparent confirmation of the feared 'clash of civilizations', as well as the accumulation of evidence that indicated that many of the September 11th terrorists had been resident in Europe for some time, created an environment of intense political support for the US as well as panic for greater coordination of European counter-measures to guard against terrorists.

In response, the EU introduced an Action Plan which made a commitment to arrive at a common definition of terrorism so as to facilitate cooperation. This was no easy task considering the fact that only six member states, at the time, had specific anti-terrorist legislation which all defined terrorism differently⁹. The leaders also agreed to the introduction of a European arrest warrant, which would replace the old system of extradition between member states and which would allow for wanted persons (not only terrorists) to be handed over directly from one judicial authority to another. The Action Plan also called upon the Justice and Home Affairs

⁹ The countries were Germany, Spain, France, Italy, Portugal and the UK.

Council to draw up a list of terrorist organizations (as referred to above) and for member states to share more information with Europol, as well as the setting up of a specialist anti-terrorist team within the latter. Going beyond the third pillar and in an attempt to deal with the complicated issue of funding terrorists, the European Council called upon ECOFIN and the JHA Council to adopt an extension of the directive on money laundering and the framework decision on freezing assets.

As a consequence of the action plan and the urgency the events of September 11th brought, the EU adopted the second Anti-Money Laundering Directive in December 2001 and the Council established Eurojust in February 2002 with the aim to improve the coordination of investigations and prosecutions in member states. The Council also launched the framework decision of June 2002 approximating the definition of terrorist offences in all member states and the European Arrest Warrant. Joint investigation teams were also inaugurated to allow two or more member states to set up an investigative team for a specific purpose and period.

However, follow up was very poor. In terms of the EU Arrest Warrant, five countries, including Germany, Italy and the Netherlands, had not signed up to the agreement and of the fifteen EU members, only nine had signed up to the Joint Investigation Teams Directive. In terms of granting the police the right to make cross-border requests to intercept communications and monitor bank accounts, only four countries signed up while the common definition of terrorism had still not been approved by three EU countries, with the consequence that these three members had failed to adjust their national laws in laying down minimum sentences for terrorist crimes. In addition to the failure of some member states to follow-up the 2001 Action Plan fully, questions were raised as to the ability of Europol to contribute fully to the anti-terrorist policy of the Union. Staff numbers were considered to be insufficient and resources were considered inadequate while little had been achieved in overcoming the obstacles in sharing information across the 34 law enforcement agencies in the EU.

So why this problem with follow-up? Why are commitments that were so readily given proved to be so difficult to achieve? One of the most important reasons stems from a lack of acceptance by some that Europe represented a real target for terrorists. After September 11th, and American

policy in Afghanistan and, later, Iraq, the war against the west was seen to involve only the Americans. Many European countries took it that the actions of al Qaeda were directed principally at the Americans, as embodiments of their hatred of the west. This was a highly simplified view of things, as Europe had already been bundled with the US for its lack of initiative in the Yugoslav civil war. However, the long-held view of the threat posed by classical terrorist groups, as well as a lack of acceptance by some that Europe could be a target, made some countries complacent and unwilling to follow-up their 2001 commitments.

There was also a fear not to destabilize the Muslim communities across Europe. Many of the counter-terrorist proposals put forward, such as monitoring Muslim religious functions, were seen as possibly igniting tensions between these communities and the countries where they resided, besides the wider issues of trying to minimise social unrest and possibly wide-spread antagonism towards Muslims. With the numbers of Muslim communities being exceptionally high in many EU states, this could have had serious repercussions for civil control.

However, another factor was the unwillingness of states to cooperate in the JHA area, an area long felt to be highly sensitive and, consequently, closely guarded by national governments. Many states prefer to guard their secret information or prefer to cooperate with other EU states bilaterally or with non-EU states. The tendency to group terrorism with other crimes also made it very difficult to agree on decisions (Italy had a problem with this in 2001).

The situation may not have seen any marked improvement if events in Spain in March 2004 had not alerted many EU leaders to the complacency that still dominated anti-terrorist policy in some EU countries. In the morning rush-hour traffic of Madrid, terrorists exploded several bombs that left nearly 200 commuters dead. The shock across Europe was palpable. The terrorist war had been brought to mainland Europe, shattering the complacency of many EU countries and leaders.

In an immediate and efficient manner, the EU leaders agreed on a new series of anti-terrorism provisions that also tried to address the problem of implementation and follow-up. The package of steps announced after March 2004 included a commitment to ensure that the pre-March 2004

legal instruments established by the 2001 Action Plan were fully implemented by June 2004 and to endorse the adoption of a solidarity clause within the draft EU constitution, providing for mutual assistance in the face of a terrorist attack on an EU country. The plan also called for the creation of a counter-terrorist co-ordinator to over-see the EU's anti-terrorist activities¹⁰. EU leaders called for the integration of an intelligence structure on terrorism within the Council Secretariat and made a commitment to strengthen border controls and progress towards the establishment of a European Border Agency. Progress towards the adoption of a database of persons found guilty of terrorism or other serious criminal acts was also called for. Finally, the plan made a commitment towards the better use of existing bodies, including Europol and Eurojust and a commitment to develop further and build on existing proposals to prevent the financing of terrorism.

However, considering the lack of follow-up after 2001, one would assume that there is still room to be sceptical about these initiatives. The lack of political will to share sensitive information remains. As this is the key to any successful policy, this can be considered a major draw-back of the present plans. Many of the larger EU members have effective intelligence structures and remain unwilling to jeopardise these, either by revealing their sources and how much they know or for fear that it will undermine established and functioning bilateral intelligence sharing arrangements like that between the UK and the USA. However, with instances such as the wide spread travels of the September 11th terrorists across Europe and instances of murderers moving between EU countries and leaving their criminal records behind, some would argue that the time is ripe to reassess established priorities. And the situation is not totally bleak with the new action plan offers areas of optimism; It stipulates a deadline for the enforcement of the commitments, both in terms of the 2001 action plan and the new commitments, though some states have already failed to meet this deadline over the summer. The new terrorist czar should also help keep minds focused and motivated. In fact, Mr. Terrorism already reprimanded Greece, Italy and Germany in June for falling behind on their commitments and as a consequence Greece promised to incorporate new laws within two weeks of the warning being issued.

¹⁰ The first co-ordinator was designated as Gijs de Vries, a former deputy Dutch Interior Minister

The new 'draft' constitutional treaty strengthens the EU's role in justice and home affairs, but some believe that it does not make the major changes that would be necessary to achieve the EU's overall goal for an area of freedom, security and justice. On the positive side, the draft treaty would incorporate the following developments:

- The SOLIDARITY clause ensures that all states are protected by the common reaction clause. It worked well for NATO and could ensure protection for small states like Malta but the clause remains highly nebulous. Reaction would have to be agreed within the Council.
- allow the Union to apply only one procedure when it makes JHA laws and policies which should make policy-making faster and more coherent;
- require the EU's Council of Ministers to use qualified majority voting rather than unanimity when voting on most JHA legislation which should help to speed up decision-making;
- expand the role of the European Parliament in JHA law-making, which will enhance democratic scrutiny of JHA decisions and popular pressure for action;
- strengthen the legal impact of EU legislation in member-states by giving more laws direct effect;
- extend the jurisdiction of the European Court of Justice to cover JHA, which would strengthen the rule of law at EU level;
- incorporate the Charter of Fundamental Rights into the new constitution and codify other rights and principles of EU law, strengthening the formal protection of citizens' rights;
- bring the emerging European police office, called Europol, within the EU's legal framework.

Reasons for optimism and areas of concern

The EU has definitely come along way since the Trevi group. Where little cooperation existed, now more work is done and increased exchange of information does take place. The problem however remains that many large states are not so eager to cooperate as smaller states. While big states like France and the UK have the means and the methods to guard their territory, they maintain a keen reluctance to share information. However, big states are also able to defend themselves, making it more difficult to

attack them. This makes soft targets in the EU easy prey. The HSBC terrorist attacks in Turkey in May 2004 being such a case. Other examples include the attack in Greece ahead of the Olympic games. Malta, by dint of EU membership, is a potential target. It is thus in our interest to push for anti-terrorist action to counter the consequences of our association with many bigger EU countries who conduct policies that make them targets for terrorism but too difficult to attack.