

*The Action of the European Union to Combat International Terrorism**

AUGUST REINISCH

I. INTRODUCTION

IN RESPONSE TO the terrorist attacks on 11 September 2001 in the United States of America, the international community reacted swiftly. The victim State showed a clearly discernible political will to act not only unilaterally but also, at least to some extent, within the framework of international organisations. The United Nations, regional security organisations such as NATO, OSCE and others immediately took steps to increase their efforts in the “fight against terrorism”.

The US and its allies focused on military measures involving the use of force following a “declaration of war on terrorism”.¹ However, the UN’s immediate reaction was not limited to “[r]ecognizing the inherent right of individual or collective self-defence in accordance with the Charter”² but also clearly stressed the criminal justice aspect of fighting terrorism.

On 12 September 2001, the day after the terrorist attacks, the UN Security Council adopted Resolution 1368 condemning the terrorist acts of the previous day and called upon all States:

to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for

*This chapter was finalised in July 2002 and updated in May 2003.

¹See the White House Questions and answers about the “War on Terrorism” available under <<http://www.whitehouse.gov/response/faq-what.html>>. See also the documents available under “AMERICA’S WAR AGAINST TERRORISM”, <<http://www.lib.umich.edu/govdocs/usterror.html>>.

²Preambular para 3 UN Security Council Resolution 1368, <<http://www.un.org/Docs/scres/2001/res1368e.pdf>>.

aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;³

It also called upon the international community

to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999;⁴

On 28 September 2001, the Security Council adopted Resolution 1373.⁵ This resolution contains in 18 sub-paragraphs a list of specific measures against terrorism States are required to take. Among these are the prevention and suppression of the financing of terrorist acts, the freezing of funds, the criminalisation of the financing of terrorism and the criminalisation of other acts supporting terrorism. It also established a Counter-Terrorism Committee (CTC)⁶ to monitor implementation of Resolution 1373 and to receive State reports on the measures taken to implement this resolution.

What is particularly interesting about this resolution is the fact that the Security Council clearly ventures into the field of general law-making activity. It should be noted that Resolution 1373 does not contain any specific reference to 11 September 2001, to Osama Bin Laden or to Al-Qaeda.

³ *Ibid.*

⁴ In Resolution 1368 the SC “Calls upon all States to implement fully the international anti-terrorist conventions to which they are parties, encourages all States to consider as a matter of priority adhering to those to which they are not parties, and encourages also the speedy adoption of the pending conventions;” (op. para. 2) and “Calls upon all States to take, *inter alia*, in the context of such cooperation and coordination, appropriate steps to

- cooperate with each other, particularly through bilateral and multilateral agreements and arrangements, to prevent and suppress terrorist acts, protect their nationals and other persons against terrorist attacks and bring to justice the perpetrators of such acts;
- prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism;
- deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition;
- take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts;
- exchange information in accordance with international and domestic law, and cooperate on administrative and judicial matters in order to prevent the commission of terrorist acts;” (op. Para. 4).

⁵ <<http://www.un.org/Docs/scres/2001/res1373e.pdf>>.

⁶ <<http://www.un.org/Docs/sc/committees/1373/>>.

Rather, it imposes very general obligations on States to legislate and take other measures in the fight against terrorism.⁷

On a European regional level, the participation in the fight against terrorism has proven to be a challenge for the European Union (EU). This has mainly technical, legal reasons. Politically, there is no question that the EU is willing to support the measures decided upon by the Security Council. However, most of these measures relate to the field of justice and police matters — core issues of national sovereignty — wherein the Union only slowly attains powers according to the complicated architecture of the Maastricht Treaty on the European Union (EU Treaty). The Treaty's allocation of competences in the Justice and Home Affairs (JHA) pillar only sparingly conceives of genuine EU powers to combat terrorism. With the Treaty of Amsterdam the new Third Pillar, now referred to as Police and Judicial Cooperation in Criminal Matters (PJCC),⁸ provides for certain harmonisation powers, such as the possibility to adopt framework decisions under Article 34 of the EU Treaty.⁹

On the other hand, the awareness of the need to combat terrorism on a European level is not new to the EU. Rather, the fight against terrorism is one of the intergovernmental policy areas since the 1992 Maastricht Treaty. The Amsterdam EU Treaty expressly states that “preventing and combating crime, organised or otherwise, in particular *terrorism*,” is one of the tasks of the Union in order to achieve the union's objective “to provide citizens with a high level of safety within an area of freedom, security and justice”.¹⁰

Article 29 EU Treaty identifies three specific areas of closer co-operation: closer co-operation between police forces, customs authorities and other competent authorities, including Europol; closer co-operation between judicial and other competent authorities of the Member States; as well as approximation, where necessary, of rules on criminal matters.

Work on measures against all forms of cross-border organised crime, including terrorism, was pursued by the EU already before 11 September 2001.¹¹ It even goes well beyond the Maastricht Treaty-created co-operation in the field of JHA and partly dates back to the intergovernmental

⁷ See J Finke and C Wandscher, “Terrorismusbekämpfung jenseits militärischer Gewalt” (2001) 49 *Vereinte Nationen* 168–73.

⁸ See generally S Peer, *EU Justice and Home Affairs Law* (Harlow, Longman, 2000); J Monar, “Institutionalizing Freedom, Security, and Justice” in J Peterson and M Shackleton (eds), *The Institutions of the European Union* 186–209 (Oxford, Oxford University Press, 2002).

⁹ According to Art 34 para 2 (b) EU Treaty the Council may “unanimously on the initiative of any Member State or of the Commission”: “adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;”.

¹⁰ Art 29 para. 2 (ex Art K.1) EU Treaty.

¹¹ See generally T Stein and C Meiser, “Die Europäische Union und der Terrorismus” (2001) 76 *Die Friedens-Warte* 33.

cooperation developed through the European Political Co-operation in the 1970s. An important step was the formation of the TREVI (French acronym for: *Terrorisme, Radicalisme, Extremisme et Violence Internationale*) Group in 1975 in which the Interior Ministers met in order to combat terrorism through increased police co-operation.

But it is obvious that the Maastricht Treaty on European Union elevated the co-operation to new levels: In 1996 the Council decided by a Joint Action of 15 October 1996¹² to create and maintain a directory of specialised counter-terrorism competences, skills and expertise to facilitate counter-terrorism co-operation between the EU Member States.

With respect to judicial co-operation, Article 31 (b) EU Treaty expressly mentions the facilitation of extradition between Member States. In the 1990s the EU adopted a number of treaties in this field, supplementing the 1957 Council of Europe sponsored European Extradition Convention¹³ and the 1977 European Convention on the Suppression of Terrorism¹⁴: among these are the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union¹⁵ and the Convention of 27 September 1996 relating to extradition between the Member States of the European Union.¹⁶

The Union also adopted in 1998 a Joint Action on the creation of a European Judicial Network¹⁷ and a Joint Action on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union.¹⁸

At the October 1999 European Council meeting in Tampere, the concept of extradition law, whether traditional or simplified, was abandoned in favour of a “mutual recognition” approach taken over from the supranational pillar of the EC. Very broadly, the European Council declared that the principle of “mutual recognition” should become the cornerstone of

¹²Joint Action 96/610/JHA of 15 October 1996, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation and maintenance of a Directory of specialized counter-terrorist competences, skills and expertise in the Member States of the European Union, OJ L 273/1, 25 October 1996.

¹³Paris, 13 December 1957, ETS No. 24, available under <<http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm>>.

¹⁴Strasbourg, 27 January 1977, ETS No. 90, available under <<http://conventions.coe.int/Treaty/EN/Treaties/Html/090.htm>>.

¹⁵OJ C 78/1, 30 March 1995.

¹⁶OJ C 313/11, 23 October 1996.

¹⁷Joint action 98/428/JHA of 29 June 1998, adopted by the Council, on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network, OJ L 191/4, 07/07/1998. Available under <http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_191/l_19119980707en00040007.pdf>.

¹⁸Joint action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, OJ L 351/1, 29/12/1998. Available under <http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_351/l_35119981229en00010002.pdf>.

judicial co-operation in both civil and criminal matters within the Union and that “the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons”.¹⁹

With regard to the harmonisation of criminal law, Article 31(e) EU Treaty contains a clear legislative mandate calling for the adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field of, among others, terrorism. Thus, the issue of defining terrorism as a criminal offence has become an unavoidable legal problem for the EU.

As will be discussed further below, the EU prepared two basic legal instruments for these purposes: a Council Framework Decision on combating terrorism²⁰ and a Council Framework Decision on the European arrest warrant.²¹ These two are by far the most important legislative measures taken in response to the challenge of terrorism.²² The following contribution will focus on these framework decisions together with the EU legislation on freezing “terrorist” assets. It should not be overlooked, however, that a host of other measures have been taken or initiated by the EU under the title of “fighting terrorism” in response to the 11 September attacks, such as humanitarian relief for Afghanistan, flight security measures, emergency preparedness, air transport insurance, etc.²³

II. IMMEDIATE AND GENERAL FOREIGN POLICY RESPONSES OF THE EU TO 11 SEPTEMBER 2001

A. Declaration by the EU

On 12 September 2001, the day after the attacks on the World Trade Center and the Pentagon, the EU Foreign Ministers reaffirmed in the General

¹⁹Tampere European Council 15 and 16 October 1999, Presidency Conclusions, para 35. Available under <<http://ue.eu.int/Newsroom/LoadDoc.asp?BID = 76&DID = 59122&LANG = 1>>.

²⁰See below text at n 111.

²¹See below text at n 150.

²²These legislative responses stand in a long tradition of law-making against terrorism. See Y Alexander and AS Nanes (eds), *Legislative Responses to Terrorism* (Dordrecht, Martinus Nijhoff Publishers, 1986); M Cherif Bassiouni (ed), *Legal Responses to International Terrorism: US Procedural Aspects* (Dordrecht, Martinus Nijhoff Publishers, 1988); D Charters (ed), *Democratic Responses to International Terrorism* (London, Cavendish Publishers, 1991); N Gal-Or, *International Cooperation to Suppress Terrorism* (Australia, Croom Helm Ltd, 1985).

²³See for an overview of EU measures: <<http://europa.eu.int/news/110901/>>. See also C Churrua Muguruza, “The European Union’s Reaction to the Terrorist Attacks on the United States” (4/2001) 14 *Humanitäres Völkerrecht* 234–43; T Müller, “Der Kampf gegen den Terror” (12/2001) *Internationale Politik* 47–53.

Affairs Council the Union's "complete solidarity with the government of the United States and the American people".²⁴

Already at this early stage, a two-fold purpose of EU action can be observed: On the one hand, immediate action against the attackers of 11 September. In the words of the General Affairs Council which are clearly reflective of US diction:

The Union and its Member States will spare no efforts to help identify, bring to justice and punish those responsible: there will be no safe haven for terrorists and their sponsors.²⁵

On the other hand, the broader intention to fight against terrorism and its future threats by taking preventive action:

The Union will work closely with the United States and all partners to combat international terrorism. All international organisations, particularly the United Nations, must be engaged and all relevant instruments, including on the financing of terrorism, must be implemented.²⁶

B. The EU Action Plan

On 21 September 2001 at the Extraordinary European Council Meeting in Brussels the European heads of State and government adopted an ambitious Action Plan, listing measures from enhancing police and judicial co-operation, developing international legal instruments, putting an end to the funding of terrorism, strengthening air security, to co-ordinating the European Union's global action.²⁷ This Action Plan contains, *inter alia*, the following precise legal agenda:

1. The introduction of a European arrest warrant and the adoption of a common definition of terrorism "as a matter of urgency" and at the latest at its meeting on 6 and 7 December 2001,
2. The identification of presumed terrorists in Europe and of organisations supporting them in order to draw up a common list of terrorist organisations,
3. Member States sharing with Europol, systematically and without delay, all useful data regarding terrorism,
4. A call for the implementation of all existing international conventions on the fight against terrorism (UN, OECD, etc),

²⁴Special Council Meeting, General Affairs, 12 September 2001, 11795/01 (Presse 318) <<http://europa.eu.int/news/110901/september.htm>>.

²⁵*Ibid.*

²⁶*Ibid.*

²⁷Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, Press Release 21/9/2001 No 140/01. Available under <<http://ue.eu.int/en/Info/eurocouncil/index.htm>>.

5. Combating the funding of terrorism as a decisive aspect of the fight against terrorism,
6. Measures to strengthen air transport security among them: classification of weapons; technical training for crew; checking and monitoring of hold luggage; protection of cockpit access; quality control of security measures applied by Member States,
7. The General Affairs Council to assume the role of co-ordination and providing impetus in the fight against terrorism.

C. The EU Common Position on Combating Terrorism

On 27 December 2001 the Council acting under Articles 15 and 34 EU Treaty finally adopted the Common Position of 27 December 2001 on combating terrorism.²⁸ The text of this Common Position basically reiterates the measures listed in Security Council Resolution 1373. A Common Position²⁹ both in the CFSP and the PJCC area does not have any immediate legal effect. Rather, it requires the Member States or — where the EU/EC has powers — the Union/Community to take action. To a large extent the measures discussed hereinafter can be viewed as action implementing the Common Position.

III. MAIN ISSUES FOR EU ACTION ACCORDING TO SECURITY COUNCIL RESOLUTION 1373

As already mentioned, Security Council Resolution 1373 provides for a very broad array of measures to be taken by UN Member States. For the purposes of the following analysis, Security Council Resolution 1373 shall serve as an analytical framework in order to provide a first brief analysis of the measures actually taken by the EU, their effectiveness and the legal problems involved in their adoption.

Of the numerous obligations contained in Security Council Resolution 1373, the most important and controversial ones will be discussed in more detail:

- a. Freezing of terrorist assets,
- b. Preventing funds from being made available to terrorists,
- c. Punishing and prosecuting terrorist offences.

²⁸2001/930/CFSP, OJ L 344/90, 28 December 2001, Available under <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_344/l_34420011228en00900092.pdf>.

²⁹According to Art 15 EU Treaty “[c]ommon positions shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions.”

Similarly, Art 34 para. 2 (b) EU Treaty provides that the Council may “adopt common positions defining the approach of the Union to a particular matter.”

A. Freezing Accounts and Assets

1. The Security Council Mandate

Security Council Resolution 1373 provides that all States shall:

Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.³⁰

2. EU Action

In order to comply with this provision the EU amended its existing freezing legislation with respect to the Taliban to target Bin Laden and Al-Qaeda. In addition, it drafted new legislation providing a legal basis for the freezing of assets of other terrorists and terrorist groups.

a) Amendments to the Existing Legislation in order to Specifically Target Al-Qaeda On 11 September 2001 far-reaching sanctions, including financial sanctions and the freezing of assets, had already been in force targeting Osama Bin Laden and Al-Qaeda.

In February 2000 — following the adoption of and with a view to implement Security Council Resolution 1267 (1999) — the EU had adopted a flight ban to Afghanistan and a freeze of Taliban funds through Council Regulation (EC) 337/2000³¹ which was broadened in March 2001 by Council Regulation (EC) 467/2001³² providing for the freezing of all funds and other financial resources belonging to any natural or legal person, entity or body designated by the “Afghanistan Sanctions Committee” (established under Security Council Resolution 1267) and listed in one of the annexes to the Regulation.

³⁰SC Resolution 1373 para 1 (c).

³¹Council Regulation (EC) No 337/2000 of 14 February 2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ L 043/1, 16/02/2000, available under <http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/L_043/L_04320000216en00010011.pdf>.

³²Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000, OJ L 67/1, 09/03/2001. Available under <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/L_067/L_06720010309en00010023.pdf>.

These sanctions have been amended repeatedly: Once in July 2001 by Regulation (EC) No 1354/2001³³ and twice in October 2001 by Regulation (EC) No 1996/2001³⁴ and Regulation (EC) No 2062/2001³⁵ and again in November 2001 by Regulation (EC) No 2199/2001.³⁶ Following a number of other changes, the last amendment dates from February 2002.³⁷ This legislation was replaced in May 2002 by Regulation (EC) No 881/2002.³⁸ Starting in June 2002³⁹ this new Taliban Sanctions Regulation has been repeatedly amended.⁴⁰

³³Commission Regulation (EC) No 1354/2001 of 4 July 2001 amending Council Regulation (EC) No 467/2001 as regards the persons and entities covered by the freeze of funds and the organisations and agencies exempted from the flight ban in respect of the Taliban of Afghanistan, OJ L 182/15, 05/07/2001, available under <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_182/l_18220010705en00150023.pdf>.

³⁴Commission Regulation (EC) No 1996/2001 of 11 October 2001 amending, for the second time, Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan and repealing Regulation (EC) No 337/2000, OJ L 271/21, 12/10/2001, available under <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_271/l_27120011012en00210022.pdf>.

³⁵Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan and repealing Regulation (EC) No 337/2000, OJ L 277/25, 20/10/2001, available under <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_277/l_27720011020en00250026.pdf>.

³⁶Commission Regulation (EC) No 2199/2001 of 12 November 2001 amending, for the fourth time, Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan and repealing Regulation (EC) No 337/2000, OJ L 295/16, 13/11/2001, available under <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_295/l_29520011113en00160018.pdf>.

³⁷Commission Regulation (EC) No 362/2002 of 27 February 2002 amending, for the ninth time, Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan and repealing Regulation (EC) No 337/2000, OJ L 58/6, 28/02/2002.

³⁸Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ L 139/9, 29/05/2002. Available under <http://europa.eu.int/eur-lex/en/dat/2002/l_139/l_13920020529en00090022.pdf>.

³⁹Commission Regulation (EC) No 951/2002 of 3 June 2002 amending Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001, OJ L 145/14, 04/06/2002. Available under <http://europa.eu.int/eur-lex/en/dat/2002/l_145/l_14520020604en00140015.pdf>.

⁴⁰See the most recent Commission Regulation (EC) No 742/2003 of 28 April 2003 amending for the 17th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001, OJ L 106/16, 29/04/2003. Available under <http://europa.eu.int/eur-lex/en/dat/2003/l_106/l_10620030429en00160017.pdf>.

These specific first pillar regulations are mirrored in the CFSP pillar by a number of common positions in which the EU repeatedly laid down its general policy.⁴¹

b) General Asset Freezing As already indicated above, Security Council Resolution 1373(1)(c) is not narrowly targeted at those responsible for the 11 September attacks. Rather, it is aimed at a general freezing of assets of terrorists. In order to comply with this broader purpose the EU prepared legislation to provide the legal basis for such asset freezing.⁴² In order to accomplish this, the EU followed the usual practice of first reaching political agreement within the framework of the CFSP and then taking specific action under the EC Treaty. Thus, the Council first adopted the Common Position of 27 December 2001 on the application of specific measures to combat terrorism.⁴³ On this basis it voted on Regulation 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.⁴⁴

The Common Position is a CFSP (and PJCC) act on the basis of Article 15 and 34 EU Treaty applying to “persons, groups and entities involved in terrorist acts” which are listed in an annex. Among the individuals listed there are mainly ETA activists and Arab suspects. Among the 13 groups listed one finds ETA and IRA related ones as well as the Palestinian Islamic Jihad and the terrorist wing of Hamas.⁴⁵ The Common Position of 27 December 2001 further contains definitions of “terrorist acts” and “terrorist groups” and provides that the EC “shall order the freezing of

⁴¹See only Council Common Position of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP, OJ L 139/4, 29/05/2002. Available under <http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_139/l_13920020529en00040005.pdf>.

⁴²In its report to the UN CTC the EU stated: “In order to adapt to the wider scope of measures covered by UNSCR 1373, and in order to be able to reach those persons who commit, attempt to commit, participate in or facilitate terrorist acts, but are not linked to any one State, the Council of the European Union, at its meeting on 10 December, reached agreement on a common position and a Regulation which together constitute a legal requirement to freeze and withhold the availability of funds, other financial assets and economic resources, to any previously identified natural or legal person, group or entity figuring in lists annexed to the legislation. It is expected that this legislation will enter into force early in 2002.” Report of the European Union to the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism, 28 December 2001, UN Doc. S/2001/1297 (hereafter EU Report).

⁴³2001/930/CFSP, OJ L 344/93, 28 December 2001, Available under <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_344/l_34420011228en00930096.pdf>.

⁴⁴OJ L 344/70 28. 12. 2001, Available under <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_344/l_34420011228en00700075.pdf>.

⁴⁵The Common Position of December 2001 listed 29 persons and 13 groups and entities.

the funds and other financial assets or economic resources of persons, groups and entities listed in the Annex".⁴⁶

The Council Regulation 2580/2001⁴⁷ is an EC act which provides for the freezing of "all funds, other financial assets and economic resources belonging to, or owned or held by, a natural or legal person, group or entity included in the list referred to in paragraph 3" of the Regulation. Potentially affected assets are very broadly defined.⁴⁸ The targets list, established by a separate Council Decision,⁴⁹ contains only "EU external" terrorists;⁵⁰ it does not apply to Bin Laden and Al-Qaeda who are already covered by earlier legislation.⁵¹

These lists were updated in early May 2002 by a Common Position⁵² and a Council Decision.⁵³ The Common Position list has been extended and contains now 23 groups including the PKK (the Kurdish Workers Party) and the Peruvian Sendero Luminoso. The list of individuals has grown to 36. The additions to the Common Position list of "EU external" terrorists and terrorist groups have also been made with regard to the Council Decision. In June 2002 the Council again amended the list by a

⁴⁶ Art 2 Common Position of 27 December 2001 on the application of specific measures to combat terrorism, above n 43.

⁴⁷ Most recently the list of competent authorities in the Member states was partially amended by Commission Regulation (EC) No 745/2003 of 28 April 2003 amending Council Regulation (EC) No 2580/2001 on specific measures directed against certain persons and entities with a view to combating terrorism, OJ L 106/22, 29/04/2003. Available under <http://europa.eu.int/eur-lex/en/dat/2003/l_106/l_10620030429en00220023.pdf>.

⁴⁸ According to Art 1 para. 1 Regulation 2580/2001: "'Funds, other financial assets and economic resources' means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit."

⁴⁹ Council Decision of 27 December 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (2001/927/EC), OJ L 344/83 28. 12. 2001, lists eight individuals and two groups. Available under <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_344/l_34420011228en00830084.pdf>.

⁵⁰ On the reason of this differentiation see below text at note 57.

⁵¹ See Reg. 2580/2001 Preamble para 15: "The European Community has already implemented UNSCR 1267(1999) and 1333(2000) by adopting Regulation (EC) No 467/2001 freezing the assets of certain persons and groups and therefore those persons and groups are not covered by this Regulation."

⁵² Council Common Position of 2 May 2002 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (2002/340/CFSP), OJ L 116/75, 3. 5. 2002, Available under <http://europa.eu.int/eur-lex/en/dat/2002/l_116/l_11620020503-en00750077.pdf>.

⁵³ Council Decision of 2 May 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2001/927/EC (2002/334/EC), OJ L 116/33, 3. 5. 2002, basically added six other groups to the list. Available under <http://europa.eu.int/eur-lex/en/dat/2002/l_116/l_11620020503en00330034.pdf>.

decision which now contains eight individuals and 20 groups.⁵⁴ The latest amendment to this list dates from December 2002.⁵⁵ It repeals an update of the October 2002 list⁵⁶ and now contains 26 individuals and 22 groups.

3. *Controversial and Problematic Issues of the Specific Measures to Combat Terrorism*

a) *Distinction Between "EU internal" and "EU external" Terrorists According to the List in the Annex* One of the obvious differences in the two lists of terrorists and terrorist groups lies in the fact that the one annexed to the Common Position on the application of specific measures to combat terrorism contains both "EU external" terrorists and "EU internal" terrorists (mainly ETA suspects), while the Council Decisions of 2 May 2002 and 17 June 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 comprise only "EU external" terrorists.

The EU reasons that this results from the limited powers of the EC: the freezing of assets of "EU internal" terrorists remains within the competence of the Member States.⁵⁷ While this may be correct as a result of the complex structure of the EU, it leads to the strange result that the EC is considered to be empowered to take (trade) measures against "EU external" terrorists, not, however, against "EU internal" ones.

b) *Procedure and Legal Protection Against Being Included in the List of Persons and Groups Whose Assets Are to be Frozen* The freezing of financial assets of individuals or legal persons is a draconian measure. It has a long-standing tradition in US national security law and was also used extensively after 11 September 2001.⁵⁸ It can fully deprive those affected

⁵⁴Council Decision of 17 June 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/334/EC, (2002/460/EC), OJ L 160/26, 18/06/2002, available under <http://europa.eu.int/eurlex/en/dat/2002/l_160/l_16020020618en00260027.pdf>.

⁵⁵Council Decision of 12 December 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/848/EC, (2002/974/EC), OJ L 337/85, 13/12/2002, available under <http://europa.eu.int/eurlex/en/dat/2002/l_337/l_33720021213en00850086.pdf>.

⁵⁶Decision 2002/848/EC implementing Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/460/EC, OJ L 295/12, 30/10/2002.

⁵⁷See Reg 2580/2001 Preamble para 14: "The list referred to in Article 2(3) of this Regulation may include persons and entities linked or related to third countries as well as those who otherwise are the focus of the CFSP aspects of Common Position 2001/931/CFSP. For the adoption of provisions in this Regulation concerning the latter, the Treaty does not provide powers other than those under Article 308."

⁵⁸See for US freezing measures, HE Sheppard, "US Actions to Freeze Assets of Terrorism: Manifest and Latent Implications for Latin-America", (2002) 17 *American University*

of their means of subsistence. Since a freezing of assets will be brought about without any prior legal proceedings convicting persons of criminal offences, it is particularly important to ensure that freezing orders are imposed on the basis of sufficient evidence. It is against this background that the recent EU legislation has to be read.

Article 2(3) of Council Regulation 2580/2001 provides that the

Council, acting by unanimity, shall establish, review and amend the list of persons, groups and entities to which this Regulation applies, in accordance with the provisions laid down in Article 1(4), (5) and (6) of Common Position 2001/931/CFSP.

Article 1(4) of the Common Position on the application of specific measures to combat terrorism (2001/931/CFSP) provides:

The list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act *based on serious and credible evidence or clues, or condemnation for such deeds*. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list.

It is unclear how one is protected against being included in this list. For instance, the decision to include the PKK in May 2002,⁵⁹ a move that followed an earlier decision by the UK, has aroused substantial controversy.⁶⁰ The PKK has formally renounced its military struggle against Turkish troops and has been operating lawfully for years in many European countries.

Whether the “credible clues” are sufficient to justify the harsh measures of freezing is questionable and one might be reminded of the succinct concern expressed in the House of Lords debate with regard to similar provisions found in UK anti-terrorism legislation: “[T]here is something distasteful about a process which begins by convicting someone and then proceeds to inquire whether there is a case against them.”⁶¹

International Law Review, 625–639; PD Trooboff, ‘September 11: Legal and Practical Implications for the US Practitioner’, (2002) 4 *International Law Forum*, 59–68.

⁵⁹See above notes 52 and 53.

⁶⁰See Statewatch News online, EU adds the PKK to list of terrorist organisations, story filed 4.5.02, available under <<http://www.statewatch.org/news/index.html>>.

⁶¹Lord Archer of Sandwell, cited in UK Terrorism Act: 21 new proscribed organisations, available under <<http://www.statewatch.org/news/2001/oct/01proscribed.htm>>. On recent UK legislation see also A Tomkins, “Legislating Against Terror: The Anti-Terrorism, Crime and Security Act 2001”, (2002) *Public Law* 205–20.

The procedure of freezing assets clearly raises concern about such fundamental rights as the presumption of innocence⁶² and the criminal fair trial guarantees⁶³ enshrined in Article 6 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁶⁴

However, one has to be aware of the rather restrictive interpretation of the scope of Article 6 para 2 ECHR by the Strasbourg organs. According to this view, the European Commission of Human Rights regarded Italian anti-Mafia legislation providing for the confiscation of criminal proceeds as a preventive measure, not a penal one. As a result, it considered the presumption of innocence not applicable.⁶⁵

For the same reason, also the criminal fair trial guarantees of Article 6 para 3 ECHR are likely to be considered inapplicable. However, since the European Court of Human Rights has held that measures of confiscation of property relate to civil rights,⁶⁶ at least

⁶² Art 6 para 2 ECHR provides: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

⁶³ Art 6 para 3 ECHR provides: "Everyone charged with a criminal offence has the following minimum rights:

- a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b. to have adequate time and facilities for the preparation of his defence;
- c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

⁶⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5, 213 UNTS 221, entered into force 3 September 1953.

⁶⁵ *M. v Italy*, European Commission of Human Rights, 15 April 1991, Application No. 12386/86: "Dans ces circonstances et à la lumière de la jurisprudence de la Cour, la Commission conclut que la confiscation litigieuse ne comporte pas un constat de culpabilité, qui suit une accusation, et ne constitue pas une peine. Dès lors, les griefs tirés de la violation des articles 6 par. 2 et 7 (art. 6–2, 7) de la Convention sont incompatibles 'ratione materiae' avec ces dispositions et doivent être rejetées conformément à son article 27 par. 2 (art. 27–2)."

See also *AGOSI v United Kingdom*, European Court of Human Rights, 24 October 1986. Available under <<http://hudoc.echr.coe.int/Hudoc2doc/HEJUD/sift/3.txt>>.

⁶⁶ *Raimondo v Italy*, European Court of Human Rights, 22 February 1994, para 44: "The Court shares the view taken by the Government and the Commission that special supervision is not comparable to a criminal sanction because it is designed to prevent the commission of offences. It follows that proceedings concerning it did not involve 'the determination ... of a criminal charge' (see the Guzzardi judgment cited above, p. 40, para. 108). On the matter of confiscation, it should be noted that Article 6 (art. 6) applies to any action whose subject matter is 'pecuniary' in nature and which is founded on an alleged infringement of rights that were likewise of a pecuniary character (see the Editions Périscope v. France judgment of 26 March 1992, Series A no. 234-B, p. 66, para. 40). That was the position in the instant case." Available under <<http://hudoc.echr.coe.int/Hudoc2doc/HEJUD/sift/455.txt>>.

the guarantees of Art 6 para 1 ECHR⁶⁷ would appear to be applicable.

The freezing of assets may also be problematic with regard to the right to property protected by Protocol No 1 to the ECHR.⁶⁸ The relevant case-law of the European human rights organs demonstrates, however, considerable deference to the discretion of States as regards freezing or forfeiture or similar orders affecting property rights which are mostly considered to be mere regulations of the use of property.

But it is important to note that the Strasbourg organs have held that even such interferences require adequate judicial remedies.⁶⁹

This has been recently reaffirmed by the Council of Europe Committee of Ministers with particular regard to anti-terrorism measures. In their Guidelines on human rights and the fight against terrorism⁷⁰ the Committee stated:

The use of the property of persons or organisations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property have the possibility to challenge the lawfulness of such a decision before a court.⁷¹

c) *Legal Remedies Against Incorrect Freezing?* Neither the Common Position nor the Regulation make any provision for remedies against incorrect freezing of assets as a result of erroneously being included in the relevant lists. Thus, one has to inquire whether general principles of EU/EC law do provide legal remedies.

A Council decision can be challenged by an annulment action according to Article 230 EC Treaty. The procedural problem of standing usually encountered by “non-privileged” claimants⁷² does not arise in the case of

⁶⁷ Art 6 para 1 first sentence ECHR provides: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

⁶⁸ Art 1 Protocol No. 1 to the ECHR provides “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

⁶⁹ See the cases *Raimondo* and *AGOSI*, above notes 66 and 65.

⁷⁰ <http://www.coe.int/T/E/Communication_and_Research/Press/Theme_Files/Terrorism/CM_Guidelines_20020628.asp#TopOfPage>.

⁷¹ Art XIV Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism.

⁷² See TC Hartley, *The Foundations of European Community Law*, 4th edn (Oxford, Oxford University Press, 1998), 350. See also A Ward, *Judicial Review and the Rights of Private Parties in EC Law* (Oxford, Oxford University Press, 2000).

challenges to decisions which are addressed to the claimants. As far as the substantive illegality is concerned, affected parties will try to argue infringements of fundamental rights on the part of the Community. According to the ECJ's well-established case-law, the EC is bound to respect "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."⁷³

An alternative route of legal recourse against incorrect freezing of assets might lie in the extra-contractual liability avenue opened by Article 288 EC Treaty. According to this provision damages may be asked of the Community institutions if there is harm as a result of their unlawful acts.

In this context it is interesting to note that the Taliban Freezing Regulations⁷⁴ have actually been challenged before the Court of First Instance in a number of actions for annulment brought by affected individuals.⁷⁵ Some of these actions expressly challenge the lack of procedural safeguards in making a freezing decision.⁷⁶

B. Measures to Prevent Funds From Being Made Available for Terrorist Acts

An important aspect of combating terrorism lies in putting a hold on the funding of terrorism. As has been clearly demonstrated by the 11 September attacks, terrorists increasingly have control over large

⁷³See now also Art 6 (2) EU Treaty.

⁷⁴See above text at n 31.

⁷⁵See eg Case T-315/01 *Yassin Abdullah Khadi v Council and Commission*, 5656/02, 21.2.02; Action brought on 10 December 2001 by *Abdirisak Aden and Others against the Council of the European Union and the Commission of the European Communities* (Case T-306/01), OJ C 44/27, 16.2.02; Case T-318/01 - *Omar Mohammed OTHMAN v Council and Commission*, 6763/02, 27.2.02.

⁷⁶See Case T-306/01 *Abdirisak Aden and Others against the Council of the European Union and the Commission of the European Communities*, OJ C 44/27, 16 Feb 2002:

"The applicants submit further that the Council and Commission have not examined the reasons why the Taliban Sanctions Committee included the applicants in its list. Nor were the applicants given any opportunity to apprise themselves of and refute the allegations on which the decision to include them in Annex I was based. The applicants have thus had onerous sanctions imposed on them without any opportunity to defend themselves. The fundamental legal principle of the right to a fair and equitable hearing has thus been disregarded."

On 7 May 2002 the Court of First Instance rejected the applicants' request for provisions measures. See Case T-306/01 *R Abdirisak Aden and Others against the Council of the European Union and the Commission of the European Communities* [2002] ECR II-2387. The main case is still pending.

amounts of financial resources. It is these resources which support and sometimes even enable them to commit their acts.

1. *The UN Security Council Mandate*

In line with the stated purpose of preventing funds from being made available for terrorist acts the Security Council in Resolution 1373 decided that all States shall:

Prevent and suppress the financing of terrorist acts;⁷⁷

Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;⁷⁸ and

Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;⁷⁹

2. *EU Action*

Already in the Action Plan of 21 September 2001 the EU had identified combating the funding of terrorism as a decisive aspect of the fight against terrorism and called for the completion of work on the following measures:

adopting in the weeks to come the extension of the Directive on money laundering and the framework Decision on freezing assets. It calls upon Member States to sign and ratify as a matter of urgency the United Nations Convention for the Suppression of the Financing of Terrorism. In addition, measures will be taken against non-cooperative countries and territories identified by the Financial Action Task Force.⁸⁰

Well before the 11 September events, the EU had identified the importance of taking measures against the financing of terrorism. In the Council Recommendation of 9 December 1999 on cooperation in combating the financing of terrorist groups⁸¹ the Council recommended that national

⁷⁷SC Resolution 1373 para 1 (a).

⁷⁸SC Resolution 1373 para 1 (b).

⁷⁹SC Resolution 1373 para 1 (d).

⁸⁰Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, Press Release 21/9/2001 No. 140/01. available under <<http://ue.eu.int/en/Info/eurocouncil/index.htm>>.

⁸¹Council Recommendation of 9 December 1999 on cooperation in combating the financing of terrorist groups, OJ C 373/1, 23/12/1999. Available under <http://europa.eu.int/eurlex/pri/en/oj/dat/1999/c_373/c_37319991223en00010001.pdf>.

security services, with the cooperation of EUROPOL, should exchange information on a regular basis on the structures and modus operandi used for financing terrorist groups operating in more than one Member State with a view to take measures against these groups.

The 19 October 2001 European Council in Ghent reaffirmed the importance of effective measures to stop the funding of terrorism.⁸² To this end it envisaged the formal adoption of an amendment to the EU Money Laundering Directive and the speedy ratification by all Member States of the United Nations Convention for the Suppression of the Financing of Terrorism.

In its report to the UN CTC, the EU vaguely stated:

The Special Recommendations on terrorist financing adopted at the Extraordinary Plenary Meeting of the Financial Action Task Force on Money Laundering on 29–30 October 2001 relate to a number of the issues covered in Operative Paragraphs 1 and 2 of the Resolution. It is intended that these recommendations be at least partly implemented by measures taken within the framework of the Treaty on European Union (EU) and the Treaty establishing the European Community (EC).⁸³

a) Amendment to the 1997 Money Laundering Directive Concerning the obligation to prevent funds from being made available for terrorist acts the EU stated in its report to the UN CTC:

The 1991 Directive was amended on 19 November 2001. The new directive extends the prohibition of money laundering to most organised and serious crime. It also extends the coverage of the earlier directive to include a number of non-financial activities and professions which are vulnerable to misuse by money launderers. The EU Member States have agreed that all offences linked to the financing of terrorism constitute a serious crime under the directive.⁸⁴

In December 2001 the Council adopted pursuant to the co-decision procedure of Article 251 EC Treaty Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC⁸⁵ on prevention of the use of the financial system

⁸²Ghent: Informal Meeting of Heads of State or Government: Declaration by the Heads of State or Government of the European Union and the President of the Commission, Press Release: Ghent (19/10/2001), SN 4296/2/01 REV 2 (OR. fr), available under <<http://ue.eu.int/en/Info/eurocouncil/index.htm>>.

⁸³EU Report, above n 42, 4.

⁸⁴EU Report, above n 42, 5.

⁸⁵Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166/77, 28/06/1991.

for the purpose of money laundering.⁸⁶ Because some of the amendments introduced by the European Parliament were not accepted by the Council a conciliation procedure had to be convened on 18 September 2001 to seek a compromise. This compromise was agreed by COREPER on 10 October and by a parliamentary delegation on 17 October 2001.

The amended Directive,⁸⁷ which has to be implemented by 15 June 2003, extends the obligations to report suspicious transactions to the authorities responsible for combating money laundering to certain non-financial professions and sectors, among them accountants, auditors and lawyers.⁸⁸ It also widens the definition of laundering to the proceeds of all serious crime, including activities of criminal organisations as defined in Article 1 of Joint Action 98/733/JHA,⁸⁹ fraud against the EU budget and corruption.⁹⁰ The original money laundering legislation applied only to the proceeds of drug offences.

Requirements as regards client identification, record keeping and reporting of suspicious transactions would therefore be extended to external accountants and auditors, real estate agents, notaries, lawyers, dealers in high value goods such as precious stones and metals or works of art, auctioneers, transporters of funds and casinos.⁹¹

According to the Directive, Member States have to ensure that the covered professions and sectors “require identification of their customers”, “cooperate fully” with the authorities in case of suspected money laundering, and “refrain from carrying out transactions which they know or suspect to be related to money laundering”, and “establish adequate procedures of internal control” to prevent money laundering.

b) Ratification of the United Nations Convention for the Suppression of the Financing of Terrorism The EU has recommended that all member States ratify the United Nations Convention for the Suppression of the Financing of Terrorism.⁹² This treaty entered into force on

⁸⁶OJ L 344/76, 28.12.2001. Available under <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/L_344/L_34420011228en00760081.pdf>.

⁸⁷See also S Armati, “Services financiers. Lutte contre la criminalité organisée et le terrorisme: prévention de l’utilisation du système financier aux fins du blanchiment de capitaux” (2001) *Revue du droit de l’Union européenne* 769.

⁸⁸Art 2(a) and 6 of the amended Money Laundering Directive.

⁸⁹See above n 18.

⁹⁰Art 1 of the amended Money Laundering Directive.

⁹¹Art 2(a) of the amended Money Laundering Directive.

⁹²Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999. Available under <<http://untreaty.un.org/English/Terrorism/Conv12.pdf>>. See also A Aust, “Counter-terrorism — a new approach. The International Convention for the Suppression of the Financing of Terrorism” (2001) 5 *Max Planck Yearbook of United Nations Law* 285–306; R Laval, “The International Convention for the Suppression of the Financing of Terrorism” (2000) 20 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 491–510.

10 April 2002,⁹³ but it has not yet been ratified by all EU Member States. It triggers far-reaching obligations of contracting parties to outlaw the intentional financing of terrorist activities. The financing of terrorism as defined in Article 2 para 1 of the Convention contains also the core of a terrorism definition that may serve as a basis for future negotiations:

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

- (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex;⁹⁴ or
- (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

The Convention requires States to take appropriate measures, in accordance with their domestic legal principles, for the detection and freezing, seizure or forfeiture of any funds used or allocated for the purposes of committing the offences described.⁹⁵ The offences referred to in the

⁹³See UN Press Release available under <<http://www.un.org/News/Press/docs/2002/LT4366.doc.htm>>.

⁹⁴The annex contains the following conventions:

1. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.
3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.
4. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.
5. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.
6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.
7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.
8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.
9. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

⁹⁵Art 8 United Nations Convention for the Suppression of the Financing of Terrorism 1999.

Convention are deemed to be extraditable offences and the contracting parties have obligations to establish their jurisdiction over the offences described, make the offences punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite alleged offenders, co-operate in preventive measures and countermeasures, and exchange information and evidence needed in related criminal proceedings.

c) *EU Co-operation within the Financial Action Task Force* On the international level, the so-called Financial Action Task Force (FATF)⁹⁶ is the leading institution in the fight against money laundering and the financing of terrorism. It was established in 1989 at the G-7 Paris Summit Meeting and was given the responsibility of examining money laundering techniques and trends, reviewing the action which had already been taken at a national or international level, and setting out the measures that still needed to be taken to combat money laundering.

In October 2001 FATF's mission was enlarged to cover terrorist financing. At the October meeting FATF adopted a series of recommendations to combat the financing of terrorism.⁹⁷ These recommendations include ratification and implementation of UN instruments, criminalising the financing of terrorism and associated money laundering, the reporting of suspicious transactions linked to terrorism, strengthening customer identification measures in international wire transfers, etc. The EU has expressed its willingness to support these recommendations.

d) *Work on a Directive to Counter Insider Dealing and Market Manipulation* Also EU amending legislation on insider dealing is frequently portrayed as a specific anti-terrorism measure. In early 2003 a Commission Proposal for a Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) (Insider Dealing Directive)⁹⁸ was adopted. On the official Europa homepage the then proposal⁹⁹ was described as one of the key elements of legislation fighting the financing of terrorism:

The Finance Council of 13 December 2001 reached unanimous orientation agreement on [the] proposed Directive to counter insider dealing and market manipulation: The Council unanimously reached an orientation agreement on the proposal for a Directive on market abuse (see IP/01/758

⁹⁶See <http://www1.oecd.org/fatf/AboutFATF_en.htm>.

⁹⁷<http://www1.oecd.org/fatf/TerFinance_en.htm>.

⁹⁸Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 96/16, 12/04/2003 (hereafter Insider Dealing Directive). Available under <http://europa.eu.int/eur-lex/en/dat/2003/l_096/l_09620030412en00160025.pdf>.

⁹⁹COM(2001) 281 final, 30.5.2001. OJ C 240/265 E, 28/08/2001. Available under <http://europa.eu.int/eur-lex/en/com/pdf/2001/en_501PC0281.pdf>.

and MEMO 01/203). The proposed Directive is based on the principles of transparency and equal treatment of market participants. It aims to reinforce protection against insider dealing and market manipulation by building one set of rules for all the EU's financial markets, thus reducing potential inconsistencies, confusion and loopholes. It would heighten investor protection and make European financial markets more attractive. It was identified by the 16 October joint Finance/Justice Council as a key measure in the fight against the financing of terrorism.¹⁰⁰

The proposed Insider Dealing Directive imposes on EU Member States an obligation to

prohibit any person ... who possesses inside information from using that information by acquiring or disposing of, or by trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates.¹⁰¹

Article 2(1) second subparagraph of the Directive defines as insiders any person

who possesses that information:

- (a) by virtue of his membership of the administrative, management or supervisory bodies of the issuer; or
- (b) by virtue of his holding in the capital of the issuer; or
- (c) by virtue of his having access to the information through the exercise of his employment, profession or duties; or
- (d) by virtue of his criminal activities.

In addition to outlawing insider trading, the directive prohibits other "market manipulation".¹⁰²

A closer look at this directive, however, makes the observer wonder where the specific anti-terrorism aspect of this legislation is hidden. The Commission Proposal — which dates back to May 2001 — does not mention terrorism even once. Rather, the proposal looks like the "normal" market protection legislation one would expect under its title. It is true that the EP suggested in its opinion to add to the proposed directive's preamble the statement that "[t]his Directive meets also the concerns expressed by the Member States following the terrorist attacks on 11 September 2001 as regards the fight against financing terrorist activities".¹⁰³ However,

¹⁰⁰ <<http://europa.eu.int/news/110901/emu.htm>>.

¹⁰¹ Art 2 para. 1 Insider Dealing Directive.

¹⁰² See Art 1 para. 2 Insider Dealing Directive.

¹⁰³ EP Report on the proposal for a European Parliament and Council directive on insider dealing and market manipulation (market abuse) (COM(2001) 281, C5-0262/2001,

whether this has been effectively accomplished by the minor change proposed by the EP in extending the definition of “primary insiders”¹⁰⁴ to “... any person who possesses that information by virtue of his criminal activities” remains doubtful at least.

3. *Is the Prohibition of the Financing of Terrorist Activities Sufficiently Addressed by the EU Action?*

Despite the repeated assurances of the EU that the above-mentioned action adequately provides against the financing of terrorism,¹⁰⁵ it is highly questionable whether any of the actions discussed above are sufficient to comply with the requirements under Security Council Resolution 1373 concerning the prevention, suppression and prohibition of the financing of terrorist activities. It was rightly noted that terrorist financing may occur not only through money-laundering and other illegal activities but also by lawful methods, such as soliciting funds via charitable and educational organisations, etc.¹⁰⁶ Therefore even the FATF experts on money-laundering in addressing a typology of terrorist financing could not agree on “whether anti-money laundering laws could (or should) play a direct role in the fight against terrorism”.¹⁰⁷

The new money laundering legislation prohibits only the use of criminally obtained proceeds (which now include proceeds of terrorist crimes). However, it still does not criminalise the provision of legally obtained funds for terrorist purposes. Also the new Insider Dealing Directive does not really address the problem of intentional financing of terrorist acts. Rather, the new legislation, as currently proposed, will only address the specific insider market abuse of taking advantage of knowledge as a result of criminal activities. The financing itself cannot be punished on this basis.

This should be contrasted with US legislation which makes it a criminal offence to “knowingly provide[s] material support or resources to a foreign terrorist organization.”¹⁰⁸ Both the obligations under the 1999 UN Convention for the Suppression of the Financing of Terrorism and the FATF recommendations aim at outlawing the financing of terrorism,

2001/0118(COD)), A5-0069/2002, 27 February 2002; now preambular paragraph 14 Insider Dealing Directive.

¹⁰⁴ Art 2, paragraph 1, second subparagraph proposed Insider Dealing Directive.

¹⁰⁵ See the EU Action Plan of 21 September 2001 and the EU report to the UN CTC, above notes 80 and 83.

¹⁰⁶ MS Navias, “Finance Warfare and International Terrorism” in Lawrence Freedman (ed), *Superterrorism. Policy Responses* (Oxford, Blackwell Publishing, 2002), 57–79, at 70.

¹⁰⁷ Financial Action Task Force on Money Laundering, *FATF-XII Report on Money Laundering Typologies (2000–2001)*, 20; <http://www.fatf-gafi.org/pdf/TY2001_en.pdf>.

¹⁰⁸ 18 USC Sec 2339 B. See also the chapter by A Gardella, “The Fight Against the Financing of Terrorism between Judicial and Regulatory Cooperation” in this book.

regardless of the legal or illegal origin of funds. Thus, formal adherence to the UN Convention as well as observance of the FATF recommendations require additional action.

C. Establishing Terrorist Acts as Serious Criminal Offences and Ensuring that Terrorists are Brought to Justice

1. The Security Council Mandate

Security Council Resolution 1373 decides that all States shall:

Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;¹⁰⁹

2. EU Action

Criminal law issues addressed by this subparagraph of Security Council Resolution 1373 are largely within the sphere of the Member States. However, where and to the extent that the EU has powers under the Third Pillar of the EU Treaty, it has taken action in order to ensure compliance with UN law. Specifically, it prepared the adoption of framework decisions on combating terrorism as well as on a European arrest warrant and it reached agreement on the definitive creation of EUROJUST, the co-operation between national judicial authorities.¹¹⁰

a) Framework Decision on Combating Terrorism The report of the EU to the UN CTC contains the following terse passage:

On 6 December 2001, the Council reached political agreement on a Framework Decision on combating terrorism. This legislation includes a common definition of various types of terrorist offences and serious criminal sanctions. The legal text will be adopted shortly, and EU Member States have until the end of 2002 to implement the measures in their own criminal law.¹¹¹

Behind this matter-of-fact account lies a fierce debate about the appropriate definition of terrorist offences that has aroused fears among civil rights

¹⁰⁹SC Resolution 1373 para 2 (e).

¹¹⁰See also generally E Barbe, "Une triple étape pour le troisième pilier de l'Union Européenne — mandat d'arrêt européen, terrorisme et EUROJUST", (2002) 454 *Revue du marché commun et de l'Union Européenne*, 5.

¹¹¹EU Report, above n 42, 6.

groups that freedom of expression and other fundamental rights might be unduly restricted.

In fact, it took another six months until 13 June 2002 to formally adopt the Council Framework Decision on combating terrorism.¹¹²

The original Commission Proposal for a Council Framework Decision on combating terrorism¹¹³ of 19 September 2001 stated that the purpose of the Framework Decision on combating terrorism is “to establish minimum rules relating to the constituent elements of criminal acts and to penalties for natural and legal persons who have committed or are liable for terrorist offences which reflect the seriousness of such offences”.¹¹⁴

But the issue of defining terrorist offences was not new after the 11 September attacks. Rather, it was already raised at the Tampere European Council in 1999 which identified terrorism as one of the most serious violations of fundamental freedoms, human rights and of the principles of liberty and democracy. Thus, in order to create a genuine area of freedom, security and justice in the sense of Title VI of the EU Treaty, it was felt necessary to take action, including legislative action against terrorism.

The Framework Decision on combating terrorism defines “terrorist offences”¹¹⁵ as well as the notion of a “terrorist group”. According to the framework decision a “terrorist group” is a “structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences”.¹¹⁶ The Framework Decision provides that, among others, the following intentional acts should be punishable: directing and certain forms of participating in “terrorist groups”.¹¹⁷ Further, inciting/instigating, aiding or abetting and attempting to commit terrorist offences will be punishable.¹¹⁸

There was an extensive debate about the issue of criminal sanctions. The Commission proposal of 19 September 2001 contained a detailed

¹¹²2002/745/JHA, OJ L 164/3, 22 June 2002. Available under <http://europa.eu.int/eur-lex/en/dat/2002/l_164/l_16420020622en00030007.pdf>.

¹¹³European Commission proposal for a Council Framework Decision on combating terrorism, 19/9/2001, COM(2001) 521 final, <http://europa.eu.int/comm/justice_home/unit/terrorism/terrorism_sg_en.pdf>.

¹¹⁴Art 1 Commission Proposal Framework Decision on combating terrorism. Preamble para. 6 of the Framework Decision now provides: “The definition of terrorist offences should be approximated in all Member States, including those offences relating to terrorist groups. Furthermore, penalties and sanctions should be provided for natural and legal persons having committed or being liable for such offences, which reflect the seriousness of such offences.”

¹¹⁵See below text starting at n 121.

¹¹⁶Art 2 para. 1 Framework Decision on combating terrorism.

¹¹⁷Contrast Art 2 para 2 Framework Decision on combating terrorism with the broader original Art 3 para 1 (l) and (m) Commission Proposal Framework Decision on combating terrorism. See in more detail below text at n 144.

¹¹⁸Art 4 Framework Decision on combating terrorism and Art 4 Commission Proposal Framework Decision on combating terrorism.

list of prison sentences, ranging from two to twenty years maximum penalties that Member States should adopt as a bottom line. The text politically agreed upon within the Council in December 2001,¹¹⁹ and maintained in the final version of June 2002, simplified this by providing — in addition to the standard phrase that the offences should be “punishable by effective, proportionate and dissuasive criminal penalties” — that terrorist offences “are punishable by custodial sentences heavier than those imposed under national law for such offences in the absence of the special [terrorist] intent.”¹²⁰

Central Issue: Definition of Terrorism and Terrorist Acts

The most difficult legal and political issue concerning a Framework Decision on combating terrorism was the definition of terrorist acts. This is not surprising since, also on the global level, to date no consensus has been found. On the EU side, the cumbersome procedure to find agreement on an acceptable definition of terrorism mirrors the difficulty the EU had with defining “organized crime”.¹²¹

It is remarkable in this context that — although Security Council Resolution 1373 requires of States that “terrorist acts are established as serious criminal offences in domestic laws”¹²² — the definition of what can be qualified a “terrorist act” is left open in Resolution 1373. This uncertainty is not accidental. On the universal level there is a distinct lack of definition mainly due to the controversy about the role of “state terrorism” and a possible exception for “freedom fighters”. This clearly has to do with the common wisdom that one State’s “terrorist” is another State’s “freedom fighter”.¹²³

The question of a definition of terrorism has a long history.¹²⁴ A first attempt to arrive at an internationally acceptable definition was made

¹¹⁹Proposal for a Council Framework Decision on combating terrorism, 14845/1/01, REV 1, 7 December 2001, <<http://register.consilium.eu.int/pdf/en/01/st14/14845-r1en1.pdf>>.

¹²⁰Art 4 Penalties. Proposal for a Council Framework Decision on combating terrorism, 14845/1/01, REV 1, 7 December 2001, now Art 5 Framework Decision on combating terrorism.

¹²¹See M Valsamis, “Defining organized crime in the European Union: The limits of European law in an area of ‘freedom, security and justice’” (2001) 26 *European Law Review* 565.

¹²²SC Resolution 1373 para. 2 (e).

¹²³See RA Friedlander, “Terrorism” in Rudolf Bernhard (ed), *Encyclopedia of Public International Law*, vol. IV (2000), 845, at 846.

¹²⁴On the problem of defining terrorism in general, see J Dugard, “International Terrorism: Problems of Definitions” (1974) 50 *International Affairs* No.71, 68; RA Friedlander, “Terrorism and International Law: Recent Developments” (1984) 13 *Rutgers Law Journal* 493–511; R Higgins and M Flory (eds), *Terrorism and International Law* (London, Routledge, 1997).

See also A Obote-Odara, “Defining International Terrorism” (1999) 6 *E Law - Murdoch University Electronic Journal of Law*, available under <<http://www.murdoch.edu.au/elaw/issues/v6n1/obote-odora61nf.html>>.

under the League of Nations,¹²⁵ but the draft Geneva Convention for the Prevention and Punishment of Terrorism of 1937¹²⁶ never came into existence.

To date, UN Member States have no universally agreed-upon definition. Terminological consensus would, however, be necessary for a single comprehensive convention on terrorism, which some countries favour instead of the present 12 piecemeal conventions and protocols.¹²⁷

The UN General Assembly has stepped in to provide at least partial guidance in resolutions such as GA Resolution 51/210 (1999) on Measures to eliminate international terrorism in which the General Assembly:

1. *Strongly condemns* all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed;
2. *Reiterates* that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.

A further step towards a more general definition was taken in the 1999 International Convention for the Suppression of the Financing of Terrorism¹²⁸ which prohibits the financing of acts prohibited by existing special anti-terrorism conventions listed in an annex¹²⁹ plus of other terrorist acts. These other terrorist acts are generally circumscribed in Art 2 (b) of the UN Convention which reads as follows:

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or

¹²⁵The draft Convention provided: "All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public."

¹²⁶Convention for the Prevention and Punishment of Terrorism, 16 November 1937, C.546.M.383.1937.V., *série de publications de la Société des Nations, Questions Juridiques*, 1937, V.10.

¹²⁷In addition to the UN Convention for the Suppression of the Financing of Terrorism and the Conventions listed in its annex (see above n 94) there are: the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963 and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991.

See also the list provided by the UN available under <<http://untreaty.un.org/English/Terrorism.asp>>.

¹²⁸ See above n 92.

¹²⁹ See above n 94.

context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

However, this does not yet solve the issue of defining terrorism. It is therefore on the agenda of current negotiations within the UN for a “Comprehensive” or “Global Terrorism Convention”.¹³⁰

On the regional level, there are also important steps to respond to the challenge of defining terrorism. The 1977 Council of Europe Convention on the Suppression of Terrorism¹³¹ basically tries to eliminate the political offence exception for the purpose of extradition.¹³²

More relevant to what appears to become an acceptable international definition of terrorism is the description used by the European Parliament in its 1996 Resolution on combating terrorism in the European Union.¹³³ In this resolution the European Parliament spoke of terrorism as:

any act committed by individuals or groups, involving the use or threat of violence, against a country, its institutions or people in general or specific individuals, which is intended to create a state of terror among official agencies, certain individuals or groups in society or the general public, the motives lying in separatism, extremist ideology, religious fanaticism or subjective irrational factors;¹³⁴

It is against this background that the proposed Framework Decision on combating terrorism should be read.

¹³⁰See Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Sixth session (28 January–1 February 2002), General Assembly Official Records Fifty-seventh Session Supplement No 37 (A/57/37), available under <http://www.un.org/law/terrorism/english/a_57_37e.pdf>. See also the Working document submitted by India on the draft comprehensive convention on international terrorism, available under <http://www.indianembassy.org/policy/Terrorism/draft_convention.htm>.

¹³¹Strasbourg, 27 January 1977, ETS No. 90, available under <<http://conventions.coe.int/Treaty/EN/Treaties/Html/090.htm>>.

¹³²Art 1 of the 1977 Convention provides: “For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:

- a. an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
- b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;
- c. a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
- d. an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
- e. an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
- f. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.”

¹³³EP Resolution on combating terrorism in the European Union, OJ C 55/27, 24/02/1997.

¹³⁴Preambular para C EP Resolution on combating terrorism in the European Union.

Article 3(1) of the original European Commission proposal for a Framework Decision on combating terrorism provided under the title “Terrorist Offences”:

Each Member State shall take the necessary measures to ensure that the following offences, defined according to its national law, which are intentionally committed by an individual or a group against one or more countries, their institutions or people with the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of a country, will be punishable as terrorist offences:

- (a) Murder;
- (b) Bodily injuries;
- (c) Kidnapping or hostage taking;
- (d) Extortion;
- (e) Theft or robbery;
- (f) Unlawful seizure of or damage to state or government facilities, means of public transport, infrastructure facilities, places of public use, and property;
- (g) Fabrication, possession, acquisition, transport or supply of weapons or explosives;
- (h) Releasing contaminating substances, or causing fires, explosions or floods, endangering people, property, animals or the environment;
- (i) Interfering with or disrupting the supply of water, power, or other fundamental resource;
- (j) Attacks through interference with an information system;
- (k) Threatening to commit any of the offences listed above;
- (l) Directing a terrorist group;
- (m) Promoting of, supporting of or participating in a terrorist group.¹³⁵

This clearly constituted an approach different from the one pursued by the UN Convention for the Suppression of the Financing of Terrorism. The draft Framework Decision lists specific “ordinary crimes” which become “terrorist” if committed with a specific intent — the intent to intimidate and to seriously alter or destroy the political, economic and social structures of a country.

Overly Broad Suppression of Political Dissent?

Civil rights groups in particular have been worried that such a broad definition of terrorist acts might include acts of political dissent as expression of democratic rights.

¹³⁵Commission proposal framework decision on combating terrorism, 19/9/2001, COM(2001) 521 final.

For instance, Article 3(1)(f) of the original Commission proposal refers to “[u]nlawful seizure of or damage to state or government facilities, means of public transport, infrastructure facilities, places of public use, and property”. This could embrace a wide range of types of demonstration and protests. It would thus depend upon the intent with which these acts are committed. According to the 19 September Commission Proposal a terrorist act requires both the aim of intimidation and of seriously altering certain structures of a country. Even the Commission in its explanatory note expressly stated that “[t]his could include, for instance, acts of urban violence”.¹³⁶

It is not surprising that this has provoked harsh criticism.¹³⁷ Apparently, part of this criticism was taken into account by the Council. In December 2001 the Justice and Home Affairs Council concluded:

When defining terrorist aims, the Council opted for a wording that strikes a balance between the need to punish terrorist offences effectively and the need to guarantee fundamental rights and freedoms, ensuring that the scope could not in any circumstances be extended to legitimate activities, for example trade union activities or anti-globalisation movements.¹³⁸

The Commission proposal was repeatedly changed in the Council. In the version finally adopted, which in turn largely corresponds to the one politically agreed upon on 6 December 2001,¹³⁹ Article 1(1) runs as follows:

Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences

¹³⁶Commission proposal framework decision on combating terrorism, 19/9/2001, COM(2001) 521 final, 9.

¹³⁷See the comment by T Bunyan, Statewatch editor: “The European Commission proposal on combating terrorism is either very badly drafted, or there is a deliberate attempt to broaden the concept of terrorism to cover protests (such as those in Gothenburg and Genoa) and what it calls ‘urban violence’ (often seen by local communities as self-defence). If it is intended to slip in by the back door draconian measures to control political dissent it will only serve to undermine the very freedoms and democracies legislators say they are protecting.” Available under <<http://www.statewatch.org/news/2001/sep/14eulaws.htm>>.

See also the Open Letter to the President of the EU by Human Rights Watch, dated September 26, 2001, stating that the Commission Proposal “provides a broad definition of terrorism that threatens to quell legitimate dissent. Human Rights Watch is concerned that public demonstrations and protests—such as those against nuclear weapons and those in favor of more transparent procedures governing international financial institutions—could be subject to the provisions of the proposal, thus infringing on the rights to freedom of association and assembly.” Available under <<http://www.hrw.org/press/2001/09/eu-0927-ltr.htm#security>>.

¹³⁸2396th Council meeting, Justice, Home Affairs and Civil Protection, Brussels, 6 and 7 December 2001, 14581/01 (Presse 444), 7. Available under <<http://ue.eu.int/newsroom/makeFrame.asp?MAX = 1&BID = 86&DID = 69187&LANG = 1&File = /pressData/en/jha/DOC.69187.pdf&Picture = 0>>.

¹³⁹The definition finally agreed upon by the Council in December 2001 and adopted in June 2002 is now also largely in line with the definition of “terrorist acts” in the Council Common

under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

- seriously intimidating a population, or
- unduly compelling a Government or international organisation to perform or abstain from performing any act, or
- seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation, shall be deemed to be terrorist offences:
 - (a) attacks upon a person's life which may cause death;
 - (b) attacks upon the physical integrity of a person;
 - (c) kidnapping or hostage taking;
 - (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
 - (e) seizure of aircraft, ships or other means of public or goods transport;
 - (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
 - (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
 - (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
 - (i) threatening to commit any of the acts listed in (a) to (h).

Further, Article 1(2) which was inserted at the 6 December 2001 Council meeting states that

This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

In addition, the Council in December 2001 added a "Draft Council Statement" to the draft Framework Decision that runs as follows:

The Council states that the Framework Decision on the fight against terrorism covers acts which are considered by all Member States of the European Union as serious infringements of their criminal laws committed by individuals whose objectives constitute a threat to their democratic

societies respecting the rule of law and the civilisation upon which these societies are founded. It has to be understood in this sense and cannot be construed so as to argue that the conduct of those who have acted in the interest of preserving or restoring these democratic values, as was notably the case in some Member States during the Second World War, could now be considered as “terrorist” acts. Nor can it be construed so as to incriminate on terrorist grounds persons exercising their fundamental right to manifest their opinions, even if in the course of the exercise of such right they commit offences.¹⁴⁰

The text finally adopted is still open to criticism. The remaining lack of precision leaves uncertainty about what conduct is prohibited. Viewed against the background of criminal law guarantees, such as legal certainty, *nullum crimen sine lege stricta/certa*, etc, the very vague and largely subjective notions used in Art 1 of the Framework Decision¹⁴¹ raise concern with regard to the standard required under Article 7 ECHR.

Article 7 ECHR provides:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

This non-retroactivity provision has been interpreted by the European Commission and Court of Human Rights to include a prohibition on the extensive interpretation of criminal law provisions, eg by analogy, and thus to require a certain minimal precision and clarity.¹⁴² The European Human Rights bodies do, however, accept that an established case-law

¹⁴⁰2396th Council meeting, Justice, Home Affairs and Civil Protection, Brussels, 6 and 7 December 2001, above n 138, 14.

¹⁴¹“Les termes « graves » ou « indûment » sont purement subjectifs et n’apportent aucune précision objective pour qualifier l’acte.” J-C Paye, “Faux-semblants du mandat d’arrêt européen”, *Le Monde diplomatique* 2002, 49e année, n 575, February, at 4, <<http://www.monde-diplomatique.fr/2002/02/PAYE/16172>>.

¹⁴²For instance, in *Kokkinakis v Greece*, 25 May 1993, Series A No 260-A, available under <<http://hudoc.echr.coe.int/Hudoc1doc/HEJUD/sift/412.txt>>, the Court held that “Article 7 para 1 (art 7-1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused’s disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him liable.”

See also the recent judgement in *EK v Turkey*, 7 February 2002, Application No 28496/95, finding a violation of the prohibition to construe criminal law extensively by way of analogy.

and legal doctrine might render an otherwise vague criminal law provision sufficiently clear and precise to satisfy the requirements under Art 7 ECHR.¹⁴³

With regard to the controversial provisions of the European Framework Decision such practice is necessarily lacking. Thus, the danger of an overly vague and insufficiently accessible and foreseeable criminal law prohibition is clearly pertinent.

Further, in a strict sense, it will depend upon the implementation legislation adopted on the level of the Member States. Third pillar framework decisions — comparable to EC directives — are not directly applicable in the EU Member States. Rather, they require national implementation measures. Thus, technically, the language of framework decisions never has to meet the *nullum crimen* requirements of precision and clarity as long as the national implementing measures do. One has to realise in this context, however, that the level of detail achieved in this Framework Decision — similar to what frequently happens in the case of EC directives — does not give much room for implementation discretion to the Member States. Thus, it is likely that the EU Member States will adopt the wording of the Framework Decision on combating terrorism. Therefore, any lack of precision of the definition of terrorist offences in the Framework Decision will be immediately relevant for the corresponding national legal provisions.

Other Problematic Aspects of the Commission Proposal

(a) *The Issue of “Status Crimes” or “Guilt by Association”* Another highly controversial point concerned the breadth of the Commission Proposal’s criminalisation of activities related to terrorist acts. According to the initial wording of Art 3 of the Framework Decision not only the directing, but also “promoting of, supporting of or participating in a terrorist group” would have entailed criminal responsibility punishable by a maximum

¹⁴³In *Hans Jörg Schimanek v Austria*, Admissibility, 1 February 2000, Application No. 32307/96, available under <http://hudoc.echr.coe.int/Hudoc1doc2/HEDEC/200002/32307di.chb1_010200e.doc> the Court held: “As regards the alleged lack of precision of Section 3a (2) of the Prohibition Act, it is true that the notion of ‘activities inspired by National Socialist ideas’ appears rather vague. However, the Court follows the line of reasoning of the European Commission of Human Rights in 12774/87 (quoted above, at p. 220), where a similar provision of the Prohibition Act which contains exactly the same term, was found to be in conformity with Article 7 on the following grounds: ‘The legislator intended to outlaw any kind of National Socialist activities. Furthermore, the scope of the provision is limited to the national socialist concept as a historical ideology, frequently referred to in Austria and elsewhere, which is a sufficiently precise concept. In addition to this background, the case-law and legal doctrine in Austria have developed further criteria making the applicable law sufficiently accessible and foreseeable and enabling the jury to distinguish clearly between the applicant’s activities which could and which could not be considered as National Socialist activities.’”

penalty of up to seven years.¹⁴⁴ It was pointed out that by such sweeping language the expression of political sympathy and understanding for groups could be made a criminal offence contrary to the requirements of legal precision and the guarantees of freedom of expression.¹⁴⁵

The broad language contained in the initial draft was narrowed by the December 2001 Council agreement which dropped the incrimination of mere support of and participation in “terrorist groups” and replaced it by the more stringent wording of intentionally

participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.¹⁴⁶

Further, the Council tried to make explicit its intention to safeguard fundamental freedoms by including the following clause in the Framework Decision’s preamble:

Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate.¹⁴⁷

(b) *The Broadening of Anti-terrorism Legislation by Including International Organizations* Another change made by the Council is the insertion of “international organizations” as potential targets of terrorist activities. While it is certainly a legitimate aim to protect international organizations in the same way as States against terrorism, the chronological coincidence of increased public uneasiness about anti-globalization protests

¹⁴⁴ Art 3 (l) and (m) in conjunction with Art 5 para 2 (d) Commission proposal framework decision on combating terrorism, 19/9/2001, COM(2001) 521 final, 9.

¹⁴⁵ See the Open Letter to the President of the EU by Human Rights Watch, dated September 26, 2001: “Human Rights Watch is concerned that broad, undefined terms such as ‘promoting’ and ‘supporting’ could result in findings of ‘guilt by association’ of persons sharing the same political ideology, nationality, or ethnicity as persons who commit acts of terrorism. Indeed, with mere expressions of sympathy for terrorists one could run afoul of such provisions.” Available under <<http://www.hrw.org/press/2001/09/eu-0927-ltr.htm#security>>.

See also the general criticism by Amnesty International that the “lack of precision creates uncertainty about what conduct is prohibited” and that such legislation may “criminalize peaceful activities and infringe unduly upon other rights such as freedom of expression and association.” Amnesty International’s concerns regarding security legislation and law enforcement measures, AI-index: ACT 30/001/2002 18/01/2002, 15, available under <<http://www.web.amnesty.org/ai.nsf/recent/ACT300012002?OpenDocument>>.

¹⁴⁶ Art 2 para. 2 (b) Framework Decision on combating terrorism.

¹⁴⁷ Preamble para. 10 Framework Decision on combating terrorism.

and attempts to outlaw such demonstrations has been interpreted to indicate that States are willing to use the proposed anti-terrorism legislation for broader purposes than only anti-terrorism in a strict sense.¹⁴⁸ However, there may be also a more harmless explanation lying in the EU's attempt to find a formulation that parallels that of the UN Convention for the Suppression of the Financing of Terrorism.¹⁴⁹

(c) *Framework Decision on the European Arrest Warrant* Work on measures against all forms of cross-border organised crime, including terrorism, was pursued by the EU already well before 11 September 2001. With regard to a European arrest warrant, already the conclusions of the October 1999 European Council in Tampere contained this as an important item.¹⁵⁰

Already on 19 September 2001 the Commission submitted a Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States which was published in the Official Journal.¹⁵¹ On 29 September 2001 the Commission presented a final proposal.¹⁵² In its Action Plan of 19 October 2001, the European Council in Ghent emphasised the importance of the approval of the practical details of the European arrest warrant. Political agreement on the European arrest warrant was largely reached at the Justice and Home Affairs Council on 6 December but partly delayed until 11 December 2001. The Framework Decision on the European arrest warrant was finally adopted on 13 June 2002.¹⁵³

As of 1 January 2004, the Framework Decision will replace the existing legal instruments, such as the 1957 European Extradition Convention¹⁵⁴

¹⁴⁸See Statewatch critique in The Council of the European Union proposes a wider definition of "terrorism" and extends it to those who aim to "seriously... affect... an international organisation", available under <<http://www.statewatch.org/news/2001/oct/08counterr.htm>> that "such a broad definition would clearly embrace protests such as those in Gothenburg and Genoa."

¹⁴⁹See text above at n 92.

¹⁵⁰Tampere European Council 15 and 16 October 1999, Presidency Conclusions, para 35. Available under <<http://ue.eu.int/Newsroom/LoadDoc.asp?BID=76&DID=59122&LANG=1>>.

¹⁵¹Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, (2001/C 332 E/18), COM(2001) 522 final § 001/0215(CNS), OJ C 332 E/305, 27 November 2001, <<http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/ce332/ce33220011127en03050319.pdf>>. On the arrest warrant see also Jean-François Kriegk, "Le mandat d'arrêt européen et les projets de lutte contre le terrorisme" (2002) 391 *Les Petites affiches: La Loi* 12–15.

¹⁵²<http://europa.eu.int/eur-lex/en/com/pdf/2001/en_501PC0522.pdf>.

¹⁵³Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States (2002/584/JHA), OJ L 190/1, 18/7/2002, available under <http://europa.eu.int/eur-lex/en/dat/2002/l_190/l_19020020718en00010018.pdf>.

¹⁵⁴See above n 13.

and the 1977 European Convention on the Suppression of Terrorism,¹⁵⁵ the 1995 Convention on the simplified extradition procedure,¹⁵⁶ the Convention of 27 September 1996 relating to Extradition between the Member States of the European Union¹⁵⁷ and the relevant provisions of the Schengen agreement.¹⁵⁸

The December 2001 EU report to the UN CTC stated:

Political agreement has also been reached on a framework decision for a European arrest warrant. This is designed to supplant the current procedures of extradition between EU Member States and enable wanted persons to be surrendered to judicial authorities in other EU Member States without verification of the double criminality of the act for a wide range of offences, subject to agreed swift judicial review procedures.¹⁵⁹

The main purpose of a European arrest warrant is to avoid formal extradition procedures which are usually a cumbersome and complex process leading to considerable delays and uncertainties in the administration of criminal justice. This clearly reflects the law-enforcement point-of-view. On the other hand, important, in some Member States even constitutional law guarantees are intended to protect individuals from being extradited or otherwise surrendered or handed over to the criminal justice system of other States. Only where "full faith and credit" can be given to other criminal legal systems is a dispensation of extradition feasible. The EU has reached the conclusion that this was the case with regard to all Member States.¹⁶⁰

General Principles

The Framework Decision is intended "to establish the rules under which a Member State shall execute in its territory a European arrest warrant issued by a judicial authority in another Member State."¹⁶¹

The Framework Decision defines the "European arrest warrant" as "a judicial decision issued by a Member State with a view to the arrest

¹⁵⁵See above n 14.

¹⁵⁶See above n 15.

¹⁵⁷See above n 16.

¹⁵⁸Art 31 para 1 Framework Decision on the European arrest warrant.

¹⁵⁹EU Report, above n 42, 6.

¹⁶⁰"A high level of mutual trust and cooperation between the member states who share the same highly demanding conception of the rule of law, has made it possible to simplify and improve the surrendering procedure. In doing so, they are developing the European Union into a single European judicial area." Commission homepage under "Agreement on a European arrest warrant" Available under <http://europa.eu.int/comm/justice_home/news/laecken_council/en/mandat_en.htm>.

¹⁶¹Art 1 September 2001 Draft European Arrest Warrant Framework Decision.

and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.”¹⁶²

It will apply to cases of 1) immediate imprisonment of four months or more; or 2) an offence carrying a term of more than a year.¹⁶³ The Member States designate the competent judicial authorities and the central authority responsible for assisting them (administrative support, translations, etc.). The European arrest warrant contains information on the identity of the person concerned, the issuing judicial authority, whether there is a final judgement or other enforceable judicial decision, the nature of the offence, the penalty, etc.¹⁶⁴ A specimen form is attached to the Framework Decision in an annex.

Procedures

As a general rule, the issuing authority in a Member State transmits the European arrest warrant directly to the executing judicial authority in another Member State.¹⁶⁵ Provision is made for co-operation with the Schengen Information System (SIS). When an individual is arrested, he/she must be made aware of the contents of the arrest warrant and is entitled to the services of a lawyer and an interpreter. In all cases, the executing authority may decide to keep the individual in custody or to release him/her under certain conditions.¹⁶⁶

The European arrest warrant must be examined as a matter of urgency. In cases where the requested person consents to his or her surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given. The decision must be taken no later than 60, exceptionally 90, calendar days after the arrest of the requested person.¹⁶⁷

Any consent by an arrested person to his or her surrender must be in accordance with the national law of the executing judicial authority. Consent may not be revoked and must be voluntary and in full knowledge of the consequences. In certain specific cases consent is not required.¹⁶⁸

¹⁶² Art 1 para 1 Framework Decision on the European arrest warrant. See, however, the broader definitions of “issuing judicial authority”, “executing judicial authority”, “judgment *in absentia*”, “detention order”, and “requested person” in the original Art 3 September 2001 Draft European Arrest Warrant Framework Decision.

¹⁶³ Art 2 Framework Decision on the European arrest warrant.

¹⁶⁴ Art 8 Framework Decision on the European arrest warrant.

¹⁶⁵ Art 9 para 1 Framework Decision on the European arrest warrant.

¹⁶⁶ Articles 11–12 Framework Decision on the European arrest warrant.

¹⁶⁷ Art 17 Framework Decision on the European arrest warrant.

¹⁶⁸ Art 13 Framework Decision on the European arrest warrant.

Grounds for Refusal to Execute a Warrant and Refusal to Surrender and the Issue of Double Criminality

One of the central political issues in the course of negotiating the Framework Decision was the scope of its application. In principle, the European arrest warrant will apply to all kinds of offences of a certain gravity. As a result of the wide scope laid down in Art 2 of the Framework Decision, any 4 months conviction or prosecution for an offence punishable by more than 12 months may trigger a European arrest warrant. In effect, this breadth was, however, severely limited through the initial proposal of a negative list system.

The September 2001 Commission Draft provided for the following system: Each Member State was to draw up an exhaustive list of cases in which the judicial authorities may refuse to execute a European arrest warrant.¹⁶⁹ In addition, the Commission draft provided that the judicial authorities were entitled to refuse to execute a warrant if:

- the act in question was not considered an offence under their national law and which did not occur on the territory of the issuing Member State;¹⁷⁰
- final judgment had already been passed upon the requested person in respect of the same offence (*ne bis in idem principle*) in the executing Member State;¹⁷¹
- the offence was covered by an amnesty in the executing Member State;¹⁷²
- the requested person had been granted immunity in the executing Member State;¹⁷³
- the warrant did not contain all the requisite information.¹⁷⁴

One of the core aspects of the European arrest warrant legislation is the abolition of the traditional extradition requirement of double criminality according to which criminal offences are only “extraditable” if they are also a criminal offence under the law of the requested State. In the original Commission proposal double criminality was abolished in principle.¹⁷⁵ However, according to Art 27 of the September 2001 Commission Draft of

¹⁶⁹ Art 27 September 2001 Draft European Arrest Warrant Framework Decision.

¹⁷⁰ Art 28 “Principle of Territoriality” September 2001 Draft European Arrest Warrant Framework Decision.

¹⁷¹ Art 29 “Ne bis in idem” September 2001 Draft European Arrest Warrant Framework Decision.

¹⁷² Art 30 “Amnesty” September 2001 Draft European Arrest Warrant Framework Decision.

¹⁷³ Art 31 “Immunity” September 2001 Draft European Arrest Warrant Framework Decision.

¹⁷⁴ Art 32 “Lack of necessary information” September 2001 Draft European Arrest Warrant Framework Decision.

¹⁷⁵ See also Preamble para. 14 September 2001 Draft European Arrest Warrant Framework Decision.

the European arrest warrant Framework Decision Member States were able to draw up an exhaustive list of crimes to which they would not apply the European arrest warrant. Art 27 initially provided:

Without prejudice to the objectives of Article 29 of the EC (sic!) Treaty, each Member State may establish an exhaustive list of conduct which might be considered as offences in some Member States, but in respect of which its judicial authorities shall refuse to execute a European arrest warrant on the grounds that it would be contrary to fundamental principles of the legal system in that State.

The list and any change to it shall be published in the *Official Journal of the European Communities* at least three months before a Member State may invoke the first paragraph in respect of the conduct concerned.

This “negative list” had been very controversial¹⁷⁶ and was changed by the JHA Council in early December 2001. Instead of the “negative list” of Article 27, a positive list was designed by the Justice and Interior Ministers. This list contains 32 serious offences, punishable by deprivation of liberty of at least 3 years. In these cases, the surrender of persons does not require the verification of the double criminality of the act.¹⁷⁷

The agreed upon list was incorporated into Art 2 para 2 of the finally adopted Framework Decision which reads as follows:

The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:

- participation in a criminal organisation,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,

¹⁷⁶See Bulletin EU 12-2001, Area of freedom, security and justice (11/28), available under <<http://europa.eu.int/abc/doc/off/bull/en/200112/p104011.htm>>: “Following rejection by the Council on 6 December, due to Italy’s opposition to the draft text, an agreement was finally reached. The European arrest warrant could be issued to implement a court judgment carrying a prison sentence of four months or more, or where the facts giving rise to the prosecution carried a prison sentence of at least one year in the Member State issuing the warrant. Furthermore, verification of double criminality was removed for a list of 32 offences carrying a sentence of at least three years in the issuing Member State. Unlike extradition, the procedure for executing the arrest warrant is entirely judicial, and grounds for refusing to execute a European arrest warrant are strictly limited.”

¹⁷⁷2396. Council — Justice, Home Affairs and Civil Protection, Brussels (7/12/2001) — Press: 444 Nr: 14581/01, p 6. See also http://europa.eu.int/comm/justice_home/news/laecken_council/en/mandat_en.htm.

- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and product piracy,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- motor vehicle crime,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Tribunal,
- unlawful seizure of aircraft/ships,
- sabotage.¹⁷⁸

This result of Council negotiations in December 2001 clearly goes beyond combating terrorism, being only one among many criminal offences now subject to the European arrest warrant system.

Evaluation

The most important issue with regard to the abolition of extradition and the introduction of the new European arrest warrant system will be the ability of the criminal justice systems to maintain individual rights in the fight against serious crime. While certainly less apparent than in the case

¹⁷⁸See also List of offences giving rise to surrender without verification of the double criminality of the act, provided they are punishable in the issuing Member State by a custodial sentence of a maximum of at least 3 years, in 2396. Council — Justice, Home Affairs and Civil Protection, p 19, above n 177.

of the freezing of assets and the harmonisation of terrorist offences, the rights of European and non-European citizens are at stake also in the field of simplified surrender procedures in the course of criminal proceedings.

Traditional obstacles to intra-Union transfer of suspects and convicts by such venerable legal principles as the requirement of double criminality, the principle of speciality or non-extradition for political offences have been abolished. There is no question that there have been instances of misuse of these principles in the past and that there cannot be any principled justification for their maintenance in a European Union built on the principle of mutual trust.

It has to be seen whether the guarantees incorporated into the new draft Framework Decision on the European arrest warrant will sufficiently protect individual citizens.

(d) *Eurojust* The December 2001 EU report to the CTC stated:

On 6 December 2001, the Council reached political agreement on a text setting up the judicial co-operation unit Eurojust. Its objective is to improve and encourage cooperation between the competent national authorities, in particular by facilitating mutual legal assistance and the implementation of extradition requests.¹⁷⁹

In February 2002 the Council formally created Eurojust¹⁸⁰ which replaced the Provisional Judicial Cooperation Unit of December 2000.¹⁸¹ Eurojust is a separate EU institution, enjoying its own legal personality, composed of national members (prosecutors, judges, police officers) seconded by the Member States. It is intended to improve the judicial cooperation between EU states, "in particular in combating forms of serious crime often perpetrated by transnational organisations."¹⁸² Though not limited to terrorism, judicial cooperation and legal assistance with regard to fighting terrorism is clearly part of Eurojust's powers.

VI. CONCLUSION

There are two main problem areas concerning the EU action taken to combat terrorism. Both go to the heart of European values as expressed in

¹⁷⁹EU Report, above n 42, 6.

¹⁸⁰Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, 2002/187/JHA, OJ L 63/1, 06/03/2002, available under <http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/1_063/1_06320020306en00010013.pdf>.

¹⁸¹Council Decision of 14 December 2000 setting up a Provisional Judicial Cooperation Unit, (2000/799/JHA), OJ L 324/2, 21/12/2000.

¹⁸²Preambular para 1 Council Decision of 28 February 2002 setting up Eurojust.

Art 6 para 1 EU Treaty: One, whether the EU will manage to respect fundamental rights and freedoms of individuals as well as the rule of law in its asymmetrical fight against terrorism. The other: whether the Union will be able to adopt effective measures in a fashion that does not forgo the basic demands of participatory democracy.¹⁸³

This paper addressed the potential fundamental rights frictions in various pieces of the new post-11 September EU legislation. The fight against terrorism surely requires that in certain situations tough choices are made. But the EU and its Member States must not lose sight of their human rights achievements. A difficult balancing of interests will have to take place. Fundamental procedural guarantees with regard to a fair trial must not be sacrificed for a perceived higher good. Otherwise terrorism may have already achieved — part of — its aim of “seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country”.

For the EU’s fight against terrorism the old maxim that “the aims do not justify the means” remains valid. This insight should not be restricted to the agenda of moralists and NGOs. It must be the fundamental principle of a EU seeking political legitimacy in the project of European integration. It is incumbent upon the EU to demonstrate that the repeated invocation of fundamental rights guarantees in the new anti-terrorism legislation is more than a mere lip-service.

In this context it should also be recognised that any attempt to legitimise the disregard for human rights on the basis of superior UN Charter obligations, is not only politically unwise but also legally untenable. In this respect the UN General Assembly’s call to respect human rights standards when combating terrorism¹⁸⁴ as well as the call by leading UN, Council of Europe and OSCE human rights officials¹⁸⁵ are exemplary.

¹⁸³See also generally I Almeida/L Lipsett, “Promoting Human Rights and Democracy in the Context of Terrorism and the Security State”, Prepared for Rights & Democracy’s Think Tank — May 30, 2002, available under <<http://www.ichrdd.ca/english/commdoc/publications/intHRadvocacy/thinkTank2002Eng.html>>.

¹⁸⁴See UN GA Measures to eliminate international terrorism, 24 January 2002, A/RES/56/88, op. para. 3: “*Reiterates its call* upon all States to adopt further measures in accordance with the Charter of the United Nations and the relevant provisions of international law, including international standards of human rights, to prevent terrorism and to strengthen international cooperation in combating terrorism ...”

¹⁸⁵See the joint press statement by Mary Robinson, the United Nations High Commissioner for Human Rights, Walter Schwimmer, Secretary-General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the Organization for Security and Cooperation in Europe’s (OSCE) Office for Democratic Institutions and Human Rights, press release, 29 November 2001: “While we recognize that the threat of terrorism requires specific measures, we call on all governments to refrain from any excessive steps which would violate fundamental freedoms and undermine legitimate dissent. In pursuing the objective of eradicating terrorism, it is essential that States strictly adhere to their international obligations to uphold human rights and fundamental freedoms.” See <[http://press.coe.int/cp/2001/910a\(2001\).htm](http://press.coe.int/cp/2001/910a(2001).htm)> and <http://www.osce.org/news/generate.php3?news_id=2183>.

A signal pointing in the same direction was given through the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism¹⁸⁶ adopted on 15 July 2002.¹⁸⁷ In these Guidelines the Foreign Ministers of the 44 Member States of the Council of Europe, including all 15 EU Member States, recalled:

that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law.¹⁸⁸

and reaffirmed

states' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member states in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights.¹⁸⁹

Art II of the Guidelines is very explicit by stating:

All measures taken by states to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

In addition to the very specific and detailed problems that result from the legislative plans of the EU and from the actual adoption of various freezing measures that may infringe upon fundamental rights of suspects there is a more general concern with regard to the democratic decision-making within the EU that arises from the action taken. It may still be less visible behind the controversial debates about the pros and cons of specific legislative choices. And it relates less to the action itself than to the way by which the action is taken. But it may well be that we will soon find out that the price we paid for more effective EU action against terrorism was very high.

The price may ultimately lie in a further aggravation of the democratic deficit problem in the EU. The intensified recourse to framework decisions in order to harmonise criminal law may contribute to worsen

¹⁸⁶ <http://www.coe.int/T/E/Communication_and_Research/Press/Theme_Files/Terrorism/CM_Guidelines_20020628.asp#TopOfPage>.

¹⁸⁷ See <[http://press.coe.int/cp/2002/369a\(2002\).htm](http://press.coe.int/cp/2002/369a(2002).htm)>.

¹⁸⁸ Preambular para d) Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism.

¹⁸⁹ Preambular para i) Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism.

the still fragile democratic legitimacy of the Union. While a less than perfectly democratic decision-making process may be acceptable in more technical fields, be it the creation of a customs union or environmental protection, core political matters such as legislative choices in the field of criminal law do not belong behind closed doors.

Absurdly, the introduction of more effective — less intergovernmental and more quasi-supranational — legal instruments by the Amsterdam Treaty, such as framework decisions, has reinforced the democratic deficit issue for the Union. Since framework decisions — as opposed to Conventions, the traditional instruments of intergovernmental co-operation in the field of JHA, — do not require approval by national parliaments and since they are adopted by merely consulting the European Parliament, neither indirect nor direct democratic legitimacy can be recognised. As a result, the introduction of Council framework decisions by the Amsterdam Treaty has further widened the “democratic deficit” of the EU. What has already been a feature of EU-decision making in general for a long time now reaches into a field that is as politically sensitive as criminal law. Thus, it should not come as a surprise that some national parliaments have reacted negatively to the proposed anti-terrorism legislation. One should not simply dispel this criticism as anti-European sentiment but rather take the challenge seriously and open a more transparent and participatory chapter of European criminal law legislation.

Finally, the big question for the future remains whether the relatively homogeneous EU with only 15 Member States, largely common values, and clearly shared interests in fighting terrorism, etc., will be able to do so effectively. One may hope so. However, the danger of an overly legalistic approach to the problems involved, coupled with the dilatory and compromising outcome of the many skirmishes in the national interest in the course of EU law-making, is as present as in other areas of EU legislation. It remains to be seen whether the impressive legal architecture of the EU action to combat terrorism will provide a real “fortification”.