THE EUROPEAN UNION AND 'SEPTEMBER 11'

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International cooperation is essential in the fight against international terrorism.[1] More than in any other continent, in Europe, such cooperation is strongly institutionalized. European international organizations play a crucial role in this respect.

The most relevant European organizations in this area are undoubtedly the European Union (EU), NATO, and the Council of Europe, and, to a lesser extent, the Organization for Security and Cooperation in Europe (OSCE). This contribution will focus on the role which the EU plays in the fight against international terrorism, especially after the September 11 attacks in the United States (September 11).[2] We will first briefly set out where and how the fight against international terrorism fits in the overall framework of the EU. Subsequently, we will give an overview of the EU's main actions against international terrorism after September 11, with particular emphasis on the measures adopted in the field of criminal law and external relations. Finally, we will make some critical reflections on a number of these actions and end up with some brief concluding remarks. It goes without saying that the present

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1. *See generally The National Security Strategy of the United States of America*, Sept. 2002, *at* http://www. whitehouse.gov/nsc/nss.pdf (last visited May 15, 2003). "[W]e know that to defeat terrorism in today's globalized world we *need* support from our allies and friends." *Id.* at 7 (emphasis added). The role of international, including regional organizations, is also recognized by the Security Council. *See, e.g.*, its resolutions 1377 (UN Doc. S/RES/1377, Nov. 12, 2001, Annex) and 1456 (UN Doc. S/RES/1456, Jan. 20, 2003, Annex, § 7-8).

2. *See generally* Monica den Boer & Jorg Monar, *11 September and the Challenge of Global Terrorism to the EU as a Security Actor*, 40 J. OF COMMON MARKET STUDIES 11 (2002); LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM: TOWARD A TRANSATLANTIC DIALOGUE (Cyrille Fijnaut et al., forthcoming 2003); Christian Tomuschat, *Der 11. September 2001 und seine rechtlichen Konsequenzen*, 28 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 335 (2001).

contribution's focus on the EU is not intended to play down in any way the important role that the other aforementioned European organizations play in combating international terrorism.[3] Finally, it should be stressed that we do not attempt to provide an exhaustive overview of all EU actions in response to September 11, since this would by far exceed the scope of a contribution such as the present one.

I. THE FIGHT AGAINST INTERNATIONAL TERRORISM IN THE FRAMEWORK OF THE EU

In its earliest stages, the process of European supranational[4] cooperation took place almost exclusively in the economic sphere.[5] This feature is clearly reflected in the setting up of distinct European Communities in the 1950s: the European Coal and Steel Community,[6] the European Economic Community,[7]

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3. *See generally September 11 - One year on. NATO's contribution to the fight against terrorism, available at* http://www.nato.int/terrorism/index.htm (last visited Feb. 27, 2003) (describing the NATO response to Sept. 11), and NATO's *Operation Active Endeavour* (see AFSOUTH, fact-sheet Operation Active Endeavour, *available at* http://www.afsouth.nato.int/operations/Endeavour/Endeavour.htm (last visited June 9, 2003). *See also* Organization for Security and Co-operation in Europe, *Decision on Combating Terrorism and the Bucharest Plan of Action for Combating Terrorism*, MC(9).DEC/1 (Dec. 3-4, 2001), *available at* http://www.osce.org/docs/english/1990-1999/mcs/9buch01e.htm (last visited May 15, 2003); Organization for Security and Co-operation in Europe, *OSCE Charter on Preventing and Combating Terrorism*, MC(10).JOUR/2 (Dec. 7, 2002), *available at* http://www.osce.org/docs/english/1990-1999/mcs/mc10ej02.pdf (last visited May 15, 2003); *Guidelines on Human Rights and the Fight Against Terrorism adopted by the Committee of Ministers*, Council of Europe, 804th mtg., H(2002)0004 (July 11, 2002), *available at* http://www.coe.int/T/E/Human_rights/h(2002)4eng.pdf (last visited May 15, 2003).

4. By 'supranationalism' we mean a process of cooperation between States going beyond traditional intergovernmentalism, which is typically based on decision-making by consensus between sovereign States and a lack of enforcement mechanisms other than peer pressure or mechanisms available under general international law. In particular, supranationalism in the EC is characterized by many areas where decisions can be adopted by the Council (*see infra* note 39) by a qualified majority, with an important role, including often one equal to that of the Council, for the directly elected European Parliament (*see infra* note 50), an exclusive right of initiative and important enforcement powers for the Commission (*see infra* note 53) and by supervision by the independent Court of Justice (*see infra* note 271).

5. However this economic integration clearly served, at least in part, political goals.

6. *See generally* TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140. This Treaty expired on July 23, 2002, in conformity with Article 97, which states "[t]his Treaty is concluded for a period of 50 years from its entry into force." *Id.* art. 97.

7. *See generally* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 [hereinafter EC TREATY] (all subsequent references to the EC Treaty will be to the EC Treaty as modified by the Treaty of Nice, *see infra* note 33).

later renamed the European Community (EC),[8] and the European Atomic Energy Community.[9]

Early initiatives aimed at supranational cooperation beyond the economic sphere, notably the European Defence Community,[10] failed. From the end of the 1940s, such cooperation was conducted in intergovernmental (as opposed to supranational) international organizations, especially NATO,[11] the Western European Union,[12] and the Council of Europe.[13] The latter organization quickly acquired significant expertise in the field of human rights with as its main achievement the European Convention on Human Rights (ECHR),[14] the respect for which is supervised by the European Court on Human Rights (ECtHR).[15] The Council of Europe also invested strongly in international criminal law, resulting in conventions on extradition,[16] mutual

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8. *See* TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1, tit. I, art. A and tit. II, art. G (entered into force on Nov. 1, 1993) [hereinafter EU TREATY].

9. *See* TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 140.

10. *See* TREATY SETTING UP THE EUROPEAN DEFENCE COMMUNITY, May 27, 1952. This treaty did not enter into force because the French parliament rejected it on Aug. 30, 1954, which put an end to plans for a European Political Community for quite some time. *See* KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 27 (1999). *See also European Parliament Fact Sheets: The First Treaties*, *available at* http://www.europarl.eu.int/factsheets/1_1_1_en.htm (last visited Apr. 4, 2003).

11. *See* North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (establishing NATO).

12. *See generally* Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, Mar. 17, 1948, *available at* http://www.nato.int/docu/basictxt/b480317a.htm as amended by the Protocol modifying and completing the Brussels Treaty, Oct. 23, 1954, *available in consolidated version at* http://www.nato.int/docu/basictxt/b541023u.htm (last visited May 30, 2003) (establishing the Western European Union).

13. *See* Statute of the Council of Europe, May 5, 1949, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm (last visited Apr. 4, 2003) (establishing the Council of Europe).

14. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 and E.T.S. No. 5, as amended and supplemented by several Protocols, *available at* http://conventions.coe.int (last visited June 9, 2003).

15. Initially also by the European Commission on Human Rights, however this organ was abolished. *See* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, E.T.S. No. 155, pmbl. para. 3, art. 1. This Protocol also made the jurisdiction of the ECHR compulsory for any party to the ECHR. *See id.*

16. *See generally* European Convention on Extradition, Dec. 13, 1957, E.T.S. No. 24. *See also* Additional Protocol to the European Convention on Extradition, Oct. 15, 1975, E.T.S. No. 86; Second Additional Protocol to the European Convention on Extradition, Mar. 17, 1978, E.T.S. No. 98.

legal assistance,[17] and other matters.[18] As far as terrorism is concerned, this led in particular to the adoption, in 1977, of the European Convention on the Suppression of Terrorism.[19] On May 15, 2003, a protocol to the latter convention was opened for signature.[20]

In the 1970s, though, the Member States of the European Communities developed intergovernmental consultation and cooperation mechanisms amongst themselves on matters relating to foreign policy and criminal cooperation, including issues relevant to terrorism. Formally, these activities took place outside the institutional context of the European Communities.

The first of these mechanisms was European Political Cooperation (EPC), instituted in 1970.[21] EPC dealt with certain foreign policy issues. It was

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17. *See generally* European Convention on Mutual Assistance in Criminal Matters, Apr. 20, 1959, E.T.S. No. 30. *See also* Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Mar. 17, 1978, E.T.S. No. 99; Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Nov. 8, 2001, E.T.S. No. 182.

18. *See, e.g.*, European Convention on the International Validity of Criminal Judgments, May 28, 1970, E.T.S. No. 70. *See also* European Convention on the Transfer of Proceedings in Criminal Matters, May 15, 1972, E.T.S. No. 73; Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, E.T.S. No. 112 (supplemented by Additional Protocol to the Convention on the Transfer of Sentenced Persons, Dec. 18, 1997, E.T.S. No. 167, and Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, E.T.S. No. 141); Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 173; Convention on Cybercrime, Nov. 23, 2001, E.T.S. No. 185. *See generally* Statute of the Council of Europe, *supra* note 13. The Council of Europe's objective "to achieve a greater unity between its members for the purpose of safeguarding and realising [sic] the ideals and principles which are their common heritage" is to be achieved by, *inter alia*, "agreements and common action in . . . legal . . . matters and in the maintenance and further realisation [sic] of human rights and fundamental freedoms." *Id.* art. 1. Member States "must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms . . . ." *Id.* art. 3.

19. *See European Convention on the Suppression of Terrorism*, Jan. 27, 1977, E.T.S. No. 90. Thirty-nine states are party to this convention. *See id.* In 1979 the (then nine) EC Member States concluded the Agreement concerning the application of the European Convention on the suppression of terrorism among the Member States, Dec. 4, 1979, Bull. EC 12-1979, 90-91, 19 I.L.M. 325, 325-26. However, this agreement never entered into force. *See* Italian Report to the Security Council Counter-Terrorism Committee, UN Doc. S/2002/8/Annex, at 11 (1980).

20. *See* Protocol Amending the European Convention on the Suppression of Terrorism, May 15, 2003, E.T.S. No. 190, *available at* http://conventions.coe.int (last visited May 29, 2003). It is one of the results of the work of a working party of the Multidisciplinary Group on International Action against Terrorism, which was, among others, responsible for reviewing the operation of the European Convention on the Suppression of Terrorism. *See Multidisciplinary Group on International Action against Terrorism, available* at http://www.coe.int/T/E/Communication_and_Research/Press/Theme_files/Terrorism/e_GMT.asp#TopOfPage (last visited May 15, 2003). *See also* Council of Europe, Doc. CM(2002)181, Nov. 6, 2002, *available at* http://cm.coe.int/stat/E/Public/2002/cmdocs/2002cm181.htm (last visited May 15, 2003).

21. The European Political Cooperation was adopted by decision of the Foreign Affairs ministers of the Member States on Oct. 27, 1970. *See* Bull. EC 11-1970, at 9-14. *See also* LENAERTS & VAN NUFFEL, *supra* note 10, at 36-37; WOUTER DEVROE & JAN WOUTERS, DE EUROPESE UNIE. HET VERDRAG VAN MAASTRICHT EN ZIJN UITVOERING: ANALYSE EN PERSPECTIEVEN, 608-09 (1997).

given a treaty basis by the Single European Act in 1986.[22] Already in 1986, an EPC working group was set up to examine the political and legal aspects of international terrorism.[23]

The second such mechanism was the biannual meeting of the Home Affairs Ministers (or their equivalents) of the Member States on matters of law and order, set up by a European Council decision of December 1975.[24] This mechanism became known as the TREVI-group (TREVI stands for *'Terrorisme, Radicalisme, Extrémisme et Violence Internationale'*).[25] Its initial purpose was precisely to exchange information on terrorist groupings.[26]

The Maastricht Treaty on European Union of 1992[27] (referred to as Maastricht Treaty) established the EU, which is founded on the European Communities (as its so-called first pillar) and supplemented by two other fields of policy and cooperation, namely the Common Foreign and Security Policy (CFSP, also referred to as the second pillar of the EU)[28] and provisions on justice and home affairs (JHA or third pillar of the EU).[29] In essence, the Maastricht Treaty brought the two aforementioned mechanisms into the institutional framework of the EU. EPC was replaced by CFSP, the scope of which is comprehensive,[30] and which therefore also covers external political relations aspects of the fight against international terrorism.[31] TREVI was

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22. *See* European Single Act, 1987 O.J. (L 169), 1-29 (entered into force July 1, 1987) (Treaty provisions on European cooperation in the sphere of foreign policy, art. 30).

23. *See* Answer to Written Question No. E-2481/93 in the European Parliament by Mr. Vertemati (PSE) on the growth of terrorism, Nov. 30, 1993, European Foreign Policy Bulletin Database, No. 93/488. For a European Political Cooperation action, see, e.g., Statement by an EPC Ministerial Meeting concerning the enquiries into Libyan involvement in the bombing of flights Pan Am 103 and UTA 772, Dec. 2, 1991, European Foreign Policy Bulletin Database, No. 91/426, *available at* http://www.ieu.it/EFPB/Welcome.html (last visited May 30, 2003).

24. *See* Summary of the Conclusions of the European Council of Rome, Dec. 1-2, 1975, published in Bull. EC 11-1975, 1104.

25. *See* LENAERTS &VAN NUFFEL, *supra* note 10, at 41.

26. *See* DEVROE & WOUTERS, *supra* note 21, at 668.

27. *See* EU TREATY, *supra* note 8.

28. *See id.* art. B and tit. V (art. J-J.11) (now EU TREATY art. 2 and tit. V (art. 11-28)).

29. *See id.* art. B and tit. VI (art. K-K.9) and especially art. K.1.9 (now EU TREATY art. 2 and tit. VI (art. 29-42)). Articles 1(11) and 2(15) of the TREATY OF AMSTERDAM (*see infra* note 32), have incorporated some aspects initially covered under the third pillar in the first pillar (*see* EC TREATY, *supra* note 7, tit. IV) and renamed the third pillar Police and Judicial Cooperation in Criminal Matters (*see* EU TREATY, *supra* note 8, tit. VI), although the latter is usually still referred to as JHA.

30. *See* EU TREATY, *supra* note 8, art. 11(1). "The Union shall define and implement a common foreign and security policy *covering all areas of foreign and security policy*...." *Id.* (emphasis added).

31. This also includes the implementation of UN sanctions against States because of involvement in terrorism. For an early case, see Council Decision on the Common Position Defined on the Basis of Article J.2 of the Treaty on European Union with Regard to the Reduction of Economic Relations with Libya, 1993 O.J. (L 295) 7 (initially implemented by Council Regulations 3274, 3275, 1993 O.J. (L 295), respectively at 1-3 and 4-6). For more recent cases, see the decisions discussed *infra* notes 175-76 and 212 and accompanying text.

integrated in the third pillar of the EU. The Treaty of Amsterdam of 1997[32] further consolidated these mechanisms as part of the EU Treaty. Some of these provisions have again been amended by the Treaty of Nice of 2001, which has entered into force on February 1, 2003 (EU Treaty means the EU Treaty as amended by the Treaty of Nice).[33]

In general, terrorism has for the largest part been viewed by EU Member States as a criminal law or justice issue and only to a lesser extent as a foreign relations problem. Thus, the EU has dealt with it mostly within the JHA pillar.[34] However, as the overview below will demonstrate, the EU's terrorism-related actions have, especially after September 11, pervaded all its spheres of activities, from the first (largely economic) pillar to the third pillar.

II. THE EU'S ACTIONS IN RESPONSE TO SEPTEMBER 11: AN OVERVIEW[35]

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32. TREATY OF AMSTERDAM, Oct. 2, 1997, 1997 O.J. (C 340) 1-144 (1999) (entered into force on May 1, 1999). The consolidated EU Treaty, including the amendments by the TREATY OF AMSTERDAM, was published in 1997 O.J. (C 340) 145-72 (1999).

33. TREATY OF NICE AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Feb. 26, 2001, 2001 O.J. (C 80) 1-87 [hereinafter TREATY OF NICE] A consolidated version of the EU and EC treaties including the amendments made by the Treaty of Nice is published in 2002 O.J. (C 325), 1-184 (2002). For ratification status, see http://europa.eu.int/comm/nice_treaty/ ratiftable_ en.pdf (last visited May 8, 2003). Moreover, the present Convention on the Future of Europe or European Convention is to propose a new framework and structures for the European Union and is likely to propose a constitutional document abolishing the three-pillar structure. *See* Convention on the Future of Europe or European Convention, *available at* http://european-convention.eu.int and http://europa.eu.int/futurum/index_en.htm (last visited May 15, 2003). This basic choice is adopted in several major contributions to the Convention. *See, e.g.*, Final report of Working Group III on Legal Personality, CONV 305/02 WG III 16, Oct. 1, 2002; Praesidium of the European Convention, Preliminary draft Constitutional Treaty, CONV 369/02, Oct. 28, 2002; For the European Union Peace, Freedom, Solidarity - Communi-cation from the Commission on the institutional architecture, CONV 448/02 CONTRIB 165, Dec. 5, 2002. All three contributions are available at http://european-convention.eu.int and at http:// register.consilium.eu.int (last visited May 15, 2003). *See also* Francois Lamoureux et. al., Feasibility study: Contribution to a preliminary draft Constitution of the European Union, working document produced at the request of President Prodi et. al., Dec. 4, 2002, *available at* http://europa.eu.int/futurum/documents/offtext/const051202_en.pdf (last visited May 8, 2003) (this study does not necessarily represent the views of the Commission) and the latest draft constitution (Praesidium of the European Convention, Draft text of Part One of the Treaty establishing the Constituiton, CONV 724/03, May 26, 2003, *available at,* http://register. consilium. eu.int/pdf/en/03/cv00/cv00724en03.pdf), especially Art. I-6 (last visited May 29, 2003).

34. *See, e.g.*, European Parliament Resolution of Oct. 4, 2001, on the Extraordinary European Council Meeting in Brussels on Sept. 21, 2001, 2002 O.J. (C 87/E) 216-219. "[C]ombating terrorism first of all requires a criminal justice approach . . . ." *Id.* pmbl. § E.

35. For a fairly recent overview of the EU's response, see, e.g., *EU action in response to 11th September 2001: one year after, available at* http://europa.eu.int/comm/110901/index .htm (last visited May 15, 2003); *11 September attacks: the European Union's Broad Response, available at* http://europa.eu.int/news/110901/ index.htm (last visited May 15, 2003); *Terrorism - the EU on the Move, available at* http://www.europa.eu.int/comm/justice_home/ news/ terrorism/index_en.htm (last visited May 15, 2003). *See generally* Steve Peers, *EU Responses to Terrorism*, 52 INT'L & COMP. L. QUARTERLY 227 (2003); Nicola Vennemann, *Country Report on the European Union, in* TERRORISM AS A CHALLENGE FOR NATIONAL AND

The EU's reaction to September 11 has been swift and comprehensive. The main lines of its actions were set out in the conclusions of the Extraordinary European Council, i.e. the summit of the EU Member States' Heads of State or Government and the President of the European Commission,[36] convened on September 21, 2002, in Brussels[37] and in the conclusions of the JHA Council[38] the day before.[39] A total of sixty-eight measures are listed in a 'road map,' which is updated regularly.[40]

A. Cooperation in criminal matters[41]

The larger part of the EU's actions in response to September 11 falls under the heading of cooperation in criminal matters.[42] Although the action taken covers many areas, the Framework decisions[43] on the European Arrest

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INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? (Christian Walter et al., eds., forthcoming 2003), *available at* http://edoc.mpil.de/conference-on-terrorism/country/eu.pdf (last visited May 29, 2003).

36. *See* EU TREATY, *supra* note 8, art. 4. The EU Treaty states that "[t]he European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof" and that "[t]he European Council shall meet at least twice a year, under the chairmanship of the Head of State or Government of the Member State which holds the Presidency of the Council." *Id.* The European Council is thus an organ of the EU and is not related to the Council of Europe.

37. *See* Conclusions of the Extraordinary European Council, *available at* http://www.europa.eu.int/comm/justice_home/news/terrorism/documents/concl_council_21sep_en.pdf (last visited May 15, 2003). *See also* European Parliament Resolution of Oct. 4, 2001, on the Extraordinary European Council Meeting in Brussels on Sept. 21, 2001, *supra* note 34 (the European Parliament's reaction to the European Council's action plan).

38. The Council of the EU (also referred to as the 'Council of Ministers') consists of a representative of each Member State at ministerial level, and meets in different formations according to the matter dealt with. It is the EU's main decision making body, although in the first pillar (the EC), it mostly shares this competence with the European Parliament. *See, e.g.*, EU TREATY, *supra* note 8, arts. 5, 13-15, 23, 34; arts. 202-10, 249-52. Unlike the European Council, it is an institution of the EU. *See id.* art. 5, art. 7.

39. *See* Conclusions of the JHA Council, Sept. 20, 2002, *available at* http://www.europa.eu.int/comm/justice_home/news/terrorism/documents/concl_council_20sep_en.pdf (last visited May 15, 2003).

40. The latest update at the time of writing the authors were able to find was in Council document 13909/1/02 REV. 1, Nov. 14, 2002, *available at* http://register.consilium.eu.int (last visited May 15, 2003).

41. *See generally* Tung-Laï, *Les initiatives menées par l'Union dans la lutte antiterroriste dans le cadre du troisième pilier (Justice et affaires intérieures)*, REVUE DU DROIT DE L'UNION EUROPÉENNE 261 (2002).

42. Tung-Laï identifies forty-four out of sixty-eight measures listed in the road map as falling under the JHA heading. *See id.* at 275.

43. According to EU Treaty, Framework decisions may be adopted by the Council for the purpose of approximation of Member States' legislation. *See* EU TREATY, *supra* note 8, art. 34.2(b). They "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" and "shall not entail direct effect . . . ." *Id.*

Warrant and Surrender Procedures between Member States (Arrest Warrant Framework Decision)[44] and on combating terrorism (Terrorism Framework Decision)[45] have attracted the most attention and will be discussed in some detail here. Other measures, such as the setting up of Eurojust, increased tasks for Europol and joint investigative teams will be addressed more briefly, except for the EU-U.S. cooperation, which we will also discuss in some more detail.

We would, however, first like to point out that many of the measures taken in the wake of September 11 do not relate to terrorism only but are in fact of a more general nature as they relate to police and judicial cooperation in criminal matters generally. This is, *e.g.*, the case with the Arrest Warrant Framework Decision. Such measures have also in many cases been initiated and prepared well before September 11. The EU Treaty provides the legal basis for most of these actions, in particular through its goal, introduced by the Treaty of Amsterdam, to maintain and develop "an area of freedom, security and justice . . . ."[46]

Pursuant to this goal, the special Tampere European Council of October 1999 adopted very ambitious objectives.[47] September 11 provided the necessary stimulus to finally push through a number of these measures already envisaged at Tampere, including the Arrest Warrant Framework Decision and the setting up of Eurojust.[48] In fact, the two framework decisions which have attracted most attention, had been called for by the European Parliament[49] less than a week *before* September 11.[50] Thus the breadth and speed of the EU's

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44. *See* Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures between Member States, June 13, 2002, 2002 O.J. (L 190) 1 [hereinafter Arrest Warrant Framework Decision].

45. *See* Council Framework Decision 2002/475 on Combating Terrorism, June 13, 2002, 2002 O.J. (L 164) 3 [hereinafter Terrorism Framework Decision].

46. EU TREATY, *supra* note 8, art. 2. *See also id.* art. 29.

47. *See Tampere European Council October 15 and 16, 1999 - Presidency Conclusions, available at* http://ue.eu.int (last visited May 15, 2003) [hereinafter *Tampere Council*]. Some of the goals set out in these conclusions can be traced back to the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, adopted by the JHA Council of Dec. 3, 1998, 1999 O.J. (C 19), 1-15 (which lists *inter alia* reinforcing "exchanges of information and the coordination of competent authorities of Member States in the fight against [terrorist offenses], using Europol in particular," initiating "a process with a view to facilitating mutual recognition of decisions and enforcement of judgments in criminal matters," establishing "minimum rules relating to the constituent elements and to penalties" of *inter alia* terrorist offenses, promoting "liaison arrangements between prosecuting/investigating officials specialising [sic] in the fight against organised [sic] crime in close cooperation with Europol," and considering "whether substantive and formal improvements can still be made to extradition procedures including rules to reduce delays").

48. *See Tampere Council*, *supra* note 47, §§ 35, 46.

49. On the powers of the European Parliament, *see especially* EU TREATY, *supra* note 8, arts. 5, 21, 39; *see also* EC TREATY, *supra* note 7, arts. 189-01, 249-52.

50. *See* European Parliament Recommendation 2001/2016 on the Role of the European Union in Combating Terrorism, 2002 O.J. (C 72/E) 135-141.

action in the field of JHA is partly due to developments predating September 11. Obviously, this in no way diminishes the importance of the measures adopted.

1. The Arrest Warrant Framework Decision[51]

A first significant decision is the adoption of the Arrest Warrant Framework Decision. As already mentioned, this instrument is not limited to terrorism, but it is regarded as part of the list of anti-terrorist measures. Even after September 11, it proved difficult to reach an agreement about it. The Commission[52] already submitted a proposal for this framework decision on September 19, 2001.[53] On September 21, 2001, the Extraordinary European Council directed the JHA Council to flesh out an agreement on this framework decision at the latest by December 6-7, 2001.[54] At its meeting on those dates, the JHA Council failed to agree on the Arrest Warrant Decision because Italy opposed the compromise reached by the fourteen other Member States, which was moreover subject to parliamentary scrutiny in a number of countries and to renewed consultation by the European Parliament.[55] On November 29, 2001, when it was first consulted,[56] the latter institution had proposed forty-four amendments to the Commission proposal and had called for renewed consultations if the Council intended to amend the Commission proposal

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51. *See also* Emmanuel Barbe, *Le mandat d'arrêt européen: en tirera-t-on les conséquences?*, (Gilles de Kerchove & Anne Weyembergh eds., 2002); Rob Blekxtoon, *Europees arrestatiebevel*, 77 NEDERLANDS JURISTENBLAD 1058, 1058-61 (2002); Rob Blekxtoon, *Europees arrestatiebevel*, 77 NEDERLANDS JURISTENBLAD 357, 357-58 (2002); D. Flore, *Le mandat d'arrêt européen: première mise en oeuvre d'un nouveau paradigme de la justice pénale européenne*, JOURNAL DES TRIBUNAUX 273, 273-81 (2002); B. Loïck, *Le mandat d'arrêt européen*, REVUE DU MARCHÉ COMMUN, No. 465, 106, 106-10; Herman Van Landeghem et al., *Europees aanhoudingsmaandaat, in* ASPECTEN VAN EUROPEES FORMEEL STRAFRECHT 165-88 (Gert. Vermeulen ed., 2002); J.M. Reijntjes, *Europees arrestatiebevel*, 77 NEDERLANDS JURISTENBLAD 712, 712-13 (2002); HERMAN VAN LANDEGHEM ET AL., *Europees aanhoudingsmaandaat*, 165-88 (2002); Gert Vermeulen, *U vraagt, wij draaien . . . . Europees aanhoudingsbevel leidt tot blinde overlevering verdachten en veroordeelden*, 56 DE JURISTENKRANT 2, 2.

52. On the role of the (European) Commission, *see especially* EU TREATY, *supra* note 8, arts. 5, 27, 36(2); EC TREATY, *supra* note 7, arts. 211-19, 256.

53. *See* Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between the Member States, COM(01)522 final, 2001 O.J. (C 332/E) 305-19.

54. *See* Conclusions of the Extraordinary European Council, *supra* note 37, para. 2.1.

55. *See* Council Doc. 14867/1/01 Rev 1, COPEN 79, CATS 50, Dec. 10, 2001, *available at* http://register.consilium.eu.int (last visited May 15, 2003).

56. The European Parliament has no decision-making powers in respect of framework decisions and other decisions concerning cooperation in criminal matters but is only consulted. *See* EU TREATY, *supra* note 8, art. 39.

substantially.[57] On the same day, the European Parliament had called on the Council to resort to closer cooperation (i.e. the mechanism which allows, under certain conditions, a limited number of Member States to adopt measures if not all Member States wish to take part[58]) *"in the event that unanimity cannot be attained or ... can only be attained by substantially weakening the proposal"*[59] and there was indeed briefly talk of this possibility after the failure to reach agreement in the JHA Council. However, as Italy dropped its opposition fairly quickly, the Committee of Permanent Representatives (COREPER)[60] was able to conclude on December 12, 2001, that a provisional agreement existed on the December 6/7 compromise, although it was understood that Italy would make a declaration upon adoption of the decision by the Council.[61] After being consulted again, the European Parliament approved the Council's draft without amendment on February 6, 2002.[62] Given this decision and the withdrawal of all parliamentary scrutiny reservations, the Council finally adopted the framework decision on June 13, 2002. Member States have to implement it by December 31, 2003,[63] although they may chose to do so earlier and several Member States have declared that they would avail themselves of this option.[64]

On a theoretical level, the introduction of a European arrest warrant and surrender procedures instead of traditional extradition reflects a paradigm shift

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57. *See* European Parliament Legislative Resolution on the Commission Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States, Nov. 29, 2001, 2002 O.J. (C 153/E) 284 and the corresponding Report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, A5-0397/2001, Nov. 14, 2001, *available at* http://www.europarl.eu.int (last visited May 30, 2003).

58. *See* EU TREATY, *supra* note 8, art. 40-40b *juncto* art. 43-44a, (as modified by TREATY OF NICE, *supra* note 33).

59. *See* European Parliament Legislative Resolution on the Commission Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States, *supra* note 57, § 4.

60. COREPER is the organ which prepares most Council decisions. *See* EC TREATY, *supra* note 7, art. 207. In the field of JHA, COREPER shares this role to some extent with the Committee of Senior Officials. *See* EU TREATY, *supra* note 8, art. 36.

61. *See* Council Doc. 14867/1/01 Rev 1 Add 1, COPEN 79, CATS 50, Dec. 12, 2001, *available at* http://register.consilium.eu.int (last visited May 15, 2003).

62. *See* European Parliament Legislative Resolution A5-0003/2002 on the Draft Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States, Feb. 6, 2002, 2002 O.J. (C 284E) 193-194. The corresponding report (A5-0003/2002, Jan. 9, 2002, *available at* http://www.europarl.eu.int (last visited May 30, 2003)) contains no substantive discussion but does include a minority opinion. *See id.*

63. Arrest Warrant Framework Decision, *supra* note 44, art. 34.

64. According to press reports, France, Belgium, Portugal, Luxembourg, the U.K., and Spain agreed to bring forward the entry into force of the European arrest warrant and adopt the necessary legislation in the first three months of 2003. *See, e.g.*, Michael Mann, *Six countries to bring in EU arrest warrant early*, THE FINANCIAL TIMES ONLINE, Feb. 14, 2002. The UK introduced its implementing legislation, the Extradition Bill, in the House of Commons on Nov. 14, 2002. *See* Extradition Bill (2002) (U.K.), *available at* http://www.homeoffice.gov.uk/extraditionbill/documents.htm (last visited Feb. 15, 2003). On the implementation in Belgium, see *infra* note 268.

in legal cooperation between Member States. Traditionally, such cooperation is based on the rule that one State does not execute or enforce decisions of another State. If such an enforcement was sought, an agreement had to be reached. In the case of extradition, this was usually accomplished through extradition treaties. In contrast, the European Arrest Warrant Decision is based on the principle (subject to limitations and exceptions, see *infra*) that Members States automatically recognize each others' judicial decisions ordering the arrest of a person.[65] Fundamentally, this principle is based on the close level of integration between EU Member States, and their mutual trust in each others' legal systems.[66] This is very clearly spelled out in the preamble, which states:

> The mechanism of the European arrest warrant is based on a high level of confidence between Member States. [Its] implementation . . . may be suspended only in the event of a severe breach by one Member State of the principles set out in Article 6(1) of the Treaty on European Union, established by the Council pursuant to Article 7(1) of that Treaty . . . .[67]

It is submitted that this, rather than any possible practical amelioration in respect of securing persons sought or convicted, is the major significance of this decision.

Nevertheless, the question may be asked whether the European arrest warrant will make a real difference in practice, especially in light of the significant number of extradition treaties that already existed between EU Member States.[68] Building on the (Council of Europe) European convention

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65. *See* Arrest Warrant Framework Decision, *supra* note 44, pmbl. 6, art. 1(2). *See also* Lorna Harris, *Mutual Recognition from a Practical Point of View: Cosmetic or Radical Change?*, *in* L'ESPACE PÉNAL EUROPÉEN: ENJEUX ET PERSPECTIVES 105-11 (Gilles de Kerchove & Anne Weyembergh eds., 2002).

66. *See generally* Guy Stessens, *The Principle of Mutual Confidence between Judicial Authorities in the Area of Freedom, Justice and Security* 93-03, *in* de Kerchove & Weyembergh, *supra* note 51, at 93-03. (2002). For divergent views as to whether this confidence is justified or not. *See* J.M. Reijntjes, *supra* note 51, at 712-13; *contra* R. Blekxtoon, *supra* note 51, at 1058-61 and G. Vermeulen, *supra* note 51, at 2.

67. The preamble of the 1996 EU Extradition Convention (*see infra* note 74) already states "EXPRESSING their confidence in the structure and operation of their judicial systems and in the ability of all Member States to ensure a fair trial . . . ." *Id.*

68. Similarly, the EU Member States have concluded a number of conventions amongst them in other areas of international criminal law, many of which are already covered to some extent by Council of Europe conventions. *See, e.g.*, the Agreement concerning the Application of the European Convention on the Suppression of Terrorism among the Member States, *supra* note 19; the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences, Nov. 13, 1991, *available at* http://ue.eu.int/ejn/data/vol_a/accords_ce/SN03556en.html (last visited May 15, 2003); the Agreement on the Application among the Member States of the European Communities of the Council of Europe Convention on the Transfer of Sentenced Persons, May 25, 1987, *available at*

on extradition,[69] the EU Member States have concluded amongst them no less than three multilateral treaties supplementing this convention.[70] The first of these treaties simplified and modernized the transmission of extradition requests[71] whereas the second simplified the extradition procedure when the person sought consented to his/her extradition.[72] The third EU convention on extradition is of a more general nature and significantly curtails certain

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http://ue.eu.int/ejn/data/vol_a/accords_ce/CPEIen.html (last visited May 15, 2003); the Agreement between the Member States of the European Communities on the Transfer of Proceedings in Criminal Matters, Nov. 6, 1990, *available at* http://ue.eu.int/ejn/data/vol_a/accords_ce/CPEinfractionsen.html (last visited May 15, 2003); the Convention between the Member States of the European Communities on Double Jeopardy, May 25, 1987, *available at* http://ue.eu.int/ejn/data/vol_a/accords_ce/CPEIIen.html (last visited May 15, 2003); and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, May 29, 2000, 2000 O.J. (C 197), 3-23 (adopted by Council Act of May 29, 2000, establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, 2000 O.J. (C 197), 1-2 and the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, Oct. 16, 2001, 2001 O.J. (C 326) 2-8, adopted by Council Act of Oct. 16, 2001, establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, 2001 O.J. (C 326) 1). For a non-conventional instrument, see Joint Action of June 29, 1998, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on Good Practice in Mutual Legal Assistance in Criminal Matters, 1998 O.J. (L 191) 1-3.

69. *See* European Convention on Extradition, *supra* note 16.

70. Furthermore, it should be mentioned that a large number of Member States are also party to the Convention of June 19, 1990, applying the Schengen Agreement of June 14, 1985, between the Governments of the States of the Benelux Economic Union, The Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, which contains provisions concerning extradition in its Articles 59-66. *See* 2000 O.J. (L 239) 19-62. The Treaty of Amsterdam has integrated this 1990 convention, as part of the 'Schengen *acquis,*' into the framework of the EU. See the Protocol (No. 2) (to the Treaty of Amsterdam) integrating the Schengen *acquis* into the framework of the European Union and the Annex thereto defining the 'Schengen acquis', 1997 O.J. (C 340) 93-96 (i.e. essentially the 1985 and 1990 agreements, accession agreements thereto and "Decisions and declarations adopted by the Executive Committee established by the 1990 Implementation Convention, as well as acts adopted for the implementation of the Convention by the organs upon which the Executive Committee has conferred decision making powers."). *Id.* For the full Schengen Acquis, see Council Decision of May 20, 1999, concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis, 1999 O.J. (L 176) 1-16. *See especially* The Schengen *acquis* as referred to in Article 1(2) of Council Decision 1999/435/EC, 2000 O.J. (L 239) 1-473.

71. Agreement between the Member States of the European Community on the Simplification and Modernisation of Methods of Transmitting Extradition Requests, May 26, 1989, *available at* http://ue.eu.int/ejn/data/vol_a/accords_ce/EPC0019en.html (last visited May 15, 2003).

72. Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union, Mar. 10, 1995, 1995 O.J. (C 78) 2-7 (adopted by Council Act of Mar. 10, 1995, drawing up the Convention on simplified extradition procedure between the Member States of the European Union, 1995 O.J. (C 78) 1) [hereinafter 1995 EU Extradition Convention].

restrictions traditionally found in extradition treaties.[73] It *inter alia* abolishes, in principle, the political offence exception between Member States, although it allows Member States to limit this abolition to the terrorist offenses listed in the European Convention on the Suppression of Terrorism[74] and a considerable number of Member States have opted for this limited abolition only.[75] This convention also obliges Member States to extradite their own nationals, although in this respect too it allows reservations, of which most Member States have made use.[76] It further allows Member States to declare that they will, in principle, renounce the rule of speciality (i.e. the rule that extradition is only granted for the offence for which it is requested),[77] a rule which is in any event set aside by this convention when there is no risk of a deprivation of liberty or when the extradited person waives this rule,[78] and permits re-

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73. Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union, Sept. 27, 1996, 1996 O.J. (C 313) 12-23 (adopted by Council Act of Sept. 27, 1996, drawing up the Convention relating to extradition between the Member States of the European Union, 1996 O.J. (C 313) 11) [hereinafter 1996 EU Extradition Convention].

74. European Convention on the Suppression of Terrorism, art. 5. Even in this case there is no obligation to prosecute if extradition is sought for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion. *See id.* para 3. The Explanatory Report states in this respect:

> The possibility that these circumstances will apply between the Member States of the European Union in the course of an extradition procedure is probably academic. However, since respect for fundamental rights and liberties is an absolute principle of the European Union and, as already said, lies behind the progress which the Union intends to accomplish this Convention, it was considered that the text should not depart from the aforesaid traditional rule of protecting persons against criminal proceedings affected by political discrimination and that the validity of that rule had to be explicitly stressed.

The Explanatory Report, May 26, 1997, 1997 O.J. (C 191), 13-26 art. 5.

Article 5(4) precludes Member States from making use between them of the possibility, open under Article 13 of the European Convention on Terrorism, enabling a State to qualify certain terrorist offense as a political offense. *See id.* art. 5(4).

75. In particular Austria, Denmark, Greece, Ireland, Luxembourg, and the Netherlands. See their declarations *available at*, the Treaty Office of the EU Council, http://db.consilium.eu.int/accords/home.asp?lang=en (last visited Dec. 12, 2002).

76. European Convention on the Suppression of Terrorism art. 7, which also allows a reservation granting conditional extradition of nationals. Austria, Germany, Greece, and Luxembourg declared that they would not extradite nationals and Denmark also made use of the possibility to refuse extradition of nationals. Belgium, Spain, the Netherlands, Portugal, and Finland declared that they would extradite nationals only under strict conditions, including the serving of any sentence to deprivation of liberty in the requested State. Sweden imposed strict conditions for the extradition of nationals and, in addition, reserved the right to refuse to extradite them altogether. Ireland stated that it would only extradite nationals on the basis of reciprocity. *See* reservations and declarations, *available at* the Treaty Office of the EU Council, http://db.consilium.eu.int/accords/home.asp?lang=en (last visited Dec. 12, 2002).

77. European Convention on the Suppression of Terrorism, art. 11. Only Austria, Germany and the UK have done so, all on a reciprocal basis. *See* reservations and declarations, *available at* the Treaty Office of the EU Council, http://db.consilium.eu.int/accords/home.asp?lang=en (last visited Dec. 12, 2002).

78. *See* EU TREATY, *supra* note 8, art. 10.

extradition between Member States, unless a Member State declares that it will not permit this.[79] In sum, the 1996 EU Extradition Convention limits obstacles to extradition to a considerable extent in principle, but still leaves Member States quite some room to retain a number of these obstacles.

It must be stressed that these three treaties have not yet been ratified by all Member States,[80] despite repeated calls to this effect.[81] Moreover, these treaties will only enter into force when all Member States have ratified them, although Member States, which ratify may declare that they will apply them already before that entry into force between themselves and those other Member States which make the same declaration.[82] Fortunately, most Member States which have ratified these treaties have made such a declaration.[83] Yet, even the inclusion of the goal to take all the necessary steps for the two conventions on extradition to enter into force on January 1, 2002, set by the September 20, 2002, JHA Council after the September 11 attacks,[84] has not been achieved. Seen against this background, the choice for a new regime adopted by way of a framework decision is understandable.

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79. *See id.* art. 12. This article adds that such a declaration will not apply where the person concerned consents to be re-extradited or where art. 13 of the 1995 EU Extradition Convention provides otherwise. *See generally* 1995 EU Extradition Convention, *supra* note 72. Belgium, Denmark, Greece, Luxembourg, Portugal, Sweden, and Finland have made a declaration retaining the rule of non re-extradition except in case of waiver. Some of these Member States also make the extradition of nationals subject to the condition that they not be re-extradited (*e.g.*, Finland). The Netherlands has retained the non re-extradition rule only for its nationals and, in some cases, residents. See the reservations and declarations, available at http://db.consilium.eu.int/accords/home.asp?lang=en (last visited Dec. 12, 2002)

80. According to data provided by the Treaty Office of the EU Council the 1995 and 1996 Conventions are still not ratified by two Member States (France and Italy) and are not yet in force for five and four Member States respectively. *See* 1995 EU Extradition Convention, *supra* note 72. *See also* 1996 EU Extradition Convention, *supra* note 73. Even the 1989 convention appears to be ratified by only ten of the fifteen current Member States. *See id.*

81. For example, the JHA Council Action Plan of Dec. 3, 1998,which listed amongst the measures to be taken within two years of entry into force of Treaty of Amsterdam (i.e. by May 1, 2001) "ensuring that the two existing conventions on extradition adopted under the TEU are effectively implemented in law and in practice." JHA Council Action Plan of Dec. 3, 1998, *supra* note 47. Sections 45(c)) and 35 of the 1999 Tampere European Council conclusions, urging Member States to "speedily ratify the 1995 and 1996 EU Conventions on Extradition." *Tampere Council*, *supra* note 47. *See also* The European Parliament Resolution of Mar. 13, 1998, on Judicial Cooperation in Criminal Matters in the European Union, 1998 O.J. (C 104), 267-272, in which the European Parliament "[r]equests the national governments and parliaments to make every effort to ensure that ratification procedures for conventions on judicial cooperation within the European Union are speeded up." *Id.* at 271.

82. *See* 1995 EU Extradition Convention, *supra* note 72, art. 16. *See also* 1996 EU Extradition Convention, *supra* note 73, art. 18.

83. Only Ireland and Greece, and Portugal with respect of the 1996 Convention only, have not made such declarations. *See* information from the Treaty Office of the EU Council, *available at* http://db.consilium.eu.int/accords/home.asp?lang=en (last visited Dec. 12, 2002).

84. See Conclusions and Plan of Action, *supra* note 39, at II.1.

The scope of application of the Arrest Warrant Framework Decision[85] is set out in Article 2, which states in § 1:

> A European arrest warrant may be issued for acts punishable by the law of the issuing Member State[86] by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.[87]

As far as the potential or imposed punishment in the issuing or requesting Member State is concerned, this provision uses an identical threshold as the European Convention on Extradition and is a little broader than the 1996 EU Extradition Convention in this respect.[88] However, the main difference with these two earlier conventions (and extradition treaties in general) lies in the fact that, in principle, under the Arrest Warrant Framework Decision, it is not necessary that the offence concerned is also punishable under the law of the executing[89] Member State: in other words, no "double criminality" is required.[90] However, for offences not listed in Article 2 § 2 the executing State *may* require that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State.[91] It remains to be seen how much use will be made of this facility in Member States' implementing legislation.[92] Article 2 § 2 lists thirty-two offences for which double criminality may not be required if these offences are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years. These crimes include *inter*

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85. *See generally* Arrest Warrant Framework Decision, *supra* note 44.

86. The "issuing (Member) State" is the State of which the judicial authority has issued the European arrest warrant. It is approximately the equivalent of the "requesting State" in extradition.

87. *See* Arrest Warrant Framework Decision, *supra* note 44, art. 2 (1).

88. The 1996 EU Extradition Convention does not include the four months penalty already pronounced. *See* 1996 EU Extradition Convention, *supra* note 73, art. 2(1). *See also* European Convention on Extradition, *supra* note 16, art. 2(1).

89. The "executing (Member) State" is the State of which the authorities are asked to execute the European arrest warrant. It is approximately the equivalent of the "requested State" in extradition.

90. The European Convention on Extradition demands that the offense be punishable under the laws of the requesting Party *and of the requested Party* by deprivation of liberty or under a detention order for a maximum period of at least one year. *See* European Convention on Extradition, *supra* note 16, Article 2(1). Article 2(1) of the 1996 EU Extradition Convention requires that the offense also be punishable under the law of the *requested* Member State by deprivation of liberty or a detention order for a maximum period of at least six months. *See* 1996 EU Extradition Convention, *supra* note 73, art. 2(1).

91. *See* Arrest Warrant Framework Decision, *supra* note 44, art. 2 (4).

92. Framework decisions are binding as to the result but leave to the national authorities the choice of form and methods. *See generally* EU TREATY, *supra* note 8, art. 34.2 (b).

alia terrorism, a number of offences which may relate to terrorist activities, such as kidnapping, illegal restraint and hostage-taking, illicit trafficking in nuclear or radioactive materials, laundering of the proceeds of crime, illicit trafficking in weapons, munitions and explosives, unlawful seizure of aircraft/ships and sabotage and a number of other offences, *e.g.*, fraud, murder, racism, corruption, illicit trafficking in narcotic drugs and psychotropic substances and crimes within the jurisdiction of the International Criminal Court. This list may be extended in the future pursuant to Article 2 § 3.

There are three grounds for *mandatory* non-execution of an arrest warrant: (1) the offence is covered by amnesty in the executing State and that State had jurisdiction over the offence;[93] (2) the requested person has been finally judged in respect of the conduct concerned in a Member State and, if he/she has been sentenced, the sentence has been served, is being served, or may no longer be executed according to the law of the sentencing State; and (3) the requested person cannot, by reason of his/her age, be held criminally responsible for the offence under the law of the executing State.[94]

There are also a number of grounds for *optional* non-execution. First, as mentioned above, in some cases double criminality may still be required. Second, there are a number of grounds for refusal which broadly can be regarded as applications of the double jeopardy prohibition (*ne bis in idem*).[95] Third, the executing State may refuse execution if the offence concerned is statute-barred according to its own law and it had itself jurisdiction over this offence.[96] Fourth, the executing State may refuse execution if it undertakes to execute itself the sentence or detention to which the requested person has been condemned if that person is a national or resident of the executing State or is staying in that State (in fact, this amounts rather to a transfer of sentence than a real refusal).[97] Finally, a refusal to execute is also permitted for offenses committed in whole or in part in the territory of the executing Member State and for offenses committed outside the territory of the issuing Member State which are not punishable extraterritorially according to the law of the executing Member State.[98]

The fact that the requested person has the nationality of the executing State is not a ground for refusing execution,[99] although execution may in this case (and also when the requested person is a resident of that State) be subject

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93. *See also* 1996 EU Extradition Convention, *supra* note 73, art. 9.

94. *See* Arrest Warrant Framework Decision, *supra* note 44, art. 3.

95. *See id.* arts. 4(2), 4(3), 4(5).

96. *See id.* art. 4(4). This solution is essentially the same as the one provided by art. 8 of the 1996 EU Extradition Convention. *See* 1996 EU Extradition Convention, *supra* note 73, art. 8.

97. *See* Arrest Warrant Framework Decision, *supra* note 44, art. 4(6).

98. *See id.* art. 4(7).

99. It is not listed as a ground for non-execution. *See id.* art. 4.

to the condition that any sentence imposed be served in the executing State.[100] The abolition of the nationality-based exception is undoubtedly one of the main achievements of the European arrest warrant, which will require constitutional changes in some Member States. Another ground for refusal that is not retained is that of tax offenses.[101]

The principle of speciality is retained, though it is subject to several exceptions and States may declare that they will renounce these principles on the basis of reciprocity unless they indicate otherwise.[102] The same goes for the rule of non re-extradition. However, in respect of re-extradition to an EU Member State, the rule of non re-extradition is severely restricted.[103]

It should be noted that a decision on the execution of a European arrest warrant and the actual surrender in case of a decision to execute such a warrant, are subject to strict time limits.[104] Furthermore, upon arrest, a requested person must be informed of the warrant and its content, has the right to counsel and to an interpreter if necessary, and if he or she does not consent to surrender, has the right to be heard by the executing judicial authority.[105]

2. *The Terrorism Framework Decision*

The Commission submitted a proposal for a framework decision on combating terrorism on September 19, 2001.[106] On September 21, 2001, the Extraordinary European Council agreed that the EU had to adopt a common definition of terrorism.[107] On October 19, 2001, the Ghent European Council called for agreement on this definition to be reached by December 6-7, 2001.[108] At its meeting on December 6-7, 2001, the JHA Council reached a provisional

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100. *See id.* art. 5(3). Article 5 also allows execution to be made conditional for judgments *in absentia* and for offenses punishable by a life sentence. *See id.*

101. Thus again going beyond existing treaty obligations: fiscal offenses are only covered by the European Convention on Extradition "if the Contracting Parties have so decided in respect of any such offense or category of offenses." *See* European Convention on Extradition, *supra* note 16, art. 5. The 1996 EU Extradition Convention requires extradition for "offenses which correspond under the law of the requested Member State to a similar offense," but allows Member States the possibility to limit this to "offenses in connection with excise, value-added tax or customs." 1996 EU Extradition Convention, *supra* note 73, art. 6. However only Greece and, not surprisingly, Luxembourg, have made use of this facility to limit extradition for fiscal offenses. *See* Declaration of Greece and Luxembourg, *available at* http://db.consilium.eu.int/accords/home.asp?lang=en (last visited Dec. 12, 2002).

102. *See* Arrest Warrant Framework Decision, *supra* note 44, art. 27

103. *See id.* art. 28.

104. *See id.* arts. 17, 23.

105. *See id.* arts. 11, 14.

106. *See* Proposal for a Council Framework Decision on Combating Terrorism, 2001 O.J. (C 332/E) 300-304 [hereinafter Proposal for a Council Framework Decision].

107. *See* Conclusions of the Extraordinary European Council, *supra* note 37, para. 2.1.

108. *See* Ghent European Council, *Declaration by the heads of State or Government of the EU and the President of the Commission. Follow-up to the September 11 attacks and the fight against terrorism, available at* http://ue.eu.int. (last visited Apr. 1, 2003)

political agreement on the framework decision, subject to renewed consultation[109] of the European Parliament and to parliamentary scrutiny in Ireland, Sweden, and Denmark.[110] The European Parliament had, after its first consultation, proposed no less than forty-two amendments to the Commission proposal and called for renewed consultations if the Council intended to amend the Commission proposal substantially.[111] After being consulted again, the European Parliament consented with the Council's draft without amendment on February 6, 2002.[112] Given this decision and the withdrawal of all parliamentary scrutiny reservations, the Council finally adopted the decision on June 13, 2002.

The Terrorism Framework Decision harmonizes the Member States' definitions of terrorism and obliges them to criminalize terrorist offenses thus approximated (art. 1), including directing, or participating in, a terrorist group (art. 2), as well as linked offenses (art. 3), and inciting, aiding and abetting and attempting (art. 4). It also obliges them to ensure that legal persons can be held liable for terrorist offenses (art. 7), and are subject to "effective, proportionate and dissuasive penalties," of which it gives some examples (art. 8). Furthermore, the Terrorism Framework Decision sets standards for the penalties to be imposed ("effective, proportionate and dissuasive criminal penalties, which may entail extradition"), including a minimum for the maximum penalties over some of the offenses listed (art. 5). It establishes jurisdictional rules to ensure effective prosecution of these offenses (art. 9). Finally, it contains rules concerning reduced penalties for terrorists who renounce terrorism and cooperate with the authorities to prevent or combat it (art. 6) and relating to the protection of, and assistance to, victims of terrorist offenses (art. 10).

Two particularly important features of the Terrorism Framework Decision merit further attention: its definitions of "terrorist offenses"[113] and of "terrorist group"[114] on the one hand, and its rules on jurisdiction over terrorist

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109. The European Parliament only had to be consulted. *See* EU TREATY, *supra* note 8, art. 39. *See also, supra* text accompanying note 57.

110. Council Doc. 14845/1/01 Rev 1, DROIPEN 103, CATS 49, Dec. 7, 2001, *available at* http://register.consilium.eu.int (last visited Apr. 1, 2003).

111. *See* European Parliament Legislative Resolution on the Commission Proposal for a Council Framework Decision on Combating Terrorism, 2002 O.J. (C 153/E) 275 [hereinafter European Parliament Legislative Resolution]. *See also*, Corresponding Report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, A5-0397/2001, Nov. 14, 2001, *available at* http://www.europarl.eu.int (last visited May 30, 2003) [hereinafter Corresponding Report].

112. *See* European Parliament Legislative Resolution on the Draft Council Framework Decision on Combating Terrorism, 2002 O.J. (C 284E) 192-193. The corresponding report A5-0003/2002, Jan. 9, 2002, *available at* http://www.europarl.eu.int (last visited May 30, 2003), contains no substantive discussion but does include a minority opinion.

113. *See* Terrorism Framework Decision, *supra* note 45, art. 1(1).

114. *See id.* art. 2.

offenses on the other hand.[115] Article 1 of the Terrorism Framework Decision defines 'terrorist offenses' as follows:

> [. . .] intentional acts referred to below in points (a) to (i), as defined as offenses [sic] under national law, which, given their nature or context, may seriously damage a country or an international organisation [sic] where committed with the aim of:
>
> — seriously intimidating a population, or
>
> — unduly compelling a Government or international organization to perform or abstain from performing any act, or
>
> —seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization, shall be deemed to be terrorist offenses:
>
> (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).[116]

115. *See id.* art. 9.
116. *See id.* art. 1.

This definition, which had essentially already been agreed upon in December 2001,[117] is broader than the definition in the Commission proposal in that it contains three disjunctive aims whereas the latter only listed two cumulative aims (i.e. that the offenses be committed "with the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of a country").[118] On the other hand, it only includes the last aim listed when directed against the *fundamental* political, constitutional, economic, or social structures, thereby taking into account to some extent the European Parliament's proposed amendment, which, in its first resolution, called for "political, economic, or social structures of a country" to be replaced by "fundamental freedoms, democracy, respect for human rights, civil liberties and rule of law on which our societies are based."[119] The possibilities of interpreting this definition overly broadly are limited by Article 1.2, which is part of the definition and states "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."[120]

We will not go into detail about the definition of terrorist groups, nor about the provisions on the liability of legal persons,[121] but will merely quote the relevant provision (*i.e.* art. 2):

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117. *See* Council Common Position of Dec. 27, 2001, on the Application of Specific Measures to Combat Terrorism, 2001 O.J. (L 344) 93-96 art. 1(3).

118. Proposal for a Council Framework Decision, *supra* note 106, art. 3(1).

119. European Parliament Legislative Resolution, *supra* note 111. *See also* Corresponding Report, *supra* note 111, amend. 17.

120. Further, the JHA Council stated

> [w]hen defining terrorist aims, the Council opted for a wording that strikes a balance between the need to punish terrorist offenses 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 [sic] movements.

JHA Council Conclusions of Dec. 6 and 7, 2001, *available at* http://ue.eu.int (last visited Apr. 1, 2003).

121. *See* Terrorism Framework Decision, *supra* note 45, art. 7.

> 1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for any of the offenses referred to in Articles 1 to 4 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on one of the following: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; (c) an authority to exercise control within the legal person. 2. Apart from the cases provided for in paragraph 1,each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of any of the offenses referred to in Articles 1 to 4 for the benefit of that legal person by a person under its authority.

Id. Compare International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, art. 5, *available at* http://untreaty.un.org/English/Terrorism/Conv12.pdf (last visited May 15, 2003).

> 1. For the purposes of this Framework Decision, 'terrorist group 'shall mean: a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offenses [sic]. 'Structured group 'shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.
> 2. Each Member State shall take the necessary measures to ensure that the following intentional acts are punishable:
> (a) directing a terrorist group;
> (b) 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.[122]

In respect of jurisdiction, the Terrorism Framework Decision contains rules requiring, or in one case permitting, States to establish jurisdiction over terrorist offenses in certain circumstances and it includes rules on how to deal with positive conflicts of jurisdiction (i.e. cases where more than one member State is competent).

The grounds on the basis of which Member States must assert jurisdiction over terrorist offenses are very broad. Article 9(1) states:

> Each Member State shall take the necessary measures to establish its jurisdiction over the offenses referred to in Articles 1 to 4 where:
> (a) the offense is committed in whole or in part in its territory. Each Member State may extend its jurisdiction if the offense [sic] is committed in the territory of a Member State;
> (b) the offense is committed on board a vessel flying its flag or an aircraft registered there;
> (c) the offender is one of its nationals or residents;
> (d) the offense is committed for the benefit of a legal person established in its territory;
> (e) the offense is committed against the institutions or people of the Member State in question or against an institution of the European Union or a body set up in accordance with the Treaty establishing the European

122. *Compare* 1996 EU Extradition Convention, *supra* note 74, art. 3(4). *See also* Joint action of Dec. 21, 1998, adopted by the Council on the Basis of Article K.3 of the Treaty on European Union, on Making it a Criminal Offense to Participate in a Criminal Organization in the Member States of the European Union, 1998 O.J. (L 351) 1-3.

> Community or the Treaty on European Union and based in that Member State.[123]

Moreover, Article 9.5 states that art. 9 "shall not exclude the exercise of jurisdiction in criminal matters as laid down by a Member State in accordance with its national legislation."[124] In adopting such a broad obligation to establish jurisdiction, the Council went beyond the Commission proposal[125] and followed the European Parliament's suggested amendments[126] in this respect.

Three of the jurisdiction clauses stand out. First, "*Each* Member State may extend its jurisdiction if the offence is committed in the territory of *a* Member State."[127] This is a quite novel provision, allowing for a kind of 'regional universal jurisdiction.'[128] Second, the duty for Member States to establish jurisdiction over terrorist offenses committed abroad not just by their nationals, but also by their residents,[129] also goes beyond what is common in international criminal law instruments.[130] Third, the duty to establish jurisdiction over terrorist offences committed against an EU institution or body which is based in that Member State is also novel.[131]

These broad provisions on jurisdiction will obviously entail many cases where more than one Member State has jurisdiction over the same offence. The Terrorism Framework Decision provides some guidance as to which State is to prosecute in such a case. This is to be decided by consultation, taking sequential account of the following factors: the State in the territory of which the offence has been committed; the State of which the perpetrator has the

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123. *See* Terrorism Framework Decision, *supra* note 45, art. 9(1).

124. *See id.* art. 9.5

125. *See* Proposal for a Council Framework Decision, *supra* note 106, art. 10-12.

126. *See* European Parliament Legislative Resolution, *supra* note 111; *see also* Corresponding Report, *supra* note 111, amends. 39, 40.

127. Terrorism Framework Decision, *supra* note 45, art. 9.1(a) (emphasis added).

128. *See* Jan Wouters & Frederik Naert, *The EU's Criminal Law Approach to Terrorism -What has been achieved so far?*, 6 CHALLENGE EUROPE, *available at* http://www.theepc.be/challenge/topdetail.asp?SEC=documents&SUBSEC=&REFID=621 (last visited Apr. 1, 2003).

129. *See* Terrorism Framework Decision, *supra* note 45, art. 9.1(c).

130. It is a basis for jurisdiction which is, *e.g.*, neither present in the International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, *available at* http://untreaty.un.org/English/Terrorism.asp (last visited May 15, 2003) nor in the International Convention for the Suppression of the Financing of Terrorism (*see supra* note 121) although both of these conventions recognize the residence of a perpetrator as an optional basis for jurisdiction if he/she is stateless (see respectively art. 6.2(c) and art. 7.2(d)).

131. The wording "committed against" seems to imply that the offense must not necessarily have been carried out on the territory of the State concerned (it might *e.g.*, be targeted at an official of the Council who is on mission outside the EU). It should be noted that terrorist offenses against international organizations are included in Articles 1.2 and 2.1(b) of the International Convention for the Suppression of the Financing of Terrorism. *See* International Convention for the Suppression of the Financing of Terrorism, *supra* note 121. Even so, the jurisdictional clauses of this convention do not mention grounds of jurisdiction based on a link with an international organization. *See id.*

nationality or in which he/she is a resident; the State where the victims are from and the State where the perpetrator is found.

Finally, pursuant to Article 9.3,

> Each Member State shall take the necessary measures also to establish its jurisdiction over the offenses referred to in Articles 1 to 4 in cases where it refuses to hand over or extradite a person suspected or convicted of such an offence to another Member State *or to a third country.*[132]

This is an application of the *'aut dedere aut judicare'* principle which has already been laid down in a considerable number of international instruments on terrorism.[133]

3. Other measures

a. Enhancing the role of Europol

The establishment of Europol (the European Police Office) was provided for in Article K.1(9) of the Maastricht Treaty, which envisaged that it would (mainly) serve for the exchange of information in the areas of drug trafficking, terrorism, and other serious forms of international organised crime. Pursuant to this provision, a Europol Drugs Unit was initially set up by a ministerial agreement concluded at the TREVI Ministerial Meeting in Copenhagen on June 2, 1993,[134] and started working in January 1994.[135] Subsequently, in 1995, the Europol Convention was concluded.[136] This convention endows Europol as a separate legal personality[137] with limited treaty-making

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132. *See* Terrorism Framework Decision, *supra* note 45, art. 9.3 (emphasis added).

133. *See, e.g.*, European Convention on the Suppression of Terrorism, *supra* note 19, art. 6-7; International Convention for the Suppression of Terrorist Bombings, *supra* note 130, art. 6-8; International Convention for the Suppression of the Financing of Terrorism, *supra* note 121, art. 7-10.

134. *See* Bull. EC 6-1993, 1.4.19. *See also* WOUTERS & DEVROE, *supra* note 2, at 700-02.

135. See Europol, *The European Police Office - fact sheet, available at* http://www.eurpol.eu.int (last visited Feb. 15, 2003). This unit was later regulated by Joint Action of Mar. 10, 1995, adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the Europol Drugs Unit, 1995 O.J. (L 62) 1-3, which expanded this Unit's competence to illicit trafficking in radioactive and nuclear substances; crimes involving clandestine immigration networks and illicit vehicle trafficking; together with the criminal organizations involved and associated money-laundering activities (art. 2(2)), and Joint Action of Dec. 16, 1996, adopted by the Council on the basis of Article K.3 of the Treaty on European Union extending the mandate given to the Europol Drugs Unit, 1996 O.J. (L 342) 4.

136. Convention on the establishment of a European Police Office, 1995 O.J. (C 316) 2-32 (adopted by Council Act of July 26, 1995, drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office, 1995 O.J. (C 316) 1) [hereinafter Europol Convention].

137. *Id.* art. 26(1)-(2).

capacity,[138] and defines Europol's objective as "improv[ing] [. . .] the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime. . ." where an organized criminal structure is involved and two or more Member States are affected "in such a way as to require a common approach by the Member States. . . ."[139] This convention was entered into force on October 1, 1998, and Europol took up its full activities as of July 1, 1999.[140]

Thus, terrorism is specifically mentioned as a serious crime for which Europol is to have competences. Nevertheless, it was not amongst Europol's original first tasks, which included especially unlawful drug trafficking. Europol was to deal with crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom, or property within two years at the latest following the entry into force of the Europol Convention unless the Council unanimously instructed Europol to deal with such terrorist activities before that period had expired.[141] The Council so instructed Europol in December 1998.[142]

The next step in the development of Europol was the 1997 Treaty of Amsterdam, which amended the EU Treaty so as to confirm a future *operational* role of Europol: the Council was to enable Europol "to facilitate and support the preparation, and to encourage the coordination and carrying out of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity."

Although terrorism is therefore not a new competence for Europol, the organization's role in fighting this form of crime was strengthened after September 11 by the setting up of a terrorism unit within Europol,[143] as well

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138. *Id.* art. 26(3). *See also infra* note 187 and accompanying text.

139. *Id.* art. 2(1).

140. Communication Concerning the Taking Up of Activities of Europol, 1999 O.J. (L 185) 1 (1999).

141. Europol Convention, *supra* note 136, art. 2(2). This was a compromise between those Member States which insisted on granting Europol competences for terrorism (such as Spain) and those who objected to this (such as the United Kingdom). *See* WOUTERS & DEVROE, *supra* note 21, at 702.

142. Council Decision of Dec. 3, 1998, instructing Europol to deal with Crimes committed or likely to be committed in the Course of Terrorist Activities against Life, Limb, Personal Freedom or Property, 1999 O.J. (C 26) 22. Europol was to do so "from the date of taking up its activities in accordance with Article 45(4)," *i.e.*, July 1, 1999. Communication concerning the Taking Up of Activities of Europol, 1999 O.J. (L 185) 1.

143. *See* Conclusions of the JHA Council, Sept. 20, 2001, *supra* note 39, §.10. It may be noted that there existed already a Directory of specialized counter-terrorist competences, skills and expertise to facilitate counter-terrorist cooperation between EU Member States. *See* Joint Action of Oct. 15, 1996, adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the creation and maintenance of a Directory of specialized counter-terrorist competences, skills and expertise to facilitate counter- terrorist cooperation between the Member States of the European Union, 1996 O.J. (L 273) 1-2.

as by additional financing.[144] As we will see below, Europol's capacity to cooperate with authorities of third States, in particular the U.S., has also been enhanced. In addition, although this is not related to terrorism, Europol's competence has been extended to other forms of serious crime.[145] Furthermore, a start has been made in implementing the operational role which the Treaty of Amsterdam assigned to Europol with the Council Framework decision of June 13, 2002, on joint investigation teams.[146] To enable Europol's participation in these joint investigation teams, the Council has drawn up the Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol.[147] Finally, the Commission has very recently submitted a proposal for Europol to take a number of specific measures, in particular setting up a European Union Bomb Data Network, a Communication Network for Special Intervention Units and an Operation Control Centre and developing a common methodology for terrorism threat and risk assessments, to step up and coordinate the fight against terrorism and to provide financing thereof.[148]

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144. Europol Supplementary and Amending Budget for 2002 (New counter-terrorism activities), adopted by the Council on Feb. 28, 2002, 2002 O.J. (C 74) 1-4. *See also infra* note 149 and accompanying text.

145. Council Decision of Dec. 6, 2001, extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention, 2001 O.J. (C 362) 1.

146. Council Framework Decision, 2002 O.J. (L 162), 1-3. In Article 1(12) this decision includes the possibility of participation by bodies set up pursuant to the Treaties, such as Europol, in joint investigation teams set up by Member States. In 2000, the Council had already recommended that "Member States, [...] make full use of the possibilities for Europol support for joint investigative teams." Council Recommendation of Nov. 30, 2000 to Member States in respect of Europol's assistance to joint investigative teams set up by the Member States, 2000 O.J. (C 357) 7-8. The 2000 European Union the Convention on Mutual Assistance in Criminal Matters also contains a provision concerning foresees joint investigation teams. *See* 2000 O.J. (C 197) 13. *See also* Council recommendation of May 8, 2003, on a model agreement for setting up a joint investigation team (JIT), 2003 O.J. (C 121) 1-6.

147. *See* Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, 2002 O.J. (C 312) 2-7. On Europol and joint investigation teams, *see* L. Groffils, et al., *Europol en gemeenschappelijke onderzoeksteams* 27-39 (Gert Vermeulen ed., 2002).

148. Proposal for a Council Decision on the financing of certain activities carried out by Europol in connection with cooperation in the fight against terrorism, COM(02)439 final, 2002 O.J. (C 331/E) 111-114. The European Parliament has approved this proposal without amendments. *See* European Parliament legislative resolution on the proposal for a Council decision on the financing of certain activities carried out by Europol in connection with cooperation in the fight against terrorism, Dec. 5, 2002, provisional version, *available at* http://www.europarl.eu.int (last visited Feb. 15, 2003).

b. Creating Eurojust

Judicial cooperation in criminal matters within the EU, which was first included as an EU objective in the Maastricht Treaty,[149] developed more or less in parallel with police cooperation. On the basis of that same Treaty,[150] a number of conventions were concluded, including the ones on extradition highlighted above.[151] Furthermore, a framework was created to improve judicial cooperation between the Member States through the exchange of liaison magistrates,[152] as well as a European Judicial Network (EJN), which was, *inter alia*, to facilitate the establishment of appropriate contacts between national contact points, organize periodic meetings of the Member States' representatives, and constantly provide a certain amount of up-to-date background information.[153]

The EU Treaty, as amended by the Treaty of Amsterdam, contains more detailed provisions on judicial cooperation in criminal matters in its Article 31. On this basis the Council set up a Provisional Judicial Cooperation Unit,[154] which led to the establishment of Eurojust in February 2002.[155] Eurojust, a 'unit' with legal personality[156] composed of one prosecutor, judge, or police officer, seconded from every Member State, will mainly stimulate and improve the coordination between the competent authorities of the Member States of investigations and prosecutions concerning two or more Member States (or under certain conditions a Member State and a non-Member State) in relation to serious crime, in particular by facilitating the execution of mutual legal assistance and the implementation of extradition requests,[157] has received a

149. EU TREATY (original version), *supra* note 8, art. K.1(7).

150. *Id.* art. K.3.

151. *See supra* notes 68 and 71-73 and accompanying text.

152. Joint Action 96/277/JHA of Apr. 22, 1996, concerning a Framework for the Exchange of Liaison Magistrates to Improve Judicial Cooperation between the Member States of the European Union, 1996 O.J. (L 105) 1-2.

153. Joint Action of June 29, 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, 1998 O.J. (L 191) 4-7.

154. Council Decision of Dec. 14 , 2000, setting up a Provisional Judicial Cooperation Unit, 2000 O.J. (L 324) 2-3.

155. Council Decision of Feb. 28, 2002, setting up Eurojust with a view to reinforcing the fight against serious crime, 2002 O.J. (L 63) 1-13. With regards to financing, amendments to this decision have been proposed by the Commission. *See* Commission Proposal for a Council Decision amending Decision 2002/187/JHA setting up Eurojust with a View to reinforcing the Fight against Serious Crime, COM(02) 406 final, July 17, 2002, 2002 O.J. (C 331/E) 67. The Rules of Procedure of Eurojust are published in 2002 O.J. (C 286), 1-7. On Eurojust, see, e.g., A. Meyfroot et al., *Jurisdictierecht en Coördinatie van Vervolgingen in* ASPECTEN VAN EUROPEES FORMEEL STRAFRECHT 54-68 (Gert Vermeulen ed., 2002) and, specifically concerning terrorism, Michèle Coninsx, *Judicial cooperation in the EU and the fight against terrorism: the role of Eurojust, in* Fijnaut et al., *supra* note 2.

156. Council Decision of Feb. 28, 2002, *supra* note 156, art. 1.

157. *Id.* art. 2, 3.

solid treaty basis in Articles 29 and 31 EU Treaty now that the Treaty of Nice has entered into force.

c. Preventing and disrupting the financing of terrorism

In December 2001, the EC broadened the scope of its 1991 money laundering Directive,[158] which only obliged Member States to prohibit money laundering for drug related offences,[159] to money laundering related to any 'serious crime.'[160] Although, curiously, the amended Directive does not *specifically* mention terrorism as such a serious offence, it is likely to be regarded as such by most Member States.

In respect of the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime, all current EU Member States are party to the 1990 Council of Europe Convention on laundering, tracing, seizure, and confiscation of proceeds of crime.[161] Furthermore, by a Joint Action of 1998 the Member States enhanced their cooperation in this field, *inter alia* by limiting the use of reservations under the above mentioned Council of Europe Convention and by encouraging direct contacts between investigators, investigating magistrates and prosecutors.[162] In June 2001, a Framework Decision was adopted amending this Joint Action and further strengthening cooperation in this area.[163] Moreover, a political agreement has been reached, subject to some parliamentary scrutiny reservations, on a Framework Decision on confiscation of crime-related proceeds, instrumentalities, and property.[164] Furthermore, a Draft Framework Decision on the execution

158. Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, 1991 O.J. (L 166) 77-83.

159. *See id.* art. 1.

160. European Parliament and Council Directive 2001/97/EC amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, 2001 O.J. (L 344) 76-82. *See also id.* pmbl., nos. 7-10.

161. *See* Council of Europe Convention on Laundering, Tracing, Seizure and Confiscation of Proceeds of Crime Nov. 8, 1990, E.T.S. No. 141.

162. Joint Action of Dec. 3, 1998, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds from Crime, 1998 O.J. (L 333) 1-3.

163. Council Framework Decision of June 26, 2001, on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds of Crime, 2001 O.J. (L 182) 1-2.

164. *See* Conclusions of the JHA Council of Dec. 19, 2002, *available at* http://ue.eu.int (last visited May 15, 2003). For the initial proposal, see the Initiative of the Kingdom of Denmark with a View to the Adoption of a Council Framework Decision on Confiscation of Crime-related Proceeds, Instrumentalities and Property, 2002 O.J. (C 184) 3-5. For the latest progress, see EU Council Doc. 5299/03, Jan. 23, 2003, *available at* http://register.consilium.eu.int (last accessed May 29, 2003).

in the European Union of confiscation orders is being negotiated,[165] as well as a Draft Framework Decision on the execution in the European Union of orders freezing property or evidence.[166]

However, it has been pointed out that these more traditional means of fighting crime and its proceeds will not always be effective in the fight against international terrorism, in particular because some international terrorist organizations derive a lot of their funding through legal methods and money laundering is based on the illegal origin of the money.[167] In order to address this problem, the OECD's Financial Action Task Force on Money Laundering (FATF) proposed, in its Special Recommendations on Terrorist Financing, that "Each country should criminalise the financing of terrorism, terrorist acts and terrorist organisations. Countries should ensure that such offenses are designated as money laundering predicate offenses."[168] Yet, as one commentator has remarked, even making terrorist financing a predicate

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165. *See* the Initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders, 2002 O.J. (C 184) 8-14. It appears that the negotiations are rather sensitive, as many of the documents relating to these instruments are not or only partially publicly available in the Council's register. The most recent complete draft which is entirely publicly available in the register is EU Council Doc. 13772/02, Nov. 11, 2002, *available at* http://register.consilium.eu.int (last assessed May 29, 2003). However, this document should be read with amendments put forward in later documents (a search in the register on 'confiscation orders' will list these documents). For the European Parliament's opinion, see European Parliament legislative resolution on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders, Nov. 20, 2002, not yet published in the O.J. but available at http://www.europarl.eu.int.

166. *See* the Initiative by the Governments of the French Republic, the Kingdom of Sweden, and the Kingdom of Belgium for the adoption by the Council of a Framework Decision on the execution in the European Union of Orders Freezing Assets or Evidence, 2001 O.J. (C 75) 3-8. This initial proposal did not cover terrorist offenses. *See id.* art. 2. In its proposed amendments of Sept. 20, 2002, the European Parliament broadened the scope of application to any offense which is punished, under the law of the issuing State, by deprivation of liberty or a detention order for a maximum period of at least six months, which would probably include terrorist offenses in most Member States. *See* the Suggested Amendments and the European Parliament Legislative Resolution on the Initiative by the Governments of the French Republic, the Kingdom of Sweden, and the Kingdom of Belgium for the Adoption by the Council of a Framework Decision on the Execution in the European Union of Orders Freezing Assets or Evidence, 2002 O.J. (C 77/E) 91-94. According to the Legislative Observatory, the subsequent Council proposal did expand the scope of the decision beyond the initial proposal and brought it largely in line with that of the European arrest warrant, which was welcomed by Parliament, which did, however, again suggest some amendments on June 11, 2002. *See* Legislative Observatory, *available at* http://wwwdb.europarl.eu.int/dors/oeil/en/search.shtm (last visited Jan. 2, 2003). The text which looks set to be adopted can be found in Council Doc. 7369/03, COPEN 26, Apr. 15, 2003, see Council Doc. 8258/03, COPEN 36, Apr. 16, 2003, *available at* http://register.consilium.eu.int (last visited May 29, 2003).

167. Michael Kilchling, *Financial Counterterrorism Initiatives in Europe in* Fijnaut et al., *supra* note 2.

168. *See* OECD's Financial Action Task Force on Money Laundering, Special Recommendations on Terrorist Financing, Oct. 31, 2001, *available at* http://www.fatf-gafi.org/SRecsTF_en.htm (last visited May 15, 2003) [hereinafter OECD Special Recommendations].

offence for money laundering is not without difficulty: in particular, it would be difficult to distinguish the financing as a proper and predicate offence on the one hand, and as money laundering on the other hand.[169] The FATF recommendations also propose the freezing of assets of terrorists and the seizure and confiscation of property "that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organizations."[170]

Even before September 11, the EU had not been completely idle in respect of specific action relating to the financing of terrorism. In particular, one may recall that in 1999, the Council urged Member States to intensify their cooperation in combating the financing of terrorist groups, especially through an improved exchange of information.[171] Such exchanges of information in the field of financing of terrorism may benefit from a 2000 Council Decision concerning arrangements for cooperation between financial intelligence units of the Member States.[172]

Obviously, after September 11, more forceful action was taken at the EU level. Article 2 of the Terrorism Framework Decision obliges Member States to criminalize participation in the activities of a terrorist group, including "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,"[173] and the Council Common Position of December 27, 2001, on combating terrorism obliges Member States to criminalize "the wilful provision or collection [...] of funds by citizens or within the territory of each of the [EU Member States] 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" and the freezing of funds of persons or entities involved in terrorism.[174] Additionally, two other legal instruments provide for the freezing of the funds of terrorist persons or entities who are listed by the Council under these separate but related instruments.[175] Finally, ten of the fifteen Member States have ratified

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169. *See* Kilchling, *supra* note 167.

170. *See* OECD Special Recommendations, *supra* note 168 (emphasis added).

171. Council Recommendation of Dec. 9, 1999 on Cooperation in Combating the Financing of Terrorist Groups, 1999 O.J. (C 373) 1.

172. Council Decision of Oct. 17, 2000, Concerning Arrangements for Cooperation between Financial Intelligence Units of the Member States in Respect of Exchanging Information, 2000 O.J. (L 271) 4-6.

173. *See* Terrorism Framework Decision, *supra* note 45, art. 2.

174. Council Common Position of Dec. 27, 2001, on the Application of Specific Measures to Combat Combating Terrorism, 2001 O.J. (L 344), 90-92, arts. 1-3.

175. *Id.* at 93-96 (updated subsequently by Council Common Position of May 2, 2002, updating Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism 2002 O.J. (L 116), 75-77; by Council Common Position of June 17, 2002, updating Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism and Repealing Common Position 2002/340/CFSP, 2002 O.J. (L 160) 32-35; by Council Common Position of Oct. 28, 2002, updating Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism and Repealing Common Position 2002/462/CFSP, 2002 O.J. (L 295) 1-4 and by Council Common Position of Dec. 12, 2002,

the International Convention for the Suppression of the Financing of Terrorism[176] and the other five have signed it.[177]

d. Other measures

We cannot give an exhaustive list here of all other measures adopted. However, we would like to mention the Council Decision on the implementation of specific measures for police and judicial cooperation to combat terrorism,[178] the EU's creation of a mechanism for peer evaluation of the national arrangements in the fight against terrorism within the framework of international cooperation between Member States[179] and of a common scale for assessing threats for visiting public figures.[180]

4. EU-U.S. cooperation[181]

International cooperation in the fight against international terrorism in the area of criminal law, including police and judicial cooperation, is obviously not limited to cooperation between Member States but also extends to cooperation between the EU Member States on the one hand and third States on the other. While the U.S. is not the only third State relevant in this

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updating Common Position 2001/931/CFSP on the Application of Specific measures to Combat Terrorism and Repealing Common Position 2002/847/CFSP, 2002 O.J. (L 337), 93-96 and Council Regulation (EC) No. 2580/2001 on Specific Restrictive Measures directed against Certain Persons and Entities with a View to Combating Terrorism, 2001 O.J. (L 344) 70-75 amended by Commission Regulation (EC) No 745/2003 of Apr. 28, 2003, amending Council Regulation (EC) No 2580/2001 on specific measures directed against certain persons and entities with a view to combating terrorism, 2003 O.J. (L 106), 22-23 and as currently implemented by Council Decision of Dec. 12, 2002, 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 Council Decision 2002/848/EC, 2002 O.J. (L 337) 85-86). The list established pursuant to the former instrument includes EU-based terrorist organizations (such as ETA and several (Northern) Irish groups), whereas that established pursuant to the latter does not.

176. *See* International Convention for the Suppression of the Financing of Terrorism, *supra* note 121.

177. *See* U.N.T.S., *available at* http://untreaty.un.org (last visited May 30, 2003).

178. Council Decision of Dec. 19, 2002, on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP, 2003 O.J. (L 16), 68-70.

179. Council Decision of Nov. 28, 2002, establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism, 2002 O.J. (L 349) 1-3.

180. *See also* Council Recommendation of Dec. 6, 2001, setting a common scale for assessing threats to public figures visiting the European Union, 2001 O.J. (C 356) 1-2.

181. *See generally* Dorine Dubois, *The Attacks of 11 September: EU-U.S. Cooperation in the Field of Justice and Home Affairs*, 7 EUROPEAN FOREIGN AFFAIRS REVIEW 317, 317-35 (2002).

respect, it is certainly the most important one and we will therefore examine the EU-U.S. cooperation in some more detail.

Despite their essentially similar political and economic system and their many shared fundamental values, the EU and U.S. do not always manage to cooperate well in the field of international criminal law. This is most visible in respect of the International Criminal Court, but it goes beyond that. For instance, the differences over the death penalty (and 'death row') have led to obstacles for extradition from EU Member States (and other European countries, in particular those party to the ECHR) to the U.S. Even differing standards of data protection cause problems for Transatlantic cooperation.[182]

September 11 has provided an incentive to attempt to overcome some of these obstacles. Moreover, it appears to have prompted a more unified EU response: whereas cooperation in the field of international criminal law traditionally takes place between individual Member States and the U.S. (although common European standards increasingly limit the margin of action for individual Member States), there are now initiatives to adopt EU-U.S. agreements and create increasing contacts between EU organs and U.S. authorities.

Thus, an agreement has been concluded between Europol and the U.S. on December 11, 2001, the purpose of which is "to enhance the cooperation of the [EU] Member States, acting through Europol, and the [U.S.] in preventing, detecting, suppressing, and investigating serious forms of international crime in the areas mentioned in Article 3,[183] in particular through

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182. *Id.* at 331-32. The European standards are mainly set out in the following instruments: Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Jan. 28, 1991, E.T.S. No. 108. All EU Member States are a party to this Convention. *See* Council of Europe Treaty Office, *available at* http://conventions.coe.int (last visited Jan. 22, 2003); Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, Nov. 8, 2001, E.T.S. No. 181 (not yet entered into force but has been signed by eleven EU Member States and ratified by two (Germany and Sweden)). *See* Council of Europe Treaty Office, *available at* http://conventions.coe.int (last visited May 30, 2003) and Council of Europe Recommendation R (87) 15 of the Committee of Ministers to Member States Regulating the Use of Personal Data in the Police Sector, Sept. 17, 1987, *available at* http://cm.coe.int/ta/rec/1987/87r15.htm (last visited May 15, 2003). *See also* European Parliament and Council Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281) 31–50. The latter instrument does, however, not apply to the processing of personal data in the field of JHA and criminal law. *See id.* Article 3(1) states:

> This Directive shall not apply to the processing of personal data in the course of an activity which falls outside the scope of Community law, such as those provided for by tits. V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence [sic], State security [...] and the activities of the State in areas of criminal law. . . .

Id.

183. Article 3 of the agreement (*infra* note 185) lists a number of crimes covered, including "crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property". *Id.*

the exchange of strategic and technical information."[184] This agreement also provides for contact points and liaison officers.[185] In fact, Europol has established a liaison office in the U.S.[186] The above mentioned differences in data protection standards have entailed longer negotiations on a similar agreement on the exchange of personal data, which was excluded from the first agreement.[187] This second agreement was concluded on December 20, 2002.[188] Furthermore, negotiations have also been opened on a cooperation agreement between Eurojust and the relevant U.S. authorities[189] and there is a U.S. liaison magistrate to Eurojust.[190]

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184. Agreement between the United States of America and the European Police Office, Council Doc. 13359/01 EUROPOL 82, Oct. 31, 2001, art. 1, *available at* http://register.consilium.eu.int (last visited Feb. 15, 2003). *See also* Council Doc. 13364/01 EUROPOL 83, Nov. 23, 2001, *available at* http://register.consilium.eu.int (last visited Feb. 15, 2003); Europol, *USA and Europol join forces in fighting terrorism*, Dec. 11, 2001, *available at* http://www.europol.eu.int (last visited May 15, 2003). *See also* Dubois, *supra* note 181, at 329.

185. *See* Agreement between the United States of America and the European Police Office, *supra* note 184, art. 4, 8.

186. *See* Europol, *Europol opens liaison office in Washington D.C.*, Aug. 30, 2002, *available at* http://www.europol.eu.int (last visited May 15, 2003). On Europol's relations with third States and third bodies, *see* Europol Convention, *supra* note 136, art. 42; Council Act of Nov. 3, 1998, laying down rules governing Europol's external relations with Third States and Non-European Union related Bodies, 1999 O.J. (C 26) 19-20 and Act of the Management Board of Europol of Oct. 15, 1998, laying down the Rules governing Europol's External Relations with European Union-related Bodies, 1999 O.J. (C 26) 89-90. *See also* Council Decision of Mar. 27, 2000, authorizing the Director of Europol to enter into Negotiations on Agreements with Third States and non-EU related Bodies, 2000 O.J. (C 106) 1 (amended by Council Decision of Dec. 6, 2001, 2001 O.J. (C 358) 1 and Council Decision of June 13, 2002, 2002 O.J. (C 150) 1).

187. *See* Agreement between the United States of America and the European Police Office, *supra* note 184, art. 1 *in fine*.

188. Supplemental Agreement between the United States of America and the European Police Office on the Exchange of Personal Data and Related Information, Council Doc. 15231/02 EUROPOL 104, Dec. 5, 2002, *available at* http://register.consilium.eu.int (last visited Feb. 15, 2003). Informal explanatory notes, which may not reflect the final text in all respects, may be found in Council documents 13696/02 EUROPOL 83, Nov. 4, 2002 and 13696/1/02 EUROPOL 83, Nov. 28, 2002, also both *available at* http://register.consilium.eu.int (last visited Feb. 15, 2003). *See also U.S. and Europol sign a second cooperation agreement*, Dec. 20, 2002, *available at* http://www.useu.be (last visited May 15, 2003); Europol, *USA and Europol sign a full co-operation agreement*, Dec. 20, 2002, *available at* http://www.europol.eu.int (last visited May 15, 2003). For a criticism of this agreement, see S. Peers, *Analysis of the Supplementary Agreement between Europol and United States, Statewatch analysis No. 15*, Nov. 2002, *available at* http://www.statewatch.org/news/2002/nov/analy15.pdf (last visited May 15, 2003). On data protection standards and the communication of data to third States and third bodies see Europol Convention, *supra* note 136, arts. 14, 18; Council Act of Mar. 12, 1999, adopting the Rules governing the Transmission of Personal Data by Europol to Third States and Third Bodies, 1999 O.J. (C 88) 1-3 (1999) (amended by Council Act of Feb. 28, 2002, amending the Council Act of Mar. 12, 1999, adopting the Rules governing the Transmission of Personal Data by Europol to Third States and Third Bodies, 2002 O.J. (C 76) 1-2); Council Act of Nov. 3, 1998, laying down rules concerning the Receipt of Information by Europol from Third Parties, 1999 O.J. (C 26) 17-18.

189. *See* Commission Briefing of Sept. 9, 2002, *supra* note 35.

190. Dubois, *supra* note 181, at 328.

Moreover, the EU and the U.S. are negotiating an agreement on EU-U.S. cooperation in criminal law matters, in particular extradition and mutual legal assistance. The mandate given to the EU's Presidency[191] by the JHA Council in April 2002, was the following:

> The negotiating mandate covers in particular, extradition, including the temporary surrender for trials and mutual legal assistance including exchange of data, the setting up of joint investigation teams, the giving of evidence (via video conference) and the establishment of single contact points.
>
> As regards extradition, the Union will make any agreement on extradition conditional on the provision of guarantees on the non-imposition of capital punishment sentences, and the securing of existing levels of constitutional guarantees with regards to life sentences.
>
> The future agreement should in all cases safeguard the efficiency of the existing bilateral agreements between the Member States and the USA.[192]

Some of the most difficult issues in these negotiations will undoubtedly be the death penalty, although that issue may be resolved by guarantees that a possible death sentence would not be carried out, and trial by military commissions.[193]

Nevertheless, it appears that the EU and the United States are very close to concluding this agreement: according to the conclusions of the JHA Council of May 8, 2003:

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191. The EC Treaty, Article 203 states "[t]he office of President [usually referred to as 'the Presidency'] shall be held in turn by each Member State in the Council for a term of six months in the order decided by the Council acting unanimously." *Id.* The Presidency has an important function in the external representation of the EU, in particular under the CFSP, and is assisted by the Secretary-General of the Council who shall exercise the function of High Representative for the common foreign and security policy (at present Javier Solana). *See* EU TREATY, *supra* note 8, art. 18.

192. *See* Conclusions JHA Council of Apr. 25-26, 2002, *available at* http://ue.eu.int (last visited May 15, 2003). For some information as to how these negotiations are taking place, see Dubois, *supra* note 181, at 329-30.

193. *See, e.g.*, the objections raised by the European Parliament in its European Parliament Resolution of Dec. 13, 2001, on EU Judicial Cooperation with the United States in Combating Terrorism, 2002 O.J. (C 177/E) 288-290, 3. With respect to military commissions, it is noteworthy that, according to the Conclusions JHA Council, "[b]oth parties respect the right to a fair trial by an impartial tribunal established pursuant to law." Conclusions JHA Council, Feb 27/28, 2003, *available at* http://ue.eu.int (last visited May 15, 2003). On the likely compromise over the death penalty, the JHA Council conclusions state that "[t]he draft agreement contains a provision that prohibits extradition if the death penalty will be imposed or executed." *Id. See also* U.S. mission to the EU, *Death penalty no block to EU-U.S. extradition, U.S. says*, Mar. 22, 2002, *available at* http://www.useu.be (last visited May 15, 2003).

> The Presidency [. . .] informed delegations that the Justice and Home Affairs Council should take the decision authorizing the Presidency to sign the draft Agreements at its next meeting on 5-6 June 2003, with a view to sign them in the context of the EU-U.S. Summit which will be held on 25 June 2003 in Washington.[194]

B. External relations[195]

In the area of external relations, the EU has also been quite active in combating terrorism. In the September 21, 2001, Extraordinary European Council conclusions, the EU stated that its CFSP will have to integrate further the fight against terrorism and the European Council asked the General Affairs Council to systematically evaluate the EU's relations with third countries in the light of the support which those countries might give to terrorism. We will focus here on the most prominent aspects of EU action in this area.

First of all, the EU has strongly supported the U.S. in its initial reaction to September 11, i.e. the military campaign against Afghanistan and the steps taken within the UN, in particular in the UN Security Council. At the September 21, 2001, Extraordinary European Council, the EU stated that "[o]n the basis of Security Council Resolution 1368, a riposte by the U.S. is legitimate. The Member States of the Union are prepared to undertake such actions, each according to its means. The actions must be targeted and may also be directed against States abetting, supporting or harbouring terrorists."[196]

The thirteen States which are candidates for accession to the EU also aligned themselves with these conclusions.[197] Thus the EU, like NATO[198] and

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194. Conclusions JHA Council, May 8, 2003, *available at* http://ue.eu.int (last visited May 30, 2003). The most recent draft text of the agreement, which seems to be the one likely to be adopted, is contained in EU Council Doc. 8295/03 CATS 20 USA 29, Apr. 9, 2003, *available at* http://register.consilium.eu.int (last visited May 30, 2003).

195. *See generally* Benoit Loïck, *La lutte contre le terrorisme dans le cadre du deuxième pilier: un nouveau volet des relations extérieures de l'Union européenne*, REVUE DU DROIT DE L'UNION EUROPÉENNE 283, 283-13 (2002); Simon Duke, *CESDP and the EU Response to 11 September: Identifying the Weakest Link*, 7 EUROPEAN FOREIGN AFFAIRS REVIEW 153, 153-69 (2002).

196. Conclusions of the Extraordinary European Council, *supra* note 37.

197. Press release by the Belgian Presidency, Sept. 22, 2001 [on file with author].

198. Which, for the first time in its history, invoked art. V of the North Atlantic Treaty, *i.e.* the mutual assistance provision. Already on Sept. 12, 2001, the North Atlantic Council, NATO's main decision-making body, adopted a declaration stating "if it is determined that this attack was directed from abroad against the United states, it shall be regarded as an action covered by Article 5 of the Washington Treaty, [...]." NATO, Sept. 12, 2001, *available at* http://www.nato.int (last visited May 15, 2003)). Subsequently, on Oct. 2, 2001, Lord Robertson, NATO's Secretary-General, announced that "it has now been determined that the attack against the United States on September 11 was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty" Lord Robertson's Statement, *available at* http://www.nato.int (last visited May 15, 2003).

the OAS,[199] supported the (legality of the) military campaign against Afghanistan by the U.S. and a number of its allies.[200] Moreover, in line with the September 21 conclusions, *individual Member States* joined the U.S.-led military campaign.[201] The EU *as such* did, however, not take part militarily in this campaign (we will come to the reasons for that in our assessment below), although it did take action on the military plain by making the (Common) European Security and Defence Policy ((C)ESDP), i.e. the EU's military and civilian crisis management mechanism,[202] operational[203] and by adopting a

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199. *See especially Terrorist Threat to the Americas*, OEA/Ser.F/II.24, RC.24/RES.1/01, Sept. 21, 2001, *available at* http://www.oas.org (last visited May 15, 2003); *Support for the measures of individual and collective self-defence established in resolution RC.24/RES. 1/01*, OEA/Ser.F/II.24, CS/TIAR/RES. 1/01, Oct. 16, 2001, *available at* http://www.oas.org (last visited May 15, 2003).

200. This support was repeatedly confirmed, see, e.g., by the General Affairs Council on Oct. 8, 2002, (conclusions *available at* http://ue.eu.int (last visited May 15, 2003)). *See also* Conclusions Ghent European Council, Oct. 19, 2001, *available at* http://ue.eu.int (last visited May 15, 2003). "The European Council confirms its staunchest support for the military operations which began on 7 October and which are legitimate under the terms of the United Nations Charter and of Resolution 1368 of the United Nations Security Council." *Id.*

201. EU Countries which provided combat troops taking active part in 'operation enduring freedom' include the UK, Denmark, and Germany, and the UK and France have taken part in the air campaign in this operation. Other EU Member States provided various other contributions. *See* Coalition Information Centre, *Campaign Against Terrorism. A Coalition Update*, Mar. 11, 2002, *available at* http://www.fco.gov.uk (last visited May 15, 2003); U.S. mission to the EU, fact sheets dated Feb. 26, May 23, June 7 and 14, and Oct. 24, 2002, *available at* http://www.useu.be (last visited May 15, 2003).

202. The TREATY OF AMSTERDAM enabled the development of CESDP. *See* EU TREATY, *supra* note 8, arts. 2, 17 (before amended by the Treaty of Nice). On the basis of these EU Treaty provisions, the CESDP was launched at the EU level (following a 1998 French-British initiative) at the Cologne European Council of June 1999. *See* Conclusions Cologne European Council Summit, §§ 55-56, Annex III, *available at* http://ue.eu.int (last visited May 15, 2003). It has subsequently developed and the progress made is codified in the EU Treaty by the Treaty of Nice. *See* EU TREATY, *supra* note 8, art. 17. The CESDP does not include collective defense but 'only' covers crisis management, in particular "humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking." *Id.* art. 17(2). *See also infra* notes 306 and following and accompanying text. For a thorough overview and analysis of the CESDP, see SIMON DUKE, THE EU AND CRISIS MANAGEMENT DEVELOPMENT AND PROSPECTS (2002).

203. The ESDP was declared operational, albeit in a limited manner, by the 'Declaration on the Operational Capability of the Common European Security and Defence Policy, adopted at the Laeken European Council on Dec. 14-15, 2001, Annex II, *available at* http://ue.eu.int (last visited May 15, 2003). The General Affairs and External Relations Council of May 19-20, 2003, declared ESDP more or less fully operational by stating that

> the Council confirmed that the EU now has operational capability across the full range of Petersberg tasks, limited and constrained by recognized shortfalls. These limitations and/or constraints are on deployment time and high risk may arise at the upper end of the spectrum of scale and intensity, in particular when conducting concurrent operations. These limitations and constraints on full achievement of the Headline and Capability Goals could be alleviated if the recommendations on meeting the shortfalls are followed-up.

Conclusions, *available at* http://ue.eu.int (last visited May 30, 2003).

'Declaration on the contribution of CFSP, including ESDP, in the fight against terrorism.'[204]

Furthermore, the EU has contributed a substantial amount of humanitarian aid to Afghanistan and has pledged major financial support for reconstruction in Afghanistan.[205] It has also flexed its diplomatic muscle to help assemble a wide international coalition in the fight against terrorism. In particular, on October 17, 2001, the General Affairs Council decided to intensify the EU's relations with the countries neighbouring Afghanistan and with the Central Asian countries, to continue a political dialogue with the Arab countries and to aim to relaunch the middle East peace process.[206] In this context, a series of visits, in various compositions (including by Heads of Government or foreign ministers of Member States), to these regions took place. Maintaining close contacts with Afghanistan's neighbours is also part of the mandate of the EU Special Representative for Afghanistan.[207] Furthermore, the EU has rewarded some countries for their efforts in combating terrorism, *e.g.*, by granting them increased financial assistance and/or trade concessions and/or by concluding (or starting to negotiate) agreements to that effect with such countries.[208]

However, even as it was providing such strong support, the EU strongly stressed the important role of the UN in the fight against international terrorism. For instance, in the September 21, 2001, Extraordinary European Council conclusions it is also stated that the EU "calls for the broadest possible global coalition against terrorism, *under United Nations aegis.*"[209] Pursuant to its general support for multilateral institutions, in particular the UN,[210] the EU has adopted a constructive stance towards fighting terrorism both in the

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204. *See* Seville European Council Conclusions, June 21-22, 2002, Annex V, *available at* http://ue.eu.int (last visited May 15, 2003).

205. For details, *see The EU's relations with Afghanistan, available at* http://europa.eu.int/comm/external_ relations/afghanistan/intro/index.htm (last visited May 15, 2003).

206. *See* Conclusions General Affairs Council, Oct. 17, 2001, *available at* http://ue.eu.int (last visited May 15, 2003). The aim to restart the Middle East peace process was in fact already mentioned in the conclusions of the Sept. 21, 2001 European Council.

207. *See initially* Council Joint Action of Dec. 10, 2001, Concerning the Appointment of the Special Representative of the European Union, 2001 O.J. (L 326) 1-2, art. 2(d) and *later* Council Joint Action of Dec. 10, 2002, amending and extending the mandate of the Special Representative of the European Union in Afghanistan, 2002 O.J. (L 334) 3, art. 3(c).

208. This concerns in particular Pakistan, Iran, and Afghanistan. *See* Commission briefing of Sept. 9, 2002, *EU action in response to 11th September 2001: one year after*, *supra* note 35. *See, e.g.*, Council Decision of Dec. 17, 2001, on the signing, on behalf of the Community, and provisional application of an Agreement in the form of a Memorandum of Understanding between the European Community and the Islamic Republic of Pakistan on transitional arrangements in the field of market access for textile and clothing products and the Memorandum of Understanding between the European Community and the Islamic Republic of Pakistan on transitional arrangements in the field of market access for textile and clothing products, Oct. 15, 2001, 2001 O.J. (L 345) 80 and 81-90.

209. Conclusions of the Extraordinary European Council, *supra* note 37 (emphasis added).

210. EU TREATY, *supra* note 8, art. 11 requires that the EU respect "the principles of the [UN] Charter." *Id.*

Security Council and the General Assembly. In particular, the EU and its Member States have first of all themselves implemented the relevant Security Council resolutions.[211] Secondly, the EU has also offered other countries assistance in the implementation of these resolutions, in particular Resolution 1373,[212] and is already providing such assistance.[213] Likewise, the EU has been actively seeking to reach agreement on a comprehensive anti-terrorism Convention at UN Level.[214]

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211. For implementation by the EU, see especially the instruments cited *supra* in notes 169-170 and, in respect of the Taliban and Al-Qaida, Council Common Position of Nov. 15, 1999, concerning restrictive measures against the Taliban, 1999 O.J. (L 294) 1 and Council Common Position of Feb. 26, 2001, concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP, 2001 O.J. (L 57) 1-2 (amended by Council Common Position of Nov. 5, 2001, concerning restrictive measures against the Taliban and amending Common Positions 1996/746/CFSP, 2001/56/CFSP and 2001/154/CFSP, 2001 O.J. (L 289), 36 both repealed by Council Common Position of May 27, 2002, concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organization 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, 2002 O.J. (L 139) 4-5 as amended by Council Common Position of Feb. 27, 2003, concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP, 2003 O.J. (L 53) 62). The Common Position of May 27, 2002, as amended by Common Position of Feb. 27, 2003, is currently implemented by 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 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, 2002 O.J. (L 139), 9-22 (last amended (at the time of writing) by Commission Regulation (EC) by Council Regulation (EC) No. 561/2003 of Mar. 27, 2003 amending, as regards exceptions to the freezing of funds and economic resources, 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, 2003 O.J. (L 082), 1-2 and Commission Regulation (EC) No. 866/2003 amending for the 18th time Council Regulation (EC) No. 881/2003 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, 2003 O.J. (L 124) 19-22). In fact, the EU as such has submitted two reports to the Security Council Counter-Terrorism Committee in addition to the reports submitted by its Member States. *See* EU Report, *available at* http://www.un.org/Docs/sc/committees/1373/1373reportsEng.htm (last visited May 15, 2003).

212. U.N. SCOR, 56th Sess., 4385th mtg., UN Doc. S/RES/1373, (2001).

213. *See* Declaration on the contribution of CFSP, including ESDP, in the fight against terrorism, *supra* note 202, § 4; the supplementary report of the EU to the Security Council Counter-Terrorism Committee, UN Doc. S/2002/928, 7, *available at* http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/533/27/PDF/N0253327.pdf?OpenElement (last visited May 15, 2003) and, for more detailed information, the EU document 'EC external assistance: UN Security Council Resolution 1373', Feb. 25, 2002, *available at* http://europa-eu-un.org (last visited May 15, 2003).

214. *See, e.g.*, Conclusions of the Extraordinary European Council, *supra* note 37, para. 2.4. For a detailed discussion of the EU's position on such a comprehensive treaty, see P. Rietjens, *Reviewing the UN conventions on terrorism. Towards a comprehensive terrorism convention: Role and attitude of the EU*, *in* Fijnaut et al., *supra* note 2.

As mentioned above, the EU has declared that it would include terrorism in its relations with all third countries. This has already led to some results. We have, *e.g.*, already mentioned above the JHA aspects of the enhanced EU-U.S. cooperation in this respect and EU support for the coalition against international terrorism.[215] There are many other examples. For instance, the EU is including anti-terrorism clauses in its agreements with third States,[216] such as Article 90 of the EU-Algeria agreement, which states that "Parties agree to cooperate with a view to preventing and penalising acts of terrorism" and provides a number of means to do so, including "the implementation in its entirety of United Nations Security Council resolution 1373 and other related resolutions."[217] The EU has also stressed cooperation in the fight against international terrorism in Joint Declarations with several countries, regional groupings or organizations.[218]

Finally, the EU has adopted a comprehensive approach to fighting terrorism: "The [EU] will step up its action against terrorism through a coordinated and inter-disciplinary approach embracing all Union policies."[219] The EU has recognized that this also requires a solution for underlying problems: "[t]he fight against terrorism requires of the Union that it play a greater part in the efforts of the international community to prevent and stabilise regional conflicts," and "[t]he integration of all countries into a fair

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215. In the immediate aftermath of September 11, the EU and U.S. stated: "We will mount a comprehensive, systematic and sustained effort to eliminate international terrorism." Joint U.S.-EU Ministerial statement on Combating Terrorism, Washington, Sept. 20, 2001, *available at* http://europa.eu.int/comm/external_relations/us/news/minist_20_09_01.htm (last visited May 15, 2003).

216. See Declaration on the contribution of CFSP, including ESDP, in the fight against terrorism, *supra* note 202, § 4.

217. Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, Council Doc. 6786/02, Apr. 12, 2002, *available at* http://europa.eu.int/comm/external_relations/algeria/docs/index.htm (last visited May 15, 2003). A similar clause is contained in the EU-Chile agreement. *See* Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, Nov. 18, 2002, 2002 O.J. (L 352) 3, art. 15 (approved on behalf of the EC by Council Decision of Nov. 18, 2002, on the signature and provisional application of certain provisions of an Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part).

218. *See, e.g.*, the Statement at the occasion of the Third EU-India Summit, Copenhagen, Oct. 10, 2002, *available at* http://europa.eu.int/comm/external_relations/india/sum10_02/stat.htm (last visited May 15, 2003); Press Release First Mexico-EU Summit in Madrid on May 18, 2002, *available at* http://europa.eu.int/comm/external_relations/mexico/intro/ma05_02.htm (last visited May 15, 2003); Joint Communique issued at the 12th GCC-EU Joint Council / Ministerial Meeting, Granada, Feb. 27-28, 2002, *available at* http://europa.eu.int/comm/external_relations/gulf_cooperation/intro/12thgcc_eu.htm (last visited May 15, 2003) and the Declaration on Cooperation against International Terrorism, included in the conclusions of the fourth Asia-Europe Meeting (ASEM) Summit, Copenhagen, Sept. 22-24, 2002, *available at* http://europa.eu.int/comm/external_relations /asem/asem_summits/asem4/1.htm (last visited May 15, 2003).

219. Conclusions of the Extraordinary European Council, *supra* note 37.

world system of security, prosperity and improved development is the condition for a strong and sustainable community for combating terrorism."[220] This was repeated at the first anniversary of September 11: "We will [. . .] seek to build a just international order that promotes peace and prosperity for all."[221]

In line with this approach, the EU has taken some steps to address the root causes of terrorism. In particular, the European Council has

> note[d] with satisfaction the Council's undertaking to examine the means and the timeframe for each Member State's achievement of the UN official development aid target of 0,7% of GNP and its commitment to continuing its efforts to improve development cooperation instruments, particularly in the countries affected by crisis or conflict.[222]

It has also committed itself to enhance the cultural dialogue with other civilizations[223] and to "devoting greater efforts to conflict prevention."[224] Furthermore, the EU is taking a positive stance in the World Trade Organization's Doha Development Round, including on cheap access to medicines for developing countries.[225] Finally, one should take note in this context of some EU measures predating September 11, such as the 'Everything But Arms' initiative, adopted in February 2001, which gradually abolishes all

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220. *Id.*

221. Declaration by Heads of State and Government of the European Union, the President of the European Parliament, the President of the European Commission, and the High Representative for the Common Foreign and Security Policy, Sept. 11, 2002, *available at* http://europa.eu.int/comm/external_relations/110901/jnt_dec_09_02.htm (last visited May 15, 2003).

222. Conclusions of the Laeken European Council, § 54, *available at* http://ue.eu.int (last visited May 15, 2003).

223. *See, e.g.*, Declaration, *supra* note 221. "The terrorist attacks of 11 September have given rise to the most comprehensive international cooperation in decades . . . . This unique solidarity must be sustained and supported, also through dialogue of cultures." *Id.*

224. *See* Declaration on the contribution of CFSP, including ESDP, in the fight against terrorism, *supra* note 202, § 7. Conflict prevention has been an EU priority for some years now, see in particular the EU Program for the prevention of violent conflicts, approved by the European Council of Göteborg, June 16, 2001. See Conclusions European Council Meeting June 16, 2001, Annex, *available at* http://ue.eu.int (last visited May 15, 2003); Commission Communication on Conflict Prevention, COM(01) 211final.

225. *See, e.g., EU seeks to break the current deadlock on WTO access to medicines: a multilateral solution is needed*, Jan. 9, 2003, *available at* http://europa.eu.int/comm/trade/csc/pr090103_en.htm (last visited May 15, 2003). *See generally Trade and Development. Access to essential medicines: Next steps in our dialogue*, *available at* http://europa.eu.int/comm/trade/csc/med.htm (last visited May 15, 2003).

import duties for all products originating in the least developed countries[226] and should boost their exports significantly.[227]

C. Other Measures

Other EU actions taken with relevance for the fight against terrorism include mainly measures to prepare against bacteriological, chemical, radiological and nuclear terrorism and measures in the field of air transport security.

1. Measures concerning bacteriological, chemical, radiological and nuclear terrorism[228]

Cooperation on civil protection is not new within the EU.[229] In particular, the EU already had some mechanisms in place before September 11 in respect of civil protection and disease control, namely the Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions (Community Civil Protection Mechanism),[230] although this was

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226. Council Regulation (EC) No. 416/2001 amending Regulation (EC)No. 2820/98 applying a multiannual scheme of generalized tariff preferences for the period July 1, 1999, to Dec. 31, 2001, so as to extend duty-free access without any quantitative restrictions to products originating in the least developed countries, 2001 O.J. (L 60), 43-50. *See also EU's Generalised System of Preferences, available at* http://europa.eu.int/ comm/trade/miti/devel/ eba.htm (information on this initiative) (last visited Feb. 15, 2003).

227. It has reportedly been estimated by the World Bank that this initiative could result in a 15-20% annual growth in the exports of least developed countries, increasing their exports by around five billion Euro per year: see Pascal Lamy, *From Doha to Cancun*, June 5, 2002, *available at* http://europa.eu.int/comm/trade/speeches_ articles/spla109_en.htm (last visited Feb. 15, 2003).

228. For an overview, see *EU actions: Emergency preparedness, available at* http://europa.eu.int/news/110901/civil.htm (last visited May 15, 2003).

229. Action relating to civil protection was incorporated in Article 3(t) of the EC Treaty by the Maastricht Treaty, although the EC was not granted any specific powers to take measures in this field, and could thus only do so on the basis of the former Article 235 EC Treaty (now EC Treaty art. 308), which states:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

DEVROE & WOUTERS, *supra* note 21, at 560-61. The Treaty of Amsterdam only changed the numbering of the relevant article to EC TREATY, *supra* note 7, art. 3.1(u). For initiatives in the field of civil protection predating the Maastricht Treaty. *See* DEVROE & WOUTERS, *supra* note 21, at 560-61.

230. Community Civil Protection Mechanism is established by Council Decision of Oct. 23, 2001, establishing a Community Mechanism to facilitate reinforced Cooperation in Civil Protection Assistance Interventions, 2001 O.J. (L 297) 7-11. *See also* Council Decision 1999/847/EEC establishing a Community action program in the field of civil protection, 1999 O.J. (L 327) 53-57. This Council Decision established a Community action program in the field

only to enter into force on January 1, 2002,[231] and the network for the epidemiological surveillance and control of communicable diseases in the Community (hereinafter 'Communicable Diseases Network').[232]

The general purpose of the Community Civil Protection Mechanism is to provide, on request, support in the event of major emergencies, or the imminent threat thereof and to facilitate improved coordination of assistance intervention provided by the Member States and the Community.[233] In order to do so, the Commission was, *inter alia*, to

> (a) establish and manage a monitoring and information centre accessible and able to react immediately 24 hours a day and serving the Member States and the Commission for the purposes of the mechanism;
> (b) establish and manage a reliable common emergency communication and information system to enable communication and sharing of information between the monitoring and information centre and the contact points designated for that purpose by the Member States;
> (c) establish the capability to mobilise and dispatch, as quickly as possible, small teams of experts responsible for
> - assessing the situation for the benefit of the Member States, the monitoring and information centre and the State requesting assistance
> - facilitating, when necessary, coordination of assistance operations on site and liaising, when necessary and appropriate, with the competent authorities of the State requesting assistance;
> (d) set up a training programme, with a view to improving the coordination of civil protection assistance intervention by ensuring compatibility and complementarity between the intervention teams . . . or as appropriate other intervention support . . ., and by improving the competence of experts for assessment.
> (e) pool information on the capabilities of the Member States for maintaining a production of serums and vaccines or other necessary medical resources and on the stocks which might be available for intervention in the event of a major

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of civil protection for the period Jan. 1, 2000, to Dec. 31, 2004. *See id.* art. 1.

231. Council Decision of Oct. 23, 2001, *supra* note 230, art. 11.

232. European Parliament and Council Decision 2119/98/EC setting up a Network for the Epidemiological Surveillance and Control of Communicable Diseases in the Community, 1998 O.J. (L 268) 1-7. For later relevant decisions, see *infra* notes 237-239.

233. Council Decision of Oct. 23, 2001, *supra* note 230, art. 1.

emergency and compile this information in the information system;[234]

The Communicable Diseases Network has as its objective "to promote cooperation and coordination between the Member States, with the assistance of the Commission, with a view to improving the prevention and control, in the Community, of the [specified] categories of communicable diseases" and is to be used for "the epidemiological surveillance of these diseases, and an early warning and response system for the prevention and control of these diseases."[235] It was later decided to reserve the early warning and response system of this network for certain defined events, or indications for such events "which, by themselves or in association with other similar events, are or have the potential to become public health threats."[236] Furthermore, the range of diseases covered was expanded[237] and case definitions were agreed upon.[238]

Enhanced cooperation since September 11 is largely based on these two existing mechanisms. For instance, in response to September 11, within a few hours, more than 1000 rescuers, with all appropriate equipment from the fifteen Member States, as well as from Norway and Iceland were ready to be dispatched to the USA, even though the Community Civil Protection Mechanism had not entered into force at that time.[239] In October 2001, at a meeting chaired by the Commission, the Directors-General for civil protection in the Member States adopted an action plan which brought forward the introduction of this mechanism, by setting up a group of nuclear, biological and chemical (NBC) experts, reinforcing the existing network of twenty- four hour contact points, better inter-agency cooperation at national and Community level, especially with the health services, setting up a system of systematic exchange of information, focusing in particular on accidents and on threats of terrorist attacks and setting up a Task Force of national experts to

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234. *Id.* art. 4(a)-(e).

235. Decision of the European Parliament and of the Council of Sept. 24, 1998, *supra* note 233, art. 1.

236. Commission Decision of Dec. 22, 1999, on the Early Warning and Response System for the Prevention and Control of Communicable Diseases under Decision No. 2119/98/EC of the European Parliament and of the Council, 2000 O.J. (L 021) 32-35, art. 1. Annex I to this decision defines the events covered and annex II details the procedures for information, consultation and cooperation under the early warning and response system.

237. By Commission Decision of Dec. 22, 1999, on the communicable diseases to be progressively covered by the Community network under Decision No. 2119/98/EC of the European Parliament and of the Council, 2000 O.J. (L 28) 50-53, which contains a list of diseases in Annex I and criteria to diseases to be covered in annex II.

238. *See* Commission Decision of Mar. 19, 2002, laying down Case Definitions for Reporting Communicable Diseases to the Community Network under Decision No. 2119/98/EC of the European Parliament and of the Council, 2002 O.J. (L 86) 44-62. The case definitions are listed in the Annex to this decision.

239. *See generally* Commission communication, Civil protection - state of preventive alert against possible emergencies, COM (2001) 707 final.

reinforce the Commission's Civil Protection Unit in order to create the monitoring and information centre provided for under the mechanism.[240] Pursuant to this plan, the monitoring and information centre which was to be established under the Community Civil Protection Mechanism was launched on October 29, 2001,[241] and action was taken concerning the gathering of information on nuclear, bacteriological, and chemical expertise and regarding the gathering of information on serum and vaccines.[242]

Subsequently, on November 15, 2001, the Health Ministers requested the Commission to develop an Action Programme addressing the following five priorities:

> (1) Develop a mechanism for consultation in the event of a crisis linked to the bio-terrorist risk and a capacity for the deployment of joint investigation teams;
> (2) Set up a mechanism for information on the capacities of European laboratories with respect to the prevention of and fight against bio-terrorism;
> (3) Set up a mechanism for information on the availability of serums, vaccines and antibiotics, including concerted strategies for developing and using those resources;
> (4) Set up a European network of experts responsible in the Member States for evaluating, managing and communicating risks;
> (5) Promote the development of vaccines, medicines and treatments.[243]

A number of these measures were addressed in a Commission Communication of November 2001, which "[set] out the main lines of action desirable for improved co-operation across the European Union."[244] In particular, the Communication stated that

> [t]he Commission . . . intends to nominate in its midst a high profile European co-ordinator who will be namely responsible for the management of the Community mechanism for co-ordination of actions in the field of civil protection. In this capacity, he will have to co-ordinate the activation,

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240. *Margot Wallström announces an action plan to deal with large-scale terrorist attacks*, EU Press Release IP/01/1413, Oct. 12, 2001, *available at* http://europa.eu.int (last visited May 15, 2003).

241. COM (2001) 707 final, *supra* note 239, at 4.

242. *Id.* at 4. *Civil Protection in the EU: Commission co-ordination reinforced*, EU Press Release IP/01/1685, Nov. 28, 2001, *available at* http://europa.eu.int (last visited May 15, 2003).

243. COM (2001) 707 final, *supra* note 239, at 5.

244. *Id.* at 2.

> implementation and follow-up of the many available community initiatives. . . .[245]

Furthermore, it said that "in the health sector, the Commission, following the invitation by the Health Ministers, is establishing an action programme. . . ."[246] This programme, the Programme of cooperation on preparedness and response to biological and chemical agent attacks (health security), was adopted in December 2001, and has as overall aim "to coordinate and support the public health/health security preparedness and response capacity and planning of the Member States against biological and chemical agent attacks."[247] Its objectives are to:

> Set up a mechanism for information exchange, consultation and coordination for the handling of health-related issues related to attacks in which biological and chemical agents might be used or have been used;
>
> Create a EU-wide capability for the timely detection and identification of biological and chemical agents that might be used in attacks and for the rapid and reliable determination and diagnosis of relevant cases, in particular by building on systems already available and aiming at long-term sustainability;
>
> Create a medicines stock and health services database and a stand-by facility for making medicines and health care specialists available in cases of suspected or unfolding attacks;
>
> Draw-up rules and disseminate guidance on facing-up to attacks from the health point of view and coordinating the EU response and links with third countries and international organisations.[248]

To achieve these objectives, the programme lists a number of actions to be taken and sets out a time framework of eighteen months for doing so, starting in May 2002.[249] Moreover, a fourteen member strong Task Force has been set up by the Commission, comprising eight experts nominated by the Member States through the members of the Health Security Committee (which

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245. *Id.* at 10.

246. *Id.* at 11.

247. Program of Cooperation on Preparedness and Response to Biological and Chemical Agent Attacks, Dec. 17, 2001, developed by the Council and the Commission and the Commission's website on bio-terrorism, *available at* http://europa.eu.int/comm/health/ph/programmes/bio-terrorism/index_en.html (last visited Feb. 15, 2003).

248. *Id.* at 1.

249. *Id.* at 2-7.

is also a new body comprised of high-level representatives of the Member States and charged with raising the alert, exchanging information rapidly and coordinating health responses in case of emergency following a deliberate release of biological or chemical agents to cause harm)[250] entrusted with the implementation of this programme.[251] Furthermore, in May 2002, the European Parliament and the Council reached an agreement regarding a new programme of Community action in the field of public health 2003-2008 in which activities relevant to the EU response to bio-terrorism are foreseen.[252] Work is also in progress on creating or pooling strategic stockpiles, evaluating manufacturing capacity for vaccines, sera and antibiotics, and developing new medicines and vaccines, in consultation with the pharmaceuticals industry.[253] Moreover, a Group of scientific experts on the fight against biological and chemical terrorism was established, comprised of representatives from the ministries of research and defence of the Member States and from the European Commission, initially to "make a joint assessment of knowledge and capacity regarding bio-defence and what additional research is needed, in particular through better co-ordination of research activities within the Member States and at Community level."[254] Obviously, the EU is also cooperating in these areas on the international plane, including with the G7/8 and the WHO.[255]

Finally, a comprehensive Programme for improving cooperation within the EU on protecting the population against bacteriological, chemical, radiological and nuclear terrorist threats, was adopted, on June 13, 2002, by the Council and the Commission.[256] This programme, which "constitutes a political and not a legal instrument"[257] and "is expected in future to operate under conditions of strict confidentiality, in particular as regards some of the more sensitive matters it deals with,"[258] aims at increasing the efficiency of national and Community measures to combat CBRN threats by: improving co-operation and co-ordination between Member States, the Council and the

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250. Council Doc. 15873/02 § 65, Dec. 20, 2002, *available at* http://register.consilium.eu.int (last visited Feb. 15, 2003).

251. *Id.* § 65.

252. *Id.* § 66. *See* European Parliament and Council Decision 1786/2002/EC adopting a program of Community Action in the Field of Public Health (2003-2008) - Commission Statements, 2002 O.J. (L 271) 1-12.

253. *Id.* § 83; *see also* COM (2001) 707 final, *supra* note 239, at 6-7; and Commission communication 'Civil Protection - Progress made in implementing the program for preparedness for possible emergencies', COM (2002) 302, at 5-7.

254. *Commission establishes Group of scientific experts on the fight against biological and chemical terrorism*, EU Press Release IP/01/1810, Dec. 12, 2001, *available at* http://europa.eu.int (last visited May 15, 2003). For progress by this group, *see* COM (2002) 302, *supra* note 253, at 7-8.

255. *See, e.g.*, COM (2002) 302, *supra* note 253, at 6.

256. Council Doc. 15861/02, Dec. 20, 2002, *available at* http://register.consilium.eu.int (last visited Feb. 15, 2003). *See also* point 43 of the updated road map (*supra* note 40).

257. Council Doc. 15861/02, *supra* note 256, at 2.

258. *Id.* at 1.

Commission; facilitating the provision of practical assistance to Member States at their request, particularly when the scale of the disaster is beyond their individual capacity of response and creating new instruments if necessary.[259] Pursuant to this programme, a detailed inventory has been drawn up of relevant EU instruments.[260]

Moreover, in its communication of June 2002, the Commission *inter alia* details measures taken and planned to set up an emergency communication and information system, to strengthen the Monitoring and Information Centre and to enhance training and exercises for intervention teams.[261]

2. *Air transport security*

Several measures have been taken regarding transport safety,[262] especially the adoption of common rules on civil aviation security,[263] but also the setting up of the European Aviation Safety Agency,[264] and EU action within the International Civil Aviation Organization.[265]

The Regulation on common rules on civil aviation security has as it main objective "to establish and implement appropriate Community measures, in order to prevent acts of unlawful interference against civil aviation" by "the setting of common basic standards on aviation security measures and the setting up of appropriate compliance monitoring mechanisms."[266] It sets out these common standards in some detail in the Annex to the Regulation and

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259. *Id.* at 1-2. It comprises seven objectives:

> 1. Strengthening risk analysis and assessment of CBRN threats and their lines of propagation; 2. Developing preventive measures with a particular focus on vulnerable sectors; 3. Ensuring quick detection and identification of CBRN attacks and providing all those concerned with appropriate information; 4. Using and further developing all necessary instruments for mitigating and repairing the consequences of an attack (e.g. developing vaccines, sera and antibiotics for human and animal use and reinforcing existing stocks); 5. Strengthening the scientific basis of the programme [sic] (research and development activities); 6. Co-operating with third countries and international organizations [sic]; 7. Ensuring an efficient co-ordination and implementation of the programme's [sic] instruments.

Id. at 2.

260. *Id.*

261. COM (2002) 302, *supra* note 253, at 3-5.

262. For an overview, see *EU Actions: Air Transport Security*, *available at* http://europa.eu.int/news/110901/airtrans.htm (last visited May 15, 2003).

263. *See* European Parliament and Council Regulation (EC) 2320/2002 establishing Common Rules in the Field of Civil Aviation Security, 2002 O.J. (L 355) 1-21.

264. European Parliament and Council Regulation (EC) 1592/2002 on Common Rules in the Field of Civil Aviation and Establishing a European Aviation Safety Agency, 2002 O.J. (L 240) 1-21. These rules and the Agency's competence concern *safety* (covering issues such as airworthiness and environmental protection) rather than *security*.

265. *EU Actions: Air Transport Security*, *supra* note 262.

266. European Parliament and Council Regulation (EC) 1592/2002, *supra* note 264, art. 1.

obliges Member States to adopt a national civil aviation security program to ensure the application of these standards and a national civil aviation security quality control program so as to ensure the effectiveness of its national civil aviation security program (articles 4 and 5 and Annex). Concerning compliance, it *inter alia* authorizes the Commission to conduct airport inspections (art. 7).

III. SOME CRITICAL REFLECTIONS

A. Cooperation in criminal matters

In the field of cooperation in criminal matters, considerable progress has been made in a relatively limited time after September 11, at least by EU standards. However, as we have indicated above, much of this quick progress was to a large extent only possible because of the extensive preparatory work that had already been carried out prior to that date. Obviously, this does not diminish the importance of many of the measures adopted, which have led one commentator to remark that the EU has probably become a credible actor for the U.S. in this field.[267]

One of the main challenges will be to safeguard the overall consistency and effective implementation of the many measures adopted. In view of the comprehensiveness of these measures and the speed with which they have often been adopted that may not turn out to be an easy task.[268]

However, the more fundamental concern is probably safeguarding human rights, especially as more and stricter anti-terrorism measures are adopted and restrictions to international cooperation are increasingly lifted. We have already seen above that differences in human rights standards between the U.S. and the EU (and its Member States) have not evaporated because of the increased focus on fighting terrorism. This is hardly surprising given that human rights are part of the common legal tradition of all EU Member States and are in many respects supervised at the international level, in particular by the ECtHR. The Committee of Ministers of the Council of Europe has even adopted specific 'Guidelines of the on human rights and the fight against terrorism.'[269] In the EU itself too, human rights occupy a central

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267. Dubois, *supra* note 181, at 324-27.

268. In particular the implementation of Framework Decisions. For example, Belgium (like a number of other Member States, see *supra* note 64) has declared that it would move forward the entry into force of the European arrest warrant, but has only introduced a bill to that effect in parliament on Apr. 2, 2003, making it most unlikely that it will achieve an early entry into force. *See* Chamber of Representatives, Doc. 50 2443/001, *available at* http://www.senate.be (last visited May 30, 2003).

269. *See Guidelines on Human Rights, supra* note 3. It might be interesting to compare these guidelines with the Inter-American Commission on Human Rights' REPORT ON TERRORISM AND HUMAN RIGHTS (OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. Oct. 22, 2002, *available at* http://www.cidh.oas.org/Terrorism/Eng/toc.htm (last visited May 30, 2003)).

position, as respect for these rights is one of the principles on which the EU is founded.[270] This is clearly pronounced in Articles 6[271] and 7[272] of the EU Treaty, as amended by the Treaties of Amsterdam and Nice, and in the Charter of Fundamental Rights of the European Union.[273] While the legal status of the latter is not yet fully determined at the time of writing,[274] the former provisions are part of the EU Treaty itself and consequently already enjoy constitutional status.

Thus, human rights arguably trump any secondary EU legislation, including treaties between Member States in the EU's third pillar (JHA) and framework decisions. Therefore it seems that a Member State would be entitled to refuse the execution of a European arrest warrant if such execution would violate its human rights obligations, even if the Arrest Warrant Framework Decision, in its preamble, only provides a basis for this "in the event of a serious and persistent breach by [a] Member State of the principles

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270. EU TREATY, *supra* note 8, art. 6(1). *See also* the very extensive case law of the European Court of Justice on the protection of human rights as general principles of Community law: LENAERTS & VAN NUFFEL, *supra* note 10, at 539-50.

271. The first two paragraphs of this provision state:

> The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall 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.

EU TREATY, *supra* note 8, art. 6.

272. Article 7 contains an enforcement mechanism, allowing the Council to suspend certain of the rights deriving from the EU Treaty in case of a serious and persistent breach by a Member State of principles mentioned in Article 6(1). The Treaty of Nice has inserted a paragraph permitting the Council to address appropriate recommendations to a State which has been found to run a clear risk of a serious breach of the same principles.

273. Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1-22. For a discussion, see, e.g., SPECIAL ISSUE: EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS, 8 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 3 (2001).

274. The conclusions of the Nice European Council, stated that "the question of the Charter's force will be considered later." Conclusions of the Nice European Council, § 2, Dec. 7-9, 2000, *available at* http://ue.eu.int (last visited May 15, 2003). The legal status of the Charter of Fundamental Rights is one of the issues now being discussed in the European Convention, where there appears to be a large consensus for incorporating it into the future EU Constitutional Treaty. *See, e.g.*, Final report of Working Group II (Incorporation of the Charter/accession to the ECHR), CONV 354/02 WG II 16, Oct. 22, 2002, 2, *available at* http://european-convention.eu.int (last visited May 15, 2003); the Summary report of the plenary session, Brussels, Oct. 28 and 29, 2002, CONV 378/02, Oct. 31, 2002, 9, *available at* http://european-convention.eu.int (last visited May 15, 2003). This approach was also adopted in the Praesidium of the European Convention, Preliminary draft Constitutional Treaty, CONV 369/02, Oct. 28, 2002, art. 6, *available at* http://european-convention.eu.int (last visited May 15, 2003), and in Art. I-7 of the latest draft constitution (Praesidium of the European Convention, Draft text of Part One of the Treaty establishing the Constitution, CONV 724/03, May 26, 2003, *available at* http://register.consilium.eu.int/pdf/en/03/cv00724en03.pdf (last visited May 30, 2003)).

set out in Article 6(1) of the [EU Treaty], determined by the Council pursuant to Article 7(1) of the said Treaty . . . ."[275] However, there may be difficulties in enforcing this primacy of human rights, not only in respect of measures adopted under the CFSP, where the European Court of Justice (hereinafter 'ECJ')[276] has no jurisdiction (and where the European Parliament also has very little to say),[277] but also in respect of certain measures adopted in the field of cooperation in criminal matters (third pillar), where the ECJ has only limited competences.[278] Therefore the appropriate legal basis of any EU action, which conditions *inter alia* which decision-making procedure applies and/or under which pillar action is undertaken, should be subject to close scrutiny.[279]

The situation is different in respect of decisions taken by the EU to implement Security Council decisions, e.g. relating to sanctions, because Article 48 UN Charter obliges EU Member States to carry out such obligations through the EU where appropriate[280] and the obligations under the UN Charter prevail over the EU and EC Treaty by virtue of Article 103 UN Charter. Therefore, if a Security Council resolution (or other decision) itself were to curtail or violate certain human rights or would oblige the EU and/or its Member States to curtail or violate certain human rights, this would bring the EU and its Member States in a constitutionally very delicate situation.[281] EU Member States should therefore very carefully consider human rights concerns when acting in the Security Council.[282] In fact, to some extent this appears to be the case. For example, some safeguards for individual's rights have been adopted by the Security Council Sanctions Committee on Al-Qaida and the Taliban[283] reportedly thanks to strong EU pressure.[284] Moreover, in several

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275. On this mechanism of EU Treaty Article 7, see *supra* note 272.

276. On the ECJ, *see* especially EC TREATY, *supra* note 7, arts. 220-45 and EU TREATY, *supra* note 8, arts. 5, 35.

277. *See id.* art. 21.

278. *See id.* art. 35.

279. Note in this respect the criticism of the European Parliament on the choice of legal basis of some of the measures adopted against terrorism: European Parliament resolution of Feb. 7, 2002, on the Council's decision of Dec. 27, 2001, on measures to combat terrorism, 2002 O.J. (C 284/E) 313-14.

280. Article 48(2) of the UN Charter states that decisions concerning action required to carry out the decisions of the Security Council for the maintenance of international peace and security "shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members." UN CHARTER art. 48(2). *See also* EU TREATY, *supra* note 8, art. 11 (requiring that the EU respects the UN Charter (see *infra* note 282)).

281. Obviously, in international law the problem is further complicated to the extent that the human rights concerned are considered to be of a *ius cogens* nature.

282. Where two EU Member States are permanent members (France and the United Kingdom, *see* UN CHARTER art. 23) and where normally one, or even two, Member State(s) is/are non-permanent members on a rotating basis (currently Germany and Spain).

283. For details on the changes in the procedure, see the Statement of the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) on de-listing procedures of Aug. 16, 2002, Press Release SC/7487 AFG/203, *available at* http://www.un.org/News/Press/docs/2002/sc7487.doc.htm (last visited May 15, 2003). Further changes were

cases[285] the legality of EU measures implementing a Security Council resolution is currently contested before the European Court of first Instance.[286]

B. External relations

The EU's reaction in relation to the military response to terrorism is more problematic and raises a number of issues, including the non-involvement of the EU as such in the military campaign in Afghanistan and the EU's appraisal of the legality of this campaign.

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made on Nov. 8, 2002, see UN, *Security Council Committee established pursuant to resolution 1267 (1999) approves new guidelines*, Press Release SC 7571, Nov. 15, 2002, *available at* http://www.un.org/News/Press/docs/2002/sc7571.doc.htm (last visited May 15, 2003) and the new Guidelines of this Committee, *available at* http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf (last visited May 15, 2003). For a critical view, even after these changes, see, e.g., R. Wessel, *Debating the 'Smartness' of Anti-Terrorism Sanctions: The UN Security Council and the Individual Citizen in* Fijnaut at all; *supra* note 2. One should also note that Security Council resolution 1452 provides, albeit rather lately, for an exception to the freezing of assets for funds necessary for "basic expenses" (unless the Committee rejects this within 48 hours after notification) and even for certain extraordinary expenses approved by the Committee. *See* U.N. SCOR, 57th Sess., 4678th mtg., UN Doc. S/RES/1452 (2002). To allow for these exceptions, the EU adopted Council Common Position of Feb. 27, 2003, concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP, and Council Regulation (EC) No 561/2003 of Mar. 27, 2003, see *supra* note 211. One may wonder why it took the EU two, respectively three, months to decide that the EU will allow the exceptions permitted by resolution 1452.

284. *See* Hoyos, *U.S. backs down over freezing terror assets*, THE FINANCIAL TIMES ONLINE, Aug. 16, 2002.

285. *See* Case T-306/01, Abdirisak Aden, Abdulaziz Ali, Ahmed Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities. (so far the only decision in this case is the Order of the President of the Court of First Instance of May 7, 2002, *available at* http://www.curia.eu.int (rejecting an application for interim measures because there was no urgency) (last visited May 15, 2003); Case T-206/02, Congrès National du Kurdistan v. Council of the European Union, 2002 O.J. (C 247) 13; Case T-228/02, Organisation des Modjahedines du peuple d'Iran v. Council of the European Union, 2002 O.J. (C 247) 20; Case T-229/02, Osman Ocalan on behalf of Kurdistan Workers Party (PKK) and Serif Vanly on behalf of Kurdistan National Congress (KNK) v. Council of the European Union, 2002 O.J. (C 233) 32 and Case T-47/03, Jose Maria Sison v. Council of the European Union and the Commission of the European Communities, 2003 O.J. (C 101), 41-41 (so far the only decision in this case is the Order of the President of the Court of First Instance of May 15, 2003, *available at* http://www.curia.eu.int (rejecting an application for interim measures because there was no urgency and noting that the application for interim measures brought against the Commission was removed from the register by order of the President of the Court of First Instance of May 7, 2003 (last visited May 30, 2003)). *See also* Wessel, *supra* note 283.

286. The Court of First Instance is distinct from the European Court of Justice and "has jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 230, 232, 235, 236, and 238, with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice." EC TREATY, *supra* note 7, art. 225 (as amended by the TREATY OF NICE, *supra* note 33). *See* Council Decision 88/591/ECSC, EEC, Euratom of Oct. 24, 1988, establishing a Court of First Instance of the European Communities, 1988 O.J. (L 319) 1-8 and 1989 O.J. (L 241) 4 (corrigenda) (as amended repeatedly).

From a legal and institutional point of view, it is understandable that the EU as such did not take part in the campaign in Afghanistan. This is so because, at present, its competence in this field only covers the 'Petersberg tasks', i.e. humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking, which were inserted in Article 17(2) EU Treaty by the treaty of Amsterdam. While we hold the view that, contrary to what is sometimes suggested,[287] this allows for peace enforcement action,[288] it clearly does not extend to (collective) self-defense.[289] Since the campaign in Afghanistan was justified by the U.S. and its allies as action taken in self-defense,[290] even if this may be questioned (see *infra*), the EU as such could not join such action. Moreover, since the EU must respect

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287. *See, e.g.*, DUKE, *supra* note 202, at 206 n. 122.

288. Tasks of combat forces implies military action but not (only) peacekeeping: that notion was well established when the Petersberg tasks were formulated and would have been used if peacekeeping had been envisaged. Therefore what remains is peace enforcement. This is also consistent with, *inter alia*, the French and German wording of EU Treaty Article 17(2) (respectively *rétablissement de la paix* and *friedensschaffender Massnahmen*). This position was also expressed by the Belgian ambassador to the EU in a speech on Mar. 8, 2001, and the (then) British Secretary of State *See* Select Committee on Defence, *Eighth Report*, May 11, 2000, *available at* http://www.parliament.the-stationery-ffice.co.uk/pa/cm199900/cmselect/cmdfence/264/26402.htm, § 41(last visited Feb. 15, 2003). *But see* the position of British Select Committee on Defence itself. *See id.* § 42; F. Pagani, *A New Gear in the CFSP Machinery: Integration of the Petersberg Tasks in the Treaty on European Union*, 9 EUR. J .INT'L L. 741, 741-42 (1998).

289. According to EU Treaty Article 2, one of the EU's objectives is "the progressive framing of a common defence policy, which might lead to a common defence" and EU Treaty Article 17(1) states that "The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence [sic] policy, which might lead to a common defence [sic], should the European Council so decide." Such a decision has not yet been adopted, as was reaffirmed at the Seville European Council in June 2002. *See Declaration of the European Council in response to the National Declaration by Ireland*, Annex, § 4, *available at* http://ue.eu.int (last visited May 15, 2003). Therefore a common defense is not yet covered by the ESDP. However, the Western European Union [hereinafter WEU, as established by the amended Brussels Treaty] is based on a mutual assistance clause. This organization was "an integral part of the development of the Union providing the Union with access to an operational capability notably in the context of paragraph 2 [i.e. the Petersberg tasks defined therein]" according to EU Treaty Article 17(2) before the entry into force of the Treaty of Nice (*supra* note 33), but is no longer mentioned in EU Treaty Article 17(2) (as amended by the treaty of Nice) because the EU has developed its own crisis management mechanism. *See also infra* note 301, including on future perspectives.

290. *See* Letter dated Oct. 7, 2001, from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/946, Oct. 7, 2001, *available at* http://www.un.int/usa/s-2001-946.htm (last visited May 15, 2003); Letter dated Oct. 7, 2001, from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, *available at* http://www.ukun.org (last visited May 15, 2003); NATO's decision that Article V of the North Atlantic Treaty applied (*see supra* note 198 and accompanying text).

the UN Charter,[291] it can only join a military enforcement action other than self-defense if such an action is authorized by the Security Council. Therefore it could have joined the military campaign if it had been authorized by the Security Council. However, this was not the case.[292] Finally, in order to guarantee the complementary nature of ESDP and NATO, ESDP[293] is not meant to play a role when NATO as a whole is engaged,[294] which was the case here (even if the military contribution by NATO as such was rather limited[295]).

In the light of this, it may seem legitimate that the German and British Heads of Government and the French Head of State held a mini-summit on October 19, 2001, (just before the Ghent European Council) and in London on November 4, 2001, (albeit in slightly enlarged format[296]).[297] However, these meetings roused considerable protest. That protest is not entirely unfounded: the European Council decided, at its September 21, 2001, meeting, that action by the Member States "will require close cooperation with all the [EU]

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291. Not only because its Member States are bound by the UN Charter but also because of EU Treaty Article 11, which states that under the CFSP the Union is to "preserve peace and strengthen international security, *in accordance with the principles of the United Nations Charter*" (emphasis added). This was *inter alia* confirmed in the Conclusions of the Helsinki European Council, § 26, *available at* http://ue.eu.int (last visited May 15, 2003) "The Union will contribute to international peace and security in accordance with the principles of the United Nations Charter. The Union recognises [sic] the primary responsibility of the United Nations Security Council for the maintenance of international peace and security." *Id.*

292. We do not see resolutions 1368 and 1373 (*infra* notes 299-00) as containing such a mandate, a view which appears to be shared by most commentators. For a detailed argumentation to this effect, see Carsten Stahn, *Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say*, *available at* http://www.ejil.org/forum_WTC/ny-stahn.html (last visited Feb. 15, 2003); Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L 835, 335 (2001); Frederic L. Kirgis, 'Security Council Adopts Resolution on Combating International Terrorism,' Oct. 1, 2001, addendum to F.L. Kirgis, 'Terrorist Attacks on the World Trade Center and the Pentagon,' ASIL Insight, Sept. 2001, *available at* http://www.asil.org/insights/insigh77.htm#addendum7 (last visited May 15, 2003); Frederic Mégret, *War'? Legal Semantics and the Move to Violence*, 13 EUR. J. INT'L L. 361, 374-75 (2002); Olivier Corten & Francois Dubuisson, *Opération "Liberté Immuable": une extension abusive du concept de légitime défense*, 106 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 51, 53-54 (2002). *But see* Jordan Paust, *Security Council Authorization to Combat Terrorism in Afghanistan*, Oct. 23, 2001, comment to Frederic L Kirgis, ASIL Insight, Sept. 2001, *available at* http://www.asil.org/insights/insigh77.htm#comment4 (last visited May 15, 2003).

293. *See supra* notes 202 and 289 and accompanying text.

294. *See, e.g.*, the Conclusions of the Helsinki European Council, Dec. 10-11, 1999, § 27, *available at* http://ue.eu.int (last visited May 15, 2003).

295. The U.S. has mainly asked for support from individual nations on a bilateral basis and NATO as such has only contributed in a limited way, mostly by sending an AWACS unit to the U.S. and a naval force to the Mediterranean. *See NATO's Response to Terrorism*, Dec. 6, 2001, NATO Press Release M-NAC-2 (2001)159, Dec. 6, 2001. *See also* Duke, *supra* note 195, at 163-64.

296. At the last minute, the Spanish and Italian Heads of Government were invited too, as were the EU's High Representative for the CFSP (Javier Solana), the Belgian prime minister (in his capacity as holder of the EU Presidency at that time) and the Dutch prime minister.

297. *See also* Duke, *supra* note 195, at 161-62.

Member States." In light of this decision the justification invoked by French president Chirac, namely that these mini-summits were held for "military reasons which only concern ourselves,"[298] is questionable. Refusal by the bigger Member States to even consult all Member States on military action may also lead to a reluctance on behalf of the smaller Member States to engage the EU as such in the future. In any event, issues and action which exceed the confines of self-defense, such as broader political goals, humanitarian aid and reconstruction, clearly fall within the competences of the EU and are therefore not matters to be settled by the big Member States only.

This brings us to an important point: under the EU Treaty, the European Council has the power to decide to extend the CFSP and ESDP[299] to a common defense, in which case it shall "recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements."[300] At present, this decision has not yet been taken.[301] However, one may question whether this is tenable. Imagine for instance that the target on September 11 had been based in Brussels or Paris. Would any EU Member State have stayed on the sidelines? In a Union which is to safeguard its "common values, fundamental interests, independence and integrity"[302] and in which Member States are very closely integrated and share the same fundamental values, this is, in our view, inconceivable. Thus it seems only logical that the EU, in time, does also grow to a full-fledged collective defense organization. While this appears unlikely in the short run, there seems to be fairly widespread support in the ongoing European Convention[303] for a less far-reaching solidarity clause along the following lines:

> 1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the victim of terrorist attack or natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:
> (a) - prevent the terrorist threat in the territory of the Member States;

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298. Translation by the authors of the following French quote in LE MONDE EN LIGNE, Oct. 20, 2001: "raisons strictement militaires et qui ne concernent que nous."

299. *See supra* notes 202 and 289 and accompanying text.

300. EU TREATY, *supra* note 8, art. 17.1.

301. *See supra* note 289, especially *Declaration of the European Council in response to the National Declaration by Ireland.* This is unlikely to change as a result of the Convention on the Future of Europe, though it is possible that the Convention will propose that a number of Member States be allowed to establish such a common defense amongst themselves, see Art. I-40 § 2 and § 7 of the latest draft constitution (Praesidium of the European Convention, Draft text of Part One of the Treaty establishing the Constitution, CONV 724/03, May 26, 2003, *available at* http://register.consilium.eu.int/pdf/en/03/cv00724en03.pdf (last visited May 30, 2003)).

302. EU TREATY, *supra* note 8, art. 11.

303. *See* Final Report of Working Group III, *supra* note 33.

- protect democratic institutions and the civilian population from any terrorist attack;
- assist a Member State in its territory at the request of its political authorities in the event of a terrorist attack;

(b) - assist a Member State in its territory at the request of its political authorities in the event of a disaster.

2. The detailed arrangements for implementing this provision are at Article [. . .], of Part Three, Title B, of the Constitution.[304]

Secondly, the question arises whether the EU position vis-à-vis the legality of the military campaign was correct under international law. We will not address this extensively here,[305] but we nevertheless wish to point out a few issues. First, while the UN Security Council did respectively recognize and reaffirm the right of self-defense in its resolutions 1368[306] and 1373,[307] adopted in response to the September 11 attacks, it did not make a finding that this right was applicable to these attacks. That should not come as a surprise given the difficulty in attributing the September 11 attacks to the Taliban, in particular when measured by the standard set out by the International Court of Justice in the *Nicaragua* case,[308] which, despite some apparent relaxation by

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304. Art. I-42 of the latest draft constitution (Praesidium of the European Convention, Draft text of Part One of the Treaty establishing the Constitution, CONV 724/03, May 26, 2003, *available at* http:/register.consilium.eu.int/pdf/en/03/cv00724en03.pdf (last visited May 30, 2003)). *Compare* Final report of the working group on Defense, CONV 461/02 WG VIII 22, Dec. 16, 2002, *available at* http://register.consilium.eu.int/pdf/en/02/cv00/00461en2.pdf (last visited Feb. 15, 2003), § 57-59; Summary report on the plenary session, Brussels, Dec. 20, 2002, CONV 473/02, Dec. 23, 2002, § 32, *available at* http://european-convention.eu.int (last visited May 15, 2003).

305. For a more elaborate discussion of the legality of the military campaign against Afghanistan, see, amongst many other contributions, Antonio Cassese, *Terrorism is also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 993-01 (2001); Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L 835, 835-39 (2001); Luigi Condorelli, *Les attentats du 11 septembre et leurs suites: ou va le droit international?*, 105 REVUE GÉNÉRALE DROIT INTERNATIONAL PUBLIC 829, 829-48 (2001); Corten & Dubuisson, *supra* note 292, at 51-77; Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L 839, 839-43 (2001); Giorgio Gaja, *In What Sense was There an "Armed Attack"?*, *available at* http://www.ejil.org/forum_WTC/ny-gaja.html (last visited Feb. 15, 2003); Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 on the U.N. Charter*, 43 HARVARD INT'L L.J. 41, 41-51 (2002); Stahn, *supra* note 292; and several other relevant contributions on the European Journal of International Law discussion forum *The Attack on the World Trade Center: Legal Responses*, *at* http://www.ejil.org/forum_WTC/index.html (last visited Feb. 15, 2003) and at Jurist, *at* http://jurist.law.pitt.edu/terrorism/terrorismacad.htm (the 'Commentary' section of the 'Terrorism' section) (last visited May 15, 2003).

306. U.N. SCOR, 56th Sess., 4370th mtg., UN Doc. S/RES/1368, (2001).

307. U.N. SCOR, 56th Sess., 4385th mtg., UN Doc. S/RES/1373, (2001).

308. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, § 195. "[T]he Court does not believe that the concept of 'armed attack' includes . . . assistance to rebels in the form of the provision of weapons or logistical or other support." *Id.*

the International Criminal Tribunal for the former Yugoslavia,[309] was recently more or less reaffirmed by the International Law Commission.[310] Second, even if the attacks could be attributed to the Taliban, a response thereto must be in accordance with the conditions set out in article 51 UN Charter. In light of the central role of the Security Council in the UN collective security system, the readiness of the Security Council "to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations"[311] and its determination "to take all necessary steps in order to ensure the full implementation of [resolution 1373], in accordance with its responsibilities under the Charter,"[312] an explicit authorization by the Security Council would have been more appropriate. This is all the more true as the military campaign did not only aim at eliminating Al-Qaida's terrorist bases in Afghanistan, but included the political goal of regime change.[313] Admittedly, the international community seems to have endorsed the legality of the military campaign,[314] although it remains to be seen whether this signifies a change in the law rather than an exceptional reaction to exceptional events.[315] Third, the EU's use of the term 'riposte' in the conclusions of the

309. ICTY, Appeals Chamber, Prosecutor v. Dusko Tadic, IT-94-1, July 15, 1999, § 97-145, *available at* http://www.un.org/icty (last visited May 15, 2003). The relaxation was, in any event, rather limited: the ICTY held in this case that attributability required "more than the mere provision of financial assistance or military equipment or training." *Id.* § 137.

310. *See* Draft articles on Responsibility of States for Internationally Wrongful Acts, art. 8, *available at* http://www.un.org/law/ilc/reports/2001/2001report.htm (last visited May 15, 2003). "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." *Id. juncto* cmts. 3, 5. "Such conduct will be attributable to the State only if it directed or controlled *the specific operation* and the conduct complained of was an integral part of that operation" and "in any event it is a matter for appreciation in each case whether *particular conduct* was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it." *Id.* (emphasis added).

311. U.N. SCOR, 56th Sess., 4370th mtg. at § 5, UN Doc. S/RES/1368, (2001).

312. U.N. SCOR, 56th Sess., 4385th mtg. at § 8, UN Doc. S/RES/1373, (2001).

313. According to a document released by UK Foreign Secretary Jack Straw on Oct. 16, 2001, and cited in the House of Commons Library the aims of operation Enduring Freedom include: "sufficient change in the leadership to ensure that Afghanistan's links to international terrorism are broken" and "reintegration of Afghanistan as a responsible member of the international community and an end to its self-imposed isolation." *Operation Enduring Freedom and the Conflict in Afghanistan: An Update*, Research Paper 01/81, Oct. 31, 2001, 12-13, *available at* http://www.parliament.uk/commons/lib/research/rp2001/rp01-081.pdf (last visited May 15, 2003).

314. *See especially* the EU, NATO, and OAS positions cited *supra* notes 198-200 and accompanying text.

315. One may note that the UN Security Council resolutions passed after September 11 in response to other major terrorist acts do not themselves mention the right to self-defense, although they reaffirm resolution 1373 which, as mentioned above, reaffirms this right. *See* U.N. SCOR, 57th Sess., 4624th mtg., UN Doc. S/RES/1438 (2002), U.N. SCOR, 57th Sess., 4632nd mtg., UN Doc. S/RES/1440 (2002), U.N. SCOR, 57th Sess., 4667th mtg., UN Doc.

September 21, 2001, European Council is most unfortunate, as the use of force in order to punish is not the same as self-defense and is not allowed under international law.[316] Fortunately, this term has been dropped in the conclusions of later meetings.

Finally, in tackling the root causes of terrorism, the EU already was very active before September 11, *e.g.*, in particular in the field of conflict prevention and trade and development. The above-mentioned 'Declaration on the contribution of CFSP, including ESDP, in the fight against terrorism'[317] stresses the importance of some of these actions for the fight against terrorism. More recent EU actions also send out a positive signal. However, one should also take into account that tackling the root causes will be a formidable task for many years, probably even decennia, to come. Moreover, it is an area where the results are often beyond the exclusive control of the EU. It is therefore essential that the EU engage the U.S. to forge a common approach. One can only hope that the (rather limited) reference in Security Council resolution 1556 to some of the underlying problems[318] is an indication of some progress in this regard.

C. Other measures

As we have not discussed the aviation security measures in detail, we will not assess these measures either. We will also be fairly brief in respect of the civil protection measures. EU action in this field is fairly recent but appears to be developing at a considerable pace, except perhaps in respect of

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S/RES/1450 (2002) and U.N. SCOR, 58th Sess., 4706th mtg., UN Doc. S/RES/1465 (2003), in respect of the Bali bombing, the Moscow hostage taking, the Kenya hotel and airport attacks and the Bogota bomb attack.

316. Declaration on Principles of International Law concerning Friendly Relations and Co-operation amongst States in accordance with the Charter of the United Nations, U.N. GAOR, 25th Sess., G.A. Res. 2625 (XXV) at Annex 1.I.6 (1970); U.N. SCOR, 19th Sess., 1111th mtg. at § 1, UN Doc. S/RES/188, (1964) and U.N. SCOR, 23rd Sess., 1407th mtg. at § 3, UN Doc. S/RES/248 (1968). *See also* C. GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 118-19 (2000). *Compare* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 194-03 (2001), who regards 'defensive armed reprisals' as permissible if they "qualify as an exercise of self-defence [sic] under Article 51" and argues that such legitimate reprisals must aim to deter renewed armed attacks. *Id.*

317. *See* Seville European Council Conclusions, *supra* note 204.

318. *See* U.N. SCOR, 58th Sess., 4688th mtg. at Annex, § 10, UN Doc. S/RES/1456 (2003):

> [The Security Council also] emphasizes that continuing international efforts to enhance dialogue and broaden the understanding among civilizations, in an effort to prevent the indiscriminate targeting of different religions and cultures, to further strengthen the campaign against terrorism, and to address unresolved regional conflicts and the full range of global issues, including development issues, will contribute to international cooperation and collaboration, which by themselves are necessary to sustain the broadest possible fight against terrorism
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> . . . .

Id.

stockpiling vaccines etc., where progress appears to be rather slow and concrete results are few. Also, while the Commission's example of the quick availability of resources in reaction to September 11[319] suggests that the assembling of resources works quite well, it was reported in the press that cooperation on the ground, as tested in an exercise, was rather problematic.[320] Given that the training and exercise program has only started recently, that is perhaps understandable. Yet it is hardly comforting should a major response be needed in the near future. Thus, it would appear that in this area there is still some way to go in implementing the different action plans.

IV. CONCLUSION

The EU has reacted to the September 11 events by fairly quickly adopting an impressive number of measures, in many policy areas. It has achieved the most progress in the field of cooperation in criminal matters, although the jury is still out on whether the measures adopted will all be effectively implemented and vigilance will be required to ensure overall consistency and continuing respect for human rights, democratic oversight and the rule of law. In the field of external relations the record is more ambiguous, in particular concerning the EU's reaction to the military campaign in Afghanistan. Finally, in respect of civil aviation security, civil protection and fighting the root causes of terrorism significant progress has been made, though much remains to be done.

319. *See* COM (2001) 707, *supra* note 239 and accompanying text.

320. Thomas Fuller, *Unified response to attack eludes Europe*, THE INTERNATIONAL HERALD TRIBUNE, Jan. 14, 2002.