Risk in EU Counter-Terrorism
A Critique of Risk Assessment-Based Policymaking

by Sofie Roehrig

ZUR AUTORIN
Sofie Roehrig schloss 2016 ihr Bachelorstudium in Liberal Arts and Sciences mit Schwerpunkt Internationale Beziehungen und Internationales Recht am University College Maastricht (UCM) ab. Derzeit absolviert sie den MSc International Relations an der London School of Economics and Political Science (LSE). Im vergangenen Jahr war sie Praktikantin an der HSFK und bei Chatham House, Royal Institute of International Affairs.

TITELBILD
Mitglieder der belgischen Polizei-Spezialeinheit CGSU während einer Parade in Brüssel 2013.
Bild: Collectorofinsignia, Wikipedia (https://en.wikipedia.org/wiki/File:Toyota_Land_Cruiser_du_CGSU.JPG)

ERSCHEINUNGSDATUM
April 2017

WISSENSCHAFT & SICHERHEIT ONLINE
Wissenschaft & Sicherheit Online, kurz WiSi Online, ist die elektronische Schriftenreihe des Bundesverbandes Sicherheitspolitik an Hochschulen. Veröffentlichungen in WiSi Online unterliegen einem beidseitig anonymen Begutachtungsverfahren. WiSi Online erscheint unter der ISSN 1667-9641 in Neuauflage seit 2015.

Redaktion: Anny Boc, Stefan Maetz, Sebastian Nieke, Marie-Christine Schwager
Gestaltung: Marcus Mohr, Stefan Maetz

KONTAKT
http://www.sicherheitspolitik.de/publikationen/wisi-online/
wisi-online@sicherheitspolitik.de

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ABSTRACT

This paper illustrates problems with risk assessment and counter-terrorism responses such as profiling. I argue that EU counter-terrorism and risk identification increasingly takes place outside of the political realm of public debate – it is being depoliticised. This is a result of the increasingly accepted notion that experts' knowledge on risk is superior to political or moral debates. In my analysis of the technical flaws inherent to risk assessments, I identify the subjectivity and dependence on individuals' risk aversion in the creation of risk matrices as disproving the claim that these tools are objective. Subsequently, I illustrate that profiling is a policing tool based on risk assessment which increasingly takes an ethnic focus. Thereby, it undermines EU legal principles of non-discrimination. The depoliticising effect of risk assessments marginalizes alternative views on risk on the basis that risk assessments provided superior knowledge. However, the claim that expert knowledge is superior does not hold true as risk assessments are inherently subjective. At the same time, practical consequences of risk assessments such as the police response of ethnic profiling often are discriminatory and unlawful. Therefore, risk assessments and counter-terrorism responses based on these practices should be assessed more critically.

KEYWORDS

European Union, counter-terrorism, risk assessment, ethnic profiling, depoliticisation

"We know as Europeans we live in one of the most complicated and dangerous places in the world today" (Mogherini 2015). High Representative of the European Union for Foreign Affairs and Security Policy Federica Mogherini's words, voiced at a meeting with United States Secretary of State John Kerry on security cooperation in April 2015, reflect the currently proliferating mindset that insecurity and risks are growing in the European Union (EU). In European politics, the notion of ever-growing insecurity is increasingly accompanied by attempts to grasp it through assessing potential risks, especially after 9/11 and the attacks in Madrid (2004) and London (2005) (Amoore/de Goede 2008). Between 2002 and 2009, EU spending on counterterrorism rose from €5.7 million to €93.5 million, in addition to spending of private actors for EU counter-terrorism actions (Boer/van de Velde/Wensink 2011: 4). The events of 9/11 as well as the more recent terror attacks in Paris, Brussels and other European (and non-European) cities contributed to the perception that more and better orchestrated security measures are needed (Amoore/de Goede 2008; Bigo et al. 2015). As the EU does not have the competencies or organizational means to conduct risk assessment on EU level, it urges member states to coordinate their systems of risk analysis and databases (ENISA 2013; EC 2015). As part of the existing EU counter-terrorism strategy (CoEU 2005) and the European Agenda on Security (EC 2015), risk assessments and profiling are widely used, despite strong criticisms (OSI 2009). This paper aims to challenge the authority of risk assessments and profiling by asking the following questions: Do risk assessments constitute a legitimate basis for policymaking and what are problematic legal and societal consequences of profiling? In critical literature, risk assessment and profiling are usually separately discussed practices. However, risk assessments inform profiling practices. Thereby, flaws in risk assessments may negatively affect profiling practices. For this reason, this paper considers risk assessments as constitutive of profiling and looks at both as intertwined mechanisms. I argue that risk assessments cannot be considered legitimate as they are depoliticised and highly subjective. I go on to analyse the discriminatory and marginalizing consequences of profiling. Ultimately, I suggest that risk assessments lead to undesirable outcomes, wherefore risk assessments should be used more carefully and should be subjected to political debate. Firstly, I outline the theoretical basis of the concept of depoliticisation. Secondly, I provide an overview of EU counter-terrorism trends and policies. Thirdly, I analyse the legitimacy of risk assessments in EU counter-terrorism from the perspectives of depoliticisation and their flawed technical accuracy. Lastly, before concluding, I highlight legally and socially problematic consequences of risk assessment responses with focus on ethnic profiling. Here, ethnic profiling is the focus of analysis as it is a controversially debated practice in the EU and abroad.

DEPOLITICIZATION IN THEORY

The theoretical basis of the concept of depoliticisation in this context is poststructuralist theory which postulates that concepts such as security, insecurity and risk are

socially constructed and constantly reflect as well as affect society (Peoples/Vaughan-Williams 2015). Social constructions are the object of power structures within society which compete to dominate and shape the discourse and thereby what constitutes reality. Ultimately, social concepts are expressed in dichotomies such as 'I' and 'other', 'inside' and 'outside', 'security' and 'insecurity' (Aradau/Lobo-Guerro/Münster 2008).[1] In terms of risk, this means that the existence of risk is neither objective nor inevitable but rather constructed, serving a power interest. Mainstream scholars of risk, on the other hand, propose that the study of risk through, for instance, risk assessments produces objective knowledge superior to societal or political norms and produces more effective policy outcomes (Dunn Cavelty/Hagmann 2012). Risk assessment is a tool to "fine-tune" public policy, and policymakers aim to streamline and prioritize policy tools based on a hierarchy of existing risks (Dunn Cavelty/Hagmann 2012: 89). When policymakers adapt this mindset of instrumental efficiency, they contribute to the depoliticisation of risk as the topic is moved from the political and debatable realm to the depoliticised and undebatable realm (Dunn Cavelty/Hagmann 2012). As a result, views on risk are mainstreamed by risk experts while alternative aims, measures and values are marginalized (Balzacq 2008; Beck 2002; Dunn Cavelty/Hagmann 2012). This does not necessarily mean that governments purposely depoliticise issues. Instead, this trend reflects the spread of the mindset of basing political decisions largely on scientific studies rather than political debate. This depoliticisation has the major consequence that it usually gives more authority to intelligence agencies, irrespective of the fact that these agencies also draw on "soft information" (non-verified information, often based on interpretations, informers, open sources), leaving space for many technical biases such as discriminatory stereotyping (De Hert/Gutwirth 2006: 30). One may argue that the concept of depoliticisation simplifies reality as it does not account for "hybrid strategies" such as the existing strategy on biometrics where debates take place among a number of competent experts (Liberatore 2007). In defence of depoliticisation, one may argue that decisions on security should only be made by experts. However, the argument of prioritizing risk experts does not hold when acknowledging that crucial decisions are often influenced by personal bias and in line with pre-existing notions of risk. In the following section, I provide an overview of developments in EU counter-terrorism endeavours.

OVERVIEW OF EU COUNTER-TERRORISM LEGISLATION AND PRACTICES

With the creation of the area of free movement (Schengen), the EU and member states developed various security tools to counter crime (Guild 2007; Huysmans 2006). Among these are Europol, the European Task Force of Chiefs of Police (EPCTF), the EU Intelligence Analysis Centre (EU INTCEN, until 2012: Situation Centre (SitCen)) and Eurojust (Den Boer et al. 2007). The Schengen Information System (SIS) database and the visa regime of the Visa Information System (VIS) are non-police tools which regulate people's entries into the EU, whereas FRONTEX is the agency that polices external borders. Special counter-terrorist bodies are the Police Working Group on Terrorism (PWGT), the Counter Terrorism Group (CTG) and the G6 composed of Germany, the United Kingdom (UK), France, Spain, Poland and Italy (Den Boer et al. 2007). EU INTCEN was already established in 2002, attached to High Representative Javier Solana's office and reinforced through counter-terrorism experts from member states' security services (EU Delegation 2015). This allowed for "strategic terrorism threat assessments based on intelligence from national services" (EU Delegation 2015).

After 9/11 and terrorist attacks inside the EU, (Islamic extremist) terrorism was officially considered a threat to the EU's existence and norms (Monar 2007). Consequently, relations between the EU's law enforcement agency, Europol, and the United States of America (US) were strengthened (Balzacq 2008). This happened through two agreements that provided for "trade of strategic and technical information" as well as "exchange of personal data", including "race, political opinions, or religious or other beliefs, or concerning health and sexual life" (Balzacq 2008: 90). In 2005, the EU Counter-Terrorism Strategy was formulated. It consists of four pillars: prevent to "combat radicalization and recruitment of terrorists"; protect to "reduce the vulnerability of targets to attack"; pursuit to "pursue terrorists across borders", "put an end to sources of terrorist financing" and "put an end to planning of terrorist activities"; and response to make member states "able to deal with [terrorist attacks] when they occur" (CoEU 2005: 2). The 2005 Counter-Terrorism Strategy was created without explicit consent "of an audience" and instead mainly driven by existing EU practices of visa regulation and FRONTEX (Balzacq 2008: 76). The strategy aims at combating terrorism "globally" with the respect to human rights to enhance Europe's security (CoEU 2005: 2).

1 The 'other' is ultimately associated with the negations of the 'self', namely 'unknown', 'insecurity', 'danger' and 'undesirable' (Aradau/Lobo-Guerro/Münster 2008) Similarly, things that are unknown and associated with dangerous are often described with the language of 'other' ('othering').

While the main responsibilities lie with the member states, the EU contributes by supporting national capabilities, helping Europe-wide cooperation, creating collective capability and pushing international partnership (CoEU 2005: 2). Concretely, the strategy pursues the common use of "passenger name record (PNR) data" and information exchange on various aspects, for instance to prevent terrorist financing and money laundering (CoEU 2016).

After multiple terror attacks in Europe in late 2015 and 2016, the EU established the European Agenda on Security which set out the EU's security priorities as "terrorism, organised crime and cybercrime" (EC 2015: 2). Enhancing already existing national and EU tools, it aims to strengthen national law enforcement, information exchange and operational cooperation in law enforcement. In a communication, the European Commission (EC) mentioned the concept of a "security union" which foresees greater information sharing between member states' police to close gaps and increase effectiveness (EC 2016: 1). in contrast to the EU Counter-Terrorism Strategy, the European Agenda on Security explicitly mentions the use of risk assessments in various contexts. The EC provided €8 million (in 2015 and 2016) for member states tasks on radicalization and rehabilitation, one of which is risk assessment (EC 2016: 7). Risk assessments became the basis of counter-terrorism activities as they provide the "specific risk areas" and priorities (EC 2016: 7). With the Agenda, the EU is developing its own risk assessment capabilities together with member states, the European External Action Service (EEAS) and other EU agencies to allow for effective EU policies (EC 2016). So far, the EC's risk assessment capacities comprise the risks of "explosives in air cargo" from outside the EU and on passenger checks in member states' airports (EC 2015: 9). Another field of expertise is the risk of illicit good or cash trade through external borders, together with member states (EC 2015).

A common EU practice to respond to risks after having established them through risk assessment is profiling (Ellyne et al. 2010; WCO 2013). This applies to counter-terrorism as well as any other field using risk assessment. Profiling categorizes individuals according to several features and automatically identifies those who deserve "further attention" or "special treatment" based on pre-existing patterns of risk (Ellyne et al. 2010: 2). Individuals identified as such are considered "potentially risky" as there is a statistical likelihood of having a security threat in this group (Ellyne et al. 2010: 2). The PNR database and the Directive 2005/60/EC on the prevention of terrorist financing and money laundering are examples of policies which give way to profiling in the EU since they authorize data sharing to establish risk indicators and behavioural patterns (Ellyne et al. 2010: 3). While the EC refused to label PNR as profiling, several EU politicians and scholars have since stated that PNR identifies certain passengers as "high-risk passengers" based on their travel history, behavioural indicators as well as other patterns associated with risks (Ellyne et al. 2010: 4; Ludford 2008).

DEPOLITICIZATION IN EU COUNTER-TERRORISM POLICIES

After 9/11, the EU did not endorse a military approach but rather one of data gathering, controlling and policing in the fight against terrorism (Delreux/Keukeleire 2014). Here, the underlying logic was to make use of neutral data which indicates risks independent from normative or subjective aspects (Dunn Cavelty/Hagmann 2012). Since then, risk scholars have criticized the use of technology in the war against terrorism for legitimizing transgressions of "political and legal borders" previously considered "solid and lasting" (Broeders 2007: 78). It is assumed that risk and danger can be calculated by multiplying likelihood by impact, sometimes including other variables as well. The alleged ability to rationalize and objectify risk led to policymakers' full reliance on agencies to produce insights on existing risks to national and European security. Under the oversight of experts instead of politicians, these agencies made risks comparable and translatable into political actions (Heng 2006). The shift of risk away from the political to the technocratic and expert-dominated realm is manifested in the Europol-US agreements. The agreements themselves came into place "excluding all parliamentary oversight" (House of Lords 2003). Under the agreements, Europol can decide without consulting member states' heads of states and governments to give information to the US. Although a parliamentary consent clause exists in individual government statements referring to the agreement, it is not embedded in the agreements and thereby far from binding (Lavranos 2003). What kind of information is passed on, in what quantities, what is done with it and on what basis personal data is collected in the first place is solely decided by the agencies and possibly heads of states and governments. Thereby, it is not open to political debate as parliaments and member states have no stake in the decisions taken. Despite this depoliticised process, the time-limit of storing personal data which is passed on under the agreement was extended from three to five years (Balzacq 2008).

Risk registers are a tool used in risk assessments to evaluate and rank potential risks. They are the product of calculating risk by means of multiplying likelihood by impact of an event (Dunn Cavelty/Hagmann 2012). The likelihood is usually determined statistically or by attempting to project past events to the future. Such historical patterns become analogies applied to the present. Impact is usually calculated with historical casualty counts or infrastructural damage. Generally, such analyses use both quantitative and qualitative data. The easily accessible output of such analyses is a risk register: reports outlining hierarchies of risks in form of risk matrices (Dunn Cavelty/Hagmann 2012). These hierarchies suggest which policy fields are more high-risk fields and

implicitly give "clear calls for action" (Dunn Cavelty/ Hagmann 2012: 87; Klinke/Renn 1999). Thereby, risk assessments are very powerful in shaping and dominating respected notions of (national) security (Dunn Cavelty/Hagmann 2012).

The Counter Terrorism Group (CTG) is a body that conducts such risk assessments and consists of the heads of the EU's intelligence and security services as well as their counterparts from Switzerland and Norway (CoEU 2001; Den Boer et al. 2007). The group aims to improve risk analyses first and foremost of Islamist terrorism and radicalism and to strengthen intelligence evaluation, partly in cooperation with EU INTCEN, Europol and the US (AIVD 2006; Den Boer et al. 2007; De Vries 2006). Controversially, the CTG has no formal link with the EU, no formal legal status, and neither data protection rules nor parliamentary accountability apply (Bendiek 2006; Den Boer et al. 2007). Similarly, the Police Working Group on Terrorism (PWGT) is not subjected to mechanisms such as parliamentary scrutiny, accountability of ministers to parliament, parliamentary approval and parliamentary control of budgets and policy plans (Den Boer et al. 2007). These specialized groups further contribute to the depoliticisation of risk as they jointly create authoritative expert opinions on what is considered as risk without involving or being accountable to democratically elected bodies such as the parliament. By definition, depoliticisation undermines democratic values since it allows for the perpetuated dominance of opinions by only a few people without public debate. Therefore, EU counter-terrorism policies as depoliticised issues currently only have limited democratic legitimacy.

SUBJECTIVITY OF RISK ASSESSMENTS

As mentioned above, risk analysis enjoys a high authoritative status in our society and politics. Its alleged objectivity and accuracy allow it to take a primal role in today's policies. However, it is questionable to what extent risk analysis is truly a neutral endeavour, superior to political decision-making. When establishing categories of social phenomena and individuals, for instance in the form of risk indicators, analysts shape society's consciousness of what conforms with and what deviates from the norm or the good (Baker-Beall 2011; Balzacq 2008; Bourdieu 1984; Lyon 2002: 249). Since there are pre-existing norms of what constitutes a threat or 'the other', analysts who design and carry out risk analyses are likely to be biased. Consequently, the practice of categorizing is not subjective. Acknowledging that risk assessments are subjective not only challenges their authority in policymaking but also brings the need to investigate the consequences of such intrinsic biases. A generally accepted argument is that technologies such as surveillance systems based on risk assessments govern social lives and reproduce and reinforce social divisions (Lyon 2002: 242). Consequently, risk assessments are biased accounts of reality which reproduce these biases in their governance of social lives.

In order to illustrate how biases enter risk analyses it is helpful to look at the technical level. Risk matrices are modelled representations of risk priority levels and depict the severity and frequency of the identified risks (Cox 2008). In his critique of risk matrices, Cox (2008) identified four major technical limitations of these tools: 1) Matrices have a poor resolution which means that they can attribute the same ratings to "quantitatively very different risks" (Cox 2008: 497). This is because risk matrices can only compare less than 10% of randomly selected risk pairs and still be unambiguous and correct. 2) Risk matrices are erroneous since they can rate risks as qualitatively higher than they actually are quantitatively. This error can happen for frequencies and severities which are negatively correlated, for instance, when an often-occurring event with overall less damage is rated equal to a rarely occurring event with overall more damage (Cox 2008). According to Cox, this renders risk matrices "worse than useless" (Cox 2008: 497; Cox/Popken 2007). 3) Effective resource allocation for risk-countering measures is not possible on the basis of the categories given by risk matrices as, for instance, when changing the potential loss of all risks in a scenario by the same amount, the risk priority order can change (Cox 2008). This makes risk measures incoherent. 4) It is impossible to make objective severity categorizations for uncertain consequences since frequency and severity inputs (in the risk matrices) depend on subjective interpretation. For instance, it is assumed that two analysts who work on one program have a common understanding of what the severity categories mean, such as the distinction between a minor or major environmental damage (Cox 2008). In reality, however, different analysts may obtain different – even opposite – ratings of the same set of quantitative risks.

Out of these four limitations, I focus on the aspect of categorizing as it is an issue that is also controversially debated by critical scholars of science and technology studies and the social sciences. In essence, it is impossible to objectively assign severity ratings to events which have uncertain consequences (Cox 2008). On the contrary, "subjective risk attitudes" are "essential" in such categorizations (Cox 2008: 508). Therefore, risk matrices are a mix of probabilistic and psychological (albeit generally ignored) information. This subjective psychological information of analysts is usually not documented which makes it difficult to differentiate the two kinds of information in the consequence severity classifications. Cox (2008: 508-510) provides examples in which analysts with different risk attitudes produced opposing risk severity ratings, arguing that it is impossible to claim that one output is more objective and superior than another – objectively correct ratings do not exist. A concrete example can be taken from counter-terrorism where reports

such as the "1998 General Accounting Office report on 'Combating Terrorism'" only give vague and highly ambiguous orders regarding category definitions (Cox 2008: 508). It provides no guidance, for instance, on how to rank a consequence that has zero severity when the probability is 90% but is catastrophic with a different probabilistic value (Cox 2008: 508). In counter-terrorism, this can result in the dilemma of not knowing how to rate the severity of consequences with one severe injury and one death compared to a consequence of fifty severe injuries and no deaths (Cox 2008: 509). As the answer is not obvious from the 'Combating Terrorism' report, it is up to analysts to determine the categorization. Analysts' categorization decisions depend on individual risk aversions, inevitably promoting misrankings (Cox 2008). Understanding risk matrices requires interpretation. However, analysts interpreting risk matrices are not aware of the risk attitudes and risk aversions of analysts who previously worked on the same risk matrix. As a result, interpretations can diverge largely and promote misperceptions of matrices (Cox 2008). Given the subjectivity and technical flaws of risk assessments, this way of understanding risks has only limited technical legitimacy, contrary to common belief. The general argument that expert views and risk assessments are superior to political debates rests on the assumption that they constitute a more neutral source of information. However, as this section has shown, this assumption does not hold true.

LEGAL AND SOCIETAL PROBLEMS OF PROFILING

Including risk assessments in the security policy-making process is considered to have concrete consequences that undermine legal principles (Broeders 2007). Both in Europe and the US, the aftermath of 9/11 brought about highly criticized "emergency measures" during states of emergency including legislative changes (Bigo et al. 2009: 288). While under normal circumstances, police databases should not have access to non-police databases and intelligence services should not have access to police databases, counter-terrorism responses ignored such regulations (Balzacq 2008). In practice, in the UK, Spain, France and at the EU level, specific groups of individuals have been profiled in discriminatory ways (Bigo et al. 2009: 288). Such police practices have often "been partly freed from judicial controls" which enabled further surveillance and control (Bigo et al. 2009: 288). While the UK made provisions which derogate from the European Convention of Human Rights (ECHR) of 1950, no such provisions were made at the EU level (Bigo et al. 2009). For instance, section 21 of the UK Antiterrorism, Crime and Security Act (2001) allows detentions in the absence of the charge of being a terrorist suspect, although Article 15 of the ECHR grants this practice only in case of war or an emergency threatening national security (Aradau 2007; ECtHR 1970; UK Parliament 2001). After 9/11 as well as the 3/11 2004 Madrid train bombing, the Spanish government reformed several criminal codes and modified prison and police regulations under the counter-terrorism rationale, adding more penitentiary restrictions, increasing police power and creating new indictable offenses (Bigo et al. 2009). Subsequently, criminal justice agencies were found to be more responsible for violations of human rights, political dissent and freedom of speech than previously (Bigo et al. 2009). The Dutch police as well were criticized for stopping and searching individuals on the basis of nationality, ethnicity, race or religion (Amnesty International 2017; Van Der Leun/Van Der Woude 2011).

A highly controversial practice partly arising from risk assessments is ethnic profiling. Risk assessments conducted by intelligence services help identify foreigners from specific origins as a "high risk group" and legitimize ethnic as well as "religious profiling of non-EU [individuals]" (Fekete 2004: 8). The same profiling pattern goes for nationals whose look or location (e.g. at a mosque) indicates their affiliation with certain high risk countries. In itself, profiling may be a valuable tool, for instance, for corporations to provide tailored services or to identify health-threatening behaviours (FRA 2010). In the context of law enforcement, profiling is termed criminal profiling and refers to the practices where an individual is considered risky when a pattern of characteristics applies (OSI 2009: 8). Criminal profiling practices include identity checks, (mass) stops and searches of vehicles and pedestrians, raids, surveillance, the issuance of cautions, arrests and detentions, data-mining, anti-radicalization policies as well as the use of bioidentifiers such as DNA profiles (Annas 2009; FRA 2010; Pantazis/Pemberton 2009). These practices are founded on specific intelligence, observed suspicious behaviour or appearance, or data mining in the form of patterns of characteristics previously established through risk assessments and resulting risk hierarchies (FRA 2010; Ringelheim/De Schutter 2008).

Meanwhile, ethnic or racial profiling is found when the decision for a law enforcement practice is based on ethnicity, race, national origin or religion (Delsol 2017). Merely classifying individuals by ethnicity is not necessarily discriminatory or unlawful but may, in turn, help monitor the behaviour of police officers and how they engage with different ethnic groups (Ringelheim/De Schutter 2008). However, ethnic profiling is discriminatory when it treats certain individuals less favourably than others and if the decision to do so is "based only or mainly" on the individual's ethnicity, race or religion (FRA 2010: 15). Put briefly, discriminatory ethnic profiling is differential treatment on illegitimate grounds (FRA 2010). This can happen consciously (direct, by order) and subconsciously (indirect, in practice). Both conscious and subconscious discrimination is unlawful and violates EU legal obligations (OSI 2009: 25). Article 14 of the ECHR prohibits the discrimination of individuals under its jurisdiction (ECtHR 1970). This aspect of non-discrimination relates to individuals' civil rights, right to

respect for privacy, correspondence, family and home (OSI 2009: 22). Protocol No. 12 of the ECHR as well as the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) further prohibit the discrimination by public authorities even in discretionary power such as during surveillance (ECtHR 1970; UN 1965). According to the ECHR, equality of treatment may be set aside given a legitimate aim and proportionality of the policy's means and aims. Another condition was established by Germany's Federal Constitutional Court in 2006 which ruled that ethnic profiling through data-mining seriously interferes with human rights and is only justified in face of an imminent and specific danger (Bundesverfassungsgericht 2006). However, ethnic profiling fulfils neither of these criteria as the existing dangers refer to a "hypothetical future attack", thus rendering it unlawful (FRA 2010: 14; OSI 2009: 23). Not only legal frameworks but also police guidance prohibits ethnic profiling (OSI 2009). Therefore, ethnic profiling is unlawful and breaches police codes.

Despite widespread controversy, numerous countries in the European Union make ethnic profiling an integral part of their anti-terrorism policies. While most of the discussion nowadays focuses on discrimination of Muslim or Asian communities, it is still black people (mostly young men) who are being discriminated the most. For instance, in the UK, black people are between 4 and 7 times more likely to be stopped and searched than Caucasian people (Delsol/Shiner 2015). Intelligence services increasingly target individuals of Muslim belief or Asian decent (Fekete 2004: 17). Intelligence services in Germany, Denmark and Norway required universities to share their data on foreign students to support their intelligence-gathering (Fekete 2004: 8). By early 2002, the German Federal Criminal Police Office gathered 6 million personal records and identified 20,000 individuals as potential suspects despite lacking concrete evidence (Fekete 2004: 8). The sole indicator was to be a young person (between 18 and 24) from a Muslim-majority country or of Islamic religious affiliation (Fekete 2004: 8). None of these were found to be affiliated with terrorism. In the UK, the police systematically gather data on bioidentifiers such as DNA and ethnicity for law enforcement purposes. Section 44 of the UK Terrorism Act of 2000 allows police officers to stop and search individuals and vehicles to look for objects potentially used for terrorist activities (Parmar 2010; UK Parliament 2000). The provision that this can be done without reasonable grounds, meaning solely based on the ethnicity of the suspect, was found unlawful by the European Court of Human Rights (ECtHR) in 2009 for violating the right to privacy stipulated by the Human Rights Act 1998 (Parmar 2010; Travis 2010). The court also criticized the "clear risk of arbitrariness" given by the wide discretion officers have in applying section 44, risking the entrenchment of ethnic profiling in policing practice (ECtHR 2010). The use of section 44 powers has increased by four between 2004 and 2008. Stop and search practices of individuals appearing to be Muslim, black or of Asian origin (Pakistani, Bangladeshi or Indian) increased by five since the 2005 Underground attacks (FRA 2010; Kundnani 2004; OSI 2009; Parmar 2010; Pantazis/Pemberton 2009). In Parisian transport hubs, ethnic Arabs are 7.6 times more likely to be stopped than Caucasians (Goris et al. 2009). In Spain, ethnic Moroccans are 7 times more likely to be stopped and searched (and much more intrusively) than ethnic Spanish (Delsol 2009). In Germany, there are several controversial cases where the police preventively conducted mass identity checks in front of major mosques and detained individuals for several hours (Fekete 2004: 11; OSI 2009: 60). In Italy, Spain and France, the police raided mosques, businesses and homes targeting practicing Muslims, often without specific evidence (OSI 2009: 42).

Risk assessments bring about so-called terrorist lists which numerous law practitioners and academics found to be discriminatory and violating human rights (Guild 2007). These lists identify high risk individuals who may be suspected of being linked to terrorism and are used to justify targeted financial sanctions or detention. These targeted financial sanctions are sometimes made on "dubious grounds", lack evidence and are ineffective (House of Lords 2007). Numerous reports by the European Commission and Amnesty International, among others, conclude that ethnic (or religious) profiling are not effective and often wrongfully target innocent individuals (Amnesty International 2017; EC 2009; Fekete 2004: 9; FRA 2010; OSI 2009: 53/2013: 22). The infamous case of raids and the wrongful two-month detention of sixteen north Africans living in Spain based on wrongful intelligence illustrates how terrorist lists are often misinformed, ineffective and harm communities (Tremlett 2003). The case caused an outcry by three Muslim organizations against the stigmatization of North Africans in Spain and the detainees' lawyer applied for compensation (Tremlett 2003). As in the Spanish case, ethnic profiling practices can publicly discriminate certain groups, and lead minority groups in European societies to perceive themselves as marginalized from the rest of society (Choudhury/Fenwick 2011; Khan et al. 2009; OSI 2013; Pantazis/Pemberton 2009). Many Muslims living in the UK express fear of abuse, assault and wrongful accusation of being affiliated with terrorism when displaying their religious or cultural identities. This causes them to restrict their freedom of movement, for instance, by staying away from public community facilities (Khan et al. 2009). Especially among women, the fear of being assaulted on the basis of their gender and religious identity is prominent. According to the view of many interviewees in the study by Fatima Khan et al. (2009), most Muslims living in the UK see themselves as both demonized and publicly feared while being in fear themselves. The Open Society Foundation's (2013: 10) interviews with numerous black and ethnically Arab individuals

illustrate the growing perception of being treated as second-class citizens and loss of trust in the police. Victims of ethnic profiling believe that this practice normalizes discrimination, a notion that they are afraid their children will internalize (OSI 2013: 11). While the European Commission acknowledged that ethnic profiling is counter-productive as people are discouraged from cooperating with the police on criminal investigations (EC 2009), it continues to be a common practice – fuelled by risk assessments. These societal issues are exacerbated by the normalization of ethnic profiling and contribute to the alienation and marginalization of Muslim groups living in Europe.

CONCLUSION: RISK MERITS POLITICAL DEBATE

In this paper, I aimed to illustrate the issues that are inherent to risk assessment and responsive practices such as profiling. By providing a theoretical and factual basis on depoliticisation and EU counter-terrorism, and by applying the concept of depoliticisation to EU counter-terrorism policies, I found that EU counter-terrorism increasingly takes place outside of the political realm of public debate. Instead, it is confined to experts' analyses, based on the notion that these experts' knowledge is superior to political or moral debates. This leads to the fact that regarding the notion of risk, which is considered as the basis of counter-terrorism, political concerns are neglected. Through my analysis of the technical flaws inherent to risk assessments, I was able to identify the subjectivity and dependence on individuals' risk aversion in the creation of risk matrices. This disproves the claim that these tools can be more objective than political debates. However, as expert-based risk assessments operate under the assumptions of neutrality and superiority of knowledge, their use has a depoliticising effect which marginalises alternative views. As a result of the increased reliance on expert's notions of risk, profiling, a policing tool that is based on risk assessment, increasingly takes an ethnic focus. This renders this tool unlawful as it undermines EU legal principles of non-discrimination, like I have shown above. Risk assessments and counter-terrorism responses based on the former need to be more critically assessed. Otherwise, the dominance of subjective expert opinions in the area might continue to result in practices that discriminate vulnerable minorities and go against established legal standards. A real political debate on risk in society needs to take place to open up the topic to more diverse views.

SOURCES

ALGEMENE INLICHTINGEN- EN VEILIGHEIDSDIENST, AIVD (2006): General Intelligence and Security Service Annual Report (The Hague).

AMNESTY INTERNATIONAL (2017): Amnesty international Report 2016/17: The State of the World's Human Rights (London: Amnesty International Ltd).

AMOORE, Louise/DE GOEDE, Marieke (2008): Risk and the War on Terror. Artificial Intelligence Series (New York: Routledge, Taylor & Francis Group).

ANNAS, George, J. (2009): Protecting Privacy and the Public: Limits on Police Use of Bioidentifiers in Europe, in: The New England Journal of Medicine, 361, p. 196-201.

ARADAU, Claudia (2007): Law Transformed: Guantanamo and the 'Other' Exception, in: Third World Quarterly, 28(3), p. 498-501.

ARADAU, Claudia/LOBO-GUERRO, Luis/VAN MUNSTER, Rens (2008): Security, Technologies of Risk, and the Political: Guest editors' introduction, in: Security Dialogue, 39 (2-3), p. 147-154.

BAKER-BEALL, Christopher (2011): The European Union's Fight Against Terrorism: A Critical Discourse Analysis. Loughborough University Institutional Repository, https://dspace.lboro.ac.uk/dspace-jspui/bitstream/2134/8964/1/Thesis-2011-Baker-Beall.pdf [30.04.2015].

BALZACQ, Thierry (2008): The Policy Tools of Securitization: Information Exchange, EU Foreign and Interior Policies, in: Journal of Common Market Studies, 46 (1), p. 75-100.

BECK, Ulrich (2002): The Terrorist Threat: World Risk Society Revisited, in: Theory, Culture and Society, 19 (4), p. 39-55.

BIGO, Didier/CARRERA, Sergio/GUILD, Elspeth/WALKER, R. B. J. (2009): The Changing Landscape of European Liberty and Security: The Mid-term Report of the CHALLENGE Project, in: International Social Science, 59(192), p. 283-308.

BIGO, Didier/CARRERA, Sergio/GUILD, Elspeth/GUITTET, Emmanuel-Pierre/JEANDESBOZ, Julien/MITSILEGAS, Valsamis/RAGAZZI, Francesco/SCHERRER, Amandine (2015): The EU and its Counter-Terrorism Policies after the Paris Attacks. CEPS Paper in Liberty and Security in Europe. No. 84/November 2015.

BOER, Lianne/VAN DE VELDE, Michael/WENSINK, Wim (2011): Geschätzte Kosten von Maßnahmen der EU zur Terrorismusbekämpfung, Zusammenfassung. [Estimated costs of EU counter-terrorism measures, summary]. Europäisches Parlament, http://www.europarl.europa.eu/RegData/etudes/note/join/2011/453181/IPOL-LIBE_NT%282011%29453181%28SUM01%29_DE.pdf [30.04.2015].

BOURDIEU, Pierre (1984): Distinction: A Social Critique of the Judgement of Taste (London and New York: Routledge).

BROEDERS, Dennis (2007): The New Digital Borders of Europe: EU Databases and the Surveillance of Irregular Migrants, in: International Sociology, 22 (1), p. 71-92.

BUNDESVERFASSUNGSGERICHT (2006): "1 BvR 518/02", http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/04/rs20060404_1bvr051802.html [04.04.2006].

CHOUDHURY, Tufyal/FENWICK, Helen (2011): The Impact of Counter-Terrorism Measures on Muslim Communities. Research Report 72 (Manchester: Equality and Human Rights Commission).

COUNCIL OF THE EUROPEAN UNION, CoEU (2001): SN 3926/6 "Conclusion Adopted by the Council" (Brussels: Justice and Home Affairs).

COUNCIL OF THE EUROPEAN UNION, CoEU (2002): 5970/02. "Access by Europol to the Schengen Information System".

Council of the European union, CoEU (2005): 14469/4/05 REV 4 "The European Union counter-Terrorism Strategy", http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014469%202005%20REV%204 [25.07.2016].

Council of the European union, CoEU (2016): EU Fight against Terrorism, http://www.consilium.europa.eu/en/policies/fight-against-terrorism/ [25.07.2016].

COX, Louis A. Jr. (2008): What's Wrong with Risk Matrices?, in: Risk Analysis, 28(2), p. 497-512.

COX, Luis A. Jr./POPKEN, Douglas A. (2007): Some Limitations of Aggregate Exposure Metrics, in: Risk Analysis, 27 (2), p. 439-445.

DEN BOER, Monica/HILLEBRAND, Claudia/NÖLKE, Andreas (2007): Legitimacy under Pressure: The European Web of Counter-Terrorism Networks, in: Journal of Common Market Studies, 46(1), p. 101-124.

DE GOEDE, Marieke (2008): The Politics of Preemption and the War on Terror in Europe, in: European Journal of International Relations, 14 (1), p. 161-185.

DE HERT, Paul/GUTWIRTH, Serge (2006): Interoperability of Policy Databases Within the EU: An Accountable Political Choice? International Review of Law Computers, 20 (1-2), p. 21-35.

DELREUX, Tom/KEUKELEIRE, Stephan (2014): The Foreign Policy of the European Union. Houndmills: Palgrave Macmillan. DELREUX, Tom/KEUKELEIRE, Stephan/ MacNaughtan, Jane. (Houndsmill: Palgrave).

DELSOL, Rebekah (2009): Addressing Ethnic Profiling by Policy: A Report on the Strategies for Effective Police Stop and Search Project (New York: Open Society Institute).

DELSOL, Rebekah (2017): Racial Profiling (London: Centre for Crime and Justice Studies).

DELSOL, Rebekah/SHINER, Michael (2015): Stop and Search: The Anatomy of a Police Power (London: Palgrave Macmillan).

DE VRIES, Gijs (2006): The European Union and the Fight Against Terrorism. Seminar Presentation (Brussels: Centre for European Reform).

DUNN CAVELTY, Myriam/HAGMANN, Jonas (2012): National Risk Registers: Security Scienticism and the Propagation of Permanent Insecurity, in: Security Dialogue, 43 (1), p. 79-96.

ELLYNE, Erika/GONZALEZ FUSTER, Gloria/GUTWIRTH, Serge (2010): Profiling in the European Union: A High-Risk Practice. No. 10 (Oslo: International Peace Research Institute).

EUROPEAN COMMISSION, EC (2009): Stop and Searched on Ethnic or Religious Grounds are not Effective, https:// ec.europa.eu/migrant-integration/news/stop-and-searches-on-ethnic-or-religious-grounds-are-not-effective [22.03.2017].

EUROPEAN COMMISSION, EC (2015): Communication from the Commission to the Euroepan Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Agenda on Security. COM(2015) 185 final, http://ec.europa.eu/dgs/home-affairs/e-library/documents/basic-documents/docs/ eu_agenda_on_security_en.pdf [25.07.2016].

EUROPEAN COMMISSION, EC (2016): Communication from the Commission to the European Parliament, the European Council and the Council: Delivering on the European Agenda on Security to Fight against Terrorism and Pave the Way Towards an Effective and Genuine Security Union. COM (2916) 230 final, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-security/legislative-documents/docs/20160420/ communication_eas_progress_since_april_2015_en.pdf [25.07.2016].

EUROPEAN COURT OF HUMAN RIGHTS, ECtHR (1970): European Convention on Human Rights.

EUROPEAN COURT OF HUMAN RIGHTS, ECtHR (2010): Gillan & Quinton v. The United Kingdom, Judgement of January 12.

EUROPEAN UNION AGENCY FOR FUNAMENTAL RIGHTS, FRA (2010): "Towards More Effective Policing – Understanding and Preventing Discriminatory Ethnic Profiling: A Guide", http://fra.europa.eu/en/publication/2010/towards-more-effective-policing-understanding-and-preventing-discriminatory-ethnic [15.03.2017].

EUROPEAN UNION AGENCY FOR NETWORK AND INFORMATION SECURITY, ENISA (2013): "National-Level Risk Assessments, An Analysis Report, http://www.google.com/ url? sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCMQFjAB&url=http%3A%2F%2Fwww.enisa.europa.eu%2Factivities%2FResilience-and-CIIP%2Fcyber-crisis-cooperation%2Fnis-cooperation-plans%2Fnlra-analysis-report%2Fat_download%2FfullReport&ei=XIxpVaLwEYqPsAGV_IG4BQ&usg=AFQjCNGpr2kX5TqA_7Z3Fxx-mGVXUiCK3w&sig2=R82HDedKdibhulzbtGjcVQ [01.05.2015].

EUROPEAN UNION DELEGATION TO THE UNITED NATIONS (2015): "Factsheet on EU Intelligence Analyses Centre (INTCEN)", http://eu-un.europa.eu/articles/en/ article_16050_en.htm [01.05.2015].

FEKETE, Liz (2004): Anti-Muslim Racism and the European Security State, in: Race & Class, 46(3), p. 3-29.

GUILD, Elspeth (2007). The Uses and Abuses of Counter-Terrorism Policies in Europe: The case of the 'Terrorist List', in: Journal of Common Market Studies, 46(1), p. 173-193.

GORIS, Indira/JOBARD, Fabien/LÉVI, René (2009): Profiling Minorities: A Study of Stop-and-Search Practices in Paris (Paris: Open Society Institute).

HENG, Yee Kuang (2006): War as Risk Management: Strategy and Conflict in an Age of Globalised Risks (London: Routledge).

HOUSE OF LORDS (2003): "European Union, Fifth Reports", http://www.parliament.the-stationery-office.co.uk/pa/ ld200203/ldselect/ldeucom/43/4301.htm [30.04.2015].

HOUSE OF LORDS (2007): "The Impact of Economic Sanctions". Select Committee on Economic Affairs.

HUYSMANS, Jef (2006): The Politics of Insecurity: Fear, Migration and Asylum in the EU. The New International Relations Series (Abingdon: Routlegde).

KHAN, Fatima/MYTHEN, Gabe/WALKLATE, Sandra (2009): 'I'm a Muslim, but I'm not a Terrorist': Victimization, Risky Identities and the Performance of Safety, in: British Journal of Criminology, 49, p. 736-754.

KLINKE, Andreas/RENN, Ortwin (1999): Prometheus Unbound: Challenges of Risk Evaluation, Risk Classification, and Risk Management. Working Paper No. 153 (Stuttgart: Center of Technology Assessment).

KUNDNANI, Arun (2004): Analysis: The War on Terror Leads to Racial Profiling. IRR News (London: Institute for Race Relations).

LAVRANOS, Nikos (2003): Europol and the Fight Against Terrorism, in: European Foreign Affairs Review, 8 (2), p. 259 -275.

LIBERATORE, Angela (2007): Balancing Security and Democracy, and the Role of Expertise: Biometrics Politics in the European Union, in: European Journal on Criminal Policy and Research, 13(1), p.109-137.

LUDFORD, Sarah (2008): Working Document on the Problem of Profiling, Notably on the Basis of Ethnicity and Race, in Counter-Terrorism, Law Enforcement, Immigration, Customs and Border Control. Committee on Civil Liberties, Justice and Home Affairs of the European Parliament.

LYON, David (2002): Everyday Surveillance: Personal Data and Social Classifications, in: Information, Communication & Society, 5(2), p. 242-257.

MOGHERINI, Federica (2015): "Remarks with EU High Representative Federica Mogherini, 29 April 2015", US Department of State, http://www.state.gov/secretary/remarks/2015/04/241277.htm [30.04.2015].

MONAR, Jörg (2007): Common Threat and Common Response? The European Union's Counter-Terrorism Strategy and its Problems, in: Government and Opposition, 42 (3), p. 292-313.

OPEN SOCIETY INSTITUTE, OSI (2009): Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory. Open Society Justice Initiative (New York: Open Society Institute).

OPEN SOCIETY INSTITUTE, OSI (2013): Equality Betrayed: The Impact of Ethnic Profiling in France (New York: Open Society Institute).

PANTAZIS, Christina/PEMBERTON, Simon (2009): From the 'Old' to the 'New' Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation, in: The British Journal of Criminology, 49(5), p. 646-666.

PARLIAMENT OF THE UNITED KINGDOM, UK Parliament (2000): "Terrorism Act 2000".

PARLIAMENT OF THE UNITED KINGDOM, UK Parliament (2001): "Anti-terrorism, Crime and Security Act".

PARMAR, Alpa (2010): Policing and Ethnic Profiling, in: Kjartan Páll Sveinsson (ed.), Ethnic Profiling: The Use of 'Race' in UK Law Enforcement (London: Runnymede), p. 8-10.

PEOPLES, Columba/VAUGHAN-WILLIAMS, Nick (2015): Critical Security Studies: An Introduction (New York: Routledge).

RINGELHEIM, Julie/DE SCHUTTER, Olivier (2008): Ethnic Profiling: A Challenge for European Human Rights Law, in: Modern Law Review, 71(3), p. 358-384.

TRAVIS, Alan (2010): Anti-Terror Stop and Search Policy Rule Illegal, in: The Guardian, https://www.theguardian.com/uk/2010/jan/12/terrorism-stop-and-search-illegal [22.03.2017].

TREMLETT, Giles (2003): Immigrants Sue Spanish PM for Claiming Terror Groups Link, in: The Guardian, https://www.theguardian.com/world/2003/sep/13/spain.gilestremlett [22.03.2017].

UNITED NATIONS, UN (1965): "International Convention on the Elimination of All Forms of Racial Discrimination", http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx [21.12.1965].

VAN DER LEUN, Joanne P./VAN DER WOUDE, Maartje A. H. (2011): Ethnic Profiling I the Netherlands? A Reflection on Expanding Preventive Powers, Ethnic Profiling and a Changing Social and Political Context, in: Policing & Society, 21(4), p. 444-455.

WORLD CUSTOMS ORGANIZATION, WCO (2013): Risk Assessment, Profiling and Targeting. Presentation, http://www.carecprogram.org/uploads/events/2014/CCC-TA-Workshop-AZB/Presentation-Materials/Day-2/009_112_209_WCO-Risk-Assessment-Profiling-and-Targeting.pdf [25.07.2016].