EU RESPONSES TO TERRORISM

I. INTRODUCTION

Following the last update in this *Quarterly*,[1] the European Union (EU) has been quite active in agreeing new measures relating to cross-border policing and criminal law. First of all, the Tampere European Council meeting in October 1999 agreed a list of measures to be adopted to develop the EU's 'Area of Freedom, Security and Justice', particularly as regards criminal procedure. Here the European Council requested the Council to agree a work programme on mutual recognition in criminal matters within a year, and to establish an EU organisation facilitating cross-border prosecutions (Eurojust) within 2 years. Following agreement in the meantime on a Convention on Mutual Assistance in Criminal Matters after 5 years' negotiations,[2] the work programme was duly adopted in November 2000, setting out a list of twenty-four measures which the Council should agree in the medium-term to facilitate cross-border investigations, prosecutions, and enforcement of judgments.[3] Several Member States then began to implement this plan, tabling two versions of a proposed Decision to set up Eurojust and also making proposals for 'Framework Decisions' to harmonise national laws as regards enforcement of other Member States' orders to freeze assets and evidence and enforcement of judgments imposing financial penalties.[4]

In the meantime, work was also underway on harmonisation of substantive criminal law, with framework decisions agreed concerning counterfeiting the Euro, forgery of non-cash means of payment and money laundering,[5] and proposals concerning environmental crime, fraud in the public procurement process, facilitation of illegal entry or residence, trafficking in humans, and sexual exploitation and child pornography.[6] As for policing, the EU agreed to adopted non-binding Recommendations purporting to extend the tasks of Europol,[7] and began to consider a proposal to extend cross-border surveillance activities by national police.[8]

However, the events of 11 September 2001 immediately and dramatically altered the context of EU discussions. The Commission immediately tabled initiatives for Framework Decisions defining and punishing terrorism and establishing a European arrest warrant, which would replace traditional extradition procedures entirely between the Member States.[9] The European Council insisted that these measures should be agreed by December 2001, and that work on other measures underway should also be accelerated as well. As a result, the Council indeed reached 'political agreement' on

[1] 49 *ICLQ* (2000) 222.
[2] *OJ 2000 C 197/1*.
[3] OJ 2001 C 12/10.
[4] *OJ 2000 C 206/1 and C 243/15 (Eurojust); OJ 2001 C 75/3* (freezing); and *OJ 2001 C 278/4* (financial penalties).
[5] Respectively OJ 2000 *L 140/1* (amended, *OJ 2001 L 329/3*); *OJ 2001 L 149/1*; and *OJ 2001 L 182/1*.
[6] Respectively OJ 2000 C 39/1, C 253/3 and 6; and COM (2000) 854 (both sexual exploitation and trafficking in persons). The Framework Decision on trafficking in persons has since been adopted (OJ 2002 L 203/1).
[7] Recommendations on requests to national forces (OJ 2000 C 289/8) and participation in joint teams (*OJ 2000 C 357/7*).
[8] *OJ 2001 C 285/3*.
[9] *COM (2001) 521 and 522*.

[*ICLQ* vol 52, January 2003 pp 227–243]

https://doi.org/10.1093/iclq/52.1.227 Published online by Cambridge University Press

both the new proposals by December 2001, although due to remaining national parliamentary scrutiny reservations, it took until June 2002 for the two measures to be formally adopted.[10] Furthermore, Europol was given power to deal with all the crimes listed in its Annex, and agreement was also subsequently reached on the proposed framework decision on freezing orders.[11] The Council also adopted a Protocol to the Mutual Assistance Convention in October 2001, along with a Decision establishing Eurojust in February 2002.[12] It also approved full participation in 'Schengen' rules by Greece and the Nordic states, along with partial participation in those rules by both the United Kingdom (UK) and Ireland, although UK and Irish participation had not yet been put into effect at time of writing.[13]

The following discussion centres on the 'flagship' measure—the framework decision setting out a definition of terrorism—and the impact of this legislation on other EU measures.

II. THE FRAMEWORK DECISION

A. Defining Terrorism

The Commission's initial proposal in turn defined its subject matter and territorial scope, then set out a list of 'terrorist offences' along with inchoate offences, followed by complex rules on criminal penalties for various offences coupled with rules for aggravating and mitigating circumstances. There were also proposed rules on liability for legal persons, jurisdiction, the 'extradite or prosecute' principle, cooperation between Member States, exchange of information, and protection of victims.[14] This text was then discussed intensively in the Justice and Home Affairs Council and its preparatory bodies.[15]

The final Framework Decision includes provisions on all the issues suggested by the Commission, apart from cooperation between Member States and exchange of information. Of these issues, the core issue is obviously the definition of terrorism. Article 1(1) sets out a three-part definition of terrorism, consisting of the *context* of an action, the *aim* of the action and the *specific acts* being committed. First, there must be 'intentional acts . . . which, given their nature or context, may seriously damage a country or an international organisation'. Secondly, there must be an aim of either 'seriously intimidating a population', or 'unduly compelling a Government or international organisation' to act or fail to act; or 'seriously destabilising or destroying the fundamental political, constitutional, economic, or social structures of a country or an international organisation'. Thirdly, there must be a specific act from a list of eight types of specific acts: attacks which may cause death; attacks upon physical integrity; kidnapping or hostage taking; 'causing extensive destruction' to specified public property or any private property 'likely to endanger human life or result in major economic loss';

[10] *OJ 2002 L 164/3* (terrorism) and *OJ 2002 L 190/1* (arrest warrant).
[11] Respectively OJ 2001 C 362/1 and Council doc 6980/02, 13 Mar 2002.
[12] Respectively OJ 2001 C 326/1 and *OJ 2002 L 63/1*.
[13] *See OJ 1999 L 327/58 (Greece);* OJ 2000 L 131/43 (UK) and 309/24 (Nordic states); and OJ 2002 L 64/20 (Ireland).
[14] Above n 9.
[15] See Council docs. 12647/01 and 12647/1–4/01. The outcome of the discussions is recorded in Council doc 14845/01 and the agreed text is in Council doc 14845/1/01.

https://doi.org/10.1093/iclq/52.1.227 Published online by Cambridge University Press

'seizure of aircraft, ships, or other means of public or goods transport'; specified offences connected with nuclear, biological, or chemical weapons; 'release of dangerous substances or causing fires, floods, or explosions' with the effect of endangering human life; or 'interfering with or disrupting the supply of water, power or any other fundamental natural resource' with the same effect. Threatening to commit any of these eight types of act is also included.

The Framework Decision also sets out offences relating to a terrorist group in Article 2 and other offences related to terrorism in Article 3. The former Article specifies that a Member State must punish 'directing a terrorist group' as defined in Article 2(1) or 'participating' in that group 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 group. As for the linked offences, they comprise 'aggravated theft' or 'extortion' connected to any of the terrorist offences listed in Article 1(1), or 'drawing up false administrative documents' in order to commit a terrorist offence or participate in a terrorist group. According to Article 4, Member States must also criminalise the inchoate offences of inciting, aiding, or abetting any terrorist offence, linked offence, or terrorist group offence, and they must also criminalise attempts to commit any terrorist offence or linked offence, except for attempts to possess nuclear, biological, or chemical weapons or attempts to threaten to commit terrorist offences.

Detailed penalties for 'terrorism' as defined by the Framework Decision are largely left to Member States. All that the measure requires in Article 5 is that all the offences set out within it should be extraditable; that custodial sentences for terrorist offences and related inchoate offences must be heavier than would normally be imposed in the absence of special intent, except where the sentences are already the maximum possible; and that directing a terrorist group must be punishable by a maximum sentence of at least 15 years (reduced to 8 years if the group has only threatened to commit such offences), while participating in such a group must be punishable by a maximum sentence of at least 8 years. Article 6 permits Member States to reduce the penalty if the person concerned renounces terrorism and provides the authorities with evidence to prevent offences or to catch other offenders.

Liability must also be imposed on legal persons, according to Article 7, in the form usually imposed by EU measures, where the acts were '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 representation of that legal person, a power to take decisions on behalf of the legal person or authority to exercise control within it. There is also a form of liability based on negligence, where the legal person 'can be held liable where the lack of supervision or control by' it has made commission of a specified criminal act possible 'for the benefit of that legal person by a person under its authority'. Such liability does not exclude criminal proceedings against natural persons. Article 8 then specifies the form that sanctions must take 'effective, proportionate, and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:' exclusion from public benefits or aid, temporary or permanent disqualification from the practice of commercial activities, judicial supervision, a winding-up order or closure of the establishments used to commit the offence.

Article 9 sets out rules on jurisdiction. Finally, Member States have certain obligations as regards victims of terrorist offences. Member States are obliged to implement

https://doi.org/10.1093/iclq/52.1.227 Published online by Cambridge University Press

the Framework Decision by the end of 2002, with a report by the end of 2003 on its application.

B. International Obligations

How do the offences in the Framework Decision compare to the international law measures on terrorism that have been widely ratified by the Member States? The United Nations Conventions addressing hijacking of aircraft (1970 and 1971), damage to airports (1988), attacks on diplomats and heads of state (1973), hostage-taking (1979), attacks on ships (1988), attacks on fixed platforms on the continental shelf (1988), safety of nuclear materials (1980), terrorist bombing (1997), and terrorist financing (1999) all set out specific offences along with rules on jurisdiction and other matters.[16] However, unlike the Framework Decision, the UN measures have focused essentially on banning specific acts without attempting the more difficult task of trying to define 'terrorism'. Only in the most recent Convention was there signs of a broader approach in which the *purpose* of the behaviour could be relevant. The terrorist financing Convention bans not only provision or collection of funds in connection with the specific acts banned by the other Conventions but also in regard to '[a]ny other act intended to cause death or injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or international organisation to do or abstain from doing any act.'[17] For its part, the Council of Europe's 1977 Convention on the Suppression of Terrorism also refers to specific acts, providing that state parties may not generally treat hijacking of aircraft, offences concerning aviation safety, attacks on the life of protected persons, hostage-taking (along with kidnapping or serious unlawful detention), use specified weapons or explosives or related inchoate offences as 'political offences' for the purpose of extradition or mutual assistance.[18]

How do the UN measures and the EU measure compare in detail? First, the UN measures do not set out any rules on the *context* of the act, as the EU measure does. As regards the *aim* of the act, the 'serious intimidation' and the 'compulsion' criteria in the

[16] Conventions concerning: the Suppression of Unlawful Acts against the Safety of Maritime Navigation (27 ILM 668 (1988)); Protocol concerning the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (27 ILM 685 (1988)); the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention) (10 ILM 133 (1970)); the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Hijacking Convention); Protocol for the Suppression of Unlawful Acts of Violence at Airports serving Civil Aviation (27 ILM 627 (1988)); on the Protection and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (13 ILM 41 (1973)); against the Taking of Hostages (18 ILM 1456 (1979)); on the Suppression of Terrorist Bombings (UN Doc A/Res/52/164 (9 Jan 1998)); on the Physical Protection of Nuclear Material (18 ILM 1419 (1980)); and for the Suppression of the Financing of Terrorism (UN Doc A/54/109 (9 Dec 1999)). From a huge literature, see the discussion with further references by Bassiouni, 'Perspectives on International Terrorism', in Bassiouni, *International Terrorism: Multilateral Conventions, 1937–2001* (Ardsley: Transnational Publishers, 2001).

[17] See UN Doc A/54/109, Art 2(1).

[18] Art 1 of the Convention (ETS 90). The first two offences are defined by reference to UN Conventions, while the others had also or have since been the subject of UN Conventions.

https://doi.org/10.1093/iclq/52.1.227 Published online by Cambridge University Press

Framework Decision are taken nearly word-for-word from the UN terrorist financing Convention.[19] However, the third aim in the Framework Decision ('serious destabilisation or destruction') is not found in any UN measure. Moreover, the two criteria taken from the UN Convention have a far broader context: the Convention only extends these criteria to financing measures related to the earlier UN Conventions or intended to *kill or injure* civilians or non-combatants for such purposes, whereas the Framework Decision applies the criteria to *all nine* specific acts which it then spells out. Only the first two of these correspond to death or injury, and as we shall see, the list of other acts banned by the Framework Decision is wider than the acts banned by the other UN Conventions. Even in the case of death or injury, the Framework Decision does not limit its personal scope to civilians and non-combatants as victims. Also, the Framework Decision applies these criteria to commission of the main offences and all connected activity, not just to the financing of such offences.

As for the specific offences in Article 1(1) of the Framework Decision:

(a) corresponds, as noted, to the Terrorist Bombing Convention, with a wider personal scope and extension to the attack itself;
(b) also corresponds, as noted, to the Terrorist Bombing Convention, with a wider personal scope and extension to the attack itself;[20]
(c) corresponds to the Hostages Convention;
(d) corresponds to the Terrorist Bombing Convention and the Fixed Platforms Convention, except that the Framework Decision also applies to damage created by means *other than* bombing and further applies to public facilities, private property, private transport systems, and information systems, and moreover applies wherever danger of death is 'likely', not only where it was intended to cause death or serious bodily injury;[21]
(e) corresponds to the Conventions on hijacking and safety of navigation, but the extension to 'other means of public or goods transport' is novel;
(f) corresponds to the Nuclear Materials Convention, as well as to the Biological and Chemical Weapons Conventions, although the latter two Conventions are not specifically related to terrorism and do not require states to set out offences relating to individual behaviour; and
(g) to (i) are novel, except that many explosions would be covered by the Terrorist Bombings Convention (albeit with a requirement of intent, rather than effect, of endangering life), and there are already offences of threatening to use or steal

[19] The differences are that the EU measure refers to '*seriously* intimidating' and '*unduly* compelling'. The 'compulsion' criterion is also found in the Protection of Nuclear Materials Convention, Art 7(1)(e)(ii); the Hostage-Taking Convention (Art 1(1)), where it applies to compulsion against all natural or legal persons or groups of persons; the Maritime Navigation Safety Convention (Art 3(2)(c)); and the Fixed Platforms Protocol, Art 2(2)(c) (above n 16).

[20] The first two points also correspond to Art 2(1)(a), Protected Persons Convention, which obviously has a far narrower personal scope.

[21] Compare to Art 2(1), Terrorist Bombing Convention. However, it is arguable that information systems are covered by the Convention's definition of 'infrastructure' as including 'communications' (Art 1(2)). The Protocol to the Montreal Hijacking Convention also covers broader forms of damage to civil aviation facilities, and Art 2(1)(b), Protected Persons' Convention covers attacks on the premises or private accommodation of such persons.

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nuclear material and of threatening to commit certain acts relating to navigation and fixed platforms or against protected persons.[22]

The only act prohibited by UN Conventions apparently missing from the Framework Decision is the seizure of fixed platforms.[23] Taken as a whole, then, the EU measure is far wider than the UN Conventions, particularly as regards: the personal scope of prohibited death and injury; the scope of prohibited damage to property and the means by which such damage is caused; individual acts related to biological and chemical weapons; release of dangerous substances or causing fires or floods; interfering with resources; and threatening to commit the great majority of these acts. However, in some cases, the scope of the EU measure is effectively *narrower* than the UN measures, given the 'context' requirements set out in the Framework Decision. Furthermore, several UN measures lack any 'aim' requirements at all. So, for example, although the act of hijacking an aircraft solely to demand money would fall within the UN Hijacking Convention, it would apparently *not* fall within the scope of the Framework Decision, unless the funds were to be used for terrorist offences, since the 'context' criterion would not be satisfied. While the 'aim' criterion would be satisfied if the money were demanded from a government or an international organisation, it would arguably not be satisfied if the hijacker demanded the money from the airline.[24]

As for the related offences, the provisions on terrorist financing are based on the UN Convention on terrorist financing, while the concept of participation and directing terrorist groups are taken from the UN Convention on terrorist bombing. Inevitably, however, these offences have broader scope in the Framework Decision given its broader definition of terrorism than found in the UN measures.[25]

C. Jurisdiction

The most striking development in the rest of the EU measure is the rules on criminal jurisdiction. Here the EU compels its Member States to take territorial jurisdiction (extending the concept to vessels flying its flag and aircraft registered there), jurisdiction based on a broad concept of the active personality principle (including acts committed by 'residents' and legal persons as well as citizens) and jurisdiction based on a broad concept of the protective principle, where acts are committed 'against the institutions or people' of that Member State or an EU institution or body based there. This may be intended to extend as far as the passive personality principle, depending on whether an attack on 'the people' also includes every attack on individual nationals of a Member State. Wider application of jurisdiction is not precluded, and there is also a 'extradite or prosecute' rule, usually described as an obligation to take universal jurisdiction.

[22] Art 7(1)(e), Protection of Nuclear Material Convention; Art 3(2)(c), Maritime Safety Convention; Art 2(2)(c), Fixed Platforms Protocol; and Art 2(1)(c), Protected Persons' Convention (above n 16).

[23] Art 2(1)(a), Fixed Platform Convention.

[24] It might be argued that the hijacking could nonetheless 'seriously damage' the country and could 'seriously intimidate' the population, thus meeting the criteria in the Framework Decision.

[25] Compare Art 2 of each Convention to Art 2 of the Framework Decision. While the Framework Decision, compared to the financing Convention, does not define the concept of 'funding', it does more precisely define a 'terrorist group'.

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It is rare for the EU to oblige its Member States to assert extraterritorial jurisdiction,[26] and the Framework Decision on terrorism sets out the most extensive such obligation to date. As a result, guidelines for priority jurisdiction are established for the first time in a EU act. Member States should 'take account' of territorial jurisdiction, followed by active personality, passive personality, and the state where the person was found, and they should use any mechanism within the EU to attempt to coordinate jurisdiction.[27] Comparing the EU instrument to the UN Conventions, the latter have widely differing approaches to jurisdiction. The UN Conventions always impose territorial jurisdiction (often with certain clarifications),[28] but impose active personality only in certain cases;[29] mandatory protective jurisdiction is rarer,[30] and mandatory passive personality jurisdiction is very rare indeed.[31] In many cases, protective or passive personality jurisdiction is permissive, but not mandatory.[32] The ideas in the Framework Decision that active personality jurisdiction applies to 'residents', apart from stateless persons with habitual residence status,[33] and that passive or protective personality jurisdiction applies to acts committed against 'the people' of a State are also new.[34] Nor do the UN Conventions set out any form of priority jurisdiction. On the other hand, all the UN Conventions, like the Framework Decision, provide that wider application of jurisdiction is not precluded and include an 'extradite or prosecute' rule.

[26] On pre-Amsterdam measures, see S Peers, *EU Justice and Home Affairs Law* (Harlow: Longman, 2000) 162–4; see now the post-Amsterdam measures, above n 5.

[27] This is largely a reference to Eurojust, above n 12 above. It should be recalled that EU rules ban cross-border double jeopardy within the EU, subject to certain exceptions: for details see Peers, op cit, 164–5. The scope of this rule is the subject of the first two third pillar cases referred to the Court of Justice (C-187/01 *Gozutok* and C-385/01 *Brugge*, both pending).

[28] The 'straightforward' territorial obligations are found in Art 5(1)(a), Montreal Hijacking Convention (applying to the Protocol to that Convention); Art 6(1)(a), Terrorist Bombing Convention; and Art 7(1)(a), Terrorist Financing Convention. For the 'clarified' obligations, see Art 6(1)(a) and (b), Maritime Safety Convention (territorial waters); Art 4(1)(a) and (b), Hague Hijacking Convention (where aircraft lands); Art 5(1)(b) and (c), Montreal Hijacking Convention (where aircraft lands); Art 3(1)(a), Fixed Platforms Protocol (continental shelf); Art 3(1)(a), Protected Persons Convention; Art 5(1)(a), Hostages Convention; Art 6(1)(b), Terrorist Bombing Convention; Art 8(1)(a), Nuclear Materials Convention; and Art 7(1)(b), Terrorist Financing Convention. These provisions all concern the state of registration of an aircraft and the flag state of vessels, along with the further clarifications mentioned.

[29] See Art 6(1)(c), Maritime Safety Convention; Art 3(1)(b), Fixed Platforms Protocol; Art 3(1)(b), Protected Persons Convention; Art 5(1)(b), Hostages Convention; Art 6(1)(c), Terrorist Bombing Convention; Art 8(1)(b), Nuclear Materials Convention; and Art 7(1)(c), Terrorist Financing Convention.

[30] Art 3(1)(c), Protected Persons Convention; Art 5(1)(c), Hostages Convention.

[31] The only examples are Art 4(1)(c), Hague Hijacking Convention and Art 5(1)(d), Montreal Hijacking Convention, applying only where a lessee company is a 'national'.

[32] See Art 6(2), Maritime Safety Convention (passive personality and protective); Art 3(2), Fixed Platforms Protocol (passive personality and protective); Art 5(1)(d), Hostages Convention (passive personality); Art 6(2), Terrorist Bombing Convention (protective and passive personality); Art 8(4), Nuclear Materials Convention (state of importation or exportation); and Art 7(2), Terrorist Financing Convention (protective, passive personality).

[33] The relevant provisions extending criminal jurisdiction to such persons are all merely permissive, not mandatory: Art 6(2)(a), Maritime Safety Convention; Art 3(2)(a), Fixed Platforms Protocol; Art 5(1)(b), Hostages Convention; and Art 7(2)(d), Terrorist Financing Convention.

[34] However, Art 4(b), Tokyo Hijacking Convention, while not requiring the application of criminal sanctions, does permit criminal jurisdiction where acts are committed by or against 'permanent residents'.

https://doi.org/10.1093/iclq/52.1.227 Published online by Cambridge University Press

It can be seen that in place of the patchwork of jurisdictional rules in the UN measures, the EU Framework Decision sets out a unified set of mandatory rules. Moreover, since the substantive acts to be criminalised by the EU measure are wider than those criminalised by the UN measures, as noted above, the effect of the EU jurisdictional rules is wider. The novel guidelines on priority jurisdiction could also be helpful. On the other hand, the EU guidelines do not solve the problem of conflicting applications of the territoriality principle when a crime was planned in one jurisdiction and was carried out or had effect in another; and the idea of applying jurisdiction to crimes committed by 'residents' and against the 'people' is simply too imprecise. It would be rather hypocritical of the EU's Member States to consider asylum-seekers or irregular migrants 'residents' for the purpose of the Framework Decision when they are not usually considered 'residents' for the purpose of immigration law.

D. State Liability?

As to the remaining provisions in the EU measure, the rules on legal persons are not novel at first sight. All other EU criminal law measures proposed or adopted after the Treaty of Amsterdam, as well as several measures agreed before that Treaty entered into force, require Member States to impose liability on legal persons.[35] But on closer examination, there is one radical difference. Unlike all other EU measures (with one exception), the definition of legal persons *does not exclude states or international organisations*.[36] So could it therefore be argued that states or international organisations (eg, NATO)[37] can or must be subjected to liability for terrorist behaviour by Member States? This issue is partly addressed by a clause in the preamble to the Framework Decision that which asserts:

> actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a state in the exercise of their official duties are not governed by this Framework Decision.

It is obviously unfortunate that the negotiators resorted to the poor drafting technique of inserting an exclusion from the scope of a legal instrument in its preamble, rather than its main text. In fact, since this clause in the preamble contradicts the ordinary meaning of the text, it is questionable whether the clause should take precedence over the text. Assuming that the exclusion is enforceable, it should be noted that its wording was obviously taken from an essentially identical clause in the UN Terrorist Bombing Convention.[38] The scope of the exclusion is expressly limited to actions of any armed forces governed by 'international humanitarian law' or State armed forces governed by 'other rules of international law', with the obvious underlying assumption that there should be no legal vacuum enabling acts of political violence to escape entirely from legal control. Other acts by states, for example, financing 'terrorist

[35] On the post-Amsterdam measures, above n. 5 and 6. On the pre-Amsterdam measures, see Peers, above n. 26, 153–4.

[36] The exception is the agreed text of the framework decision on facilitation of illegal migration (Council doc 10075/01), which also does not define 'legal person'.

[37] Of course, in practice it is highly improbable that proceedings would be brought against NATO for alleged acts of 'terrorism' in any EU Member States.

[38] See Art 19(2) of that Convention, above n 16. Art 1(4) of that Convention further defines the meaning of 'military forces of a state'.

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groups' as defined by the Framework Decision, fall outside the scope of the exclusion and so it could therefore be argued that such acts by a state should be considered 'terrorist' acts and punished accordingly, subject to any state immunity which might arguably exist in such circumstances.[39] Also, the first part of the exclusion removes activity by *any* armed force, not merely state armed forces, from the scope of the Framework Decision during periods of armed conflict where such actions are governed by international humanitarian law.

E. Human Rights Issues

Anti-terrorist legislation inevitably raises concerns about adequate protection for human rights and civil liberties. The primary reason is that such legislation often provides for special powers reducing the usual protections relating to investigations, detention, and prosecution. Although the EU Framework Decision does not address issues besides the substantive definition of the crime and related issues of sentencing and jurisdiction, further EU measures taken forward since agreement on its text do touch on these issues. They are discussed further below. For the Framework Decision itself, the key question is whether the broad obligation to criminalise political violence that it imposes gives rise to human rights concerns.

At first sight, there are no grounds for concern. Given the consistent case-law of the European Court of Human Rights rejecting any human rights protection for violent political acts committed in the territory of its signatory states, since all of them are considered to be democratic countries committed to an extensive system for ensuring human rights protection, there can be obviously no objection in principle to treating such political violence as a serious criminal offence. Moreover, the preamble to the Framework Decision states that the Union is 'based on the principle of democracy and the principle of the rule of law', and that the Framework Decision 'respects fundamental rights' as guaranteed by the European Convention on Human Rights (ECHR) and Member States' constitutions and 'observes the principles recognised by' the EU Charter of Fundamental Rights, agreed in December 2000.[40] The preamble further asserts that the Framework Decision could not be interpreted to 'reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association and of expression, including the right of everyone to form and join trade unions . . . and the related right to demonstrate'. A Council statement to be adopted when agreeing the measure formally elaborates upon the relationship between human rights and combating terrorism:

> The Council states that the Framework Decision on the fight against terrorism covers acts which are considered by all Member States of the European Union as serious infringements of their criminal laws committed by individuals whose objectives constitute a threat to their democratic societies respecting the rule of law and the civilisation upon which the societies are founded. It has to be understood in this sense and cannot be construed so as to argue that the conduct of those who have acted in the interest of preserving or restoring those

[39] The relationship between state immunities and terrorism is beyond the scope of this paper. If Member States' treaty obligations require them to grant such immunity, it is not clear whether those treaty obligations or the Framework Decision would take precedence, as there is nothing in the EU Treaty to indicate the intended relationship between EU criminal legislation and any rules of international law besides human rights law (see Art 6 TEU).

[40] OJ 2000 C 364.

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> democratic values, as was notably the case in some Member States during the Second World War, could now be considered as 'terrorist'acts. Nor can it be construed so as to incriminate on terrorist grounds persons exercising their fundamental right to manifest their opinions, even if in the course of the exercise of such right they commit offences.[41]

There is also a reference to human rights in the main text of the measure. Article 1(2) specifies that the 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 EU Treaty, which states that the EU respects human rights as defined in the ECHR and national constitutions as general principles of Community law.

The first question here is the application of the 'just war' principle: can political violence ever be justified in principle against an undemocratic system or against an invading force? On this issue, the statement to the Framework Decision itself accepts the legitimacy of actions against invading forces, although several issues here are unclear. The legal effect of the statement is not certain, because it is not reflected in the text, and the European Court of Justice does not accept that such statements attached to Community legislation can have any binding effect.[42] Assuming that the statement is binding, its scope is uncertain: is it limited to historical events, or to activities within the EU, or to invasions as distinct from activities against undemocratic regimes? The better view is that the statement is not limited in time, since the Framework Decision could not impose retroactive criminal liability in any event;[43] that it is not limited to activities within the EU, since the Framework Decision is not so limited and the statement is broadly worded; and that its broad wording also covers activities against undemocratic regimes, not merely invading forces. But it would obviously have been helpful to clarify these issues,[44] at least politically if not legally. It should be recalled that while acts committed entirely outside the EU will not fall within Member States' territorial jurisdiction, the broad obligation to assert widely defined active personality and protective jurisdiction and the default obligation to 'extradite or prosecute' in the Framework Decision mean that many persons committing acts in third countries will be within its scope.

Moreover, it is similarly unfortunate that the statement does not suggest any limitation upon the *nature* of the acts of violence that might be considered legitimate in such circumstances: how could the activities committed by an invading force or despotic government justify violence against the life or physical integrity of civilians? The risk is that in their concern to provide for an ambiguous and apparently non-binding exception, Member States will implement the Framework Decision by failing to provide for exemptions from liability in appropriate cases. Alternatively, the statement could be misused by 'terrorist' groups even in democratic states to argue that they are exempt from the Framework Decision from because they consider themselves to be fighting an invasion or fighting for democracy, or that any violent act committed for arguably democratic ends can be considered justified.

The second issue is whether, even absent such special circumstances of arguably

[41] Council doc 14845/1/02, 15 (above n. 15).
[42] Case C-292/89 *Antonissen* [1991] ECR I-745.
[43] See Art 7 ECHR.
[44] See the rather clearer distinction in point T of the European Parliament recommendation on terrorism of 5 Sept 2001 (OJ 2002 C 72 E/139) between 'acts whose aim is to alter . . . structures in States governed by the rule of law by actually threatening to use violence or resorting to violence, as distinct from acts of resistance in third countries against state structures which themselves employ terrorist methods'.

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'justified' violence, whether the obligations imposed by the Framework Decision could infringe human rights in certain cases. Here, the biggest human rights concerns are the prospect that criminal damages offences committed by protesters could be considered to be 'extensive destruction to . . . private property' or that injury to police caused during a demonstration or protest could be considered as 'attacks on the physical integrity of a person'. It could also be argued that individuals could be wrongly considered as 'participating' in terrorist activities if they have knowledge that such offences are planned during a demonstration or even that other less serious offences are planned, such as public order offences, which are not terrorist offences by any possible interpretation of the Framework Decision. This is because the Framework Decision expressly requires imposition of liability for participation in terrorism merely for knowing participation in the *criminal* offences of a group, which obviously might not amount to terrorist offences. Such concerns would inevitably increase where a person allegedly participates in a group with knowledge of its 'criminal' activity in an undemocratic state—which might, for example, criminalise much or all freedom of expression or association.

Is there any cause for concern on this point? The preamble, text, and particularly the attached statement quoted above appear to suggest convincingly that there is not. It is expressly recognised that offences committed in the course of expressing opinions are not to be considered terrorism. But as suggested already, the preamble and particularly the statement to the Framework Decision are of questionable legal value—and on this point, the text does no more than refer back to the EU Treaty. And as we shall see below, subsequent developments give rather greater cause for concern than the original Framework Decision.

III. IMPLEMENTING THE FRAMEWORK DECISION

As suggested above, the greatest importance of anti-terrorist legislation is not always the crimes that it defines, but the special investigative methods which are developed to deal with it. It is important, however, to examine what further measures the EU is taking or considering to deal solely or principally with terrorism in the wake of the Framework Decision. Despite the delay in formal adoption of the Framework Decision until June 2002, the EU nevertheless began to implement it. There were no fewer than three agreed measures since December 2001 that explicitly or implicitly apply the newly agreed definition of terrorism, in spite of the continuing parliamentary scrutiny reservations and despite the absence of the European Parliament's second reading opinion until February 2002.

A. Common Positions on Terrorism

The first of these measures is a actually package of four acts adopted by written procedure on 27 December 2001,[45] then later amended on 2 May and 17 June 2002.[46] The

[45] Common Positions 2001/930 and 931/CFSP (OJ 2001 L 344/90 and 93); Reg 2580/2001 (OJ 2001 L 344/70); and Decision 2001/927/EC (OJ 2001 L 344/83). Compare with the Commission proposal for the Regulation (COM (2001) 569 as amended by COM (2001) 713).

[46] Common Position 2002/340/CFSP (OJ 2002 L 116/75) and Decision 2002/334/EC (OJ 2002 L 116/33); Common Position 2002/460/CFSP (OJ 2002 L 160/26) and Decision 2002/462/EC (OJ 2002 L 160/32).

https://doi.org/10.1093/iclq/52.1.227 Published online by Cambridge University Press

package comprises two 'Common Positions' adopted on the joint basis of Articles 15 and 34 TEU (and so addressing both foreign policy and policing and criminal law matters), a Regulation implementing the Community law aspects of the foreign policy part of one of the Common Positions, and a Decision further implementing that Regulation. The two Common Positions evaded parliamentary scrutiny entirely at European level, as there is no requirement in Articles 21 and 39 of the Treaty on European Union (TEU) to consult or inform the European Parliament on any foreign policy measure or any third pillar 'common positions'. Moreover, the two Common Positions will also largely evade judicial scrutiny, as there is no role for the European Court of Justice in foreign policy acts and the Court has jurisdiction under Articles 35 and 46 TEU only over dispute settlement between Member States as regards third pillar common positions. While Article 34 TEU does not specify that third pillar 'Common Positions' are binding, these measures clearly purport to be.

The first Common Position essentially transposes the UN Security Council Resolution 1373/2001 of 28 September 2001 on the suppression of terrorism. However, it differs from the UN measure in making several advisory measures mandatory,[47] and more strikingly by altering the Security Council's command that States must refrain from any active or passive support for terrorism into an obligation for *individuals* to refrain from such support.[48] Since the Security Council Resolution does not define terrorism, it is not clear what definition is being applied in this context, and whether the Council has imposed obligations on Member States going beyond the more precisely defined prohibitions agreed in the Framework Decision.

The second Common Position is more precise. It sets out 'specific measures to combat terrorism', consisting first of a freezing of assets and ban on transfer of funds to 'international' terrorists, to be carried out pursuant to *Community* law, and secondly (and more vaguely) requiring Member States to step up judicial and police cooperation as regards both 'domestic' and 'international' terrorists. The distinction as regards the first category of measures is due to the belief that while the EC has power under Articles 60 and 301 of the Treaty to freeze the funds of international terrorists in order to give effect to a EU *foreign policy* measure, the EC lacks any powers regarding freezing of funds of *domestic* terrorists. But who is a terrorist? Here the Common Position first defines 'terrorist act' and 'terrorist group' by using precisely the same definition as had been agreed in the Framework Decision, even though the Framework Decision had not then been adopted due to parliamentary scrutiny requirements. Moreover, since the Common Position simply borrows the wording of the Framework Decision, instead of making a cross-reference to it, the protection for human rights in the preamble of and the statements attached to the Framework Decision have inevitably been dropped. Furthermore, the specific clause concerning human rights protection in the main text of the Framework Decision has also been discarded.

Then the Common Position goes on to apply this definition in practice by asserting that all those groups and individuals listed in the Annex are terrorists. The connected Decision simply copies this list within the framework of EC law, while the connected Regulation more fully defines the 'funds' and assets to be frozen and sets out a detailed freezing procedure. Initially, there were thirteen groups on the 'terrorist' list, including only two 'international' groups, along with the names of a number of individuals

[47] See Arts 13–17 of the Common Position, transposing para 3 of the Resolution.
[48] See Art 4 of the Common Position, transposing para 2(a) of the Resolution.

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connected with those groups, including eight 'international' individuals. The listed groups included splinter groups of the IRA, Protestant groups in Northern Ireland, ETA in Spain, the 'terrorist wing of Hamas', and Palestinian Islamic Jihad. The May extension added another ten groups, all of them 'international', including the International Sikh Youth Federation, the Kurdistan Workers' Party (PKK), an Iranian group and certain Latin American groups. At the same time, the list of names was extended to include more ETA activists. Finally, the June extension added a further eight 'international' groups. It is understood that the EU Council has a longer secret internal list of groups it considers 'terrorist'.

The approach taken by the EU to this issue copies the system set up to freeze the assets and stop transfers of funds going to other persons and groups, most notably persons and entities connected to Slobodan Milosevič and (previously) the Serbian and Yugoslav governments,[49] and more recently persons and entities connected to the Taliban and the Al-Qaeda network (including Osama Bin Laden), most or all of whom would be also described as 'terrorists' by EU Member States.[50] Both these sets of restrictions have been challenged in the EU courts by certain companies and individuals affected by them, with failure in the Serbian case and provisional failure in the case of the Taliban/Al-Qaeda sanctions.[51] While the draconian measure of freezing all assets and funding could arguably be justified in the case of a criminal conviction for financing terrorism or (provisionally) where relevant criminal charges have been laid or will be laid imminently, it is obviously a different question where the freezing takes place on the basis of 'soft' intelligence information and there is no effective opportunity for a person to defend himself or herself against the allegation. To date in these cases, the EU courts have, with great respect, failed to ensure effective protection for human rights, in particular failing to understand that freezing of assets prima facie affects the right to property and carry on a business.[52]

B. Recommendation on Investigation Teams

The second measure is a Recommendation on establishing multinational police investigation teams to combat terrorism. Following the initial proposal by the Spanish Council Presidency in January 2002,[53] this Recommendation was adopted without discussion by the JHA Council on 25/26 April 2002.[54] The agreed measure had not been published in the EU's *Official Journal* at time of writing, and indeed the final text only became available publicly in late May. Since this measure takes the form of a

[49] See Peers, 'Common Foreign and Security Policy 1999–2000' 20 *YEL* (2001) 531, at 562–6.

[50] Reg 337/2000 (OJ 2000 L 43/1), replaced by Reg 467/2001 (OJ 2001 L 67/1), implemented nine times, most recently by Commission Reg 362/2002 (OJ 2002 L 58/6); now replaced by Reg 881/2002 (OJ 2002 L 139/9), implemented by Reg 951/2002 (OJ 2002 L 145/14).

[51] On the former, see Case T-189/00 R and Case T-317/00 P(R) *Invest Import und Export GmbH and Invest Commerce Sarl v Commission* [2000] ECR II-2293 and [2000] ECR I-9541. On the latter see Cases T-315/01 *Khadi*, T-318/01 *Othman* and T-306/01 *Aden and others*, all pending, and Order of the Court of First Instance of 7 May 2002 in T-306/01R *Aden* (not yet reported).

[52] See comments on *Invest Import und Export* by Peers, 'Human Rights Case Law of the European Court of Justice' (2001) 1 *HRLR* 145, at 166–7.

[53] Council doc 5715/02 and redrafts 5715/1–5/02.

[54] Council doc 5715/6/02.

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Recommendation, it was not subject to democratic scrutiny and will not be subject to judicial scrutiny, although it will likely have important practical consequences.

As for the substance of this measure, it raises three principal issues. First, what is the nature of the investigations to be carried out by these teams? The EU's Mutual Assistance Convention agreed in 2000 already provides for joint investigation teams to deal with many forms of cross-border crime, as does a proposed Framework Decision on joint investigation teams agreed in December 2001 (although not adopted until June 2002).[55] So what is the point of a non-binding measure apparently covering the same ground? The answer can be found in the early drafts of the proposal, in which the Spanish Council Presidency argued that there was 'an operational shortfall' since 'terrorists and/or terrorist organisations are engaged in many activities which directly or indirectly harm Member States' interests or national security, do not come under criminal legislation, *not being criminal offences*, and thus do not and cannot give rise to any actual judicial proceedings'.[56] During the discussions, this frank admission of the intent of the proposal was removed. Later on, a preambular clause specifying that the Recommendation would not conflict with or overlap with the Framework Decision and Mutual Assistance Convention was also removed.[57] It is thus unclear whether the final Recommendation is or is not intended to focus on non-criminal investigations, on criminal investigations, or on both. The investigations will be subject to 'national law and the authority and legislation of the Member State in which the activities are carried out'. So if national law allows police 'investigations' into 'non-criminal' activity, then the joint teams can carry out such 'investigations' also. While the definition of 'terrorism' in the Recommendation (see below) arguably appears to limit the scope of the Recommendation to criminal investigations, the background to the measure and the lack of express limitation to criminal investigations suggests that in practice the Recommendation might be interpreted more broadly. Accountability is to be ensured by the relevant national law; but scandals concerning groups carrying out previous 'non-criminal investigations' in various Member States suggest that systems of national accountability and control in such cases may leave much to be desired.[58] Moreover, the very idea that the police should expand their functions beyond preventing and investigating crimes inevitably runs the risk of encouraging questionable behaviour on their part.

The second issue is the competence of Europol to participate in the joint teams. The final Recommendation states that the joint teams 'could be assisted by Europol officers, provided that [the officers'] participation is requested by the team, in accordance with the Europol Convention'. But the Europol Convention does not provide presently for participation by Europol in joint teams. The earlier Recommendation of 2000 purporting to address this issue could not have validly extended Europol's powers, as only a binding Protocol amending the Europol Convention could do that.[59] It might be argued, despite the clear wording of the Europol Convention, that another binding

[55] Respectively above n 2 and OJ 2002 L 162/1.

[56] Council doc 5715/02 (above n 57), emphasis added. See also clause (6) in the preamble to the subsequent two drafts.

[57] This clause was first omitted in Council doc 5715/5/02, ibid.

[58] For instance, on the 'Gladio' network, see *Statewatch Briefing*, July 1991 and the annexed EP resolution of 22 Nov 1990. The Resolution alleged that 'security services (or uncontrolled branches thereof) were involved in serious cases of terrorism and crime as evidenced by various judicial enquiries'.

[59] Above n 7.

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measure could extend Europol's powers. Even if that is true, the EU's Mutual Assistance Convention is not yet in force and the proposed framework decision on investigation teams has not yet been adopted. In any event, Europol only has the power to assist investigations concerning 'organised forms of international crime',[60] not non-criminal 'investigations', so its participation in the teams set up by the Recommendation could not be permitted, to the extent that these teams engage in such 'investigations'. But given the EU Council's cavalier attitude to the restrictions on Europol's competence to date, it might be doubted whether this limit will be observed in practice.

The final issue is again the definition of 'terrorism' for the purpose of this measure. Initially, there was no proposed definition of 'terrorism' in it. Logically, the concept of 'terrorism' for the purpose of the initial version of the Recommendation could not be same as in the Framework Decision discussed above: the former only concerned 'non-criminal' terrorism, but the central purpose of the latter is to define criminal acts. Ultimately, the final version of the Recommendation refers to the three aims of terrorism as set out in the Framework Decision (but not to the context or acts set out in the Framework Decision) and states that the concept of 'terrorism' in the Recommendation is the same as in other EU instruments, without defining those instruments. Since the Framework Decision has not been adopted, this must logically be a reference to the Common Positions discussed above, which means the concerns about the limited human rights protection in those measures applies equally to the Recommendation.

C. Exchange of Information

Finally, the third measure is a proposed Decision on the exchange of information on terrorists.[61] Ultimately, after 3 months' discussion,[62] it was replaced by a proposal for a Recommendation, 'in light of observations made and in order to ensure a rapid adoption of the text'.[63] In fact, if the Spanish Council Presidency had sent the proposal to the European Parliament for its opinion nearly 4 months earlier when the proposed text was first issued, instead of trying to reach agreement in the Council first, there would have been no need for such a rush. National parliamentary scrutiny has been lacking as well.[64]

The substance of this proposal is particularly questionable. Certainly the EU should aim to enhance the exchange of information concerning the investigation and prosecution of terrorism. But such a measure was already under discussion before 11 September 2001.[65] It concerns alerts on 'terrorist attacks', defined as 'bombing', 'attack with firearms', 'attack with biological or chemical weapons', 'seizure of hostages', 'hijacking of means of transport', arrest of individuals, discovery of explosives, or firearms protection for individuals, or institutions from attack and attempts to commit the first five acts. In light of the scope of this system for information exchange, what is the purpose of the new proposal?

[60] See Art 2(1) of the Europol Convention (OJ 1995 C 316/1).
[61] Council doc 5712/02.
[62] Council docs 5712/1–4/02.
[63] Council doc 5712/5/02. The Recommendation had not yet been adopted at time of writing.
[64] See comments by the House of Commons Select Committee on European Scrutiny, 27th report (2001–2), part 6.
[65] See Council doc 10524/5/01. It is not clear whether or not this measure was later adopted.

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In fact, the new measure aimed initially only at activity 'at various European Union summits and other events'. In other words, the measure was aimed specifically at protesters. Here it is necessary to recall that the agreed statement to be attached to the Framework Decision on terrorism states that the measure could not be 'construed so as to incriminate on terrorist grounds persons exercising their fundamental right to manifest their opinions, even if in the course of the exercise of such right they commit offences'. But in its initial proposal, the Spanish Council Presidency took a directly opposing view, arguing that there was 'a gradual increase, at various European Union summits and other events, in violence and criminal damage orchestrated by radical extremist groups, clearly terrorising society'. Moreover, 'organisations [are] taking advantage of their legal status to aid and abet the achievement of terrorist groups' aims' and 'violent urban youthful radicalism . . . is increasingly being used as a cat's paw by terrorist groups in order to achieve their criminal aims'.

The next version claimed that 'the Union has reacted by including such acts in Article 1 of the Framework Decision on combating terrorism, where the offence is defined'. This so clearly contradicts the statement to be attached to the Framework Decision that the Council Presidency was at best assuming that the declaration had no legal or political value, or at worst acting either ignorantly or in bad faith. While a minority of anti-globalisation protesters at various summits has of course caused property damage, this is a classic example of persons committing criminal offences falling short of terrorism in the course of demonstrations as defined by the framework decision. In any event, there have conversely been continued concerns about the tactics, legality, and proportionality of police behaviour in response to protests.[66] The apparently separate idea in the proposed Decision that protestors are (also) some form of 'pawn' of terrorists was not backed up by any evidence in the initial Spanish proposal. Indeed, there is no such suggestion in the EU's own detailed report on terrorist activity in the EU during 2000–1.[67] Finally, it is worth recalling that in several years of mass anti-globalisation protests, the only person to die has been a protester shot by the Italian police.[68]

Ultimately, the latest version at time of writing, now in the form of a Recommendation, avoids any broad statement about protest groups, referring more generally to 'preventing activities carried out by terrorist organisations to achieve their criminal aims at large international events'. It concerns information about 'individuals with a police record in connection with terrorism as defined in the framework decision on combating terrorism' and Member States must 'take care that the exchange of information refers to members of actual organised groups run by terrorist organisations for the purpose of their own destabilisation and propaganda aims'. Moreover, 'the information exchanged must not relate to persons who exercise their own constitutional rights set out in Article 6 of the TEU'.

Is the protection for human rights now sufficient? Certainly the absence of express reference to protestors as terrorists or 'cats' paws' is welcome. But the measure refers to exchanging information from 'police records', which goes beyond an exchange of information on criminal convictions. Such 'soft' information is obviously a necessary part of police investigations, but its use to ban persons from entry into a territory in order to demonstrate and express their opinions is rather more questionable. One might

[66] See, eg, *Statewatch Bulletin*, May/July 2001 (Genoa).
[67] Council doc 5759/02, 31 Jan 2002.
[68] Above n 66.

https://doi.org/10.1093/iclq/52.1.227 Published online by Cambridge University Press

also wonder how much the Member States will respect peoples' right to exercise their constitutional rights to freedom of assembly expression if they are simultaneously also trying to combat 'destabilisation and propaganda'—words which could just as easily describe the activities of 'spin doctors' in mainstream political parties. The framework decision on terrorism concerns violent acts performed in a political context, but the focus of the Recommendation on such inherently purely political and subjectively defined activities such as 'destabilisation and propaganda' could risk an infringement of human rights.

IV. CONCLUSION

The investigation and prosecution of criminal offences must often strike a difficult balance between infringement of suspects' rights and the need to protect the public. In the case of terrorism, even the underlying criminal offence must define an appropriate dividing line between groups that advance political goals principally by violent means and groups which advance political goals principally by non-violent means. The task is inevitably complicated in that the two types of groups often share political goals even if they have different methods; at least some individuals in each type of group sometimes employ the methods of the other type of group, at least to a limited extent; political groups are often difficult to define and do not always control the actions of associated individuals; and the perceived legitimacy of violence against the State is inevitably bound up with the perceived legitimacy of that State's political system. A harsh reaction to 'terrorists' and their supporters might be considered necessary in the interests of public safety, but such a reaction potentially risks alienating moderate critics of the State, increasing the ranks of violent opponents of the system and thus paradoxically further increasing the risk to public safety. Most profoundly, a reaction to terrorism that undermines the protection of democracy, human rights, and civil liberties damages the very values and principles upon which liberal democratic states have founded their political legitimacy.

How well has the European Union crossed this minefield? The Framework Decision on terrorism represents a significant attempt to construct a broad and defensible definition of the concept of 'terrorism' that builds upon fragmented initiatives in the United Nations. It contains adequate protections for human rights *if* its preamble and statements to be attached to it are fully applied, apart from its great confusion about the circumstances in which violent political activity could nevertheless be considered legitimate. However, the EU measures later agreed or proposed relating to terrorism raise certain further concerns about the EU's plans to target protestors and to endorse unaccountable methods of policing, and the methods of agreeing these measures suggests grave concerns about the transparency, accountability and democracy of the Union's action. So while the EU's anti-terrorist policy have in many respects made a useful contribution by agreeing a coherent definition and ending any dual criminality problems within the EU concerning certain prescribed activities, the ambiguity of the Framework Decision and the 'side decisions' taken by the EU Council make it necessary to keep a close eye on the Union's and its Member States' implementation of the policy because of possible abuses of human rights in certain cases.

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https://doi.org/10.1093/iclq/52.1.227 Published online by Cambridge University Press

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