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**Between Foreign Policy and Global Security Governance: A Place of
Counter-Terrorism Clauses and UN Measures in EU's international
Counter-Terrorism Activities.**

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ABSTRACT

This paper revolves around the argument of Daniel Keohane that foreign policy is an 'absent friend' of the EU's counter-terrorism policy. It discusses one of the flagships of this policy, namely, the so-called counter-terrorism clauses. It argues that in order to understand the EU's relatively weak stance on the issue one must take into consideration the constitutional architecture of the Union and the particular approach it has developed with regard to terrorism, that is, the 'mainstreaming' of counter-terrorism into other external policies. A study of a content, legal nature and practice of counter-terrorism clauses leads to the conclusion that, although their effectiveness as foreign policy tools is disputable, they might play an important role in global and regional security governance.

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1 INTRODUCTION: COUNTER-TERRORISM AND ITS ABSENT FRIEND

The external dimension of the EU's counter-terrorism policy has not attracted much interest so far. Daniel Keohane has recently expressed the view which provides a partial explanation to this. He argues that the external element is simply missing and that foreign policy is an 'absent friend' of counter-terrorism.¹ In contrast with swift actions concerning internal aspects of counter-terrorism cooperation (adoption of European Arrest Warrant, police and judicial cooperation, intelligence cooperation), the external dimension of the fight against terrorism is floating in the air full of declarations, conclusions and aspirations, the crude content of which is rather hard to grasp. How is it possible? Not only did the very first reactions to the 9/11 attacks spoke of working closely with the US and all partners,² but also the Action Plan was adopted which affirmed that 'fight against terrorism will, more than ever, be a priority objective of the European Union'.³ The commitment to coordinated and inter-disciplinary approach embracing all Union policies including, obviously, all external policies was restated at numerous occasions. The European Security Strategy adopted in 2003 defined terrorism as a major threat to the EU and called for reinforced cooperation and better co-ordination between external actions and Justice and Home Affairs.⁴ While such coordination between different EU instruments was already problematic, the Strategy called for cooperation embracing the external activities of the individual member states as well. Further, the 2004 Counter-Terrorist Strategy stressed that pursuing terrorism must take a global dimension. It also consolidated this external action as involving two broad policies.⁵ On the one hand, efforts would go to reinforce the international consensus through the United Nations and other international bodies, through dialogue and agreements with key partners (which would include counter-terrorism clauses) as well as working for agreement of a UN Comprehensive Convention against Terrorism. On the other hand, assistance was to be provided to priority countries to help them introduce and implement the necessary mechanisms to disrupt terrorism. It actually looked as if one of the central preoccupations of the EU was to focus on the enforcement of the international justice.

Why does then Keohane believe that there is a foreign policy component lacking in the EU's counter-terrorism? He points to the 'relative absence' (as compared to internal security) in terms of 'political impetus, resources and sheer number of initiatives'.⁶ The reasons for this are the EU's role and approach to counter-terrorism, in which the leading role played interior ministers, external

1 D. Keohane, 'The Absent Friend: EU Foreign Policy and Counter-Terrorism', (2008) 46 *JCMS* 1, 125–146.

2 Declaration adopted at the special Council meeting, Brussels, 12/09/2001

3 Extraordinary European Council Meeting, Conclusions and Plan of Action, SIC (2001) 990 - Brussels, 21/09/2001

4 European Security Strategy, A secure Europe in a Better World, Brussels, 12/12/2003

5 European Council, EU Counter-terrorism Strategy, 14469/4/05 REV 4, 30/11/2005

6 See Keohane, n.1 above.

factors and actors. Among the latter he lists the links (or lack of them) between EU policy and the US 'global war on terror' as well as the role played by the NATO. He also claims that, while the EU does promote international counter-terrorism cooperation as a foreign policy objective, other aspects of EU's foreign policy such as development assistance and democracy promotion are becoming 'securitized' by which he means that they are increasingly presented as counter-terrorism measures rather than goals in themselves.⁷

The present paper addresses the deficiencies in the EU's external response to terrorism from a different perspective. It is argued that to understand the reality of the Union as an international actor one must take into consideration its constitutional architecture. It is the Union's pillar structure, its Treaty objectives and available instruments that make it a *sui generis* international actor, which might simply be unsuitable to respond forcefully to international terrorism. Without looking into institutional dimensions of the emergent EU's foreign policy, one can hardly understand why the actions of the Union take a particular turn and often result in a limited effectiveness of its measures. While this analysis does not purport to offer a complete overview of institutional constraints that impact upon the Union's ability to engage in international counter-terrorism, one policy instrument is analyzed in depth, that is, the counter-terrorism clause (hereinafter CT clause). In light of a political significance and a (lethal) danger of terrorism one would expect a sophisticated mix of instruments, which the Union as a 'norm generator' could design and employ.⁸ As it will be demonstrated, the reality falls short of expectations. Counter-terrorism clauses tend to be vague and overly dependant on the effectiveness of the UN measures. Their substantive weakness is reinforced by legal limitations of instruments used, namely mixed agreements, and an unclear system of delivery. As many evils in the EU external relations have their source in the pillar structure of the EU, this also seems to be true in the present case.

2 COUNTER-TERRORISM AS A CROSS-PILLAR PROBLEM

Until the Maastricht Treaty terrorism belonged to the sphere of political cooperation between member states, which felt outside the scope of the treaties.⁹ The Treaty on the European Union mentioned it as a serious form of international crime, which must be prevented and combated within Union-wide police and customs cooperation. Third pillar was the only place where terrorism explicitly appeared even though the EC pillar and the foreign policy had been already

⁷ Ibid

⁸ M. Cremona, 'The Union as a Global Actor: Roles, Models and Identity', (2004) 41 *CMLRev* 553.

⁹ C. Hill, 'European preoccupations with terrorism' in A. Pijpers, A. Regelsberger, W. Wessels (eds.) *European political cooperation in the 1980s : a common foreign policy for Western Europe?* (Dordrecht, Netherlands ; Boston, Norwell, MA, M. Nijhoff, 1988)

involved in countering terrorism before. In the Treaty of Amsterdam, apart from a general reference to 'crime' in Article 2 TEU, the express reference to 'terrorism' appeared in Article 29 TEU providing that a high level of safety within an area of freedom, security and justice shall be achieved by preventing and combating crime, in particular, that of terrorism. It has been clear, however, that police and judicial cooperation is only one tool in tackling terrorism. Thus, in the post 9/11 practice the proliferation of 'counter-terrorist' measures continued to take place under all three pillars. Likewise, the EU started to act internationally in this field while its powers accrued.¹⁰ In the first phase of existence of cooperation in Justice and Home Affairs (hereinafter JHA) following the Treaty of Maastricht, the EU had no powers to develop international relations in that field. Only the Treaty of Amsterdam granted to the Union the competence to conclude international agreements in the Third Pillar.¹¹ The 1999 Tampere European Council conclusions indicated the ambition of the member states to develop a 'stronger exterior action' by stating 'that all jurisdictions and all instruments at the Union's disposal, especially in matters of exterior relations, should be used in an integrated and coherent manner to create the area of freedom, security and justice'.¹² In June 2000, the Feira European Council approved a report identifying the objectives and formulating the political priorities of the EU's external action.¹³ Ever since, the EU contemplated coupling the external JHA activities with a broad array of Community international measures. The approach was taken that developing an external dimension of JHA is not an objective in itself. Instead, new fields of cooperation (such as immigration, asylum, external border controls, combating drug addiction, customs cooperation, police cooperation and judicial cooperation in civil and criminal matters) should be included to the existent frameworks. The Council stressed that '[t]he JHA dimension should form part of the Union's overall strategy. It should be incorporated into the Union's external policy on the basis of a 'cross-pillar' approach and 'cross-pillar' measures.'

3 'MAINSTREAMING' COUNTER-TERRORISM - A NEW PARADIGM FOR THE EU'S INTEGRATED FOREIGN POLICY?

The idea of using the EC policies and instruments as a leverage in a pursuit of broader security goals was not a new one.¹⁴ Hence, quickly after 9/11 the EC policies started to be conceived as

10 J. Monar, 'The EU as an International Actor in the Domain of Justice and Home Affairs' (2004) 9 *EFA Rev.* 395.

11 *Ibid*

12 European Council, Presidency conclusions, 15-16/10/1999, Tampere

13 Council of the European Union, 'European Union priorities and policy objectives for external relations in the field of justice and home affairs', Brussels, 6 June 2000.

14 It was more or less successfully tested with human rights, see L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP, 2005); P. Leino, 'European Universalism? The EU and Human Rights Conditionality' (2005) 24 *YBEL* 329; E. Fierro, 'Human Rights Clauses in Bilateral Agreements' in *The EU's Approach to Human Rights Conditionality in Practice* (Nijhoff, 2003); T. King, 'Human Rights in European

important tools reinforcing the counter-terrorist actions and work started on incorporating the fight against terrorism into all aspects of the Union's external relations policy. In 2003 the European Security Strategy declared that:

'challenge now is to bring together the different instruments and capabilities: European assistance programmes and the European Development Fund, military and civilian capabilities from Member States and other instruments... Security is the first condition for development. Diplomatic efforts, development, trade and environmental policies should follow the same agenda. In a crisis there is no substitute for unity of command'.¹⁵

Similarly, in the aftermath of the 2004 Madrid terrorist attacks the Declaration on Combating Terrorism adopted by the European Council spoke of targeting 'actions under EU external relations towards priority Third Countries where counter-terrorist capacity or commitment to combating terrorism needs to be enhanced'. The EU stepped up its action to evaluate its relations with third countries and counter-terrorism clauses emerged as a new tool for such a review.¹⁶ The European Declaration on Combating Terrorism of 25 March 2004 set out, among other goals, two strategic objectives in the area of external relations: to deepen the international consensus and enhance international efforts to combat terrorism (objective 1), and to target actions under EU external relations towards priority Third Countries where counterterrorist capacity or commitment to combating terrorism needs to be enhanced (objective 7). Under objective 1, the Declaration gives the following mandate: 'Include effective counterterrorism clauses in all agreements with third countries'. Under objective 7, it requires the following: 'Ensure that specific counter-terrorism issues, including effective counter-terrorism clauses in all agreements, reflecting the priorities of the revised Plan of Action, are a key element of EU relations at all levels with priority countries'.¹⁷

In practice, from the very outset the EU undertook concerted actions with the third states which resulted in numerous joint declarations and actions.¹⁸ The most far reaching was the cooperation with the US which led to the conclusion of a series of important bilateral agreements. In 2001

Foreign Policy: Success or Failure for Post-Modern Diplomacy' (1999) *EJIL* 313.

¹⁵ European Security Strategy, n. 4 above, p.13

¹⁶ Action Plan, n. 3 above; On 17 October 2001, the Council adopted an objective set of indicators in order to help the EU to evaluate systematically its relations with third countries.

¹⁷ See Council, Integrating the fight against terrorism into EU external relations policy, 14456/2/04 REV 2 EXT 1, Brussels, 11/05/2005 in which the Council put forward a number of suggestions to ensure greater effectiveness and enhanced coherence to the EU external action in the fight against terrorism.

¹⁸ See e.g.: the Statement at the occasion of the Third EU-India Summit, Copenhagen, Oct. 10, 2002,; the press release issued at the first Mexico-EU Summit in Madrid on May 18, 2002; the Joint Communiqué issued at the 12th GCC-EU Joint Council / Ministerial Meeting, Granada, Feb. 27-28, 2002, and the Declaration on Cooperation against International Terrorism, included in the conclusions of the fourth Asia-Europe Meeting (ASEM) Summit, Copenhagen, Sept. 22-24, 2002.

and 2002, two U.S.-Europol agreements were concluded to allow the US law enforcement authorities and Europol to share information. In 2003, the United States and the EU signed two treaties on extradition and mutual legal assistance (MLA) simplifying the extradition process and reinforcing prosecutorial cooperation. Agreements have been signed also in other fields: cooperation in the areas of border control¹⁹ and transport security.²⁰

4 COUNTER-TERRORISM CLAUSES AS A CROSS-PILLAR INSTRUMENT

4.1 Legal challenges to cross-pillar actions

It was argued in the opening section that the constitutional perspective on the EU as an international actor can provide important insights that might help to understand and properly evaluate the results the European Union achieves in international activities. The EU regarded as a legal system has a complex internal structure which is 'looking out' and, thus influencing its external action.²¹ This external constitution is constantly developed to accommodate new realities and international challenges. The main characteristics of this external constitution are dialectic principles which require, on the one hand, strict delimitation of boundaries of legal sub-systems and, on the other, maintaining consistency between them.²² The institutional design directs the majority of energy towards finding a right fit between autonomy and cooperation.²³ For instance, the Union is founded on three separate pillars, but these pillars contain overlapping competences; it is vested with the task of developing different foreign policies, according to separate procedures and using specific instruments, but through a single institutional framework; it has the obligation to preserve the *acquis communautaire*, but also it should develop it (also through the CFSP actions).²⁴

As it will be seen these tensions seriously impact on the possibility to develop the external counter-terrorism action by the Union.²⁵ Yet, before judging the result we shall first consider the

19 In April 2004, the United States and EU signed a customs cooperation accord which, among other measures, it calls for extending the U.S. Container Security Initiative (CSI) throughout the Union.

20 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 PNR Agreement), JO L 204/18 of 04.08.2007

21 R.A. Wessel, 'The Inside Looking Out: Consistency And Delimitation In EU External Relations' (2000) 37 *CML Rev.* 1135 and literature cited there.

22 See Article 3 TEU

23 See E. Cannizzaro, Unity and Pluralism in the EU's Foreign Relations Power, in C. Barnard(ed.), *The fundamentals of EU law revisited : assessing the impact of the constitutional debate*, Oxford ; New York : Oxford University Press, 2007

24 See Article 47 TEU

25 According to Cremona they are inevitable given the nature of Article 47 TEU: 'However necessary it may be, Article 47 EC potentially creates an obstacle for developing fully integrated policies across the Union, and the Constitutional Treaty would not remove the obstacle.' M. Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, EUI

possible options for the creating of a Union's external instrument, which while cross-pillar in nature would link the existing measures and the *acquis* to a new goal, that is, a fight against terrorism. Given the nature of EU competences in the field and its pillar structure the following possibilities could be envisaged.

The first possibility is a separate action by the EC, the EU (acting under the second and the third pillar) and member states coordinated at the EU level.²⁶ This would be a consequence of separate provisions regulating legal basis for the EC and EU international agreements.²⁷ However, it would go against the objective and the result sought which consisted in having an explicit link to pre-established networks of the EC cooperation with third states. It would also be contrary to the spirit of unity and a pursuit of EU's 'actorness'. In the 'mandate' authorizing the opening of negotiations, the CFSP and third pillar anti-terrorism aspects were to form a separate agreement under Article 24 TEU, next to a classical commercial agreement under Article 133EC. It was reported that the problem was the creation of a political link between the two agreements by a declaration.²⁸ Some feared this would lead to a subordination of EC decision-making about a possible suspension or termination of the EC trade agreement to the decision under TEU. And this in turn would be contrary to Article 47 TEU, which *inter alia* has the function of protecting Community decision-making against second and third pillar intergovernmental methods.

The second option could be a conclusion of one agreement to which both the EC and the EU would be parties. However, there are two problems with such solution. First, it is controversial whether the EU has legal personality and legal capacity necessary to become a party to a treaty. Although in practice the EU has concluded several dozens of international agreements *inter alia* with Lebanon on cooperation in counter-terrorism²⁹ and inter-pillar mixity has already been practiced,³⁰ the member states are still reluctant to allow the EU to make a coherent use of this

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26 This option was envisaged for the agreement with Iran and Thailand. It was eventually chosen for the agreement with Lebanon.

27 On the part of the EC, agreements are concluded pursuant to Articles 300EC – general power for international agreements, 133EC - common commercial policy, 181EC - development cooperation, 308EC - so-called, residual power for the situations where there is no explicit legal basis. The EC also has an implied competences which flow from sectoral policies such as transport, health or industry. On the side of the CFSP and PJCCM agreements are concluded according to Article 24 and 38TEU.

28 M. Petit, *Current Legal Issues in the External Relations of the European Union*, Lecture at the European University Institute, Academy of European Law, Florence – 7th July 2006

29 The Agreement in the form of an Exchange of Letters between the EU and the Republic of Lebanon concerning cooperation in the Fight against Terrorism (Council doc. 7494/02 of 17 April 2002). Not published in the OJ.

30 For example, see the agreement between the EU, the EC and Switzerland on the Schengen *acquis*, signed on behalf of the EC by Council Decision 2004/860/EC OJ 2004 L 370/78, and on behalf of the EU by Council Decision 2004/849/EC [sic] OJ 2004 L 368/26.

option. Moreover, this option could also cause problems from the point of view of the autonomy of the Community pillar, protected by Article 47 TEU in the situation in which explicit links would be made between compliance with such clauses and other provisions of the agreement. This would be the case if a determination by the Council in relation to counter-terrorism could trigger action under trade or assistance provisions of the agreement. There are also practical drawbacks of mixed agreements in general which become particularly salient in the context of cooperation on immediate threat prevention. Since national ratifications of the non-Community part of agreement are required it would lead to a long period during which the actual operation of agreement would be stalled.³¹ In the meantime the Community part of the agreement could be provisionally applied, but not the national competence provisions including the counter-terrorism clauses. This would lead to a 'very imbalanced application of the agreement during the period of national ratification'.³²

The third option, which was eventually chosen in the most of cases, was to conclude agreements pursuant to the EC powers and to which the member states would become the party. This is the resort to a classical mixity. Three observations can be made with regard to this solution. First, an exercise of EC/member states' mixity appears to suggest that the Union has not yet been able to develop an independent international identity separate from its sub-orders: the Communities and their member states. Second, there is no clarity as to the scope of powers and the implementation of clauses requires resort to instruments under all three pillars and member states actions. Finally, although the agreements purport to be comprehensive in nature, they do not provide all the leverage which would result from the unity of the order.

We shall now turn to the content of counter-terrorism clauses.

4.2 Content of counter-terrorism provisions

The language of counter-terrorism clauses developed through practice. Before a standard clause, as it is known now, emerged we can observe the following evolution. For the first time provisions on counter-terrorism appeared in agreements with Macedonia (FYROM, signed in 2001) and Croatia (signed in 2002).³³ However, listed among other measures for preventing and

³¹ The national ratifications by fifteen member states used to take three to four years. With the most recent enlargements the ratification of an amended Cotonou agreement will now require 27 ratifications above 79 ratifications by ACP countries.

³² M. Petit, *Current Legal Issues in the External Relations of the European Union*, Lecture at the European University Institute, Academy of European Law, Florence – 7th July 2006

³³ Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, OJ L84 of 20/03/2004, p.13; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, OJ L26 of 28/01/2005, p.3.

combating crime and other illegal activities, they were just one measure listed under the title on Justice and Home Affairs.³⁴ The cooperation on these matters was a subject of consultations and close coordination between the parties. It was also flanked with technical and administrative assistance which included the drafting of national legislation in the field of criminal law, enhancing the efficiency of the institutions charged with fighting and preventing crime, staff training and the development of investigative facilities and the formulation of measures to prevent crime.

By contrast, Article 59 of the Association Agreement signed in 2001 with Egypt dealt exclusively with cooperation in the fight against terrorism.³⁵ It was an antecedent of what was to become a standard clause, which first emerged in 2002 in the agreement signed with Chile.³⁶ This standard clause opens with the reaffirmation by the Parties of the importance of the fight against terrorism and contains an agreement to cooperate in the prevention and suppression of terrorist acts. Three points can be made concerning to the scope and limits of this cooperation.

Applicable law

By virtue of this clause parties agree to cooperate 'in accordance with international conventions and with their respective legislation and regulations'.³⁷ This may raise some controversies. The CT clause in the agreement with Algeria (signed in 2002) has a slightly different wording than the one with the other Euro-Mediterranean country – Egypt. It states that the cooperation takes place in accordance with the international conventions 'to which they are party'. The latter version makes explicit what is most often a case in reality, i.e., parties in such cooperation might have not ratified important international conventions. Thus, they act according to different standards. This problem is further exacerbated by submitting the cooperation to respective legislation and regulations. There is clearly a dilemma of EU cooperating with the countries with very different legal systems, in particular, there where torture is allowed or tolerated, privacy is not being respected, anti-terrorist legislation is applied against the opposition etc. Hence, in the Action Plan between the EU and Egypt the provisions on political dialogue include one that provides for '[e]nsur[ing] respect for human rights in the fight against terrorism in accordance with international law'. Furthermore, the parties to that Action Plan decided to 'work on elaborating appropriate legislation to address the phenomenon of terrorism serving as a

34 See Article 78 of the Agreement.

35 Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part, OJ L304 of 30/09/2004 p.39.

36 Standard Counter-Terrorism Clause agreed by COREPER in 2002, see document of the Council of the European Union, EU Counter-Terrorism Clauses: assessment, Brussels, 11 May 2005, 14458/2/04 REV 2 EXT 1

37 Ibid.

legal substitute to the application of the current state of emergency'.

The EU also addressed this issue in Association Council:

The EU emphasizes that any measures to prevent and combat terrorism must comply with international law, in particular international human rights law, refugee law and humanitarian law, and reiterates that effective counter-terrorism measures and the protection of human rights are not conflicting but complementary and mutually reinforcing goals.³⁸

Implementation of UN counter-terrorist measures

According to the clause, the parties cooperate in particular 'in the framework of the full implementation of Resolution 1373(2001) of the UN Security Council and other relevant UN resolutions, international conventions and instruments'.³⁹ The UN has been at the forefront of international action against counter-terrorism after 9/11.⁴⁰ Within three weeks, the Security Council unanimously adopted Resolution 1373 (2001) and set up the Counter Terrorism Committee with extensive powers. By way of this resolution it took up a quasi-legislative role by imposing on States a number of obligations ranging from the prohibition to provide any form of support to terrorist groups to the obligation to criminalize in their domestic legal systems the willful provision or collection of funds to be used for terrorist activities. The EU cooperation on counter-terrorism envisions the actions together with the partner states which aim at reinforcing the role of the UN in the fight against terrorism. The Action Plans implementing the CT clauses provide for three broad common actions:

- the full implementation of the UNSC resolution 1373 (2001) and other relevant UN resolutions;
- the ratification and implementation of the 13 UN conventions and protocols on terrorism;
- the negotiation of a Comprehensive UN Convention on International Terrorism.

The Action Plan with Egypt also mentions cooperation to ensure the implementation of the standards laid down in the Financial Action Task Force (FATF) recommendations on terrorist financing.

In its relations with third countries the EU consistently urges the ratification and implementation of the existing conventions and protocols against terrorism. Terrorism now also regularly features on the agenda of its political dialogue.⁴¹ Moreover, the EU has devoted much energy to supporting work towards an agreement on a comprehensive convention on international

38 Council, Adoption of the European Union's position for the second Association Council meeting (Luxembourg, 24 April 2007), Brussels, 17 April 2007

39 See the Standard Clause, n. 36 above

40 See J. Dhanapala, *The United Nation's Response to 9/11 (2005) 17 Terrorism and Political Violence* 17-23.

41 See Council of the European Union, *CFSP Guide: Political Dialogue*, Brussels, 31 January 2008, Doc. 5955/08

terrorism. Already a 2001 Action Plan spoke of the European Union support to 'proposal for framing within the United Nations a general convention against international terrorism, which should enhance the impact of the measures taken over the last twenty-five years under UN aegis'.⁴² Such proposal was also among the EU's priorities for the UN General Assembly.⁴³

Exchange of information and practice

The cooperation on the basis of CT clauses takes place through 'exchange of information on terrorist groups and their support networks in accordance with international and national law'.⁴⁴

Once again, the question arises as to whose standards are to be applied in concrete cases of exchange of information. This can mount the problems of the lack of adequacy in the protection of personal data (which could be much more serious than those which arose in the cooperation between the EU and the US and led to controversy over Passenger Name Record case⁴⁵).

Another form of cooperation explicitly listed amounts to 'exchanges of views on means and methods used to counter terrorism, including in technical fields and training, and by exchange of experiences in respect of terrorism prevention'. This cooperation can take numerous forms as can be witnessed in the EU-Egypt Action Plan whereby the parties undertake to inter alia:

- Strengthen of cooperation on measures to tackle the financing of terrorism;
- Develop cooperation between Egypt and EU Member States counter-terrorism and law enforcement agencies including through effective measures to preclude the access of terrorist elements to Egypt and EU Member States;
- Develop judicial cooperation on combating terrorism;
- Work together to fight cyber crime and to fight the use of the Internet for terrorist purposes;
- Support the institutional capacity building and the development of human resources and technological capabilities of law enforcement institutions.

Unlike in the cases of clauses in agreements with Egypt and Algeria that list the forms of cooperation, the standard clause speaks of cooperation 'in particular' through the abovementioned methods. As a result, in practice, the scope for cooperation can be much broader.

42 See Action Plan, n. 4 above.

43 The work on the Convention is going slowly due to the lack of agreement on the definition of terrorism.

44 See the Standard Clause, n. 46 above.

45 Joined Cases C-317/04 and C-318/04 *European Parliament v Council (PNR)*, [2006] ECR I-4721.

Finally, it must be noted that while all clauses retain the elements found in the standard clause, their exact wording is being adjusted and become more articulate and broader in scope.⁴⁶ They 'are being adapted so as to suit the specifics of EU relations with the individual countries concerned and as a result of the demands put forward in negotiations by partners'.⁴⁷ So far, the most elaborated clause has been the one included in the cooperation agreement signed with the Republic of South Africa.⁴⁸ In addition to standard provisions, Article 91B of the agreement contains a strong condemnation of terrorist acts, methods and practices 'wherever and by whomsoever committed' as well as two additional provisions:

2. The Parties furthermore firmly recognise that terrorism cannot be defeated without also fundamentally addressing factors conducive to the spread of terrorism. The Parties reaffirm their strong commitment to developing and implementing comprehensive action programmes aimed at eliminating these factors. The Parties underline that the fight against terrorism must be conducted with full respect for international law, human rights and refugee law and that all measures must be firmly based on the rule of law. The Parties stress that effective counter-terrorism measures and the protection of human rights are not conflicting goals but complementary and mutually reinforcing.

3. The Parties emphasise the importance of the implementation of the UN Global Counter-Terrorism Strategy and their willingness to work for this objective. They continue to be committed to reaching an agreement on the Comprehensive Convention on International Terrorism as soon as possible.⁴⁹

The mention of human rights made its way into the clause and will certainly remain there given the salience of this problem in EU's external policy.

We shall now turn to the Union's practice with regard to counter-terrorism clauses, their operation and implementation.

5 OPERATION OF CLAUSES AND THEIR IMPLEMENTATION

A preliminary observation must be made that counter-terrorism clauses can take different forms in respect of their legal source. While, most of the clauses were included in formal international agreements which are legally binding on the EU institutions and member states (association and cooperation agreements),⁵⁰ in one case the clause was included in an agreement concluded in the form of 'exchange of letters'.⁵¹ In principle, the latter is also legally binding if there is no specific provision to the contrary. Remarkably, it was the Union that signed such agreement with the Republic of Lebanon in 2001 acting in conformity with Article 24 TEU and it is 'legally binding

46 See Council document n.36 above.

47 Ibid.

48 European Commission, Proposal for a Council Decision on the signing of an Agreement between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, amending the Agreement on Trade, Development and Cooperation, COM(2008) 50 final, 07/02/2008.

49 Ibid.

50 See: Article 300(7)EC 'Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.'

51 See n.29 above.

for the Union'.⁵²

Stabilisation and Association Agreements

The Stabilisation and Association Agreements (SAA) were designed for their use in the process initiated by the EU in order to consolidate the Western Balkans region. They establish bilateral contractual relations between the EC and the countries of the region. At present such agreements are in force between the EU and FYROM, Croatia and Albania. Further agreements with Serbia, Bosnia and Herzegovina and Montenegro are envisaged.⁵³ As mentioned earlier in this paper the agreements with FYROM and Croatia contain broad provision on cooperation on justice and home affairs, including terrorism. By contrast, the agreement with Albania contains a standard counter-terrorism clause.⁵⁴ A general comment can be made that the cooperation in the field of counter terrorism emerged here clearly on the request of the EU as the issue of counter-terrorism had not belonged to the most important preoccupations of the States in Western Balkans.⁵⁵ The cooperation on the basis of these agreements operates in the context of the prospect of a full integration of Balkan states with the EU and it assumes a profound transformation of their legal systems. This can be illustrated by a provision of the Action Plan between the EU and Macedonia, which contains the following measures for the implementation of the counter-terrorism obligation from SAA:

Upgrading of domestic legislation from the aspect of a more efficient combating of all sophisticated structures and forms of organized crime and terrorism, that is: establishing of a specific constitutional basis for specifying exceptions and exemptions from the rule of privacy of mail and all other forms of communication; legalization of special police techniques in criminal procedure, special protection of witnesses and victims of such crimes; establishing appropriate cooperation with Europol and enhancement of the existing international cooperation in relevant areas, in accordance with EU legislation.⁵⁶

The agreements are supplemented by Action-oriented papers on improving cooperation between the EU and the Western Balkans on the fight against organized crime, corruption, illegal immigration and terrorism. These papers focused on law enforcement, prosecutors and judiciary as well as the exchange and sharing of criminal intelligence. According to their provisions, it is largely up to member states, EUROPOL, EUROJUST, the European Judicial Network,

52 Council decision concerning the conclusion of the agreement of 17 April 2002, Doc. 7494/02. This treaty supplements the Euro-Mediterranean Association Agreement between the European Community and its Member States and the Republic of Lebanon on behalf of the European Community, COM (2002) 170 final.

53 Commission, Recommendation from the Commission to the Council to authorise the Commission to open negotiations with Serbia and Montenegro for a Stabilisation and Association Agreement /* SEC/2005/0926 final */

54 See Article 84 of Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, signed on 12/06/2006 in Luxembourg, not yet ratified.

55 This can be seen, for example, in Zagreb Declaration where the Heads of State or Government of the five Balkan States undertook to establish between themselves the close cooperation in the field of justice and home affairs without, however, referring to the threat of terrorism.

56 Government of Macedonia, Action plan for the implementation of the Stabilization and Association Agreement between the European Communities and their Member States and the Republic of Macedonia, 2001, p.11.

FRONTEX and the European Union Joint Situation Centre (SitCen) to ensure the effective implementation of a range of practical measures.⁵⁷

European Neighborhood Policy

When it comes to the European Neighborhood Policy (ENP) it was clearly its southern dimension where the counter-terrorism cooperation was of utmost importance. Three Euro-Mediterranean Partnership and Association Agreements concluded with Egypt and Algeria (both in force since 2004) as well as with Syria (initialed in October 2004) contain among their provisions a counter-terrorism clause.⁵⁸ A separate agreement on counter-terrorism cooperation was signed with Lebanon in 2002. For these countries the provisions of the ENP action plans on terrorism substantiate and supplement the provisions of association agreements. However, for all the other ENP states they constitute the only basis for cooperation.⁵⁹ The substance of a commitment is the same for most of the Action Plans (AP) and involves cooperation to reinforce the role of the UN (through implementation of UNSC Resolutions 1373/01 and 1267/01 as well as implementation and enforcement of the UN Convention for the Suppression of the Financing of Terrorism) and implementation of international standards on terrorist financing (laid down in the FATF's recommendations on terrorist financing). These AP's also contain commitment to ensure respect for human rights in the fight against terrorism. The cooperation in the field of combating terrorism is coupled with the work on fighting illegal arms trafficking and proliferation of the Weapons of Mass Destruction (WMD). Moreover, general AP's are supplemented by Action Plan on Justice and Home Affairs, which provide that specific instruments such as implementation of UN instruments and counter-terrorism dialogue are to be developed in the broader context of approximation and cooperation on criminal justice. As a consequence, also other activities in this field become counter-terrorism instruments and the fight against terrorism is pursued in the context of fight against organized crime and fight against money laundering. In addition, fight against the financing of terrorism is further pursued in the context of elimination of money laundering.

It must be observed that while the counter-terrorism clauses contained in association and cooperation agreements are legally binding, the provisions of the ENP Action Plans are not. They do not amount to 'clauses' in the formal legal sense and they should be read as a political statement of intent. According to the Council, '[w]hile counter-terrorism clauses in agreements

⁵⁷ Commission, Progress report on the implementation of the strategy for the External Dimension of JHA: Global Freedom, Security and Justice, SEC(2006) 1498, p.8.

⁵⁸ In the course of the 2008 the EU will also start negotiating an agreement with Libya.

⁵⁹ This is the case for Armenia, Azerbaijan, Georgia, Israel, Jordan, Moldova, Morocco, Palestinian Authority, Tunisia and Ukraine

regularly provide the best basis for a comprehensive cooperation with third countries, both types of provisions can, from a practical point of view, carry equally significant political and operational implications for EU relations with third countries'.⁶⁰ In practice, however, it appears to be little difference as to the intensity of the cooperation resultant from the clause.

The implementation of counter-terrorism provisions in the context of the ENP vary from one state to another. They are put in place by different programmes. For instance, the police project led by European Police College (CEPOL) provided targeted training to high-level officers from the entire Mediterranean region on terrorism. The MEDA/JAI II programme provided for assistance in the sectors of judiciary and police. Finally, The Code of conduct on terrorism, adopted at the Barcelona Summit in November 2005 is put into practice. A good example of cooperation on the basis of an Action Plan is the cooperation with Israel, which involves *inter alia* expert-level meetings on the financing of terrorism, appointing of a contact point for Eurojust, possible negotiation of an operational agreement with Europol and informal talks on data protection. In the case of Jordan, the first sub-committee is leading to a possible twinning arrangement covering advice in the areas of combating money laundering and the financing of terrorism. In the case of Egypt a twinning on money laundering is also in the pipeline.

However, the cooperation on the basis of counter-terrorism clauses with Mediterranean countries was also considered to be detrimental in terms of improving accountability of and respect for human rights by security forces of Arab ENP countries. It has been argued that the downside of these clauses 'is – as is the case for Algeria, for instance – that they give the partner state *carte blanche* with regards to its security sector, as well as its arms trade and defense policies'.⁶¹ Moreover, it was argued that 'sector reform should actually be among the explicit objectives of the EU, especially in the context of the ongoing fight against terrorism, the label of which is all too easily abused by security agencies and armed forces to silence legitimate opposition'.⁶² The Commission correctly issued a following warning: '[a] tension between internal security concerns and the promotion and protection of human rights can result in negative consequences in human rights terms, particularly apparent under the umbrella of the

60 Counter-terrorism Clauses Assessment, n.36 above.

61 See Art. 101 of the Association Agreement with Algeria, signed 12 April 2002; See H.Hänggi & F.Tanner, Promoting security sector governance in the EU's neighborhood, Chaillot Paper, Institute for Security Studies, July 2005.

62 S.Biscop, The European Security Strategy and the Neighbourhood Policy: A New Starting Point for a Euro-Mediterranean Security Partnership? Paper presented at EUSA Ninth Biennial International Conference, Austin, Texas, 31 March – 2 April 2005

‘war on terror’’.⁶³ It attempts to address these anxieties by engaging into the political dialogue with the countries concerned.

Agreements concluded with the countries of Latin America

The Association Agreement was signed with Chile in 2002. It contained what was to become later a standard counter-terrorism clause. In 2003 the EC and its member states signed two Political Dialogue and Cooperation Agreements: one with countries of Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama),⁶⁴ and the other with Andean Community and its member countries, that is, Bolivia, Colombia, Ecuador, Peru and Venezuela.⁶⁵ These new agreements focused solely on political dialogue and cooperation and did not contain a trade component.⁶⁶ They touched on issues which belong to all three pillars, in particular, they included provisions on broad cooperation in the field of foreign and security policy as well as a counter-terrorism clause. In 2007 the EU has opened negotiations of an association agreement with Andean Community. It also negotiates the agreement with Mercosur.

Cooperation Agreements

In 2004 the EU signed a Partnership and Cooperation Agreement with Tajikistan. As the Commission explained this agreement aimed at consolidating and strengthening 'the EU's political and economic and trade presence in Tajikistan and Central Asia in general'.⁶⁷ Although modeled on other partnership and cooperation agreements and concluded according to Article 181EC this agreement is the first to include clauses on action against terrorism and weapons of mass destruction in that type of agreement. In consequence, it was concluded as a mixed agreement and is undergoing a long process of ratification. Therefore, a provisional agreement on the application of the Community part of the agreement was also concluded. The most recent among agreements containing a counter-terrorism clause is the cooperation agreement with

63 European Commission (2003a), *Wider Europe – Neighbourhood: a New Framework for Relations with our Eastern and Southern Neighbours*, COM (2003) 104

64 Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama

65 Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Andean Community and its member countries, the Republics of Bolivia, Colombia, Ecuador, Peru and the Bolivarian Republic of Venezuela, of the other part; Venezuela subsequently ceased to be a part to the agreement when it ceased to be a member of the Andean Community.

66 They are based on Article 181CE and 300CE.

67 Commission, Explanatory memorandum for a Proposal for a decision of the Council and of the Commission on the conclusion of a Partnership and Cooperation Agreement between the European Community and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Tajikistan, of the other part, COM(2004) 521 final, Brussels, 26/7/2004

South Africa.⁶⁸ The negotiations continue with South-East Asian countries and China.

Development Cooperation – Cotonou Agreement

Introduction of a counter-terrorism clause raised particularly much controversy in relation to the Community development agreements. In the aftermath of 9/11 attacks the EU foreign ministers warned partner countries that their relations would suffer if they fail to cooperate in the fight against terrorism. What is more, the EU declared that counter-terrorism would become ‘a key element of political dialogue’ with other countries and proposed to increase development assistance for ‘targeted technical assistance’ to ‘priority countries’. Several NGOs expressed concern that spending money on the fight against terrorism would have detrimental effects for the development aid to the poorest states.⁶⁹ In particular, they heavily criticized the idea of aid and trade being affected if the fight against terrorism was considered insufficient. In this context the EU included a counter-terrorism clause in a new Article 11(a) of the revised Cotonou Agreement.⁷⁰ However, given the strong opposition to the idea of placing it, together with the clause on WMD, among the essential elements with a consequence of creating a new conditionality, it has not introduced a mechanism to that end. Nevertheless, several arguments were invoked against such provision.⁷¹ First, that contributions made by African ACPs to fight against terrorism were negligible and that African countries do not play a vital role in fighting terrorism. Second, that this provision may encourage the ACP states to ‘strengthen their security arsenals (against political opponents) on the pretext of fighting terrorism’, compromising civil liberties and even democratic principles in the process and possibly undermining the core ‘essential elements’ of the entire EC–ACP agreement. Third, that it distracts energy from action against underdevelopment.⁷² One additional important argument against the clause was that while it is not robust enough to accomplish its stated aims of combating terrorism, ‘ironically, it is clear enough to be interpreted as a supportive contribution to America’s ‘war on terror’ and the EU’s support of this radical interpretation of the development–security discourse.’⁷³

68 See n.48 above.

69 See CONCORD, *Hold the Applause! EU governments risk breaking aid promises*, 2007.

70 The Partnership Agreement between the Members of the African, Caribbean and Pacific (ACP) Group of States and the European Community and its Member States (the Cotonou Agreement) was signed on 23 June 2000 and was concluded for a period of 20 years. Following the review and further negotiations, the parties signed an agreement amending the Cotonou Agreement on 25 June 2005 (the Amending Agreement).

71 A. Hadfield, ‘Janus Advances? An Analysis of EC Development Policy and the 2005 Amended Cotonou Partnership Agreement’, (2007) 12 *EFA Rev.* 39.

72 *Ibid.*

73 M. Clarke, ‘A Good Diplomatic and Development Opportunity for the UK: The G8, the EU and a New Start for Africa’, *Opinion* (2005) 5/1 *Conflict, Security & Development*, p. 121.

6 CONCLUSIONS

The paper discussed the external dimension of the EU counter-terrorism policy and, in particular, counter-terrorism clauses as an instrument thereof. The goal was to propose an additional constitutional perspective on the subject of a relative lack of foreign policy 'friend' of counter-terrorism. The argument can be restated as follows: The competence for counter-terrorism is divided between the three pillars of the Union and a comprehensive international instrument in this area must necessarily be of a cross-pillar nature. Already before 9/11 attacks the approach taken by the EU with regard to Justice and Home Affairs matters had been to 'mainstream' them in all external policies. When combating terrorism topped the agenda, it was to be mainstreamed by the means of counter-terrorism clauses in conventional relations linking the Community and the third states. Such approach, however, sits uneasily with the constitutional architecture of the EU's foreign policy. In particular, where any meaningful link was to be established between cooperation in the fight against terrorism and exercise of the Community competence, Article 47 TEU stands firmly in the way. As a result, counter-terrorism clauses are indeed present in the EU's agreements but their value is at most, a potential one. This is due to the fact that they belong to the part of mixed agreements which must undergo national ratifications before they enter into force. Thus, only very few of them are operational today. Moreover, any form of conditionality was ruled out. The EU will thus not be able to use its potential economic leverage to influence the third countries' performance in counter-terrorism. The positive development is that since counter-terrorism is listed among the provisions of the agreements which are subject to human rights and democracy clause, the EU might potentially invoke this clause when a third state is not living up to certain standards in its counter-terrorist policies.

We shall now propose some observation as to the use of counter-terrorism clauses as foreign policy and global security governance instruments. This paper argued that the instruments used by the EU which could potentially become foreign policy tools have a circumscribed ability to play any meaningful role. This is due to the following reasons. First, their effectiveness cannot be judged by their appearance in agreements. It will ultimately depend on their implementation, which in turn depends on the framework of relationship between the EU and a given third country. Second, they are more of a symbolic nature and confirm the upgrading of the relations with third states and expanding ambitions of the EU.⁷⁴ They also allow the EU to make positive

⁷⁴ The Council in its assessment of clauses wrote that they 'contribute to raising the political profile of EU external policy.' and 'While it may be argued that counter-terrorism clauses in agreements and action plans with third countries are not a necessary element of EU external policy in the area of counterterrorism, it is worth recognizing that they can be a useful tool, even as EU foreign policy extends its reach and develops a global scope. In this respect, given the current profile of CFSP at the present stage and prospects for its further development, counter-

impression on its international partners, at least with by a sheer number of countries which are part to these clauses (currently there are more than hundred such states). Finally, it is quite clear that the EU has achieved the concrete results only where it has considerable power and advantage over a third state. Indeed, formal agreements with strategic partners such as Russia or China, not to mention Pakistan, do not include such clauses.

It does not, however, mean that the actions of the EU should be viewed as meaningless and declaratory only. On the contrary, although they are not spectacular, they became an important tool for regional and global security governance. While the member states have chosen to vest most of counter-terrorist functions with other bodies and forums, such as the UN Security Council, transnational intelligence cooperation, or NATO, the role of the Union was rather an ancillary one. But the EU's actions reinforce the efforts of other bodies. In the context of the UN measures, the EU has unreservedly supported the implementation of the UN SC resolutions and conventions, in particular, Resolution 1373(2001). Further, the EU continues to provide assistance through all channels at its disposal to 'beef up' the UN norms with required tools. It has also taken on itself the control of implementation and linked a multilateral norm creation with regional norm enforcement ('carrots and sticks'). Finally, it has been a faithful promoter of a comprehensive convention on terrorism and has continued to build support for it.

At the end, it must be stressed that although it is fairly difficult to appreciate the practical impact of counter-terrorism clauses, they nevertheless constitute an important development. Counter-terrorism efforts are now being imprinted in the EU's constitutional architecture and international architecture of its relations with other states and organizations. They also demonstrate that an integrated approach in the EU external relations through a cross-pillar action is possible, however, it is typically achieved at the price of diluting the force of the measures adopted.

terrorism clauses are significant politically, regardless of immediate practical implications and aside from the operation of conditionality in practice.' See Council document n.36 above.