

European Responses to International Terrorism: Diversity Awareness as a New Capability?*

ANTJE WIENER
University of Bath

Abstract

This exploratory article seeks to identify angles for theory-guided research on European responses to terrorism. It argues that, when placed within the historical context of its own trajectory in the area of border politics, and especially experiences related to the Schengen Agreement, its implementation and cross-pillar collaboration, it is possible to identify a distinct European capability. This article describes this capability as ‘diversity awareness’. That is, as an actor on the world stage, the European Union is able to draw on transnational and trans-border experiences with law enforcement in beyond-the-state settings, as opposed to e.g. conventional warfare in order to defend the national interest. While sympathetic to the ‘normative power Europe’ literature, the article’s critical constructivist approach notes reservations against the Universalist bias of that literature and proposes an approach that is more conducive to empirical research instead.

Then came 1989 and all the enthusiasm about the global rule of law – human rights, trade, environment, criminal law, sanctions and a world police. The end of the Cold War was understood – especially in Europe – as the removal of obstacles on the way to history’s natural progress towards a *universal federation*. [. . .] Where American international relations analysts

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added footnotes to Hegel, Europeans fell back on Kant. Somehow, international law appeared to find its home in a (Germanic) language of universal reason. [. . .] *But the new developments in the law did not point to unity.*
Koskenniemi (2007, pp. 3–4; emphasis added)

Introduction

As the editors' introduction to this special issue points out, responses to terrorism constitute a 'contested transformation' on a world scale. At the same time, they reflect that transformation. If we are to discuss European responses to terrorism it is crucial to understand the context in which political and policy strategies are developed. A contextualized approach allows for an understanding of specific *capabilities* in a context where normative, procedural and institutional resources have developed over time and in relation to social practices. To explore the potential of this contextualized perspective, this article pursues a more theory-driven than policy-oriented perspective. It intends to complement the detailed insights on specific policy responses provided elsewhere in this volume. To capture, highlight and discuss the potential of specific European capabilities, it takes into account the controversial discussion about the reform of the United Nations (UN) and the role of international law. Here the keyword is the 'break-down' of the UN (Ikenberry and Slaughter, 2006; Zürn *et al.*, 2007) and, accordingly, the crashed hopes for a Kantian universalist world community *v.* the revival of Kant based on 'thin cosmopolitanism' (Sjursen, 2007; Eriksen, 2005; Habermas, 2007).

This context matters especially as responses to international terrorism increasingly involve all three of the EU treaties' pillars: the internal market, common foreign and security policy and justice and home affairs. In the light of the growing importance of co-operation in beyond-the-state contexts and across national state boundaries, Europe's responses to terrorism not only depend on the interplay between Member States and the EU, but also involve co-operation within the context of the wider international community. In addition to the conception of states as the dominant actors in international politics and, accordingly, a research focus that seeks to explain state behaviour which is (still) upheld by most approaches including realism, neo-realism, neoliberal institutionalism and modern constructivism, the specific European situation includes the actorness of the EU as a political entity that is still more than a regime and less than a state. Here, the 'normative power Europe' literature has made a strong inroad sustaining the 'thin cosmopolitan' approach to the international system (Manners, 2002, 2006; Sjursen, 2006, 2007).

For all its good intentions, this approach has been generally criticized for hypocrisy and moral superiority (Diez, 2005; Sjursen, 2007). More specifically, there is an inherent universalism in the ‘normative power Europe’ literature. The general reliance on universal principles as the roots of Europe as a normative power that can ‘do good’ (Sjursen, 2007, pp. 4–6) by diffusing its values to other places (Manners, 2002) risks blinding *empirical* research to finding out what might be specific about Europe. It thus blends out the opportunity to examine specific interpretations of norms, rules and standards that have been developing throughout the process of European integration and in relation with social practices. To be sure, this perspective does not suggest generalizing from European experiences and thus cannot be considered as having universal reach. On the contrary, this contextualized perspective seeks to understand and identify how it is possible that different attitudes towards terrorist threats have been developed in Europe and seeks to explore whether and how social practices have contributed to a distinct set of capabilities as resources for developing counter-strategies to terrorist threats. An example is the emergence of European border politics which has led to a highly complex and differentiated transnational space in which a mix of state and non-state actors interrelate (Bigo, 1999).¹ The potential of the ‘normative power Europe concept’ is – perhaps unnecessarily – undermined by applying a modern universalistic concept of civilization with implicit assumptions about constitutional quality, community, core principles, values and norms. I therefore juxtapose the normative power argument’s own universalistic normative bias with a more contextualized approach to norms.²

The following elaborates on the observation that, especially when compared with the United States’ government position towards terrorist threats which appears to be squarely grounded in the world of modern nation-states, the EU displays an altogether different set of strategies and perceptions. Compare, for example, the either/or position displayed by US President George W. Bush when associating terrorist activities with ‘state sponsorship’, addressing the reaction to this activity as ‘state’ warfare and ultimately presenting a choice – from one head of state to others – as ‘every nation, in every region, *now* has a decision to make. Either you are with us, or you are with the terrorists’ in his 2001 Address to Congress,³ with the both/and position displayed by European ministers, who readily admit that the ‘25 don’t all

¹ For a similarly contextualized perspective on the social practices of border politics rather than sovereignty focused approaches, see Doty’s work on the US–Mexican border (Doty, 2007).

² For the distinction between these two approaches see Tully’s work (1995), most explicitly for the distinction of these approaches and their impact on the practices and possibilities of ‘civil’ v. ‘civic traditions’ of citizenship (Tully 2007).

³ See: <<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>>.

have the same perception about what constitutes a terrorist threat'.⁴ While Europeans have to take into account different national experiences and collaborate with the EU's institutions in order to develop counter-strategies, the US-American discourse emphasizes a binary world view and a belief in Westphalian territoriality that perceives terrorists as foreigners coming in from the outside and a strategy of 'conventionalism' when fighting crime or wars (Scheipers, 2007; Welsh, 2007). In addition, Bush's speech suggests that decisions about responses to terrorism bear no relation to specific contextual conditions but must be taken once and for all. As the other contributions to this volume point out in more detail in Europe, not only do the Member States' respective strategic proposals differ, but the perception of terrorist threat itself differs as well.⁵

Two insights follow: first, Europe's responses to terrorism can draw on a more differentiated set of information; and, secondly, terrorist activity does not conjure up a balanced set of reactions across Europe. This suggests that, if terrorist threats cause different reactions and terrorism is about communication, then empirical research examining the interplay between terrorist threats, the perception of threat and the type of counter-terrorist measure applied, will provide key information for responses to terrorism. It could, therefore, be argued that, in comparison with others, especially the United States, the EU has the advantage of a 'diversity experience' that could be considered a special *capability* that is lacking with most of the other UN member states. While other members of the international community of 'civilized nations'⁶ would still base their foreign and security policy on the prime purpose of defending the national interest, states with a double membership of the EU and the UN have developed a much more complex understanding of foreign and security policy.

Three questions therefore need to be asked when examining the EU's responses to terrorism. First, what is this specifically European understanding of foreign and security policy (Sjursen, 2007, p. 3)? Second, are actors in this policy field aware of this specific status so as to be able strategically to apply it in policy and politics? And, third, how are we to conceptualize this specifically European understanding of foreign and security policy which is both less and more than defending the national interest? The following explores the third question in particular. To that end, section II elaborates on the critical

⁴ According to one diplomat who remained anonymous, see the Deutsche Welle report on the European justice and home affairs Council of Ministers meeting in December 2005, see: <<http://www.dw-world.de/dw/article/0,2144,1798830,00.html>> accessed 25 October 2007.

⁵ Compare a range from 3 per cent to 54 per cent of the European population depending on the Member State, see details in Edwards and Meyer (in this volume) and in the following sections.

⁶ See ICJ 38(1)c.

constructivist framework with the focus on the role of norms and the normative structure, while section III turns to a discussion of the 'normative power Europe' argument based on the diffusion of universal values and norms. Section IV addresses the potential of European diversity awareness as a new capability which might be fruitful for empirical research on responses to international terrorist activities.

I. Norms and the Normative Structure

The immediacy of terrorist threats following the recent resurgence of international terrorism on Western territories has led to a flurry of policy and political responses which, in turn, has become the subject of criticism, and calls for more scrutiny (Edwards and Meyers in this volume). Empirically, an assessment of responses to terrorism will refer to the *context* in which terrorist activity, policy innovation, political debate, public perception and proposed measures to counter terrorist threats in order to protect citizens unfold. All activities are related and contribute to the transformation of governance. This transformation has become particularly visible based on the ongoing process of European summit meetings and treaty revisions which have cumulated in the debate about the constitutional quality of the EU's institutions. The contested constitutionality of the EU notwithstanding, it is important to note that politics and policy-making in the Union work according to a set of norms that differ substantially from those guiding either international organizations or nation states.

Why does this matter for a debate about potential responses to terrorism? The following develops the role of norms as an analytical yardstick for examining responses to terrorism in some detail. In order to tackle the potential of 'European' responses to terrorism, they need to be placed and examined within the particular context of European integration and compared with other countries' responses. Placing European responses to terrorism within the particular institutional and constitutional setting of the EU, which has developed through social practices and their increasing reach beyond the state, matters insofar as these social practices have been decisive in constituting the norms and rules that guide politics and policy-making in the EU, for example, sovereignty. The goal is to assess the specific European context and to open a discussion about its potential for effective responses to terrorist threats, thereby taking into account the predominantly international operation of suicide bombing strategies that have come to be considered as the 'fourth wave of modern insurgent terrorism' (Edwards and Meyer in this volume).

As Sjørnsen notes 'norms are a variety of different things and, after all, most actors pursue norms; most preferences also reflect a normative position and many foreign policy actors have some kind of normative influence or agenda' (Sjørnsen, 2007, p. 3). The international relations literature offers two types of theoretical frameworks to study the input of norms and normative power in world politics. The conventional (or modern) constructivists focus on the structuring power of norms, that is the power of norms to influence behaviour in world politics (Katzenstein, 1996; Risse *et al.*, 1999). In turn, the critical constructivist literature focuses on normative structures that are constituted by and constitutive of specific interactive use (Kratochwil, 1989; Weldes and Saco, 1996; Reus-Smit, 1997, 2003; Wiener, 2007). The former is helpful in indicating the emerging influence of one fundamental norm over another, say the 'power of human rights' or the diffusion of a specific 'Weberian administrative culture', or in focusing on a specific decision-making situation in which norms guide processes of deliberation. The latter's contribution to understanding international politics and offering avenues towards change consists of conceptualizing the normative structure as reflecting meaning that is actually 'in-use'. It is therefore receptive of the interrelation between agent-centred and structural change.

As the international relations literature has demonstrated, norms may achieve a degree of appropriateness reflected by changing state behaviour on a global scale.⁷ However, in the absence of social recognition, norms are likely to be misinterpreted or simply disregarded: contestation is expected. This also holds true for legal norms which require social institutions to enhance understanding and identify meaning, i.e. normative practice. The documented language about norms indicates no more than the formal validity of a norm, while the social recognition stands to be constructed by social interaction. In other words, understanding does not follow directly from reference to 'objective reality', 'rather it is inherently constructed and sustained by social processes' (Colombo, 2003, p. 1). This link between the 'oughtness' of legal texts and the social context of interpretation facilitates an important empirical access point. It is especially valuable when studying enhanced norm contestation, that is, situations where legal text and social context of interpretation do not overlap. This can be achieved by examining individual interpretations of meanings. This additional dimension would allow for a way of identifying the *cultural validation* based on the experience of an individual's day-to-day life. Cultural validation therefore needs to be accounted for in addition to the legal validity and social recognition of norms. In sum, norms – and their meanings – evolve through interaction in context. They are therefore contested by default. This is

⁷ This and the following paragraphs of this section draw on Wiener (2008, Ch. 3).

particularly important in beyond-the-state contexts where ‘no “categorical imperatives” ’ are in practice and where ‘the context, or situation, within which activities take place is extremely important’ (Jackson, 2005, pp. 19–20; see also Finnemore and Toope, 2001; Brunnée and Toope, 2001). As social constructs, norms may acquire stability over extended periods of time, yet they remain flexible by definition.

Three elements matter in particular for the analysis of responses to terrorism: normative structure, crisis and critical juncture. The following defines each in its turn. In doing so, it sketches a framework for situating terrorist threats and counter-terrorist measures within specific contexts and for identifying specific capabilities in comparative case studies. To be able to distinguish between differences in the respective regional and national capabilities, a critical constructivist approach is adopted which includes the assumptions of intersubjectivity (Kratochwil and Ruggie, 1986; Niesen and Herboth, 2007), relationality (Tilly, 1975; Somers, 1994) and critical contestation (Tully, 1995, 2002; Taylor, 2001). The key analytical categories are, accordingly, the *dual quality of norms* as both structuring and constructed (Giddens, 1979; Taylor, 1993; Wiener, 2007), the *structure of meaning-in-use* as providing access to specific meanings that are influential at a specific time and place, yet will only be revealed through individual use (Weldes and Saco, 1996; Milliken, 1999) and the application of the *normative standard of legitimacy* based on equal access to contestation (Taylor, 1994).

Normative Structure

The definition of fundamental norms such as procedural norms and core constitutional norms in the UN Charter and the Treaty of European Union, respectively, can be considered as the central elements of the normative structure. The structure achieves a particular instructive role in times of crisis. On such occasions the interpretation of its main elements becomes clear; the actual structure of meaning-in-use is enacted. That is, the particular interpretation of the meaning is revealed by a situation of conflict. The contestation over norms is revealed by discursive interventions, as ‘discourses do not exist’ ‘out there’ in the world; rather, they are ‘structures that are actualized in their regular use by people of discursively ordered relationships’ (Milliken, 1999, p. 231). Two perceptions matter in examining the context in which contingent meanings are constituted: the larger normative structure and the more narrowly defined environment of decision-making in politics and the policy process. This perspective allows for a distinction between major historical structural changes and the processes of institutional evolution (Tilly, 1984; Reus-Smit, 1997) which can be evaluated in order to provide a view of

present conditions of decision-making and normative expectations from which appropriate prospective normative development can be derived. With regard to the normative structure of meaning-in-use in the current contested quality of international law, it is important to distinguish between these two processes which work in different ways – the context of ‘large procedural change’ (Tilly, 1984) on the one hand and the context of decision-making under conditions of crisis on the other.

Crisis and Enhanced Contestation

Reactions to norms have been conceptualized as habitual rather than reasoned (March and Olsen, 1989). It is therefore quite common for norms to remain ‘invisible’ despite their input as a structuring factor of politics and everyday life (Manners, 2002, p. 241). Norms usually acquire political significance in situations where their meaning is disputed. At that point, they obtain visibility in the political process. Such points of contestation are mostly triggered by contingency, so that actors encounter the use of norms outside their own societal context. They are a regular occurrence in processes of governance beyond the state, when international encounters occur on a regular basis. And they are particularly visible in situations of ‘crisis’, ‘a moment of crucial decision in the context of immense danger’ (Griffiths and O’Callaghan, 2002, p. 57). We can therefore hypothesize that the contested meaning of norms is enhanced under three conditions, with each condition indicating greater contestation due to declining social feedback (i.e. the possibility to turn to social institutions as frameworks of reference for the interpretation of norms). In sum, first, the *contingency* of normative meaning indicates a change of constitutive social practices, both cultural and organizational, and hence normative meaning over time. Second, the extension of *governance practices* beyond modern political and societal boundaries changes the social environment and hence the reference frame provided by social institutions. And, third, a *situation of crisis* raises the stakes for understanding meanings based on social institutions (see Table 1).

Consequences of Crisis

The condition of crisis has short-term and long-term implications for decisions in the realm of international relations. Its immediate effect is reflected by institutional and policy changes. It can then be commented on and documented by research on foreign and security policy decision-making. The long-term effect will consist of changing sets of norms and institutions that have been regulating the interplay between politics and law on the global scale. Both reframe the context of the EU’s responses to terrorism. How the

Table 1: Enhanced Contestation of Norms: Three Conditions

<i>Steps</i>	<i>Type</i>	<i>Condition</i>
1	Contingency	Historical <i>contingency</i> means that norm interpretation depends on context.
1 + 2	Social Practices	Moving selected <i>social practices</i> (i.e. organizational practices only) beyond a given social context reduces the social feedback factor when interpreting norms.
1 + 2 + 3	Crisis	A situation of <i>crisis</i> raises the stakes for norm interpretation as time constraints enhance the reduced social feedback factor.

Source: Wiener (2008, Ch. 3).

EU acts in this changed setting will remain subject to the outcome of the debate on international law and the EU's input into this debate. The EU's own specific actorness therefore stands to play a key role at this critical juncture in international politics. How this impacts will depend significantly on awareness of the EU's own normative diversity which undermines widely shared assumptions about the degree of constitutional quality.

What has been shown from reactions to the domestic implementation of anti-terrorist measures has been the importance of *radicalization*. This effect is generated especially as a reaction to the operations of lower level law enforcers who are more likely to operate in *legal grey zones*, which is to say, the enforcement practices lack sufficient surveillance and training and undergo little or no parliamentary scrutiny. Such a finding questions the capacity of liberal democratic states to fulfil the responsibility of protecting their citizens and highlights the consequences of the dilemma of being torn between protecting and curtailing fundamental rights. In the light of these insights, which are generated within the domestic context, it is important to notice the potential consequences for law enforcement practices that involve trans-border action. This action, while in principle legitimized by the proposed changes in international law and the new focus on 'civilian inviolability', is likely to be conducted in a considerably enhanced legal grey zone.

Examples

Following the terrorist attacks on territories of several UN states in the early 21st century, a condition of crisis has been created. This condition has implications for decision-making in contexts of governance beyond the state where individuals act according to their respective normative baggage, and where shared frames of reference cannot be taken for granted. At a macro-level, we can observe processes of institutionalization, supranationalization,

globalization and transnationalization within the framework all making for significant changes with regard to the status quo orientation of the 'interstate system', changes in which the weakening of the 'non-intervention principle' as well as the 'emphasis on human rights' play a strategically decisive role (Zürn *et al.*, 2007, pp. 5 and 10). Similarly, the results of the Princeton Project on 'Freedom and Security for the 21st Century' suggest, from a US perspective, that 'the system of international institutions which the United States and its allies built after World War II and steadily expanded over the course of the Cold War *is broken*' (Ikenberry and Slaughter, 2006, p. 7; emphasis added).

On the narrower level of day-to-day politics, an increasing push for concrete decisions, such as, for example, following the 9/11 terrorist attacks, can be observed. In 2004 an internationally co-ordinated move was launched to gain redress under German International Criminal Law (GICL) against former Secretary of State, Donald Rumsfeld, for the tolerating the torture of Iraqi prisoners. This legal action involved the Centre of Constitutional Rights, an US American NGO led by Michael Ratner and a German lawyer, Wolfgang Kaleck, who acted on behalf of four Iraqi citizens against the US government and military officials (Fischer-Lescano and Bothe, 2006; Kaleck and Wiener, 2007).⁸ In addition, the United States' treatment of prisoners held at Guantánamo Bay has caused other law suits in which the interplay between politics and law has been scrutinized (Venzke, 2007). A case study on the interplay between legislative change, law enforcement and radicalization in Northern Ireland reiterated the implications of the condition of crisis. This case sustains the assumption that state policy that had originally been designed to curb radicalization and violence might actually generate the opposite effect. A recent investigation of the practices of law enforcement in Northern Ireland based on qualitative interviews with individuals who had in one way or another become involved (as bystanders or targets) in stop-and-search or house-search measures, observed that anti-terrorist security regulations including legislative measures and the introduction of new policy instruments often facilitate law enforcement practices that are carried out in 'grey zones' of the law (Campbell and Connolly, 2006).

Both the Northern Ireland case and the recent surge in complaints against the treatment of prisoners in Abu Ghraib, Guantánamo Bay and in relation to recent terrorist attacks in Europe have demonstrated how law enforcement practices can contribute to the radicalization of individual citizens. However, it is important to note that in the light of the extraordinary threat posed by terrorist attacks and in the immediate aftermath of either terrorist threats or

⁸ See for the documents of this legal case, the collection on this website: <<http://www.rav.de/rumsfeld2.html>> accessed 25 October 2007.

actual attacks, legislative measures include two types of measures. On the one hand, they aim to *enhance the range of law enforcement instruments* to prevent terrorist attacks – such as stop-and-search, house-search, legal arrest under suspicion of terrorist activities, control of communication by post, email or phone, as well as CCTV cameras, biometric passports and so forth. These measures are pushed by policy-makers – usually in the home or interior ministries with endorsement from foreign ministries. They undergo little parliamentary scrutiny and imply in one way or another a restriction of fundamental rights and freedoms, including the freedom of speech, the freedom of association, the right to remain innocent until proven guilty and so on.⁹ On the other hand, they seek to enhance mediation. It is widely acknowledged in national and international governance contexts that countering terrorism requires repressive legislation to be implemented not in isolation but as part of a wider ‘package’ which includes positive reforms aimed at tackling inequality and disadvantage and promoting dialogue and mutual understanding. This dialogical dimension draws more generally on the literature on democratic constitutionalism and citizenship. More specifically, this literature seeks to enhance equal access to rights, access to participation and dialogue based on the principles of democracy and constitutionalism beyond the state.

Global Constitutionalism at a Critical Juncture

When speaking of a constitution, we mean a set of norms, principles and provisions and the mandate to organize the political. In distinction from other agreements such as conventions or treaties, constitutions are expected to offer a ‘civilized’ and ‘embedded’ approach to settling conflicts while respecting the constituents’ wishes and ways of life. Constitutions work within specific cultural contexts only. They represent an agreement (written or not) among representatives of the governed within a community to make sure that the governors proceed according to the wishes of the former (Tully, 1995). While this type of agreement has had a long-standing role in domestic politics in Europe starting with the Greek City States, a similar constitutional quality has emerged only much more recently in international politics. Thus, the creation of international organizations such as the UN, the EU and its predecessors, Mercosur, the Association of South East Asian Nations (ASEAN) and the African Union (AU), to name but a few organizations attempting to move ahead with arrangements of an increasingly binding constitutional quality, dates back to the past century only. Nonetheless, as Koskenniemi observes, a

⁹ For an account of this multi-dimensional strategy in the UK, see MI5, *Countering International Terrorism: the United Kingdom’s Strategy*, July 2006, available at: <http://www.mi5.gov.uk/output/Page555.html> accessed 25 October 2007.

'global enthusiasm' about the possibilities of the global rule of law had emerged with the beginning of the post-cold war era (Koskenniemi, 2007). Subsequently and taking the stable normative structure in world politics at the time into account, many spoke of a process of 'constitutionalization' in beyond-the-state contexts.

While the communities that were part of quasi-constitutional arrangements such as the EU's various treaties, or the UN Charter, were much less defined by the boundaries of a Hegelian state than by international agreements negotiated among government representatives, the language of 'civilization', 'constitutionalization' and, more generally, 'the rule of law' did create an over-arching framework of reference for practising international law. Despite their formal differences, both these regional and international institutions and others share the issue of contested constitutional quality. The norms, principles and rules that guide politics within them provide the substance of this quality. It is the way they 'work' which establishes the 'invisible constitution of politics' (Wiener, 2008). Given the necessity of social recognition for the interpretation of any kind of legal document, this invisible constitution of politics is crucial for both the interpretation and the construction of international law. It matters in particular in a situation of crisis.

As Koskenniemi observes, international lawyers are faced with an increasing 'incoherence' and an impending 'loss of overall control' (Koskenniemi, 2007, p. 4). In other words, international law is at a critical juncture as its basic rules, procedures, *Grundnorms* as well as the organizational framework of the international community stand contested (Ikenberry and Slaughter, 2006; Zürn *et al.*, 2007). As a global structure of meaning-in-use, international law, its substance, use and scope, and hence its application as a reference frame to ensure accountability, are contested. At the same time, the resurgence of terrorism as an international activity has raised new demands on cross-border law enforcement strategies which require some sort of legal framework to ensure accountability. Developments in international and regional law reflect this demand. Examples of the former are the 'responsibility to protect' strategy and the related support for the principle of civilian inviolability (Slaughter, 2005), as well as the constitutionalization of the German International Criminal Law Principle (Kaleck and Wiener, 2007). Examples of the latter are the third pillar debates in the EU (see among others Den Boer *et al.* in this volume). Taken together, both processes, the larger context of structural change and the narrower context of increasing pressure for fast decisions, have generated some conceptual questions with regard to the normative structure in international relations in which states used to operate. This raises more specific and potentially path-breaking questions about multilateralism and international law based on political premises.

To summarize, while the enthusiasm about the possibilities of the role of international law and the belief in the successful establishment of international organizations received a severe blow by the terrorist attacks in 2001 and the ensuing unresolved conflict regarding the 2003 military intervention in Iraq, the assessments of these events and their impact vary considerably. Thus, while some observers see a general 'breakdown' of the UN institutional network (Ikenberry and Slaughter, 2006), others anticipate an impending paradigm change with regard to the future of international law (Wolf, 2007). Two aspects are crucial with respect to a European sense of actorness in this scenario. First, a condition of crisis emerged in world politics. Second and related to the first aspect, this crisis sets the stage for a critical juncture in the development of international law. The condition of crisis indicated two instances of potential contestation. It meant that decisions regarding appropriate reactions to terrorist atrocities and threats had to be taken (1) in a context of governance beyond the state and (2) under time constraints. Subsequently, rule following, based on the shared interpretation of the norms and rules of international law, was challenged significantly. Contestation ensued, first, on the interpretation of specific fundamental norms and, second, on the role of international law altogether.

II. 'Normative Power Europe': Diffusing Fundamental Norms?

Ian Manners suggests 'that conceptions of the EU as either a civilian power or a military power, both located in discussions of capabilities, need to be augmented with a focus on *normative power* of an ideational nature *characterized by common principles and a willingness to disregard Westphalian conventions*' (Manners, 2002, p. 239; emphasis added). This observation is central to locating the EU's actorness with regard to possible responses to terrorist threats as it speaks to both the normative bias and the conceptual potential of this approach. However, grounding the concept of normative power on shared common principles runs the risk of making assumptions about commonality and convergence that may not stand up to empirical proof. While members of a community may agree to sign up to a set of principles based on social recognition within their respective domestic contexts, this is no guarantee for expecting the cultural validation of these principles to overlap as well. The latter will come to the fore once meanings are attached to social practices in their relation to the constitution of norms within a structure of meaning-in-use rather than by deducing meanings from communities with a given identity (Katzenstein, 1996). Moreover, the path of disregarding Westphalian conventions, while important, must be carefully trodden. For example, a modicum of

the 'culture of sovereignty' that has been established through practices in international relations may be required in order to warrant equal access to participation as a basic democratic principle (Cohen, 2004).

Constituting Meanings: Downwards and Upwards

Studies on security communities hold that membership in a community is likely to enhance norm convergence (Adler and Haas, 1992; Adler, 1997; Adler and Barnett, 1998; Schimmelfennig, 2000). Accordingly, liberal norms translate into specific behaviour in the area of foreign and security policy. The normative structure is interpreted as entailing particular norms, principles and standards such as the non-proliferation norm, standards of prisoner of war treatment according to the Geneva Convention and the principle of non-intervention according to the UN Charter. However, persistent divergences in the interpretation of the normative structure of world politics contradict the security community literature and the so-called liberal community hypothesis (Schimmelfennig, 2003). As constructivist analyses in international relations have demonstrated, the structuring quality of norms needs to be understood in the specific social, cultural and ideational context of norm application – a process which in itself involves norm construction and alteration (Guzzini, 2000; Johnston, 2001; Mueller, 2004; Finnemore and Toope, 2001; Wiener, 2004). Such research has pointed out that the consensus required for the interpretation of international norms cannot be guaranteed by law or, in fact, any other means of establishing formal validity.

International law is based on treaty language which must remain sufficiently unspecific so as to warrant signature of the highest possible number of negotiating parties (Chayes and Chayes, 1993). To generate insights into identifying conditions under which international norms generate a shared interpretation among the highest possible number, constructivists have pointed to the importance of social recognition or a sense of 'appropriateness' (March and Olsen, 1989). The stress on practice in context in the proceedings and development of international law have led Jutta Brunnée and Stephen Toope to propose the concept of 'international interactive law' (Brunnée and Toope, 2001). Since the power of international law depends on the social recognition of norms by a particular community of states, three factors offer important pointers for analyses of compliance with or, indeed, contestation of international law. First, it is important to identify the community which has set up a particular set of norms and whose members are expected to recognize them. Second and related to this, it is necessary to identify a sense of awareness and recognition of international law among the members of that community: do all members indiscriminately share the same sense of

appreciation? Third, any analysis must make sure to identify the structure and goal of international law so as to establish the core characteristics of a particular era in which these norms are considered powerful by a significant majority in world politics.

The concept of 'normative power Europe' implies reference to a limited community with boundaries, however fuzzy, yet with a given identity that allows for the recognition of shared fundamental norms as appropriate in order to diffuse them successfully to other regions of the world (Manners, 2002; Sjørnsen, 2006). This community may be based on shared organizational grounds or based on the definition of values *qua* membership agreement, or it may be based on the neo-Kantian reconstitution of the democratic values of national states.¹⁰ However, recent research found enhanced diversity rather than harmonization when examining the interpretation of the meaning of fundamental norms such as democracy, human rights, citizenship and the rule of law among different elites and in different arenas of the EU (Wiener, 2008). The assumption of 'normative power Europe' would imply that the EU is able to achieve diffusion without applying military power. Yet, in light of the identified degree of contestation about normative values within the EU, it would appear that the EU's own Member States and their representatives would need to establish a shared meaning of norms before 'diffusing' norms 'to others'.

The point of referring to normative diversity among EU elites is not one of establishing degrees of contestation or harmonization of normative meaning (Europeanization). Instead, the issue of normative diversity points to 'cultural validation' as an invisible layer of normative meaning. In addition to the layers of 'formal validity' and 'social recognition', this third layer certainly has the ability to interfere with political decision-making. It puts a spanner in the works and its impact is most powerful when invisible. Once empirically highlighted, this layer demonstrates possibilities rather than constraints of diversity, yet, turning these conceptual possibilities into political opportunities requires taking a more contextualized approach.

For example, the core principles and values guiding the EU's common foreign and security policy according to Article 11 (1) TEU stipulate the objectives to 'safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter'.¹¹ In addition, EU Member States have confirmed their appreciation of the Union's central constitutional norms of democracy, fundamental human rights and the rule of law in Article 6 (TEU). These

¹⁰ For the latter see much of the conceptual contributions to the Oslo based RECON project; for details, see: <<http://www.reconproject.eu/>> accessed 25 October 2007.

¹¹ See Article 11 (1), Treaty of the European Union (TEU).

principles are common, insofar as they are all recognized within the respective domestic constitutional realm of each Member State. They are therefore stipulated as 'common values' by supranational European law as the guiding legal framework of EU common foreign and security policy decision-making. They therefore establish a link between core constitutional principles of regional and global politics as defined by UN Charter Article 2(4).

Yet, the point of contention in the case, for example, of the decision to intervene in Iraq, emerged precisely with regard to these – presumably shared – community values. In fact, the 15 EU members were not in agreement on how to interpret their respective reading of the UN Charter (Mayer, 2003; Wiener, 2004). As recent research has demonstrated, a key problem with the European Union's actorness in the international realm is that despite a strong overlap in formal validity, and often, social recognition, representatives from the 27 EU capitals are unlikely to share the same cultural validation (Wiener, 2008). This suggests that internationally agreed fundamental norms remain contested even among EU Member States. Importantly, this adds another dimension of potential contestation to international negotiations. It indicates that not only different security *interests* but also different interpretations of the meanings of fundamental norms matter.

In sum, the social practices of European integration have been constitutive towards a new interpretation of sovereignty. In fact, there is little disagreement about the revised interpretation of the fundamental norm of sovereignty. Following the qualified majority voting under the first – market – pillar, enhanced co-operation in the second – foreign policy – pillar and increasing cross-pillarization of third – justice and home affairs – pillar policies, EU Member State sovereignty has been qualified (Claussen, 2007). While European integration has moved sovereignty away from being a match of the Hobbesian or Westphalian state (Caporaso, 2000; Everson, 2004), there is no supranational political entity inside and Member State differences in interests and interpretations are alive and well. It is suggested, therefore, that Europe's strength does not lie in 'normative power' *per se*, as being the morally better equipped actor on the world stage, but on experience with diversity. Once this experience is recognized as a policy element, it may helpfully guide policy and political responses to terrorist threats, based on the principle of 'diversity awareness'. While 'normative power Europe' scholars argue from a normative basis of 'unity' (compare the 'diversity in unity' research programme of the ESRC as well as the 'finality' debate with regard to the European constitutional process), the point is that European integration is a process that will, at least for the foreseeable future, create more rather than less diversity (and subsequently less rather than more unity). However, this 'diversity experience' can be an asset when developing responses to terrorist threats.

III. European Diversity Awareness: A New Capability?

The strong interactive dimension of terrorist activity suggests that social facts are much more important for the development of counter-terrorist measures than material facts (Ruggie, 1998; Wendt, 1999). Thus, capabilities are derived from experience rather than from material resources. If 'terrorism can to a large extent be conceptualized as a form of *political communication* by means of threat and actual violence' (Edwards and Meyers in this volume; emphasis added; see Duyvesteyn, 2004), then it is vital for those studying responses to terrorism to tackle the dynamics of interaction. The success of terrorist activity, in the form of threats or actual attacks, depends on conveying the message of fear, mayhem and personal harm to the largest possible number of affected individuals. Within this psychologically charged environment, terrorist attacks seek to create the basis for political change. The 9/11 attacks marked a shift in terrorist attacks insofar as suicide bombings have become the most common form of terrorist activities. The turn towards suicide terrorism follows from the fact that 'terrorists have learned that it works' (De Burca, 2006, p. 2; Pape, 2003, p. 350). The observation that 'battles for Islam are won not through the gun but by striking fear into the enemy's heart' (De Burca, 2006, p. 2; Hassan, 2001, p. 5) indicates the emotional and religious dimensions of international terrorism. The religious dimension has turned into a distinctive element of Hamas and Islamic Jihad as well as more generally post 9/11 terrorist activities.¹²

Working out responses to terrorism requires focusing on communication, asking who communicates with whom, when and where, as opposed to a focus on how to protect state boundaries and defend the national interest against other nations. While others raise the issue of why terrorist activities emerge and how they can be maintained based on an arguable degree of legitimacy (De Burca, 2006), the question tackled here is how to respond to terrorism. Of course both questions are interrelated and need ultimately to be addressed within the larger frame of a three-step analysis that includes causes (motivation), sustainability (success) and responses (counter strategies) to terrorism. This encompassing research perspective notwithstanding, it is appropriate to ask whether the EU is particularly well- or ill-equipped to deal with international terrorism.

The following argues that the EU's diversity awareness stems from its long-term experience in dealing with different *national standards*, a variety of *institutional procedures* and a number of distinct *policy initiatives*. Together,

¹² For example, as De Burca points out, Gupta and Mundra found that an analysis in the period from 1991 to 2003 revealed that suicide bombings were actually part of an intensely political series of moves by Hamas and Islamic Jihad and were a strategic weapon (De Burca, 2006; Gupta and Mundra, 2005, p. 591).

this set of standards, procedures and initiatives allows for a diversity-based approach to the penetration of Westphalian borders, that includes a variety of practices of law enforcement. In the light of this experience of diversity, the high variation in the assessment of a perceived terrorist threat among European citizens ranging from a low 3 per cent in Finland and Sweden to a high 28 per cent in the UK and a top 54 per cent in Spain¹³ comes as no surprise. These statistics raise the more far-reaching question of whether or not diversity awareness is an insight with the potential to become a key factor for examining responses to terrorist threats in contexts other than the EU. Two observations are of particular relevance for this exercise. First, if the success of terrorist activity depends on the degree of threat that is provoked among the population, then different perceptions of threat provide comparative access points for drafting counter-terrorist strategies. Secondly, if experience with border politics matters, then the Schengen Agreement, its inception, implementation and institutionalization in beyond-the-state contexts will be crucial for creating a post-Westphalian understanding of protecting citizens against terrorist threats.

If empirical research can confirm that this is particularly suitable for countering the fourth wave of terrorism as it matches its transnational character and cross-border social practice, then the challenge for Europeans would be how to best present and defend this strategy within the wider international context. This would represent an important intervention in the current debate about the future of international law. For example, following the military interventions in Kosovo, Afghanistan and Iraq and in relation to the enhanced perception of the threat of terrorism in global politics since 9/11, we have witnessed a surge in the literature on international law and, especially, the future of international law. A key theme with a view to identifying appropriate anti-terrorist measures is the contested relationship between legal obligation and political interests (Fischer-Lescano and Teubner, 2004; Scott, 2005). In addition, the problem of legal grey zones has been enhanced by increasing expectations towards cross-border law enforcement. For example, proposals which seek to put more weight on 'civilian inviolability' (Slaughter and Burke-White, 2006) than on 'sovereign equality' (Cohen, 2004; Cryer, 2005, p. 988) as the *Grundnorm* of the international society of states (Bull, 1977; Jackson, 2005) signal a lack of a sense of appropriateness with regard to the quality of international law.

In the light of such proposed radical changes of international law, on the one hand and, on the other, research on the 'radicalization' effect which is

¹³ For these figures, see Edwards and Meyer.

generated by law enforcement operations in so-called legal grey zones, the question remains of whether qualitative changes in international law that undermine the culture of sovereign equality among states offer appropriate measures in response to terrorist threats. For Europe, the focus is more likely to be on the normative issues arising from anti-terrorist measures as well as specific policy experiences with trans-border law enforcement following terrorist threats. The normative issues include the implications brought about by the dilemma faced by liberal democratic EU Member States created by the obligation to protect their citizens against terrorist attacks whilst adhering to the fundamental norms that constitute the liberal community of states. In addition they entail the promotion of specific European capabilities within the institutional and legal framework of the UN.

Conclusion

This exploratory article has discussed theoretical and empirical venues for research on potential European responses to terrorist threats. To that end, it has suggested the importance of contextualizing European (i.e. EU based) experiences, especially in the area of trans-border law enforcement, e.g. the areas of justice and home affairs and foreign and security policy. This analytical approach involves two steps. The first seeks to reconstruct the European experience with a view to the social practices that contribute to the definition of rules, norms and procedures, especially regarding trans-border politics and policy-making. The second turns to the discussion of European actorness and its role within the wider global context. It suggested that the specific European experience with trans-border and transnational activity including law-enforcement strategies, co-operation and collaboration, which derive from the Schengen process in particular, actually creates a diversity awareness that stands out in comparison with other global actors such as the United States which draw predominantly on the experience of national states.

The article proposed a contextualized approach drawing on the critical constructivist literature on norms and normative structures. While sympathetic to the idea of 'normative power Europe', it has also cautioned against a modernist conception of shared values and norms and the expectation of being able to diffuse these towards 'other' contexts. It holds that, in the situation of crisis that emerges in any moment of terrorist threat, it is key to resolve ways of reaching a shared understanding of both the interests of the negotiators and their respective interpretations of the norms that are meant to bind their decision-making procedures. These norms may be codified in legal

agreements, thus presenting formal validity; in addition, they may enjoy a degree of shared social recognition among the negotiators; yet, they are most likely to spur conflictive cultural validation based on the normative baggage that individuals carry with them when moving between different political arenas to negotiate and decide. The discussion about Europe as a normative power and the link of this discussion with the larger context of international norms suggests two further directions for future research on the EU's actorship at this moment of critical juncture. Normatively, research needs to explore the conceptual affinities and bridges between the constitutional quality achieved in the EU and the future of international law. Empirically, one avenue singled out by this article would be for future research to identify the specific European capability of diversity awareness and its implementation in international co-operation.

Correspondence:

Antje Wiener
 Department of European Studies & Modern Languages
 University of Bath
 Bath, BA2 7AY, UK
 email aw309@bath.ac.uk

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