

## The E.U.'s Definition of Terrorism: The Council Framework Decision on Combating Terrorism

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### A. Introduction

Terrorist acts have, for a long time, constituted a major concern for the international community. Yet the definition of terrorism has represented an area of international law where the divergence of views between States was significant. For some, the protection of the State<sup>1</sup> and of the democratic values of the society laid at the heart of the debate, whereas others were more concerned with the risk of an unjustified repression of "freedom fighters."<sup>2</sup> These approaches, although apparently complementary, have proved to be irreconcilable in practice. At the United Nations' level, this division of the international community prevented the emergence of a consensus over a horizontal definition of terrorism. This situation,-

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<sup>1</sup> For a long period of time, only acts of terrorism targeting States were discussed at the international level. Acts of terrorism imputable to States were not part of the debate. *See* Draft Article 11(4)(b) of the Draft Code of Offences against the Peace and Security of Mankind (1986 version), which addresses solely terrorist acts targeting States or international organisations: "The following constitute terrorist acts: (i) any act causing death or grievous bodily harm or loss of freedom to a head of State, persons exercising the prerogatives of the head of State, the hereditary or designated successors to a head of State, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity; (ii) acts calculated to destroy or damage public property or property devoted to a public purpose; (iii) any act calculated to endanger the lives of members of the public through fear of a common danger, in particular the seizure of aircraft, the taking of hostages and any other form of violence directed against persons who enjoy international protection or diplomatic immunity; (iv) the manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of terrorist acts" ([1986] 1 Y.B. Int'l L. Comm'n 84).

<sup>2</sup> On the 25 September 1972, during the twenty-seventh session of the United Nations' General Assembly, the United States of America brought in a draft convention on terrorism (U.N. Doc. A/CN.6/L.850). The failure of this project is due in particular to the fact that some delegations from Third World countries insisted on the need of studying the causes of terrorism before drafting a convention on this issue.

paradoxically did not impede the adoption of several international conventions dealing with specific aspects or forms of terrorism<sup>3</sup> as well as of multiple resolutions on this issue.<sup>4</sup>

At the European level, under the Council of Europe's aegis, the greater homogeneity of European States' interests made possible, as soon as 1977, the signature of the European Convention on the Suppression of Terrorism.<sup>5</sup> One should however stress that this Convention does not offer a comprehensive definition of terrorism, since its objective is of a procedural nature (i.e. the prosecution of terrorist acts by Contracting Parties). It draws up a list of terrorist acts defined either autonomously or by reference to international conventions.<sup>6</sup> The

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<sup>3</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft (signed at Tokyo on 14 September 1963), Convention for the Suppression of Unlawful Seizure of Aircraft (signed at the Hague on 16 December 1970), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (signed at Montreal on 23 September 1971), Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted by the General Assembly of the United Nations on 14 December 1973), International Convention against the Taking of Hostages (adopted by the General Assembly of the United Nations on 17 December 1979), Convention on the Physical Protection of Nuclear Material (signed at Vienna on 3 March 1980), Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (signed at Montreal on 24 February 1988), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (done at Rome on 10 March 1988), Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (done at Rome on 10 March 1988), Convention on the Marking of Plastic Explosives for the Purpose of Detection (signed at Montreal on 1 March 1991), International Convention for the Suppression of Terrorist Bombings (adopted by the General Assembly of the United Nations on 15 December 1997), International Convention for the Suppression of the Financing of Terrorism (adopted by the General Assembly of the United Nations on 9 December 1999), available at <http://untreaty.un.org/English/Terrorism.asp>.

<sup>4</sup> The General Assembly and the Security Council of the United Nations were very active in this field. The General Assembly and the Security Council have to date adopted respectively 24 and 21 resolutions on terrorism.

<sup>5</sup> European Convention on the Suppression of Terrorism, signed at Strasbourg on 27 January 1977, available at <http://conventions.coe.int/>

<sup>6</sup> According to Article 1 of the European Convention on the Suppression of Terrorism: "For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives: (a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970; (b) an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971; (c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents; (d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention; (e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons; (f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence." The

European Convention on the Suppression of Terrorism is the first to address a wide spectrum of terrorist acts and to impose on States the obligation not to consider them as political offences, offences connected with a political offence or as offences inspired by political motives.<sup>7</sup>

The European Union's Member States have all ratified the European Convention on the Suppression of Terrorism, which constituted for more than twenty-four years their sole common denominator in the field of terrorism.<sup>8</sup> Finally, the 11<sup>th</sup> of September 2001 attacks set off major new developments. The importance of these dramatic events cannot be overstated, since the 1992 Treaty of the European Union had already provided the legal basis for an action of the Union in this field.<sup>9</sup> The European Parliament was the only E.U. institution having addressed the question of terrorist offences' definition<sup>10</sup> before the 11<sup>th</sup> of September 2001.

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definition of the offences listed at Article 1 (c) to (e) emphasizes the danger represented by the use of certain means for committing a crime and it does not take into account the specific intention required for a terrorist offence. Hence, it does not represent a proper definition of terrorist acts.

<sup>7</sup> It is only in the late 90's that similar provisions appear in international conventions on terrorism. The International Convention for the Suppression of the Financing of Terrorism, which provides in its Article 2 a list of terrorist acts whose funding is prohibited, requires Contracting Parties "to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature" (Article 6 of the Convention). A similar provision can be found in Article 5 of the International Convention for the Suppression of Terrorist Bombings.

<sup>8</sup> A Convention relating to Extradition between Member States of the European Union was also adopted in 1996 (1996 O.J. (C 313) 12). This convention does not deal specifically with terrorism, its objective being to improve the judicial cooperation between Member States in criminal matters in general. It is worth stressing that, by simplifying the extradition procedures between Member States, this Convention facilitates the application of the Council of Europe Convention on the Suppression of Terrorism.

<sup>9</sup> According to Article K.1 of the Maastricht Treaty, "For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest: [...] (9) police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol)." (emphasis added).

<sup>10</sup> European Parliament Recommendation on the Role of the European Union in Combating Terrorism, U.N. Doc. A5-0273/2001 of 5 September 2001, 2002 O. J. (C 72) 135, 135-141. The definition proposed in this Recommendation was vague. The Recommendation's only added value was its call to the Council of the European Union to adopt a framework decision establishing a definition of terrorist offences.

## B. Legal Basis for E.U. Intervention

### I. Institutional Context

Article 29 TEU mentions the establishment of a space of freedom, safety, and justice as one of the E.U.'s objectives. In particular, this implies the development of an effective fight against terrorism at the European level. The Union has several tasks to fulfill<sup>11</sup> and a variety of instruments<sup>12</sup> at its disposal, an emphasis being laid upon the approximation of Member States' criminal laws in accordance with Article

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<sup>11</sup> See Article 29 TEU: "Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.

That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:

- closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32,
- closer cooperation between judicial and other competent authorities of the Member States including cooperation through the European Judicial Cooperation Unit ('Eurojust'), in accordance with the provisions of Articles 31 and 32,
- approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e)."

<sup>12</sup> See Article 34(2) TEU: "The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:

- (a) adopt common positions defining the approach of the Union to a particular matter;
- (b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;
- (c) adopt decisions for any other purpose consistent with the objectives of this title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union;
- (d) establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council."

31(1)(e) TEU.<sup>13</sup> This provision expressly mentions terrorism as one area where minimal rules on the constitutive elements of crimes and on sanctions should be adopted by the European Union. The need for approximation of national criminal laws on terrorism is also recalled at point 46 of the *Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice*, adopted by the Justice and Home Affairs Council of 3 December 1998.<sup>14</sup>

At its extraordinary meeting on 21 September 2001, convened in the aftermath of the 11 September 2001 attacks, the European Council reached an agreement on the necessity of a European definition of terrorism. It gave instructions<sup>15</sup> to the Justice and Home Affairs Council to “flesh out that agreement and to determine the relevant arrangements, as a matter of urgency and at the latest at its meeting on 6 and 7 December 2001.”<sup>16</sup> A Framework Decision was rapidly negotiated and adopted by the Council on 13 June 2002;<sup>17</sup> 31 December 2002 was agreed on as the deadline for transposition into national law.<sup>18</sup>

## II. The Framework Decision

According to Article 31(e) TEU, the E.U. resorts to framework decisions for approximating Member States' criminal law. The legal *regime* of the framework

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<sup>13</sup>Article 31(1) TEU: “Common action on judicial cooperation in criminal matters shall include: [...] (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.”

<sup>14</sup> 1999 O. J. (C 19) 1

<sup>15</sup> According to Juliet LODGE, these instructions constituted “an unprecedented move, (since) the extraordinary European Council of Heads of Government that met on 21 September 2001 ‘directed’ the Justice and Home Affairs Council to act as instructed. The choice of words for its ‘conclusions’ is significant. Instead of the usual ‘urges’ or ‘recommends’, the Heads of Government ‘direct’ and ‘instruct’ the relevant Council to act. Thus, not only has it assumed a legislative right of initiative, in effect, but also a right to side-step the usual legislative process.” (Juliet Lodge, “EC Securitisation and Terrorism: 2001-2002”, in Miller and Zumbansen (eds.), *Annual of German & European Law*, Berghahn Books, Oxford and New York 2004, p. 246-286))

<sup>16</sup> Conclusions and Plan of Action of the Extraordinary European Council Meeting of 21 September 2001, p. 2, available at <http://ue.eu.int/Terrorisme/index.asp?LANG=1>

<sup>17</sup> Council Framework Decision of 13 June 2002 on Combating Terrorism U.N. Doc. 2002/475/JHA, 2002 O. J. (L 164) 3-7, hereinafter, “the Framework Decision”.

<sup>18</sup> By the end of March 2004, only 8 Member States (Belgium, Italy, Austria, Portugal, Denmark, Finland, Sweden and the United Kingdom) had amended their national legislation to implement the Framework Decision (Agence Europe, n°8675, 27 of March 2004, p. 6 and 7).

decision<sup>19</sup> is similar to that of directives under Community law,<sup>20</sup> its main characteristic residing in the wide freedom of implementation granted to the Member States. The limits of this freedom vary and, as far as the definition of terrorist offences is concerned, they are quite narrow. Article 1(1) of the Framework Decision, for example, is written in a manner more reminiscent of an EC Regulation than of an EC Directive.

The Council Framework Decision on Combating Terrorism aims at providing a uniform legal framework for prosecuting terrorist acts. It institutes a common definition of terrorist offences, as well as rules of competence and of legal cooperation between Member States for the prosecution of persons having committed terrorist acts. The Framework Decision thus constitutes the cornerstone of the fight of the European Union against terrorism.

The Framework Decision was adopted in conformity with the subsidiarity principle which, in accordance with Article 2(2) TUE, governs the action of the E.U. in all areas where it does not enjoy exclusive competence.<sup>21</sup> Indeed, as of 2001 only six out of fifteen E.U. Member States<sup>22</sup> had a separate incrimination for terrorist acts in their criminal law; other States were punishing terrorist acts as a common offence (*infraction de droit commun*).<sup>23</sup> Moreover, the definitions of terrorist offences adopted in the six Member States were far from uniform. These legal gaps, together with the fact that all Member States had not ratified all the international

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<sup>19</sup> See Article 34(2)(b) TEU, *supra* note 12

<sup>20</sup> Article 249(3) TEC: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of forms and methods."

<sup>21</sup> Article 2(2) TEU: "The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 of the Treaty establishing the European Community". Article 5(2) TEC defines the principle of subsidiarity in these terms: "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

<sup>22</sup> France, Germany, Italy, Portugal, Spain, United Kingdom

<sup>23</sup> See on this point the proposal for a Council framework decision on combating terrorism presented by the Commission, COM (2001) 521 final, 19 September 2001, p. 7, available at [http://wwwdb.europarl.eu.int/oeil/oeil\\_ViewDNL.ProcedureView?lang=2&procid=5566](http://wwwdb.europarl.eu.int/oeil/oeil_ViewDNL.ProcedureView?lang=2&procid=5566)

conventions on terrorism,<sup>24</sup> obviously created a context in which the “objectives of the proposed action [could not] be sufficiently achieved by the Member States”. Accordingly, the E.U.’s intervention was entirely justified in the light of Article 2(2) TEU. The adoption of the Framework Decision also had the merit of satisfying the European Union’s international obligations stemming from UN Security Council resolution 1373 (2001).<sup>25</sup>

### C. Typology of Offences

The ambitious objective of the Framework Decision is to provide a comprehensive definition of terrorism and thus to succeed in an area where international law has by and large failed. For the first time, a single instrument provides the incrimination of terrorist acts listed beforehand in twelve different international conventions as well as the incrimination of a new category of terrorist activities, namely, the acts “relating to a terrorist group.”

The Framework Decision covers terrorist acts committed against European Union’s institutions and Member States and terrorist acts targeting third countries or other international organisations. An additional condition is added for the application of the Framework Decision to the latter case: terrorist acts targeting a third country or an international organisation must be perpetrated on the E.U.’s territory, by a European national/resident or for the benefit of a legal person established in the E.U.<sup>26</sup> Moreover, the Framework Decision does not differentiate international

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<sup>24</sup>The state of ratification of the international conventions on terrorism by the EU’s Member States is reflected in their reports to the Committee created by the Security Council resolution 1373 (2001). These reports are available at [http://www.un.org/Docs/sc/committees/1373/submitted\\_reports.html](http://www.un.org/Docs/sc/committees/1373/submitted_reports.html)

The fact that all Member States have not ratified all international conventions on terrorism, with the exception of the European Convention on the Suppression of Terrorism, which does not offer a comprehensive definition of terrorism, represents a proof of the respect of the subsidiarity principle.

<sup>25</sup> The Framework Decision implements point 1 letters a), b) and d) of this resolution, in which the Security Council “1. (d) decides that all States shall: (a) Prevent and suppress the financing of terrorist acts; (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts; [...] (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.” (resolution 1373 (2001) adopted by the Security Council on 28 September 2001).

<sup>26</sup> For rules on jurisdiction see Article 9 of the Framework Decision.

terrorist acts from purely national ones.<sup>27</sup> The distinction between these two types of terrorism is indeed of no relevance for the definition of terrorist offences, and has to be taken into account only with respect to the exercise of jurisdiction, an issue addressed by Article 9 of the Framework Decision.

The Framework Decision distinguishes three types of offences: terrorist offences (Article 1), offences relating to a terrorist group (Article 2), and offences linked to terrorist activities (Article 3). According to Article 4, inciting, aiding or abetting, and attempting to commit one of the offences referred to in Articles 1 to 3 must also be incriminated in national law.

### *I. Terrorist offences*

The offences listed in Article 1 form the basis for the definition of all offences mentioned by the Framework Decision: offences mentioned in Articles 2 to 4 require a connection with an Article 1 offence.

Under Article 1 of the Framework Decision, the terrorist offence is characterised by two objective elements (incrimination under national law and effective or potential consequences)<sup>28</sup> and a subjective one (the aim of: “seriously intimidating a population,” “unduly compelling a Government or international organisation to perform or abstain from performing any act,” or “seriously destabilising or destroying the fundamental ... structures of a country or an international organisation.”).

In order for an act to be qualified as a terrorist offence under the Framework Decision, judicial authorities thus have to answer the following three questions: a) Is the act at stake already incriminated under national law? b) By its nature or context, does the act “seriously damage a country or an international organisation”? c) Was the act committed for one of the aforementioned aims?

#### *1. First Objective Element of the Terrorist Offence: Incrimination Under National Law*

By requiring incrimination under national law, the Commission and the Council ensured that the Framework Decision would respect both the subsidiarity principle

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<sup>27</sup> The Commission underlined in its explanatory memorandum to the proposal for a Council Framework Decision (*supra* note 23, at 2) that : “This proposal does not relate only to acts of terrorism directed at Member States. It also applies to conduct on the territory of the European Union which can contribute to acts of terrorism in third countries. This reflects the Commission’s commitment to tackle terrorism at a global as well as European Union level.”

<sup>28</sup> “Seriously damage a country or an international organisation”



and warrant criminal laws' "accessibility," as required by the European Convention on Human Rights.<sup>29</sup>

The list of acts which Member States are required to incriminate under their national law is provided in Article 1.<sup>30</sup> This list bears the mark of the legacy of the twelve international conventions on terrorism. It nevertheless departs from them on several occasions. Three types of terrorist offences can consequently be distinguished: offences corresponding to the offences listed in the different

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<sup>29</sup> See European Court of Human Rights' judgement in the *Sunday Times* case, 26 April 1979, A n° 30 at 49 "...the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case."

<sup>30</sup> Article 1(1): "Each Member State shall take the necessary measures to ensure that the international acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

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

conventions,<sup>31</sup> offences defined more largely than in the international conventions,<sup>32</sup> and offences incriminated in the different conventions but apparently missing from Article 1 of the Framework Decision.<sup>33</sup>

However, a thorough analysis of the Framework Decision makes clear that this last “category” of offences is also covered. Whereas the theft or robbery of nuclear material, incriminated in Article 7 of the Convention on the Physical Protection of Nuclear Material, is not listed in Article 1 of the Framework Decision, it is dealt with under Article 3, which requires Member States to take “the necessary measures to ensure that [are incriminated under national law](a) the aggravated theft with a view to committing one of the acts listed in Article 1(1); (b) extortion with a view to the perpetration of one of the acts listed in Article 1(1).”

The capture of fixed platforms, incriminated in Article 2(1)(a) of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, can equally be broke down into acts mentioned by the

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<sup>31</sup> Article 1(1)(a) and (b) correspond to offences mentioned in the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and its Protocol, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol, the International Convention for the Suppression of Terrorist Bombings. The definition of the offence incriminated in Article 1(1)(c) is similar to the definitions established by the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and the International Convention against the Taking of Hostages and the definition of the Article 1(1)(g) offence corresponds to offences included in Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Convention on the Physical Protection of Nuclear Material or the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol, the International Convention for the Suppression of Terrorist Bombings.

<sup>32</sup> The Article 1(1)(d) offence is drafted in wider terms than similar offences dealt with under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation or in its Protocol, in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation or in its Protocol, in the International Convention for the Suppression of Terrorist Bombings or in the Convention on the Marking of Plastic Explosives for the Purpose of Detection. The same can be said about Article 1(1)(e) (corresponding to certain offences incriminated in the Convention for the Suppression of Unlawful Seizure of Aircraft and in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation), (f) (in comparison with offences present in the Convention on the Physical Protection of Nuclear Material, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Convention on the Marking of Plastic Explosives for the Purpose of Detection). The Article 1(1)(h) offence does not match any offence existing in the international conventions on terrorism.

<sup>33</sup> Theft or robbery of nuclear material, incriminated in Article 7 of the Convention on the Physical Protection of Nuclear Material; capture of fixed platforms, incriminated in Article 2(1)(a) of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf

Framework Decision. The interests protected by the incrimination of the capture of the fixed platform are indeed linked to: the integrity of the platform: the acts likely to affect it are covered either by Article 1(1)(d), or by Article 1(1)(g); the physical protection of the people on the platform, which is addressed by Article 1(1)(a) and (b); the supplying of the rest of the country with natural resources exploited on the platform, which represents an interest protected *via* Article 1(1)(h).

We can consequently consider that all terrorist acts prohibited by the international conventions on terrorism are also covered by the Framework Decision. However, the Framework Decision is not a mere consolidation of existing international treaties, since its scope is wider than the one covered by them. This difference originates from the "horizontal" nature of the Framework Decision which, in comparison with the international conventions, is not concerned with specific acts or forms of terrorism, but intends to seize all facets of a proteiform phenomenon. It is however worth emphasizing that the Framework Decision subordinates the qualification of an act as a terrorist offence to the existence of certain aims and consequences. The Framework Decision could thus be compared with a fisher's net which would be broader than the international conventions' "net" (in that it covers a larger spectrum of terrorist acts) but whose meshes would be wider (seriousness and specific aim criteria). This approach reduces the risk of a "politically oriented," and thus potentially abusive, use of the terrorist offences regime.

## 2. *Second Objective Element of the Terrorist Offence: The Consequences of the Act*

The second objective element ensures that the Framework Decision differentiates terrorist offences from less serious offences constituted by the same material element. It resides in the seriousness of an act's consequences on a country or an international organization.<sup>34</sup>

The Commission was widely criticised for having indicated, in the explanatory memorandum of its proposal of the Framework Decision,<sup>35</sup> that "acts of urban violence"<sup>36</sup> could be encompassed by this criterion. Furthermore, the consequences

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<sup>34</sup> EU's Member States have always been determined not to qualify minor acts as terrorist acts and have tried to promote the same criminal policy at the international level. During the preparatory work of the International Convention for the Suppression of Terrorist Bombings, Germany militated in favour of the introduction, in the text of Article 2 of the convention, of the words "of significant value" after the words "public of private property". The final version of this text refers to "major economic loss", which is a compromise between the initial version and the German proposal.

<sup>35</sup>The explanatory memorandum is not legally binding and is a mere introductory note of the Commission's proposal.

<sup>36</sup> *Supra* note 23, at 9

of the act, which now constitute a distinct objective element in the definition of terrorist offences, were initially included in the intentional element and thus "subjectivised." The concrete or potential effects of the act (relatively easy to assess) were thus of no relevance since what mattered were the effects planned by the author of the act (obviously more difficult to determine).

The final version of the text corrects these initial errors, since two additional criteria are introduced in the definition, and the consequences' criterion is better drafted.<sup>37</sup> These improvements are owed to Member States, which were probably aware of the harmful of consequences that the imperfections of the initial definition could have had in terms of legal safety.<sup>38</sup> One could lament the fact that the European Parliament, the traditional guarantor of the respect of human rights by the E.U., did not deem it necessary to suggest on this point an amendment to the Commission's proposal.<sup>39</sup>

### 3. Subjective Element of the Terrorist Offence

The Framework Decision requires a specific intent<sup>40</sup> for committing a terrorist offence and leaves aside the motive, (religious, political or other) having

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<sup>37</sup> The Commission's proposal (*supra* note 23, at 17) was drafted in these terms: "Each Member States shall take the necessary measures to ensure that the following offences, defined according to its national law, which are intentionally committed by an individual or a group against one or more countries, their institutions or people *with the aim of intimidating them and seriously altering or destroying* the political, economic, or social structures of a country, shall be punishable as terrorist offences" (emphasis added). The "subjectivisation" of the consequences criterion is more evident in the French version of the text: "Chaque Etat member prend les mesures necessaries pour faire en sorte que les infractions suivantes, définies par son droit national, commises intentionnellement par un individu ou un groupe contre un ou plusieurs pays, leurs institutions ou leur population, et *visant à les menacer et à porter gravement atteinte ou à détruire* les structures politiques, économiques ou sociaux d'un pays, soient sanctionnées comme des infractions terroristes" (emphasis added).

<sup>38</sup> See the press release following the discussions in the Council on the Framework Decision, U.N. Doc. PRES/01/444 of 6 December 2001: "When defining terrorist aims, the Council opted for a wording that strikes a balance between the need to punish terrorist offences effectively and the need to guarantee fundamental rights and freedoms, ensuring that the scope could not in any circumstances be extended to legitimate activities, for example trade union activities or anti-globalisation movements."

<sup>39</sup> See the Report of the European Parliament on the Commission proposal for a Council framework decision on combating terrorism (U.N. Doc. A5-0397/2001 final of 14 November 2001). Under Article 39 TEU, the Parliament has a mere consultative role in Title VI procedures (*Provisions on Police and Judicial Cooperation in Criminal Matters*), which implies that the Council is not bound by its opinion.

<sup>40</sup> "Seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation."

determined the individual to perpetrate it.<sup>41</sup>

## II. Offences Relating to a Terrorist Group

Article 2(1) of the Council Framework Decision gives a definition of the terrorist group<sup>42</sup> and states that Member States shall make punishable the direction of and participation in the activities of such a group.<sup>43</sup> This provision largely draws on the “criminal organisation” definition already endorsed by the Council in its Joint action of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the E.U.<sup>44</sup>

However, the Framework Decision further refines this definition. The “structured association” concept is defined by the Framework Decision with reference to the

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<sup>41</sup> The typology of motives is not relevant for the definition of terrorist offences. The UN Special Rapporteur on terrorism and human rights, Mrs. Kalliopi K. Koufa, underlines it in her additional report of 8 August 2003 : “In any event, while broad or general categorizations can hardly reach precision and do full justice to the variety and complexity of the terrorist phenomena, attempts to devise analytical and more sophisticated subdivisions and distinctions providing more precise delimitations of, or information on, subgroups of terrorism – such as their organizational structure, size, potential relationships with States and degrees of such relationship, their identity, characteristics, social, political, cultural and psychological motivations, and so forth – are too complicated and diverse and, above all, they only serve the needs of a particular user. As useful as they are for illuminating particular aspects of the phenomena of terrorism and of terrorists, and for contributing to our understanding of the wide-ranging nature of the *problématique* surrounding them, they are of little utility in identifying exactly what constitutes terrorism and who the terrorists are.” (*Additional Progress Report Prepared by Ms. Kalliopi K. Koufa, Special Rapporteur on Terrorism and Human Rights*, Sub-Commission on the Promotion and the Protection of Human Rights, U.N. Doc. n° E/CN.4/Sub.2/2003/WP.1 13 (2003)).

<sup>42</sup> “For the purposes of this Framework Decision, ‘terrorist group’ shall mean : a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. ‘Structured group’ shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure” This definition is arguably clearer and more precise than the one proposed by the US State Department in its introduction to *Patterns of Global Terrorism, 1999* : “The term ‘terrorist group’ means any group practicing, or that has significant subgroups that practice, international terrorism,” *available at*

<http://www.state.gov/www/global/terrorism/1999report/1999index.html>

<sup>43</sup> This incrimination of the participation in a terrorist group is very similar to the infractions defined in Article 2(1) of the International Convention for the Suppression of the Financing of Terrorism.

<sup>44</sup> Article 1 thereof provides that a criminal organisation is : “[a] structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable” (1998 O.J. (L 351) 1). It is worth noting that the Joint action specifically refers in its preamble to terrorism as one of the forms of organised crimes whose seriousness and development requires a strengthening of cooperation between the EU Member States.

intent of the terrorist offence's author and to the association's composition. The "structured association" is in both cases defined by negations. One can infer from the fact that it is "not randomly formed for the immediate commission of an offence" that one of its criteria is the premeditation of the terrorist offence. With respect to the structured association's second criterion, a *per a contrario* interpretation of the text leads to the conclusion that any conspiracy in crime falls within the Framework Decision's scope of application, even in the absence of a hierarchy or of a constant composition of the criminal association. The Framework Decision thus opts for a wide definition of the structured association, which encompasses any informal structures purporting to commit a terrorist offence.

In order to avoid sanctioning any individual associated with the group, Article 2(2) of the Framework Decision requires that the person accused of an offence relating to a terrorist group has acted "with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group." Another subjective element, and therefore difficult to prove, is thus included in the offence's definition. It will be up to national authorities to demonstrate the group members' knowledge of the nature of its activities.

### *III. Offences linked to terrorist activities*

Offences linked to terrorist activities that are listed in Article 3 of the Framework Decision,<sup>45</sup> were not mentioned in the Commission's proposal. They were added by the Council and constitute an innovation with regard to international precedents.<sup>46</sup> This amendment can certainly be explained by the Member States' will to be enabled to prevent terrorist acts from their earliest stages.

The implementation of Article 3 could prove to be problematic since its scope of application is difficult to assess. To take but one example, the establishment of forged documents in order to prepare a terrorist offence constitutes an offence hardly distinguishable from the complicity of a terrorist offence, which is dealt with under Article 4.

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<sup>45</sup> Article 3: "Each Member State shall take the necessary measures to ensure that terrorist-linked offence include the following acts: (a) aggravated theft with a view to committing one of the acts listed in Article 1(1); (b) extortion with a view to the perpetration of one of the acts listed in Article 1(1); (c) drawing up false administrative documents with a view to committing one of the acts listed in Article 1(1) (a) to (h) and Article 2(2) (b)."

<sup>46</sup> An exception can be found in Article 7(1) of the Convention on the Physical Protection of Nuclear Material which incriminates the theft or robbery of nuclear materials as such. This provision thus does not concern only terrorism.

*IV. Incitement, complicity, attempt*

The Framework Decision presents some *lacunae* with respect to the incrimination of incitement, complicity and attempt.<sup>47</sup> Whereas terrorist offences and offences linked to terrorist activities are very precisely defined, the same can unfortunately not be said for the concepts of incitement, complicity and attempt, whose definitions are left to Member States.

Consequently, the distinction between different types of offences (notably between participation in the activities of a terrorist group and complicity) is blurred. According to Article 2(2)(b) of the Framework Decision, an individual participates in the activities of a terrorist group if he supplies "information or material resources [or funds] its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group." One is thus left to wonder on the offences that are covered by the incrimination of complicity. However, it should be stressed that these critics also apply for all the international conventions dealing with terrorism.

**D. Authors of the offences listed in the Framework Decision**

The Framework Decision covers the entire spectrum of private law persons who can be implied in the perpetration of terrorist acts.<sup>48</sup> Article 1 concerns individuals, Article 2 terrorist groups, who are not legal entities but *de facto* associations,<sup>49</sup> and Article 7 establishes the regime of liability for legal persons.<sup>50</sup> The national

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<sup>47</sup> Article 4: "1. Each Member State shall take the necessary measures to ensure that inciting or aiding or abetting an offence referred to in Article 1(1), Articles 2 or 3 is made punishable.

2. Each Member State shall take the necessary measures to ensure that attempting to commit an offence referred to in Article 1(1) and Article 3, with the exception of possession as provided for in Article 1(1)(f) and the offence referred to in Article 1(1)(i), is made punishable."

<sup>48</sup> With regard to the victims covered by the Framework Decision, Article 1(1) thereof specifies that the main victim shall be a State or an international organisation. Provided that this condition is fulfilled, the Framework Decision also applies where damages are caused to private interests, to the extent that they "endanger human life or result in major economic loss" (Article 1(1)(d)) and under the condition that they "seriously damage a country or an international organisation". This narrower scope of application stems from the fact that the Framework Decision is not concerned with the protection of victims, but rather with the repression of authors of terrorist acts.

<sup>49</sup> Terrorist groups cannot be directly sanctioned, since they do not exist, from a legal perspective. States can prosecute and sanction the members of the groups, members who are legal persons or individuals.

<sup>50</sup> According to Article 7(1) of the Framework Decision, Member States "shall take necessary measures to ensure that legal persons can be held liable for any of the offences referred to in Articles 1 to 4 committed for their benefit by any person, acting either individually or as a part of an organ of the legal person, who has a leading position within the legal person, based on one of the following: (a) a power of

implementation of this last provision calls for substantial legislative amendments in a number of Member States. If criminal responsibility for legal persons is not new in common law countries,<sup>51</sup> it is indeed less common in continental law ones.

Furthermore, acts of terrorism attributable to international law subjects are not expressly mentioned in the Framework Decision. This feature does not prevent some authors from considering that this form of terrorism is also covered by the Framework Decision,<sup>52</sup> since the principle of liability of legal persons established by Article 7 would be equally applicable to States actively involved in terrorist acts. To support this conclusion, these authors base themselves on the Preamble of the Framework Decision, which specifically excludes activities of armed forces from its field of application.<sup>53</sup> A *per a contrario* interpretation enables them to conclude that any other State act is covered by the Framework Decision.<sup>54</sup>

Yet, Articles 7 and 8 of the Framework Decision make it clear, in our view, that the Council did not intend to cover State terrorism. According to Article 7(1), a legal person can be held liable for terrorist acts only when these acts are committed for its benefit by a person occupying a leading position within the legal person, on a basis explicitly mentioned in the text. In laying down these criteria, the Framework

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representation of the legal person; (b) an authority to take decisions on behalf of the legal person; (c) an authority to exercise control within the legal person." Member States have to insure also that legal persons are held liable where "the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of any offences referred to in Articles 1 to 4 for the benefit of that legal person by a person under its authority" (Article 7(2) of the Framework Decision).

<sup>51</sup> Denmark and Netherlands are two of the rare continental countries establishing criminal liability for legal persons (see John C. Coffee, *Corporate Criminal Liability: An Introduction and Comparative Survey* in ALBIN ESER, ET AL., CRIMINAL RESPONSIBILITY OF LEGAL AND COLLECTIVE ENTITIES. INTERNATIONAL COLLOQUIUM BERLIN 1998 21-24 (Freiburg 1999)).

<sup>52</sup> See Steve Peers, *EU Responses to Terrorism*, 52 INT'L & COMP. L. Q. 234 (2003) "the definition of the legal persons [by the Framework Decision] does not exclude states or international organisations."

<sup>53</sup> Paragraph 11 of the Framework Decision's Preamble: "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."

<sup>54</sup> *Supra* note 52, at 234: "The scope of 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 from legal control. Other acts by states, for example financing 'terrorist groups' as defined by the Framework Decision, fall outside of the scope of the exclusion and so it could 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."



Decision undoubtedly inspired itself from private law concepts.<sup>55</sup> These criteria are inapplicable to situations like Lockerbie, the classical case of State terrorism.<sup>56</sup> The sanctions applicable to legal persons established by the Framework Decision<sup>57</sup> are also inspired from national criminal or commercial law.<sup>58</sup> It is difficult to envisage the enforcement of such sanctions on States organs or on States themselves.

Moreover, the incrimination of State terrorism can be decided only through traditional international conventions: neither the European Union, nor a State acting on its own is entitled to unilaterally regulate it. A different step would violate, as regards third States accused of terrorism, the principle of opposability of

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<sup>55</sup> Article 7(1): "any person [...] who has a leading position within the legal person, based on one of the following: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; (c) an authority to exercise control within the legal person". These criteria are commonly used to determine whether a person can represent a legal entity in commercial or civil transactions. To compare with Article 4 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its fifty-third session (2001): "(1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. (2) An organ includes any person or entity which has that status in accordance with the internal law of the State."

<sup>56</sup> See also *Nicaragua* case, where, in spite of numerous links between the *contras* and the United States, the International Court of Justice refused to admit United States' responsibility: "The Court has taken the view [...] that United States participation, even if preponderant and decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua." (*Military and Paramilitary Activities in and against Nicaragua, judgement on the merits*, 1986 I.C.J. Y.B. 65, 115). This solution is easily transposable to terrorism cases where the acts are not committed by State agents. One has also to underline that, until now, no international judicial decision established Libya's international responsibility for having sponsored the Lockerbie terrorist acts. Libya admitted its own responsibility only in 2003 (see Security Council resolution 1506 (2003) of 12 September 2003). Nevertheless, the Security Council has also held liable Libya for these acts (see, e.g., point 2 of its resolution 748 (1992) of 31 March 1992: "the Libyan Government must commit itself definitively to cease all forms of terrorist action and all assistance to terrorist groups and that it must promptly, by concrete actions, demonstrate its renunciation of terrorism.").

<sup>57</sup> According to Article 8 of the Framework Decision, penalties applicable to legal persons are "(a) exclusion from entitlement to public benefit or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placing under judicial supervision; (d) a judicial winding-up order; (e) temporary or permanent closure of establishments which have been used for committing the offence."

<sup>58</sup> See for an analysis of sanctions applicable to legal persons, Günther Heine, *Sanctions in the Field of Corporate Criminal Liability*, in ESER, *supra* note 51, at 237-254.

the treaties enshrined in the Vienna Convention on the Law of Treaties.<sup>59</sup> The Framework Decision is a European Union internal legal instrument and consequently cannot affect the legal patrimony of third States by laying down rules of criminal responsibility applicable to them for terrorist acts. This situation has obviously regrettable consequences for the victims who cannot always obtain reparation from States which have, for instance, financed acts of terrorism. The existence of compensation funds for the victims of the terrorist acts, already in place in certain States and under discussion at the E.U. level, could constitute a palliative, albeit not an entirely satisfying one. Within the limits imposed by international law, the Framework Decision accordingly addresses all categories of persons who can be linked to terrorism.

#### E. Conclusion

The definition of the offences relating to terrorism the Council Framework Decision provides is a welcome step. The Framework Decision adopts a horizontal approach of terrorism and establishes synthetic and precise definitions satisfying the requirements of legal safety the European Union and its Member States must respect.<sup>60</sup> The limited uncertainty present in the definition of the complicity to terrorist offences or of the offences relating to a terrorist group does not, in our view, violate the European Convention on human rights.<sup>61</sup> It is, after all, inherent to any legislative intervention in such a significant and evolutionary field as the fight against terrorism. The national judiciary authorities will have to take on the task of filling the few gaps in the definitions established by the Framework Decision, provided of course that all Member States duly transpose it into national law.

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<sup>59</sup> See Article 34 of the Vienna Convention on the Law of Treaties (1969): "A treaty does not create either obligations or rights for a third State without its consent."

<sup>60</sup> According to the European Court of Human Rights case-law, laws have to be accessible, clear and precise, for individuals to be able to predict when they will violate them. In the *Sunday Times* judgement *supra* note 29, the Court held that "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice." (paragraph 49 of the judgment).

<sup>61</sup> The European Court of Human Rights considered that the condition of predictability of the law does not require a presentation in detail of all facts engaging the criminal liability. See the *Müller* judgment, 24 May 1988, A n° 133, paragraph 29: "The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague".