

COMPLEMENTARY APPROACHES? A BRIEF COMPARISON OF EU AND UNITED STATES COUNTER- TERRORISM STRATEGIES SINCE 2001

*Alberto Costi**

Terrorism presents one of the greatest challenges faced by the world today. In the aftermath of the events of 11 September 2001, both the United States of America and the European Union (EU) developed comprehensive approaches to counter-terrorism. This paper posits that these approaches, while similar, differ in several respects. The United States approach is generally regarded as pre-emptive and often military focused, and seeks to externalise the threat of terrorism, with policies potentially undermining human rights and the rule of law. The EU approach attempts to internalise the terrorism threat and treat it as a criminal offence, with institutional inadequacies potentially limiting the effectiveness of its policies. It is argued that the United States and the EU have taken these different approaches because of differing perceptions of the threat that terrorism poses and their different governance arrangements. Progress in cooperation is currently stunted by the reluctance of both the United States and the EU to make compromises on issues such as privacy standards and the death penalty. It is contended that the United States and the EU must accommodate these differences in order to cooperate at the level of international law, for a more effective transatlantic response to counter-terrorism.

I INTRODUCTION

The attacks of 11 September 2001 (9/11) on the World Trade Center and the Pentagon in the United States of America represented the start of a new era as regards terrorism and the struggle to combat it. The scale of damage and number of victims, the level of sophistication in the organisation and synchronisation of the attacks, and the steadfast determination of the 19 hijackers to carry out their

* Associate Professor, Faculty of Law, Victoria University of Wellington.

mission were globally unprecedented.¹ As a result, on 12 September 2001, the United Nations (UN) Security Council unanimously condemned the 9/11 attacks and called on all UN members to cooperate "to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks" and to ensure "that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of the acts will be held accountable."² Then, on 28 September 2001, the Security Council passed a new resolution calling on all states to share their intelligence on terrorist groups in order to assist in combating international terrorism, adjust their domestic legislation so that they can ratify all of the existing conventions on terrorism and "ensure that terrorist acts are established as serious criminal offences in domestic laws and regulations and that the seriousness of such acts is duly reflected in sentences served."³ Security Council Resolution 1373 also established the Security Council's Counter Terrorism Committee to monitor state compliance with its provisions.⁴

Considering that the United States was in an armed conflict with Al-Qaeda and its associated forces, Congress authorised President George W Bush to use all necessary and appropriate force against those entities and the Bush Administration declared a global "war on terror", demanding the support of its international friends

-
- 1 Bruce Hoffman "Rethinking terrorism and counter-terrorism since 9/11" (2002) 25 *Studies in Conflict & Terrorism* 303 at 304.
 - 2 *Threats to international peace and security caused by terrorist acts* SC Res 1368, S/RES/1368 (2001). The Resolution expressed the determination of the Security Council to combat threats to international peace and security caused by acts of terrorism, recognised the right of individual and collective self-defence and called on the international community "to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions."
 - 3 *Threats to international peace and security caused by terrorist acts* SC Res 1373, S/RES/1373 (2001). The Resolution aimed in fact to ensure member states criminalise a wide range of terrorist activities, including financing of terrorist activities, active and passive support of persons involved in terrorist acts, limit the movement of terrorist entities, for instance, by improving border security measures, affording each other assistance in criminal investigations and proceedings and finding "ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups."
 - 4 SC Res 1373, above n 3, at [6]. The Committee consists of all the members of the Security Council and was established "to monitor implementation of this resolution, with the assistance of appropriate expertise," and called upon all member states "to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution."

and allies.⁵ The member states of the European Union (EU) rallied behind the cause and soon the EU joined the United States in its condemnation of terrorism.⁶ EU foreign ministers scheduled a rare emergency meeting on 12 September 2001 to discuss a joint response, as officials expressed solidarity with the United States.⁷ At an extraordinary meeting on 21 September 2001, the EU Council stressed solidarity and cooperation with the United States, and highlighting the role of the EU in the world, approved a comprehensive policy to combat terrorism, calling for the adoption of instruments and measures in a number of areas.⁸ The EU then proceeded to adopt a series of measures over the years. These include a definition of terrorism, a strategy and an action plan, in accordance with UN action and in response to terrorist attacks in Europe, forming a security strategy that condemns all forms of terrorism and identifies terrorism committed to maximum violence,

-
- 5 See Authorization for Use of Military Force Pub L No 107-40, §2(a), 115 Stat 224 at 224 (2001) [AUMF]. In addition to the authority arising from the AUMF, the President's use of force against Al-Qaeda and associated forces was considered by the first Obama Administration to be lawful under United States and international law, such as the responsibility of the President to protect the nation and the inherent right to self-defence recognised in the Charter of the United Nations. The United States responded to the attacks on 11 September 2001 (9/11) on these bases and "[t]hese domestic and international legal authorities continue to this day". See Harold Hongju Koh, Legal Adviser, United States Department of State "The Obama Administration and International Law" (Address to the Annual Meeting of the American Society of International Law, Washington (DC), 25 March 2010) reproduced in John R Crook "Contemporary Practice of the United States" (2010) 104 AJIL 271 at 276.
 - 6 Jeremy Shapiro "Where you stand depends on where you get hit: US and EU counterterrorism strategies" (Security Studies Seminar presented at Massachusetts Institute of Technology, Cambridge (Massachusetts), 9 November 2005) <<http://web.mit.edu>>.
 - 7 The External Relations Commissioner of the European Union (EU), Chris Patten, called the attacks "the work of a madman". See "Reaction from around the World" *New York Times* (online ed, 12 September 2001).
 - 8 Council of the EU "Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001" (September 2001) <<http://europe.eu.int>>. This document "binds the EU to a single long-term counterterrorism strategy, implying that the rotating presidencies will no longer be able to set the EU counterterrorist agenda solely on the basis of their own national priorities": Oldrich Bures "EU Counterterrorism Policy: A Paper Tiger?" (2006) 18 *Terrorism and Political Violence* 57 at 60.

proliferation of weapons of mass destruction and the weakening of the state system as key areas of concern.⁹

The post-Cold War environment is one of increasingly open borders in which the internal and external aspects of security are indissolubly linked. Flows of international trade and investment, the development of technology and the spread of democracy have brought freedom and prosperity to many people.¹⁰ Others have perceived globalisation as a cause of frustration and injustice as economic decisions have been pushed away from national governments and promises of modernisation and development have not been fulfilled.¹¹ These developments have increased the scope for non-state actors to play a part in international affairs, by taking advantage of discontent and the easier movement of funds, technologies and people across borders.¹² Globalisation has also led to increased dependence on an interconnected infrastructure in transport, energy, information and other fields with any disruption to them creating increased vulnerability.

The post 9/11 wave of terrorism is global in its scope and is linked to violent religious extremism. It arises out of complex causes. These include the pressures of

-
- 9 The Framework Decision on Combating Terrorism, adopted by the Council in June 2002, established a common EU definition of terrorism: Council of the EU "Council Framework Decision of 13 June 2002 on Combating Terrorism" [2002] OJ L164/1, art 1. Following the major terrorist acts in Madrid (11 March 2004) and London (7 July 2005), the "security state" concept was "Europeanised" for the fight against terrorism. In 2004, the EU adopted the Declaration on Combating Terrorism, which declared the fight against terrorism: Council of the EU "Declaration on Combating Terrorism" (25 March 2004) <www.consilium.europa.eu>. This was followed in November 2005 by the adoption of the Counter-Terrorism Strategy proposed by the EU presidency and the counter-terrorism coordinator (Council of the EU "The European Union Counter-Terrorism Strategy, 14469/4/05 REV4" (30 November 2005) <<http://register.consilium.europa.eu>>). Since June 2004, a detailed Action Plan on Terrorism guides the EU's efforts in this regard: see EU Commission "Action Plan on Terrorism" (2004-2005) <<http://ec.europa.eu>>. The Action Plan includes technical details and the possibility to check the progress in the fight against terrorism (the Plan is updated every six months). These instruments commit the EU to counter-terrorism measures at a global level. The EU security strategy also promotes solidarity between member states and with foreign and justice ministries involved in strategy formation.
- 10 Frédéric Guillaume Dufour and Michel-Philippe Robitaille "Globalisation capitaliste, discipline néolibérale et souveraineté néoconservatrice: retour sur quelques distinctions conceptuelles" (2011) 24 RQDI 45 at 61-62; Anne Aly *Terrorism and Global Security* (Palgrave Macmillan, Melbourne, 2011) at 101.
- 11 Wiktor Osiatynski "Are Human Rights Universal in an Age of Terrorism?" in Richard A Wilson (ed) *Human Rights in the 'War on Terror'* (Cambridge University Press, New York, 2005) 295 at 304-305; Audrey Kurth Cronin "Behind the Curve: Globalization and International Terrorism" (2002-2003) 27 *International Security* 30 at 30.
- 12 Aly, above n 10, at 101-102, 128-129. For an opposing view arguing that terrorist attacks have become increasingly localised since the 1990s, see Ogen Goldman "The Globalization of Terror Attacks" (2010) 23 *Terrorism and Political Violence* 31-59.

modernisation, cultural, social and political crises, and the alienation of young people feeling disenfranchised.¹³ The United States and the EU have been both targets and fertile grounds for terrorism. However, the approaches taken by the EU¹⁴ and the United States to counter-terrorism in this era seem to differ both in terms of overall strategy and specific measures. This paper argues first that different perceptions of the threat and divergent governance arrangements are the main reasons for the differing approaches. Secondly, it is contended that the United States approach is mainly pre-emptive, seeks to isolate terrorism externally in order to eliminate it, and is more *belligerent* and short-term focused. The EU prefers to respond to threats as they arise domestically, and uses a mixed strategy of *appeasement* and force in the hope of combating terrorism in the long-term. Finally, it is suggested that distinctive approaches to counter-terrorism can co-exist, but for the fight against terrorism to be effective, the United States and the EU must cooperate and collaborate to a greater extent.

II REASONS FOR DIFFERENT APPROACHES

The approaches taken by the United States and the EU to counter-terrorism differ both strategically and operationally. The main reasons for their respective approach relate to different perceptions of the threat of terrorism and divergent arrangements concerning constitutional governance in one state, the United States, and institutional processes in a supranational entity consisting of 27 member states (28 with the accession of Croatia on 1 July 2013), the EU.

A Threat Perception

The United States and the EU concur that terrorism represents a serious threat to global and national security. A survey conducted by the German Marshall Fund in 2004 found that 76 per cent of Americans and 71 per cent of Europeans shared concerns about international terrorism.¹⁵ Indeed, both the United States and the EU have focused their counter-terrorism policies on threats from radical Islamist

13 See Cronin, above n 11, at 35: "even though the newest international terrorist threat, emanating largely from Muslim countries, has more than a modicum of religious inspiration, it is more accurate to see it as part of a larger phenomenon of antiglobalization and tension between the have and have-not nations, as well as between the elite and underprivileged within those nations. In an era where reforms occur at a pace much slower than is desired, terrorists today, like those before them, aim to exploit the frustrations of the common people (especially in the Arab world)".

14 For the purposes of this paper, the relevant EU approach is primarily that manifested in legislative and executive acts of the EU institutions, notwithstanding discrepancies on some issues between member states at national level.

15 "Transatlantic trends 2004" (2004) A project of the German Marshall Fund of the United States and the Compagnia di San Paolo 12 <trends.gmfus.org>.

terrorist movements such as Al-Qaeda and have been targets of attacks by these groups since 9/11.¹⁶

The United States and the EU differ, however, in their perceptions of the nature and extent of the threat. First, there are differences in the interpretation of Al-Qaeda's stated goal. Al-Qaeda's ultimate aim, as was articulated by Osama Bin Laden, is to establish a Muslim caliphate across the Middle East by driving the West out of countries such as Saudi Arabia.¹⁷ The United States has interpreted this aim as a declaration of unrelenting war against the West and values of peace, democracy and freedom.¹⁸ It believes Islamist terrorist groups are a united network primarily targeting its "far enemy", the United States.¹⁹ As argued by Jonathon Stevenson, it is the United States that "maintains military assets in Saudi Arabia, broadly supports Israel, and is the chief source of the popular culture that Bin Laden and his followers so despise."²⁰ However, since the objectives of Al-Qaeda are embedded in their interpretation of Islamic history, the continued lack of knowledge of Islam by both policymakers and the public²¹ inhibits the ability of the United States to optimally conduct counter-terrorism policy and may compromise its ability "to properly calculate its longterm national security interests against Al-Qaeda and like-minded Islamist movements."²²

16 Notably, the 2001 attacks in New York and Washington, the 2004 attack in Madrid and the 2005 attack in London.

17 Daniel Keohane "The Absent Friend: EU Foreign Policy and Counter-Terrorism" (2008) 46 JCMS 125 at 134.

18 "The National Security Strategy of the United States of America 2002" (The White House, Washington (DC), 17 September 2002) at 3 <www.whitehouse.gov>. For an in-depth discussion of the shaping effect of 9/11, see Saby Ghoshray "Guantánamo: Understanding the Narrative of Dehumanization Through the Lens of American Exceptionalism and Duality of 9/11" (2011) 56 Wayne L Rev 163-225.

19 Shapiro, above n 6.

20 Jonathan Stevenson "How Europe and America Defend Themselves" (2003) 82 Foreign Affairs 75 at 78.

21 In 2004, the 9/11 Commission Report remarked that "[t]he history, culture, and body of beliefs from which Bin Laden has shaped and spread his message are largely unknown to most Americans." See National Commission on Terrorist Attacks Upon the United States *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the U.S.* (Government Printing Office, Washington (DC), 2004) at 48. In a 2006 article that asked leading policymakers, including a Congressman and a top counter-terrorism official, a relatively simple question: What is the difference between Sunni and Shia Islam?, the responses depicted a lack of elementary knowledge of Islam. See Jeff Stein "Can You Tell a Sunni From a Shiite?" *New York Times* (online ed, 17 October 2006) <www.nytimes.com>.

22 Michael Scheuer *Osama Bin Laden* (Oxford University Press, New York, 2011) at 167.

The EU, in general, does not espouse the view that Al-Qaeda seeks a war between Islam and the West. The threat of terrorism, therefore, does not require a "war on terrorism" but rather a "fight against terrorism".²³ Wars are fought between states, and governed by international law; terrorism is a criminal act perpetrated by individuals, and should be treated as such.²⁴ The experience of EU member states with pre-9/11 terrorism campaigns perpetrated within their borders continue to convince policy-makers of the relative successes, and effectiveness, of a law enforcement approach – primarily adapting and toughening criminal law instruments.²⁵ This explains the multidimensional approach underlying the EU Counter-Terrorism Strategy of 2005:²⁶ the strategic objectives are regrouped under the four headings of "PREVENT" (radicalisation and recruitment), "PROTECT" (citizens and infrastructure), "PURSUE" (terrorists across borders) and "RESPOND" (to the consequences of terrorist attacks). Thus, the focus of the EU is on prevention, policing, judicial cooperation and law enforcement.²⁷ The EU's Internal Security Strategy adopted by the Council of the EU in February 2010 follows a similar pattern. The Strategy sets out the common threats facing EU member states (including terrorism) and the principles and strategic guidelines to respond to these challenges, laying down the key elements of a European security

23 Keohane, above n 17, at 136.

24 At 135. See also M Van Herpen "Six Dimensions of the Growing Transatlantic Divide: Are the US and Europe Definitively Driving Themselves Apart?" in H Gardner (ed) *NATO and the European Union: New World, New Europe, New Threats* (Ashgate Publishing Ltd, Aldershot (UK), 2004) 198 at 204: "The apparent contradiction between its perceived new vulnerability and its massive military superiority leads the US to seek primarily military solutions. Europeans get more and more uneasy, as has become clear from the diplomatic conflict between Germany and the US over an eventual attack on Iraq. Most Europeans favour diplomatic means over military means to resolve international conflicts".

25 Jörg Molnar "The European Union as a Collective Actor in the Fight against Post-9/11 Terrorism: Progress and Problems of a Primarily Cooperative Approach" in Miriam Gani and Penelope Matthew (eds) *Fresh Perspectives on the 'War on Terror'* (ANU EPress, Canberra, 2008) 209 at 214.

26 Council of the EU "The European Union Counter-Terrorism Strategy", above n 9, at 7-16.

27 Molnar, above n 25, at 215-216; R Coolsaet "EU counterterrorism strategy: value added or chimera?" (2010) 86 *International Affairs* 857 at 863.

model based on cooperation among EU member states and the work of EU Home Affairs agencies.²⁸

Secondly, threat perceptions in the EU and the United States are shaped by their respective historical experiences with terrorism. Although the EU has not suffered an event on the scale of 9/11, terrorism is not a new phenomenon to states in Europe.²⁹ Reference may be made to the struggles between the United Kingdom and the Irish Republican Army, Spain and the Basque ETA movement, Germany and the Red Army Faction as well as Italy and the Red Brigades.³⁰ These groups have emanated from within the borders of the state and have been viewed by their followers and sponsors as liberation groups, either by espousing secession or vouching to replace the political structures in place.³¹ Taking the view that terrorism is often a means to an end, EU governments have focused on the motives of terrorists and why they might receive support, rather than just the end result.³² One could argue that the EU, with a longer history of experience with terrorism, has a more mature perception of the threat. The EU identifies the threat as a criminal offence to be tackled and contained. Conversely, the United States views it as something to be defeated for good³³ and has squarely grounded the legitimacy

-
- 28 Council of the EU "Internal Security Strategy for the European Union: Towards a European Security Model, 5842/2/10, Brussels, 23 February 2010" <www.consilium.europa.eu>. Among the EU Home Affairs agencies, note the development of the institution of Eurojust, which was originally set up in 2002 by the EU Council to facilitate intra-European judicial cooperation (Council of the EU "Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime" [2002] OJ L 63/1, as amended by "Council Decision of 18 June 2003" [2003] OJ L 245/44). Although it has been met with mixed reviews, primarily because the operations of Eurojust "depend ultimately on the goodwill of the member states for their smooth and swift functioning", the law enforcement focus has been considered as a "proactive approach" and the work of Eurojust could generate "a unique and reliable body of counterterrorism case law" (Coolsaet, above n 27, at 863-864).
- 29 Lauri Lugna "Institutional Framework of the European Union Counter-Terrorism Policy Setting" (2006) 8 *Baltic Security & Defence Review* 101 at 103. In the United Kingdom, Ireland and Spain alone, more than 5000 lives have been lost to terrorism over the last 30 years.
- 30 Christian Kaunert "The External Dimension of EU Counter-Terrorism Relations: Competences, Interests, and Institutions" (2010) 22 *Terrorism and Political Violence* 41 at 49. For a detailed analysis of the struggle against terrorism pre-and post-9/11, see Louise Richardson *What Terrorists Want: Understanding the Enemy, Containing the Threat* (Random House Publishing, London, 2006).
- 31 Aly, above n 10, at 34-38.
- 32 Keohane, above n 17, at 135.
- 33 Shapiro, above n 6. See President George W Bush "Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11" 2 Pub Papers 1140 at 1141 (20 September 2001): "Our war on terror begins with Al Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated".

of its response in the law of armed conflict, thus defending the use of drones, targeted killings and detention of alleged combatants and combat-like activities around the world to stop or minimise the ability of terrorists to attack the United States.³⁴

Thirdly, the experiences of the United States and the EU with followers of the Muslim faith within their respective domestic society influence their perceptions of the alleged threat. Muslims in the United States are relatively well integrated.³⁵ In contrast, the social integration of Muslim migrants into EU member states has been difficult and has been associated with issues of poverty, welfare and immigration.³⁶ In this context, terrorism appears as an isolated and relatively minor issue when most EU member states think about Islam; it also means the EU is more careful not to antagonise its Muslim population.³⁷ Thus, while the Bush Administration talked about waging "war" against "evil enemies", the EU refers to the "struggle against terrorism". Soon after 9/11, Patrick McCarthy summed up the EU attitude as follows: "Catching Osama Bin Laden may be an excellent undertaking, but the real goal is to live with and talk to, not about, Islam."³⁸

34 See AUMF, above n 5, s 2(a): "... the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons". See also "National Strategy for Counterterrorism" (The White House, Washington (DC), 28 June 2011) at 2 <www.whitehouse.gov>: "[t]he United States deliberately uses the word 'war' to describe our relentless campaign against al-Qa'ida. However, this Administration has made it clear that we are not at war with the tactic of terrorism or the religion of Islam. We are at war with a specific organization – al-Qa'ida". See generally Geoffrey S Corn and others *The War on Terror and the Laws of War: A Military Perspective* (Oxford University Press, New York, 2009).

35 Shapiro, above n 6: "... the United States has a relatively small and well integrated Muslim population that poses little danger. In the US, most Muslims are not Arabs and most Arabs are not Muslims".

36 Michael Freeman "Order, Rights and Threats: Terrorism and Global Justice" in Wilson, above n 11, 37 at 42-43.

37 Shapiro, above n 6: "Counter-terror is just one and not even the biggest issue when [EU countries] think about their Muslim population. The U.S. can think about counter-terrorism in relative isolation from most of its other domestic issues". See also Molnar, above n 25, at 213: "The *European Union Strategy for Combating Radicalisation and Recruitment to Terrorism* of November 2005, which is an integral part of the Counter-Terrorism Strategy, defines the terrorism perpetrated by Al Qa'ida 'and extremists inspired by' it as the main terrorist threat to the Union. ... It is important to note that a considerable effort has also been made to avoid anything in the official definition of the threat that could make Islam or the Muslim world appear as the 'threat' or 'enemy'".

38 Patrick McCarthy *Language, Politics and Writing* (Palgrave Macmillan, London, 2002) at xiii.

B National versus Supranational Infrastructure

Another reason for the different approaches taken by the United States and the EU to counter-terrorism is their distinct governance arrangements. The United States is a national, sovereign federal state. The EU consists of a political and economic union of sovereign states, governed by a number of supranational institutions. In some areas, legislation adopted at the EU level has been transposed into national law and enforced by EU member states within their borders.³⁹ In other areas, such as counter-terrorism, member states have preferred to develop common actions through closer cooperation between police forces, judicial organs, customs agencies and other competent authorities and approximation of rules on criminal matters, leaving competence in these areas squarely in the hands of member states.⁴⁰ Governments agree in principle that the transnational nature of terrorism requires cooperation at the EU level, but they are sometimes reluctant to give the EU the power and resources necessary for combating it effectively at the EU level.⁴¹ For example, whereas the United States has a national police force with independent powers of investigation, the EU has Europol. Europol is the EU's law enforcement agency "whose main goal is to help achieve a safer Europe for the benefit of all EU citizens".⁴² Europol's mandate was extended after 9/11 and it has played a role in gathering information from, and disseminating it between, national law enforcement authorities,⁴³ but it lacks the authority and resources to be a truly

39 See generally Elspeth Berry and Sylvia Hargreaves *European Union Law* (2nd ed, Oxford University Press, Oxford, 2007) ch 4.

40 Lugna, above n 29, at 106. The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1 [Treaty of Lisbon], signed on 13 December 2007 and entered into force on 1 December 2009, retains the status quo. Although politically the Treaty strives to create a Union based on freedom, security and justice and confirms a joint immigration policy, a common asylum strategy and a system to manage the EU's external action, defence and counter-terrorism issues are still subject to the principle of unanimity and based on cooperation.

41 Stevenson, above n 20, at 84. See also Lugna, above n 29, at 107, who stresses the fact that "security policy – especially when it concerns protecting citizens – goes to the core of national sovereignty, and governments are reluctant to give the EU powers that could interfere with their existing laws and national security practices".

42 Europol "About Us" <www.europol.europa.eu>. See also Commission of the EU "European Security Strategy – Fight Against Terrorism" (Commission staff working paper, Doc SEC (2004) 332 (19 March 2004)) at 6.

43 Europol's formal objective, as laid down in Council of the EU "Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol)" [2009] OJ L121/37, and echoed in art 88 of the Treaty on European Union as amended by the Treaty of Lisbon, above n 40, is to "support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy."

effective terrorism-combating agency. Some states (such as Germany) would like to see Europol evolve into an organisation like the Federal Bureau of Investigation (FBI), but others would prefer it to remain a coordinating body.⁴⁴ Similarly, Eurojust provides "immediate legal advice and assistance in cross-border cases to investigators, prosecutors and judges" but has no authority of its own and instead plays a coordinating role among member states.⁴⁵ The reluctance to establish distinctive supranational agencies highlights the desire to retain national sovereignty in this area and indicates that many member states may not be ready for the EU to play a primary role in counter-terrorism when it revolves around traditionally state-specific policy areas such as policing, criminal justice and the gathering of intelligence data.⁴⁶

Added to this is the fact that counter-terrorism spans many policy areas (including law enforcement, border control, finance and foreign policy) and three levels of legal system – if coordinating ministries within a national government is difficult, coordinating ministries across so many different governments is even more so.⁴⁷ For example, in 2004, Spain and France set up a combined terrorism unit to run joint operations. France, Germany, Italy, Spain, the United Kingdom and Poland, since 2006, meet regularly to discuss counter-terrorism efforts.⁴⁸

44 Nora Bensahel *The Counterterror Coalitions: Cooperation with Europe, NATO, and the European Union* (RAND Corporation, 2003) at 40. Note that Europol has no executive powers, and that its mandate is primarily to act as a support service to the EU member states, with its core tasks being to facilitate the exchange of information between member states and to develop criminal intelligence. That said, since 2009, Europol has been granted more operational powers, such as its participation (in a support and coordination role) in Joint Investigation Teams, together with Eurojust and representatives of national police forces, and one of Europol's main tasks is now "to prepare threat assessments, strategic analyses and general situation reports relating to its objective, including organised crime threat assessments." See Council of the EU "Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol)", above n 43, arts 5-6.

45 Bures, above n 8, at 64.

46 At 64. For more information on national responses to the terrorist threat after 9/11, see, for example, Doron Zimmermann and Andreas Wenger *How States Fight Terrorism: Policy Dynamics in the West* (Lynne Rienner Publishers, Boulder (CO), 2007).

47 Most homeland security measures in the EU accordingly fall under the responsibility of national governments and may be governed by bilateral as well as multilateral arrangements: see Stevenson, above n 20, at 84. See Cian Murphy *EU Counter-Terrorism Law: Pre-emption & the Rule of Law* (Hart Publishing, Oxford, 2012) at 14-15: "counter-terrorism action in Europe can now be described as taking place in one of three types of legal system: national, European Union or international. ... EU Member States may pursue national policies through EU law-making institutions or international treaties. Similarly, any EU law adopted as part of counter-terrorism action relies on the Member States to enforce it".

48 The G6 (Group of Six) is an unofficial group of the interior ministers of the six EU member states with the largest populations (and, therefore, with the majority of votes in the Council of the EU) established to deal with immigration, terrorism and law and order.

Although such closer cooperation may be beneficial, it also means a somewhat fragmented approach among EU member states, thereby limiting the effectiveness of EU counter-terrorism policies.

The United States, seemingly unencumbered by such fragmentation issues, thus has a greater ability to "marshal its power at home" and craft a national approach.⁴⁹ In fact, the United States government has played up ideas of national sovereignty as a way of garnering public support for its "war on terror".⁵⁰

III COMPARING THE APPROACHES

Although the United States and the EU legal approaches to terrorism since 9/11 differ to some extent on the international plane, at the domestic level, similar views prevail as to the need to balance human rights with state security.

A Criminal Law versus Law of Armed Conflict Approach

In its 2002 National Security Strategy (NSS), the Bush Administration pledged to "disrupt and destroy terrorist organizations" by taking direct and continuous action against them, including exercising its (alleged) right under international law to pre-emptive use of force in self-defence.⁵¹ In fact, the 2002 NSS unapologetically embraced unilateralism and emphasised military action where necessary. The 2006 NSS followed in the footsteps of the 2002 NSS, with similar views on pursuing the "war on terror" to achieve the same goals – freedom from the threat of radical extremism and mass destruction; preservation of universal

49 Shapiro, above n 6.

50 Laurie Blank writes that policy-makers in the United States have regularly used the rhetoric of "war" to describe "a major governmental or societal effort to combat an evil that threatens society, national security, or some other communal good. The idea is a rhetorical tool, a technique for resource mobilization, and, above all, a method for coalescing authority to meet the challenge, whether the challenge is poverty, drugs, or – in the most recent example – terrorism": Laurie Blank "The Consequences of a 'War' Paradigm for Counterterrorism: What Impact on Basic Right and Values?" (2012) 46 *Georgia L Rev* 719 at 721.

51 "The National Security Strategy of the United States of America 2002", above n 18, at 6. An example of this may be said to be the 2003 United States invasion of Iraq. The right of anticipatory self-defence is controversial and the instances of state practice are limited and inconclusive, as the question turns around the determination of the imminence of the armed attack. This is even more so in the case of the doctrine of "pre-emptive" self-defence developed in the 2002 National Security Strategy (at 15): "[t]he greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attacks. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively". For a critical view of the doctrine of "pre-emptive" self-defence, see Christian J Tams "The Use of Force against Terrorists" (2009) 20 *EJIL* 359 at 389-391; D Rothwell and others *International Law: Cases and Materials with Australian Perspectives* (Cambridge University Press, Melbourne, 2011) at 623-624.

values and freedoms throughout the world; and the continued crucial role of the military.⁵² The 2006 NSS though refers to the importance of working closely with allies and plays down the possibility of unilateral use of force. A certain turnaround occurred during the first Obama Administration, with the 2010 NSS ostensibly seeking to build coalitions with strong international support and participation and encouraging engagement with like-minded states.⁵³ The 2010 NSS describes the need for a whole-of-government approach to security. It also places a less overt emphasis on the use of force, with a renewed enthusiasm in gathering wide support and isolating problematic regimes from the international scene. That said, the 2010 NSS explicitly retains unilateral action as an option and so it remains unknown how the United States would react if an option for such presented itself, particularly if that option is not a last resort.⁵⁴ The increasing use of drones in recent years to carry out surgical strikes to eliminate alleged terrorists in Yemen, Pakistan and Afghanistan and their legitimisation on the basis of the law of armed conflict cast doubt on the Obama Administration's attempts to distance itself from that of George W Bush.⁵⁵

Whereas the EU approach is considered to be driven by actualities, the United States approach seems to be motivated by potential future attacks.⁵⁶ The United States strategy tends to favour short-term "fixes" with the risk of foregoing long-term effectiveness.⁵⁷ For example, it has been commented that the detention of suspected terrorists at Guantanamo Bay has effectively undermined United States

52 See generally "The National Security Strategy of the United States of America 2006" (The White House, Washington (DC), 16 March 2006) <www.whitehouse.gov>.

53 "The National Security Strategy of the United States of America 2010" (The White House, Washington (DC), 27 May 2010) at 3, 13, 39 <www.whitehouse.gov>.

54 At 22: "While the use of force is sometimes necessary, we will exhaust other options before war whenever we can, and carefully weigh the costs and risks of action against the costs and risks of inaction. When force is necessary ... we will seek broad international support The United States must reserve the right to act unilaterally if necessary to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force".

55 According to Peter Bergen and Jennifer Rowland "Obama ramps up covert war in Yemen" (12 June 2012) CNN <<http://edition.cnn.com>>, "[t]he Obama administration has launched an estimated 28 drone strikes and 13 air strikes in Yemen By contrast, the administration of George W. Bush only launched one drone attack in Yemen." See also Jackie Northam "As Drones Strikes Increase, So Do Concerns Over Use" (12 June 2012) NPR <www.npr.org>, who states that "[w]ithout question, drones have become the U.S. weapon of choice in the fight against terrorism. Counterterrorism officials say they've come to rely on the pilotless aircraft for their surveillance capability and what officials say is precision targeting. That reliance has led to greater use in the past couple of years, especially in Pakistan and Yemen."

56 Stevenson, above n 20, at 79.

57 Bruce Hoffman "A Counterterrorism Strategy for the Obama Administration" (2009) 21 *Terrorism and Political Violence* 359 at 361 ["Counterterrorism Strategy"].

"national security, prestige and stature" by irritating the global Muslim community and risks inciting more violence against the United States in the long-term.⁵⁸ A third of participants in a 2008 BBC global survey on the "war on terror" thought that Al-Qaeda had grown stronger since 2001,⁵⁹ casting doubt on the effectiveness of the United States approach.

Maintaining that the best defence is an offence, the United States has thus chosen to fight its war on terrorism abroad, focusing particularly on the border between Afghanistan and Pakistan. As argued by Bruce Hoffman, the security challenges in both states being "ineluctably symbiotic, any serious effort to stabilise and secure Afghanistan must begin with a clear and consistent policy designed to achieve the same in Pakistan."⁶⁰ Consequently, the three steps in the United States counter-insurgency campaign consist in clearing territory held by militant groups, addressing governance challenges and promoting economic development on both sides of the border.⁶¹ The United States is also focused on "fighting the information war relentlessly", so as to minimise the spread of the influence of terrorists.⁶² Washington perceived Southeast Asia as the "second front" for a military approach to counter-terrorism in the aftermath of 9/11.⁶³ The presence of the United States in that region has been strong, but has proved very costly, with mixed results.⁶⁴ The United States has also employed drones in Yemen, trying to stop the export to Africa of Al-Qaeda know-how and strategic

58 At 361.

59 "US 'War on Terror' has not weakened al-Qaeda, says Global Poll" (2008) World Public Opinion at 2 <www.worldpublicopinion.org>.

60 Hoffman "Counterterrorism Strategy", above n 57, at 364.

61 Bruce Hoffman and Seth G Jones "Cell Phones in the Hindu Kush" (2008) 96 *The National Interest* at 50.

62 Hoffman "Counterterrorism Strategy", above n 57, at 367.

63 Jürgen Haacke and Paul D Williams "Regional Arrangements and Security Challenges: A Comparative Analysis" (Crisis States Working Papers No 2, London School of Economics, 2009) at 5. See ASEAN-United States of America Joint Declaration for Cooperation to Combat International Terrorism, adopted in Bandar Seri Begawan (Brunei) on 1 August 2002, reproduced in *ASEAN Documents on Combating Transnational Crime and Terrorism. A Compilation of ASEAN Declarations, Joint Declarations, and Statements on Combating Transnational Crime and Terrorism* (Security Cooperation Division/ASEAN Political-Security Department, Jakarta, 2012) at 27.

64 See generally Simon S C Tay and Tan Hsien Li "Southeast Asian Cooperation on Anti-Terrorism: The Dynamics and Limits of Regional Responses" in VV Ramraj and others (eds) *Global Anti-Terrorism Law and Policy* (2nd ed, Cambridge University Press, Cambridge, 2012) ch 19.

intelligence by targeting alleged terrorist masterminds.⁶⁵ In fact, the use of drones has become the weapon of predilection for the Obama Administration.

The EU believes that, on the international plane, action against terrorism requires the legitimacy of a multilateral framework and thus tends to look to the UN for leadership on this front.⁶⁶ At the regional level, the EU has focused its counter-terrorism strategies mainly on non-military policies, targeting threats within its borders.⁶⁷ In the aftermath of 9/11, the Council of the EU endorsed a comprehensive "European policy to combat terrorism" that binds the EU to a single, long-term counter-terrorism strategy,⁶⁸ which has been consolidated through a variety of measures over the past decade. The EU's initial focus though was on building internal capacity and competencies in order to carry out its strategy. Two such examples are the elaboration of a common EU definition of terrorism and the creation of the European Arrest Warrant (EAW).

65 See, for instance, "Islamist cleric Anwar al-Awlaki killed in Yemen" (30 September 2011) BBC <www.bbc.co.uk>. United States born cleric Anwar al-Awlaki was suspected by the United States to be "a key figure in al-Qaeda in the Arabian Peninsula" and to have played an important role "in plots to blow up US airliners and ... use poison to kill US citizens". For a discussion of the risks involved in a drone policy lacking sufficient political and legal accountability mechanisms, see generally Benjamin R Farley "Drones and Democracy: Missing Out on Accountability?" (2012) 54 South Texas LJ 385-424.

66 Various EU member states have sent troops to Iraq and Afghanistan and the EU has implemented the various Security Council measures regarding the listing of terrorist entities over the years. See, for instance, *Afghanistan* SC Res 1267, S/1267/1999 (1999), which initially set up the sanctions regime targeted at Al-Qaeda and the Taliban administered by the "1267 Committee" (composed of representatives of all Security Council members), and whose role was to monitor the compliance of UN member states with a range of sanctions imposed against Al-Qaeda and the Taliban. The Committee designates a person or organisation linked to Al-Qaeda after one or more states have submitted the name of that person or organisation, the name has been circulated to other states, and no objection has been received within 48 hours. UN member states have to freeze the financial assets of the individuals and entities appearing on the list and take a range of other restrictive measures against them. The delisting procedure is more onerous and has raised significant issues regarding internationally recognised human rights, including the right to property and due process rights. Security Council Resolution 1267 was originally implemented through Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban [2002] OJ L/139 [Regulation (EC) No 881/2002 of 27 May 2002]. For an overview of the various counter-terrorist measures adopted by the Security Council post-9/11, see generally James Mouangue Kobila "Dixième anniversaire des attaques du 11 septembre 2001: bilan de la gestion de la lutte contre le terrorisme par le Conseil de sécurité des Nations Unies" (2011) 24 RQDI 349-405.

67 Keohane, above n 17, at 137.

68 Council of the EU "Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001", above n 8. The binding nature of this common EU policy removed the ability of the rotating president to set counter-terrorism policies based on national interest.

First, the Framework Decision on Combating Terrorism, adopted by the Council in June 2002, established a common EU definition of terrorism, clarifying the context of an action, its aim and the specific acts regarded as terrorist acts.⁶⁹ Threatening to commit any of the specific acts was also included and the Framework Decision further required EU member states to punish a number of other intentional acts.⁷⁰ The Framework Decision also ensured that terrorist offences would be "punished by heavier sentences than common criminal offences in all the EU member states."⁷¹ Such a comprehensive definition was intended to prevent terrorists from exploiting open EU borders and legal loopholes arising from geographical limitations on investigations and prosecutions as well as definitional differences between states.⁷² The EU definition has been criticised as too extensive and broad, and as not being adequate "to meet the requirement of lawfulness".⁷³ Although it contains adequate protection of human rights if its

-
- 69 Council of the EU "Council Framework Decision of 13 June 2002 on Combating Terrorism", above n 9, art 1: the definition specifies the context of an action ("intentional acts ... which, given their nature or context, may seriously damage a country or an international organisation") and its aim (acts must be committed with the aim of "seriously intimidating a population" or "unduly compelling a Government or international organisation" to act or fail to act, or "seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation"). A list of eight types of specific acts then follows. See Bures, above n 8, at 66.
- 70 Council of the EU "Council Framework Decision of 13 June 2002 on Combating Terrorism", above n 9, art 2(1): related acts included direction of a terrorist group and participation "in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group". Interestingly, before 9/11, only six of the then 15 EU member states recognised terrorism as a special offence.
- 71 Bures, above n 8, at 66. However, the practical impact of the Framework Decision has been "hampered by the lengthy transposition of its provisions into the national legislation of some EU Member States" (at 67).
- 72 Sionaidh Douglas-Scott "The rule of law in the European Union – putting the security into the area of freedom, security and justice" (2004) 29 *European L Rev* 219 at 229.
- 73 EU Network of Independent Experts in Fundamental Rights "The Balance Between Freedom and Security in the Response by the European Union and Its Member States to Terrorist Threats" (31 March 2003) at 11 <www.statewatch.org>. Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 [ECHR] refers to the concept of lawfulness, that is, the need to comply with the legality principle also known by the Latin phrase *nullem crimen nulla poena sine lege*. Article 7 has been interpreted in a variety of contexts by the European Court of Human Rights. See, for instance, *Kokkinakis v Greece* (1994) 17 EHRR 397 (ECHR), a case concerning compatibility of certain sanctions for proselytism with art 7 of the Convention, where the Court asserted the view that a conviction would violate that provision only where the provision of domestic law serving as ground for a conviction would not be sufficiently precise and clear (at [51-53]). See also *SW v United Kingdom* (1995) 21 EHRR 363 (ECHR), where the Court found that art 7 "is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage; it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty ... and the principle that the criminal law

preamble and attached statements are fully applied, the ambiguity of some aspects of the Framework Decision could lead to possible abuses of human rights in certain cases.⁷⁴

Secondly, the EAW was created to make the extradition (now referred to as "surrender") process more efficient and effective.⁷⁵ The EAW institutes shorter time limits for extradition,⁷⁶ thereby raising the possible infringement of human rights. The shorter timeframe may jeopardise the possibility of appeal or judicial review in some cases.⁷⁷ Enforcement is carried out by judicial authorities, effectively removing any political element from the process.⁷⁸ The EAW abolishes the principle of double criminality for serious offences, so a warrant cannot be

must not be extensively construed to an accused's detriment. From these principles it follows that an offence must be clearly defined in law" (at [35]). The Court then went on to say that art 7 does not prevent the gradual clarification of the criminal law from case to case, provided that "the resultant development is consistent with the essence of the offence and could reasonably be foreseen" (at [36]).

- 74 Steve Peers "EU Responses to Terrorism" (2003) 52 ICLQ 227 at 243. See Verena Murschetz "The Future of Criminal Law within the European Union – Union Law or Community Law Competence?" (2006) 12 NZACL Yearbook 145 at 149-151, who believes that recent EU initiatives in criminal matters are only acceptable if accompanied by equivalent standards for procedural rights of the defendants.
- 75 Council of the EU "Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States" [2002] OJ L190/1 [EAW Framework Decision]. See generally Mark Mackarel "The European Arrest Warrant – the Early Years: Implementing and Using the Warrant" (2007) 15 Eur J of Crime, Crim L & Crim Just 37-65; Oreste Pollicino "European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance Between Interacting Legal Systems" (2008) 9 German LJ 1313-1355.
- 76 For example, the final decision on the execution of the European Arrest Warrant (EAW) "should be taken within a period of 60 days after the arrest of the requested person" and "where in specific cases the European arrest warrant cannot be executed within the time limits ... the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days": EAW Framework Decision, above n 75, art 17(3).
- 77 Article 1(3) of the EAW Framework Decision, above n 75, explicitly acknowledges the obligation to respect fundamental rights and fundamental legal principles. However, in their implementing laws, ten EU member states have retained the power to oppose human rights exceptions: see "Annex to the Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States" (11 July 2007) COM (2007) 407 final.
- 78 See Michael Plachta "European Arrest Warrant: Revolution in Extradition?" (2003) 11 Eur J of Crime, Crim L and Crim Just 178 at 187: "Arguably the most striking feature of the extradition system based on the Framework decision is its removal outside the realm of the executive. The sole responsibility for this procedure has been placed in the hands of the judiciary... . Since the procedure for executing the European arrest warrant is primarily judicial, the political phase inherent in the extradition procedure was abolished. Accordingly, the administrative redress phase following the political decision was also abolished".

contested on the basis that it is for an activity not criminalised in the surrendering state.⁷⁹ Also removed are the principles of political offence and nationality as legitimate reasons for refusing the extradition. This means extradition can be refused only in very limited circumstances.⁸⁰ The list of offences is set out in general rather than defined terms, and many EU member states perceive the criminality or gravity of offences differently.⁸¹ For example, while the United Kingdom does not criminalise racism, it has harsher blasphemy laws than some other member states.⁸² Many EU states have been slow to implement the EAW – for example, Poland and Cyprus had to modify their respective constitution after the EAW was challenged before their national courts.⁸³

B Human Rights versus State Security

It is beyond the scope of this article to address the possible violations of human rights that may arise from the (ab)use of counter-terrorism policies. A vast body of legal literature addresses the subject exhaustively from various angles.⁸⁴ In particular, many scholars have dissected in detail the key challenge facing governments throughout the world – reconciling issues of state security with respect for fundamental human rights. Despite a certain diversity of views, the clear majority has tended to shy away "from the negative effects an absolutist commitment to either security or rights may produce"⁸⁵ and favour a new paradigm based upon respect for human rights, a coordinated international counter-terrorism

79 Douglas-Scott, above n 72, at 223.

80 The only mandatory grounds for refusal, acknowledged in art 3 of the EAW Framework Decision, above n 75, are amnesty, *ne bis in idem* and the age of the suspect. Article 4 mentions other optional grounds for refusal, none of which refers to the political offence exception.

81 Douglas-Scott, above n 72, at 225.

82 At 225. Although justified as a key counter-terrorism measure, the EAW programme has been used to transfer individuals for less serious offences than transnational terrorism. See Sally McNamara "The EU-US Counter-terrorism Relationship: An Agenda for Cooperation" (2011) Backgrounder at 3 <www.heritage.org>.

83 Kaunert, above n 30, at 56; Bures, above n 8, at 61-62.

84 See, for instance, Benjamin J Goold and Liora Lazarus (eds) *Security and Human Rights* (Hart Publishing, Oxford, 2007); S Sottiaux *Terrorism and the Limitation of Human Rights: The ECHR and the US Constitution* (Hart Publishing, Oxford, 2008); Kent Roach *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, Cambridge, 2011).

85 Benjamin J Goold and Liora Lazarus "Introduction: Security and Human Rights: The Search for a Language of Reconciliation" in Goold and Lazarus, above n 84, 1 at 22.

justice strategy and "a long-term political vision that can reduce the global tensions that generate a political constituency for terrorists."⁸⁶

On the surface, the impression is that the United States has formulated a more intrusive homeland security policy. The USA PATRIOT Act of 2001 enhances federal agency powers to gather intelligence within the United States, expands the Secretary of the Treasury's authority to regulate financial transactions, particularly those involving foreign individuals and entities, and broadens the discretion of law enforcement and immigration authorities in detaining and deporting non-United States citizens suspected of terrorism-related acts.⁸⁷ The Act also expands the definition of terrorism to include domestic terrorism, thus enlarging the number of activities to which the USA PATRIOT Act's expanded law enforcement powers can be applied to prevent a terrorist attack on home soil.⁸⁸ "Sneak and peak" search warrants, used more and more liberally, threaten to violate the Fourth Amendment.⁸⁹ The use of Guantanamo Bay to detain alleged terrorists without charges and the ambition of the Bush Administration to set up military courts to replace civilian courts in certain cases, have effectively side-stepped the

86 Richard A Wilson "Human Rights in the 'War on Terror'" in Wilson, above n 11, 1 at 33. Most authors insist on the need to respect ordinary legal principles and the rule of law in response to the tendency to give governments extraordinary power in times of emergency: see, generally, Victor V Ramraj "Between Idealism and Pragmatism: Legal and Political Constraints on State Power in Times of Crisis" in Goold and Lazarus, above n 84, 185-202; David Dyzenhaus "The State of Emergency in Legal Theory" in Ramraj and others, above n 64, ch 5.

87 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 Pub L No 107-56, 115 Stat 272 (2001).

88 D Cole and J Lobel *Less Safe, Less Free: Why America Is Losing the War on Terror* (The New Press, New York, 2007) at 31. The PATRIOT Sunsets Extension Act of 2011 Pub L No 112-14, 125 Stat 216 (2011), signed into law by President Obama on 26 May 2011, effected a four-year extension of three key provisions in the USA PATRIOT Act of 2001: roving wiretaps, searches of business records (the "library records provision"), and conducting surveillance of "lone wolves" – individuals suspected of terrorist-related activities not linked to terrorist groups.

89 See generally Nathan H Seltzer "Still Sneaking & Peeking" (2006) 42 Criminal Law Bulletin 289. Other possible violations include the principle of non-discrimination and due process: see Bernard E Harcourt "Muslim Profiles Post-9/11: Is Racial Profiling an Effective Counter-terrorist Measure and Does It Violate the Right to be Free from Discrimination?" in Goold and Lazarus, above n 84, 73 at 74-76; David Luban "Eight Fallacies About Liberty and Security" in Wilson, above n 11, 242 at 248-254.

Constitution and the rule of law.⁹⁰ These "patriotic" measures have been condemned as disregarding civil liberties and democratic justice.⁹¹ They cost the United States tax-payers billions of dollars each year and, more importantly, they tarnish its government's reputation around the world and set back more generally the cause of human rights.⁹²

Implementation of the EU response to terrorism has also raised some eyebrows, with some authors going so far as arguing that the national measures adopted by some EU member states post-9/11 have been tougher and more far-reaching than those taken by the United States.⁹³ Studies have shown a tendency towards a consolidation of state powers as a result of attempts to emulate United States legislative measures.⁹⁴ In some cases, legislation was adopted very quickly following 9/11. For instance, the Anti-Terrorism, Crime and Security Act 2001 was rushed through the United Kingdom Parliament and adopted within a month. One of its most controversial parts related to the power to detain without trial, on an

90 Douglas-Scott, above n 72, at 219. For the relevant judgments of the United States Supreme Court in relation to detentions and trials at Guantanamo Bay, see *Boumediene v Bush* 553 US 723 (2008); *Hamdan v Rumsfeld* 548 US 557 (2006) (superseded by Military Commissions Act of 2006 Pub L No 109-366, 120 Stat 2600 (2006)); *Hamdi v Rumsfeld* 542 US 507 (2004); *Rasul v Bush* 542 US 466 (2004) (superseded by Detainee Treatment Act of 2005 Pub L No 109-148, 119 Stat 2739 (2005)). See also Alberto Costi "Human Rights before the US Supreme Court: Lessons from Guantanamo Bay" in Paul Morris and Helen Greatex *Human Rights Research* (Victoria University of Wellington, Wellington, 2004) 1-27.

91 For a strong critique of the policies of the United States, see Richard Falk "Human Rights: A Descending Spiral" in Wilson, above n 11, 225 at 229-234.

92 At 239-240. Along the same lines, see Neil Hicks "The Impact of Counter Terror on the Promotion and Protection of Human Rights: A Global Perspective" in Wilson, above n 11, 209 at 216-221.

93 See Michael Jacobson *The West at War – US and European Counter-terrorism Efforts, Post-September 11* (The Washington Institute for Near East Policy, Washington (DC), 2006) at 55. The author brings up a number of examples from Germany and the United Kingdom. For instance, "grid searching", a form of profiling allowing law enforcement authorities to employ some technological searches to identify individuals who match certain criminal profiles, which was used in many German *Länder* before 9/11, was further liberalised afterwards and made legal in several German *Länder* where it was previously illegal (at 56). In the United Kingdom, the author mentions the increasing ability of the authorities to stop and search people without specific suspicion, the shift of burden of proof in some terrorist cases and the expansive use of immigration powers to detain indefinitely non-citizens presumed to be terrorists (at 58-59). Many of the measures discussed would be "deemed unconstitutional in the United States" (at 58).

94 For instance, see Carol J Greenhouse "Nationalizing the Local: Comparative Notes on the Recent Restructuring of Political Space" in Wilson, above n 11, 184 at 203-204, who concludes that case studies of Italy and Spain show that "where there is room to question the axiomatic assumption that civil liberties involve a necessary trade-off against security, because in each of the cases considered here, the new executive powers were not restricted to the security context, but relatively soon put to use for older and more familiar purposes – that is, the concentration of executive power and party political contestation at the national level."

indefinite basis, certain categories of non-nationals who were subject to deportation for reasons of national security,⁹⁵ which appeared to breach the right to personal liberty guaranteed by the European Convention on Human Rights.⁹⁶ Upon a challenge before the House of Lords by a number of such detainees, the majority was willing to accept that a public emergency threatening the life of the nation existed under the Convention.⁹⁷ However, it found that the power of detention itself was outside the permissible scope of derogation from the Convention, which also requires derogating measures to satisfy a test of objective justification. As a result, the majority held that the applicability of the detention power to non-nationals alone constituted discriminatory treatment that could not be shown to be proportionate, giving the absence of any clear justification as to why non-nationals were being singled out for special treatment.⁹⁸ Although the United Kingdom Parliament repealed these provisions in light of the House of Lords decision in that case, it immediately enacted a new piece of legislation allowing strict control orders to be placed on citizens and non-citizens who are reasonably suspected of

95 Anti-Terrorism, Crime and Security Act 2001 (UK), ss 21-32.

96 ECHR, above n 73, art 5, which requires that detained individuals must be charged and brought to trial as soon as possible.

97 *A v Secretary of State for the Home Department* [2004] UK 56 at [28], [44] per Lord Bingham, [154] per Lord Scott, [208] per Lord Walker. See ECHR, above n 73, art 15(1), which provides that "[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." Lord Hoffmann dissented on this point, holding that no public emergency existed (at [96-97]).

98 *A v Secretary of State for the Home Department*, above n 97, at [68] per Lord Bingham: "[a]rticle 15 requires any derogating measures to go no further than is strictly required by the exigencies of the situation and the prohibition of discrimination on grounds of nationality or immigration status has not been the subject of derogation. Article 14 [prohibition of discrimination] remains in full force. Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. What has to be justified is not the measure in issue but the difference in treatment between one person or group and another. What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another. To do so was a violation of article 14. It was also a violation of article 26 of the [International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976)] and so inconsistent with the United Kingdom's other obligations under international law within the meaning of article 15 of the European Convention". Similar views were expressed by Lord Hope at [139] and Lord Scott at [158] and [160].

terrorist activities,⁹⁹ recently replaced by a new power to investigate and detain within set parameters.¹⁰⁰ Other controversial measures include the more recent enactment by the French Parliament of a law effectively banning the wearing in public places of scarves and other apparel traditionally worn by Muslim women¹⁰¹ and a number of EU member states having admittedly allowed the use of their air space by CIA chartered flights.¹⁰²

On a more positive note, the European Court of Justice delivered a landmark judgment in 2008 in which it refused to allow UN Security Council Resolution 1267 to enjoy primacy over EU law where an individual's fundamental rights could be jeopardised.¹⁰³ The claimant, Mr Kadi, was identified as a possible supporter of Al-Qaeda and subjected to sanctions, in particular an assets freeze, by the 1267 Committee. The EU transposed this UN sanctions regime by a regulation¹⁰⁴ which Mr Kadi attacked before the European Court of Justice. The Court of First Instance held that such a review was precluded by virtue of the binding measure being implemented – a resolution adopted by the Security Council under Chapter VII of

99 Prevention of Terrorism Act 2005 (UK), s 2. In *Secretary of State for the Home Department v JJ* [2007] UKHL 45 at [63] per Baroness Hale, [84] per Lord Bingham and [109] per Lord Brown, the House of Lords referred to the jurisprudence of the European Court of Human Rights on art 5 of the ECHR, above n 73, to state that control orders imposing substantial restrictions on liberty would breach that provision, if they effectively constitute a total deprivation of liberty, the majority taking the view that each case must be evaluated on its own merits. This approach that leaves a certain degree of ambiguity was criticised. See Colm O'Connell "Strapped to the Mast: The Siren Song of Dreadful Necessity, the United Kingdom Human Rights Act and the Terrorist Threat" in Gani and Matthew, above n 25, 327 at 341-342. See also D Feldman "Deprivation of Liberty in Anti-Terrorism Law" (2008) 67 Cambridge LJ 4-8.

100 Terrorism Prevention and Investigation Measures Act 2011 (UK), s 2. Section 1 of this Act repeals the Prevention of Terrorism Act 2005 (UK) – in particular ss 21-32 – and replaces it by a new power to the Secretary of State for the Home Department "to impose specified terrorism prevention and investigation measures on an individual if conditions A to E in section 3 are met."

101 Loi No 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [2010] 237 JORF 18344. This law entered into force on 11 April 2011.

102 Ian Fisher "Reports of Secret U.S. Prisons in Europe Draw Ire and Otherwise Red Faces" *New York Times* (1 December 2005) at A14, who reported "that CIA-operated planes had made 307 flights in Europe since 9/11: ninety-four in Germany, seventy-six in England, thirty-three in Ireland, sixteen in Portugal, fifteen in Spain, fifteen in the Czech Republic, thirteen in Greece, six in Poland, five in Italy, four in Romania, and lesser amounts in a dozen other countries." Condoleezza Rice, United States Secretary of State, reminded the EU on 5 December 2005 that some of its member states "cooperated in the CIA flights and were fully complicit in what was done": quoted in Louis Fisher "Extraordinary Rendition: The Price of Secrecy" (2008) 57 Am U L Rev 1405 at 1428. See also Monika Hakimi "The Council of Europe Addresses CIA Rendition and Detention Program" (2007) 101 AJIL 442 at 442.

103 C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 [*Kadi*].

104 Regulation (EC) No 881/2002 of 27 May 2002, above n 66.

the UN Charter.¹⁰⁵ The European Court of Justice reversed that decision on appeal. The Court first reviewed the lawfulness of the EU Regulation transposing Security Council Resolution 1267 into EU law. Since the protection of fundamental rights forms part of the very foundations of the EU legal order, it derives that all EU measures must be compatible with fundamental rights.¹⁰⁶ For the Court, this does not amount to a review of the lawfulness of the Security Council measures. The review of lawfulness would apply only to the EU act "intended to give effect to the international agreement at issue, and not to the latter as such."¹⁰⁷ The European Court of Justice then found that the EU Regulation breached the due process rights of Mr Kadi as he had not been informed of the grounds for his inclusion in the list of individuals and entities subject to the sanctions.¹⁰⁸ The European Court of Human Rights has also handled its fair share of cases invoking breaches of the European Convention on Human Rights, in most cases restricting attempts by governments to detain or deport individuals for reasons of national security when their rights would be breached.¹⁰⁹

105 *Kadi*, above n 103, at [74-76]. The Court of First Instance thus concluded "first, that the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, that in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations" (at [80]). However, since the EU is based on the rule of law, the Court of First Instance did go on to examine whether the UN Security Council had respected *jus cogens*, in particular certain fundamental rights, but found no infringement of the right of the claimant to respect for property (at [91-94]), his right to be heard (at [96-102]) or the right to effective judicial review (at [103-105]).

106 At [281-285], [290-300] and [303-328].

107 At [286].

108 Mr Kadi had, therefore, not been able to seek judicial review of these grounds, and consequently his right to be heard as well as his right to effective judicial review (*Kadi*, above n 103, at [348-353]) and the right to property (*Kadi*, above n 103, at [368-372]) had been infringed. For a discussion of the case and its impact on the relationship between EU law and international law, see Gráinne de Búrca "The European Court of Justice and the International Legal Order After *Kadi*" [2010] 51 *Harvard Int'l LJ* 1-49.

109 See, for instance, *Chahal v United Kingdom* (1997) 23 EHRR 413 (ECHR) (prohibiting the deportation of a Sikh separatist to India because of the risk of violation of art 3 of the ECHR, above n 73, in the form of torture or inhuman or degrading treatment or punishment); *Saadi v Italy* (2009) 49 EHRR 30 (Grand Chamber, ECHR) (involvement in terrorism does not affect an individual's absolute rights under art 3 of the ECHR). On 13 December 2012, the European Court of Human Rights determined that Khalid El Masri had been tortured while held by CIA agents and ruled that Macedonia was responsible for abusing him while in the country, and knowingly transferring him to the CIA when torture was a possibility; he was awarded compensation: *El Masri v FYR Macedonia* (39630/09) Grand Chamber, ECHR 13 December 2012. This marked the first time that the CIA activities against detainees were legally declared as torture. The Court condemned nations for collaborating with the United States in these secret programmes.

The above examples raise issues regarding respect for the rule of law in both the United States and the EU and may lead to the perception that the fight against terrorism may be used by some states to consolidate their grip on certain groups perceived to represent a threat to (a certain conception of) society.

IV CONSEQUENCES FOR UNITED STATES-EU COOPERATION

Despite differences in their approaches, cooperation between the United States and EU is both possible and necessary.

A Positive Cooperation Record?

An "insidious dynamic" links the two approaches: Europe was the main recruitment, planning and logistics base for the 9/11 attacks and could be for future attacks if the EU's counter-terrorism measures are ineffective; and returnees from United States-waged wars in Iraq and Afghanistan could create problems for the EU.¹¹⁰ More positively, the pooling of resources and intelligence across the Atlantic enables both the United States and the EU to investigate and prosecute terrorism more widely. The aforementioned strengthening of the EU's internal competencies has been a practical precondition to its ability to cooperate with the United States at international law.¹¹¹

The United States and the EU have taken some steps towards cooperation in the areas of police and law enforcement, judicial decision-making, information sharing, border security and combating terrorism financing. For example, the United States and the EU have representatives at Europol and the FBI respectively.¹¹² Two agreements were concluded in 2001 and 2002 to allow the United States and the EU to share strategic information (risk assessment, threat tips and crime patterns) as well as personal information (names, addresses and criminal

¹¹⁰ Stevenson, above n 20, at 80.

¹¹¹ Kaunert, above n 30, at 44. Note that many EU member states cooperated on judicial and security matters with the United States and other states through bilateral and multilateral agreements before 9/11, and they have continued to do so since. See McNamara, above n 82, at 9-10: "[d]espite Brussels's increased role in counterterror policymaking, the EU has not replaced the bilateral relationships that have been formed between law-makers, intelligence officers, and the security services over many decades. ... U.S.-European bilateral counterterror operations have enjoyed a number of extraordinary successes. The Anglo-American relationship stands out in particular for the remarkable ease with which intelligence officers operate together".

¹¹² Kaunert, above n 30, at 55. See also Jacobson, above n 93, at 20: "[w]hile the EU has assumed some control in the legislative and policy arenas, it is not involved to any real extent in day-to-day counterterrorism matters. European intelligence and police work is still performed by the member states, and cooperation on counterterrorism matters between member states is done through either a bilateral or multilateral process".

records).¹¹³ The 2003 EU-United States Mutual Legal Assistance (MLA) Treaty allows for judicial cooperation such as sharing evidence for investigations and prosecutions, streamlining extradition arrangements and sharing data such as bank account details.¹¹⁴ The Treaty gives United States authorities access to EU bank account and financial information in criminal investigations, "speed[s] MLA request processing, allow[s] the acquisition of evidence (including testimony) by video conferencing, and permit[s] the participation of U.S. authorities in joint EU investigations."¹¹⁵ However, the Treaty has been criticised in the EU as lacking democratic safeguards for scrutiny, being too broadly worded and not providing explicit provision for extradition to be refused on European Convention on Human Rights grounds.¹¹⁶ It has also been criticised in the United States for not precluding EU states from giving primacy to the EAW over a United States request for extradition.¹¹⁷ The use of the death penalty in some states of the United States may encourage an EU member state to use the EAW to transfer an alleged terrorist to another EU member state, rather than extraditing the accused to the United States.

As regards the promotion of information sharing, protection of data privacy and strengthening of border and transport security, attempts to cooperate have stalled or have only reaped benefits following arduous negotiations. Often, this is because the EU has higher data protection standards than the United States, and is unwilling to allow invasions of privacy to facilitate the investigation of suspected terrorists.¹¹⁸ For example, in February 2010, the EU Parliament voted down a Society for Worldwide Interbank Financial Telecommunication (SWIFT) data-sharing

113 Kristin Archick "U.S.-EU Cooperation against Terrorism" (Congressional Research Service Report for Congress RS22030, Washington (DC), 2012) at 4: "U.S.-EU negotiations on the personal information accord proved especially arduous, as U.S. officials had to overcome worries that the United States did not meet EU data protection standards. The EU considers the privacy of personal data a basic right, and EU regulations are written to keep such data out of the hands of law enforcement authorities as much as possible".

114 Agreement on mutual legal assistance between the European Union and the United States of America [2003] OJ L181, 34-42. It should be noted that this Agreement only came into force in February 2010, following approval by the United States Senate and ratification by all EU member states. See Archick, above n 113, at 4.

115 See Archick, above n 113, at 5.

116 "EU/US Agreements on Extradition and Mutual Legal Assistance" (House of Lords, Select Committee on the EU, Session 2002-03, 38th report) at 11.

117 Archick, above n 113, at 5: "Washington *effectively* agreed to EU demands that suspects extradited from the EU will not face the death penalty, which EU law bans. U.S. officials also relented on initial demands that the treaty guarantee the extradition of any EU national" (emphasis added).

118 Archick, above n 113, at 6. This is especially true of Germany, which has one of the strictest privacy laws in the EU: Kaunert, above n 30, at 56.

agreement with the United States on the basis of privacy concerns and lack of proportionality and reciprocity, effectively rendering the agreement void.¹¹⁹ It was not until June 2010 that the EU Commission was able to conclude a new draft agreement with Washington, and only with the inclusion of a number of new restrictions.¹²⁰ In 2006, the European Court of Justice struck down the Passenger Name Records (PNR) Agreement as breaching European privacy standards.¹²¹ The Court focused on the amount of data transferred to the United States authorities under the Agreement, the length of time such data could be kept, the limited redress available to EU citizens in case of abuse by the United States authorities, and the profiting-potential of the United States authorities.¹²² After six years of negotiations, the EU Parliament, on 27 March 2012, approved a new version of the PNR Agreement, once misgivings about data privacy safeguards and human rights were adequately addressed.¹²³

There have also been disagreements on the listing of foreign terrorist organisations (FTOs). Keeping an updated FTO list is an important step in freezing the flow of finances to a terrorist organisation.¹²⁴ Although the EU, its member states and the United States have maintained updated lists designating terrorist organisations (and individuals) in accordance with UN Security Council resolutions, they have sometimes differed as to whether an organisation (or an individual) should be qualified as a terrorist entity. A case in point is that of Lebanon's Hezbollah. The United States has regularly protested the EU's refusal to

119 McNamara, above n 82, at 8.

120 Council of the EU "Council Decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program" (24 June 2010) <<http://register.consilium.europa.eu>>. See Toby Vogel "SWIFT Deal on Data Sharing with U.S. Reopened" (24 June 2010) European Voice <www.europeanvoice.com>. The Agreement entered into force on 1 August 2010 for a period of five years. EU officials are now posted at the United States Treasury in order to scrutinise the transfer of EU banking data to investigators; also, information requests must be tailored as narrowly as possible: McNamara, above n 82, at 8.

121 See Case C-317/04 and C-318/04 *Parliament v Council and Commission* [2006] ECR I-4721.

122 At [54-60] and [67-70]. See also McNamara, above n 82, at 6.

123 "Parliamentary Committee Approves EU-US PNR Agreement" (28 March 2012) Agence Europe <www.agenceurope.com>. See Archick, above n 113, at 14: "U.S. officials assert that [the Agreement] reaffirms the shared commitment of the United States and the EU to countering terrorism and other transnational threats while protecting privacy and other civil rights". The Agreement entered into force on 1 June 2012 for a period of seven years.

124 Efforts to list, and to prohibit financial dealings with, terrorist entities is an established part of UN procedures: see, for instance, SC Res 1267, above n 66; SC Res 1373, above n 3.

list Hezbollah as an FTO.¹²⁵ Hezbollah has launched a number of attacks against United States personnel and buildings, including a suicide truck bombing of United States marine barracks at Beirut Airport in October 1983, killing 241 people, and the 1996 bombing of the Khobar Towers in Saudi Arabia that killed 19 United States servicemen.¹²⁶ Hezbollah's Secretary-General noted that the organisation's funding (as well as its moral, political and material support) would dry up without the support of the EU.¹²⁷ It seems that the EU prefers to engage in dialogue with the political wing of Hezbollah. Given the extensive role Hezbollah plays in Lebanese politics, any deemed act of hostility from the EU could further destabilise Lebanon and have negative flow-on effects for Europe.¹²⁸

B Future Trends?

There has been EU-United States counter-terrorism cooperation since the 1990s, but similarities and differences in transatlantic responses to international terrorism after 9/11 have shaped the dialogue during the past decade. Although EU member states retain the main responsibility for security of their citizens,¹²⁹ the EU approach, in supporting its member states, can be defined as multilateral, norm-based and law enforcement driven, at the same time ensuring respect for human rights. The United States is seen to prefer a unilateral, practice-based approach which looks at international law as a framework for its counter-terrorism initiatives. In reality, and especially since the beginning of the first Obama Administration, the policies of the United States and the EU have converged, although there still seems to be some reticence to share information and adopt common views on all security matters.

Cooperation will be effective only if the United States and the EU respect the differences between their approaches and acknowledge the reasons for them as legitimate.¹³⁰ The United States is concerned to maintain its global role as a superpower and is protective of its long established and hard fought "American way" of life. The EU, following successive enlargement waves based on its democratic values and the elimination of the possibility of war between its member

125 McNamara, above n 82, at 8-9.

126 At 8.

127 Steven J Rosen "The Arab Lobby: The European Component" (2010) 17 *The Middle East Quarterly* 17 at 25.

128 At 25-26.

129 Treaty of Lisbon, above n 40, art 4.

130 Shapiro, above n 6: "[w]orking together doesn't imply that you have to think of the problem in exactly the same way".

states, is interested in strengthening its internal integration efforts so as to play a greater international role. Given that national, regional and international security depends in part on the effectiveness of counter-terrorism efforts, the United States and the EU should work together, and within the UN, as efficiently as possible to succeed on all fronts.

For instance, the United States and the EU must overcome the perception that their respective efforts are at odds by focusing on the similarities in their approaches and on the common aspects of the challenges they face.¹³¹ Furthermore, it is important to work more closely on a shared strategy to develop solutions that are acceptable to all, not only to fight terrorism offences but also non-terrorism related crimes perpetrated by terrorists or their supporters.¹³² A mutually beneficial strategy can only work based on better tactical cooperation. It is also important, in the long-term, that the United States and the EU counter-terrorism initiatives be more synchronised, especially as regards partners in other regions and states with weaker capabilities.¹³³

Practical ways should be found to accommodate trans-Atlantic differences, such as allowing EU member states to refuse extradition requests to send alleged offenders to the United States if a fair trial in a military tribunal cannot be guaranteed.¹³⁴ The EU might also need to clarify its approach toward organisations that have political as well as military wings to avoid creating undue tensions with the United States.¹³⁵ Political disputes (for example, about trade or Iraq) must be divorced from day-to-day cooperation over counter-terrorism.¹³⁶ Finally, the United States and the EU must avoid entering into any arrangement that will violate human rights or threaten the rule of law.

With their shared history and values, including in the security area, the United States and the EU have much in common. By working more closely together, they

131 Jacobson, above n 93, at 128: "[a] focus on common grounds should make it far easier for both sides of the Atlantic to collaboratively tackle their similar problems".

132 At 129-130.

133 Peter Wennerholm, Erik Brattberg and Mark Rhinard "The EU as a counter-terrorism actor abroad: finding opportunities, overcoming constraints" (EPC Issue Paper No 60, September 2010) at 27; Jacobson, above n 93, at 132; Parliament of the EU "European Parliament resolution of 14 December 2011 on the EU Counter-Terrorism Policy: main achievements and future challenges (2010/2311(INI))" at [21-22] <www.europarl.europa.eu>.

134 Adam Townsend "Transatlantic disputes must not undermine EU and US counter-terrorism cooperation" (Centre for European Reform Briefing note, 27 June 2003) at 2.

135 McNamara, above n 82, at 10.

136 Townsend, above n 134, at 2.

can and should complement their counter-terrorism efforts and form mutually beneficial synergies. This will help increase the effectiveness of their policies not only for their own respective benefit, but also for a safer global world for all.

V CONCLUSION

The EU and United States approaches to counter-terrorism in the post-9/11 era differ in terms of justifications, immediate objectives and ultimate goals. To the EU, the United States approach is sometimes seen as short-sighted and heavy-handed. To the United States, the EU approach often appears weak and too restrained. Actually, both approaches lack certain effectiveness and democratic accountability, but they reflect the fact that, although terrorism is a global challenge, it affects states differently. These approaches, one based on criminal law and the other on the law of armed conflict, have their limitations and deficiencies though they can, together, complement each other and be more effective. The right balance should also be struck between the pursuit of equally valid objectives of security and respect for human rights and the rule of law. Rather than considering these legitimate objectives as competing, they should be viewed as mutually reinforcing.

In time, the approaches may grow more similar, as the EU builds up its internal competencies and the United States eventually ends its "war on terror" overseas. The death of Osama Bin Laden is likely to reorient the United States' priorities. But for now, to effectively fight terrorism on a global scale, the United States and the EU must cooperate. They must recognise the differing threat perceptions and governance arrangements as legitimate reasons for taking different approaches to counter-terrorism, and accommodate rather than try to change these differences. Furthermore, the United States can encourage the EU to pull its weight as it establishes itself as a significant actor in the security area on the world stage, and the EU can act as a check on the United States to ensure it stays within the parameters of international law and the rule of law.

No doubt, enhanced cooperation in combating terrorism would benefit the United States and EU as well as the wider international community.

