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**9/11 AND THE EUROPEANISATION OF ANTI-TERRORISM POLICY:  
A CRITICAL ASSESSMENT**

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## INTRODUCTION

The 11<sup>th</sup> of September terrorist acts in the USA seemed to unleash an unprecedented wave of policy interventions within the European Union. In the words of EU Justice Commissioner Vitorino, the terrorist attacks have led to a “giant leap forward” for EU Justice and Home Affairs co-operation. European approaches to the fight against crime, in particular terrorism, were suddenly regarded as more feasible and important. However, counter-terrorism is certainly not a new policy issue within the EU: it is a theme, which was central in the early days of internal security cooperation between EC Member States. Through TREVI, which was originally conceived in the context of European Political Cooperation (EPC) and which became a regular high-level congregation of the Interior Ministers and national top security officials, counter-terrorist policies were established in a climate which was rife with domestic terrorism in several EC countries (Anderson et al, 1995: 53f). The works of TREVI had however become absorbed in the executive-driven Third Pillar hierarchy, and terrorism was demoted to a position amidst other internal security concerns, among which illegal immigration and organised crime. Hence, within Europe, it seemed as if the issue of terrorism had temporarily disappeared from the stage. Meanwhile, however, the European Parliament had started a campaign to speed up the adoption of counter-terrorist measures in the EU, and came out with a resolution notably a week prior to the 11<sup>th</sup> of September 2001. The rest is history. Terrorism was resurrected with all its political salience after this date, especially after a meeting of the Extraordinary Council.

Below, we will venture into the question of whether and to what extent terrorism may be regarded as a conflated set of policy agendas in the EU. Experiences with terrorism in European countries have traditionally mainly - although not solely - been of the ‘domestic’ type, which implies that political views on terrorism and counter-strategies differ greatly between the Member States in scope and intensity. By and large, governments have traditionally interpreted terrorism as a domestic problem, although it should be acknowledged that even over a century ago, European countries had already started cooperating against international anarchy and subversion. But it is only in the last decade that the general focus has gradually shifted to international and/or imported terrorism, and this has been strengthened by the threat posed by Islamic fundamental terrorism. Reframing terrorism as an international and – because of its networked character – as a more unpredictable threat, has facilitated the mobilisation of international criminal justice efforts. As a consequence, developing an EU policy against terrorism is increasingly regarded as indispensable and unavoidable.

The EU policy-making pattern however reveals that the concern about terrorism, and the perceived urgent need to address it with counter-terrorism measures has also functioned as a major policy-catalyst in the Europeanisation of crime control policies. This regulatory spillover effect can be clearly demonstrated in the wide application of the European arrest warrant, which was adopted in the wake of the 11<sup>th</sup> of September.

This paper endeavours to show that most Title VI<sup>1</sup> instruments capture a much wider field of security concerns than merely terrorism. First, the paper looks into the question of whether and to what extent terrorism poses a common problem to the EU Member States. It is suggested that the reframing of terrorism as a transnational, networked phenomenon has

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<sup>1</sup> Title IV covers “Police and Judicial Cooperation in Criminal Matters”, which is an intergovernmental arena of cooperation within the EU in which the European Commission shares the right of initiative with EU Member States.

infused the need for international co-operation. Second, by establishing an overview of legal and institutional measures that were adopted after the 11<sup>th</sup> of September 2001, it can be illustrated that the catastrophic events in the USA formed a pretext for the acceleration of the legislative process. Leading on from this, the third part of the paper argues that the fast adoption of a wide range of measures may have been at the expense of a cautious consideration of human rights, privacy and effects on the free movement of persons. The fourth part of the paper looks into the paradox of terrorism as an internal security concern: while it is traditionally considered as an issue of state sovereignty, it lies at the roots of the Europeanisation (and globalisation) of law enforcement co-operation and criminal law harmonisation. Finally, some broader policy recommendations are suggested to overcome some of the typical problems encountered in the context of EU-decision-making on terrorism.

## **I - FRAMING TERRORISM AS A COMMON AND CURRENT THREAT TO EU MEMBER STATES**

Since the end of the Cold War, Europe has gradually evolved towards a broad notion of security, which tends to conflate several notions into a security continuum, ranging from illegal immigration to organised crime and international terrorism (Makarenko, 2002: 1)<sup>2</sup>. This amalgamation discourse (Bigo and Leveau, 1992) is however not self-evident when reviewing the particular national concerns with terrorism.

Despite ample evidence that terrorist groups are increasingly operating on a transnational basis, national secret services have traditionally tended to focus their intelligence-gathering operations on domestically active organisations. Indeed, the EU TE-SAT<sup>3</sup> report on terrorist activity in the European Union<sup>4</sup> reports that domestic (as opposed to international) terrorism continues in certain EU countries. In France and Spain, ETA continued its terrorist activity, and numerous attacks were carried out in Spain. The operational capability of ETA is apparently maintained despite extensive law enforcement cooperation between French and Spanish authorities. Also in Spain, the Spanish left-wing group Revolutionary Armed Groups First of October (GRAPO) carried out armed robberies, but it suffered a serious setback when its management structure was dismantled in coordinated French-Spanish operations.

In Northern Ireland and the British mainland, RIRA<sup>5</sup> was the most active terrorist group. In Corsica and to some extent on mainland France, Corsican nationalist terrorist groups committed a large number of attacks. “Anarchist terrorism” is reported to be still active in parts of the EU, notably Spain, Italy, Greece and Germany. In Italy, Red Brigades for the construction of a Combatant Communist Party (BR-PCC) murdered an economic adviser of the Minister of Labour. Moreover, the Revolutionary Front for Communism claimed responsibility for two failed bomb attacks. A bomb attack against the Ministry of the Interior remained unclaimed. In Greece, the left-wing group November 17 was dismantled after the arrest of 18 of its members and the seizure of its entire operational equipment. The EU Member States submitted no reports about right-wing terrorism.

As already argued above, until 11 September 2001, terrorism was seen as a “less fundamental security threat” (Krahmann 2001: 6):

“(...) within the context of expectations of peaceful change and intergovernmental cooperation, contemporary European governments are increasingly free to address less fundamental security threats than those which challenge their state borders and seek the collaboration of a broad variety of state and non-state actors.” (Krahmann 2001: 6).

After the large-scale catastrophic attacks in New York and Washington on 11<sup>th</sup> September 2001, no major terrorist attacks were reported within the EU, which could be linked to Islamic terrorism. A suicide attack was however prevented in December 2001 when passengers of American Airlines flight 063 overpowered a “shoe bomber”. Moreover, a number of cells that

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<sup>2</sup> Makarenko argues that there is a convergence between transnational organised crime and terrorism, e.g. in motivations, strategic cooperation and strategic alliances, which she calls the crime-terror continuum (CTC).

<sup>3</sup> Report on Trends and Situations on Terrorism.

<sup>4</sup> The Hague, 14 November 2002, File number 2566-221, ENFOPOL 14014280/02.

<sup>5</sup> RIRA = Irish Republican dissident terrorist group, the “Real” IRA. There is also the CIRA, the Continuity IRA, which is linked to the Republican Sinn Féin and which is opposed to the Good Friday Agreement – this is the only republic paramilitary organisation, which has not declared a ceasefire. Source: TE-SAT Report 2002, p. 12.

were preparing attacks within the EU were dismantled in Italy, Germany, the Netherlands, Belgium, the United Kingdom, France and Spain. Criminal investigation has to a large extent been targeted at recruitment and financing activities:

“A number of law enforcement operations have been conducted against Islamic terrorist groups or cells and their support networks. From these operations a new tendency has been identified within the Islamic extremist groups. They appear to be focusing less on national goals. Although different in origin and purpose, they are now seen to collaborate and provide mutual assistance in terms of logistic support, financing and propaganda. Islamic terrorist cells in Europe appear to be involved in a number of criminal activities including credit card fraud to finance their activities. A large number of Islamic activists have fought in Afghanistan, Bosnia, Chechnya and Kashmir; some of them were specially trained for terrorist operations. A number of these have left combat zones and settled throughout Europe. Borders do not concern Islamic terrorists. They use forged documents, which enable them to travel worldwide with little restrictions, if any. They are up to date in the latest techniques in the field of communications and make extensive use of the Internet and the satellite telephone, enabling distant control of operations and real time transmission of orders.”<sup>6</sup>

Worldwide, a number of terrorist attacks were reported to have been aimed deliberately at European citizens or interests (e.g. attack against a bus transporting French engineers in Karachi, Pakistan). No cases of bio-terrorism or cyber-terrorism within the EU were reported, although semantic confusion remains about the difference between political-ideological activism and hacker attacks against information systems (e.g. by spreading viruses). The TE-SAT report notably also includes a section on “crimes on furtherance of animal rights and environmentalism”. This demonstrates that the definition of terrorism is potentially quite wide.

In sum, many European terrorist groups still remain significantly active, but clearly, “subsequent to the attacks on the USA in 2001 there has been a greater focus on the Islamist threat and on the use of Europe as a logistics base for terrorist groups.”<sup>7</sup> With the weakening of the threat of war in Europe, terrorism has now taken a more predominant stance and has been framed as a threat with a strong international dimension.<sup>8</sup> At least, terrorism has infused widespread awareness that an enhanced form of co-operation was required at the European level.

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<sup>6</sup> EU TE-SAT report 2002, p. 20 and 21.

<sup>7</sup> Frank Gregory, “The EU’s role in the war on terror”, in *Jane’s Intelligence Review*, January 01, 2003.

<sup>8</sup> A recent example of this framing discourse is the view by the High Representative presented to the Thessaloniki Council, entitled “A Secure Europe in a Better World”: “International terrorism is a strategic threat. It puts lives at risk; it imposes large costs; it threatens the openness and tolerance of our societies. The new terrorism is different from the organisations with which we are familiar. Not only is it international, connected by electronic networks, and well resourced, it also lacks the constraints of traditional terrorist organisations.”

## II - TERRORISM AS A POLITICAL WINDOW OF OPPORTUNITY WITHIN THE EU

Terrorism – in particular the 11<sup>th</sup> of September – provided a catalyst for the swift adoption of legal instruments, both nationally as well as at EU level (Den Boer, 2003; Bonner, 2002: 498). The enhanced political focus on terrorism made it possible to accelerate decision-making and to “rubber-stamp” agreements and draft decisions that were already underway.<sup>9</sup>

### *The Accelerated Adoption of A Wide Range of Legal Instruments*

Three months after the 11<sup>th</sup> of September, political agreement was reached on the *EU Arrest Warrant*<sup>10</sup> at a JHA Council meeting on 6 and 7 December 2001. The legal instrument, which had been lying on the shelves, was created to facilitate extradition proceedings as it is based on the principle of mutual recognition, which since the Tampere European Council had been hailed as the new cornerstone for criminal justice cooperation. After a fast track procedure – partly due to the use of the procedure of urgency within the European Parliament – it received eventual endorsement in the form of political agreement, but it took another 6 months before various controversial matters were ironed out. These controversies related to: the fact that the Arrest Warrant facilitated extradition to countries which practise the death penalty; the width of the application (see below) to 32 offences and the removal of the double criminality principle to most of these offences; the removal of the political offence exemption; the removal of the exemption to extradite one’s own nationals; and constitutional implications for the national laws of EU Member States.

Indeed, one of the most contentious matters related to the question of whether extradition would be allowed to states which practise the death penalty, but, as article 13 of the Preamble affirms “No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”

The Arrest Warrant was made applicable to a list of 32 (ill-defined) offences. In addition, the explanatory memorandum to the European Arrest Warrant states that the principle of double criminal liability will be removed for most of the 32 offences. Various states lodged reservations against the removal of the double criminality principle, which means that the offence only has to be subject to criminal law in the requesting state. JHA Commissioner Antonio Vitorino rightly predicted resistance from within the Member States to abolish the double criminal liability:

“(..), some Member States still attach far too much importance to the issue of *double criminal liability*. Mutual recognition depends upon mutual trust for other Member States’ judicial systems. There is no longer a need for a judicial order issued by one Member State to be scrutinised by a judge in another Member State to see whether the underlying offence is exactly the same as in its own domestic law. This is the traditional, slow and bureaucratic approach to mutual assistance. For mutual

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<sup>9</sup> Statewatch News Online: Informal EU Justice and Home Affairs Council; see <http://www.statewatch.org/news/2002/sep/08informaljha.html>.

<sup>10</sup> 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, Official Journal L 190 , 18/07/2002 P. 0001 – 0020.

recognition to be effective, the traditional “double criminal liability” barrier to mutual assistance must be removed. Unfortunately some Member States have not yet realised this.”<sup>11</sup>

Another difficulty related to the scope of application of the Arrest Warrant: Member States with special legislation on abortion and euthanasia like the Netherlands feared that the coverage of various crimes besides terrorist offences would also apply to these special cases. Furthermore, the European Arrest Warrant could raise constitutional issues for some Member States in regard to the possible extradition of their own nationals,<sup>12</sup> and the binding nature of this instrument raised questions as to whether member states are prepared to revise their national extradition regimes.

The European Arrest Warrant contains highly detailed procedural rules based on a system of instant mutual recognition of one Member State’s judicial decisions in all other Member States, thereby replacing the unwieldy extradition procedures<sup>13</sup>. Such a system can only operate efficiently if it ensures that all judicial systems apply one identical scheme. As such, the European Arrest Warrant will not be operational until the Member States have transposed it, word for word, into domestic law. Any variations may give rise to refusal of mutual recognition. In addition, the scheme is weakened by the absence of machinery to penalise a Member State that does not meet its obligations. In fact, only a Member State can institute proceedings against another Member State before the Court of Justice, because the Commission cannot institute proceedings for failure to fulfill an obligation. The Member States are supposed to implement the European Arrest Warrant by January 2004.

Another legal instrument supposed to infuse further the process of legal harmonisation is the *Framework Decision on Terrorism*.<sup>14</sup> It was adopted at the JHA Council of 6 and 7 December 2001, but three parliamentary reserves were submitted. The instrument uses the key concept of terrorist offences, and as such, it establishes minimum rules relating to the constituent elements of criminal acts and compiles a common list of offences.<sup>15</sup> As far as the penal sanctions are concerned, the JHA Council chose a maximum penalty with a limit of fifteen years of imprisonment for leading a terrorist organisation, and a maximum sentence of not less than eight years for participating in a terrorist group.

Similar to the Arrest Warrant, the Framework Decision on the Freezing of Assets of Suspects, had been underway for a while.<sup>16</sup> The proposal on the mutual recognition and execution of orders to freeze the assets and evidence of suspects by all member states was made in

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<sup>11</sup> Antonio Vitorino, 27 September 2001, The European Policy Centre, [http://europa.eu.int/comm/justice\\_home/news/terrorism/press\\_cuttings/vitorino\\_epc\\_en.htm](http://europa.eu.int/comm/justice_home/news/terrorism/press_cuttings/vitorino_epc_en.htm).

<sup>12</sup> Bunyan, *Statewatch: Analysis Reports on Post-11 September*, no. 6.

<sup>13</sup> In particular the Convention of 10 March 1995 on simplified extradition procedures between the Member States of the European Union (OJ C 78, 30.3.1995, p. 2) and the Convention of 27 September 1996 relating to extradition between the Member States of the European Union (OJ C 313, 13.10.1996, p. 12).

<sup>14</sup> Proposed Framework Decision on Terrorism from the Commission, COM (2001) 521, 19 September 2001; Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA), L 164/3, 22.6.2002.

<sup>15</sup> Bunyan, *Statewatch: Analysis Reports on Post-11 September*, no. 6. The proposed *Framework Decision on Terrorism from the Commission* included a possible broadening of the concept of terrorism to cover protests at international summits and international violence. However, the JHA Council Conclusions of 6 and 7 December 2001 argue in favour of a balance between suppressing terrorist offences and guaranteeing fundamental rights in order to ensure that legitimate activities - such as trade union activities or the anti-globalist movements - do not in any case fall under the application of the definition of terrorism (14581/01 (Presse 444-G)).

<sup>16</sup> Proposed in November 2000 as part of the mutual recognition programme; Proposal by France, Sweden and Belgium on the execution of orders, assets and evidence, 13986/00, 30 October 2000; 5126/01, 2 February 2001; principle agreement reached by JHA Council on 28 February 2002; see *De Volkskrant*, 1 March 2002.

November 2000. Originally it was supposed to be part of the mutual recognition programme and it covered drug trafficking, EC budget fraud, money-laundering, counterfeiting of the euro, corruption and trafficking in human beings, but it was allegedly amended to include terrorism.<sup>17</sup> The mechanism proposed in February 2001 provides for the automatic execution in one state of orders to freeze assets or evidence from another. From the perspective of mutual recognition, Member States are expected to treat these orders as if they would be requested by their own national authorities to freeze assets.

Shortly after the events on 11 September 2001, the European Commission introduced emergency legislation to freeze more than 100 million euros worth of assets of people suspected of terrorism.<sup>18</sup> This draft was overtaken by Council Regulation (EC) No 2580/2001 of 27 December 2001, which is referred to in the Council Decision on Specific Measures directed against Certain Persons and Entities with a View to Combating Terrorism and in the Council Common Position on the Application of Specific Measures to Combat Terrorism.<sup>19</sup> These instruments contain no information on who precisely decides on listing these organisations (except 'the Council'), nor do they outline how these organisations can appeal against that decision.

Other avenues towards legal 'approximation' include: the ratification of existing conventions, including the 1995<sup>20</sup> and 1996<sup>21</sup> EU Conventions on Extradition<sup>22</sup> and the 2000 Mutual Legal Assistance Convention;<sup>23</sup> EU-wide standards introduced by the Commission to improve security for air travellers, and measures to reinforce security measures of the common visa;<sup>24</sup> investigations by the Commission into how EU legislation on asylum and financial markets can be made 'terrorism proof'; and tackling illegally obtained profits that are exploited for the benefit of sponsoring terrorist activities, under the 1985 EC Directive on Money-Laundering.

In parallel, a peer evaluation system was designed which allows mutual evaluation anti-terrorist measures.<sup>25</sup> This mechanism involves "evaluation teams" and "evaluation subjects" to monitor the effectiveness of national systems and their implementation of anti-terrorism measures. The mechanism is to be established under the responsibility of the Article 36 Committee (which in turn is composed of the national JHA coordinators of the Member States) and will be executed by a team of designated experts drawn from the Member States themselves.

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<sup>17</sup> Bunyan, *Statewatch: Analysis Reports on Post-11 September*, no. 6.

<sup>18</sup> Bunyan, *Statewatch: Analysis Reports on Post-11 September*, no. 6.

<sup>19</sup> OJ L 116/33, 3 May 2002; and OJ L 116/75, 3 May 2002, which repealed former decisions.

<sup>20</sup> In October 2001, this Convention still had to be ratified by France, the UK, Ireland, Italy and Belgium (Doc. 12759/01).

<sup>21</sup> In October 2001, this Convention still had to be ratified by France, the UK, Ireland and Italy (Doc. 12759/01).

<sup>22</sup> *Convention on Simplified Extradition Procedures between the Member States of the EU*, signed 10 March 1995; *Convention on Extradition between the Member States of the EU*, signed 27 September 1996.

<sup>23</sup> *Convention on Mutual Assistance in Criminal Matters between the Member States of the EU* (OJ 2000 C 197/1).

<sup>24</sup> Within the EU, there is discussion about a uniform model document for visas in case the travel document of the traveller is not officially recognised (use of biometrics and in the future digitalised versions of the photographs). Moreover, work is carried out concerning the standardisation of residence permits for non-EU citizens; see *Brief Tweede Kamer*, 27 October 2001.

<sup>25</sup> Council Decision of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism (2002/996/JHA), OJ L 349/1.

Overview of main decisions in the field of terrorism:

<b>BELGIAN PRESIDENCY</b> <b>1 JULY 2001-31 DECEMBER 2001</b>		
Commission tables European arrest warrant to supplant the current system of extradition between Member States and a common definition of terrorism and related penalties. They represent the first of many measures against all forms of cross-border organised crime, including terrorism.	European Commission, 13 September 2001	
General anti-terrorism plan in Council <i>Conclusions</i> , consisting of several measures including the creation of a special anti-terrorist unit at Europol; request to member states to reinforce their external border controls <sup>26</sup>	Extraordinary session JHA Council, 20 September 2001	JHA Council Conclusions, SN 3926/6/01, REV 6
Joint EU-US statement on terrorism	Solana, 20 September 2001	
EU-wide search and arrest warrant to be adopted; new extradition procedures; agreement on data-sharing; more prominent role for Europol; joint investigation teams of police and magistrates from throughout the EU; a common list of terrorist organisations; routine exchange of information about terrorism between the Member States and Europol; a specialist anti-terrorist team within Europol; a co-operation agreement on terrorism between Europol and the relevant US authorities; and Eurojust, a co-ordination body composed of magistrates, prosecutors and police officers, to be launched on 1 January 2002.	EU Extraordinary Council, 21 September 2001 <sup>27</sup>	
Anti-terrorism roadmap <sup>28</sup> .	JHA Council, 21 September 2001	
Vote on European Council of 21 September 2001: 431 votes in favour; 45 against; 24 abstentions	European Parliament	
Discussions about the Framework Decision on the European Arrest Warrant and the Framework Decision on the Fight against terrorism	JHA Council 16 October 2001	
Political agreement about the revised EU Money Laundering Directive	JHA/ECOFIN Council, 16 October 2001	
<i>Conclusions</i> ; General description of EU action after the events on 11 September 2001 and evaluation of their possible economic impact <sup>29</sup>	General Affairs Council and European Commission, 17 October 2001	
Declaration: Action Plan to be implemented as soon as possible. Firstly, the approval of the practical details of the European arrest warrant and the common definition of terrorist offences. Secondly, an increased co-operation between the operational services responsible for combating terrorism: Europol, Eurojust, the intelligence services, police forces and judicial authorities. Such co-operation	European Council in Gent, 19 October 2001	SN 4296/2/01

<sup>26</sup> Objective 41, doc. 12759/01; JHA Council *Conclusions* of 20 September 2001, SN 3926/6/01 REV 6.

<sup>27</sup> See [http://europa.eu.int/comm/external\\_relations/cfsp/doc/concl\\_21\\_09\\_01.htm](http://europa.eu.int/comm/external_relations/cfsp/doc/concl_21_09_01.htm).

<sup>28</sup> SN 4019/01, revised SN 4019/1/01 on 2 October 2001. The overall plan was brought together as 'Coordination of Implementation of the Plan of Action to Combat Terrorism', first as 12579/01 (12 October 2001), then as 12800/01 (16 October 2001) and 12800/1/01 REV (17 October 2001). Also see Tony Bunyan, *Statewatch: Analysis Reports on Post-11 September*, no. 7.

<sup>29</sup> COM(2001) 611 final, Brussels, 17 October 2001.

should in particular enable a list of terrorist organisations to be drawn up by the end of 2001.		
Political agreement about list of offences appended to European arrest warrant, with the exception of the Italian delegation <sup>30</sup>	JHA Council, 16 November 2001	
Momentum for political agreement on the Framework Decision on the European Arrest Warrant and Framework Decision on Terrorism; adoption of anti-terrorism road map <sup>31</sup>	JHA Council, 6 and 7 December 2001 <sup>32</sup>	
<b>SPANISH PRESIDENCY</b> <b>1 JANUARY 2002-30 JUNE 2002</b>		
Strategic document on terrorism in Europe, 14574/1/01 ENFOPOL 141 REV 1	28-29.01.2002 2406 <sup>th</sup> Council Meeting General Affairs pt. A 15.	
Europol Supplementary and Amending Budget for 2002 (New counter-terrorism activities) – Revised in the light of the outcome of the meeting of the Management Board on 11 and 12 December 2001 5439/02 EUROPOL 3 15309/01 EUROPOL 107	28.02.2002 2411 <sup>st</sup> Council Meeting Justice, Home Affairs and Civil Protection, pt. A 10.	C74 of 23.03.2002, p. 1.
Terrorist Activity in the European Union: situation and trends 5759/1/02 ENFOPOL 21 REV 1 (TE-SAT)	25-26.03.2002 2420 <sup>th</sup> Council Meeting Transport / Telecommunications pt. A 19.	
Council recommendation for the establishment of multinational ad-hoc teams for gathering and exchanging information on terrorists 5715/6/02 ENFOPOL 19 REV 6	25-26.04.2002 2423D Council Meeting Justice, Home Affairs and Civil Protection pt. A 14.	
Reaffirmation of EU and USA of cooperation in fight against terrorism (meeting Bush, Aznar and Prodi)	2 May 2002	
Decision adopted by written procedure, Fight Against Terrorism, Updated List, updating of texts adopted on 27 December 2001 (...) which implement UN Security Council Resolution 1373 (acts adopted concerned a common position updating common position 2001/931/CFSP on the application of specific measures to combat terrorism; an implementing Decision establishing the list provided for in Article 2(3) of the Regulation (EC) No 2580/2001 on specific restrictive measures directed against persons and entities. This Decision repeals Decision 2001/927/EC adopted on 27 December 2001. The common position defines “terrorist acts”, the “persons, groups and entities” involved in such acts and the procedure for drawing up the list. The list will be reviewed at regular intervals.	3 May 2002, 8549/02 (Presse 121)	Acts published in the Official Journal L 116 of 3 May 2002.
Communication from the Commission to the Council on civil protection measures	11.06.2002	COM [2002] 302 final.
(Final adoption of) Council Framework Decision of 13 June	13-14.06.2002	L 190 of

<sup>30</sup> Alternative proposal lodged by Italian delegation: 14559/01 COPEN 78 CATS 43; proposal of the Belgian Presidency: 1 January 2004; see Article 26 of the Draft Framework Decision (provision concerning transition), 14867/1/01 REV, 10 December 2001.

<sup>31</sup> No. 14925/01 (7 December 2001; POLGEN 35); 14919/1/01 (13 December 2001; POLGEN 34).

<sup>32</sup> 14581/01 (Presse 444), provisional version.

2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision	2436 <sup>th</sup> Council Meeting Justice, Home Affairs and Civil Protection pt. A 40.	18.7.2002
(Final adoption of) Council Framework Decision of 13 June 2002 on Combating terrorism	13-14.06.2002 2436 <sup>th</sup> Council Meeting Justice, Home Affairs and Civil Protection pt. A 42.	L 164 of 22.06.2002
Council Decision of 13 June 2002 amending the Council Decision of 27 March 2000 authorising the Director of Europol to enter into negotiations on agreements with third States and non-EU related bodies 8703/02 EUROPOL 37 8770/02 EUROPOL 39	13-14.06.2002 2436 <sup>th</sup> Council Meeting Justice, Home Affairs and Civil Protection pt. A 5	C 150 of 22.06.2002, p. 1
<b>DANISH PRESIDENCY 1 JULY 2002-31 DECEMBER 2002</b>		
Non-confidential report on the terrorism situation and trends in Europe (TE-SAT report – October 2001 – October 2002)	20 November 2002, 14280/02, ENFOPOL 140	
Draft Recommendations of the Management Board to the Council on the future of the Counter-Terrorism Task Force	28-29.11.2002 2469 <sup>th</sup> Council meeting Justice, Home Affairs and Civil Protection	
Draft Council Recommendation on the development of terrorist profiles	28 – 29.11.2002, 2469 <sup>th</sup> Council Meeting, Justice, Home Affairs and Civil Protection	
Council Decision of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism	28 –29.11.2002, 2469 <sup>th</sup> Council Meeting Justice, Home Affairs and Civil Protection.	L 349 of 24.12.2002, p. 1
Common Position 2002/976/CFSP, on the application of specific measures to combat terrorism	12 December 2002	
Non-confidential report on the terrorism situation and trends in Europe	19.12.2002, 2477 <sup>th</sup> Council Meeting Justice, Home Affairs and Civil Protection	
<b>GREEK PRESIDENCY 1 JANUARY 2003 – 31 JULY 2003</b>		
Council Decision concerning the signature of an agreement between EU – USA Agreement on Extradition and Mutual Legal Assistance	05-06.06.2003 2514 <sup>th</sup> Council Meeting Justice and Home Affairs, pt. 5	
Strategic Document on terrorism	05-06.06.2003	2514 <sup>th</sup> Council Meeting Justice and Home Affairs, pt. A11.

This – most likely imperfect - overview of adopted counter-terrorism legislation within the EU demonstrates that the legislative machine has gradually come to a halt. This relative standstill may have different reasons, about which we can only offer some speculation. In part, attention to security issues was geared towards the Iraq crisis, which dominated the EU security agenda for several months. But this would only explain why the CFSP machinery had slowed down concerning the adoption of counter-terrorism instruments. Another reason, also probable, is that the JHA decision-making machinery reached a saturation point after it was established that all items on the Action Plan adopted by the Extraordinary Council held in the wake of the attack on the World Trade Center had been achieved. A final reason may have been that the Spanish Presidency of the EU (which succeeded the Belgian Presidency during which the terrorist attacks took place) simply carried out policy objectives adopted under the regime of its predecessor, and decided to focus the priority on illegal immigration as the dominant JHA policy item during its Presidency term.

From the Seville Presidency conclusions, it appears that there has been considerable spillover from counter-terrorism legislation to legislation in the immigration and asylum area. Legislation related to consular cooperation, visa policy and identity controls reveal that anti-terrorism efforts have also extended to immigration and border controls, which may be read as a consequence of the “securitisation” of the migration discourse.

### *The Bolstering of Justice and Home Affairs Organisations*

The Tampere European Council, which was convened in October 1999, already opened the door for a stronger institutional approach to internal security matters: Europol had to be strengthened, Eurojust and a European Police College had to be established, and a Police Chiefs Task Force<sup>33</sup> – based on a looser setting - had to take up a coordinating role in view of cross-border operational activities. A further institutional strengthening took place in the wake of the September 2001 attacks.

Europol already expanded its mandate to include counter-terrorism in 1999. After the September 2001 attacks, the agency was asked to establish a Task Force for the Fight against Terrorism, which commenced its activities on 15 November 2001. The Task Force is composed of experts and liaison officers from police and intelligence services in the Member States. Its tasks include: a) timely gathering of relevant information and intelligence about actual threats; b) analysis of collected information and performance of the necessary operational and strategic analysis; c) undertaking of threat assessment on the basis of acquired information (including targets, damage, modus operandi and impact for the security situation in the Member States).<sup>34</sup> The first output of the Task Force included the EU evaluation report about Islamic extremist terrorism and the first EU overview concerning preventive measures against terrorism. The Task Force has access to Europol’s database that contains information on the (illicit trafficking in) explosives, which was established prior to 11 September 2001. It is also responsible for the evaluation of the financing of terrorism and it works on an Arabic-English translation system, which allows the evaluation of intelligence in the Arabic language by Europol.

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<sup>33</sup> This Task Force was established to compensate for the perceived lack of professional input in the JHA-decision-making system. In some respects, its functioning resembles that of the old Trevi-structure, but the participation is in principle limited to high-ranking police officers and hence there is no inclusion of the senior executive. The chairmanship is carried out by a chief police officer of the EU Member State that holds the EU Presidency.

<sup>34</sup> Europol Annual Report 2001, p. 13, The Hague, 16 April 2002, file no. 8381/02.

Europol also established an operational centre, which exchanges and coordinates information and intelligence 24 hours a day and which composes an information bulletin. The EU Member States receive a weekly update of the open sources repertory about terrorism-related activities. A glossary of terrorist groups with basic data about origin, ideology, targets, leadership and activities is updated on a regular basis. Open sources and national reports allow the frequent release of trend and situation reports by Europol.<sup>35</sup> In the field of ICT, a *Counter Terrorism Support System* was designed on the basis of the Europol Interim Information System (IIS), which is meant to store data concerning terrorism without distribution of this –very sensitive- data within the Europol-network.<sup>36</sup> Whereas before 11 September 2001 Europol had ‘only’ seven counter-terrorist specials, by 15 October of that same year the team comprised 35 national counter-terrorist specialists, known as the Counter Terrorist Task Force (CATTY). These secondments from national services were not permanent but renewable on a six-monthly basis. This Task Force has now been re-baptised as the Counter Terrorism Unit, which covers operational analysis as well as strategic aspects.

To fulfil its counter-terrorism mandate, Europol has combined its efforts in a range of programmes. The first is the Counter Terrorism Programme (CTP), which monitors developments in the mandated areas, which analyses strategic and operational aspects, and which undertakes threat and risk assessments by carrying out awareness activities. In this programme, there is a spill-over to the monitoring of “some forms of extremism”, but only if it is violent or when it is targeted at European political or economic aspects. The Counter Proliferation Programme (CPP) covers all forms of illicit trafficking, namely nuclear material, strong radiological ammunition and explosives as well as weapons of mass destruction and related precursors. The Networking Programme (NP) is meant to enhance the efficiency of the co-operation in counter-terrorism efforts and other state security areas amongst the co-operating partners. The programme aims to establish regular contacts and meetings with experts in the Counter Terrorism and Counter Proliferation units of the Member States and International Organisations. The Preparedness Programme (PP) develops a methodology for joint teams and prepares future task forces. Finally, the Training and Education Programme (TEP) seeks to guarantee an effective response by providing training to law enforcement and intelligence officers.

Guidance and support to Europol is supposed through the JHA Terrorism Working Group and the meetings of EU security and intelligence service heads in the new Counter-Terrorism Group. In addition, Europol has created a ‘high-level expert group’, which draws representatives from the Member States key bodies, such as the Metropolitan Police Special Branch, and which is chaired by the Europol Deputy Director (Gregory, 2003).

A second institution sailing with the tide of EU anti-terrorism efforts is Eurojust. Its establishment was decided upon at the Tampere European Council (15 and 16 October 1999), as it was perceived necessary to improve judicial cooperation between the member states and to overcome obstacles thrown up by mutual legal assistance agreements (such as disparate procedural requirements for evidence-gathering). Following a Council Decision of 14 December 2001, the decision to create Eurojust formally was adopted by the JHA Council on 6 and 7 December 2001. On 28 February 2002, the Council adopted the Decision setting up Eurojust with a view to reinforcing the fight against serious crime.<sup>37</sup> Eurojust, which is composed of one national member from each EU member state (prosecutor, judge or police

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<sup>35</sup> Europol Annual Report 2001, p. 14, The Hague, 16 April 2002, file no. 8381/02.

<sup>36</sup> Europol Annual Report 2001, p. 20, The Hague, 16 April 2002, file no. 8381/02.

<sup>37</sup> OJ L 63/1 (2002/187/JHA), 6 March 2002.

officer<sup>38</sup>), has a wide general competence over all types of crime and the offences on which Europol is also competent, but also computer crime, fraud and corruption, money-laundering, environmental crime, and participation in a criminal organisation. Eurojust will be based in The Hague and will pursue close cooperation with Europol (Den Boer, 2003: 200).

The provisional Eurojust (Pro-Eurojust) began operating in January 2001, and throughout 2001 it was working on 170 cases. According to the conclusions of the Extraordinary Council on 21 September 2001, Eurojust has to pursue a strengthening of 'cooperation between anti-terrorist magistrates'. The first such meeting was held on 10 October 2001. Eurojust's activities naturally entail the exchange of personal data.<sup>39</sup> Despite a recommendation from the European Parliament that the 1981 Council of Europe Convention and supplementary Recommendation 87(15) should apply, there were no data protection provisions in the draft Council Decision.<sup>40</sup> The final Council Decision contains provisions on the handling of personal data, data security, and the appointment of an independent joint supervisory body to monitor the activities of Eurojust. The Joint Supervisory Body accommodates representatives from the relevant (i.e. nationally responsible judicial) national authorities. Also a Data Protection Officer has been appointed at Eurojust, who is a staff member. From this, it may appear that there are various accountability gaps vis-à-vis the functioning of Eurojust (Den Boer 2002: 278).

Like Europol, Eurojust was asked to intensify its cooperation with anti-terrorism magistrates in the US.<sup>41</sup> The (then) President of Eurojust assured that the facilitated liaison between EU and US magistrates does not involve the direct exchange of information between them.<sup>42</sup> A Eurojust magistrate was appointed by the US, which implied a more direct operational contact with the US liaison magistrate working at the USA embassy in Paris.

Alongside Europol and Eurojust, joint investigation teams are to be established, which will – once they become operational - consist of officers and officials from EU member states and which will be charged with the coordination of investigations linked to terrorism. A team will comprise police officers and magistrates who specialise in counter-terrorism, representatives of Eurojust, and Europol officers to the extent that this is allowed by the Europol Convention.<sup>43</sup> The decision to create joint investigation teams partly flows from the Tampere Conclusions (October 1999), partly from an early implementation of the (not yet fully ratified) EU Convention on Mutual Legal Assistance. The draft Framework Decision<sup>44</sup> authorises joint teams to carry out criminal investigations concerning trafficking in drugs and human beings as well as terrorism. EU member states should have the possibility to decide whether representatives of authorities of non-member states, and in particular the US, can participate. A *procédure d'urgence* was introduced into the European Parliament in order to

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<sup>38</sup> Although Eurojust is supposed to act as a legal organisation, the participation of police officers is apparently allowed to overcome the differences between the legal systems in the European Union, some of which are not prosecutorial but adversarial in character.

<sup>39</sup> Bunyan, *Statewatch: Analysis Reports on Post-11 September*, no. 7.

<sup>40</sup> Bunyan, *Statewatch: Analysis Reports on Post-11 September*, no. 6; see *Decision 2000/799/JHA setting up the Provisional Judicial Cooperation Unit (Eurojust)* (OJ 2000 L 324/2); *Draft Council Decision setting up Eurojust*, 11685/2/01, 20 September 2001.

<sup>41</sup> Objective 54, doc. 12759/01.

<sup>42</sup> Michèle Konincxs, in an interview with *Agence Europe*, 5 November 2001.

<sup>43</sup> For Europol to participate fully, the 1995 Europol Convention must be amended by way of a protocol amended by national parliaments. It appears that Europol has already been participating in de facto joint teams for some time in contravention of Article 4(2) of the 1995 Convention; see Bunyan, *Statewatch: Analysis Reports on Post-11 September*, no. 6.

<sup>44</sup> Proposed *Framework Decision by Belgium, Spain, France and the UK on Joint Investigation Teams*, 11990/01, 19 September 2001.

accelerate decision-making, and the Framework Decision was implemented on 1 July 2002 (Den Boer, 2003: 201).<sup>45</sup>

The Article 36 Committee, which consists of senior civil servants from Justice and Home Affairs ministries, is to ensure the closest possible coordination between Europol, Eurojust and the EU Police Chiefs Operational Task Force (PCOTF). The Committee was also asked to hold a policy debate on strengthening cooperation between police services, including Europol and intelligence services. The JHA Council of 20 September 2001 instructed the Article 36 Committee to work out a speedier version of the evaluation mechanism defined in the Joint Action of 5 December 1997. This Action established a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime. This was done in order to define a procedure for the peer review of national anti-terrorist arrangements, on the basis of considerations of a legislative (such as legislation allowing the interception of telephone communications or to draw up a list of terrorist organisations), administrative or technical nature. The JHA Council wished to receive an evaluation report together with proposals by the end of 2002. The General Secretariat of the Council would accordingly be host to two national experts specialising in counter-terrorism and seconded from police and intelligence services (Den Boer, 2003: 201).<sup>46</sup>

The PCOTF was charged with organising high-level meetings between the heads of EU counter-terrorist units. In cooperation with the Council Working Group on Terrorism, the PCOTF was to compile an inventory of national measures and alert plans. Moreover, it was charged with preparing measures to strengthen controls at external borders, about which it has to report to the meetings of the Council of JHA Ministers.

The Heads of Security and Intelligence Services<sup>47</sup> were asked to meet on a frequent basis, and they were expected to include internal security agencies (such as MI5 in the UK) and external intelligence agencies (such as MI6 and GCHQ in the UK). Their task is to work on an inventory of legal competences of the secret intelligence services in the field of anti-terrorism. Some commentators, like Tony Bunyan, have reacted with a sceptical note by saying that data compiled by Europol concerning threats emanating from outside the EU will pass straight to this new *ad hoc* group'.<sup>48</sup> The group will stand alongside the PCOTF, but in practice 'it will be the senior group'. Data between Europol and this group are likely to be passed on a 'need-to-know' basis, which is a pragmatic form of co-operation between police agencies. This new group, as Bunyan argues, "has no legal standing, no provision for data protection, and no mechanism for parliamentary scrutiny or accountability". A first meeting was held on 11 and 12 October 2001, while the Heads of EU counter-terrorist units met on 15 October 2001.<sup>49</sup> The latter meeting was held in order to improve operational cooperation between Member States and third countries, to coordinate measures implemented in the Member States to guarantee a high level of security, including in the field of air safety, and to consider the missions to be entrusted to the team of counter-specialists within Europol (Den Boer, 2003: 202).<sup>50</sup>

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<sup>45</sup> In addition, the Council adopted a Council Recommendation for the establishment of multinational *ad hoc* teams for gathering and exchanging information on terrorists (25-26 April 2002, 5715/6/02 ENFOPOL 19 REV 6).

<sup>46</sup> SN 3926/6/01 REV 6.

<sup>47</sup> Working on an inventory of legal competencies of the secret intelligence services in the field of anti-terrorism.

<sup>48</sup> Bunyan, *Statewatch: Analysis Reports on Post-11 September*, no. 7.

<sup>49</sup> See objective 25, doc. 12759/01.

<sup>50</sup> JHA Council *Conclusions*, 20 September 2001, SN 3926/6/01 REV 6.

Additional measures included the expansion of the network of Counterterrorist Liaison Officers (CTLO's) which belonged to the Police Working Group on Terrorism (PWGT), which – incidentally – covers more countries than the EU Member States<sup>51</sup>. Also the Second Pillar Counterterrorism Working Party (COTER) and the JHA Terrorism Working Group were to be expanded. Moreover, a JHA Joint Action from 1996 had required the creation and maintenance of a Directory of Specialised Counterterrorist Competencies, Skills and Expertise in the Member States (Gregory, 2003). Inter-organisational relationships were to be consolidated after 9/11 by means of three-monthly joint meetings between COTER (the CFSP's counter-terrorism group) and the JHA Working Party on Terrorism Troikas. They report to high-level transatlantic meetings. Other forums to be reinforced included the Forum of Magistrates, the Financial Action Task Force (FATF),<sup>52</sup> and the European Coordinator of Civil Protection (biological and chemical weapons).<sup>53</sup>

The involvement of all these agencies, groups and individuals means that the EU's counter-terrorism venue may well be characterised as a crowded policy area, which is mainly caused by a gradual and incremental form of policy-making (Walker, 2000: 256f). At the national level, various law enforcement organisations compete for representation space at the European stage. In this process, hard choices are seldom made, which means that the national rivalry tends to reverberate within EU Council Working Groups, task forces and committees.

For the time being, it is unlikely that previous bilateral and multilateral practises of information and intelligence exchange will subside, implying numerous interactions that may go in different directions. With the increased involvement of and interaction with the national secret services, there has been a gradual insertion of "high policing agenda" into European security governance (Brodeur, 1983). The former barriers between traditional policing functions and secret service activities are eroding, and this has (or should have) implications for the transparency and accountability of European law enforcement organisations (Den Boer, 2002: 279). One of the most problematic aspects of the mushrooming of transnational law enforcement agencies is the lack of a design, certainly when placed in a new setting (e.g. a written Constitution for Europe) (Walker, 2002: 320). Neither does there seem to be much reflection on the inter-institutional interaction between these law enforcement bodies, nor does accountability appear as an issue to be addressed in the drafting of legal instruments (Den Boer, 2002: 277f; Walker, 2000: 256f). As such, accountability usually appears as an after-thought, and is too complex an issue to be tackled by Council working groups who sometimes work in splendid isolation from one another.

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<sup>51</sup> Members include the EU Member States, Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Norway and Switzerland as well as the EU states. The PWGT also has a secure communications system linking bodies like the French UCLAT and the European Liaison Section of the UK Metropolitan Police Special Branch (Gregory, 2003).

<sup>52</sup> FATF is an independent body under the OECD and consists of 29 states (including all EU member states). It organized an extraordinary meeting in Washington DC on 29 and 30 October 2001, during which it adopted recommendations and an action plan to combat terrorist financing; see <http://www.fatf-gafi.org>, from: *Newsletter to the European Parliament*, 6 November 2001.

<sup>53</sup> An extraordinary meeting of Civil Protection Directors-General was held in October 2001 in Knokke, Belgium.

## *The Consolidation of the Transatlantic Nexus*

The external side of the internal security agenda also received a significant boost. This is particularly visible in the transatlantic cooperation with the USA, and to some extent, also with Canada. The momentum opened up by 9/11 was also exploited to launch an agreement between Europol and the USA to provide for the exchange of personal data. To the surprise and outrage of parliamentarians and civil liberty groups, the agreement on data exchange failed to pass a proper parliamentary consultation, which would have been in accordance with the Europol Convention.<sup>54</sup> Previously, the EU had not yet been able to enter into such an agreement because of the absence of a relevant data protection regime at the federal level of the USA. Eurojust, the judicial counterpart of Europol, was also asked 'as a matter of priority' to consider starting up negotiations on similar agreements. Also, negotiations about mutual legal assistance treaties between the EU and the US were conducted, mainly relating to the extradition of suspects to the USA. But differences in data protection regimes remained a hindrance in the cooperation. This meant that the FBI agent who was seconded to Europol only stayed for six months, and that law enforcement personnel from the EU working in the USA faced restrictions on their access to information in US law enforcement agency files (Gregory, 2003). A first liaison office was however opened in Washington D.C. in August 2002.

Other EU-USA issues included the continuation of a dialogue between the USA and the EU about a comprehensive convention on international terrorism. The EU Action Plan on terrorism recommended a swift and efficient exchange of operational information on terrorist activities between the law enforcement authorities in the USA and the EU. European and US law enforcement experts should meet regularly to share information on threat assessments in relation to preventive measures. Moreover, possibilities of setting up specific joint investigation teams were to be examined as quickly as possible. These joint investigation teams were to be established with the participation of law enforcement officers from the USA and one or more Member States of the EU, and with a view to investigate the financing of terrorism (e.g. by drugs trafficking). Finally, the USA and the EU should systematically share information on security measures introduced in order to prevent terrorism, especially in relation to border control, and on law enforcement initiatives as well as investigation techniques relevant for the fight against terrorism.<sup>55</sup> It is clear that the transatlantic axis against terrorism has opened the EU-door to the USA far more widely than before, and that there is a spill-over from terrorism to other security or mobility-related issues. Border controls, criminal justice co-operation, immigration and asylum policy have thus become elements inserted in a wider transatlantic security policy continuum.

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<sup>54</sup> <http://www.statewatch.org/news/2002/nov/12europa.htm>.

<sup>55</sup> See Statewatch: <http://www.statewatch.org/news/2002/sep/08informaljha.html>.

### III - TERRORISM VERSUS THE EUROPEAN CITIZEN: ARE CIVIL LIBERTIES AT STAKE?

Is there a risk of over-securitisation of the European society through issuing anti-terrorist legislation and if so, how does this affect the protection of personal rights? Does the emergence of this security continuum turn Europe into a surveillance society, or worse: have EU Member States become police states? In unfolding this analysis, it should be taken into account that some EU Member States, in particular those which have endured political violence and domestic terrorism, already had a significant regulatory repertoire to fight terrorism prior to 9/11.

However, the 11<sup>th</sup> of September seemed to have a certain strengthening impact on domestic legislation. In response to the new EU Framework Decision on Terrorism, the Dutch Government for instance drafted a new anti-terrorist law, which will make terrorism a punishable offence for the first time in Dutch history.<sup>56</sup> Moreover, to enhance counter-terrorism efforts in the Netherlands, there have been proposals to facilitate the demand for data from the financial sector, to introduce compulsory identification, and to relax the employment pro-active investigation methods (in particular the employment of criminal informants). Germany responded to 9/11 with the rapid introduction of new police competencies, in particular to stage house searches on buildings belonging to religious organisations. Secret services were given the possibility to intercept telecommunications – including e-mail communication – in a preventive manner. In Belgium, the legislation was not changed after 9/11, but it became easier to freeze assets.<sup>57</sup>

In the UK, the terrorist attacks in the USA provided the catalyst for the Anti-terrorism, Crime and Security Act 2001, which is severe as it allows for detention without trial and as it introduced a range of policing and criminal law reforms (C. Walker, 2003: 11). In reviewing the impact of the new law, Bonner (2002: 523) sketches the “fragility” of the human rights culture, as the UK can derogate from ECHR obligations through the public emergency clause. From a quick scan among the EU countries, we may learn that measures not directly related to criminal law were also introduced to toughen the security climate. This was done primarily through the toughening of identity controls, the relaxation of data exchange regimes between police, security services and the private sector (banking, transport business), and making it easier to track data via mobile telephones and other forms of telecommunication.

In global terms, human rights have been seriously affected by the “war against terrorism”. This trend was emphasised by Kofi Annan, the Secretary-General of the United Nations<sup>58</sup>:

“Internationally, we are beginning to see the increasing use of what I call the “T-word” – terrorism – to demonise political opponents, to throttle freedom of speech and the press, and to delegitimise legitimate political grievances. We are seeing too many cases where States living in tension with their neighbours make opportunistic use of the fight against terrorism to threaten or justify new military action on long-running disputes.”

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<sup>56</sup> Wetsvoorstel tot uitvoering van het EU-Kaderbesluit terrorismebestrijding (Wet terroristische misdrijven) (28 463).

<sup>57</sup> NRC Handelsblad, 9 April 2003.

<sup>58</sup> Newsletter School of Human Rights Research, Volume 6, Issue 4, December 2002, p. 10; Lecture given at the occasion of receiving an honorary degree from Tilburg University.

Likewise with organisational accountability, renewed counter-terrorism cooperation between the secret services has introduced new opaqueness concerning data exchange and the protection of personal privacy. It is unclear to what extent operational information is exchanged during high-level international meetings, and to what extent the information “firewall” between police agencies and secret services has become attenuated. The disappearance of the Cold War paradigm may not have been substituted by a new coherent world-view, and hence, accountability which relates to the continued operations of the secret services, has acquired a broader meaning (Brodeur, Gill and Töllborg, 2002: 2):

“Consequently, accountability now ought to take a broader meaning than it did in the past. It does not anymore refer only to the provision of accounts for various operations in respect to their legality and their observance of basic human rights but also to what we may call doctrinal accountability, that is accounting for the reorientation of the agencies’ operations within the new historical context.”

Human rights and accountability thus have to be perceived from a far more fundamental perspective: counter-terrorism has had the potential to accelerate the already ongoing merging process between internal and external security. Moreover, the perceived threat of terrorism has infused support for relaxing civil liberties standards, as may be witnessed from the introduction of tougher identity controls, camera surveillance, linkage of electronic databases, and the suspension of procedural rights during pre-trial detention periods.

#### **IV - TERRORISM AND THE EVOLUTION OF A SECURITY GOVERNANCE WITHIN THE EU**

From the above, it appears that the government and governance of terrorism are becoming more Europeanised. When seen from the perspective of anti-terrorism, national approaches do not seem incompatible with supranational strategies (Van Kersbergen, Lieshout and Lock, 1999: 16). In line with the Europeanisation trend, the delegation of competencies may be an aspect of the ‘relocation’ of politics. Van Kersbergen (1999: 83) argues that this does not necessarily imply an emasculation of the power of the nation state; it rather seems a transformation of the manner in which state power is exercised. Within the creation of a European criminal justice area, states do not intend to relinquish their powers and therefore insist on applying the proportionality and subsidiarity requirements onto the need for international cooperation. A clear example of this is the ‘soft’ alignment strategy that has been agreed on between European Commission and the EU Member States, namely by adopting a JHA “scoreboard” and by imposing a peer review system. Notwithstanding the relative success of these instruments, nation states increasingly realise that national instruments against terrorism are beginning to lose effectiveness.

Indeed, while states still want to keep a stronghold on anti-terrorism efforts, their influence is intersected by other states, in particular the USA; intergovernmental organisations active within the external security domain (G7<sup>59</sup>, NATO, United Nations); and non-state actors (NGO’s; private sector; actors at the global or subnational level). A complex, multi-level governance emerges, within which national sovereignty still prevails as the main framework of reference. This complex ordering of power, influence and politics accommodates both vertical (centralised decision-making) and horizontal (decentralised, networked and informal policy cooperation). The policy issue of counter-terrorism belongs to the realm of high politics, which is sensitive enough to be particularly prevalent in the context of inter-state bargaining about the extent of harmonisation between anti-terrorism instruments.

It seems certain that states themselves are increasingly regarded as less able to exercise traditional sovereignty over high security issues such as terrorism. Their capacity to manage may decline, although their role in international coordination is still pivotal. Some argue that therefore, security governance tends to become fragmented externally (between states and interstate bodies), but also internally between actors in an increasingly complex arena, bringing along turf wars and organisational rivalry (e.g. Brodeur et al, 2002: 5).

Many arenas of high politics indeed concern themselves with counter-terrorism: the policy issue has been colonised by various international forums, including the UN, the EU, OSCE, NATO, and the Council of Europe. The effect of this could be that counter-terrorism becomes the subject of fragmented governance arrangements, resources and regulations, which are subsequently dispersed among a range of public and private actors who have to coordinate their efforts in order to resolve common problems. Despite occasional instances of rivalry, lack of coordination problems, and overlap, it seems that counter-terrorism has not been completely carved up and shared by multiple actors in what seems a crowded policy and regulatory space.

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<sup>59</sup> The G7 + launched a plan to coordinate responses to bioterrorism globally, IP/01/1553, 8 November 2001.

The NATO Summit in Prague<sup>60</sup> and the EU Summit in Copenhagen<sup>61</sup> revealed that NATO and the EU are heading for a convergence of security objectives, which throws up the question whether Europe in the process of creating a new pan-European political order. NATO, with its formerly exclusive focus on military security, has incorporated new security challenges, and is, like the EU, faced with the impact of enlargement. This means that security foci of the organisations are increasingly converging. Threat analysis has become a joint issue: there is a growing importance of collective strategic intelligence, which also implies an enhanced role for Europol in strategic intelligence gathering.

The CFSP pillar has traditionally played a less active role in the EU response against terrorism, mainly because of the difficulty to achieve consensus on European Security and Defence Policy operational matters. On the other hand, the EU has been active on issues relating to cooperation between external intelligence agencies and longer-term matters relating to non-proliferation and arms control. A common response item was formed by the need to address the 40 counter-terrorism response priorities which were set out in President Bush's letter of 16 October 2001 to European Commission President Romano Prodi, but the majority of measures proposed fell under the remit of the Third Pillar. As far as the input of the Second Pillar is concerned, it should also be noted that the prevention of or the fight against terrorism is not included in the Petersberg missions<sup>62</sup>. During the Spanish Presidency term of the EU, on 21 March 2002, Spanish Defence Minister Federico Trillo said about this:

“First of all, we should bear in mind that the threat from terrorism is not included in the Petersberg missions, which are confined to peace, humanitarian and rescue operations. That said, we cannot ignore the fact that the Union Treaty itself provides, among the objectives of the Common Foreign and Security Policy, for defending the interests and security of the EU in all their forms - and there can be no doubt that international terrorism has now become the greatest threat to world peace and security. As a result, (...) Spain's EU Presidency intends to drive forward measures providing for intelligence sharing and protection against potential attacks from NBC (nuclear, bacteriological and chemical) weapons of mass destruction.”<sup>63</sup>

However, within the context of an ESDP meeting on 22 March 2002, it was agreed that proposals would be submitted to the European Convention preparing the Intergovernmental Conference in 2004 regarding possible amendment of the Treaty on European Union to

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<sup>60</sup> NATO Summit in Prague, 21 and 22 November 2002, where the NATO Heads of State and Government opened a new chapter in the Alliance's history by inviting seven countries to Accession talks and by discussing to equip NATO with “new capabilities to meet the security threats of the 21<sup>st</sup> century.” The Communiqué (2002 (127)) provides in pt. 3 that: “Recalling the tragic events of 11 September 2001 and our subsequent decision to invoke Article 5 of the Washington Treaty, we have approved a comprehensive package of measures, based on NATO's Strategic Concept, to strengthen our ability to meet the challenges to the security of our forces, populations and territory, from wherever they may come. Today's decisions will provide for balanced and effective capabilities within the Alliance so that NATO can better carry out the full range of its missions and respond collectively to those challenges, including the threat posed by terrorism and by the proliferation of weapons of mass destruction and their means of delivery.” Moreover, in 4d, NATO formulated the threat of terrorism as follows: “Terrorism, which we categorically reject and condemn in all its forms and manifestations, poses a grave and growing threat to Alliance populations, forces and territory, as well as to international security. We are determined to combat this scourge for as long as necessary. To combat terrorism effectively, our response must be multi-faceted and comprehensive.” (<http://www.nato.int/docu/pr/2002/p02-127e.htm>)

<sup>61</sup> Presidency Conclusions of the Copenhagen European Council, 12 and 13 December 2002, which point at the conclusion of a “permanent agreement between EU and NATO in full conformity with the principles agreed at previous meetings of the European Council and the decisions taken at the Nice European Council.”

<sup>62</sup> Originally defined by the WEU Council of Ministers in June 1991, the Petersberg tasks (‘humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking’) were inserted in article 17(2) TEU by the Treaty of Amsterdam.

<sup>63</sup> <http://www.ue2002.es/portada/plantillaDetalle.asp?opcion=0&id=1107&idioma=ingles>.

expand the Petersberg missions to include military missions. In line with this proposal, the final text of the Convention explicitly mentions these tasks in relation to the fight against terrorism<sup>64</sup>. In the short term, cooperation between military intelligence services was to be enhanced, and systems to protect against NBC (nuclear, biological and chemical) weapons of mass destruction were to be better coordinated. The implementation of the single European sky in order to enhance air security was encouraged and better protection of military forces deployed on humanitarian missions was to be analysed.<sup>65</sup>

These considerations should be read within the context of a wider discourse which concerns itself with the question whether the European Union as a legal-political community can define itself as a Security Actor on the world stage, or whether it remains a divided and heterogeneous security community, which is characterised by a fragmentation of political authority concerning terrorism questions. Has the concern with terrorism - i.e. with a security threat which is traditionally seen as an internal issue - become subject of a complex system of functionally differentiated networks, or has the renewed attention for counter-terrorism contributed to the gradual evolution of the EU's own "security governance"?

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<sup>64</sup> Section I, "The Common Security and Defence Policy", Article III-210, section 1: "The tasks referred to in Article I40(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peacemaking and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their countries." (CONV 850/03, Brussels, 18 July 2003).

<sup>65</sup> <http://www.ue2002.es/portada/plantillaDetalle.asp?opcion=0&id=1132&idioma=ingles>.

## V - PROBLEMS TO BE ADDRESSED AND POLICY RECOMMENDATIONS

As far as policy-making on terrorism in the EU is concerned, it seems that the EU Member States still primarily act in the form of intergovernmental bargaining. Nation states are still rather conservative about the internationalisation of their criminal justice systems, which are considered to be among the last bulwarks of national sovereignty. But the reframing of terrorism as an international threat demands the formulation of a joint commitment. The conflation of policy objectives combined with an increased international demand may have an impact on policy autonomy of the nation states. Within an intergovernmental governance, however, states are still “the prime movers” within a constellation of supranational institutions.

European criminal justice co-operation, certainly when focused on anti-terrorism efforts, seems thus caught in a policy pendulum (Wallace, 2000: 46) that moves between extreme reluctance to share powers with EU institutions and an eagerness to gradually establish a federalised structure for criminal justice co-operation. The hybrid character of the policy-making process leads to a series of problems, which have been mentioned in the course of this paper. To name but a few, these problems include:

- A fragmented governance, leading to inconsistencies between the Second and the Third Pillar regarding anti-terrorism efforts, and – more specifically – to inconsistencies in the legal framework.
- A crowded policy area, which harbours a multiplication of actors who may not all be seeking to achieve the same policy objectives; in the worst case, this leads to obstructions along the decision-making process, or – seen from a slightly more optimistic perspective - to duplications and inefficiency regarding the achievement of policy objectives.
- The prevalence of a “sense of urgency” pattern<sup>66</sup> which has dominated JHA decision-making thus far and which has been reinforced by the six-month rotation of the EU Presidency, culminating in a series of Third Pillar institutional and legislative developments that have shown a pattern of threat and response. The ongoing absence of a systematic, long-term programme of policy and legislative priorities has been paralleled by *ad hoc* considerations of security threats.
- Uneven implementation of EU-wide legislative instruments in the EU Member States, leading to a heterogeneous impact on domestic criminal law and a differentiated implementation schedule.
- Insufficient consideration of the effects of the newly arising EU legislative framework on individual rights, in particular those regarding a fair trial, protection

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<sup>66</sup>“In each case, the development of institutional strength and policy capacity in FSJ (Freedom, Security and Justice, mdb) was preceded, accompanied and endorsed by a policy attitude and language that sought to address or contain threats to the security of the European Union. The latest and largest security threat to mobilize development in FSJ is of course, the destruction of the Twin Towers at the World Trade Center, New York on September 11<sup>th</sup> 2001, but the policy response to this must be seen as merely the most vivid example of a trend rather than as a radical departure.” (N. Walker, 2003).

of individual privacy, and the right to enjoy free movement. The Area of Freedom, Security and Justice consists of a legally heterogeneous domain. As such, the jurisdiction of the European Court of Justice is often unclear and remains insufficiently anchored in the Treaty texts. New EU legal instruments against terrorism have been adopted under Title VI TEU, where citizens' rights remain under-protected.

The above leads us to consider the following policy recommendations, which do not narrowly apply to the anti-terrorism policy of the EU alone, but to Justice and Home Affairs governance more generally:

- Taking advantage of its stronger legislative role in Justice and Home Affairs domain, the Commission should lead the debate about a future security governance in the European Union, which is not only substantive-strategic in nature, but which also seeks to address criteria of good governance (transparency, accountability, participatory debate and social legitimacy – in line with the Lisbon recommendations on the promotion of democracy).
- In line with the proposals of the European Convention, the EU Charter of Fundamental Rights ought to become a fully binding text, which should be inserted into the future constitutional Treaty of the Union. This should compensate for the unacceptable situation concerning the weak protection of citizens' rights (European Policy Centre, 2003: 8), certainly “considering the impact” of the policy area on internal security on individual rights. The general jurisdiction of the European Court of Justice should therefore be extended to the whole area of Justice and Home Affairs. However, in view of the protection of individual rights, these two measures may be insufficient as long as the safeguarding of individual rights is not profoundly anchored in EU and domestic criminal law instruments.
- Having in mind the link which has been created between terrorism and criminality in general (especially since the Seville summit in June 2002), there should be a standard monitoring to prevent counter-terrorism efforts from jeopardising the integration of minority ethnic groups in society. Counter-terrorism measures are often accompanied by increased surveillance and selective targeting, which may have a deeply pervasive effect on society. Hence, counter-terrorism should primarily remain located in the domain of high policing, with due regard of maximum standards of professional integrity and accountability.

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