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The Attacks on 11 September 2001, and the Immediate Response of the European Union and the United States

C. Fijnaut

The confrontation that we are calling for with the apostate regimes does not know Socratic debates ..., Platonic ideals ..., nor Aristotelian diplomacy. But it knows the dialogue of bullets, the ideals of assassination, bombing, and destruction, and the diplomacy of the cannon and machine-gun.

(From the Introduction to the Al-Qaida Manual)

1. The Policy of the European Union before 11 September

Terrorism is by no means a new phenomenon within the borders of the European Union. In the 1960s, 1970s and 1980s several countries had to deal with terrorist or extremist groups and organisations, especially those of an extreme left-wing persuasion but also some with extreme right-wing tendencies. Names and abbreviations like RAF, Red Brigades, CCC, Action Directe and Wehrsport Gruppe Hoffmann are still fresh in many people's memory. Some countries still face the threat of nationalist or separatist terrorist organisations and groups to this very day. The United Kingdom, for example, with the Provisional and Real IRA and its Protestant counterpart the UFF; Spain with ETA and France with all manner of Corsican terrorist groups. Add to that the fact that Palestinian organisations and commandos committed many terrorist attacks on European soil in the 1960s and early 1970s. The Abu Nidal Group, Al Fatah and the PFLP have become the most infamous symbols of those incidents.¹ Finally, the Netherlands has had to cope

¹ A. Schmid, *Political Terrorism: A Research Guide to Concepts, Theories, Data Bases and Literature*, Amsterdam, North-Holland Publishing Company, 1983 and X. Crettiez and J. Ferret (eds.), *Le Silence des Armes? L'Europe à l'Épreuve des Separatismes Violents*, Paris, La Documentation Française, 1999.

with terrorist attacks not only by foreign organisations and groups but also by Moluccan radicals.²

It more or less goes without saying that the emergence and growth of terrorism of this kind went hand in hand with a policy to put a stop to it. Depending on the nature and scale of the problem, this policy took very different forms in the various countries affected, ranging from political concessions and diplomatic manoeuvres to simple law enforcement activities. The complexity and versatility of this policy is sometimes overlooked, mainly because intervention by special intelligence, police and military units appeals more to the popular imagination and readily sparks a debate about civil liberties and civil rights.³

Another factor that must be considered, however, is that most of the countries concerned, in their capacity as Member States of the European Community, were at that time formally developing a common antiterrorism policy within the context of European Political Cooperation (EPC), mainly in the area of the law enforcement and intelligence services. The first step was to create TREVI, in December 1975, to broaden and enhance police cooperation in the fight against terrorism.⁴ A few years later, in 1979, the Police Working Group on Terrorism (PWGT) was set up mainly to promote the exchange of information between police and intelligence services.⁵ It is not surprising, therefore, that combating terrorism is mentioned in the Treaty on European Union (Article 29)⁶ as one of the areas in which the Member States will cooperate closely within the framework of the Third Pillar.

² E. Muller, *Terrorisme en Politieke Verantwoordelijkheid; Gijzelingen, Aanslagen en Ontvoeringen in Nederland*, Arnhem, Gouda Quint, 1994.

³ Ch. Dobson and R. Payne, *Terror! The West Fights Back: The Inside Story on the Élite Anti-terror Squads*, London, Papermac, 1982; N. Cettina, *Les Enjeux Organisationnels de la Lutte contre le Terrorisme*, Paris, LGDJ, 1994; L. Donohue, *Counterterrorist Law and Emergency Powers in the United Kingdom, 1922-2000*, Dublin, Irish Academic Press, 2001 and P. Klerks, *Terreurbestrijding in Nederland, 1970-1988*, Amsterdam, Uitgeverij Ravijn, 1989.

⁴ J. Van der Wel and W. Bruggeman, *Europese Politieke Samenwerking; Internationale Gremia*, Brussels, Politeia, 1993.

⁵ J. Benyon *et al.*, *Police Cooperation in Europe: An Investigation*, Leicester, University of Leicester, Centre for the Study of Public Order, 1993.

⁶ Ex. Art. K(1)9. For the current consolidated text of the Treaty on European Union, see 2002 *OJ C* 325/5.

Likewise enhancing its effectiveness forms one of the objectives of Europol.⁷ Incidentally, one striking fact is that in both instances the Netherlands was one of the initiators.

In the early 1990s it was generally believed in Western Europe that – apart from the troubles in Northern Ireland and Northern Spain – terrorism, including terrorism perpetrated by Islamic fighting groups, was no longer a European challenge. In so far as this latest form of terrorism was perceived as a problem, it was mainly associated with the civil war and related massacres in Algeria. The Islamic group that plays a central role in this is the terrorist organisation GIA (Armed Islamic Group). Until recently the GIA confined itself to committing violent acts in France, starting with the hijack of an Air France flight in 1994 and followed by a series of bombings in 1995, mainly in Paris. The French Government took tough police and military action, however, and this is probably one of the reasons why some (alleged or otherwise) supporters of the GIA have taken refuge in the Belgian capital-Brussels in recent years.

Against this background and against the background of the 11 September attacks, the fact that the Dutch National Security Service (BVD), in its brochure entitled *Terrorisme aan het Begin van de 21e Eeuw* (Terrorism at the Beginning of the 21st Century), published in April 2001,⁸ explicitly described Islamic terrorism as a serious international threat, especially to the United States and Russia, can be considered a positive development. However, the brochure fails to recognise this as a very acute problem that urgently demands a more decisive approach at European Union level. This failure is all too evident not only when the BVD brochure is set alongside American policy literature of the period (see below), but also when it is compared with the report published by a European Parliament committee in July 2001 on the role of the European Union in combating terrorism.⁹

⁷ Article 2(1) of the Europol Convention (Convention on the Establishment of a European Police Office, 26 July 1995, 1995 *OJ C* 316/2, adopted by Council Act of 26 July 1995 Drawing up the Convention Based on Art. K.3 of the Treaty on European Union, on the Establishment of a European Police Office (Europol Convention), 1995 *OJ C* 316/1).

⁸ Binnenlandse Veiligheidsdienst, *Terrorisme aan het Begin van de 21e Eeuw; Dreigingsbeeld en Positionering BVD*, Den Haag, Ministerie van Binnenlandse Zaken, 2001.

⁹ G. Watson, *Report on the Role of the European Union in Combating Terrorism*, European Parliament, 1999-2004, 12 July 2001, A5-0273/2001, PE 302.219, available at <http://www.europarl.eu.int> and at <http://www.statewatch.org/news/2001/sep/watson.pdf>.

The report, written by Graham Watson, argues that traditional forms of police and judicial cooperation are no longer adequate to combat modern-day terrorism effectively and that there is an urgent need to modernise that cooperation. The BVD confined itself to listing current initiatives and completely failed to point out the need to re-organise and improve cooperation efforts. One area where the BVD was totally wide of the mark – as we can see with the benefit of hindsight – concerns the consequences of the use of ‘conventional’ weapons: according to the BVD, these can cause great suffering but their potential in terms of numbers of victims is ‘relatively limited’. In the light of the bomb attacks on the American embassies in Kenya and Tanzania in August 1998, which killed more than 200 people and injured at least 4500, this assessment is nothing short of remarkable.

2. The Policy of the United States before 11 September

The attacks on American embassies in Africa bring us to the antiterrorism policy that the United States has pursued in the past few decades. It is important to devote some attention to that in this context because in the aftermath of the attacks, the European Union declared its solidarity with the superpower and since then EU policy has inevitably been determined to some extent by American strategy on terrorism.¹⁰

Until the beginning of the 1980s, successive US Administrations regarded international terrorism as a consequence of the Cold War. And even though it was not yet a major problem in their view, they did take measures to ensure an adequate response. The task of dealing with terrorist incidents on American soil was put in the hands of the FBI, while the State Department, and hence the CIA, became the lead agency in handling terrorist incidents beyond the borders of the United States. In the wake of the attacks on the United States Marine Corps Barracks in Beirut on 23 October 1983 (241 dead) and on the American embassy in Beirut on 20 September 1984 (14 dead), US strategy on international terrorism took a significant U-turn. President Reagan wrote to Congress in April 1984:

¹⁰ C. Fijnaut, ‘Het Beleid van de Verenigde Staten tegen (Internationaal) Terrorisme tot 11 September 2001’, in B. Pattyn and J. Wouters (eds.), *Schokgolven. Terrorisme, Fundamentalisme en 11 September*, Leuven, Davidsfonds, 2002, pp. 79-98.

Terrorism has become a frightening challenge to the tranquility and political stability of our friends and allies ... A very worrisome and alarming new kind of terrorism has developed: the direct use of instruments of terror by foreign states ... These activities are an extremely serious and growing source of danger to us, our friends and our allies, and a severe challenge to America's foreign policy.¹¹

It was clear that he was particularly referring to the Hizbollah in Lebanon and to countries like Iran under Khomeini. And these were not just empty words. In the years that followed, the FBI was expanded, a Counterterrorism Center was set up within the CIA, FBI liaison officers were posted to embassies abroad to enhance international police cooperation and rewards were given for information about terrorist activities.

In the 1990s the number of attacks in or against the United States did not rise, but their seriousness, and hence their impact on policy, increased. This was not confined to terrorist activities by Islamic extremists. The bombing of the A.F. Murray Federal Building in Oklahoma City in 1995 by Timothy McVeigh and Terry Lynn Nichols (174 dead and 1.800 injured) naturally caused an uproar in the country. But just as dramatic – for American antiterrorism policy at any rate – was the sarin nerve gas attack by Aum Shinrikyo in the Tokyo underground (over 5.000 casualties, 12 of which fatal). In American eyes, this attack demonstrated that it was not only dictators like Saddam Hussein who were willing and able to use biological or other weapons of mass destruction against their domestic enemies, but also terrorist organisations. And even though these organisations may not yet be capable of making such weapons themselves, they could sooner or later get access to them via a country such as Iraq and would thus be in a position to commit catastrophic attacks on American cities. The serious concerns that America had in this regard about the regime of Saddam Hussein did not therefore sprung up overnight. They had grown steadily over the years, in tandem with the attacks on America by Islamic terrorist organisations, because if a country like Iraq were willing and able to arm terrorists, it would be precisely these Islamic groups that would most likely benefit. They do, after all, share the same implacable hatred of the United States.¹²

¹¹ R. Reagan, National Security Decision Directive 138, addressed to the Congress of the United States, White House, Office of the Press Secretary, 26 Apr. 1984, available at <http://fas.org/irp/offdocs/nsdd/nsdd-138.htm>.

¹² J. Stern, *The Ultimate Terrorists*, Cambridge, Mass., Harvard University Press, 1999;

Moreover, these groups are also very hostile to many of the regimes in the Middle East, regarding them as 'apostate regimes', as is apparent from the quotation that prefaces this contribution. In other words, they are regimes that should be fought using every means available.

After Beirut, the attacks resumed in February 1993 with the partially successful bombing of the World Trade Center in New York City (six dead and more than a thousand injured). It is worth remembering that in the wake of this incident, attacks on several other famous and important buildings in the city were only narrowly prevented and that in 1997 a serious attack on the subway was only averted at the very last moment. In the meantime, in 1996, the US military base at Khobar Towers in Saudi Arabia was bombed with the loss of 19 lives and hundreds of serious injuries. Two years later, in 1998, the aforementioned attacks on American embassies in Africa took place and on 12 October 2000, 17 servicemen were killed when the USS Cole was bombed while docked in the Yemeni port of Aden. The attacks on 11 September 2001 therefore represented the culmination (for the time being?) of a whole series of attacks that can be attributed – according to the findings of the criminal investigations conducted – to Islamic terrorist organisations. In any case, the leader of one such organisation from Egypt was convicted in 1995 for the 1993 bombing, and in May 2001 the military chiefs of Al-Qaida – including Bin Laden himself – and a few of their supporters were either convicted or sentenced *in absentia* in New York for the 1998 attacks. All these attacks prove beyond a shadow of a doubt that Bin Laden and his cohorts are waging a war against the United States, and that it is a political war. This is why the attacks are aimed at symbols of American political power in the world and not, for example, at Coca-Cola.¹³

US antiterrorism policy was detailed in successive Presidential Decision Directives. The key aspects to emerge over the course of time were as follows: limitation of the vulnerability of United States personnel and facilities to terrorist attack through the widespread collection of intelligence, deterrence of terrorism by coming down hard on terrorist acts, an effective response to attacks against American citizens and the development of resources to prevent the use of weapons of

A. Lake, *6 Nightmares: The Real Threats to American Security*, Boston, Little, Brown and Company, 2000 and J. Miller *et al.*, *Germs: Biological Weapons and America's Secret War*, New York, Simon & Schuster, 2001.

¹³ P. Bergen, *Holy War Inc.: Inside the Secret World of Osama bin Laden*, New York, The Free Press, 2001.

mass destruction by terrorists wherever possible and optimise management of the consequences in the event of their deployment. To give shape to this policy, the counterintelligence community was reorganised. A Counterintelligence Board of Directors was established, supported by a National Counterintelligence Executive and a National Counterintelligence Policy Board. The FBI was also the focus of attention, with the establishment of a Counterterrorism Center, a National Domestic Preparedness Office and a National Infrastructure Protection Center. In addition, Rapid Deployment Teams were mobilised in five cities. Under the 1996 Antiterrorism and Effective Death Penalty Act, terrorist groups could be designated as Foreign Terrorist Organisations and, as such, their assets could be frozen. Policy was also tightened up to internationally isolate States that – in American eyes – support terrorist organisations, and to enable tough sanctions to be imposed on them. Besides Iraq, these States include Iran, Cuba, Libya, North Korea, Sudan, Syria and – before the fall of the Taliban – Afghanistan on account of its support of Bin Laden and co. The US antiterrorism strategy therefore evolved more and more towards an integral and integrated domestic and foreign policy.¹⁴

Several national commissions in the United States did not consider this raft of measures sufficient to effectively avert the threat of terrorism. Between 1996 and 1999, three different commissions indicated that policy was still not sufficiently coherent and hence was not being implemented decisively enough. More specifically, the organisation of the Federal Government's programmes for combating terrorism was criticised as being 'fragmented, uncoordinated, and politically unaccountable'; there was an urgent need for a National Office for Combating Terrorism to be established in the White House itself. The concerns of many policymakers in Washington and of many executive personnel were forcefully brought to the fore in the report entitled *Countering the Changing Threat of International Terrorism* (published Spring 2000) of the National Commission on Terrorism, chaired by Ambassador L. Paul Bremer III.¹⁵ The message in this report was as follows:

The government must immediately take steps to reinvigorate the collection of intelligence about terrorists' plans, use all available legal avenues to disrupt and prosecute terrorist activities and private sources of support, convince

¹⁴ P. Pillar, *Terrorism and US Foreign Policy*, Washington, Brookings Institution Press, 2001.

¹⁵ Text available at <http://www.fas.org/irp/threat/commission.html>.

other nations to cease all support for terrorists, and ensure that federal, state, and local officials are prepared for attacks that may result in mass casualties.

Partly in view of the great urgency underlying this message, it is not surprising that, in the commission's view, the number one priority should be to collect intelligence regarding terrorist plans and methods. Secondly, tougher sanctions should be imposed on States that support terrorist groups or do not cooperate fully on counterterrorism. In this context the commission named Greece a candidate for consideration. Thirdly, all tiers of Government should be much better prepared for a catastrophic terrorist attack. And fourthly, the programmes and activities of all departments and agencies responsible for countering terrorism should be more fully integrated in terms of policy and budget.

In the wake of the 11 September attacks we know that this commission was all too right to issue such an alarming message. Anyone who has any knowledge of the way in which these attacks were planned and executed cannot fail to come to the conclusion that they only succeeded because there was a mismatch between the antiterrorism policy that had been pursued in the years leading up to the attacks and the nature of the threat at which the policy was aimed. After all, Atta and other members of Al-Qaida were able to slip through the American security net quite easily thanks to some relatively clever manoeuvring – and not just the American net, but also that of a few Member States of the European Union. So it was not just an American mismatch, but also a European miscalculation.¹⁶ This does not mean that if the transatlantic net were faster and tighter such attacks would not have taken place. The history of terrorism and counterterrorism in Europe adequately reveals that terrorism continues to adapt to counterterrorist methods, and vice versa.

3. The Response of the European Union to the Attacks

3.1. Initial Response

In September 2001, for the first time, the European Union officially expressed its view as a Union on transatlantic cooperation in the fight against terrorism. But it

¹⁶ See the reports in *The New York Times* on 4 and 18 November and 30 December 2001. And following the recent arrest in Pakistan of the operational mastermind of Al-Qaida, Abu Zubaydah, see also the articles in *The Guardian* on 7 April 2002 and in *Der Spiegel* on 8 April 2002.

was not the first time that several Member States of the European Union officially discussed with the United States how they could work together. On the initiative of President Clinton, summits had already been held in June 1995, December 1995 and July 1996 on the subject of combating terrorism, attended by France, the UK, Germany and Italy.¹⁷ The parties were able to reach agreement on a range of action items at these summits. These included the international criminalisation of terrorist activities and the possession of biological weapons, the extradition of terrorists and initiatives to combat money laundering, air transport security and measures to widen the scope of forensic investigation in connection with terrorist attacks. One aspect where they definitely could not come to an agreement was how to deal with States that are suspected/accused of supporting terrorist organisations. Germany and France were dead set against the isolation strategy that the United States was advocating. They opted instead for critical talks with these States.¹⁸

However, not much that was discussed at these summits has found its way into the policy of the European Union. The results have chiefly filtered through to the policy of the individual Member States. In December 1995 the European Council did publish a declaration on terrorism, in which it called for enhanced mutual cooperation. In the years that followed modest initiatives were in fact taken in this area. In October 1996, for instance, a directory of specialised counterterrorist competences, skills and expertise of the Member States was created.¹⁹ And in December 1999 the European Council recommended that more coordinated initiatives should be taken to combat the financing of terrorist activities.²⁰ The internal correspondence of the Working Party on Terrorism in the Third Pillar also reveals that in recent years there had been some discussion about the preparation of common threat analyses, the publication of 'open' reports on the situation regarding

¹⁷ The relevant documents can be found at <http://www.state.gov/www/global/terrorism>.

¹⁸ B. Hoffman, 'Is Europe Soft on Terrorism?', *Foreign Policy*, Summer 1999 (<http://www.foreignpolicy.com>).

¹⁹ Joint Action of 15 October 1996 Adopted by the Council on the Basis of Article K.3 of the Treaty on European Union Concerning the Creation and Maintenance of a Directory of Specialised Counterterrorist Competences, Skills and Expertise to Facilitate Counterterrorist Cooperation between the Member States of the European Union, 1996 *OJ L* 273/1.

²⁰ Council Recommendation of 9 December 1999 on Cooperation in Combating the Financing of Terrorist Groups, 1999 *OJ C* 373/1.

terrorism in the European Union, the structure of mutual reporting on terrorist acts and the support of prospective Member States in building up their potential to tackle such acts.²¹

Not very impressive at all. Compared with the policy that the United States has pursued at federal level during the past few decades, it does not in fact amount to anything substantial. However, the problem with this comparison is of course that it involves two very different variables: whereas in the case of the US we have a federal State with – in the area of domestic and foreign security – more and more jurisdiction at federal level, the Member States of the European Union have barely relinquished their own sovereignty in this area, if at all. So how could the European Union have pursued a policy in the recent past that might well have stood up to comparison with the policy of the United States?

Against this background, the response of the European Union to the 11 September attacks can be described as highly unusual: for the first time in its history something like a general antiterrorism policy was formulated. This happened on 20 September when the JHA Council (Ministers of Justice and Home Affairs) agreed on a set of measures for the Member States concerning judicial cooperation, cooperation between the police and the intelligence services, initiatives to combat the financing of terrorism, and border security.²² Measures that particularly stand out include:

- the formulation of a common definition of terrorist offences;
- the introduction of a European Arrest Warrant;
- the accelerated introduction of the European Union Convention on Mutual Assistance in Criminal Matters;
- the creation of one or more joint investigation teams comprising police officers, magistrates and representatives of Europol and Pro-Eurojust/Eurojust who specialise in antiterrorism;
- the improvement of judicial coordination of criminal investigations concerning terrorism;

²¹ This correspondence can be found using the search term 'Enfopol' in the documents of the Council of the European Union (<http://register.consilium.eu.int>).

²² The conclusions of this JHA Council are available at http://www.europa.eu.int/comm/justice_home/news/terrorism/documents/concl_council_20sep_en.pdf.

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- the development of the cooperation between the intelligence services with a view to preventing terrorist acts;
- closer consultation between heads of antiterrorism units with regard to operational cooperation;
- faster flow of information about terrorism to Europol;
- the formation of a team of antiterrorism specialists at Europol;
- tighter application of existing legislation on freezing the assets of terrorist groups;
- the introduction of a system of mutual evaluation of the antiterrorism policy pursued.

Secondly, several measures were implemented to improve cooperation with the United States, in particular:

- closer consultation on terrorist threats and terrorist organisations;
- more coordination of initiatives to combat the financing of terrorism;
- invitations sent to American representatives to attend talks between heads of antiterrorism units;
- exploration of the possibilities of formal and informal cooperation between Europol and American police services within the framework of the Europol Convention and the corresponding legislation, particularly the possibility of exchanging personal data about terrorists;
- the possible conclusion of a convention on mutual assistance in criminal matters in the fight against terrorism.

These measures were officially ratified at the extraordinary European Council meeting on 21 September 2001,²³ and the Council followed this up in December of that year by examining reports to establish to what extent the measures had already been implemented.²⁴ The September meeting also emphasised the need to integrate the policy pursued into the general policy of the European Union, and

²³ Conclusions available at <http://ue.eu.int/en/Info/eurocouncil/index.htm>.

²⁴ See *infra* note 34 and accompanying text.

especially into foreign policy. This raised the delicate question of States that allegedly support terrorist organisations. It was cautiously agreed that relations with these States would be reviewed. A point of view was then expressed, one that had already been vigorously defended at the 1995 and 1996 summits, namely that the fight against terrorism will be all the more effective if it:

is based on an in-depth political dialogue with those countries and regions of the world in which terrorism comes into being. The integration of all countries into a fair world system of security, prosperity and improved development is the condition for a strong and sustainable community for combating terrorism.²⁵

Once again there was little sympathy for the American isolation strategy.

3.2. Follow-up

The position of the European Union was re-evaluated at the European Council meeting on 19 October 2001.²⁶ This was necessary for several reasons.

First, because in the meantime the United Nations had entered the fray. On 12 September the General Assembly condemned the attacks and the Security Council adopted Resolution 1368,²⁷ which likewise condemned the attacks and also referred, in the preamble, to the 'inherent right of individual or collective self-defense in accordance with the Charter', i.e. Article 51, which recognises this right 'if an armed attack occurs against a Member of the United Nations'. This right was not cited in the text of the Resolution itself because under no circumstances did the United States, in its response to the attacks, wish to be dependent on the decision-making process in the Security Council.²⁸

²⁵ *Supra* note 23, point 3.

²⁶ See the conclusions of this informal European Council in Ghent, available at <http://ue.eu.int/en/Info/eurocouncil/index.htm>.

²⁷ UN Doc. S/RES/1368, 12 Sept. 2001, available at <http://www.un.org/documents/scres.htm>.

²⁸ For a discussion of this important issue, see the articles by W. Reisman, J. Charney, T. Franck and D. Vogts in (2001) 95 *AJIL* 833-848. See also the contributions by R. Wedgwood, p. 553, and J. Wouters and F. Naert ('Shockwaves through International Law after 11 September'), pp. 425, 445-446 and 462-465.

Subsequently, on 28 September, Resolution 1373 was adopted,²⁹ in which the UN Member States were called upon to refrain from providing any form of support for terrorist activities in other countries, to cooperate in the fight against terrorism, including exchanging information about terrorist groups and terrorist activities, and to take additional measures to prevent and suppress the financing of any acts of terrorism. Under the Resolution a Committee was also set up to monitor implementation of this Resolution.³⁰

Secondly, we should not of course lose sight of the fact that in the meantime the NATO Alliance had on 12 September decided to invoke Article 5 of the Washington Treaty. In other words they had declared that the attacks in the United States were regarded as an armed attack on a NATO Ally. This decision was confirmed by the NATO Secretary-General on 2 October after US envoys had briefed the North Atlantic Council on the results of investigations into the attacks. On 4 October it was decided to enhance mutual cooperation in the campaign against terrorism, provide assistance to the United States in a variety of ways, and take the necessary measures to provide increased security for facilities of the United States and other Allies on their territory.³¹ The war against the Taliban regime began on 7 October 2001.

At the European Council meeting on 19 October a declaration was adopted, which expressed the Council's full support for the action being taken by the United Nations and its total solidarity with the United States, and in particular confirmed 'its staunchest support for the military operations which began on 7 October', the objective of which was 'elimination of the Al-Qaida terrorist organisation, which is responsible for the attacks on 11 September, [...] the leaders of which have not been handed over by the Taliban regime'.³² The European Council also empha-

²⁹ UN Doc. S/RES/1373, 28 Sept. 2001, available at <http://www.un.org/documents/scres.htm>.

³⁰ See generally the Counter-Terrorism Committee's pages, which are at <http://www.un.org/Docs/sc/committees/1373/> and the contribution by E. Rosand, pp. 603-631.

³¹ These NATO decisions are available at <http://www.nato.int>. See also Ch. Bennett, 'Aiding America', (Winter 2001) 49:4 *NATO Review* 6-7 (available at <http://www.nato.int/docu/review/2001/0104-01.htm>) and the contribution by J. Wouters and F. Naert ('Shockwaves through International Law after 11 September'), pp. 446-450.

³² *Supra* note 26, Declaration by the Heads of State or Government of the European Union and the President of the Commission. Follow-up to the September 11 Attacks and the Fight against Terrorism, Doc. SN 4296/2/01.

sised that the JHA Council should review the progress made on the various initiatives begun in September at its meeting on 6 and 7 December, that there should be increased cooperation between the operational agencies responsible for combating terrorism, that effective measures should be taken to combat the financing of terrorism, for example by speedy ratification of the relevant United Nations Convention, and that the European Commission's proposals on air transport security had been adopted in full. The European Council also confirmed that humanitarian aid for Afghanistan and its neighbouring countries was an absolute priority. Specifically, with regard to the United States, it was declared that mutual judicial assistance would be facilitated, including extradition in connection with terrorism (albeit in accordance with the constitutional rules of the Member States) and that joint efforts with regard to non-proliferation and export controls regarding both conventional arms and non-conventional (biological, chemical and nuclear) weapons would be enhanced. An explicitly new gesture towards the United States was the undertaking that, although terrorist attacks in Europe had never involved the use of biological or chemical weapons, cooperation between the Member States would be stepped up to prevent and combat attacks of this kind. Finally, the European Council emphasised the crucial need to relaunch the Middle East peace process with a view to finding a political settlement, based on the establishment of a Palestinian State and the right of Israel to live in peace and security: 'Such a settlement is necessarily conditional upon the cessation of violence and recognition of the principle of two States.'³³

We can conclude from all this – the documents of the (European) Council and the European Commission, as well as the European Parliament – that the European Union worked hard in November and December to make the outlined policy a reality. The 'road map' that was drawn up on 7 December 2001 is evidence of this; likewise the report of 13 December 2001 to the European Council. Attempts have been made in numerous ways to give substance to the measures agreed.³⁴ It is impossible to reproduce all of these here, let alone discuss them in any detail, but, partly based on the European Council decisions adopted by written procedure on 27 December, it is possible to indicate where political energy was mainly being directed:

³³ *Id.*

³⁴ The relevant EU Council documents 14925/01 POLGEN 35 (7 Dec. 2001) and 14919/1/01 POLGEN 34 (13 Dec. 2001) can be found at <http://register.consilium.eu.int>.

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- intensive consultation at political and law enforcement level with the United States;
- diplomatic dealings with countries in the Middle East and Asia;
- the complex decision-making process – at all possible levels – to curb the financing of terrorist activities;
- consultation concerning the intensification of police and judicial cooperation between the Member States of the European Union;
- the discussion about air transport security.

It was in these same areas that the most concrete results were eventually achieved. The most obvious examples that can be cited include³⁵:

- a common position with regard to policy on terrorism, in particular through curtailment of financial support, exchange of information and implementation of the relevant international treaties;
- a regulation containing specific measures to stop the financing of terrorism;
- a common position with regard to the definition of terrorist acts and terrorist groups, including the designation of persons, groups and units involved in perpetrating such acts;
- the decision to actually set up Eurojust;
- a draft agreement between Europol and the United States.

As is evident from this last item, by no means all the actions announced in the Autumn of 2001 have since been translated into concrete measures. There is still quite a lot in the administrative and political pipeline between Brussels and the capital cities of the Member States. It is worth bearing in mind, however, that it is virtually impossible for outsiders to keep track of the implementation of important aspects of current policy. The vast majority of diplomatic, political and administrative dealings simply evade, almost by definition, any form of external observa-

³⁵ Most of the decisions listed here were published in the 2001 *OJ L* 344 and in the 2002 *OJ L* 63. For a more detailed and updated account, see the contribution by J. Wouters and F. Naert ('Police and Judicial Cooperation in the EU and Counterterrorism'), pp. 108-146.

tion. And when anything does find its way to the media it is often difficult to judge its value. For instance, the (unsuccessful?) actions of the European Union or some of its Member States in the Middle East and elsewhere in Asia, or the (difficult, on account of the problem of the death penalty?) negotiations on a judicial assistance convention between the United States and the European Union.³⁶ Another factor to consider is that much of the policy that has been outlined is in fact implemented at national level. So anything that is happening (or not, as the case may be) at this level in the Member States must be taken into consideration when analysing and evaluating this policy. And, for example in the case of the Netherlands, this is actually quite a lot.³⁷ Too much to discuss here in any detail.

4. The Response of the United States to the Attacks

This last comment must of course be kept in mind when considering the American response to the 11 September attacks. As touched on earlier, these attacks took place in a completely different political context. Nevertheless, it is useful to briefly examine this response, because in a number of areas – the war against the Taliban, transatlantic police and judicial relations, the heightened awareness of the danger of terrorists using non-conventional weapons – it has had a tremendous impact not only on the policy that the European Union has pursued up to now, but possibly also on the policy it will pursue in the months and years ahead. Moreover, reviewing this response makes it possible to some extent to point to the difficulties involved in European-American cooperation in the fight against terrorism, particularly Islamic terrorism. Regrettably, this article is not the proper place to give further consideration to the debate that the attacks have stirred up in America itself regarding the previous, current and future role of the United States

³⁶ Concerning this last example, see the to some extent conflicting reports in *NRC-Handelsblad* on 16 Feb. 2002 and *The New York Times* on 22 Mar. 2002. For a more elaborate discussion on the latter issue, see the contribution by J. Wouters and F. Naert ('Police and Judicial Cooperation in the EU and Counterterrorism'), pp. 139-146.

³⁷ See the action plan 'Terrorismbestrijding en Veiligheid' of 5 Oct. 2001 (available at <http://www.justitie.nl/pers/persberichten/archief/2001/actieplan.pdf>) and the second progress report dated 14 Dec. 2001, Tweede Kamer, II, 2001-2002, 27925, No. 21 *et seq.*

in world politics. In any event it is true to say that not only Europe is reflecting on this issue ...³⁸

The start of the war in Afghanistan against the Taliban and Al-Qaida was the first and certainly the clearest sign for the world that the United States was determined to wage war after weeks of solemn promises from the President of his intent to do so. Partly thanks to new strategies and technologies, things went much better than critics and commentators – obviously not well informed about the situation – had predicted.³⁹ But it is far from over, especially for the Americans. Not in Afghanistan itself and – perhaps in another guise – not in a whole list of other countries either. President Bush repeated this in no uncertain terms on 29 January 2002 in his State of the Union address, in which his sights were set on North Korea, Iran and Iraq in particular:

States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic ... Our war on terror is well begun, but it is only begun.⁴⁰

And he explicitly added that even if other States were reluctant to take action, America was not: 'If they do not act, America will'.⁴¹ What followed is fairly well documented: action – though not without problems – in Pakistan, the Philippines and in and around other countries in Asia and Africa. Whether in fact any action was to be taken against Iraq in particular remained to be seen at the time. The US Administration was certainly considering this, and, as far as anyone could tell, might even have gone it alone. It was clearly only a matter of time, as we now

³⁸ See e.g. J. Hoge, Jr and G. Rose (eds.), *How Did This Happen? Terrorism and the New War*, New York, Public Affairs, 2001 and S. Talbott and N. Chanda (eds.), *The Age of Terror: America and the World After September 11*, New York, Basic Books, 2001.

³⁹ See the analysis of the "new" US war' in *The New York Times* on 29 Dec. 2001.

⁴⁰ Text available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>, also published in *The New York Times*, 29 Jan. 2002.

⁴¹ *Id.*

know. Not just because it had set its heart on a change of regime in Baghdad, but also because the only alternative – renewed, rapid and unconditional inspection of all potential production and storage sites of weapons of mass destruction – would not have been possible without a credible threat of military action, at least according to experienced commentators.⁴²

In addition to this most visible and belligerent component of foreign policy – there are also some very different initiatives – there is the review of domestic policy.⁴³ For the sake of convenience, a distinction can be made here between, on the one hand, the policy on jurisdiction and methods to improve the effectiveness of domestic action against terrorist organisations and terrorist activities and, on the other hand, the policy on reorganising the agencies involved and increasing their resources to achieve this goal.

The first part of this policy is mainly reflected in the so-called Patriot Act. As the full title of the Act suggests, it has little or nothing to do with a review of the criminal procedure with a view to tracking down and prosecuting alleged or confirmed terrorists.⁴⁴ There have been no problems in this area recently in any case. On the contrary, several of the terrorists involved in the attacks mentioned earlier that took place in the United States and elsewhere have successfully been brought to justice. But what is the point of this approach with perpetrators who are willing to give their own lives in such an attack? Little or none. That is why the main emphasis of the Patriot Act is on increasing the possibilities of pre-emptive disruption of terrorist activities. The Act also offers greater scope for depriving illegal immigrants of their freedom in the long term, intervening in the financing

⁴² See the articles in *The New York Times* on 13 Feb. 2002, *The Guardian* on 15 and 17 Mar. 2002 and the *Washington Post* on 7 Apr. 2002. With regard to the problem of the inspections in Iraq, see the rather alarming book by the former head of the UNSCOM unit, Richard Butler (R. Butler, *The Greatest Threat: Iraq, Weapons of Mass Destruction and the Growing Crisis of Global Security*, New York, Public Affairs, 2000).

⁴³ For an (incomplete) summary of American policy, see the report on the White House website: 'The Global War on Terrorism', available at <http://www.whitehouse.gov/news/releases/2001/12/100dayreport.html>, and the reports that the US submitted to the Counter-Terrorism Committee of the Security Council (available at <http://www.un.org/Docs/sc/committees/1373/1373reportsEng.htm>).

⁴⁴ The Act is fully titled 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism' and is referenced under the number H.R. 3162. It can be consulted at <http://thomas.loc.gov>.

of terrorist organisations, exchanging information between the public prosecutions department, the police forces and the intelligence services, intercepting communications, etc. Both the Act itself and its application have been the target of sharp criticism in the United States, mainly from civil rights groups, but up to now this protest has found little support. As yet these measures have not been a resounding success, but this says little in itself: not only should we not lose sight of the fact that most of the perpetrators of the attacks operated from outside the United States, but we should also bear in mind that the way in which the domestic fight against terrorism is reported does not exactly give much away. For example, the report that only a small number of the 1200 people detained following the attacks may have links with Al-Qaida does not say much in itself.⁴⁵ In the light of Emerson's book about Islamic terrorism in the United States itself, the question arises as to whether this report is in fact correct.⁴⁶

The second part of this policy can partly be found in the budget proposals for 2003.⁴⁷ Over the next few years several tens of billions of dollars will be spent on expanding and modernising the army, border security, the CIA, the FBI, the DEA, the customs service, the Secret Service, the Bureau of Alcohol, Tobacco and Firearms (ATF), critical infrastructure protection and medical care. Among the most notable organisational initiatives are the following:

- the establishment of an Office of Homeland Security to ensure coordination between the different departments and agencies;
- reorganisation of the FBI, including a separate counterterrorism division and a separate counterintelligence division;
- the creation of an antiterrorist military command.

In parallel with this, important reforms are also being implemented at local level. One of the first initiatives of the new Police Commissioner of New York City, Raymond W. Kelly, was to appoint a retired Marine Corps General as Deputy

⁴⁵ See the reports in *The New York Times* on 25 and 29 Nov. 2001 and 21 Mar. 2002.

⁴⁶ S. Emerson, *American Jihad: the Terrorists Living Among Us*, New York, The Free Press, 2002.

⁴⁷ See 'Budget of the United States Government; Fiscal Year 2003', <http://w3.access.gpo.gov/usbudget/fy2003/budget.html>.

Commissioner for Counterterrorism and a former senior CIA official as Deputy Commissioner for Intelligence.⁴⁸

5. The Policy of the European Union in the Future

The antiterrorism policy that the European Union is currently pursuing does not amount to much compared with that of the United States. Naturally, as mentioned before, the picture would look considerably more balanced if the policy of each individual Member State were to be placed on the scales. And yet we can (indeed must, given the seriousness of the situation) ask ourselves whether the European Union (or its individual Member States) is not displaying a lack of decisiveness or – in the present situation – possibly less decisiveness than it can or must display.

How we answer this question naturally depends, first of all, on the question of the threat of terrorism – especially Islamic terrorism – for Europe, and Western Europe in particular. The threat is not insignificant. The EU Council report on the situation regarding terrorism (dated 20 February 2002) starts thus: ‘Important from a global point of view is the fact that the European Union is not only a target for terrorist attacks but also an important area for preparatory and logistic purposes in the widest sense.’ The report concludes by saying: ‘At the moment Islamic extremist terrorism could be regarded as the main threat against the European Union. However, it would be dangerous to focus only on this phenomenon, as other European terrorist groups still remain active, with all possible consequences.’⁴⁹ In view of the arrest of a number of Al-Qaida supporters in several Member States and the plans they were hatching to attack the American embassies in Paris, Rome and Sarajevo, this assessment of the danger is not exaggerated. It is of course difficult to say whether the ‘domestic’ and transatlantic measures taken are sufficient to effectively avert the danger both now and in the future. First, not enough is known about how the measures will work out in practice. Secondly, it is far from certain what all these hundreds and possibly thousands of extremists who trained in Afghanistan in the past few years will do; do not forget that the leaders of Al-Qaida are still at large. It is to be hoped that what happened in the United States does not

⁴⁸ *The New York Times*, 28 Jan. 2002.

⁴⁹ *Terrorist Activity in the European Union: Situation and Trends*, EU Council Doc. 5759/1/02 REV 1 ENFOPOL 21, 20 Feb. 2002, available at <http://register.consilium.eu.int>.

occur here: that because of a lack of adequate measures it is made easier than need be for politically motivated suicide bombers to carry out mass attacks on American or other targets on European soil. In this regard politicians and police chiefs bear the heavy responsibility of constantly evaluating policy in a critical light and revising it in line with new developments. Here, it should not of course be forgotten that successful implementation of common policy carries the risk that Islamic terrorists might start targeting the European Union directly.

In view of the political objectives of Islamic terrorism, namely the total 'liberation' of the Middle East in particular, the nature, scale and growth of the danger for the European Union or the individual Member States depends not only on the otherwise rather judicially biased 'domestic' antiterrorism policy, but also – as in the case of the United States – on foreign policy. In this context the problems of pursuing an effective policy to avert that danger are by no means less than those on the 'domestic' front. This is because on the one hand the European Union itself is not able to display a united front and play a decisive role in arbitrating the major conflicts in the Middle East and Asia, in particular the war between Israel and the Palestinians. As far as that is concerned, the EU is largely dependent on the position adopted by America. It is also because on the other hand the United States and the European Union – with some exceptions, including in particular the United Kingdom – at the time were very much divided on the policy that should be pursued, particularly with regard to Iraq and the Iraqi regime, and there was a real possibility that America could have been forced (in its own eyes) to take military intervention action at some point, if necessary alone – or with the support of the UK and Iraqi opposition groups.⁵⁰ It more or less goes without saying that in both cases the United States was in an unenviable position: failure of the talks in the Middle East would considerably increase the chance of anti-American terrorism, and an invasion of Iraq, successful or otherwise (from an American point of view), would encourage this kind of terrorism in any case. It is more than likely, however, that the European Union will not be able to keep out of harm's way either, since there is a significant risk that its territory will be used more and more as an arena for Islamic terrorists. Given that some Member States supported a war against the regime of Saddam Hussein, the risk of direct action against 'symbolic' targets has increased. In the event of such an attack occurring, the European Union's common

⁵⁰ See B. Schirra, 'Schiiten. Bereit für die Nacht der langen Messer' ['Shiites. Ready for the Night of the Long Knives'], *Die Zeit*, Dossier 12/2002, available at http://www.die-zeit.de/archiv/2002/16/200216_irak.xml.

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antiterrorism policy would be put under considerable strain. Then it would soon be apparent whether this policy is sufficiently united and decisive.