

Introduction

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The images of the 11 September terrorist attacks on the institutions that symbolised American economic, military and political power have been forever seared in the collective memory of humankind. History will sombrely mark the day two passenger planes, hijacked by Islamic terrorists, flew into the twin towers of the New York City World Trade Center, which collapsed hours later with a thunderous roar. On that same day a third passenger plane, also hijacked by Islamic terrorists, attacked the Pentagon, and a fourth airplane, intended for an attack on the White House or the Capitol, crashed en route to Washington, DC.

These attacks stunned the world – except, of course, those who planned and executed these incomprehensible acts, and who were thus able to carry them out successfully. There had been signs before this tragedy that such terrorist attacks using passenger planes were possible, but there was no concrete evidence for what would happen on 11 September 2001. Many American Government agencies had vital information on the terrorists involved prior to the attacks, but none were aware of the plot or had a sense of the puzzle into which this information fitted. This is why the United States was able to publish names and other information on the attackers just days after 11 September 2001.¹

Why the puzzle was not pieced together sooner and why the 11 September attacks could not have been prevented in whole or in part are questions that have plagued the United States public since, and that have led to a number of investigations by, or at the initiative of, the United States Congress. One of the most significant of these investigations is the Joint Inquiry, launched by the Senate and the

¹ See the statement that was issued on 20 September 2002 by E. Hill, Staff Director of the Joint Inquiry Staff of the investigatory commission that was set up by the Senate and the House to form a judgment particularly about the problems in the gathering, analysis and dissemination of information on threats to national security, and in particular terrorism (E. Hill, ‘The Intelligence Community’s Knowledge of the September 11 Hijackers Prior to September 11, 2001’, http://www.fas.org/irp/congress/2002_hr/092002hill.html).

Legal Instruments in the Fight against International Terrorism

House of Representatives in 2002 and which concluded with the publication on 24 July 2003 of the full – albeit censored – version of the final report.²

As early as 10 December 2002, the Commission concluded in a report that – although there were indications that Bin Laden and his cohorts were planning to strike on American territory and that they might do it using aeroplanes as weapons – the Intelligence Community:

too often failed to focus on that information and consider and appreciate its collective significance in terms of a probable terrorist attack. Neither did the Intelligence Community demonstrate sufficient initiative in coming to grips with the new transnational threats.³

And shortly thereafter, it was said that, although the Government worked on the prevention of attacks by Bin Laden, it did this:

largely without the benefit of an alert, mobilised and committed American public. Despite intelligence information on the immediacy of the threat level in the spring and summer of 2001, the assumption prevailed in the US Government that attacks of the magnitude of September 11 could not happen here. As a result, there was insufficient effort to alert the American public to the reality and gravity of the threat.⁴

In its report published on 24 July 2003, these and other conclusions were expressed even more sharply at particular points and, of course, supported with many more facts and arguments. Note, for example, the following important conclusions:

² 107th Congress, 2nd Session, *Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001*, S Rep. No. 107-351, H. Rep. No. 107-792, Report of the US Senate Select Committee on Intelligence and US House Permanent Select Committee on Intelligence (Joint Inquiry, *Final Report*), *inter alia* available at http://www.fas.org/irp/congress/2002_rpt/911rept.pdf and at <http://www.gpoaccess.gov/serialset/creports/911.html>

³ Joint Inquiry, *Final Report, Part I, The Context, Part I, Findings and Conclusions*, § 5, available at http://intelligence.house.gov/jis_findings.htm (see the identical 5. finding in the Joint Inquiry, *Final Report*, *supra* note 2, p. xi).

⁴ *Id.*, § 19 (see the identical 19. finding in the Joint Inquiry, *Final Report*, *supra* note 2, p. xix).

In short, for a variety of reasons, the Intelligence Community failed to capitalise on both the individual and collective significance of available information that appears relevant to the events of September 11. As a result, the Community missed opportunities to disrupt the September 11th plot by denying entry to or detaining would-be hijackers; to at least try to unravel the plot through surveillance and other investigative work within the United States; and, finally, to generate a heightened state of alert and thus harden the homeland against attack.⁵

...

Prior to September 11, the Intelligence Community was neither well organised nor equipped, and did not adequately adapt, to meet the challenge posed by global terrorists focused on targets within the domestic United States. Serious gaps existed between the collection coverage provided by US foreign and US domestic intelligence capabilities.⁶

The responsibility for this is assigned largely to the Director of Central Intelligence (i.e. the Director of the CIA), George Tenet: ‘... the Director of Central Intelligence (DCI) was either unwilling or unable to marshal the full range of Intelligence Community resources necessary to combat the growing threat to the United States’.⁷

Congress’s exasperation over the errors that the Intelligence Community, in particular, made in the run-up to the 11 September attacks is more readily understood if everything that happened prior to this fatal date is known. Ever since the 1979 Islamic revolution in Iran and the 1983-1984 attacks on the American Embassy and an American military base in Beirut, Washington policy-makers had been aware of the danger of Islamic terrorism in the United States. The attacks organised in the 1990s from this corner both within the United States (in 1993 on the World Trade Center in New York City) and elsewhere (in 1998 on two American embassies in Africa), certainly increased the fear of this form of political violence. But by no means did it effectively drive home the threat, as the Bremer Commission, i.e. the National Commission on Terrorism, argued as early as 2000. First, it warned:

⁵ Joint Inquiry, *Final Report*, *supra* note 2, p. xv.

⁶ *Id.*

⁷ *Id.*, p. xvi.

Legal Instruments in the Fight against International Terrorism

Today's terrorists seek to inflict mass casualties, and they are attempting to do so both overseas and on American soil. They are less dependent on state sponsorship and are, instead, forming loose, transnational affiliations based on religious or ideological affinity and a common hatred of the United States.⁸

Then it concluded:

Countering the growing danger of the terrorist threat requires significantly stepping up US efforts. The government must immediately take steps to reinvigorate the collection of intelligence about terrorists' plans, use all available legal avenues to disrupt and prosecute terrorist activities and private sources of support, convince other nations to cease all support for terrorists, and ensure that federal, state and local officials are prepared for attacks that may result in mass casualties.⁹

The attacks of 11 September 2001 confirmed the Bremer Commission's conclusion. The danger of Islamic terrorism was far greater than many believed, and the response came far too late and with far too little focus. For that matter, whether a more adequate response could have prevented the attacks in whole or in part is a question that was answered conditionally by the Joint Inquiry, with the necessary reserve as appears from the citations above.

We must wait and see how the other major investigatory commission, the National Commission on Terrorist Attacks upon the United States (formed at the end of 2002 by the President with the support of Congress), will respond to the questions raised above. In view of its mission, in any event, it cannot ignore these questions. It must:

- examine and report upon the facts and causes relating to the terrorist attacks of September, 11 ...;
- ascertain, evaluate, and report on the evidence developed by all relevant governmental agencies regarding the facts and circumstances surrounding the attacks ...;

⁸ National Commission on Terrorism, *Countering the Threat of International Terrorism*, Washington, 2000 (available at <http://www.fas.org/irp/threat/commission.html>), executive summary.

⁹ *Id.*

- make a full and complete accounting of the circumstances surrounding the attacks, and the extent of the United States' preparedness for, and immediate response to, the attacks ...;
- investigate and report to the President and Congress on its findings, conclusions, and recommendations for corrective measures that can be taken to prevent acts of terrorism.¹⁰

This Commission must issue its final report in May 2004.¹¹ This will not be an easy task because, as it bluntly stated in its first interim report of 8 July 2003, its efforts to obtain vital information have been met with a lack of cooperation by a number of agencies.¹² The Commission will have to go all out and be backed by political will and full support of the President to complete its mission on time: 'The task in front of us is monumental. Time is slipping by. Every day lost complicates our work.'¹³

Quite soon after 11 September, it became clear that the attacks were prepared in part in Western Europe, particularly in Germany. Later, it was revealed that not only had Islamic terrorists in a number of Western European countries been involved in the attacks but also that a number of them had been under observation by, *inter alia*, the German and the French intelligence agencies.¹⁴ These facts obviously raise questions similar to those on the Americans' agenda in the US. To what degree did the intelligence agencies of the Member States of the European Union

¹⁰ 107th Congress, *H. Rep.* 107-789, *Intelligence Authorisation Act for Fiscal Year 2003; Conference Report*, Title VI, s. 602 (see http://fas.org/irp/congress/2002_rpt/hrpt107-789).

¹¹ *Id.*, s. 610(b).

¹² National Commission on Terrorist Attacks upon the United States, *First Interim Report*, Washington, 8 July 2003, available at <http://fas.org/irp/news/2003/07/911interim>.

¹³ *Id.*

¹⁴ See, *inter alia*, D. van Natta Jr. and K. Zernike, 'Hijackers' Meticulous Strategy of Brains, Muscle and Practice', *NY Times*, 4 Nov. 2001; J. Taglabue, 'Retracing the Trail to Sept. 11 Plot', *NY Times*, 18 Nov. 2001; S. Erlanger and C. Hedges, 'Terror Cells Slip through Europe's Grasp', *NY Times*, 28 Dec. 2001; D. Butler, 'Germans Were Tracking Sept. 11 Conspirators as Early as 1998, Documents Disclose', *NY Times*, 18 Jan. 2003; O. Schröm, 'Tödliche Fehler' (Dossier 41/2002), *Die Zeit*, 30 Sept. 2002 (available at http://vredessite.nl/andernieuws/2002/week41/09-30_fehler.html) and 'Terrorverdächtiger lange überwacht', *Der Spiegel*, 13 Jan. 2003.

(EU) consider Islamic terrorism dangerous for Europe, the EU and the United States, and how urgently did they perceive the need for intervention? What did they know about the attackers of 11 September 2001? Did they share this information with one another and with the American agencies? If so, when, with whom, and how? Could a more active and more common intervention on the part of Western European authorities have prevented or hindered the attacks in the United States? And so on.

For outsiders it is difficult – or rather, impossible – to draw a clear picture of the way in which the intelligence agencies in the EU viewed Islamic terrorism in general before 11 September for the simple reason that, until then, the *threat documents* produced by the Working Party on Terrorism of the EU Council had been treated completely confidentially.¹⁵ Furthermore, how the intelligence agencies of individual Member States perceived the threat of Islamic terrorism, can be discussed only regarding a few of them. Thus, the Dutch Internal Security Service published a brochure in April 2001 on *Terrorisme aan het Begin van de 21e Eeuw* [Terrorism at the Beginning of the 21st Century] in which Islamic terrorism was explicitly labeled as a serious international threat, particularly in the direction of the United States and the Russian Federation.¹⁶

The most valuable public document within the EU, however, was not produced, at least not directly, by one or several intelligence agencies. It was published on 12 July 2001 – i.e. two months *before* the 11 September attacks – by G.R. Watson in his capacity as Rapporteur of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs of the European Parliament and entitled the *Role of the European Union in Combating Terrorism*.¹⁷ What is striking about this report is that while it mentions no single form of terrorism by name it does state that the European Union had had to deal with an increase of terrorist activities in recent years and that these activities demonstrate: 'that there has been a profound change in the nature of terrorism in the European Union and highlights the inadequacy of traditional forms of judicial and police cooperation in combating terrorism'. Watson

¹⁵ See Council of the European Union, *Strategic Document on Terrorism in Europe*, Doc. 10564/01 ENFOPOL 73, 9 July 2001, available at <http://register.consilium.eu.int>.

¹⁶ Binnenlandse Veiligheidsdienst, *Terrorisme aan het Begin van de 21e Eeuw*, The Hague, Ministerie van Binnenlandse Zaken, 2001.

¹⁷ European Parliament, Session 1999 – 2004, *Report on the Role of the European Union in Combating Terrorism*, 12 July 2001, PE 302.219, Final, Doc. A5-0273/2001, available at <http://www.europarl.eu.int>.

continues, noting that this new form of terrorism ‘stems from the activities of networks operating at international level, which are based in several countries and exploit legal loopholes arising from the geographical limits of investigations, sometimes enjoying extensive logistical and financial support’. And he concludes this passage with the statement that it is necessary ‘to step up action to combat terrorism, while respecting the rights and freedoms enshrined in the European Convention on Human Rights^[18] and the European Union Charter of Fundamental Rights^[19]’. The attacks of 11 September have led the European Union to cease minimising this exhortation. The attacks led the European Union to launch, within just a few weeks, a true offensive against international (and, in particular, Islamic) terrorism that – despite the great differences in political organisation – is comparable in many respects to the reaction of the United States.

Before going into the antiterrorism actions of the United States and the European Union since 11 September, it is worth noting that, unlike in the United States, the attacks of 11 September 2001 did not lead in the EU to the setting up of an inquiry to seek answers to the questions that are central to the work of the American investigatory commissions, such as: What was known before 11 September 2001 in the Member States of the European Union? How was this knowledge communicated within and outside of the EU, in particular to the United States? Given the political conflicts, the institutional difficulties and the practical problems to which such an investigation would give rise within and between Member States, it is understandable that such an inquiry was never established. Even from an American perspective there is little reason to blame the EU on this point: until now, the role of foreign intelligence agencies has been touched upon little or not at all in the American investigations and the resulting reports.²⁰

But this does not alter the fact that there are indeed good reasons for arguing for a thorough investigation into international and Islamic terrorism and the counterterrorism actions in response thereto in the EU. One argument is, of course, that

¹⁸ (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov. 1950, 213 *UNTS* 222 and *ETS* No 5.

¹⁹ Charter of Fundamental Rights of the European Union, 7 Dec. 2000, 2000 *OJ C* 364/1.

²⁰ See the mission of the National Commission cited above and the reports from which we have already cited above. But compare, for example, also the report of the Subcommittee on Terrorism and Homeland Security of the House of Representatives of July 2002, *Counterterrorism Intelligence Capabilities and Performance Prior to 9-11*, available at http://fas.org/irp/congress/2002_rpt/hpsci_ths0702.

such terrorism also constitutes a major problem in Europe, both indirectly, in the form of danger to American citizens and property or other interests in Europe, and directly, in the form of danger to Europe's 'own' citizens and objects at home and abroad. Attacks such as those in the Tunisian city of Djerba and arrests like those in Frankfurt, London and Paris in the last few months should dispel any doubts about this.²¹ International terrorism, including Islamic terrorism, is therefore certainly not just an American problem. Another argument is that, even though a comprehensive antiterrorism policy was developed in the European Union after 11 September, it is far from clear – certainly not to the citizens of the European Union – how this policy is being applied in practice. Is it working as intended? Is the necessary information actively exchanged in a timely way between the police and intelligence agencies of the Member States via the channels opened for this purpose after 11 September 2001, such as the special unit that was set up within Europol? Or can questions like these only be answered – as in the United States – if it were to appear after a serious attack that all this apparently did not happen or only did so to a clearly insufficient extent?

This book does not focus on the backgrounds, nature, scope, spread, methods, and so on of international and Islamic terrorism, however important these are. Rather, as the title suggests, it primarily concerns the legal aspects of the US and EU responses to 11 September 2001. The focus on legal aspects is merely a reflection of our own expertise and obviously in no way diminishes the importance of other aspects of the comprehensive approach that is required to combat terrorism and to which we will return briefly in the epilogue.

A preliminary step towards this publication was a colloquium organised by the Institute for International Law in cooperation with the European Centre for Ethics of the Katholieke Universiteit Leuven on 27 September 2001 in Leuven to give

²¹ See, *inter alia*, the reports in this regard in *Die Zeit* (Dossier 36/2002), *Spiegel Online* (23 Apr. 2002), *Le Monde* (31 Dec. 2002), *Times Online* (27 Jan. 2003), *The NY Times* (17 Feb. 2003), *The Observer* (24 May 2003) and *Spiegel Online* (7 June 2003). In this regard, moreover, we can point to the non-confidential versions of the *Situation and Trend Reports*, which have been published since November 2002 by the Working Party on Terrorism of the Council. In the report of 20 November 2002 (*Non-confidential Report on the Terrorism Situation and Trends in Europe*, EU Council Doc. 14280/02 ENFOPOL 140, available at <http://register.consilium.eu.int>), ten pages are devoted to 'Islamic extremist terrorism' (pp. 19-28).

students and teachers an opportunity to discuss what had happened two weeks previously.²² This meeting was introduced by the first editor of this book (Cyrille Fijnaut), with two citations to conjure up in a personal manner before the eyes of all those present what had happened in New York City. The first citation (translated here) was from a Leuven student who had completed his LL.M. at the New York University School of Law in the summer of 2001 and who sent an e-mail message in the beginning of September 2001 to Professor Fijnaut, who had advised him to participate in this programme:

Looking back on the year that I was able to experience, I can only conclude that it exceeded my wildest expectations. The academic excellence I could enjoy, the world city I could discover, the exposure to often very talented fellow students, the various cultural approaches that I could absorb – all were presented to me before I departed, now a year ago, but there was no way I could imagine then that the experience awaiting me would be so intensely enriching.

The second citation came from an e-mail message from one of the professors at the New York University School of Law, the renowned sociologist of law Jerome H. Skolnick, to Professor Fijnaut shortly after the attacks. This message reflected well the deep wounds the attack had made in the global city about which the student had spoken so enthusiastically. However, it also showed that New Yorkers were not planning to yield Manhattan to terrorists, however much the concern for the future overshadowed their own lives:

It continues to be an extraordinary time in New York City. In the aftermath of the disaster, people and institutions remain communal. You may have seen the issue of the New Yorker with the brilliant, and appropriate, dead black cover reflecting the mood of the city. [He follows with a description of a concert he had attended.] The program opened with a rousing duo violin performance of the Star Spangled Banner, with the normally liberal left, upper west side crowd, singing lustily. It was followed by an inspired chamber performance, beginning with Mozart's quintet for clarinet and strings, and ending with Schubert's 'Death and the Maiden'. So life goes on. We

²² See the verbatim proceedings on the website of the Institute for International Law, <http://www.internationallaw.be>. The various presentations have also been published in (2001:4) *Ethische Perspectieven*.

teach, we go to lectures, we read, we're busy, we're well, but in the background, we feel anxiety – plus a welcome sense of community such as I have never experienced in this often tough, fast-moving city.

The tone for the colloquium having thus been set, fellow professors of the KU Leuven gave short lectures on a range of subjects from Islamic terrorism and fundamentalism and the reactions of Governments in the United States and Western Europe to the role of the United Nations. These presentations along with the discussions that followed and other related conferences at the KU Leuven led to the idea of publishing a book for a broader Dutch-language audience, with essays by many experts on terrorism in its relation to fundamentalism.²³ This book appeared in 2002 under the title *Schokgolven* ('Shockwaves') and attracted considerable public interest both in The Netherlands and in Belgium.²⁴

Influenced in part by the controversies that arose during that year between the United States and (some Member States of) the EU over the approach to international terrorism and the conduct of the war against the Taliban and Al-Qaida in Afghanistan, members of the KU Leuven Faculty of Law decided that it would be appropriate to promote the transatlantic dialogue on these controversies by organising an international conference. Together with America's Northwestern University School of Law and with the support of the European Parliament, the American Embassy's Office for Public Affairs in Belgium and the European Masters' Programme in Human Rights and Democratisation, the KU Leuven Faculty of Law organised a conference on 'Legal Instruments in the Fight against International Terrorism'. An important reason for focusing the conference on this subject in particular was the then-ongoing negotiations between the United States and the EU over extradition and mutual legal assistance treaties, which were signed at the US-EU Summit on 25 June 2003.²⁵

²³ See *inter alia* the series of lunch conferences 'Europe and Terrorism' which took place in the autumn of 2001 (see <http://www.internationallaw.be>). On the website of the Institute for International Law, a special 'terrorism' web page, containing numerous references to official documents on terrorism, was developed by the third editor of this book, Frederik Naert (see likewise <http://www.internationallaw.be>).

²⁴ B. Pattyn and J. Wouters (eds.), *Schokgolven; Terrorisme en Fundamentalisme*, Leuven, Davidsfonds, 2002.

²⁵ For the text of both Treaties and of the related Decision of the Council, see the 2003 *OJ L* 181/25-42 (19 July 2003).

The conference took place on 7-8 May 2002 in the European Parliament and opened with a short introduction by G.R. Watson, Member of the European Parliament and author of the above-mentioned report on *Role of the European Union in Combating Terrorism*. Subsequently, a number of important subjects were discussed, as far as possible by both European and American speakers, in three successive sessions.

The first session was devoted to counterterrorism initiatives and concentrated on police and judicial cooperation in the fight against international terrorism as well as on financial counterterrorism measures in the EU and the United States. In the second session, human rights, democracy and the rule of law in fighting terrorism were addressed. The third session concerned international law aspects of the fight against international terrorism. The conference ended with concluding remarks by J. Nicholson, Member of the European Parliament and then-President of the European Parliament Inter-parliamentary Delegation with the US.

The book follows this structure and contains mostly essays that are adaptations of the texts the authors presented at the conference, supplemented by a number of contributions that were written especially for this book. It also features several contributions that have been published in whole or in part elsewhere, some on the occasion of the conference. These additional contributions have been included because they address matters not fully covered in the texts already available and thus enhance the content and value of this book.

Finally, we have endeavoured, in close collaboration with the authors, to keep the contributions in this book as up-to-date as possible. However, not only terrorism itself but also the American and European actions against it are evolving so rapidly that it is impossible to remain absolutely up-to-date throughout, especially in the framework of a book to which a relatively large number of authors have contributed. We are very grateful to the authors because they were prepared to take into account the editors' recommendations as much as possible in their contributions.