

Terrorism and Parliamentary Control

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Terrorism poses multiple challenges to parliamentarians. They have to be seen as active in countering a massive threat to Western society, but are groping in the dark as to its causes and plans of action. No other issue has such a direct impact on their voters and their view of the world, since all of them have to cope with it in trying to continue their daily routine normally. Fear increases with every new terrorist incident and fear is a powerful factor in politics.

Fear of a massive Soviet attack on Western Europe turned NATO into the most effective collective defence alliance in history, based on an intricate doctrine of deterrence. The adversary was unable to count on an easy success, and mutually assured destruction – although declared “MAD” by some – worked, by making it clear that any possible gains would be far outweighed by massive losses. It also balanced Soviet conventional superiority with the threat of nuclear retaliation. It was a “balance of terror,” but most people could live with it because in the final analysis they expected and counted on rational behaviour. States would not easily commit suicide, it was argued, with varying degrees of conviction.

The major changes in modern terrorism are its suicidal and catastrophic methods, aimed at massive casualties among the general public, without a well-defined link to precise and negotiable demands. In this respect, it resembles the anarchist attacks in the beginning of the twentieth century. In itself, suicide has been a tool of war and politics before. Kamikaze pilots have been used to be certain of hitting a target, monks have immolated themselves to draw attention to their cause, and in Nazi Germany a plot was hatched to blow up Hitler with bombs strapped to the body of a young officer. The difference is that today’s attacks are aimed at the Western way of life in general and are very difficult to deter. The attacks of 11 September 2001 have made that clear. Their scope perfectly fitted the objective: the World Trade Center in New York as the symbol of globalisation and the Pentagon in Washington as the epitome of American power. No subsequent attempt came close. In fact, no further major attack took place in the United States or Western Europe until the train bombings in Madrid. Prior to March 2004, one could ask the question: was Al Qaeda was less effective than it was thought to be, or were the host of preventive measures adequate

in deterring and detecting new terrorist acts? In Madrid, the attacks appeared to be most cunningly planned and timed, given their influence in the subsequent decision to withdraw Spanish forces from Iraq.

Terrorism Becomes the Major Threat

The day after 9/11, NATO – for the first time in its history – invoked Article V, providing for collective defence against an external attack. Contrary to expectations at the time of its inception, it was not a case of the United States helping Europe to resist aggression, but of the Alliance expressing solidarity with Americans in their day of shock and bereavement. “Today we are all Americans” was the rapid and sincere message that Europeans sent across the Atlantic. It was highly appreciated in the U.S. Congress and Speaker of the House Dennis Hastert made a special trip to Ottawa to express U.S. gratitude at the plenary session of the NATO Parliamentary Assembly. Regrettably, that common feeling evaporated when NATO was not given a role in the Afghanistan campaign to dislodge the Taliban regime.

The attacks were qualified as “external,” which brought them under the scope of Article 51 of the UN Charter. On 12 September 2001, the Security Council passed Resolution 1368, labelling the terrorist acts a “threat to international peace and security” and “recognised the inherent right of individual or collective self-defence.” This was understood as an authorisation of the use of military force against the Taliban regime in Afghanistan, which was sheltering Usama bin Laden and his movement. On 28 September 2002, Resolution 1373 laid down very specific measures to combat terrorism: obliging states to deny all forms of financial support to terrorist groups; to suppress the provision of safe havens, sustenance, or support for terrorists; to share relevant information with other governments; to cooperate with them in the investigation, detection, arrest, and prosecution of alleged terrorists; to criminalize active and passive assistance to terrorists in national laws; and to become party to the relevant international conventions. This resolution also established the Counter-Terrorism Committee (CTC), made up of all fifteen members of the Security Council.

The attacks also spurred the European Union into action, not only politically, but this time more importantly in the fields of money laundering and the so-called “third pillar” of justice and home affairs. Dossiers that had been kept pending for years were concluded, and decisions were taken on an impressive range of issues. Here the EU proved to have an advantage over NATO by possessing a spectrum of instruments which went well beyond the military dimension. Al Qaeda had shown that henceforth, internal and external security would be inextricably

cably linked. As a consequence, parliamentary interest no longer would be limited to a small group of defence experts, but extended to other sectors as well. A major issue would be the conflict between enhanced security for the citizen and the preservation of his liberty and fundamental freedoms. Not all measures agreed to in Brussels could count on enthusiastic support by national parliaments. Consequently, political leaders needed all their skills to forge a coherent approach among their sectoral spokesmen.

In the United States, the newly discovered vulnerability caused, in the words of Guillaume Parmentier,¹⁴⁴ a “rape trauma” that would colour its citizens’ views of world affairs. Other victims of terrorism, including Israel, got more sympathy from Americans than from Europeans, which had somehow learned to live with terrorist acts. Northern Ireland had stiffened the upper lip of the British; Basque terrorism had not substantially influenced the government in Madrid; and Germany, Italy, and France had outlived the killings by the *Rote Armee Fraktion*, *Brigate Rosse*, and *Action Directe*. Europe was preoccupied with ethnic conflict in the Balkan states, where terror and political violence created a climate of escalating fear, but catastrophic terrorism did not appear. Parmentier observed that few in Western Europe would see Usama bin Laden’s radical brand of Wahabite Islam as constituting a viable alternative to liberal democracy. As a result, the “war on terrorism” did not unify the West in the same way the Soviet threat had. While many Americans regarded themselves as being in an actual and ongoing state of war, Europeans remained reluctant to use the war metaphor and, if they did, wondered how you could ever win a war against terrorism, with its shifting targets, players, and networks.

Opinion varied on the root causes of catastrophic terrorism. Bin Laden struck at the Western way of life, but his immediate goal was to bring down the ruling House of Saud in his native country. The car bombing in Bali, which killed many Australians, also had an indiscriminate anti-Western objective. Most other incidents had a more immediate objective, such as Taliban remnants and supporters of Saddam Hussein impeding reconstruction of Iraq, or Palestinians keeping the cause of an independent state alive by maintaining it in the international news. A worrying aspect of terrorism in the Middle East is the increasingly religious inspiration of the actors, who expect martyrdom and salvation by indiscriminate killing. Huntington’s spectre of a “clash of civilisations” seems to be approaching, but in a different manner. Parmentier reverses Huntington’s analysis. Huntington described the West as a civilisation in opposition to other civilisations, but currently it seems

¹⁴⁴ See his “Is there a West? Changes in the Western Alliances,” in *Transatlantic Relations at a Crossroads* (Netherlands Atlantic Association, 2003), 15–19.

more accurate to conclude that other civilisations attempt to define themselves in opposition to the West. What this means for our “universal” declaration of human rights remains to be seen. It is encouraging to note that also in the Arab world people point a finger at internal causes of stagnation – including the minimal role of women in economic activity – which may counterbalance feelings of frustration and anger that Islam and Arab culture have lost the leading role they once had.

In the debate about the causes of terrorism, poverty is often given an important place, and is used as an argument for economic and social development aided by foreign assistance. The jury is still out on this. Obviously, the existence of large numbers of unemployed young people is likely to be a cause for instability and a breeding ground for terrorists. On the other hand, the terrorists of 9/11 were well-educated people who seemed to be on the way toward integration into American society. Usama bin Laden is a rich man who is able to personally finance his network. More importantly, poor people are not necessarily opposed to law and order. On the contrary, the masses in Iran are conservative and not inclined toward novel social experiments. Educated people are more susceptible to becoming revolutionaries. The roots of terrorism are socioeconomic rather than purely economic, and grow in areas most dramatically affected by incomplete, unbalanced, or failed modernisation.¹⁴⁵

The failure of many development projects in the Third World have led national parliaments in donor countries to insist on “good governance” and better accountability for money spent. Increasingly scarce resources undoubtedly will accentuate this trend, in spite of protestations of neocolonialism by the recipient states. The growing number of “failed states” and the call for peacekeeping and other means of intervention will simply put a limit to what the international community is able and willing to do. American willingness to take forceful action, as shown in Afghanistan and Iraq, already did have an effect on other states that in the past have figured among the “states of concern.” Iran, North Korea, and Libya, to varying degrees, have limited their nuclear aspirations out of fear of American preemptive action. Sudan is moving toward internal agreement, and – albeit of a different order – India and Pakistan finally are moving toward the conference table. In short, we see a new paradox emerging: anti-Americanism is on the increase, but at the same time, American determination to match its words by its deeds might be paying off. If Afghanistan and Iraq settle down with acceptable standards of governance and human rights, regime change will have a lasting effect on what is now called the Wider Middle East. The

¹⁴⁵ Ekaterina Stepanova, “Anti-terrorism and peace-building during and after conflict,” SIPRI, June 2003, 31.

Israeli-Palestinian conflict had little to do with the U.S. intervention in Afghanistan and Iraq, but its continuation remains a heavy burden on Arab perceptions of American credibility.

Even in Washington it took almost eighteen months to put together a coherent counterterrorism strategy. In February 2003, the White House released the National Strategy for Combating Terrorism, which called for simultaneous action on four fronts: to defeat, deny, diminish, and defend:

Defeat terrorist organisations of global reach by attacking their sanctuaries; leadership; command, control, and communications; material support; and finances. Deny sponsorship, support, and sanctuary to terrorists. Diminish the underlying conditions that promote despair and lead people to embrace terrorism. Defend against attacks on the United States, its citizens, and interests around the world.

The strategy was weighted in favour of military action, but together with its emphasis on economic development and the programme for homeland defence, it presented an impressive agenda. Its implementation required the involvement of all sectors of government and Congress.

In the military field, there is a glaring discrepancy in the trends of defence budgets in the United States and in most European countries. The astronomical rise in the United States, where the budget is larger than those of all its allies together, makes us forget that Washington is also engaged in an ambitious program of homeland defence, thus linking internal and external aspects of security in a much more conceptual manner than Europe does. The EU has a double problem in not having a fully integrated security and defence policy and in the ongoing competition with NATO concerning rapidly available reaction forces.

Germany no longer retains the central position it had in East-West relations during the Cold War. After the enlargement of both NATO and the EU, it no longer is on their periphery, but firmly embedded in the new area of stability and prosperity which the two organisations foster. German reactions to this new situation are puzzling, but might be temporary. Her most surprising stand was the announcement that, in spite of being a member of the Security Council, Germany could not participate in any military action in Iraq, even were it authorised by the Council. Previously, Germany had always been reluctant to join military operations outside the NATO area, but had been slowly moving toward international involvement – its participation in Bosnia and Kosovo being prime examples. Under the Schröder government, the *Bundeswehr* is being transformed from a relatively static collective defence force to one that includes a sizeable intervention force (35,000) and a stabilisation force for peacekeeping (70,000). Yet it becomes less clear whether Germany will ever participate in robust military interventions in general or counterterrorism operations in particular. The Security Council has

moved from interstate conflicts to ethnic strife within countries, but has no record of authorising counterterrorist operations that would infringe on national sovereignty. In view of its history, German reluctance was understandable – perhaps even laudable – but that attitude now seems to have given way to a superior and legalistic posture that Maarten Brands called *Friedensselbstgefälligkeit*, a feeling that peace is always best.¹⁴⁶ Unqualified reliance on authorisation by the UN Security Council is a recipe for inaction. The Security Council is a forum for negotiation and political compromise and should not be elevated to the position of an exclusive source of international law. Regarding an intergovernmental body like the UN, which includes a majority of nondemocratic regimes, most of which make no contribution to international peace and security, a more realistic approach recommends itself. France and the United Kingdom, although divided over Iraq, conceptually have fewer qualms about preventive action, and have demonstrated that fact in both words and in action. It is not the first time that Germany has been accused of a streak of romantic pacifism. Fortunately, she is trying to compensate for the negative attitude on Iraq by doing more in Afghanistan. This is not to deny the disputed legitimacy of American intervention in Iraq. In Washington and London, legal experts have argued that it was justified in the light of earlier UNSC resolutions. The case against the Taliban was more unequivocal, as the regime sheltered Al Qaeda and therefore could be legitimately attacked in a self-defence operation.

The European Union might not have to spend more money on defence, but it certainly has to spend it better. Many countries have not fully adjusted to the post-Cold War security environment and maintain useless capabilities. The main problem is the lack of a common answer to the “what for” question and national decision-making processes that take place without much regard to what the partners are doing. High Representative Solana has taken a major step forward with his strategy paper, presented to the Thessaloniki European Council in June 2003 and adopted in December as a consensus document.

The strategy outlined three major new threats: terrorism, weapons of mass destruction, and the combination of “failed states” and organised crime. It advocated “preemptive engagement,” later changed to “preventive engagement” in the light of the criticism of the American emphasis on military preemption. Solana saw it more broadly, and rightly so. Early action is more effective, but the response to the new threats cannot be exclusively military. His document also gave priority to the areas bordering on the EU. It was well received. Even if it does not give

¹⁴⁶ “How reliable and stable is Germany as a partner in international politics?” in *Transatlantic Relations at a Crossroads* (Netherlands Atlantic Association, 2003), 93.

answers to concrete crises, it provides a common underpinning of basic approaches of the ESDP, and it does so in a manner to which nobody can take exception. In fact, the threat analysis comes very close to American perceptions.

In implementing the strategy, the EU is engaged in some competition with NATO. The Helsinki Headline Goals of 1999 envisaged a capability of 50,000–60,000 personnel available within sixty days and sustainable for a year; its size was predicated upon the experience in Bosnia and Kosovo. The need for earlier action prompted NATO, at the insistence of U.S. Defence Secretary Rumsfeld, to develop the NATO Response Force of some 20,000, able to act quickly as an “insertion force.” The NRF came into being remarkably quickly, with a timetable for rotation of the army components. As a fighting force, there was merit in limiting its multinational character. In its turn the EU followed a similar approach, but focused on national or binational “battle groups” of some 1,500 persons. Both organisations moved sensibly in the direction of more concrete scenario planning. In doing so, however, the old notion that the same units could be made available to both organisations became less tenable. Of course, nations have but one set of forces, but units designed for very short reaction times should be assigned to one task only. That should not be a problem for the twenty-six members of NATO and the twenty-five of the EU, who should be able to devise sensible rotation schemes.

Finally, it is worth noting a new trend in parliamentary debates in Europe linking development with security. As it is recognised that without security on the spot there is little chance of economic development, the dividing lines between the “aid and cooperation” sector and the military establishment are less marked than before.

Defining Terrorism

After the initial shock of 9/11 and, except for the “shoe bomber,” the absence of major terrorist attacks in Western Europe, most politicians in Europe did not feel at war. In November 2002, several major capitals considered it necessary to warn their populations of the risk of terrorist attacks on a wide scale. Yet, in spite of the fact that, contrary to received wisdom, Europe was now as much at risk as America, it did not dawn on people that, in the words of Thérèse Delpech, they faced the return of war to the most developed societies.¹⁴⁷ In fact, some ministers – for example, in the United Kingdom – were accused of sowing panic

¹⁴⁷ Chaillot Paper 56, December 2002, International Terrorism and Europe, EU Institute for Security Studies, Paris.

when they talked of the likelihood of terrorist attacks in their countries. It is still unclear to what extent the Madrid train bombings have visibly changed that perception.

Governments and parliaments were in a quandary. They wished to avoid upsetting their people, but had the duty to take precautionary measures to prevent attacks and to respond quickly if terrorist action took place. They also had to protect themselves physically. The fact that the EU was implementing its third pillar of cooperation on justice and home affairs greatly helped in reacting to the new threat in a measured but effective way. The agenda was impressive and moved along on many fronts at the same time.

As said before, terrorism is not a new phenomenon on European territory, nor is it outside the scope of earlier activities. In 1982, the Genscher-Colombo proposals on bringing security within the scope of the European Political Cooperation already had referred to the need for measures against terrorism among its rationales for stronger European action. But that was before the days of catastrophic terrorism carried out by suicide bombers without the possibility of negotiation.

Similarly, in 1994 the OSCE adapted its Code of Conduct on Politico-Military Aspects of Security, which in Paragraph 6 reaffirmed the commitment to take appropriate measures to prevent and combat terrorism in all its forms.

The political debate on ways and means and guiding principles in the fight against terrorism has been an uneasy one, dominated by two persistent controversies. First, how to distinguish between terrorists and freedom fighters, the former being condemned and punished, the latter hailed and supported? And second, should states behaving in a reprehensible fashion be defined as “terrorist” and therefore be condemned and punished? Both issues proved to be formidable stumbling blocks on the road toward a comprehensive UN convention outlawing international terrorism. Nevertheless, progress proved to be possible on establishing rules and practices in the fight against specific terrorist actions.

The Dutch expert on terrorism Marianne van Leeuwen attempted to arrive at a “neutral” and at the same time manageable interpretation of terrorism by listing the following premises:¹⁴⁸

1. Terrorists are nonstate actors. States should not be called terrorist, even if they violate their own and international laws; they can be brought to justice in other ways.

¹⁴⁸ “Terrorism and Counter terrorism. Insights and perspectives after September 11” (Clingendael: Netherlands Institute of International Relations, December 2001), 8–10.

2. Terrorists try to change the political, societal, or religious order by using or by threatening the use of violence. They should be distinguished from criminal or mentally diseased persons or pranksters.
3. Terrorists are not soldiers. Their natural battleground is the big city. Their strategy is demoralisation rather than physically defeating their opponents.
4. Terrorists may look for inspiration in a charismatic leader, but traditionally operate in small units with a great deal of autonomy and not within a strictly hierarchical chain of command.
5. Terrorists seek to defeat their enemy through demoralisation, but they also try to win public support for their cause. By resorting to indiscriminate or mass killings, however, they might lose a supportive general public.

A definition of terrorism was particularly important because most national legislations did not contain references to terrorism or terrorist acts. Prosecution had to be based on existing criminal law referring to murder, bodily harm, or destruction of property. Long before the actions of Al Qaeda, the international community was engaged in the conclusion of international conventions against terrorism, starting with the unlawful seizure of aircraft in 1979 and, later on, the punishment of crimes against protected persons, the taking of hostages, the physical protection of nuclear material, maritime navigation, and fixed platforms located on the continental shelf (1988).¹⁴⁹ A new departure was made with the International Convention for the Suppression of Terrorist Bombings,¹⁵⁰ adopted by the UN General Assembly in December 1997. Two years later, on 9 December 1999, it was followed by the International Convention for the Suppression of Financing of Terrorism.¹⁵¹ All these conventions had to be ratified by parliaments and acts had to be adopted to translate the content into national legislation. The 1999 Convention followed a short and simple definition of terrorism: the intention to intimidate with acts of gross violence (such as murder or gross bodily harm) in order to compel governments to take or refrain from certain acts.

At the time of the signature of these conventions, several states, including the Netherlands, had made a declaration that they would follow the territorial principle and prosecute only if the assumed culprit was discovered on its territory and a request for extradition had been received and rejected. In the light of the 9/11 attacks, these reservations were withdrawn and the law courts obtained unlimited universal juris-

¹⁴⁹ The list is contained in appendix 1.

¹⁵⁰ http://www.unodc.org/unodc/terrorism_convention_terrorist_bombing.html

¹⁵¹ <http://www.un.org/law/cod/finterr.htm>

diction in the field of these conventions. The main argument was that no safe havens should be created where terrorists could go unpunished.

Both the Council of Europe and the European Union have adopted legislation to combat terrorism. The list of the Council of Europe is as follows:

- European Convention on the suppression of terrorism, signed on 27 January 1977 and entered into force on 4 August 1978. Ratified by all EU members and candidates.
- European Convention on extradition, signed on 13 December 1957 and entered into force on 18 April 1960. Ratified by all EU members and candidates. The additional protocols of 1975 and 1978 were not signed by all.
- European Convention on Mutual assistance in criminal matters, signed on 20 April 1959 and entered into force on 12 June 1962. Ratified by all EU members and candidates. The additional protocol of 17 March 1978 was not signed by all.
- European Convention on the transfer of proceedings in criminal matters. Signed on 15 May 1972 and entered into force on 30 March 1978 with only sixteen ratifications.
- Convention on laundering, search, seizure, and confiscation of the proceeds from crime, signed on 8 November 1990 and entered into force on 1 September 1993. Not yet ratified by Romania and Turkey.
- Convention on cybercrime, signed on 23 November 2001 but not yet entered into force. Not all EU members and candidates signed.

The EU Approach

The European Union promptly reacted to 9/11 with an extraordinary council that met on 12 September 2001. It passed a resolution in support of the United States and set about to implement measures in all three pillars of the Union, be it flight security in the first pillar, or actions in the framework of CFSP, or police and judicial cooperation in criminal affairs. In order to ensure the continued functioning of the international financial markets, the European Central Bank closely coordinated with the U.S. Federal Reserve and agreed upon a swap agreement of up to 50 billion U.S. dollars on 13 September 2001. The European Commission presented proposals for a more effective fight against terrorism on 19 September 2001. Among them was a common definition of terrorism, terrorist activities, and punishment for terrorist crimes, which was clearly important since only six EU member countries (Germany, Italy, France, Spain, Portugal, and Great Britain) had at that time an explicit mention of terrorism or terrorist activities in their

criminal codes. The Commission also stipulated the introduction of a European arrest warrant in addition to the traditional bilateral extradition regulations. Other measures included the listing of prohibited organisations; combating their financing and, more widely, money laundering; cooperation among prosecuting authorities through “Eurojust” and joint investigation teams; and extending Europol’s beyond the drug trade to counterterrorism activities as well.

The European Council adopted a Common Position on the application of specific measures to combat terrorism on 27 December 2001 (doc.2001/931/CFSP), which was translated into a framework decision on 18 April 2002, following a proposal by the European Commission and advice of the European Parliament. It listed a series of terrorist acts, but preceded it with three qualifications of the aims with which these acts were committed. In a first draft, the Commission did not seek a parallelism with the UN texts and did not include the element of compulsion, but added an important new criterion, which covered intentional acts that could seriously damage a country or an international organisation. During the negotiations establishing the Common Position, the text became more congruent with the UN conventions, but maintained this new element. The full text reads as follows:

For the purposes of this Common Position, “terrorist act” shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:

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

- (h) interfering with or disrupting the supply of water, power, or any other fundamental natural resource, the effect of which is to endanger human life;
- (i) threatening to commit any of the acts listed under (a) to (h); or directing a terrorist group;
- (k) participating 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 group.

For the purposes of this paragraph, “terrorist group” shall mean a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. “Structured group” means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership, or a developed structure.

So far, the work of the Council in the field of justice and home affairs has been conducted according to the intergovernmental method, which gives only a limited role to the Commission and the European Parliament, and decisions are taken on the basis of unanimity. The Treaty of Amsterdam provided for the transfer of “Schengen” and visa and immigration policy to the communitarian “first pillar,” but the harmonisation of penal law and most terrorism-related questions remains intergovernmental. As a result, national practices regarding decision making in Brussels vary greatly.¹⁵² The ensuing lack of transparency has as its consequence that neither the national parliamentarians nor the European Parliament, which had provided an *avis*, were aware of the final text. In the case of the framework decision on terrorism, the text was changed so much (and the list of criminal acts substantially shortened) that ministers had to submit it once again to the European Parliament for advice. During the debate on the arrest warrant, much attention was paid to the fact that it dropped the requirement that the offence for which the arrest was sought had to be punishable in both countries, the state asking for the arrest and the state where the culprit was staying. Many had qualms about it, but in a truly European warrant, the condition of double penalisation had no place any longer. Another difficult item was the proposal to harmonise maximum penalties in order to prevent criminals from fleeing to countries with the lowest punishment. This debate was influenced by the debate on zero-tolerance and minimum penalties, but that was a different matter. Judges maintained dis-

¹⁵² In the Netherlands, both houses of parliament need to give a green light before the government can agree to legally binding decisions. This required timely availability and openness of the documents on which decisions have to be taken, but in practice preparatory work usually continued until the eve of a ministerial session.

cretion in imposing a sentence below the maximum provided by law, but it would also make sense to harmonise the upper ceiling.

The European Convention drafting a Constitution for the European Union introduced a “solidarity clause” allowing a state that becomes a victim of a terrorist attack or another calamity to ask for the assistance of other members. Obviously, this would have to be organised to guarantee speedy and effective action. Another improvement endorsed by the Convention concerns the principle of the subsidiary, stipulating that measures should be taken at the most appropriate level: local, regional, national, or European. In its proposals for regulation, the European Commission should explain why it should be applied at the European level. Subsequently, national parliaments would have six weeks to debate its necessity. This will require much more attention of national parliamentarians to European matters. They no longer will be able to claim ignorance when a European directive has to be translated into national legislation. On the other hand, it will put a brake on possible ambitions in Brussels to do too much. It is not necessary to find European solutions to every type of criminal behaviour.

Nevertheless, the urgency of joint actions against transborder crime and international terrorism is not fully reflected in effective action. Undoubtedly, the problems are serious. Terrorism is a method that can be applied in many fields, as shown in the list of crimes drawn up by the European Council. Many crimes in themselves were punishable by national penal law before 9/11, but sentencing varied and – more difficult – rules on criminal procedures and admissible evidence touched the heart of the rule of law as practised throughout the European Union.

In the European Union, a particular parliamentary concern related to the lack of transparency and supervision of the new bodies set up by the EU. It was all very well to exchange personal data, but what use would be made of them? Not all present and future EU members possessed mature data protection regimes. This question also played a role in the agreement with the United States on the provision of personal data of airline passengers. By and large, security cooperation with the United States worked well (as it clearly constituted a mutual interest), but uncertainty about the use the American authorities would make of the data played heavily in the negative advice delivered by the European Parliament on the proposed agreement.

The second concern related to internal and external accountability. How could accountability mechanisms keep track of the proliferation of international enforcement measures? Monitoring remained very fragmented, as these functions had not yet been transferred to the EU institutions, including the Court of Justice. Monica den Boer¹⁵³ has given

¹⁵³ In “From Europol to Parlopol. Proceedings of the Europol conference,” organised by the Netherlands Parliament on 7–8 June 2001, Boom, Amsterdam, 30.

the example of covert techniques used by joint investigation teams: would it be sufficient to hold them accountable to one or two national authorities only? And the extension of Europol's mandate to terrorism (on 1 January 1999, well before 9/11) called into question the involvement of state security services and military intelligence, which, with English understatement, were "subjected to low transparency and limited parliamentary control" in most member states. The European Parliament was not even consulted on the Europol convention, and its subsequent involvement was limited to receiving the annual Europol report. The 2001 Parlopol conference in The Hague advocated the creation of a parliamentary body to scrutinise the third pillar. The same problem exists in the other area of intergovernmental cooperation: common foreign, security, and defence cooperation, where the functions of the WEU have been transferred to the EU but the European Parliament and the Commission are prevented from exercising parliamentary oversight.¹⁵⁴ As a result the WEU Assembly continues its work on consensus building among national parliamentarians, but without a dialogue with a ministerial Council. As a result, the parliamentary dimension of European intergovernmental cooperation is not functioning properly.

Concrete Action

In the aftermath of 9/11, parliaments and governments focused on suppression and prevention: suppression of the Taliban in Afghanistan through the dual operations of Enduring Freedom led by the United States to hunt Al Qaeda fighters and the International Security Assistance Force to stabilise the situation in the Kabul area under the auspices of the UN but commanded by NATO; and prevention through a host of measures to strengthen international cooperation and to make national control mechanisms and capabilities more effective. In the Netherlands, an action plan for fighting terrorism and enhancing security was presented to Parliament on 5 October 2001 and was signed by the prime minister, the state secretary of finance, and the ministers of justice, home affairs, and defence. Half yearly reports about its implementation followed and were put on the parliamentary agenda. Altogether, forty-six action points were listed with detailed commentary, some subdivided by supplementary points which arose in the course of implementation. Examples are given below:

¹⁵⁴ See my DCAF occasional paper no. 2: "Democratic Control of Armed Forces: the national and international parliamentary dimension," October 2002.

- Expansion of the intelligence and security services and better exchanges with the police and with Europol. Europol had been given authorisation to start a counterterrorism task force in the autumn of 2001, in addition to its activities against narcotics trafficking. At the same time, a Police Chiefs Task Force met periodically, but outside the EU institutions. During the Danish EU presidency, its tasks were ambitiously defined as acquiring a strategic position against trans-border crime. The government of the Netherlands described the arrangements as “workable,” which hardly sounded enthusiastic for parallel arrangements.
- Development of biometric methods of identification, such as fingerprinting and iris scans, including a centralised system, which possibly could be used when issuing visas
- EU harmonisation of visa policy, covering fraud-proof visa stickers, the feasibility of a databank, cooperation among consulates, and the introduction of a uniform model for (temporary) residence permits
- Enlargement of the immigration service
- Better protection for embassies and official foreign visitors
- New equipment ranging from armoured guard cabins to special cars and water cannons
- Stronger surveillance of the external EU border and the Schengen regime
- Enhanced measures for civil aviation, such as controls of passengers and baggage (financed by a security levy on airline tickets) and airport security
- EU regulation for protecting civil aviation, including basic norms and an audit system, and linked to the ICAO conference of February 2002 (which provided for periodic controls of airports by independent experts). The regulation was subjected to a conciliation procedure in the European Parliament.
- Protection of infrastructure and essential supplies. This item led to a very detailed analysis, reminiscent of the civil emergency planning of Cold War days. It was designed in response to the terrorist acts but could also be necessary in order to cope with other calamities, either natural or manmade. It was helped by the analysis of vital services made in the run-up to the millennium year and the feared collapse of computer systems. Vital sectors were energy, drinking water, telecommunications, transport, water management, and flood protection, financial infrastructure, the tax system, law and public order, the judiciary, the armed services, social security and public health, and food services. Obviously, the list was too long and priorities had to be set. Nevertheless, it was clear how vulnerable modern society has become. It was necessary to determine interrelationships: who provided essential services and to what extent were these dependent upon governmental bodies and or private firms? The next question

was how the continuity of these essential functions could be maintained at a minimum level. In other words, what requirements should be formulated for minimum availability if dependencies on other services or supplies were disrupted? Switching to other sources might be a way out, but could these be counted on? Equally, attention had to be paid to repair and replacement within acceptable time frames.

- Enlargement of the criminal investigation capacity, including the ability to respond to international requests for common action and the creation of a quick response team at the Netherlands Forensic Institute

- Enlargement of the interagency team against human trafficking

Implementation of the regulation concerning the tapping of telecommunications and the regulation of legitimate access to cryptographic installations. Also, the enlargement of the capacity to intercept satellite communications and a study of the safekeeping practices of telecommunications providers.

- Surveillance of money transfers, trust offices, and unusual financial transactions. Within the EU, a coherent system of Financial Intelligence Units should be realised.
- Preparation of legislation to create an interagency "Financial Expertise Centre"
- Attention to the OECD report concerning the misuse of corporate identities
- Additional instruments to freeze suspected bank accounts
- Enlargement of special forces units of the police and of the Royal Netherlands Marines to provide assistance in exceptional circumstances
- The Netherlands' insistence on the rapid ratification of the extradition treaties in the EU council
- The implementation of the EU framework directives on terrorism and arrest warrants, which should enter into force on 1 January 2003 and on 1 January 2004 respectively. The arrest warrant was agreed upon at the Laeken European Council of December 2001, and listed thirty-two offences (not all involving terrorism) justifying arrest in any EU country. The UN Convention on Terrorist Bombings and the Financing of Terrorism entered into force for the Netherlands on 9 March 2002 and 10 April 2002 respectively.
- The signature of the Treaty to Combat Crime in Cyberspace.¹⁵⁵ The implementation would be linked to the prohibition of child pornography.

¹⁵⁵ <http://conventions.coe.int/Treaty/Commun/QueVoulez-Vous.asp?NT=185&CM=8&DF=16/04/04&CL=ENG>

- Implementation of the EU protocol attached to the agreement on the provision of legal assistance concerning the duty of financial institutions to provide information on deposits
- Preparedness for biological, chemical, and nuclear terrorist attacks, including food safety

Other countries took similar actions. In the United Kingdom, a vast new law was approved in December 2001, which gained notoriety for its provision to detain foreigners without trial for a long period of time. In July 2002, the Secretary of State for Defence, Geoff Hoon, announced a long series of measures covering aerial surveillance, protection against nuclear, radiological, biological, and chemical attacks, and domestic reaction forces of 6,000 men. Having suffered a series of bloody attacks in 1995, France's antiterrorist setup was already in place before September 2001. On 15 November 2001, a new internal security law was enacted, providing for car and home searches, additional checks at airports and seaports, surveillance of internet communication, and the right to disband certain groups. These measures, however, had a limited duration of two years and their extension would be subjected to an assessment report submitted to Parliament. Security forces may be reinforced with military assets, and "all military detachments must be capable of assisting the civilian population in the event of asymmetric attacks."¹⁵⁶ In the opinion of Thérèse Delpech, civil defence remains undersupported in France because of the considerable ground still to be made up in the conventional requirements of the armed forces. In Germany, the government meets resistance to measures allowing the police to build up files on suspects.

Dealing with Terrorist Incidents

Terrorists need media attention to get their message through and the gruesome details of terrorist actions are news for the media. "Classic terrorism is propaganda by deed, and propaganda is impossible without the use of the media." Politicians are in a similar position. They have to give immediate reactions to unexpected events with which even faster media confront them. This is an almost impossible task because they normally lack precise information about what happened and why. Nevertheless, they are expected to give a value judgement and to formulate policy prescriptions. The most difficult part comes when they are put face to face with relatives of hostages who are clamouring for concessions to the terrorists in order to save the lives of their beloved family

¹⁵⁶ Thérèse Delpech in Chaillot Paper no. 56: 20.

members. Paul Wilkinson, who has written about terrorism for many years, defined the most important principles underlying counterterrorism in democracies:¹⁵⁷

- no surrender to the terrorists, and an absolute determination to defeat terrorism within the framework of the rule of law and the democratic process
- no deals and no major concessions, even in the face of the most severe intimidation and blackmail
- an intensified effort to bring terrorists to justice by prosecution and conviction before the courts of law
- tough measures to penalise the state sponsors who give terrorist movements safe haven, explosives, cash, and moral and diplomatic support
- a determination never to allow terrorist intimidation to block or derail international diplomatic efforts to resolve major conflict in strife-torn regions

Parliamentarians will have to deal with this question, but they are divided. As said before, many attribute terrorism to socioeconomic causes, which might have been true in Northern Ireland or the Basque area. The case of Al Qaeda is more complicated, given its religious fanaticism and its objective of creating massive casualties in Western societies. Mass killings are bound to erode any support the perpetrators might have received had they instead appealed to the feelings of injustice held by possible supporters. Attempts to link their actions with the Israeli-Palestinian conflict have some relevance, but only to a limited extent. Attacks on American targets also took place during Clinton's presidency, amidst efforts to bring the parties together. And the terrorist attacks within the United States enhanced sympathy for Israel as a primary victim of continued suicide attacks rather than the contrary. Having said this, it is also clear that a solution of this conflict would be the single most important element in reducing tensions in the Middle East and force the governments in the region to concentrate on domestic policy and development. Therefore, it is understandable that in Europe protests against the Israeli settlement policy are becoming so loud that they erode the traditional sympathy for the impressive achievements of that country.

¹⁵⁷ Wilkinson, P., "The Strategic Implications of Terrorism," in *Terrorism and Political Violence. A Sourcebook*, edited by Sondhi, M. L. (India: Haranand Publications, 2000), 10.

The Aftermath of Madrid

Deeply shocked by the terrorist attacks in Madrid, the European Council of 25 March 2004 revised its Plan of Action to meet the strategic objectives to combat terrorism and asked for a report at its June meeting. Sadly, a second catastrophe, this time on European soil, was necessary to reinvigorate the momentum created in September 2001. Some real progress was made, but many agreed measures had not been implemented by the member states. A “Counterterrorism Coordinator” was appointed to maintain an overview of all the instruments at the Union’s disposal, reporting regularly to the Council and to follow up on the Council’s decisions. In addition, the solidarity clause proposed by the European Convention was agreed upon in anticipation of the European Constitution (see appendix 2), a European Borders Agency should be in place by 1 January 2005, and an intelligence capacity should be established within the Council Secretariat to assist the High Representative. The “high-level strategic objectives” for the Plan of Action read as follows:

- Deepen the international consensus and enhance international efforts to combat terrorism
- Reduce the access of terrorists to financial and other economic resources
- Maximise the capacity within EU bodies and Member States to detect, investigate, and prosecute terrorists and prevent terrorist attacks
- Protect the security of international transport and ensure effective systems of border control
- Enhance the capability of the EU member states to deal with the consequences of a terrorist attack
- Address the factors which contribute to support for and recruitment into terrorism
- Target actions under EU external relations toward countries where counterterrorist capacities or the commitment to combating terrorism needs to be enhanced

Combating terrorism will be a priority item on the agenda of the Netherlands presidency of the EU during the second half of 2004. It will be a tedious process. The European arrest warrant met with opposition in Germany and Italy. The tasks of the European prosecutor, at least for the foreseeable future, will be limited to crimes against the financial interests of the EU and not be extended to serious transborder crime. The Europol counterterrorist unit has been reactivated, but it deals primarily with the exchange of information. This is not an impressive continuation of a good start. Nevertheless, the combined activities at all levels, both national and international, have the effect of pushing back Al

Qaeda as the main player. According to the assessment of Rohan Gunaratna, chairman of the Combating Terrorism Working Group of the PfP Consortium for Defense Academies and Security Studies Institutes, given at the annual conference in Bucharest in June 2004, Al Qaeda inspires rather than instigates; it is still active on the Pakistani border, but assumes the traditional role of training, financing, and ideological indoctrination in other areas. This leaves many cells in place that could be turned into attack networks, especially when fighters returning from Iraq turn their newly acquired combat experience into terrorist action. They will have to be kept under close surveillance, and new methods of human penetration will have to be developed.

Under these circumstances, governments and parliamentarians have to prepare for the long haul. In their legislation, they have to find the right balance between effective counterterrorism and the protection of high-value targets on the one hand and maintaining popular support by moderation and preservation of the rule of law. The lessons of counterinsurgency in Asia and of European terrorism in the 1970s seems to point to a mix of improved interagency cooperation, the use of minimum force but active penetration and, where possible, the disruption of terrorist cells. This leaves the question unanswered: what can the process of military transformation do in the fight against terrorism? Transformation will be necessary to build flexible and mobile forces—but which specific military assets can be developed to supplement the effective action of the other agencies?

Conclusion

Terrorism is a high priority in the national and international political agenda. Increasingly, parliamentarians will be subject to “peer pressure” and forced to compare their own performance with that of neighbouring countries. The implementation of the “solidarity clause” of the newly adopted Constitution of the European Union will make them aware of the possibilities and constraints of mutual assistance. Although there seems to be a growing awareness of the necessity to act in unison, the adoption of concrete measures still varies greatly from country to country. The process of consensus building, which is the essence of international parliamentary contacts, is still in its infancy, partly because the parliamentary agenda of counterterrorism is so complex and multifaceted. Even national parliamentary groups are groping for consistency in their approaches toward effectiveness and the balance between individual freedom and national security.

Parliamentarians are confronted with the paradox of the simultaneous tendencies of globalisation and interdependence on the one hand

and political fragmentation and discontent with their government on the other. People are frustrated by the inability of their governments to provide effective answers to their needs. Insecurity in the streets and insufficient means for education and social security have occupied a large part of the political debate, enhanced by feelings of insecurity caused by economic recession and the inflow of migrants and asylum seekers. In this climate, terrorism has added an element of suspicion, intolerance, and even discrimination toward new and unknown neighbours. Beethoven's Ninth Symphony, with its vision of brotherhood, remains a powerful message in Europe, but is far from realisation. Religious fanaticism has made Europeans shift their emphasis in immigration policies from respect for the cultural identity of newcomers toward preconditions of assimilation and integration. A clash of civilisations does not seem inevitable – at least not yet – but if most of the terrorists continue to be Muslims, they will become an obstacle to mutual respect and constructive interreligious relations. Therefore, the political debate should attach a priority to the efforts to keep moderate Muslims on board and to avoid alienation through discriminating legislation and excessive controls. At the same time, governments have to demonstrate to their citizens that they are doing their utmost to prevent terrorist attacks, to protect vital services, and to be ready to deal with calamities when they occur. And they have to keep the public informed without causing a climate of panic and fear. On this point, the traumatic experience of American vulnerability on 9/11 has had a greater lasting effect in the United States than in Europe, which has a long experience of terrorist attacks of various kinds. It might be cynical to say that even after the most horrible experience, life goes on for the survivors. That is small consolation for the victims and no reason to soften vigilance. It would be more constructive to hope that indiscriminate killing ultimately will not appeal to many people, including Muslims. In Europe, outbursts of catastrophic terrorism aimed at society in general have subsided, and more work will have to be done on the reasons why. In the final analysis, it must be because they lacked popular support for their unattainable objectives.

The 9/11 attacks and the Madrid train station bombings changed much – but not everything. Internal and external security are becoming intertwined. To combat terrorism, military forces continue to play a role, but less so in relation to nonstate actors. Armed forces will have to work closely with others, especially with the police and intelligence agencies, and define which capabilities are needed specifically for counterterrorism operations as distinct from defence and peacekeeping operations.

At home, new standards are developing for privacy. The relationship between freedom and security comes to the foreground in preserving our democratic way of government. Without vigilance and security

there will be little freedom, but real security depends also on the transparency, accountability, and the effectiveness of those who provide it. In a democracy, people are prepared to pay a price for their security—on the condition that they have trust and confidence in the measures taken. Western democracy depends on sanity and common sense, and the best way our parliamentarians can avoid a climate of fear is to demonstrate those two qualities.

APPENDIX 1

International conventions against terrorism

1. Convention for the Suppression of Unlawful Seizure of Aircraft
(The Hague, 16 December 1970)
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
(Montreal, 23 September 1971)
3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents
(adopted by the General Assembly of the United Nations on 14 December 1973)
4. International Convention against the Taking of Hostages
(adopted by the General Assembly of the United Nations on 17 December 1979)
5. Convention on the Physical Protection of Nuclear Material
(Vienna, 3 March 1980)
6. Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
(Montreal, 24 February 1988)
7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
(Rome, 10 March 1988)
8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf
(Rome, 10 March 1988)
9. International Convention for the Suppression of Terrorist Bombings
(adopted by the General Assembly of the United Nations on 15 December 1997)
10. International Convention for the Suppression of Financing of Terrorism
(adopted by the General Assembly of the United Nations on 9 December 1999)

APPENDIX 2

Declaration on solidarity against terrorism

We, the Heads of State or Government of the Member States of the European Union, and of the States acceding to the Union on 1 May, have declared our firm intention as follows:

In the spirit of the solidarity clause laid down in Article 42 of the draft Treaty establishing a Constitution for Europe, the Member States and the acceding States shall accordingly act jointly in a spirit of solidarity if one of them is the victim of a terrorist attack. They shall mobilise all the instruments at their disposal, including military resources to:

- prevent the terrorist threat in the territory of one of them;
- protect democratic institutions and the civilian population from any terrorist attack;
- assist a Member State or an acceding State in its territory at the request of its political authorities in the event of a terrorist attack.

It shall be for each Member State or acceding State to the Union to choose the most appropriate means to comply with this solidarity commitment towards the affected State.