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### **Citation**

Eijkman, Q. A. M. (2011). Preventive Counter-terrorism and Non-discrimination Assessment in the European Union. *Security And Human Rights*, 22(2), 80-101. doi:10.1163/187502311797457102

Version: Not Applicable (or Unknown)

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**Note:** To cite this publication please use the final published version (if applicable).

# Preventive counter-terrorism and non-discrimination assessment in the European Union

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## Introduction

As a result of the 9/11 terrorist attacks and the bombings in Madrid and London, a prevention-focused counter-terrorism approach has developed across the European Union (EU). Preventive counter-terrorism is appealing because it implies interventions that remove the ability or, better still, the motivation of potential terrorists to carry out their lethal designs. Member states such as the United Kingdom (UK) and the Netherlands that primarily have experience in addressing ‘home-grown’ terrorism, have developed preventive counter-terrorism measures in response. Even though the majority of these laws, regulations and policies recognise the importance of the rule of law and human rights, it remains relevant to examine whether in theory and in practice particular measures have had disproportionate effects on ethnic and religious minorities and thereby violate non-discrimination standards.

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

This article introduces the concept of preventive counter-terrorism. Furthermore, it will briefly consider the use of preventive counter-terrorism measures in the EU as well as their (potential) discriminatory side-effects. Two member states, the Netherlands and the UK, serve as case studies. In the conclusion, the need for a systematic evaluation of the effect of preventive

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

counter-terrorism measures in relation to non-discrimination is considered.

### **Preventive Counter-terrorism**

Counter-terrorism is a complex and multifaceted subject that encompasses a host of different strategies for dealing with violent extremism or radicalisation. Its central purpose can be described as ‘devising methods and policies to cause non state groups that employ [terrorism] to stop using violence to achieve their political objectives’.<sup>3</sup> Paraphrasing Alex Schmid, it is possible to divide these methods and policies into two broad categories: namely, those efforts that combat the manifestations of terrorism and those that attempt to address the conditions which are conducive to the spread of terrorism. It is the latter category of preventive counter-terrorism that constitutes the focus of this article.<sup>4</sup>

The most obvious advantage of a counter-terrorism approach that focuses on prevention is its ability to avert the deaths and injuries of innocent civilians who might otherwise have fallen victim to a terrorist attack. Moreover, by forestalling the societal polarisation and calls for revenge that frequently follow terrorist acts and which in turn may lead to a vicious cycle of retaliation, preventive strategies can also have clear longer-term benefits.<sup>5</sup> However, laws and policies that focus on preventing terrorism are not necessarily limited to any concrete act of preparing a terrorist attack. A broader or more fundamental form of preventive counter-terrorism attempts to remove the factors which are conducive to the spread of violent extremism. By engaging in dialogue with radicalising individuals or organisations and by addressing the grievances that engender an environment in which violent radicalisation may occur, governments can take steps towards the long-term resolution of a conflict and diminish the appeal to resort to terrorism.

Yet it is debatable whether the preventive counter-terrorism approach is truly preventive in the sense of seeking to remove the factors that could contribute to the choice of individuals or groups to turn to political violence. Although the EU, the UK and the Netherlands are ostensibly committed to such policies, in day-to-day reality this commitment is sometimes seen as being pushed to the background by a more reactive desire to sentence, disrupt or collect information on individuals of whom there already exists a strong suspicion that

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<sup>3</sup> Robert J. Art and Louise Richardson, ‘Introduction’, in Robert J. Art and Louise Richardson (eds.), *Democracy and Counterterrorism: Lessons from the Past* (Washington: United States Institute of Peace Press, 2007), p. 1.

<sup>4</sup> Alex P. Schmid, ‘Prevention of Terrorism: Towards a Multi-Pronged Approach’, in Tore Bjørgo (ed.), *Root Causes of Terrorism: Myths, Reality and Ways Forward* (London: Routledge, 2005), p. 223.

<sup>5</sup> Northern Ireland’s experience with domestic terrorism during the ‘Troubles’ provides an example of the reciprocal nature of terrorism-related violence. For example, see: Steve Bruce, *The Red Hand: Protestant Paramilitaries in Northern Ireland* (Oxford: Oxford University Press, 1992), pp. 31, 56, 136-138.

they are involved in terrorism-related activities.<sup>6</sup> 'Prevention' thus becomes much more narrowly focused on stopping potential suspects from committing a terrorist act rather than attempting to remove such individuals' motivation for taking up arms. Also, distinct forms of prevention such as counter- and de-radicalisation policies, which attempt to address the ideological motivations for violent extremism and the narratives that individuals adopt in moving toward support for or committing acts of terrorism, are challenging because they reflect judgments, not about the objective and practical means of committing such acts and subsequent tactics to limit access to those means, but about the subjective beliefs or ideas that underlie terrorist impulses. Prevention in the latter case, especially when attempting to detect persons who are in early processes of radicalising and have not carried out any concrete act of terrorism, or even the preparation of such an attack, involves judgments about belief systems and the possible consequences of certain beliefs.

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

### **The European Union**

The EU's counter-terrorism strategy consists of four strands: prevent, protect, pursue and respond. The preventive aspect of this strategy is in turn divided into three segments: disrupting radicalisation and terrorist recruitment, ensuring mainstream opinion prevails over extremist views and promoting with a strong third country dimension security, justice, democracy and equal opportunity.<sup>7</sup> This latter aspect would appear to be the most suited to addressing the conditions which are conducive to the spread of violent radicalisation and terrorism, but on how to actually achieve this outside of the EU's borders, the Union is somewhat vague. 'Outside Europe, we must promote good governance, human rights, democracy, as well as education and economic prosperity, through our political dialogue, assistance - and responsible media programmes. And we must work to

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<sup>6</sup> Quirine A.M. Eijkman and Bart Schuurman, 'Preventive Counter-terrorism and Non-discrimination in the European Union: A call for systematic evaluation!', ICCT Research Paper, 2011, pp. 27-29.

<sup>7</sup> Council of the European Union Note 15893/1/10 of 17 January 2011 on the EU Action Plan On Combating Terrorism; Council of the European Union Note 15443/07 of 23 November 2007 on the European Union Strategy for Combating Radicalisation and Recruitment to Terrorism, p. 3.

resolve conflict'.<sup>8</sup>

The EU's response to terrorism has been partly event-driven.<sup>9</sup> Following the attacks of 9/11, international terrorism immediately became a key concern for the Union and led to the formulation of a counter-terrorism action plan. This plan has since undergone several modifications and currently lists details of how the various strands (prevent, protect, pursue and respond) of the EU's Counter-terrorism Strategy are to be put into practice. According to Rik Coolsaet, the EU's 'domestic' approach to fighting terrorism has always focused on devising measures and institutions to complement member states' own counter-terrorism initiatives and abilities with a strong focus on criminalising terrorism.<sup>10</sup> Such is indeed the approach taken by the 2005 strategy. With regard to the 'prevent' strand, the document states that the EU 'can provide an important framework to help co-ordinate national policies, share information and determine good practice.' Key elements of the prevent strand are combating radicalisation and recruitment into terrorism, empowering mainstream opinion and promoting security, justice and democracy.

Yet despite the prevent strand having been labelled as the EU's foremost counter-terrorism pillar, many of the most important countermeasures adopted in the decade since 9/11 do not seem to fit this category.<sup>11</sup> At least, not if prevention is seen as addressing the factors which are conducive to the spread of terrorism. Instead, the EU seems to have concentrated most of its 'prevention' efforts on creating and strengthening the aforementioned framework, particularly with regard to streamlining member states' judicial responses to terrorism and collecting, retaining, processing and cross-sharing large amounts of personal data, a practice which can undermine the presumption of innocence by making people who have not committed any offence the subject of an investigation.<sup>12</sup>

The desire to streamline member states' and EU agencies' ability to access each other's databases, to create new data storage facilities and programmes and to further the cooperation and coordination between member states' judicial systems, police forces and intelligence agencies is of central importance to the EU's 2010-2014's Stockholm Programme. This five-year strategic approach was approved by the Council in December 2009 and aims to develop what the EU calls its 'area of freedom, security and justice'.<sup>13</sup> Together with the Europe 2020

<sup>8</sup> Ibid. 2007, p. 5; Ibid. 2011, pp. 6-7.

<sup>9</sup> European Parliament Committee on Civil Liberties, Justice and Home Affairs (see note 2 above), p. 3; Rik Coolsaet, 'EU Counterterrorism Strategy: Value Added or Chimera?', *International Affairs*, vol. 86, no. 4, 2010, p. 858.

<sup>10</sup> Ibid. 2010, p. 871-872.

<sup>11</sup> Ibid. 2010, p. 866.

<sup>12</sup> Open Society Institute, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory* (New York: Open Society Institute, 2009), pp. 57-118.

<sup>13</sup> The Stockholm Programme defines the EU's framework for police, rescue services and customs cooperation, criminal and civil law cooperation, as well as asylum, migration and visa policy for the period of 2010-2014. For more information on the Stockholm Programme

Strategy, a ten-year plan for reviving the European economy, ‘Stockholm’ is a major element of the EU’s long-term planning.<sup>14</sup> Although it claims to put citizens’ interests first, the Stockholm Programme has attracted criticism, among others from the FRA and Amnesty International, on account of its weak stance on non-discrimination and its protection of the rights to privacy and data protection.<sup>15</sup>

### **The Netherlands**

On a national level, the Dutch government employs what it refers to as a ‘broad approach’, aimed at addressing both the effects of terrorist violence and preventing such incidents from occurring by early intervention and countering violent radicalisation.<sup>16</sup> The General Intelligence and Security Service (AIVD) plays a central role in the preventive part of this counter-terrorism strategy, using its considerable resources to map ‘trends’ in radicalisation and to pinpoint individuals and organisations who could pose a threat to Dutch society. The Office of the Netherlands National Coordinator for Counter-terrorism (NCTb) is primarily concerned with streamlining Dutch counter-terrorism policies and efforts, but also conducts threat level assessments of its own.

The Dutch government’s pre-emptive approach to counter-terrorism has also led to several important legal and policy reforms. Some of these reforms were undertaken in order to implement EU Framework decisions while others were the products of domestic politics. Such legislation has consistently viewed terrorism as a criminal act, consequently strengthening the ability of law enforcement and public prosecutors to deal with it. Of particular interest is the 2004 Crimes of Terrorism Act (‘Terrorism Act’) and the 2006 Act on expanding the scope for investigating and prosecuting terrorist crimes.<sup>17</sup> Enacted to implement a 2002 EU Framework decision that would make suspects convicted of terrorism-related crimes eligible for more severe punishment, this law was modified beyond the original EU requirements to incorporate terrorist recruitment

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see: European Council, ‘The Stockholm Programme: an Open and Secure Europe Serving and Protecting Citizens’, *Official Journal of the European Union* (4 May 2010).

<sup>14</sup> European Commission Communication COM(2010) 171 of 22 April 2010 on Delivering an Area of Freedom, Security and Justice for Europe’s Citizens.

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

<sup>16</sup> National Coordinator for Counterterrorism (NCTb), ‘Terrorisme’ (NCTb, 2011). [http://www.nctb.nl/onderwerpen/wat\\_is\\_terrorisme/wat\\_is\\_terrorisme.aspx](http://www.nctb.nl/onderwerpen/wat_is_terrorisme/wat_is_terrorisme.aspx). Retrieved 3 March 2011; National Coordinator for Counterterrorism, pp. 62-79.

<sup>17</sup> *Wet Ter Verruiming van de Mogelijkheden tot Opsporing en Vervolging van Terroristische Misdriften*, Stb. 2006, 580, entered into force 1 February 2007. In English also known as the ‘Investigation and Prosecution of Terrorist Offences (Extension of Powers) Act’; *Wet Terroristische Misdriften*, Stb. 2004, 290, entered into force 10 August 2004.

and conspiracy to commit terrorist acts as distinct offences.<sup>18</sup> A key concept of the amendments to the code of criminal procedure was that the police no longer required ‘suspicions of a terrorist crime’ but could act upon ‘indications of a terrorist crime’, a considerably lower threshold standard of evidence. In addition to criminal law, immigration law, administrative measures or a combination of these instruments is used against individuals who, according to the so-called Counter-terrorism Infobox (‘CT-Infobox’), pose a threat to national security.

According to the National Counter-terrorism strategy for 2011-2015, personal disturbance as well as early intervention will continue to play a key role in future policies to prevent terrorism.<sup>19</sup> Early intervention is executed, among other things, through initiatives designed to counter radicalisation. Using both ‘hard’ and ‘soft’ measures, this broad approach aims to recognise such radicalisation processes at an early stage in their development and to abort them using ‘specific intervention strategies’. They appear to include administrative, financial, communicative and immigration law-related measures. One of the most concrete counter-radicalisation measures is the person-oriented intervention or disturbance, whereby individuals suspected of radicalisation are made to understand that law enforcement personnel are following their every move. Somewhat concerning, however, is the fact that a 2009 evaluation of Dutch counter-terrorism measures implies that numerous government officials feel that counter-radicalisation instruments are being under-utilised, with most counter-terrorism measures focusing on situations in which radicalisation has already occurred.<sup>20</sup>

In relation to (preventive) counter-terrorism measures non-discrimination concerns are not widespread in Dutch political and public discourse. Furthermore, a 2011 government evaluation of Dutch counter-terrorism measures concludes that there are no grounds to assume that they violate basic human rights standards as set by the European Convention on Human Rights.<sup>21</sup> International human rights committees, however, present a slightly different point of view. A 2009 Council of Europe report on the Netherlands expressed concern with the legislative and administrative counter-terrorism measures enacted by the Dutch government. For example, it argued that terrorism was too broadly defined in Dutch law, thus running the risk that far-reaching

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<sup>18</sup> Council of the European Union Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.

<sup>19</sup> National Coordinator for Counterterrorism (NCTb), ‘Nationale Contraterrorismestrategie 2011-2015’ (NCTb, 2011). <http://www.nctb.nl/Actueel/persberichten/2011/persbericht-110414.aspx>. (Retrieved 19 April 2011), pp. 62-76.

<sup>20</sup> Committee on the Evaluation of Counterterrorism Policy (Suyver Committee) Report IBIS-13171 of May 2009 on An Integrated Evaluation of Counterterrorism Policies [Naar een Integrale Evaluatie van Antiterrorisme Maatregelen], p. 80.

<sup>21</sup> Dutch Government Report 04126-6359 of January 2011 on Counterterrorism Measures in the Netherlands in the First Decade of the 21st Century [Antiterrorisme Maatregelen in Nederland in het Eerste Decennium van de 21ste Eeuw], pp. 10.

investigative measures and severe penalties can be used too widely and indiscriminately.<sup>22</sup> That same year, the UN Human Rights Committee published its Concluding Observations on the Netherlands, in which it expressed similar concerns, citing inter alia the lack of judicial oversight on the use of exclusion and personal disturbance orders.<sup>23</sup> Even though both human rights committees are concerned with non-discrimination issues, they do not mention this specifically in relation to counter-terrorism.

### **The United Kingdom**

In order to prevent terrorism the British government has relied on extending the powers of the intelligence and security services as well as specific policies. Its counter-terrorism strategy is called 'Contest' and consists of four strands: pursue, prevent, protect and prepare. Contest was launched in 2003 and has undergone a renewal in 2009.<sup>24</sup> Responsibility for putting the various programmes that make up Contest into practice rests with the Office for Security and Counter-terrorism (OSCT), which was founded in 2007. According to the British government that refocused the prevent strategy in 2011, efforts are intended to respond to the ideological challenges of terrorism, to identify and support vulnerable individuals and to cooperate with institutions and organisations where there are risks of radicalisation.<sup>25</sup> In the independent oversight of the revised prevent strategy, it is stressed that the policy should be free of discrimination and that support for extremism is often associated with a perception of discrimination.<sup>26</sup> Furthermore, the equality impact assessment of the prevent strategy emphasized that the previous strategy had had a disproportionate impact on belief, religion and race. To some extent there might be a perception among young men that this continues to be the case.<sup>27</sup>

To illustrate, according to the West Midlands Police, 'prevent' is a key element of Contest and one that focuses on building relationships with local communities with an eye to preventing radicalisation and addressing the conditions which are conducive to the spread of terrorism. More specifically, this entails challenging violent or extremist rhetoric and supporting mainstream opinion, disrupting those who spread messages of violence, supporting individuals who are vulnerable to terrorist recruitment, increasing the resilience

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<sup>22</sup> Council of Europe Report CommDH(2009)2 of 11 March 2009 on the Commissioner for Human Rights Mr. Thomas Hammarbergs's visit to the Netherlands, pp. 37-40.

<sup>23</sup> United Nations Human Rights Committee CCPR/C/NLD/CO/4 of 25 August 2009 on Concluding Observations of the Human Rights Committee on the Netherlands, pp. 8-10.

<sup>24</sup> House of Commons, 'Project CONTEST: the Government's Counterterrorism Strategy', (British Government, 2009).

<sup>25</sup> House of Commons, 'Prevent Strategy', (British Government, 2011).

<sup>26</sup> Alex Carlile, *Report to the Home Secretary of Independent Oversight of Prevent Review and Strategy* (London: British Government, 2011), p. 4.

<sup>27</sup> House of Commons, *Prevent Strategy: Equality Impact Assessment* (British Government, 2011), pp. 5-6.



of communities to extremist propaganda and addressing the grievances which may make individuals and communities vulnerable to such exploitation.<sup>28</sup> On paper at least, the focus on addressing the root causes of radicalisation and the desire to intervene before individuals turn from extremism to violence is very reminiscent of the Dutch and European counter-terrorism programmes.

The pre-charge detention of terrorist suspects is one such measure that has extended the powers of the executive to thwart potential terrorist plots. As determined by the Terrorism Act 2006 suspects could be detained for up to 28 days before having to be charged with a particular offence. In a January 2011 review of British counter-terrorism policies, a review conducted by Lord Ken Macdonald, the ability to hold suspects for such an extended period of time was criticised and a recommendation was issued to reduce the maximum time of detention to 14 days.<sup>29</sup> As of the 25th of January 2011, pre-charge detention in the UK was indeed reduced to a maximum of 14 days when the order which allowed a 28-day limit was not renewed.<sup>30</sup>

Other preventive counter-terrorism measures that focus on removing possible suspects, and in this case also suspicious objects, from public life are stop and search powers without reasonable suspicion and the use of surveillance cameras. Stop and search actions by law enforcement officials on the street, at airports or ports allow individuals and their property, such as cars, to be subjected to a search without a specific indication that the individuals in question have committed an offence. The Macdonald Review has supported the 2010 European Court of Human Rights' ruling that this measure is unlawful in its current form and recommends that limitations in time and place be attached to the practice.<sup>31</sup> Both detentions without trial and 'stop and search' powers are granted by the Terrorism Act 2000. In 2010, 'stop and search' powers were restricted: except for at airports and ports, British law enforcement officials are now required to have a reasonable suspicion that a person is a terrorist before being allowed to exercise those powers. As a 2011 investigation has indicated that people from ethnic minorities are far more likely to be targeted at airports and ports, there are still significant human rights concerns.<sup>32</sup> Surveillance

<sup>28</sup> West Midlands Police, 'What We Do' (West Midlands Police, 2011). <http://www.west-midlands.police.uk/crime-reduction/tackling-terrorism/index.asp>. Retrieved 18 March 2011.

<sup>29</sup> Ken Macdonald, *Review of Counterterrorism and Security Powers* (London: The Stationary Office 2011), p. 4.

<sup>30</sup> Liberty, 'Extended Pre-Charge Detention' (Liberty, 2011). <http://www.liberty-human-rights.org.uk/human-rights/terrorism/extended-pre-charge-detention/index.php>. Retrieved 14 April 2011.

<sup>31</sup> Macdonald (see note 29 above), pp. 4-5; European Court of Human Rights, Gillian and Quinton v the United Kingdom, Application no 4158/05, Judgment of 12 January 2010, sections 57, 63, 80-86; Terrorism Act 2000, Part V and Schedule 7; 'Rules on Stop and Search Changed', *BBC News* (8 July 2010).

<sup>32</sup> 'Asian People 42 Times More Likely to Be Held under Terror Law', *The Guardian* (23 May 2011). For more information see also Tufyal Choudhury and Helen Fenwick, *The Impact of Counter-terrorism Measures on Muslim Communities*, Equality and Human Rights

cameras are used to deal with reducing crime, anti-social behaviour and countering terrorism. However, in addition to invading on people's privacy, surveillance cameras may also contribute to the stigmatisation of minorities and particular areas. For instance, impact research in Birmingham shows that surveillance cameras, which had been deployed in areas with significant Muslim populations, strained the relations between the police and local communities.<sup>33</sup>

### **Preventive Counter-terrorism Measures and Non-discrimination**

Many politicians and citizens feel that in exceptional circumstances curtailing the rights and liberties of minorities associated with terrorism is justified. Most people recognise that absolute human rights such as the right to life should be respected, but in order to fight terrorism adequately, particular rights including the prohibition of discrimination as well as the right to equality may need to be limited. This point of view has been described as the balance (and/or) proportionality response thesis. Others argue that the balancing metaphor is misleading and that for legal, practical and public legitimacy reasons the right to non-discrimination and equality in the 'War on Terror' should be upheld. Additionally, human rights advocates such as The Eminent Jurists Panel, in its report on Terrorism, Counter-terrorism and Human Rights, have recommended that (preventive) counter-terrorism measures should respect the rights of minority communities and be fully non-discriminatory.<sup>34</sup>

Increasingly, human rights and civil rights organisations and community groups which stress the relevance of assessing the effect of counter-terrorism efforts on non-discrimination are being heard by both national and international bodies. For instance, in his 2010 European Counter-terrorism Strategy discussion paper, the European Counter-terrorism Coordinator acknowledged the relevance of assessing the impact that counter-terrorism measures have on minority groups.<sup>35</sup> Also, in contrast to most official evaluations of the impact of counter-terrorism, only a few, such as the 2011 British Review on Counter-terrorism and Security Powers, explicitly discuss the potential discriminatory side-effects.<sup>36</sup> Despite these significant developments, the effect of most counter-terrorism efforts on the rights and liberties of minorities and especially non-discrimination has received modest attention in the European Union. Among other explanations this can be attributed to the fact that even though, according to international law,

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Commission Research Report Series no.72 (Manchester: Equality and Human Rights Commission, 2011), pp. 18-28.

<sup>33</sup> Ibid. 2011, pp. 36-38.

<sup>34</sup> International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counterterrorism and Human Rights* (Geneva: International Commission of Jurists, 2009), pp. 116, 165.

<sup>35</sup> Council of the European Union Note 15894/1/10 of 29 November 2010 on EU Counter-Terrorism Strategy – Discussion Paper, pp. 10-11.

<sup>36</sup> Macdonald (see note 29 above).

non-discrimination is a non-derogable right<sup>37</sup>, counter-terrorism reviews, following the European Convention on Human Rights regime, have tended to focus on infringements on the primary human rights, for example fair trial or freedom of movement, rather than on non-discrimination norms as such.

In the EU the right to equal treatment and the ban on discrimination are fundamental human rights. Discrimination between individuals on the basis of race, ethnic origin, religion, sex, sexual orientation, nationality, language etc. is prohibited by several international conventions that are directly or indirectly applicable in most EU member states. These include almost all UN human rights conventions. The EU legal framework that refers to equal treatment and the prohibition of discrimination includes the EU Race Directive, the Anti-Discrimination Directive, Privacy Directives, the Lisbon Treaty, and the Charter of Fundamental Rights. Like many other member states, the Netherlands and the UK are party to most international human rights conventions and are subjected to the EU's legal framework.<sup>38</sup>

Even though opinions differ when it comes to the absolute protection of human rights such as the prohibition of discrimination and the principle of equality, on the basis of European case law there is a consensus that it is legitimate to draw distinctions on the basis of specific scrutiny tests, including proportionality, effectiveness and necessity. This is clear from the jurisprudence of the European Court of Human Rights and the Data Protection Convention of the Council of Europe.<sup>39</sup> Following this, experts such as Goldschmidt and Rodrigues maintain that when law enforcement officials use discriminatory profiles that breach human rights, it is always essential to determine whether these breaches are proportional and necessary.<sup>40</sup> Therefore, government officials must ask themselves whether the advantages of profiling outweigh the disadvantages, and whether the objective cannot be attained in some less extreme way.

<sup>37</sup> European Union Agency for Fundamental Rights (FRA), *Handbook on European Non-discrimination Law* (Vienna: FRA, 2011); Open Society Institute (see note 12 above), pp. 22-25.

<sup>38</sup> Ibid. 2011.

<sup>39</sup> European Network Against Racism (ENAR), 'Factsheet 40: Ethnic Profiling', (ENAR, June 2009), p. 5; Council of Europe European Commission Against Racism and Intolerance (ECRI) General Policy Recommendation No 11 CRI(2007)39 of 29 June 2007 on Combating Racism and Racial Discrimination in Policing, p. 9; European Court of Human Rights, *Timishev v Russia*, Application no. 55762/00, 55974/00, Judgment of 13 December 2005, sections 56-58; Council of Europe Convention 1981/108 of 28 January 1981 on the Protection of Individuals with regard to Automatic Processing of Personal Data.

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

In debates about preventive counter-terrorism the right to equality and the prohibition of discrimination are receiving ever-increasing attention. Nonetheless, the issue of non-discrimination remains ambiguous. The UK government's counter-terrorism prevent strategy reflects this ambiguity as, although it addresses all forms of terrorism, it is implicit that because of the major threat Islamist terrorism is the key concern. Combined with the fact that the website of a specific police force does make such a focus explicit, this might be seen as indicative of how the terrorist threat is perceived by the UK government.<sup>41</sup> The EU also appears to be making an effort to stress that the threat comes not only from Islamist terrorism, but also from separatist, and ethno-nationalist terrorists.<sup>42</sup> The Dutch government, more specifically the NCTb and AIVD, states that it does not specifically focus its 'broad approach' on a certain group or ideology, but at the same time does imply quite clearly that in the 21st century the terrorist threat derives mostly from Islamist groups and individuals.<sup>43</sup>

Some preventive counter-terrorism measures distinguish by their very nature. For instance, restrictive measures on admission or travel bans in the EU are focused on persons and entities involved in (possible) terrorist acts. They therefore distinguish between immigrants who are believed to be associated with terrorism and those who are not. To a certain extent, the discriminatory side-effects of preventive security measures are tolerated by society at large. The majority population in several EU member states may not be aware of or concerned with, for example, the fact that the minorities who personally or as part of their household own a car have a higher likelihood of being stopped by law enforcement officials.<sup>44</sup> Additionally, many EU citizens do not know that minority groups are generally less aware of non-discrimination legislation compared to the majority population and therefore rarely issue complaints.<sup>45</sup> Furthermore, discrimination often occurs in combination with an infringement of other human rights such as freedom of expression or movement. For instance, police stops in theory affect the entire population, but in practice may sometimes be implemented selectively against one ethnic or religious group ('ethnic

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<sup>41</sup> House of Commons (see note 24 above); West Midlands Police (see note 28 above).

<sup>42</sup> Europol, *TE-SAT 2011: EU Situation and Terrorism Report*, (The Hague: TE-SAT, June 2011); Council of the European Union Note 15359/1/09 of 26 November 2009 on EU Counterterrorism Strategy — Discussion Paper; General Secretariat of the Council of the European Union, 'The Lisbon Treaty's Impact on the Justice and Home Affairs (JHA) Council: More Co-Decision and New Working Structures', (Council of the European Union, December 2009), p. 2.

<sup>43</sup> NCTb (see note 19 above); General Intelligence and Security Service (AIVD), 'Jaarverslag 2010' [Annual Report 2009] (AIVD, April 2011), p. 1.

<sup>44</sup> European Union Agency for Fundamental Rights, *European Union Minorities and Discrimination Survey: Data in Focus Report 4: Police Stops and Minorities* (Vienna: FRA, 2010), p. 11.

<sup>45</sup> European Union Agency for Fundamental Rights, *European Union Minorities and Discrimination Survey: Data in Focus Report 3: Rights Awareness* (Vienna: FRA, 2010), pp. 8-10.

profiling?').<sup>46</sup> Last but not least, notwithstanding some governmental evaluations, there are few independent empirical studies that substantiate different treatment in the EU, the Netherlands and the UK.

### Conclusion

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

Preventive counter-terrorism measures are appealing because they imply interventions that remove the ability or, better still, the motivation of potential terrorists to carry out their lethal designs. On paper, the Dutch and British governments, as well as the EU, underline their dedication to preventing terrorism by addressing the factors which are conducive to the spread of violent extremism, through intervening early to disrupt radicalisation processes and via introducing a range of special measures such as, for example, stop and search practices. But the difficulties associated with actually addressing these highly complex problems at the international level and the more pressing necessity of being seen to prevent terrorist attacks on the home front seems to have led the EU, the UK and the Netherlands towards a form of preventive counter-terrorism that focuses mainly on domestic threats. In day-to-day reality this commitment is sometimes seen as being pushed to the background by a more reactive desire to sentence, disrupt or collect information on individuals of whom there already exists a strong suspicion that they are involved in terrorism-related activities.

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

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<sup>46</sup> Open Society Institute (see note 12 above); European Union Agency for Fundamental Rights, *Understanding and Preventing Discriminatory Ethnic Profiling — A guide* (Vienna: EU Agency for Fundamental Rights, 2010).

breaches (inter-)national non-discrimination standards. Furthermore, ethnic profiling has proven quite ineffective — and sometimes even counterproductive — in actually combating terrorism.

There are specific grounds for concern in relation to (preventive) counter-terrorism and their non-discriminatory side-effects. The first regards proportionality and necessity; arguably, many of the preventive counter-terrorism measures outlined in this article present risks to democratic oversight procedures and human rights compliance that exceed their potential benefits as counter-terrorism instruments. Henceforth any non-discrimination or equality impact assessment should incorporate the question — both integral as well as per (preventive) counter-terrorism law or policy — whether the measure was and still is necessary and proportional. This evaluation should be transparent and conducted on the basis of involvement and consultation with external and internal stakeholders.

Furthermore, (independent) research and collecting empirical data is a precondition for a thorough evaluation in relation to legitimacy. The concern is that the efficacy of these (preventive) counter-terrorism measures ranges from uncertain to distinctly counterproductive, as is the case with data mining and ethnic profiling techniques. This makes it all the more important to critically assess the desirability of adopting stringent counter-terrorism legislation, administrative measures and the creation of ever-larger and interconnected databases containing personal data. Preventive counter-terrorism legislation and policies that have little effect alienate people and subsequently affect trust in and cooperation with law enforcement officials. In conclusion, this article calls for a coherent and systematic evaluation of (preventive) counter-terrorism measures in the EU as well as in its member states.

