

**COUNTERTERRORISM FROM AN INTERNATIONAL  
AND EUROPEAN PERSPECTIVE**

No. 49, September 2006

ADVISORY COUNCIL ON INTERNATIONAL AFFAIRS  
ADVIESRAAD INTERNATIONALE VRAAGSTUKKEN

**A I V**

## **Members of the Advisory Council on International Affairs**

<b>Chair</b>	F. Korthals Altes
<b>Vice-chair</b>	Professor F.H.J.J. Andriessen
<b>Members</b>	A.L. ter Beek Professor G. van Benthem van den Bergh Ms A.C. van Es Professor W.J.M. van Genugten Ms P.C. Plooij - van Gorsel H. Kruijssen Professor A. de Ruijter Professor A. van Staden Ms H.M. Verrijn Stuart
<b>Secretary</b>	Dr R.J. van der Veen

P.O. Box 20061  
2500 EB The Hague  
The Netherlands

Telephone + 31 70 348 5108/6060  
Fax + 31 70 348 6256  
E-mail [aiv@minbuza.nl](mailto:aiv@minbuza.nl)  
Internet [www.aiv-advice.nl](http://www.aiv-advice.nl)

## **Members of the Joint Committee on Counterterrorism**

<b>Chair</b>	Prof. T.C. van Boven
<b>Vice-chair</b>	Lt. Gen. G.J. Folmer (retd)
<b>Members</b>	Prof. P.R. Baehr Prof. M.G.W. den Boer Dr P.P. Everts Prof. F.J.M. Feldbrugge Prof. B. de Gaay Fortman R. Herrmann F. Kuitenbrouwer Lt. Gen. H.W.M. Satter (retd) Prof. B.A.G.M. Tromp Ms H.M. Verrijn Stuart
<b>Executive secretary</b>	P.J.A.M. Peters T.D.J. Oostenbrink

# Table of contents

## Foreword

<b>I</b>	<b>Introduction</b>	<b>7</b>
<b>II</b>	<b>Roots of contemporary terrorism</b>	<b>13</b>
	<b>II.1 Relevant factors</b>	<b>13</b>
	<b>II.2 Potential policy implications</b>	<b>16</b>
	<b>II.3 Summary conclusion on foreign policy concerning the roots of terrorism</b>	<b>18</b>
<b>III</b>	<b>The international system: The United Nations</b>	<b>20</b>
	<b>III.1 Developments within the United Nations</b>	<b>20</b>
	<b>III.2 Assessing effectiveness</b>	<b>21</b>
	<i>a. Standards and conventions</i>	21
	<i>b. Compliance with standards</i>	22
	<i>c. Projects and technical assistance to states</i>	23
	<i>d. Military action aimed at combating terrorism</i>	24
	<b>III.3 Assessing legality and legitimacy</b>	<b>25</b>
	<b>III.4 Coherence and architecture</b>	<b>27</b>
<b>IV</b>	<b>The European Union and relevant regional organisations</b>	<b>29</b>
	<b>IV.1 Counterterrorism in the European Union</b>	<b>29</b>
	<b>IV.1.1 Policy developments in the European Union</b>	<b>29</b>
	<b>IV.1.2 Assessing effectiveness</b>	<b>30</b>
	<i>a. Cooperation</i>	30
	<i>b. Compliance and supervision</i>	32
	<i>c. Roots of terrorism</i>	32
	<i>d. Coherence and architecture</i>	33
	<b>IV.1.3 Legal principles and legitimacy</b>	<b>34</b>
	<b>IV.1.4 Interim conclusions</b>	<b>37</b>
	<b>IV.2 Counterterrorism and regional organisations of which the Netherlands is a member</b>	<b>37</b>
	<b>IV.2.1 Council of Europe</b>	<b>37</b>
	<b>IV.2.2 OSCE</b>	<b>38</b>
	<b>IV.2.3 NATO</b>	<b>39</b>
<b>V</b>	<b>Counterterrorism and the protection of human rights</b>	<b>41</b>
	<b>V.1 General observations</b>	<b>41</b>
	<b>V.2 Permissibility of restricting or derogating from human rights</b>	<b>42</b>
	<b>V.2.1 Restricting human rights</b>	<b>42</b>
	<b>V.2.2 Derogating from human rights in times of emergency</b>	<b>43</b>
	<b>V.2.3 Concluding remarks</b>	<b>44</b>

<b>V.3</b>	<b>Developments since the publication of the interim report on the prohibition of torture</b>	<b>45</b>
<b>V.4</b>	<b>Relationship between human rights and international humanitarian law</b>	<b>47</b>
<b>V.5</b>	<b>Improving human rights law with a view to combating terrorism</b>	<b>49</b>
<b>VI</b>	<b>Summary, conclusions and recommendations</b>	<b>52</b>
<b>Annexe I</b>	Request for advice	
<b>Annexe II</b>	List of abbreviations	

## Foreword

On 15 July 2005, the government asked the Advisory Council on International Affairs (AIV) to prepare an advisory report on combating terrorism from a European and international perspective.<sup>1</sup> The AIV was asked to assess the progress made against international terrorism since 11 September 2001 and to look ahead at the agenda for the coming years, as outlined in the High-Level Panel's report to the UN Secretary-General.<sup>2</sup>

The government, which also sought advice on how human rights and the rule of law can best be safeguarded in the struggle against terrorism, was especially interested in whether the AIV believes there is any justification for restricting human rights and international humanitarian law and, if so, to what degree and in what circumstances. In addition to the two main questions the Council was also asked to address 11 more specific questions. The Senate of the States General requested that the AIV devote attention to the role of the Council of Europe as well. The Minister of Foreign Affairs accepted this suggestion and included it in the request for advice.

In responding to all these questions, the AIV had to make certain choices. At the very start of the process, the AIV concluded that, given the scope of the request and the complexity of the subject matter, it would not be possible to deliver an advisory report as quickly as the government wished. In December 2005, the AIV therefore published an interim report on the prohibition of torture and its enforcement, a subject which is currently generating great international concern. The AIV has addressed most of the other questions in the present report. In doing so, it has focused on those areas where, in the light of its expertise, it can contribute to the analysis and discussion of the issue. In practice, the AIV found it difficult to gather enough 'hard' information on the effectiveness of counterterrorist measures. Although these measures appear to be effective, not least in the light of recent reports on the prevention and failure – respectively – of attacks in the United Kingdom and Germany, it is impossible to provide a well-founded opinion on this issue in the absence of comparative data. For this reason, and due to the rapid succession of such measures, the present report offers observations of a more general nature, which are meant to serve as a frame of reference.

To prepare this report the AIV set up a Joint Committee on Counterterrorism, comprising members of the AIV's four permanent committees: Professor T.C. van Boven (chair), Professor P.R. Baehr, R. Herrmann, F. Kuitenbrouwer and Ms H.M. Verrijn Stuart of the Human Rights Committee (CMR); Lt. Gen. G.J. Folmer (retd) (vice-chair), Dr P.P. Everts, Professor F.J.M. Feldbrugge, Ms B.T. van Ginkel (corresponding member), Lt. Gen. H.W.M. Satter (retd) and Professor B.A.G.M. Tromp (temporary vice-chair) of the Peace and Security Committee (CVV); Professor M.G.W. den Boer of the European Integration Committee (CEI); and Professor B. de Gaay Fortman of the Development Cooperation Committee (COS). The civil

1 See Annexe 1 for the request for advice.

2 *A More Secure World: Our Shared Responsibility*, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004.

service liaison officers were J.F. Gerzon, F.H. Olthof and A.P. van Wiggen (Political Affairs Department, Ministry of Foreign Affairs). The committee was assisted by P.J.A.M. Peters and T.D.J. Oostenbrink (executive secretaries), H.J.W.B. Lathouwers (civil service trainee) and Ms S.F. van den Driest, B. Groothuis and Ms S. Looijenga (trainees).<sup>3</sup> Special assistance was provided by Dr L.J. van der Herik (Leiden University).

The AIV adopted this report on 5 September 2006.

3 The joint committee interviewed a number of experts from the spheres of foreign policy and domestic security, academia and non-governmental organisations. It also made a working visit to Brussels.

# I Introduction

## *General*

This advisory report on the fight against international terrorism is premised on the idea that the aims of safeguarding the rule of law and upholding the rights and safety of individuals are inseparable. In every action undertaken against terrorism, the authorities must do everything in their power to ensure that there are no casualties and that society is not disrupted. Terrorism constitutes a direct attack on human rights, in particular the right to life. The state is obliged to protect the right to life and the safety of its citizens.

## *Terminology and scope of the report*

Since the attacks in the United States in 2001, and particularly since the attacks in Bali, Dar es Salaam, Nairobi, Istanbul, Yemen, Madrid and London, terrorism is also regarded as a serious threat to the Netherlands and the rest of the European Union. Until these attacks, most national governments essentially regarded terrorism as a problem caused by regional or national factors elsewhere in the world, for which they bore no immediate responsibility. In many countries, the above-mentioned incidents greatly increased the awareness that, whatever the causes of terrorism, such attacks can actually take place anywhere. The terminology used in the current debate, such as 'the fight against international terrorism', creates the impression that we are dealing with a recognisable, uniform movement – with its own ideology, organisational structure, strategy, etc. – that regards the West as its enemy and wishes to cause it harm. However, historical examples, such as the anarchist terrorism of the late 19th and early 20th century and the separatist terrorism of the IRA and ETA and various groups in Kashmir, show that it makes more sense to analyse terrorism as a policy, a *modus operandi*, a tactic or a tool. It can be adopted or abandoned at any given time. That being said, there will always be people who wish to attack their enemies and who accept – or even intend – innocent casualties.

The above-mentioned terrorist attacks often included an undeniably international dimension, such as the origins or motives of the perpetrators, the identity of the victims or the target, or the consequences of the attack. The current debate on terrorism uses a multitude of terms to describe the groups behind the attacks. In some cases, the attacks are linked to Islam, a fact which has given rise to the term 'Islamist terrorism'.<sup>4</sup> In other cases, for example in the policy documents of the Netherlands and the European Union, the term 'jihadist terrorism' is used. However, the reality behind these terms is neither consistent nor homogenous, as witness the publications of the Dutch General Intelligence and Security Service (AIVD) and the Belgian terrorism expert Rik Coolsaet.<sup>5</sup> Whenever the AIV mentions terrorism in this report, it is referring to 'contemporary terrorism' as manifested in actual attacks perpetrated in the above-mentioned locations and elsewhere.

4 C.K. Ervin, 'The Usual Suspects: Stereotyping Terrorists', *International Herald Tribune*, 28 June 2006, p. 8.

5 AIVD, *De gewelddadige jihad in Nederland, actuele trends in de islamistisch-terroristische dreiging* (Violent Jihad in the Netherlands: Current Trends in the Islamist Terrorist Threat), The Hague, 2006, p. 11; and R. Coolsaet, *Between al-Andalus and a Failing Integration: Europe's Pursuit of a Long-Term Counterterrorism Strategy in the Post-al-Qaeda Era*, Egmont Paper No. 5, Royal Institute for International Relations, May 2005, p. 4.



### *Putting the threat into perspective*

In order to adopt effective measures against the dangers and threats posed by terrorism, we must continually update our assessment of these dangers and threats on the basis of all available information.

In recent centuries, terrorist attacks have occurred all over the world. The risk of such attacks are a fact of modern life and will remain so for many years to come. This also explains why there has been a substantial increase in the size of institutions and in the amount of legislation at national and international level since 2001. This development has serious implications for our societies, not only thanks to the expansion of the criminal law arsenal but also to the transformation of surveillance and control into everyday phenomena that are applied both generally and selectively.

As already noted, the authorities must do everything in their power to prevent casualties and ensure social stability. However, the above-mentioned expansion of powers also entails risks. There is a danger that the authorities will lose sight of the fact that the specific terrorist threat targeted by their measures is of a temporary nature. If attacks of a specific type do not occur for a prolonged period, it may be provisionally concluded that the threat in question has diminished or disappeared.<sup>6</sup> This might be due to the measures taken or to other, autonomous factors. Although it is impossible to determine whether – or when – a specific terrorist threat will disappear, it is worth noting that officials rarely if ever consider the period of validity of the measures they adopt. In order to ensure that the established framework for combating international terrorism does not take on a life of its own, especially when there is no longer a serious threat, governments should periodically evaluate the national and international measures they have adopted, as argued elsewhere in this report. The tools used to combat terrorism should be adapted to the severity of the threat.

The other risk relates to the need to balance various priorities while countering different kinds of threats. Counterterrorism is just one of many tasks the authorities face, albeit a very important one. In general, proportionality is a key factor in determining how much attention, manpower and resources to devote to controlling threats, since absolute protection from terrorist attacks is unachievable. It therefore remains the task of the authorities, in the case of counterterrorism as with other policy areas, to make sense of the risks, the expected benefits of expenditure, the constitutional and practical limitations on policy options and the need to address threats other than terrorism. In the field of foreign policy, this implies that they should not only pursue an effective response to the threat of terrorist attacks but also devote attention to the side effects of this policy and aspire to a balanced approach to threats in general.<sup>7</sup>

6 Thus, for example, R. Coolsaet and T. van den Voorde note in a study that, in global terms, the number of victims of terrorist attacks dropped substantially in 2005 (excluding the situation in Iraq). They also conclude that international terrorism, as opposed to domestic terrorism, is more accurately described as a political challenge than a military threat. See *The Evolution of Terrorism in 2005: A Statistical Assessment*, Department of Political Science, Ghent University, Feb. 2006 and 'Terreurstatistieken: brug tussen perceptie en realiteit' (Terror statistics: a bridge between perception and reality), *Vrede en Veiligheid*, vol. 35, No. 2, 2006.

7 See also AIV, *An analysis of the US missile defence plans: pros and cons of striving for invulnerability*, advisory report No. 28, The Hague, Aug. 2002.

Because the fight against terrorism needs to be waged at both national and international level, it is rightly regarded as a foreign policy issue. The AIV believes that a basic definition is vital for analysing and discussing terrorism in a clear and rational manner. In this context, it has tried to ascertain whether a proper discussion of this issue requires a clear-cut legal definition or whether a detailed description of the phenomenon can suffice. This question is examined in more detail in the next section.

#### *The need for an international legal definition*

The AIV recognises the need for a uniform legal definition and is aware of attempts to draft a new comprehensive UN convention against terrorism that would include such a definition. It could serve to consolidate the international consensus and act as a basis for action. A legal definition would have other technical advantages as well, such as harmonising legislation, satisfying the requirement of double criminality in extradition cases and clarifying what constitutes a 'political offence'.<sup>8</sup> A good definition is also a means of preventing certain regimes from branding every political opponent a terrorist.<sup>9</sup>

The need for a legal definition is illustrated by the incremental nature of the process, as discussed briefly in this section. (In chapter III, several other relevant aspects of developments within the United Nations are examined in greater detail.)

It is important to note that thirteen different UN conventions on terrorism have been adopted so far. All these conventions use their own definitions and terminology and relate to different aspects of terrorism. Over the years, the UN Security Council has adopted a number of resolutions on terrorist acts, and even attached consequences to those decisions, all without the benefit of an agreed definition of the concept. Under these circumstances, it is surprising that the Security Council has characterised terrorism in general (initially only international terrorism and later national terrorism as well) as 'a threat to international peace and security'.<sup>10</sup> Countries such as Cuba, China and Belarus treat this as a licence to brand protest movements and even non-violent citizens as terrorists.

This characterisation has also served as a basis for issuing general declarations and imposing obligations under Chapter 7 of the UN Charter, as with the establishment of the Al Qaida and Taliban Sanctions Committee regime under resolution 1268 and the Counterterrorism Committee (CTC) under resolution 1373. From the point of view of legal certainty, the linkage of 'terrorism', as an undefined phenomenon, to a classification that carries serious legal consequences (i.e. sanctions) is most curious.<sup>11</sup>

8 This concept, which is alluded to in Article 1F of the Refugee Convention, constitutes grounds for exemption from extradition.

9 B. Saul, *Defining 'Terrorism' to Protect Human Rights*, working paper, Feb. 2006, available at: <<http://www.fride.org>>.

10 See, *inter alia*, Security Council Resolutions 1368 (2001) and 1377 (2001), the annex to Security Council resolution 1566 (2004) and General Assembly Resolution 60/1 (2005), para. 81. See also K. Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future', *Journal of Conflict and Security Law*, vol. 8, No. 1, 2003, pp. 15-70.

11 See also Article 24 of the UN Charter, which states that the member states confer primary responsibility for the maintenance of international peace and security on the Security Council.

The same could be said of the link between terrorism and armed conflict, as referred to in question 7 of the request for advice. This issue also appears to be open to different interpretations. For instance, the High-Level Panel (HLP) gives significant weight to the Geneva Conventions in its list of elements that should be included in any definition. This seems to imply an emphasis on terrorist acts in times of armed conflict or even a mandatory link between the two. However, the general substantive description of terrorism given in the same document does not insist on such a link.<sup>12</sup> This suggests that the HLP is of the opinion that terrorist acts need not be committed during an armed conflict in order to qualify as such and that a single terrorist act does not necessarily constitute an armed conflict.<sup>13</sup> In this connection, incidentally, it may be noted that the 'war on terror' as such does not constitute an armed conflict either.<sup>14</sup> In this regard, independent UN expert Robert K. Goldman adds that international humanitarian law applies only to terrorist acts committed *within* the framework of an armed conflict. Acts committed outside the framework of an armed conflict can therefore not be classified as war crimes, though they may be subject to other rules of international law, as well as national criminal law.<sup>15</sup> The AIV believes that the definition of the HLP and the views of Professor Goldman are complementary.

It is clear from the above that the progress towards a definition of terrorism has been slow and laborious within international organisations and specifically the United Nations. The same applies to the talks on adopting a comprehensive UN convention. The main reason for this is a failure to resolve key points of disagreement. These include 'state terrorism' and the distinction between terrorism and violence committed in the context of a people's legitimate struggle for self-determination. The AIV does not address these issues in the present report, but would instead refer the reader to its comments on the subject in a previous advisory report on UN reform.<sup>16</sup> The conclusions of this report are equally relevant today, including the recommendation that the Netherlands can and should take the initiative in bringing these negotiations to a successful conclusion.

#### *Defining the subject of the advisory report*

As long as there is no clear-cut definition, it is possible to proceed on the basis of a detailed description of the phenomenon of terrorism. Given the politically charged nature of the debate on the deployment of policy instruments, a detailed description based on the characteristics of terrorism is desirable. The AIV has chosen not to add to the long list of existing definitions. Security Council resolution 1566, which was adopted unanimously, and the additional elements proposed by the UN Secretary-

12 See UN Doc. A/59/565, 2 December 2004, para. 164.

13 See H. Duffy, *The 'War on Terror' and the Framework of International Law*, Cambridge, 2005, pp. 249-255.

14 *Situation of Detainees at Guantánamo Bay*, UN Doc. E/CN.4/2006/120, 27 February 2006, para. 21.

15 See *Report of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/CN.4/2005/103, 7 February 2005, para. 17.

16 See AIV, *Reforming the United Nations: a closer look at the Annan Report*, advisory report No. 41, The Hague, May 2005.

General in 2005 together provide an adequate working definition.<sup>17</sup> These elements are:

- physical action;
- intended to cause death or serious bodily harm;
- to civilians or non-combatants;
- with the purpose of intimidating a population; or
- compelling a government or an international organisation to do, or abstain from, any act.

In this context, the AIV would note that causing large-scale material damage or social disruption, in furtherance of a political goal and in combination with the element of intimidation, can also be classified as terrorism.

#### *An integrated approach to security*

The fight against terrorism should be part of an integrated approach. This means devoting attention to the motives and roots of terrorist acts and the resources and opportunities that facilitate their perpetration.

Combating terrorism effectively is primarily the responsibility of national governments. Given the international dimension of the problem, however, international cooperation is more important now than ever before. At the same time, however, such cooperation must not cause states to split up into different interest groups. In recent years, a wide-ranging concept known as 'human security' has therefore been developed both within and outside the UN framework.<sup>18</sup> It encompasses physical and social security as well as respect for individual rights and socioeconomic security. According to this concept, combating terrorism cannot be separated from tackling other grave dangers and threats such as poverty, inequality, disease, human rights violations, genocide and crimes against humanity. As stated in the HLP report: 'To be credible and sustainable a collective security system must be effective, efficient and equitable.'<sup>19</sup> The UN Secretary-General places the fight against terrorism firmly in the framework of achieving *freedom from fear* and regards this as part of an integrated approach to the four freedoms propounded by Franklin Roosevelt.<sup>20</sup> The final document of the UN World Summit of September 2005 states that the UN General Assembly will continue working towards a security consensus based on the unifying recognition that development, peace, security and human rights are mutually reinforcing.<sup>21</sup>

17 See Security Council Resolution 1566, UN Doc. S/RES/1566 (2004), 8 October 2004. See also *In Larger Freedom: Towards Development, Security and Human Rights for All*, report by the UN Secretary-General on the follow-up to the outcome of the UN Millennium Summit, Doc A/59/2005, 21 March 2005, para. 91.

18 See <<http://www.humansecuritynetwork.org>>. See also note 16.

19 See UN Doc. A/59/565, 2 Dec. 2004, para. 31; and W. van Genugten, K. Homan, N. Schrijver and P. de Waart, *The United Nations of the Future: Globalization with a Human Face*, Amsterdam, 2006, pp. 266-271.

20 See UN Doc. A/59/2005, 21 March 2005, para. 222.

21 See UN Doc. A/RES/60/1, para. 72; and AIV, *Reforming the United Nations*, advisory report No. 41, The Hague, May 2005, pp. 7-8 and 32.

### *Conclusion*

In its interim report of December 2005, the AIV pointed to the importance of complying with obligations under international law, in particular those relating to human rights. This does not mean simply fulfilling a number of discrete conditions but rather making an effort to arrive at an integrated approach in which various elements of international law come together effectively.<sup>22</sup> Before it considers the essence of such an approach, the AIV first examines the factors that fuel terrorism in the next chapter.

<sup>22</sup> See N.J. Schrijver, 'Elf september en het internationale recht' (September 11 and international law), *NJB*, 16 September 2005, pp. 1688-1692.

## II Roots of contemporary terrorism

In its request for advice, the government asked the AIV to assess the fundamental causes and roots of radicalisation and the recruitment of individuals for terrorist objectives.<sup>23</sup> The AIV addresses these issues in the present chapter, though it does not claim to present a comprehensive picture. After touching upon the factors that encourage radicalisation and recruitment, it briefly discusses several that merit special attention. The AIV would stress, however, that its efforts to increase understanding of the factors and circumstances that may give rise to terrorism in no way implies a justification of this strategy. Rather, the identification and analysis of the factors and circumstances that give rise to terrorism should be regarded as a key aspect of policy development.

### II.1 Relevant factors

Given what is known about the origins of the perpetrators of recent attacks, the AIV examined not only the conditions in Islamic countries and the shared beliefs of radical movements, but also the circumstances of Islamic immigrants in Western societies, in order to identify relevant factors. Based chiefly on the literature, the AIV has identified five key factors:

- unstable states;
- isolation;
- conflicts;
- the cultural and historical context;
- the marginalisation of minorities.

*Unstable states* often face problems of transition, such as those resulting from the shift from an autocratic regime to a democratic one, or from the consequences of economic growth and modernisation.<sup>24</sup> Groups that are unwilling or unable to participate in such transitions – for example because new trends threaten their traditional norms, society and identity – often feel excluded and accordingly resist the pull of change. This is particularly true of countries whose leaders are unwilling or unable to steer change in the right direction.<sup>25</sup> The extreme variant of an unstable state, the ‘failing state’, provides a ‘facilitative environment’, but this does not make it a root cause of terrorism.<sup>26</sup>

23 This report uses the term ‘radicalisation’ as defined by the Minister of Justice: ‘A mindset involving a willingness to accept and act on even the most extreme implications of an ideology’. Although there are certainly circumstances in which such an attitude may be laudable, the inference in the current context is that it may lead to violence and, more specifically, terrorism.

24 T. Bjørge (ed.), *Root Causes of Terrorism: Myths, Reality and Ways Forward*, London, 2005, p. 258. See also Club de Madrid, *Addressing the Causes of Terrorism*, Club de Madrid Series on Democracy and Terrorism, Vol. I, 8-11 March 2005, Madrid, p. 19.

25 R. de Wijk, ‘Terrorismebestrijding: Een strategie van ‘hearts and minds’ (Counterterrorism: a strategy of ‘hearts and minds’), *Justitiële Verkenningen*, Vol. 31, No. 2, 2005, pp. 47-48.

26 R. Coolsaet, *Between al-Andalus and a failing integration*, p. 15. For a definition of failing states, see AIV/CAVV, *Failing States: a Global Responsibility*, advisory report No. 35, The Hague, May 2004.

*Isolation* plays a role at national and international level. After a period in which Islam and Islamic states were successful and even dominated world history, they have come to occupy a less prominent position. In this day and age, the world is characterised by the political, cultural and economic ascendancy of the Western powers, which came to prominence at a later date.<sup>27</sup> For this reason, among others, the colonialism of the past and the globalisation of the present are regarded, especially in the Middle East, as developments that have maintained and reinforced this disparity in power.<sup>28</sup> The relative weakness of these states has led to feelings of resentment towards the West among the public in those countries, which sees itself as the victim of foreign domination and the machinations of regional powers. Thanks to this and other factors, isolation, marginalisation and power differentials also exist *within* Islamic countries. Large sections of the population have no opportunity to participate in decision-making and development. This is usually due to the combined absence of civil liberties, democracy and the rule of law, coupled with an inequitable distribution of wealth, which generally manifests itself as dire poverty among the general population and great affluence among the ruling class. This internal inequality makes isolated individuals more susceptible to radicalisation and recruitment for terrorist objectives.<sup>29</sup> In such countries, moreover, it is often the case that the leaders themselves are not poor, despite the fact that they claim to represent the poor and marginalised.<sup>30</sup>

*Conflicts* of a nationalist, ethnic, religious or tribal nature often give rise to violent resistance, which can manifest itself not only in guerrilla warfare or civil war but also in terrorism. The desire for autonomy, secession or an independent state has been the source of many large-scale conflicts. Almost all the organisations that have made use of suicide attacks were fighting a foreign power occupying their native country or a government preventing their succession.<sup>31</sup> There have been and continue to be many conflicts in which Islamic population groups have suffered at the hands of non-Islamic opponents. These include wars, colonial rule, ethnic cleansing and actions to frustrate self-rule or the establishment of an independent state. Religion can even be used as a rallying cry and become a dominant issue in conflicts that were not originally religious in nature. Radical activists seize upon actual events to prove that Islam itself is under attack from outside forces. Certain flaws in counterterrorism policy, such as torture, the conflation of jihad with terrorism, Guantánamo Bay and the events in Iraq and Lebanon, are currently increasing hostility towards Western ideas and interests (a trend sometimes known as ‘Occidentalism’).<sup>32</sup>

27 AIVD, *Van dawa tot jihad*; and R. Coolsaet, *Between al-Andalus and a failing integration*, pp. 17-18.

28 Club de Madrid, *Addressing the Causes of Terrorism*, p. 22.

29 See S. Atran, ‘Genesis of Suicide Terrorism’, *Science*, Vol. 299, 2003, pp. 1536-1537. See also AIVD, *Van dawa tot jihad*; and Ministry of Justice, *Nota radicalisme en radicalisering* (Policy document on radicalism and radicalisation), 19 August 2005, Parliamentary Papers 29 754, No. 26, pp. 2 and 5.

30 T. Bjørge (ed.), *Root Causes of Terrorism*, pp. 229, 256 and 257; W. Laqueur, *No End to War: Terrorism in the Twenty-First Century*, New York, 2004, p. 15.

31 C. Caryl, ‘Why they do it’, *New York Review of Books*, Vol. 52, No. 14, 22 September 2005.

32 I. Buruma and A. Margalit, *Occidentalism: the West in the Eyes of its Enemies*, New York, 2004.

Falling victim to violence can lower people's threshold for using violence themselves. In addition, ideological and religious convictions, for example concerning martyrdom, can increase an individual's willingness to commit violent acts and significantly lower his or her threshold for doing so.<sup>33</sup> The fighting in Afghanistan, Bosnia and Chechnya has turned the spotlight on violence as an instrument and an ideal of Islamic volunteers.

When considering the *cultural and historical context* of contemporary terrorism, we should avoid the term 'cause'. Contemporary terrorism is definitely part of a historical process, but it is difficult to claim that it has been 'caused' by certain jihadist traditions. Historically, there have been many movements that advocated strict adherence to the precepts and traditions of Islam. The supporters of certain of these movements translated their criticism of imperfect observance of these laws, precepts and traditions into the wholesale denunciation of their opponents as heretics.<sup>34</sup> The present generation of terrorists adheres to several of these movements, from which it derives the belief that it has a mandate to kill the rulers of Muslim countries because they have not established true Islamic states, to kill co-religionists whom they regard as apostates or collaborators, and to kill outsiders whom they regard as a threat to Islam.

The modernisation process is regarded as a threat to existing identities both in the West and beyond.<sup>35</sup> The step from religion as a unifying force to a way of imposing change or maintaining traditional norms by means of violence is a big one, and one that only very few believers are willing to take. Nevertheless, it is fair to assume that many people feel far removed from the West, especially the United States.<sup>36</sup>

One other factor is particular to Western Europe. A relatively large number of immigrants and their families, especially those of the second generation, are not only excluded from the economy but also feel displaced on a personal level. They have been – and therefore feel – isolated (In other cases, this isolation is self-imposed). This points to *marginalisation*. In the AIV's opinion, successful integration does not mean the assimilation and disappearance of Muslims into Western society. They

33 T. Bjørge (ed.), *Root Causes of Terrorism*, p. 259.

34 See, *inter alia*, ICG, *Understanding Islamism*, Middle East/North Africa Report No. 37, Brussels, March 2005; AIVD, *Van dawa tot jihad*; and J.J.G. Janssen, 'De radicaal-islamitische ideologie: van Ibn Taymiyya tot Osama bin Laden' (Radical Islamic ideology: from Ibn Taymiyya to Osama bin Laden), lecture at Utrecht University, 3 Feb. 2005. See also Z. Baran (ed.), *The Challenge of Hizb ut-Tahrir: Deciphering and Combating Radical Islamist Ideology*, conference report, The Nixon Center, Washington, September 2004.

35 Though the origin of anti-modernist movements can often be traced to Western societies, the underlying ideas began to spread around the world starting in the early nineteenth century, unrestricted by national boundaries. See also I. Buruma and A. Margalit, *Occidentalism*, pp. 7-17; and F. Stern, *The Politics of Cultural Despair*, New York, 1965.

36 In many cases resentment towards the US is linked to American support for dictatorships, Israel, multinationals, the IMF and other institutions linked to globalisation. See, *inter alia*, I. Buruma and A. Margalit, p. 8-9: 'But whatever the U.S. government does or does not do is often beside the point. [...] This is not about policies, but about an idea, almost a vision, of a machinelike society without a human soul.' Anti-Americanism is formulated primarily in spiritual terms. In this light, the fight against terrorism is the fight against an idea.



should be able to maintain their own identity in the social and economic integration process, provided that they accept the rule of law and respect the rights of women and minorities. Integration should first and foremost reduce the psychological and social distance between groups. If it does not, psychological displacement in Western society leads the children of immigrants to search for alternative lifestyles. Some end up supporting radical variants of Islam, where they find refuge in an ideology that provides them with clear-cut goals and duties.<sup>37</sup> The frustration of these groups is further fuelled by feelings of kinship with 'other' oppressed Muslim groups abroad. This also promotes an 'us versus them mentality', which ought to be prevented.

## **II.2 Potential policy implications**

It is no simple matter to translate a recognition of these factors into policy. Certain factors, for example, may be historical facts, and therefore unalterable. Nevertheless, the AIV has chosen to consider a number of foreign policy issues.

Terrorism highlights the global responsibility for dealing with problems. This responsibility is based on solidarity with affected population groups and, ultimately, self-interest. It involves taking action at global level, for example to combat the spread of violent jihadist ideology, as well as tackling specific problem regions and countries.<sup>38</sup> Examples of this include attempts to find solutions through global dialogue and foster mutual understanding between countries and religions. As long as civil society groups are able to act independently and the management of problems is not left entirely to states, there is rarely the possibility of 'too much of a good thing'. In addition, the government could look into establishing a regional follow-up programme focusing on change, on the basis of the Arab Development Reports. Organisations such as the United Nations Development Programme (UNDP) and the Economic and Social Committee for Western Asia (ESCWA) could contribute to such a programme by providing studies, grants, exchanges and projects proposals.

The aforementioned feelings of *isolation* and *marginalisation* are obviously risk factors, because individuals and groups can become alienated from the society and community in which they live and drift into isolation. Detecting problems early and formulating and implementing an integrated approach can help to improve their situation and, ultimately, prevent terrorism. These problems have both a national and international dimension.

At national level, the authorities can help to solve this problem by creating the right conditions to ensure that immigrants feel part of the economic and social fabric of this country and come to lose their sense of isolation and displacement. Central government should therefore focus on exchanging information and experiences in order

37 See C. Caryl, 'Why they do it'. Caryl provides a summary of the diaspora subculture described by Farhad Khosrokhavar in *Suicide Bombers: Allah's New Martyrs*: 'splintered loyalties and frustrated aspirations ... young men who have grown up in the West while longing for an imagined community of the faithful that will outshine the realities of the rundown storefront mosques and the halal butcher on the corner.' Caryl describes this as a sense of compensatory belonging and refers to the social traits of the perpetrators of the London bombings in July 2005.

38 The local origins of terrorism are also emphasised in the AIVD report *De gewelddadige jihad in Nederland*, p. 12.

to achieve the best possible results. In addition, the Ministry of Foreign Affairs, in particular, must do its utmost to ensure that the Netherlands comply with the treaties to which it is party, as complying with human rights treaties, combating discrimination, securing fundamental freedoms and recognising minority rights can help to create better conditions for integration. With regard to integrating isolated population groups, the emphasis should be not only on bridging cultural differences and finding common ground but also on improving socio-economic opportunities.

At international level, there is also scope for putting more political pressure on regimes in the Middle East to improve their human rights records. Feelings of marginalisation on the part of entire countries and religious communities should be acknowledged, and Western countries should abandon double standards and make it clear that they take universal values seriously. This also means, for example, unequivocally defending Muslims whenever they fall victim to oppression, as occurred in Bosnia and Kosovo in the recent past. Conversely, as the AIV noted in its interim report on the prohibition of torture, human rights violations by Western countries form a political handicap that increases hostility and should therefore be firmly opposed.

Developments in states that are essentially wealthy (e.g. due to their oil reserves), but where social and economic inequality is rapidly increasing, are a source of constant concern to the AIV.<sup>39</sup> Terrorists must be prevented from exploiting feelings of injustice. Encouraging an open attitude towards the outside world instead of an introverted one can be a key part of this approach. This also implies that the rest of the world has a responsibility to create the conditions under which these countries will have something to gain from a fuller relationship with the outside world.

As already noted, *conflicts* and *violence* also increase the risk of terrorism. This applies not only to conflicts or violence that are experienced by individuals directly, but also to perceived injustices towards kindred groups or co-religionists. Conflict prevention, conflict resolution and post-conflict reconstruction should therefore be essential elements of any counterterrorism policy. This is particularly true for the Israeli-Palestinian conflict. Though not a root cause of contemporary terrorism, it has become a key symbol for religious and secular resistance, acquiring a significant value as a mobilising tool. For the fate of the parties concerned as well as the image of the West in the wider Islamic world, the European Union should pursue a much more active Middle East policy, including greater pressure on Israel to remove the 'security fence' from Palestinian land, in accordance with the advisory opinion of the International Court of Justice, and continued pressure on Hamas to recognise Israel.

Discussions about and between the various *strains of Islam* will continue to be conducted within Islam itself. The outcome of these discussions will be of crucial importance, and not only for Muslims.<sup>40</sup> For this reason, these discussions cannot simply be allowed to run their course, uninfluenced. At the very least, non-radical

39 See AIV/AER, *Energised foreign policy: security of energy supply as a new key objective*, advisory report No. 46, The Hague, December 2005. In this report, the AIV and the General Energy Council (AER) describe how dependence on oil and gas from the Middle East stands to increase.

40 See ICG, *Understanding Islamism*, Middle East/North Africa Report No. 37, Brussels, March 2005; and R. Meijer, 'Het islamitisch debat over geweld' (The Islamic debate on violence), *Internationale Spectator*, Vol. 60, No. 1, January 2006, p. 40 et seq.

forces should be encouraged to participate. The role of the Netherlands in this regard is described in the AIVD's report on radicalisation as encouraging resistance to radicalisation.<sup>41</sup> A similar approach has been adopted by other EU countries and elsewhere.<sup>42</sup> In principle, it is advisable to encourage Muslims in all countries (and their spiritual leaders) to resist and reject radicalism on the basis of accurate information. Various instruments can be used for this purpose:

- disclosing financial flows to reveal who is funding radical activists and spiritual leaders;
- promoting independent journalistic and academic research;
- promoting the dissemination of information (e.g. on international norms) in local languages;
- promoting the translation into Dutch of reform-minded literary, cultural and religious works from Muslim countries;
- promoting international contacts so that citizens and imams can learn more about the many legitimate expressions and traditions within Islam existing, for example, in Turkey, Tunisia and Indonesia; and
- providing more grants for students from Muslim countries.

In addition, at the level of individual countries and religious communities, efforts must be made to reduce the psychological distance between different ideologies, in order to slow the spread of the 'us versus them' mentality. If rapprochement becomes an objective, certain discussion partners will soon reach their limits. Those pursuing a political form of Islam will not be willing to compromise their ideals, and EU countries will not relinquish their views on human rights and freedom. Under such circumstances, a realistic and respectful dialogue may prove a useful instrument for de-escalating tensions. The Netherlands Advisory Council for Government Policy (WRR), for example, has identified opportunities for a dialogue with representatives of political Islam.<sup>43</sup> Not only will this require the assembly of a group of actors with flexible attitudes: success will also depend on the political context. Support for a dialogue with more moderate forces must also be echoed in the political relations between countries. According to the aforementioned report by the International Crisis Group, however, a political rapprochement with non-violent (but militant) supporters of political Islam not only implies that the West will have to change its tack on the Palestinian issue, but also, more generally, that it must show more respect for the national sovereignty of its negotiating partners than it often has in the past. Although striking the right tone is essential in these matters, this should not lead to situations in which negligent governments are no longer called to account for the way they treat their people.

### **II.3 Summary conclusion on foreign policy and the roots of terrorism**

Without claiming to present a comprehensive picture, the AIV has identified five key factors that encourage radicalisation and the embrace of terrorism. The AIV is aware

41 See AIVD, *Van dawa tot jihad*, p. 50.

42 *The European Union Counterterrorism Strategy*, 14469/4/05/REV 4, Brussels, 30 November 2005; and Z. Baran (ed.), *The Challenge of Hizb ut-Tahrir*, p. xvi. See also R. Meijer, 'Het islamitisch debat over geweld', p. 40 et seq.

43 See WRR, *Dynamiek in islamitisch activisme* (Dynamism in Islamic activism), report No. 73, The Hague, 2006, p. 201.

that it is no simple matter to translate these factors into policy. Indeed, some of the factors discussed are simply historical facts, and thus irreversible. Policies that have their own intrinsic value, but which may also have a preventive effect as key elements of counterterrorism policy, have both short- and long-term implications. In this context, the AIV advises the government to play an active role – particularly through multilateral initiatives – in the following areas:

- global dialogues and efforts to encourage mutual understanding between countries and religions, as established in the framework of UNESCO and the United Nations and through the initiatives of individual countries, NGOs and religious organisations;
- projects and technical assistance, involving the Office of the High Commissioner for Human Rights (OHCHR) and the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime (UNODC), as recommended by the UN Counterterrorism Committee (CTC) to complement the UNDP programmes on good governance and strengthen law enforcement capacity;
- using its position in the European Union to promote the EU action plan and various assistance programmes related to good governance, human rights, democracy, education, economic welfare and conflict resolution, with a view to establishing an active integration policy in respect of minorities and, more specifically, marginalised groups;
- improving observance of universal human rights around the world and demonstrating that the West does not apply double standards, as previously recommended in the AIV's interim report on the prohibition of torture;
- turning conflict prevention, conflict resolution and post-conflict reconstruction into key elements of any counterterrorism policy and promoting a more active EU Middle East policy, including greater pressure on Israel and continued pressure on Hamas to recognise Israel, for the benefit of the parties concerned and the image of the West in the wider Islamic world;
- employing various instruments to promote resistance to radicalisation (including greater disclosure of financial flows to reveal who is funding radical activists and agitators), promoting academic research, promoting the dissemination of information (e.g. on international norms), promoting international contacts so citizens and imams can learn more about the many legitimate expressions and traditions within Islam and providing more grants for students from Muslim countries; and
- creating better conditions for the integration of immigrants, for example by combating discrimination on the grounds of race, national or ethnic origin and religion, promoting and protecting minority rights and, more generally, complying with human rights treaties.

### III The international system: The United Nations

In its request for advice, the government also asked the AIV to provide an assessment of the international measures taken to combat terrorism since 2001. The AIV decided to discuss this issue separately for each organisation, in Chapters III and IV. This present chapter is devoted to the United Nations; Chapter IV covers the European Union and other relevant regional organisations.

#### III.1 Developments within the United Nations

Article 1 of the UN Charter states that maintaining international peace and security is one of the main purposes of the organisation. This mission encompasses counterterrorism. In recent years, the United Nations has therefore adopted measures aimed at combating terrorism in a wide range of areas.

Between 1972 (the Munich attack) and 2001, the UN General Assembly played an active role in this area. The counterterrorism resolutions and conventions it adopted are characterised by their wide-ranging approach, which takes account of the security component, human rights issues, the development of international law and the fight against international crime.<sup>44</sup> Various organs within the General Assembly are active in this area.

During the past few years, the Security Council has taken the lead in this area.<sup>45</sup> Among other things, it has established four committees named after resolutions: the 1267 Committee (Al Qaida and Taliban Sanctions Committee), the 1371 Counterterrorism Committee (CTC), the 1540 Committee (terrorism and weapons of mass destruction) and the 1566 Working Group (solutions and coordination). However, the four specialised suborgans that derive their mandates from these resolutions have overlapping responsibilities, which inevitably leads to duplication and inefficiencies. The CTC is the most important of the four.<sup>46</sup> Because it regards the CTC's activities as the most innovative and distinctive, due to the far-reaching obligations this Committee can impose on states, the AIV examines these activities in greater detail in the following sections.

Certain sections of the UN Secretariat also focus specifically on terrorism.<sup>47</sup> UN Secretary-General Kofi Annan has recently been trying to bring together the various

44 See UN Declaration on measures to eliminate international terrorism (1994), annexed to UN Doc. A/RES/49/60.

45 See D.A. Leurdijk and G. Steeghs, *Decision-making by the Security Council: Terrorist acts which threaten international peace and security, 1989-2004, A Survey of Resolutions*, reader, Clingendael, The Hague, 2005.

46 See UN Doc. S/RES/1535 (2004). In addition, several specialised agencies and other parts of the UN system are involved in counterterrorism, including the International Civil Aviation Organisation (ICAO), the International Maritime Organisation (IMO), the International Atomic Energy Agency (IAEA) and the Organisation for the Prohibition of Chemical Weapons (OPCW).

47 An overview of these sections dating from August 2005 appears in UN Doc. A/60/228, para. 121 et seq.

aspects of UN policy in this area under a single heading. In the *Uniting Against Terrorism* report of 2006<sup>48</sup> he elaborated on a strategy he first presented in 2005,<sup>49</sup> arguing for the kind of integrated approach referred to in Chapter I.<sup>50</sup> He also established the Counterterrorism Implementation Task Force (CTITF) to monitor coordination efforts under his guidance.<sup>51</sup> The CTITF does not actually manage or coordinate all the various initiatives, but focuses primarily on formulating more detailed proposals and recommendations from the Secretary-General to the General Assembly and the Security Council aimed at streamlining the capacity building.

### **III.2 Assessing effectiveness**

Various criteria are relevant when it comes to assessing the effectiveness of the international system: are standards being set effectively, are states party to conventions, do they fulfil their obligations under those conventions, where can effectiveness be improved, is there an integrated policy that addresses the roots of terrorism and, finally, is military action effective? The AIV realises that although it is possible to describe progress in terms of developments, there is no way of determining with any degree of certainty what measures may have helped to prevent actual attacks.

#### *A. Standards and conventions*

In recent decades, the UN General Assembly has adopted thirteen conventions and protocols covering many aspects of terrorism, often in response to specific attacks.<sup>52</sup> In mid-2005, the number of contracting parties per instrument (excluding the most recent one) varied from 115 to 183, which are very high figures.<sup>53</sup> This number rose rapidly after 11 September, especially in the case of the International Convention for the Suppression of Terrorist Bombings (1997) and the International Convention for the Suppression of the Financing of Terrorism (1999).<sup>54</sup> This large number of contracting parties provides a good basis for harmonising standards and cooperating in the fields of law enforcement, exchanging information and preventing terrorist financing.

In addition, at the time of the drafting of the Statute of the International Criminal Court, various parties argued for the inclusion of terrorism as one of the crimes falling under the Court's jurisdiction. This proposal was not adopted. The AIV believes that, for the time being, there is little point in advocating an amendment during the review of

48 See UN Doc. A/60/825, 27 April 2006.

49 See UN Doc. A/59/2005, 21 March 2005, para. 88.

50 See UN Doc. A/RES/60/1, paras. 82 and 88, and UN Doc. A/60/228, paras. 137 and 140.

51 In addition, a ten-member panel meant to advise on the human rights dimension of counterterrorism has been added to the task force.

52 See P.J. van Krieken (ed.), *Terrorism and the International Legal Order*, Cambridge 2002.

53 See UN Doc. A/60/228, para. 178 et seq.

54 See D. Cortright, *A Critical Evaluation of the UN Counterterrorism Program: Accomplishments and Challenges*, paper presented at the conference on Global Enforcement Regimes, Transnational Organised Crime, International Terrorism and Money Laundering, Transnational Institute, Amsterdam, April 2005, p. 6.

the Statute in 2009, given that the existing definitions in the Statute provide sufficient scope for prosecuting terrorist offences.

#### *B. Compliance with standards*

Now that the Security Council has made it compulsory for states to submit reports to the CTC, it is possible to gain a clearer picture of compliance. By mobilising the political and legal authorities to participate in law enforcement, the CTC also acts as a non-military alternative for UN counterterrorist actions. In general, states appear to be cooperating well with the procedures it has established. All 191 states have submitted their initial reports, though in the case of the follow-up reports this number is significantly lower.<sup>55</sup> This may be indicative of a certain degree of 'reporting fatigue', and it might therefore be wise to examine whether consolidating reports can provide some relief.<sup>56</sup> States have gained valuable experience producing such key documents as part of their reporting requirements under the human rights treaties.

Substantive compliance is obviously the key issue. The reports and survey indicate that states are amending their legislation and expanding their capacity in order to comply with UN standards. The practice of the CTC and its Executive Directorate (CTED) of conducting visits provides additional information on requirements relating to counterterrorism capacity. An evaluation carried out in 2003 indicated that only some 30 states satisfied the then prevailing requirements for intervening in the financing, transport, recruitment and equipment of terrorists. A further 60 states had made progress, and 70 states were classified as 'willing but unable', for reasons such as internal conflict, poverty or a lack of adequate legal and administrative structures. For reasons of their own, approximately 20 countries do absolutely nothing despite having the necessary financial resources. Unfortunately, some of these countries have to contend with a great deal of terrorist activity, and their lack of commitment undermines the efforts of the United Nations as a whole.<sup>57</sup>

#### *Sanctions for non-compliance?*

The CTC is not a sanctions committee. The most far-reaching measure it has at its disposal is the ability to blacklist countries that are late in submitting their reports, but even in this regard it exercises restraint.<sup>58</sup> With respect to terrorist financing, however, the CTC has already made substantial progress, and international cooperation is increasing. The CTC has borrowed a checklist of criteria from the Financial Action Task Force, and it has independently developed a three-stage system that imposes increasingly tough criteria in order to boost norm compliance.<sup>59</sup> By restricting

55 E. Rosand, 'Current Developments: Security Council Resolution 1373, the Counterterrorism Committee, and the Fight against Terrorism', *American J.I.L.*, Vol. 97, No. 2, April 2003, pp. 333-341.

56 See UN Doc. S/RES/1617 and the final document of the UN World Summit of September 2005.

57 See also AIV, *The nuclear non-proliferation regime: the importance of an integrated and multilateral approach*, advisory report No. 47, The Hague, January 2006, pp. 13 and 32.

58 In contrast to the position of the HLP in UN Doc. A/59/565, para. 156, which argues in favour of sanctions.

59 Described by E. Rosand and A. Millar, *The Future of Multilateral Counterterrorism: The Case for an International Counterterrorism Body*, Century Foundation, 2006 (forthcoming), pp. 611-612 and 618-619.

financing, safe havens and travel options for individuals in the Al Qaida network, the CTC has certainly reduced the flow of financial assistance and has probably disrupted operations. A total of approximately \$200 million in potential terrorist funding has been frozen.<sup>60</sup> More than 4,000 suspects are in prison, although it should be noted that only a handful of convictions have been handed down.<sup>61</sup> In this sense, the international measures have had only a limited impact. In addition, it needs to be acknowledged that an attack like the one in Madrid probably cost just a few thousand dollars and that success is therefore a relative concept. On the other hand, potential terrorists feel increasingly compelled to raise funds locally, which is probably making them easier to monitor.<sup>62</sup> As it continues to refine its criteria, the CTC can also try to integrate other norms established by the functional organisations in recent years. However, in order to ensure that such norms are directly binding on the member states, a specific decision from the Security Council is required.

### *C. Projects and technical assistance to states*

The problem of compliance is thus not so much the result of loopholes in the conventions but rather a lack of capacity or political will.

Technical assistance can therefore be an important tool for establishing restrictive measures at national level and observing human rights while doing so. The CTC coordinates such assistance and, during the first four years of its existence, it has provided technical assistance to 100 countries to help them build legislative capacity and create legal powers. It has also provided training and technical assistance for policing borders and monitoring the movement of persons. The AIV welcomes this, both because of the possibility that it will actually increase capacity and because it reinforces the political involvement of these countries. The fact is that states that threaten to 'fail' or that are engaged in state-building require long-term international commitment.<sup>63</sup>

As more and more states acquire the capacity to comply with their obligations under the aforementioned conventions and Security Council resolutions, the effectiveness of action taken by all states collectively will increase. The CTC should therefore seek to link up more with existing assistance programmes, such as those run by UNDP, the OHCHR and the Terrorism Prevention Branch of UNODC in Vienna. Thus, for example, UNDP's good governance programme could be enhanced by emphasising the need to

60 See White House, *Progress Report on the Global War on Terrorism*, US Department of State, September 2003. Rosand mentions a figure of \$150 million. See his lecture to the ICLN Conference, The Hague, 15 December 2005.

61 Security Council, Second Report of the Monitoring Group established pursuant to resolution 1363 (2001) and extended by resolutions 1390 (2002) and 1455 (2003), on sanctions against Al Qaida, the Taliban and individuals and entities associated with them, UN Doc. S/2003/1070, New York, 2 December 2003. See also D. Cole, 'Are We Safer?', *New York Review of Books*, 9 March 2006, p. 15.

62 See the declaration by G. de Vries on behalf of the European Union on 24 June 2005 in the 1267 Committee of the United Nations.

63 See AIV/CAVV, *Failing states: a global responsibility*, advisory report No. 35, The Hague, May 2004, p. 75.



build law enforcement capacity, as identified by the CTC.<sup>64</sup> Another aim should be to secure a more operational role for the OHCHR.<sup>65</sup> Until recently, the CTC devoted no attention to human rights issues, despite the fact that respect for human rights in the fight against terrorism has been associated with the CTC on a number of occasions, for example in the preamble of the resolution reaffirming the committee's mandate.<sup>66</sup> In order to improve coordination, the staff of CTED has included an official from the OHCHR since 2005.<sup>67</sup> In addition, it is worth noting that the CTC received a briefing in October 2005 from the Special Rapporteur on the promotion and protection of human rights while countering terrorism and that it adopted a policy guidance in 2006 on the relevance of human rights issues in the assessment of country reports. The AIV supports these developments, since it believes that human rights should be integral to this approach to all projects and reports.

Taking all this into account, the AIV recommends adhering to the current approach to dialogue with the member states. At the same time, however, it is important to give a high priority to monitoring compliance with standards and policy measures aimed at combating terrorism. The practice of establishing accountability by means of expert monitoring seems more effective than sanctions and conditionality, which can cause alienation. Despite this, these options should not be ruled out. The practice of 'naming and shaming' should only be used against countries that refuse to cooperate, while actual sanctions are an even more remote option. Assistance should be available to countries that are unable to comply with the norms. In some cases, it may even be necessary to establish multi-year programmes for the underlying government institutions.

#### *D. Military action aimed at combating terrorism*

One of the main purposes of the United Nations is to prevent violent conflicts and military action. In advisory report No. 36 on pre-emptive action, the AIV and the Advisory Committee on Issues of Public International Law (CAVV) note that the UN Charter also imposes clear limits in the case of new threats such as terrorism. Incidentally, since the publication of this report, the HLP and the UN Secretary-General have also emphasised the importance of observing the prohibition on the use of force, as laid down in the UN Charter.<sup>68</sup>

After September 2001, the Security Council applied the rules of the UN Charter concerning military action in the context of counterterrorism. Resolution 1368 contained an implicit reference to the possibility of self-defence, and the United States,

64 See Recommendations for improving the United Nations Counterterrorism Committee's Assessment and Assistance Coordination Function, written and produced by the Counterterrorism Evaluation Project of the Fourth Freedom and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame, 2005, p. 11.

65 See, inter alia, Uniting against Terrorism, UN Doc. A/60/825, paras. 34 and 79.

66 See UN Doc. S/RES/1535.

67 See the Report by the UNHCHR on the protection of human rights and fundamental freedoms while countering terrorism, UN Doc. E/CN.4/2006/94, para. 6.

68 See UN Doc. A/59/565, para. 191 and UN Doc. A/59/2005, para. 216.

the United Kingdom and Australia accordingly reported the invasion of Afghanistan to the Security Council as an act of self-defence. The Security Council reported this in a press release and later referred to the positive developments in a resolution.<sup>69</sup> In legal terms, however, it would be going quite far to interpret these acts as an approval of Operation Enduring Freedom for a period of several years. In this connection, the AIV wishes to point out that, under international law, self-defence on the basis of Article 51 of the UN Charter is linked to a number of restrictions concerning the nature, scope, location and duration of the relevant measures.<sup>70</sup> Now that the forces in Afghanistan are there with the approval of the government, it is no longer necessary to invoke Article 51 to justify military action in the framework of Operation Enduring Freedom. Since 11 September 2001, the United Nations' collective security system has served as the framework for such action, and the AIV sees no reason for making structural changes on the basis of these developments. By interpreting the Charter and its concepts as 'living instruments', the Security Council can respond to terrorism in a sufficiently effective manner.

### **III.3 Assessing legality and legitimacy**

In general, the AIV admires the way the Security Council has acted and the decisiveness with which it has sought out new paths. On closer consideration, however, the AIV has a number of doubts relating to powers, precedents and side-effects. These are briefly discussed in the sections that follow.

#### *Legality: the Security Council's powers*

The UN Charter grants the Security Council the power to intervene in situations involving a violation – or impending violation – of international peace and security. The Council could only start imposing general rules regarding terrorism after it had established in resolutions 1373 and 1377 in 2001 that terrorism is an ever-present danger that seriously threatens international peace and security. (The disadvantages of categorically equating these two concepts are discussed in Chapter I).

By adopting resolution 1373 (and later resolution 1540), the Security Council essentially started acting as a legislator. That is to say, it introduced general standards (with no connection to a specific issue) that are binding on the member states.<sup>71</sup> Thus, for example, the Council effectively declared certain treaty provisions, such as those concerning terrorist financing, universally binding. As a result, these provisions also apply to countries that are not parties to these conventions; they even apply in the case of a convention that had not yet entered into force.

69 Security Council, press release, 8 October 2001, UN Doc. AFG/152, SC/7167; and Security Council resolution 1378 of 14 November 2001. The later invasion of Iraq was initially not justified by reference to a terrorist threat.

70 On the *Caroline* doctrine, see AIV/CAVV, *Pre-emptive action*, advisory report No. 36, The Hague, July 2004, p. 17. See also N.J. Schrijver in *NJB*, 16 September 2005, p. 1689, and W.J.M. van Genugten, 'Nederlandse troepen ter zelfverdediging naar Afghanistan?' (Dutch troops to Afghanistan for self-defence?), *NJB*, 2005, pp. 790-791.

71 See B.T. van Ginkel and R.A. Wessel, 'Bestuurlijke vernieuwing van de VN-VR. Wereldwetgever of achterhaald instituut?' (Administrative renewal in the UN Security Council: global legislator or outdated institution?), *Jaarboek Vrede en Veiligheid*, 2004, pp. 3-5.

In drawing up the lists of persons who would be the target of sanctions under resolution 1267 concerning the Taliban and (on the basis of resolution 1333) Al Qaida, the Security Council essentially took on a judicial function without providing sufficient procedural safeguards for those concerned.<sup>72</sup> Although there is officially a procedure for appealing against measures like asset freezing, the conditions governing such appeals do not comply with the applicable minimum requirements, while the procedure itself lacks transparency. The AIV also has other concerns besides the protection of individuals/suspects from the consequences of concrete measures taken by the Security Council, such as the practice of discouraging the granting of asylum.<sup>73</sup>

#### *Allocation of powers*

In the UN Charter, the United Nations is structured around six principal organs that each have their own powers, including setting standards, using force, resolving conflicts, monitoring procedures and adopting budgets. This ensures a certain balance. However, if the Security Council, which determines its own powers in specific cases, expands its own scope to make policy (e.g. at the expense of the UN General Assembly), this balance may be disrupted. The unrepresentative composition of the Council makes this an even more pressing problem.<sup>74</sup>

#### *Legitimacy*

The Security Council has taken some important decisions, and it is reasonable to ask whether these decisions are legitimate. A power is exercised legitimately if both its chosen legal basis and its actual implementation can weather criticism, thus rendering them broadly acceptable. In this particular case, the widely perceived gravity of the threat and the decisiveness that was displayed, spurring states into action, are factors to be considered in evaluating this legitimacy.

Even when the Security Council essentially has the authority to exercise legislative and judicial powers, it must respect a number of legal principles, such as *jus cogens*, procedural safeguards, human rights and the principle of proportionality. The Council is expected to treat the purposes of the United Nations as a guideline. Article 1(3) of the UN Charter refers to international cooperation aimed at promoting and encouraging respect for human rights as one of the organisation's four main purposes. It should go without saying that, at least in this area, the Security Council is also bound by internationally accepted human rights norms and international humanitarian law. It is in this light that the potential curtailment of procedural safeguards should be examined.<sup>75</sup>

72 However, the Security Council did provide such guarantees when it established the Yugoslavia and Rwanda tribunals.

73 A list of recommendations can be found in T.J. Biersteker and S.E. Eckert, *Strengthening UN Targeted Sanctions by Addressing Due Process Concerns*, Watson Institute Targeted Sanctions Project, Brown University, Providence, April 2006, section 4.

74 In a Security Council debate evaluating the work of the counterterrorism committees on 21 February 2006, Brazil reiterated that only the UN General Assembly has universal membership and that the exchange of best practices cannot be equated with treaties. Syria stressed that the work of the 1540 Committee should not supplant multilateral mechanisms. Summary in press release of 21 February 2006, UN Doc. SC/8644.

75 See B.T. van Ginkel and R.A. Wessel, 'Bestuurlijke vernieuwing van de VN-VR. Wereldwetgever of achterhaald instituut?', pp. 1-31; and E. de Wet, *The Chapter VII Powers of the United Nations Security Council*, Oxford and Portland, Oregon, Hart Publishing, 2004, pp. 352-354.

In this context, the AIV refers the reader to its comments in section IV.3 concerning a possible lacuna in the legal protection of individuals.

The AIV observes that the Security Council has adopted far-reaching measures to combat terrorism, in particular following the attacks of 11 September 2001, and that in doing so it has essentially appropriated legislative and judicial powers. The AIV does not contest the legality or desirability of this exercise of powers, though it does believe that the Security Council should increase the legitimacy of its actions by justifying them more thoroughly and aiming for compatibility with substantive human rights standards, for example with regard to sanctions that apply directly to individuals, whether or not they are actually targets of a criminal investigation. Continuous assessment and periodic evaluations according to the criteria of necessity and proportionality remain essential as well.

#### **III.4 Coherence and architecture**

One of the key advantages of the Security Council's decisive approach to combating terrorism in September 2001 was that, due to the momentum of the response to the attacks, it was possible to form a united front. This is less true in 2006. It is much harder to subsume the common will to combat terrorism under a single heading. A number of developments have generated certain centrifugal forces. The invasion of Iraq and its protracted aftermath, including reports of excesses committed by coalition forces, have significantly strained cooperation. Recent developments in the Middle East, and more specifically in Israel, Lebanon and Gaza, are also undermining the willingness to cooperate.

Looking to the future, the AIV wondered whether the creation of a new single agency could provide the answer, as some have contended.<sup>76</sup> It is unlikely that such a move would ultimately be successful. Talks on the allocation of powers would probably never produce a smoothly functioning mechanism. Experience within the UN teaches that adoption of a systematic approach often runs up against the reluctance of a substantial number of states to establish precedents, allocate powers, transfer funds and, in general, surrender a small amount of sovereignty. The AIV concludes that a process aimed at creating a new counterterrorism agency within or outside the UN framework has little chance of succeeding, and therefore it does not support such an initiative.

Combating terrorism is first and foremost a matter for national governments and institutions, which obviously cooperate at international level as well. Added value can certainly be achieved at this level, and the United Nations can play a key political role in this regard, serving as a forum for achieving consensus which can then be transformed into legal instruments, and also for politically challenging countries that make no effort to combat international terrorism. As already noted, the UN General Assembly is highly suited to drafting treaties that set global standards and provide a framework for cooperation, while the Security Council can accelerate the creation of international rules by adopting binding resolutions. The Security Council also has the power to deploy military resources. The various specialised agencies in the UN system are very useful as forums for experts from the member states and can contribute to improvements in different areas. In addition, various parts of the UN system can provide technical assistance to governments.

<sup>76</sup> See, for example, E. Rosand and A. Millar, *The Future of Multilateral Counterterrorism*.

In the current UN framework, it is better to harness the available momentum to secure political support for limited measures. There will always be time afterwards to gradually streamline structures and eliminate overlaps. Creating a coherent whole and achieving results should contribute to the legitimacy of this process. In the AIV's opinion, the Secretary-General should play a more prominent role in facilitating such an incremental approach. This could include submitting an annual report to the General Assembly concerning the role of the various parts of the UN system in the fight against terrorism, as a follow-up to the inventory drawn up in 2005. It is very important that the various parts of the United Nations have a good understanding of all facets of terrorism and that they are thus able to learn from each other's work and best practices. Furthermore, as noted in Chapter I, the adoption of a comprehensive counterterrorism convention would also help to promote the implementation of an integrated policy.

In conclusion, the AIV notes that the *coherence and architecture* of international organisations and institutions are part of the international arsenal for effective counterterrorism. As regards the United Nations, the AIV supports the Secretary-General's aim to improve coordination between the various organs and departments of the Secretariat. The necessary resources should obviously be made available for this purpose. However, the AIV does not advocate launching a process aimed at creating a new counterterrorism organisation within or outside the UN framework.

## IV The European Union and relevant regional organisations

As already noted, the government asked the AIV to provide an assessment of the international measures taken to combat terrorism. In this chapter, the AIV examines developments within the European Union, the Council of Europe, the OSCE and NATO.

### IV.1 Counterterrorism in the European Union

The European Union's role is chiefly strategic and facilitative, as it does not possess operational powers and resources of its own. It is dependent on the member states for the adoption and implementation of policy decisions. At the same time, the member states have chosen to pursue counterterrorism at EU level, because they are much stronger together than individually and because the Union allows them to coordinate their law enforcement activities more effectively. However, given the European Union's structure, this is a complex venture, since the measures they need to adopt are spread across all three decision-making pillars.<sup>77</sup>

#### IV.1.1 Policy developments in the European Union<sup>78</sup>

Cooperation in this field has existed for some time, and what follows is a brief description of its main elements. The adoption of the Tampere Programme (1999) was an important step towards a more coordinated approach in the field of Justice and Home Affairs. Under this programme, the member states accepted the mutual recognition of each other's judicial decisions as a practical form of cooperation which could also be applied in the field of Freedom, Security and Justice.<sup>79</sup> The aim of the talks on the Framework Decision on combating terrorism (2002) was to bring the definitions closer together.<sup>80</sup>

77 In the first pillar, the European Commission has the sole right of initiative to present proposals on issues that fall under the mandate of the EU. The second pillar covers action, undertaken in the framework of the Common Foreign and Security Policy (CFSP). In the third pillar, the justice and home affairs ministers of the member states meet to adopt specific agreements.

78 This discussion of EU policy is based, *inter alia*, on M. den Boer, 'Fusing the Fragments: Challenges for EU Internal Security Governance on Terrorism', in D. Mahncke and J. Monar (eds.), *College of Europe collection on counterterrorism*, Peter Lang Publishers, Brussels, 2006 (forthcoming); D. Keohane, *The EU and Counterterrorism*, working paper, Centre for European Reform, London, May 2005; H. Brady and D. Keohane, *Fighting Terrorism: The EU Needs a Strategy not a Shopping List*, briefing note, Centre for European Reform, London, October 2005; P. Wilkinson, *International Terrorism: The Changing Threat and the EU's Response*, Chaillot Paper No. 84, Institute for Security Studies, Paris, October 2005; A. Lorenz, *The European Union's Response to Terrorism*, Institute for Counterterrorism, Interdisciplinary Center, Herzliya, May 2005; T. Balzacq and S. Carrera, *The EU's Fight against International Terrorism: Security Problems, Insecure Solutions*, CEPS Policy Brief No. 80, Brussels, July 2005.

79 The Tampere European Council (Finland, October 1999) produced mostly policy guidelines on asylum and migration, the administration of justice and crime prevention.

80 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ L* 164 of 22 June 2002.

Following the attacks of 11 September 2001 in the United States and the bombings in Madrid (2004) and London (2005), policy development in the European Union started to gain momentum. The European Security Strategy of December 2003 placed a strong emphasis on external security, leading to the creation of the post of EU Counterterrorism Coordinator. In 2004, Dutchman Gijs de Vries was the first person to be appointed to this post, which falls under the authority of the High Representative for the CFSP, Javier Solana, and the European Council.

The Hague Programme (2004) is based on the principle that member states should consider not only their own security but also common security (principle of solidarity). In addition, it provides that civil servants involved in law enforcement should have access to certain data held by other member states (principle of availability).<sup>81</sup> The programme also includes provisions aimed at guaranteeing human rights, procedural safeguards and access to the legal system.

In 2005, the basic principles of counterterrorism were subsequently set out in greater detail in a thematic strategy, which identifies four key objectives:<sup>82</sup>

- to focus on the roots of radicalisation in order to prevent people from turning to terrorism ('prevention');
- to protect citizens and infrastructure from attack ('protection');
- to promote the investigation and prosecution of terrorists ('investigation and prosecution'); and
- to be prepared to respond to attacks ('preparedness').

An accompanying detailed action plan describes almost 200 actions designed to contribute to the success of this strategy.<sup>83</sup> A separate strategy and action plan were adopted to address the issues of radicalisation and recruitment. There have also been developments in several other areas, for example regarding the European Arrest Warrant and the European Evidence Warrant. The AIV discusses these developments in the following sections.

#### ***IV.1.2 Assessing effectiveness***

Although the member states believe in the power of collective action, measuring its effectiveness has proven to be extremely difficult. There is no generally accepted standard for determining effectiveness within the European Union, nor is there an independent organ that could offer an opinion on the issue. The AIV will nevertheless attempt to assess the effectiveness of EU policy on the basis of a number of factors.

##### *A. Cooperation*

The EU member states want to work together to achieve better results than they could ever achieve alone. This is not so simple, as one of the key characteristics of national justice systems is that they have long traditions and form part of the very essence of the nation-state. Over the years, these systems have contributed to the development of

81 The Hague Programme of November 2004 is a multi-year EU programme in the field of Freedom, Security and Justice.

82 See The European Union Counterterrorism Strategy, 14469/4/05/REV 4, Brussels, 1 December 2005.

83 See EU Action plan on combating terrorism, EU Presidency and Counterterrorism Coordinator, Brussels, 13 February 2006.

specific national values, priorities and procedures that are not easily surrendered. In spite of this, the member states decided to adopt judgments given in other member states without subjecting them to judicial review. This is one method for establishing the planned Field of Freedom, Security and Justice within the territory of the European Union.

In the field of counterterrorism, trust between the partners is still not absolute, and this manifests itself chiefly in a reluctance to share information. There are two reasons for this. First, there is the risk to the national organisation: the erosion of source protection, the exposure of domestic failures, the inability to claim sole credit for successes and the compromising of domestic criminal proceedings by actions of third states. Second, there are concerns that not all partners will respect the human rights of citizens and third parties and that citizens may lose rights they enjoy in national systems under European rules.<sup>84</sup>

Trust cannot be established by decree. It will have to develop gradually, particularly in a European Union of 25 member states. Proclaiming the principle of availability sets the right tone, but concrete measures are needed to support the implementation of this guiding principle. These measures should take account of the above-mentioned reasons for withholding information. As already noted, national standards and practices can be at odds with human rights and thus form an obstacle to trust. In this context, it is important for the European Commission to take stock of and report on national legislation and measures aimed at combating terrorism.<sup>85</sup> In addition, standardised procedures and classifications need to be developed in order to determine more accurately who has access to certain information, why this information is needed (security, analysis or law enforcement) and how such access should be granted. In due course, this will lead to more efficient European cooperation.<sup>86</sup>

One area of cooperation where a lack of trust has seriously hindered performance is Europol. In recent years, the organisation has been operating in an increasingly professional and systematic manner, but it is severely hampered by the inadequate exchange of information. Standardising operational procedures and quality requirements would certainly help in this regard and contribute to the further development of instruments like the European Crime Intelligence Model and the Organised Crime Threat Assessment. Another option might be to strengthen Europol's right of initiative in relation to the member states, thereby enabling the organisation to operate successfully and improve its status.

84 Decision of the *Bundesverfassungsgericht*, BvR 2236/04 of 18 July 2005, declaring the European Arrest Warrant void.

85 See Amnesty International, *Human Rights Dissolving at the Borders? Counterterrorism and EU Criminal Law*, Brussels, 31 May 2005, p. 11.

86 See, for example, Communication on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs, COM (2005) 597 final of 24 November 2005. The EU is also seeking to adopt a framework decision on personal data protection in the framework of the third pillar, COM (2005) 475.



### *B. Compliance and supervision*

One weakness of European counterterrorism policy lies in its implementation. Even European policymakers have concluded that the implementation of decisions has fallen short of intentions. This is apparent, for example, from the slow implementation of adopted decisions, delays in the ratification of conventions and protocols, and the belated incorporation of EU decisions into national law and practice.

The EU Counterterrorism Strategy attempts to overcome this weakness by placing a strong emphasis on monitoring the performance of the member states. Not long ago, the European Union started using peer reviews in this area. A recent example of this is the screening exercise on national cooperation arrangements.<sup>87</sup> The European Union also uses an instrument known as a scoreboard. This instrument, which indicates on a point-by-point basis whether countries are sticking to their agreements, can also be used to publicise member states' performance in counterterrorism. Moreover, it can encourage member states to introduce adequate legislation promptly. In the absence of official powers on the part of the EU institutions, this could be a good way of encouraging member states to stick to their agreements.<sup>88</sup> However, it remains to be seen whether it will really lead to greater effectiveness.

### *C. Roots of terrorism*

The EU Security Strategy of 2003 talks about tackling fundamental political causes. In this context, the European Union has chosen to construct a safe environment using an approach predicated on preventive engagement. The EU Counterterrorism Strategy of December 2005 also takes a broader approach in which conflict resolution, reconstruction and the prevention of state failure all figure into relations with third countries.<sup>89</sup> In this connection, the European Union aims, among other things, to promote international partnerships and intercultural dialogue.<sup>90</sup> Like its member states, the European Union wants to tackle the conditions that encourage radicalisation, and it has chosen to do so by means of prevention rather than repression. It also advocates active European citizenship, a topic on which the AIV has previously expressed its views.<sup>91</sup> Other useful measures include promoting the EU Action Plan as well as assistance programmes in the fields of good governance, human rights, democracy, education, economic welfare and conflict resolution with a view to establishing active integration policies for minorities in general and marginalised groups in particular. Here too, it is the member states that must carry out the work at local level, by means of proactive policies.

87 See *Final Report on the Evaluation of National Anti-Terrorist Arrangements: Improving National Machinery and Capability for the Fight against Terrorism*, EU Presidency and Counterterrorism Coordinator, Brussels, 18 November 2005, 12168/3/05 REV3.

88 EU Commissioner Franco Frattini is working on a new system. The AIV has therefore not been able to evaluate it.

89 See also the letter of the Minister for European Affairs to the House of Representatives of 23 January 2006.

90 The joint declaration with the United Nations and the Organisation of the Islamic Conference regarding the violence that erupted in response to the publication in Denmark of cartoons depicting the prophet Muhammad appears to be an example of this. See also *EU Counterterrorism Strategy*, paras. 11 and 13.

91 See also AIV, *From internal to external borders: recommendations for developing a common EU asylum and migration policy by 2009*, advisory letter No. 7, The Hague, March 2004.

#### *D. Coherence and architecture*

The fact that measures sometimes have a disproportionate effect is often partly due to their history. Governments appear decisive when they take firm action and impose far-reaching measures in response to events, but they often do so for no other reason than a vague sense that 'something must be done'. In such cases, projects that were often not implemented for valid reasons are dusted off and put back on the table, and political pressure is applied to those who did not agree at an earlier stage. This kind of process is rarely the recipe for well-considered standards. However, both the general Security Strategy and the Counterterrorism Strategy project an integrated approach, which advocates the deployment of legal, police, military, diplomatic, economic and social resources. This strategy for combating terrorism provides a number of good starting points and rightly pays attention to long-term policy issues.

The EU member states have established a large number of structures for consultation, policymaking and implementation within and outside the EU framework. It is therefore no exaggeration to speak of a crowded policy space. Improvements to this situation should involve modifying decision-making methods rather than creating new institutions. At the same time, the member states choose to pursue counterterrorism at EU level because they recognise that there is strength in numbers and because it allows them to coordinate their law enforcement activities more effectively. Achieving such collective action inside the existing EU framework is a complicated matter, as counterterrorism covers a number of policy areas. This means that we are dealing with all three pillars, each of which has its own decision-making regime. There is currently a proposal from the European Commission on the table to improve this situation by transferring all the relevant policy areas to the first pillar (although there will obviously still be common ground with the CFSP, which falls within the second pillar). In the view of the AIV, such a transfer would be very beneficial for counterterrorism, since the European Commission and the European Parliament have more powers in the first pillar.<sup>92</sup> This in turn translates to decisiveness. In addition, the Commission has the sole right of initiative in the first pillar. The AIV does not provide a more detailed assessment of the various issues relating to these powers in this advisory report, as it intends to examine them in greater depth in a forthcoming report on the future of the European Union.

The task of the EU Counterterrorism Coordinator is to ensure that all forums linked to the European Union achieve results. He also represents the European Union externally. Observers point to the position's limited powers but concede that there have also been successes.<sup>93</sup> In the interests of transparency and accountability, it would be preferable if the Coordinator would personally account for his policies and actions before the European Parliament whenever he is requested to do so.<sup>94</sup>

92 Decision making in the second and third pillars is mainly of an intergovernmental nature. In practice, this means that decisions can only be adopted on the basis of unanimity, since every state has a right of veto. The Constitutional Treaty, which was rejected by the Netherlands and France, would have streamlined decision making in the European Union, for example by abolishing the traditional pillar structure.

93 See D. Keohane, *The EU and Counterterrorism*, p. 19.

94 On 6 July 2006, the European Parliament reached a compromise on the decision of the European Council and the European Commission regarding the expansion of the Coordinator's powers, which consequently increased significantly.

A system whereby all 25 member states are involved in policymaking also forms a handicap outside the core EU bureaucracy. In the case of Europol, for example, decision-making within the 25-member Management Board is ineffective. The meeting of the Justice and Home Affairs Council of 1-2 June 2006 decided to enact various practical improvements and transform the Europol Convention into a Council decision, so that it would be easier to amend in the future.<sup>95</sup> From the outset, the structure of another organisation in this field – Eurojust – has been better suited to smooth decision-making, but this entails weaker democratic controls than in the case of Europol.<sup>96</sup>

#### **IV.1.3 Legal principles and legitimacy**

In the fight against terrorism, it is vital that fundamental legal principles, including human rights, are respected at all times. Clearly this also applies to measures adopted at EU level.<sup>97</sup> In this section, the AIV examines a number of key instruments that have been introduced to help combat terrorism, in order to determine whether the European Union respects fundamental legal principles in practice. In this connection, the AIV briefly considers the Framework Decision on combating terrorism, the European Arrest Warrant, legal protection in the context of the financial sanctions regime, and personal data protection.

As already noted, one of the objectives of the Framework Decision on combating terrorism is to bring national definitions of terrorism closer together. However, there is concern about the wide scope – and attendant lack of precision – of the definition used in the Framework Decision. The AIV shares this concern, which has been articulated by Amnesty International, among others. The organisation calls on the European Union to ensure that governments do not abuse this definition to criminalise legitimate protests and demonstrations.<sup>98</sup>

The European Arrest Warrant (EAW), which had actually been in preparation for some time, was quickly included in the package of counterterrorism measures adopted in the immediate wake of the 11 September attacks.<sup>99</sup> It has since been declared applicable in many hundreds of cases.<sup>100</sup> In addition, the average time frame of an extradition procedure has gone down from nine months to 43 days. A number of safeguards and conditions connected to traditional forms of extradition do not apply to the EAW system. One of the requirements that has been abandoned is that of double criminality; in other words a given act must be an offence in both the executing and the

95 See Justice and Home Affairs Council, 9409/06 (Presse 104), p. 23, conclusion 4.

96 Eurojust was established by Council Decision 2002/187/JHA of 28 February 2002, OJ L 63 of 6 March 2002, as an organ of the European Union charged with improving the effectiveness of the fight against serious, organised and cross-border crime by the competent authorities in the member states.

97 See Article 6 of the Treaty on European Union.

98 See Amnesty International, *Human Rights Dissolving at the Borders?*, pp. 9 and 42.

99 See Framework Decision 2002/584/JHA of 13 June 2002, OJ L 190 of 18 July 2002.

100 The figures for 2004 are 3,318 arrest warrants, which led to 1,073 arrests and 729 extraditions. Source: G. de Vries, Speech, Centre for European Reform, Brussels, 19 January 2006. However, the EAW is also used for 'ordinary', non-terrorist offences.

requesting state. The suspected involvement of persons in terrorist activity, combined with the lack of a precise and accepted definition of terrorism, raises the question of whether the EAW allows too much latitude for diluting the requirements of specificity and legal certainty. The scope of the EAW extends far beyond counterterrorism, and the effect of all these regulations is that citizens are increasingly the object of state surveillance. Moreover, the EAW does not allow an individual member state the freedom to call off a transfer if there are doubts that the requesting state will not adequately safeguard the fundamental rights of the person or persons concerned. Although the AIV regards the EAW, in principle, as a benefit to the fight against terrorism, the Advisory Council also believes it is essential, for the above-mentioned reasons, to swiftly establish or confirm fundamental human rights standards relating to the administration of criminal justice, such as procedural guarantees and the right to a fair trial. International norms, and specifically the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its related case law, should serve as a point of departure in this regard.<sup>101</sup> In practice, this could be achieved relatively easily by attaching the previously envisaged but not yet concluded Framework Decision on certain procedural rights in criminal proceedings to the EAW as a counterweight.<sup>102</sup>

In accordance with the aforementioned Security Council resolutions, the European Union also operates a financial sanctions regime. On the basis of this regime, governments can freeze funds and bar financial services to persons and organisations with links to terrorist activities. Such financial sanctions may be regarded as a key tool in the fight against terrorism, provided that there is adequate legal protection. At present, this protection is only partial, due to the limited possibilities for judicial review of a decision to include an individual on the sanctions list.<sup>103</sup>

The Court of First Instance of the European Union has so far dealt with this issue in two cases, which concerned applications by interested parties for the annulment of implementing regulations adopted by the Council of Ministers.<sup>104</sup> The applicants alleged a breach of their fundamental rights, in particular the right to property and various rights of defence. Although a detailed examination of the judgments is beyond the scope of this report, the AIV notes that the Court decided to dismiss the applications. In doing so, the Court held, *inter alia*, that obligations flowing from binding declarations of the Security Council on the basis of Article 103 of the UN Charter have priority over EU law. For this reason, the Court held that it lacked jurisdiction to examine the legality of decisions of the EU Council adopted on this basis, except in cases involving international legal norms that prevail over all other legal norms as *jus cogens*. The Court did not regard the freezing of the applicants'

101 This principle was embraced by the JHA Council on 2 June 2006, Press release 9490/06, p. 14.

102 Proposal of the EU Commission in COM (2004) 328 final. For a critical analysis, see Amnesty International, *Human Rights Dissolving at the Borders?*, pp. 19-21; and the letter of the Austrian presidency of the European Union of 26 April 2006.

103 M. Bulterman, 'Oh baby, baby it's a wild world: over terrorismbestrijding, financiële sancties en rechtsbescherming' (Oh baby, baby it's a wild world: counterterrorism, financial sanctions and legal protection), *NJCM Bulletin*, Vol. 30, No. 8, December 2005, p. 1069 et seq.

104 CFI, Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation/Council and Commission* and Case T-315/01 *Yassin Abdullah Kadi/Council and Commission*.

funds, in relation to the right to property, as a violation of fundamental rights of such a binding nature, though it did identify a non-critical lacuna in the legal protection of the applicants. In the AIV's opinion, the sanctions regime should be regarded as reinforcing the international counterterrorism arsenal. However, it also believes that the legal protection afforded to the persons concerned should not be undermined and that their right to legally challenge a decision at UN, EU or national level to place them on a financial sanctions list should not be denied. If the judgments of the Court of First Instance prevail, it is advisable to examine whether additional provisions on legal protection need to be adopted.<sup>105</sup>

A fourth issue is the protection of citizens' privacy. From various sources, the EU has access to an increasing amount of information on its citizens, which it occasionally shares with third parties. The Article 29 (Data Protection) Working Party, which brings together privacy monitors from the EU member states, regularly stresses the need to incorporate sufficient guarantees for the public in this area. Examples of such guarantees include requirements to clearly describe the intended goal of a measure and identify a direct link to the fight against terrorism and organised crime. In this context, vague descriptions like 'serious offences' do not suffice. These and other safeguards can limit the scope of a measure from the outset. Privacy protection often seems like an afterthought, and yet the main objective of counterterrorist policy has always been to protect the freedom of citizens. This should be reflected in the measures taken. The approach of the Article 29 Working Party should serve as a policy guideline. Personal data protection was also a concern in relation to the transfer of passenger flight data to US authorities, and this almost certainly played a part in the judgment of the European Court of Justice of 30 May 2006, which invalidated the agreement concluded with the United States.<sup>106</sup> The Court held that the agreement was part of the third pillar, which does not offer a harmonised framework for data protection. Another example involves the directive on the retention of telecommunications data. What was at stake here was not only the duration of the retention but also the validity of the measures themselves. In this context, the Article 29 Working Party pressed for periodic evaluations to determine whether the justifications that were originally offered are still valid or whether measures need to be tightened up.<sup>107</sup> In the view of the AIV, the interests of citizens, which are well served by the use of such restrictions, should not only carry weight in relation to measures that may infringe on privacy but also in relation to other restrictive measures.<sup>108</sup>

105 See also T.J. Biersteker and S.E. Ecker, *Strengthening UN Targeted Sanctions by Addressing Due Process Concerns*, Watson Institute Targeted Sanctions Project, Brown University, Providence, April 2006, UN Doc. A/60/887-S/2006/331 of 14 June 2006.

106 The judgment does not however address the merits of the case. See Cases C-317/04 and C-318/04. In its response of 14 June 2006, the Article 29 Working Group recommended that an agreement should nevertheless be adopted swiftly at EU level and that the level of protection should be raised.

107 See Article 29 Working Party, *Opinion on the Retention of Data Processed in Connection with the Provision of Public Electronic Communication Services*, WP 113 of 21 October 2005. In an opinion of 25 March 2006, the Working Party urged that the political compromise that had been achieved should be implemented as harmoniously as possible and that specific guarantees should be added.

108 See Public Administration Council (ROB), *Tussen oorlog en vrede, Kader voor een balans tussen vrijheidsrechten en veiligheid* (Between war and peace: a framework for balancing liberties and security), The Hague, 2005, p. 58. See also H. van Gunsteren, *Gevaarlijk veilig* (Dangerously safe), Van Gennep, Amsterdam, 2004.

#### ***IV.1.4 Interim conclusions***

To summarise, the AIV has reached six conclusions concerning the European Union:

1. In the interests of effectiveness and legitimacy, the AIV argues that all EU counterterrorism measures should be adopted with all possible speed. This may imply that decision-making in the field of counterterrorism should be transferred from the third pillar to the first. The AIV will examine this issue in a forthcoming advisory report.
2. Mechanisms expressly established to combat terrorism and other mechanisms that can be employed for that purpose form an essential part of the counterterrorism arsenal. Examples of these include the exchange of information and the standardisation of procedures and classifications, which should lead to improved operational cooperation between investigative services. The AIV believes that a number of specific counterterrorism mechanisms, such as the EAW (which endeavours to accelerate the transfer of suspects and the financial sanctions regime), should be regarded as valuable additions to the counterterrorism arsenal, but also identifies lacunae in the legal protection they offer.
3. In this context, the AIV would observe that the European Union does not always fully respect fundamental legal principles in practice. The AIV therefore argues that the envisaged Framework Decision on certain procedural rights in criminal proceedings should be adopted as soon as possible as a counterweight to the EAW. On the issue of financial sanctions, the AIV believes that the relevant authorities should be ever mindful that the persons and organisations concerned receive adequate legal protection. They should not be denied the right to challenge in court a decision to place them on a sanctions list. Furthermore, the AIV argues that the necessity and proportionality of counterterrorism measures should be examined in cases where the protection of personal data is at issue.
4. The AIV emphasises that the European Union must ensure, by fostering transparency and performing periodic evaluations, that counterterrorism powers are not used for other purposes and do not remain in force after the specific threat has passed.
5. The AIV values the role of the Counterterrorism Coordinator and is in favour of strengthening the position. Such a move would also entail greater accountability to the European Parliament.
6. The AIV believes that the European Union should promote its Action Plan as well as assistance programmes in the fields of good governance, human rights, democracy, education, economic welfare and conflict resolution, with a view to establishing active integration policies for minorities in general and marginalised groups in particular.

## **IV.2 Counterterrorism and regional organisations of which the Netherlands is a member**

### ***IV.2.1 Council of Europe***

The place of the Council of Europe in the fight against terrorism is largely determined by the important role of the ECHR and the related case law of the European Court of Human Rights in safeguarding human rights and the rule of law in the member states. Against this background, the Committee of Ministers of the Council of Europe issued guidelines on human rights and counterterrorism on 11 July 2002. The central theme of these guidelines is the obligation of states to protect persons from terrorism, with due regard for human rights and the rule of law.

The further development of these guidelines led to the adoption of the Council of Europe Convention on the Prevention of Terrorism on 16 May 2005. The Convention focuses primarily on preventive measures. Its core provisions concern the criminalisation of 'public provocation to commit a terrorist offence' (Article 5), 'recruitment for terrorism' (Article 6) and 'training for terrorism' (Article 7).

Without going into too much detail regarding the Convention's scope and purpose, the AIV supports the view that, taken as a whole, it is a useful additional instrument in the necessary fight against terrorism.<sup>109</sup> However, the ambiguous nature of several core provisions should not be overlooked. This applies in particular to the criminalisation of 'public provocation' to commit a terrorist offence (Article 5), a provision which may conflict with freedom of speech. In this context, the AIV refers to its comments on the grounds for restricting fundamental rights and freedoms (see Chapter V). In addition, the AIV recalls that various UN instruments impose explicit restrictions on advocating serious violations of the legal order, such as war propaganda, or national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Such forms of expression should be prohibited by law.<sup>110</sup> The AIV does not rule out that, under certain circumstances, it may be necessary to use legislation to act against advocating serious violations of the legal order. In its view, 'the dissemination ... of a message to the public, with the intent to incite the commission of a terrorist offence' may constitute such a violation, but even then a high degree of circumspection is required given the great importance of protecting freedom of expression. In this context, too, the lack of a clear legal definition of terrorism and what constitutes a terrorist offence is keenly felt.

#### **IV.2.2 OSCE**

The Organisation for Security and Cooperation in Europe (OSCE) traditionally focuses on conflict prevention and the use of soft power in conflict situations.<sup>111</sup> This tradition is reflected in the Bucharest Declaration (2001), the basic document underlying the joint efforts of the OSCE countries to combat international terrorism. The Action Plan that emerged from the Declaration is therefore also characterised by an emphasis on prevention. On the other hand, it also stresses the need to cooperate with existing organisations and regards the United Nations as most important partner in this regard.<sup>112</sup> Prevention includes promoting human rights, tolerance and multiculturalism as well as tackling the flow of funds to terrorist organisations and combating criminal organisations operating at international level. Cooperation with existing organisations takes the form of support for all UN anti-terrorism conventions and the coherent implementation of policy in coordination with other international organisations involved

109 See the text of the Convention, the Explanatory Report and the Preparatory Report of Christian Tomuschat for the Council of Europe Committee of Experts on Terrorism (CODEXTER) in *Human Rights Law Journal – HRLJ*, Vol. 26, No. 5-8, 2005, pp. 157-16 and 264-306.

110 See Article 20 of the International Covenant on Civil and Political Rights. See also M. Kearney, 'The Prohibition of Propaganda for War in the International Covenant on Civil and Political Rights', *Netherlands Quarterly of Human Rights*, Vol. 23, 2005, pp. 551-570.

111 See, *inter alia*, AIV, *The Netherlands and the Organisation for Security and Cooperation in Europe in 2003: Role and Direction*, advisory report No. 26, The Hague, May 2002, pp. 35 and 39 and Chapter III.

112 See *The Bucharest Plan of Action for Combating Terrorism*, Annex MC(9).Dec/1.

in counterterrorism. In accordance with the relevant OSCE decisions, all this must be achieved while respecting and protecting human rights and fundamental freedoms.<sup>113</sup>

The added value of the OSCE is primarily its ability to bring together a large number of countries – including those in Eastern Europe and Central Asia – that can agree on norms that are more compatible with European/Western ideas than those of the United Nations. In addition, these countries can expect to be assisted, counselled and monitored by essentially like-minded countries and an active secretariat. The OSCE has a wider geographical scope and employs a broader definition of security than NATO and the European Union. In addition, it has many representations and offices in the field, which enables it to identify escalations early on and reverse them wherever possible. Due to the broad range of its tasks, the OSCE has experience operating in all stages of a conflict, a useful skill in dealing with international terrorism. The Action against Terrorism Unit (ATU) is the OSCE's main instrument in this area. Its principal task is to assist countries in preventing and combating international terrorism.

The AIV would also highlight the OSCE's expertise and the stress it places on human rights and international law both inside and outside the EU and NATO treaty areas. Based on this premise, the OSCE could also place greater emphasis on its task of helping individual states implement counterterrorism legislation, especially states that are not members of the European Union or NATO but which *are* party to the UN human rights acquis. If necessary, the OSCE could use the analyses of the UN Counterterrorism Committee as a guideline, thereby maximising its comparative advantage.

In conclusion, the AIV observes that the OSCE's main role in the field of counterterrorism includes terrorism/conflict prevention and the reduction of disparities.

#### **IV.2.3 NATO**

Although counterterrorism was already on NATO's agenda, the attacks of 11 September 2001 led to a marked increase in policy and practice. As an immediate response, the alliance invoked Article 5 of the NATO Treaty which says that an attack against one member state is an attack against all member states. Solidarity and resolve became a key theme in the fight against terrorism originating outside the North Atlantic area, but in practice the United States made very limited use of the NATO framework for military purposes. In fact, it built cooperation on a bilateral basis, in a 'coalition of the willing'. This applies in particular to Operation Enduring Freedom. In the general counterterrorism framework, NATO lent its forces to Operation Active Endeavour in the Mediterranean (to monitor suspicious vessels) and permitted the stationing of AWACS aircraft (to protect US air space). The takeover of the UN-mandated stabilisation mission in Afghanistan (ISAF) is an important new development, as it constitutes the first time that NATO forces have been deployed outside the treaty zone. There is also a clear geopolitical dimension. For example, Operation Active Endeavour is intended as an olive branch towards NATO's eastern neighbours Russia and Ukraine and its southern, Muslim neighbours Algeria and Morocco.<sup>114</sup>

<sup>113</sup> See P. de Waart, 'OVSE: Succesvolle bestrijding terrorisme eist effectieve naleving mensenrechten' (OSCE: Successful counterterrorism requires effective observance of human rights), *VN-Forum*, Vol. 4, 2003, pp. 9-10. The OSCE has identified a conflict between combating terrorism and promoting human rights, but opts explicitly for the latter.

<sup>114</sup> Article 2 of the NATO Treaty provides, *inter alia*, that the Treaty covers more than just defence matters, promoting conditions that encourage stability, well-being and economic cooperation between the members of the alliance.



NATO has made terrorism the focus of information sharing between its partners. It has established a Terrorist Threat Intelligence Unit for this purpose and advocates an attitude of mutual openness. The standards for drafting and classifying reports are up to date, but legal restrictions at national level complicate exchanges.

At the Prague Summit of 2002, the alliance's Military Concept for Defence against Terrorism accorded a key role to defence against terrorist attacks on NATO forces on missions. In addition, it has established a range of research projects, whereby the Netherlands has assumed responsibility for a specific topic (incoming mortar shells). However, the AIV notes that it is inappropriate to devote this much attention to protecting NATO's own forces against terrorist attacks in the context of counterterrorism. Attacks on combatants should obviously be prevented, but it is not necessary to address this point in the framework of counterterrorism. Thus, in terms of substance, there is no need to redefine NATO tasks in terms of counterterrorism.

One of NATO's functions as a forum for combating terrorism is bringing together those who determine national policy on international threats, such as defence ministers, and binding them to an international policy. On this basis, the member states can then decide to draw on NATO's organisation, logistics and strength, as was done in the operation in the Mediterranean and surveillance missions at important events. Thanks to its experience (e.g. as regards information exchange, procedures and long-term cooperation) and the available military capacity, NATO is capable of taking forceful military action.

The political debate on military action by NATO can also serve a higher political purpose. In the past – in the case of Yugoslavia – it was occasionally easier to achieve consensus between the European countries *within* NATO (due to pressure from Canada and the United States) than outside it. Allied cooperation on this issue also aids in fostering Atlantic dialogue, overcoming tension, maintaining American involvement in Europe, voicing mutual criticism and continuing to present NATO to the United States as a stable and valuable coalition.<sup>115</sup>

Cooperation between NATO and the European Union has not run smoothly. Progress may nevertheless be achieved through more intensive consultation (though without the creation of common structures and obligations). An appropriate model in this context is the Berlin Plus arrangement on the possible use of NATO resources by the European Union. One example of a common interest is the protection of vital infrastructure.

<sup>115</sup> See AIV, *The Netherlands in a Changing EU, NATO and UN*, advisory report No. 45, The Hague, July 2005, p. 47.

## **V Counterterrorism and the protection of human rights**

### *Introduction*

In its request for advice, the government asked how best to safeguard human rights and the rule of law in the fight against terrorism. The AIV addressed several aspects of this question in its aforementioned interim report of December 2005.<sup>116</sup> The present report therefore only provides an update on these issues (paragraph V.3). In general, the AIV's response takes its cue from questions 8-11 of the request for advice. It accordingly describes the relevant human rights standards and rules of international humanitarian law and explains their applicability to counterterrorism measures. In the process, the AIV also considers the permissibility of restricting or derogating from human rights (section V.2). At the end of the chapter, the AIV examines the possibility of improving the human rights acquis with a view to combating terrorism. For the record, the reader is also referred to the paragraphs on human rights in Chapters III (on the United Nations) and IV (on the European Union).

### **V.1 General observations**

Here, as in its interim report, the AIV notes that it has no intention of separating the two main questions posed in the request for advice. The twin aims of upholding the rule of law and safeguarding the rights and safety of individuals are inseparable. In taking action against terrorism, the authorities must do everything in their power to ensure that there are no casualties and that society is not disrupted. Terrorism is a direct attack on human rights, in particular the right to life. In combating terrorism, a state such as the Netherlands is defending the rule of law, which is an essential element of the protection afforded by the state to its citizens and all others within its jurisdiction. A state governed by the rule of law protects its people with due respect for substantive and procedural norms. These norms may not be violated. This places limits on government action, which should be no more – but also no less – severe than warranted by the need to combat terrorism and protect the public effectively. This means that persons suspected of terrorism-related offences always have a right to be treated in accordance with certain minimum standards, which among other things are intended to guarantee the quality of the outcome of legal proceedings. On the other hand, this also means that persons who are not suspected of criminal offences (i.e. ordinary members of the public) should not be forced to put up with serious infringements of their rights, not even in the context of counterterrorism.

The protection of citizens by the state requires an integrated approach. Nevertheless, governments and international organisations have become increasingly aware that counterterrorism and respect for human rights can sometimes conflict with each other. According to Security Council resolution 1456 (2003): 'States must ensure that any measures taken to combat terrorism comply with their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law'.<sup>117</sup> This obligation has since

<sup>116</sup> See AIV, *Counterterrorism in a European and international perspective: interim report on the prohibition of torture*, advisory letter No. 11, The Hague, December 2005. The government responded on 22 February 2006.

<sup>117</sup> See UN Doc. S/RES/1456 (2003), para. 6.

been reiterated on several occasions, for example at the UN World Summit in September 2005, by the aforementioned Robert K. Goldman and by Secretary-General Kofi Annan.<sup>118</sup> The AIV supports this view, in part because counterterrorism policies that are inconsistent with international human rights norms can actually help to fuel terrorism, rather than suppress it.

In general, it can therefore be argued that anti-terrorist measures should always be compatible with international law and, more specifically, with international human rights, refugee law and humanitarian law. Measures that restrict or derogate from internationally recognised rights should only be applied within the framework of the relevant areas of international law.<sup>119</sup> This observation is important, because there is actually some scope for restricting human rights where this is necessary for ensuring an effective counterterrorism policy. The AIV discusses this issue in the following section.

## **V.2 Permissibility of restricting or derogating from human rights**

In the interests of national security, the human rights system provides for the possibility of restricting – or in very exceptional circumstances even derogating from – certain rights. This option is briefly discussed in the following sections.

### **V.2.1 Restricting human rights**

Human rights can only be restricted to the extent provided for in the provisions of treaties protecting those rights. Absolute rights, such as the prohibition of torture, cannot be restricted. A distinction must be made between restrictions on the essence of a right, which derive from its formulation, and restrictions on exercising a right, by means of restrictive provisions. The present advisory report focuses chiefly on specific restrictive provisions connected to particular rights.<sup>120</sup>

Rights under the ECHR and the International Covenant on Civil and Political Rights (ICCPR) that can be restricted by means of a restrictive provision include:

- the right to respect for private and family life (Article 8 ECHR);
- freedom of religion (Article 9 ECHR and Article 18 ICCPR);
- freedom of expression (Article 10 ECHR and Article 19 ICCPR);
- freedom of assembly and association (Article 11 ECHR and Articles 21-22 ICCPR, see also Article 8 of the International Covenant on Economic, Social and Cultural Rights on the right to form trade unions); and
- protection of property (Article 1 of Protocol no. 1 to the ECHR).

The restrictive provisions connected to these rights are not uniform in nature. The extent to which a certain right can be restricted depends on the exact formulation of

<sup>118</sup> See UN Doc. A/60/1 of 16 September 2005, para. 85; UN Doc. E/CN.4/2005/103 of 7 February 2005, paras. 7-12; and UN Doc. A/60/374 of 22 September 2005, para. 4.

<sup>119</sup> See Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, 11 July 2002.

<sup>120</sup> For an in-depth discussion of all these concepts, see J.P. Loof, *Mensenrechten en staatsveiligheid: verenigbare grootheden?* (Human rights and national security: compatible variables?), Wolf Legal Publishers, Nijmegen, 2005, pp. 191, 202-215 and 235-352.

the restrictive provision in question. In general, a restriction must fulfil three conditions in order to be justified:

1. it should have a basis in national law;
2. it should serve a legitimate purpose, such as protecting public order and national security or the rights and freedoms of others; and
3. it should be necessary and proportional.

These conditions are elaborated on in the case law of the European Court of Human Rights and in the opinions of the UN Human Rights Committee. The supervisory organs have indicated that such restrictions should:

- not impair the essence of the human right concerned;
- be appropriate to the legitimate purpose concerned;
- respect the principle of non-discrimination; and
- not be arbitrarily applied.<sup>121</sup>

### ***V.2.2 Derogating from human rights in times of emergency***

In the exceptional circumstances of a state of emergency, a government can derogate from certain human rights under very strict conditions pursuant to Article 4 of the ICCPR and Article 15 of the ECHR.

#### *Conditions for proclaiming a state of emergency*<sup>122</sup>

The two main conditions for proclaiming a state of emergency are:

1. there must be a real emergency that threatens the existence of the state/nation;
2. the state of emergency must be officially proclaimed by the competent national authority.

In addition to these main conditions, Article 4 of the ICCPR also provides that measures derogating from the Covenant should not exceed the exigencies of the situation. This proportionality principle requires that the state of emergency exist for only a limited period and extend no further than absolutely necessary in geographical or material terms. States should always be able to justify specific derogations in the light of this principle.<sup>123</sup> Furthermore, the derogating measures should not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin and should not conflict with other rules of international law, such as international humanitarian law. Thus article 4 of the ICCPR may not be invoked to derogate from the rules of the Geneva Conventions.<sup>124</sup> Finally, Article 4(3) of the ICCPR obliges states proclaiming a state of emergency to immediately inform other states parties via the UN Secretary-General.

#### *Non-derogable v. derogable rights*

Article 4(2) of the ICCPR and Article 15(2) of the ECHR list a number of rights from which no derogation is possible even in times of emergency (non-derogable rights):

<sup>121</sup> See UN Doc. E/CN.4/2005/103 of 7 February 2005, para. 8, in particular note 6.

<sup>122</sup> See UN Human Rights Committee, General Comment 29, States of Emergency (Article 4), 31 August 2001, paras. 2, 3-5 and 9.

<sup>123</sup> Ibid. See also UN Doc. A/RES/60/158 of 16 December 2005, para. 3.

<sup>124</sup> Ibid. See also Article 5(2) of the ICCPR.

- the right to life (Article 6 ICCPR and Article 2 ECHR);
- the prohibition of torture and other inhuman or degrading treatment, including the prohibition of medical experimentation without consent (Article 7 ICCPR and Article 3 ECHR);
- no retroactive criminal laws (Article 15 ICCPR and Article 7 ECHR);
- freedom of thought, conscience and religion (Article 18 ICCPR); and
- the prohibition of the death penalty (Article 6 of the Second Optional Protocol to the ICCPR).

In summary, certain human rights do not permit derogation under any circumstances. This is laid down in international treaties. In cases in which derogation is possible, there are a number of ground rules which also apply to the fight against terrorism. In such cases, derogation is still only permitted in times of emergency, and even then restrictions will apply (such as temporariness, proportionality and non-discrimination). These restrictions also include, for example, the rule that persons can only be deprived of their liberty in accordance with the law, and the obligations always to afford prisoners the option of challenging their detention and never to hold detainees incommunicado, as well as the prohibition on deporting people to countries where they face a real risk of being subjected to torture.<sup>125</sup>

### **V.2.3 Concluding remarks**

The above discussion shows that the human rights treaties provide a detailed system of options for restricting or derogating from human rights. In concrete situations, states must always examine whether a particular restriction or derogation is justified. In cases where they invoke national security as a legitimate reason for restricting a particular right, the ECtHR allows them substantial discretion (known as the 'margin of appreciation'). The ECtHR also allows states a wide margin of appreciation for *proclaiming a state of emergency*, but this margin becomes progressively narrower as the extent to which the right in question is infringed increases.<sup>126</sup> The ECtHR also allows states a margin of appreciation for interpreting and implementing human rights in general. In this connection, the AIV points to the criticism from various quarters concerning the bill prohibiting the glorification of terrorism, in the light of freedom of expression,<sup>127</sup> and to the criticism of the bill expanding investigative and prosecutorial

125 See Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, 11 July 2002, and the Declaration of the International Commission of Jurists, Berlin, 28 August 2004.

126 See J.P. Loof, 'Hoe Osama Bin Laden het Verenigd Koninkrijk een noodtoestand bezorgde (I). Enkele aspecten van het spanningsveld tussen terrorismebestrijding en mensenrechtenbescherming' (How Osama Bin Laden caused a state of emergency in the United Kingdom: Aspects of the conflict between combating terrorism and protecting human rights, Part I), *NJCM-Bulletin*, Vol. 30, No. 1, 2005, pp. 17-24; and Part II, *NJCM-Bulletin*, Vol. 30, No. 2, 2005, pp. 137-153.

127 Advisory report of the Council for the Judiciary of 15 September 2005; advisory report of the Netherlands Bar Association of 9 September 2005; and Amnesty International Report 2006. See also R. Vennix, 'Wetsvoorstel verheerlijken van terrorisme: niet effectief en niet nodig' (Glorification of terrorism bill: ineffective and unnecessary), *NJCM Bulletin*, Vol. 30, No. 8, 2005, pp. 1085-1090; and E.J. Dommering, 'Strafbare verheerlijking' (Criminal glorification), *NJB*, Vol. 80, No. 32, 2005, pp. 1693-1696.

powers in connection with terrorist offences, in the light of Article 5 of the ECHR on the right to liberty and security of person.<sup>128</sup>

This detailed approach to restrictions and derogations was specially developed for situations in which the enforcement of human rights comes into conflict with other duties of the state, such as guaranteeing security. It has been enshrined in various international treaties and refined in the relevant case law. States can use this approach to resolve conflicts of the kind mentioned above. The existing human rights arsenal provides an adequate framework for this purpose. In the AIV's opinion, it is irrational – and unwise – to question this approach at a time overshadowed by security fears.

### **V.3 Developments since the publication of the interim report on the prohibition of torture**

In December 2005, the AIV published an interim report on the prohibition of torture in view of the highly topical nature of the issue and the widespread concern that the prohibition was being undermined. Recent developments indicate that this issue has lost none of its relevance and that it continues to give rise to grave concerns. In this section, the AIV examines these developments, particularly insofar as they relate to its assertions in the interim report.

In the United Kingdom, judicial organs were permitted to *use information* that might have been obtained under torture by foreign intelligence services in proceedings in accordance with the Anti-Terrorism, Crime and Security Act 2001. In 2005, the House of Lords, as Britain's highest judicial authority, held that such evidence, even if obtained without intervention by the British authorities but via third parties, should not be admissible.<sup>129</sup> The House of Lords argued, *inter alia*, that Article 15 of the UN Convention against Torture prohibits the use of such evidence. This argument is premised on two assumptions: evidence obtained by torture is unreliable, and the use of such evidence undermines the judicial system.

The AIV welcomes this judgment from Britain's highest court and recalls its position, as articulated in the interim report, that *absolutely no legal consequences* should be attached to such dubious information, either inside or outside a court. This position actually goes further than the treaty norm, which was also cited by the government in its response to the interim report. Along with its plea for a legal restriction, the AIV argued that the government should evaluate external intelligence and its sources and, if necessary, take action to protect the vulnerable.

128 For criticism of the bill amending the Criminal Code and several other acts which seek to expand the possibilities for investigating and prosecuting terrorist offences, see the advisory report of the Netherlands Association for the Judiciary of 24 December 2004; the advisory report of the Council for the Judiciary of 23 December 2004; and Amnesty International Report 2006. See also P.H.P.H.M.C. van Kempen, 'Terrorismebestrijding door marginalisering van strafvorderlijke waarborgen' (Combating terrorism by marginalising procedural safeguards), *NJB*, Vol. 80, No. 8, 2005, pp. 397-400; and K. Veegens, 'Het Straatsburgse recht op vrijheid en veiligheid en Nederlandse verdenkingscriteria voor "terrorismeverdachten"' (The Strasbourg right to liberty and security and Dutch criteria for identifying 'terrorist suspects'), *NJCM-Bulletin*, Vol. 30, No. 2, 2006, pp. 182-205.

129 House of Lords, 8 December 2005, *Ars Aequi*, Vol. 55/2006, pp. 116-122, with comments.

With regard to the principle of *non-refoulement* and the related issues of diplomatic assurances and extraordinary renditions,<sup>130</sup> the AIV points to a number of developments. In recent times, the UN High Commissioner for Human Rights has repeatedly spoken out against the use of diplomatic assurances (in the case of the transfer of persons to states with dubious reputations regarding the treatment of detainees) as well as the practice of extraordinary rendition, which lacks any legal remedy or safeguard.<sup>131</sup> The Council of Europe has also become increasingly interested in examining the human rights aspects of diplomatic assurances. In this context, it asked a group of experts on the relationship between human rights and counterterrorism to examine whether there was a need to formulate a legal instrument in this area. However, it soon became apparent that there was widespread opposition to this, especially from NGOs, the UN Special Rapporteur on Torture and the Council of Europe's Commissioner for Human Rights, for both practical and moral reasons. The practical objection, which stemmed from negative experiences in the past, was that compliance with such an instrument would be hard to enforce. The moral objection concerned the risk that the instrument would undermine the absolute ban on torture and the principle of *non-refoulement*.<sup>132</sup> In April 2006, the Council of Europe concluded that there should be no minimum requirements for diplomatic assurances.<sup>133</sup> In this connection, the AIV refers once again to the vital importance of the principle of *non-refoulement*, which is inseparable from the absolute nature of the ban on torture and which should therefore continue to apply without restriction, even in fighting terrorism.

The AIV further notes that both the Parliamentary Assembly of the Council of Europe and the European Parliament are actively looking into possible European involvement in CIA flights intended for the transport and illegal detention of terrorist suspects. The recent report of the Council of Europe's special rapporteur, Dick Marty, reinforces concerns regarding the complicity of European governments.<sup>134</sup> The Parliamentary Assembly even goes so far as to claim that fourteen member states were involved in extraordinary renditions.<sup>135</sup> In response, while referring to the European Commission's limited control over the intelligence services, European Commissioner Franco Frattini promised to formulate stricter provisions on what is permitted and what is not.<sup>136</sup> The

130 Defined in the interim report as capturing persons and transporting them to unknown destinations without the involvement of criminal justice authorities or any court proceedings.

131 See UN Doc. E/CN.4/2006/94.

132 See Council of Europe document DH-S-TER (2005) 18.

133 See 'No guidelines on empty "no torture" promises, Council of Europe rejects minimum standards for diplomatic assurances', Human Rights Watch, press release, 3 April 2006, New York.

134 See D. Marty, *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states*, draft report, Part II, Council of Europe Parliamentary Assembly, Strasbourg, 7 June 2006.

135 See Resolution 1507, Council of Europe, 27 June 2006. There are thought to be over 20 European countries involved. See also 'VN erg kritisch over kampen VS' (UN highly critical of US camps), *Volkscrant*, 29 July 2006, p. 4.

136 See 'Rendition will get closer look; Rights panel keeps prison inquiry open', *International Herald Tribune*, 28 June 2006, p. 3.

AIV also refers to the actions of the Secretary General of the Council of Europe, who, pursuant to his powers under Article 52 of the ECHR, asked the member states to provide information on the possible involvement of public officials in the detention of persons at the request of foreign intelligence services. The information obtained from studies and reports has prompted the European Parliament to strongly condemn the use of extraordinary rendition and the role of the United States in this practice and to urgently request the member states to scrupulously respect the principle of *non-refoulement* laid down in Article 3 of the UN Convention against Torture.<sup>137</sup> The AIV welcomes these developments.

#### **V.4 Relationship between human rights and international humanitarian law**

Although international humanitarian law does not apply to terrorist acts perpetrated *outside* the framework of an armed conflict, international human rights do. Conversely, the question arises whether international humanitarian law is the only law that applies to terrorist acts perpetrated within the framework of an armed conflict or whether international human rights also apply to such acts.

In General Comment 31 (2004), the UN Human Rights Committee states that the ICCPR also applies during armed conflicts and that it is complementary to international humanitarian law. The International Court of Justice confirmed this general principle in 2004,<sup>138</sup> and the Inter-American Commission on Human Rights has clarified the relationship between these two areas of law in the same manner in its case law.<sup>139</sup>

Furthermore, in their joint report on Guantánamo Bay, five UN rapporteurs reiterate the view that human rights are complementary to international humanitarian law. They, too, regard international humanitarian law as *lex specialis* in relation to human rights. Thus, with regard to the prisoners in Guantánamo Bay, the rules of international humanitarian law concerning the detention of persons participating in hostilities have precedence over Article 9 of the ICCPR on arbitrary detention. However, this only applies to those prisoners detained during and in connection with an armed conflict. For all others, the prohibition of arbitrary detention in Article 9 automatically applies.<sup>140</sup>

Persons who have been taken prisoner during an international armed conflict can be divided into three categories:

1. prisoners of war, who are entitled to broad protection under the Third Geneva Convention;

137 See Document 2006/2007 (INI), 24 April 2006, paras. 5, 6 and 13.

138 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion, 9 July 2004, para. 106. See also UN Doc. E/CN.4/2005/103 of 7 February 2005, para. 27.

139 See *Precautionary Measures in Guantánamo Bay, Cuba*, Inter-American Commission on Human Rights, 13 March 2002, as cited in the *Digest of Jurisprudence of the UN and Regional Organisations on the Protection of Human Rights while Countering Terrorism*, OHCHR, 2003, p. 15.

140 For the arguments presented in this paragraph, see UN Doc. E/CN.4/2006/120 of 27 February 2006, paras. 15, 16, 19 and 20.



2. 'unprivileged belligerents', who under international customary law are entitled to humane treatment of the level prescribed in common Article 3 of the Geneva Conventions and Article 75 of the First Additional Protocol; and
3. the civilian population, whose rights are enshrined in the Fourth Geneva Convention, in particular.<sup>141</sup>

At present there is disagreement on the more technical question of whether persons falling under category 2 can directly invoke certain rights from the Geneva Conventions in addition to rights derived from international customary law. During the past few years, the US government has taken the position that the Geneva Conventions do not apply to these so-called 'unlawful combatants'. However, the US Supreme Court has recently rejected this position, ruling that common Article 3 of the Geneva Conventions does in fact apply.<sup>142</sup> In this connection, it should be noted that Article 5 of the Third Geneva Convention prescribes a procedure for cases in which there are doubts regarding the status of prisoners of war and that Article 4 of the Fourth Geneva Convention excludes certain categories of persons from protection under the Fourth Geneva Convention solely on the basis of nationality. Furthermore, the AIV observes that at the very least there is broad agreement that, regardless of their nationality, all persons in the second category are entitled to humane treatment in accordance with the standards laid down in common Article 3 of the Geneva Conventions and Article 75 of the First Additional Protocol. Such persons should be released as soon as the conflict is over, since the main purpose of their detention is to prevent them from participating any further in hostilities. However, they can be tried for committing criminal offences, including terrorist acts, and may therefore be held in pre-trial detention in accordance with the applicable statutory provisions.<sup>143</sup>

With regard to prisoners of war and other prisoners held outside the territory of the detaining state, the AIV points out that states are obliged to comply with human rights treaties in relation to persons within their jurisdiction, regardless of their geographical location – the argument being that they exercise effective control over these persons. This obligation also applies to peacekeeping and other military operations involving

141 See UN Doc. E/CN.4/2006/120 of 27 February 2006, para. 22. See also G.H. Aldrich, 'The Taliban, Al Qaeda and the Determination of Illegal Combatants', *American Journal of International Law*, Vol. 96, No. 4, 2002, pp. 891, 893; and N.J. Schrijver, 'Elf september en het internationale recht' (September 11 and International Law), *NJB*, Vol. 80, No. 32, 2005, pp. 1688-1692.

142 See E. van Sliedregt, 'Guantanamo Bay. Het Amerikaans Hooggerechtshof en de rechten van "onwettige vijandelijke strijders"' (Guantánamo Bay: The US Supreme Court and the rights of 'unlawful enemy combatants'), *NJB*, Vol. 80, No. 2, 2005, pp. 80-86; and US Supreme Court, *Hamdan v. Rumsfeld*, No. 05-184, judgment of 29 June 2006.

143 For this paragraph, see UN Doc. E/CN.4/2005/103 of 7 February 2005, paras. 20-21, and UN Doc. E/CN.4/2006/120 of 27 February 2006, para. 22.

many countries, for example, the Dutch mission to the Afghan province of Uruzgan.<sup>144</sup> In this sense, human rights treaties have extraterritorial effect.

## **V.5 Improving human rights law with a view to combating terrorism**

In response to the question of how the corpus of international human rights law can be improved with a view to combating terrorism, the AIV would conclude that a distinction needs to be made between the existing normative framework in the field of human rights and the use of measures to promote and, if necessary, enforce observance and compliance.

Broadly speaking, although there continues to be a need for more detailed rules in certain areas and for the benefit of certain categories of persons, such as indigenous peoples, the disabled and homosexuals, the codification process of international human rights has largely been completed. On the other hand, the AIV has repeatedly expressed concern about the danger that existing human rights norms are being seriously undermined in the context of the necessary and legitimate fight against terrorism. As argued above, this is illustrated by the fact that the absolute ban on torture is under threat from various quarters. The AIV believes that the above-mentioned danger should not be dealt with by means of additional codification or the introduction of new international human rights standards but rather by the stricter enforcement of existing standards.

In this context, the AIV considers two approaches of vital importance. The first is to strengthen the mechanisms which enable states to take account of human rights norms in a timely manner while developing national and international measures to prevent and combat terrorism. The AIV has repeatedly emphasised this type of coordination. Thus, for example, it has argued that the counterterrorism organs falling under the Security Council, such as the CTC and the Al Qaida Sanctions Committee, should take account of human rights in their mandates and actions. With regard to the European Union, moreover, the AIV endorses both the importance of coordinating human rights instruments and counterterrorism instruments and the need to incorporate a human rights test into legislation and other measures adopted in the fight against terrorism. The aim of this approach is to ensure that, from the outset, policymakers and implementing agencies take account of human rights in designing, enacting and enforcing counterterrorism measures.

The second approach, which is actually inseparable from the first, is to strengthen national and international oversight and monitoring of the compatibility of legislative and executive measures aimed at combating terrorism with the basic safeguards

144 For judgments of regional human rights organs, see European Court of Human Rights, *Cyprus v. Turkey*, preliminary objections, judgment of 26 April 1979, Series A, No. 30; *Loizidou v. Turkey*, preliminary objections, judgment of 23 March 1995, Series A, No. 310, paras. 59-64. For a limitation of extraterritorial effect, see European Court of Human Rights, *Bankovic and others v. Belgium and others*, admissibility decision, application No. 52207/99, 12 December 2001. See also UN Human Rights Committee, General Comment 31 (2004): Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, para. 10. See also UN Doc. E/CN.4/2005/103 of 7 February 2005, para. 25, and UN Doc. A/60/374 of 22 September 2005, para. 15. Cf. the case concerning the murder of Argentinians in Uruguay, Human Rights Committee, *Lopez Burgos v. Uruguay*, Communication No. 52/1979, CCPR/C/13/D/52/1979, 29 July 1981.

established by international human rights norms. In this connection, the role of independent courts in the protection of statutory rights is extremely important, as substantiated by various judgments of the highest courts in the United States and the United Kingdom.<sup>145</sup> Attention should be devoted not only to the role of national judicial authorities but also to the tasks performed by international judicial and semi-judicial bodies like the European Court of Human Rights and the various UN treaty committees. The decisions of these bodies – in the form of case law, general recommendations and country-specific recommendations – help to consolidate and develop the corpus of human rights law, especially in the context of the fight against terrorism, as is evident from many of these decisions.<sup>146</sup> Being more reactive than preventive, these judicial and semi-judicial tasks are not as effective as they might be. Nevertheless the AIV believes they play a key part in safeguarding human rights in the fight against terrorism, due to the authoritative status of the bodies concerned. The AIV therefore contends that these bodies should have more human and material resources at their disposal to enable them to perform their tasks in a dynamic and effective manner.

Over the years, to complement the work of the treaty organs, the now defunct UN Commission on Human Rights developed many special procedures involving Special Rapporteurs and working groups.<sup>147</sup> These rapporteurs and working groups were in a better position than the treaty organs to initiate action, whether on the basis of a complaint or otherwise, by raising issues of serious concern, conducting studies, confronting governments individually or collectively, and then reporting to the UN policy organs. Since 2001, many of the special procedures, such as those on torture, arbitrary detention, freedom of expression, freedom of religion, racial discrimination and others, have thus devoted explicit attention to safeguarding the specific human rights falling under their mandates in the context of the fight against terrorism. This is illustrated by the aforementioned joint report of five Special Rapporteurs concerning the situation of detainees at Guantánamo Bay.

Nevertheless, there proved to be a need for a special mandatory who could devote himself fully to promoting and protecting human rights in the fight against terrorism, thereby complementing the efforts of other human rights organs and taking a proactive approach to governments, international organisations and non-governmental organisations. The appointment of a Special Rapporteur with such a mandate by the UN Commission on Human Rights in April 2005 was therefore a very important development.<sup>148</sup> The position went to the Finnish human rights expert Martin Scheinin. His first report is evidence of an active, hands-on approach. In preparing that report he subjected legislation and enforcement practices in various countries to a critical examination (sometimes visiting the country in question personally), addressed complaints (often together with other Special Rapporteurs) and maintained contact with

145 See UN Doc. E/CN.4/2005/103, paras. 13-15.

146 See *Digest of Jurisprudence of the UN and Regional Organisations on the Protection of Human Rights while Countering Terrorism*, United Nations, New York and Geneva, 2003.

147 Now that it has succeeded the UN Commission on Human Rights, the Human Rights Council has the power to extend the mandates of special procedures.

148 Commission resolution 2005/80 of 21 April 2006.

relevant international institutions like the CTC. His report also devotes detailed attention to the definition of terrorism, the ideal role of human rights in the CTC's work on country reports and the modalities of cooperation between the Special Rapporteur and the CTC.<sup>149</sup> The AIV is convinced that the Special Rapporteur has taken up his monitoring tasks with great vigour and that he can continue to play a positive role in promoting and protecting human rights norms in cooperation with other human rights organs. The AIV accordingly believes that the Special Rapporteur's work deserves strong support and that he should be granted sufficient human and material resources to do his job effectively.

Finally, the AIV wishes to highlight the importance of authoritative statements from senior international officials, such as the UN Secretary-General, the UN High Commissioner for Human Rights and the Council of Europe's Commissioner for Human Rights. In various settings and in response to various developments, they have increasingly expressed the need to respect human rights in the context of the fight against terrorism.<sup>150</sup>

In summary, the AIV concludes that the corpus of international human rights law should be strengthened chiefly by means of two approaches: promoting the coordination of human rights instruments and counterterrorism instruments, both in the United Nations and in the European Union, and enhancing the monitoring tasks of the existing judicial, semi-judicial, supervisory and advisory bodies in the field of human rights. The AIV advises the government to provide strong political and material support to strengthen these approaches.

149 See UN Doc. E/CN.4/2006/98.

150 This includes statements by UN High Commissioner for Human Rights Louise Arbour on diplomatic assurances and extraordinary rendition and by Commissioner Alvaro Gil-Robles of the Council of Europe on Sweden and the United Kingdom.

## **VI Summary, conclusions and recommendations**

### *General*

In its request for advice, the government took the situation after the terrorist attacks of 11 September 2001 as its starting point. A series of attacks perpetrated in various countries and locations after 11 September 2001 has highlighted the necessity and urgency of effective counterterrorism. The AIV, though acutely aware that terrorism has a long history, has accordingly focused on the fight against contemporary terrorism at international and European level.

In this advisory report on the fight against international terrorism, the AIV starts from the premise that the aims of safeguarding the rule of law and upholding the rights and safety of individuals are inseparable. In each step taken against terrorism, the authorities must do everything in their power to ensure that there are no casualties and that society is not disrupted. Terrorism constitutes a direct attack on human rights, in particular the right to life, which the state is duty bound to protect. At the same time, as the AIV also argues in its interim report, counterterrorism measures must be compatible with the rule of law and the obligations undertaken by states in accordance with international law, especially international human rights.

In order to adopt effective measures against the dangers and threats posed by terrorism, it is important to realistically assess and reassess these dangers and threats based on all the available information. In doing so, the authorities must consider what measures are likely to be effective and how the costs of such measures to the rule of law, society and the economy relate to other public interests. The extent of the measures should be no more – but also no less – rigorous than warranted by the need to combat terrorism and protect the public effectively. This implies a need for periodic evaluations of the international counterterrorism arsenal and, consequently, the possible modification of this arsenal in accordance with rising and falling threat levels.

The AIV supports the view that every counterterrorism strategy should comprise elements focusing on immediate and serious threats as well as elements aimed at eliminating or reducing the factors that contribute to the emergence of terrorist movements. Such a comprehensive approach requires short, medium and long-term policies. The AIV notes with approval that the United Nations and the European Union clearly recognise the need to combine prevention and suppression. The AIV draws particular attention to the effects and side-effects of counterterrorism instruments. In its view, force as an instrument of counterterrorism should be applied with the greatest possible restraint, due to the inherent risk of escalation and radicalisation. The latter applies in particular to the disproportionate use of force.

### *Roots of terrorism and policy development*

The AIV starts from the premise that identifying and analysing the factors and circumstances that may give rise to terrorism is important for developing policies to prevent terrorist attacks. It bears mentioning, however, that evincing understanding for these factors and circumstances in no way implies a justification of terrorist methods.

Without claiming to present a comprehensive picture of the factors that encourage radicalisation and recruitment, the AIV has formed a general impression of these

factors and identified five that merit particular attention: (i) *unstable or failing states*, which generally provide a facilitative environment for international crime and terrorism; (ii) justified or unjustified feelings of *marginalisation* at international and domestic level, combined with political and social and/or economic isolation and leading to frustration and susceptibility to radicalisation; (iii) *conflicts* of a nationalistic, ethnic, religious or tribal nature that often give rise to violent resistance, including terrorist acts; (iv) the *cultural and historical context*, which manifests itself in several ways, including hostility towards Western ideas and interests ('Occidentalism'), and which is simultaneously reinforced by existing misconceptions and flaws in counterterrorism policy (e.g. torture, Guantánamo Bay, disproportionate force and the practice of equating jihad with terrorism); and (v) specifically within Western Europe, a general *failure to integrate* immigrant communities, in particular Islamic minorities, combined with socioeconomic and political discrimination which can lead to hopelessness, frustration and anti-social behaviour.

The AIV is aware that it is no simple matter to translate the above factors into specific policy measures. A particular factor or circumstance that gives rise to terrorism may be a historical fact, and therefore irreversible. In the light of its mandate, the AIV focuses on the foreign policy dimension of this issue. Policies that have their own intrinsic value, but which may also have a preventive effect as key elements of counterterrorism policy, have been discussed earlier in this report and have implications extending from the short term to the long term. Bearing this in mind, the AIV advises the government to play an active role – both independently and, in particular, multilaterally – in the following areas:

- global dialogues and efforts to encourage mutual understanding between different countries and different religions, as established in the framework of UNESCO and the United Nations and through initiatives of individual countries, NGOs and religious organisations;
- projects and technical assistance as recommended by the CTC to complement the UNDP programmes on good governance and strengthen law enforcement capacity, involving the Office of the High Commissioner for Human Rights (OHCHR) and the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime (UNODC);
- promotion by the European Union of assistance programmes on good governance, human rights, democracy, education, economic welfare and conflict resolution and of its own action plan with a view to establishing an active integration policy on minorities and, more specifically, marginalised groups;
- improving observance of universal human rights around the world and demonstrating that the West does not apply double standards, as previously recommended in the AIV's interim report on the prohibition of torture;
- making conflict prevention, conflict resolution and post-conflict reconstruction key elements of any counterterrorism policy and promoting a more active EU Middle East policy, which would include greater pressure on Israel and continued pressure on Hamas to recognise Israel, in view of the position of the parties concerned and the image of the West in the wider Islamic world;
- employing various instruments to promote resistance to radicalisation, including greater disclosure of financial flows to reveal who is funding radical activists and agitators, promoting academic research, promoting the dissemination of information (for example on international norms), promoting international contacts so that ordinary Muslims and imams alike can gain an insight into the many legitimate movements and traditions within Islam, and providing more study grants for students from Muslim countries; and

- creating better conditions for the integration of immigrants, for example by combating discrimination on the grounds of race, national or ethnic origin and religion, promoting and protecting minority rights and, more generally, complying with human rights treaties, and ensuring that the Netherlands continues to render account on this point in an effective way to the competent organs of the UN, the Council of Europe and the EU.

#### *International instruments*

In its assessment of counterterrorism measures adopted at international and European level, particularly in the framework of the United Nations, the Council of Europe, the European Union, the OSCE and NATO, the AIV is constantly on the lookout for new ways of strengthening the international counterterrorism arsenal and employing it more effectively. In this context, the AIV emphasises that the effectiveness of this arsenal largely depends on how states enforce the required measures, both independently and jointly.

One of the ways to establish a basis for combating terrorism is by adopting treaty norms. During the past 40 years, the United Nations has drawn up thirteen conventions on this subject. The negotiations on a comprehensive UN convention against terrorism have proceeded with difficulty for many years. Unfortunately, the AIV is forced to conclude that agreement on an international legal definition of terrorism is still a long way off. The controversies surrounding state terrorism and the struggle against foreign rule are still as relevant as ever. Although a comprehensive convention would, in the AIV's opinion, help to transform the current fragmented approach involving thirteen conventions into a more coherent strategy, the lack of a universal definition should not impede counterterrorism policy. For policy purposes, the definition that appears in Security Council resolution 1566 of 8 October 2004, which was adopted unanimously, is perfectly adequate.

The AIV further believes that the recently adopted Council of Europe Convention on the Prevention of Terrorism is a useful additional instrument for combating terrorist activity. However, the ambiguous nature of certain core provisions should not be overlooked. This applies in particular to the criminalisation of 'public provocation' to commit a terrorist offence, which raises conflicts with the freedom of expression.

It is important to give a high priority to monitoring compliance with norms and required policy measures aimed at combating terrorism. Within the UN, the CTC and its Executive Directorate (CTED) play a vital role with respect to the member states' reporting requirements (and the consolidation of those requirements) and country visits aimed at obtaining additional information on requirements relating to counterterrorism capacity. Likewise, the AIV believes the European Union should place a stronger emphasis on monitoring the member states' efforts to comply with counterterrorism agreements, for example by providing adequate and specific details of this monitoring in public progress reports.

Cooperation and the mechanisms that have been established for this purpose or that can be employed more effectively to combat terrorism are an essential part of the counterterrorism arsenal. These include the exchange of information and the standardisation of procedures and classifications, which should ideally lead to improved operational cooperation between investigative services. The effectiveness of Europol's role should also be considered more closely. The AIV further believes that a number of specific counterterrorism mechanisms developed within the EU framework,

such as the European Arrest Warrant, which is meant to accelerate the transfer of suspects, and the financial sanctions regime regarding persons and organisations linked to terrorist activities, which is meant to facilitate the implementation of relevant Security Council resolutions, should be regarded as strengthening the counterterrorism arsenal.

*The framework and architecture of international organisations and institutions* are also part of the international counterterrorism arsenal. As regards the United Nations, the AIV supports the Secretary-General's aim to improve the coherence of the various organs and the departments of the Secretariat. The AIV is not however in favour of starting a process aimed at creating a new counterterrorism organisation within or outside the UN framework. With regard to the European Union, the AIV values the role of the Counterterrorism Coordinator and would like to see the position strengthened and made more accountable to the European Parliament. A stronger Coordinator also depends on improved cooperation between the operational investigative services. Again with regard to the European Union, the AIV argues that all counterterrorism measures should be adopted in as decisive a manner as possible, in the interests of effectiveness and legitimacy. This may imply that decision-making in the field of counterterrorism should be transferred from the third pillar to the first. The AIV will examine this issue in a forthcoming report.

*Military action* should only be employed as a counterterrorism instrument in exceptional cases. The United Nations' system of collective security has served as a framework for such action since 11 September 2001. For the record, the AIV wishes to point out that, under international law, self-defence pursuant to Article 51 of the UN Charter entails a number of restrictions. In the context of counterterrorism operations, the AIV believes that the concept of self-defence should not be stretched so far that it applies without restriction to action that goes beyond combating the original attackers.

#### *Legal principles and legitimacy*

The AIV emphasises once again that the instruments used to combat terrorism should be efficient and effective. At the same time, they should be applied in accordance with certain principles underlying the rule of law, such as fundamental human rights, and with due regard for the powers granted to the relevant international organs. The AIV believes policy measures (i.e. both legislation and its implementation) should be examined for their compatibility with democratic legitimacy, transparency and proportionality, and periodically reassessed.

The AIV observes that the Security Council has adopted far-reaching measures to combat terrorism, in particular since the attacks of 11 September 2001, and that in doing so it has, in effect, appropriated legislative and judicial powers. The AIV does not dispute the legality of this exercise of powers, though it does believe that the Security Council should increase the legitimacy of its actions by accounting for them in a more substantive manner and by aiming for compatibility with substantive human rights norms, for example with regard to sanctions that apply directly to individuals, whether or not they are actually targets of a criminal investigation. Continuous assessment and periodic evaluations according to the criteria of necessity and proportionality also remain necessary.

With regard to key operational instruments introduced by the European Union to combat terrorism effectively, the AIV believes that the EU does not fully respect certain fundamental legal principles in practice. It therefore argues that the envisaged



Framework Decision on certain procedural rights in criminal proceedings, which sets out essential human rights norms in the field of criminal procedure that all member states must observe, should be adopted as soon as possible as a counterweight to the EAW. On the issue of financial sanctions, the AIV calls for an active focus on the legal protection of the persons and organisations concerned. In particular, they should not be denied the right to challenge in court a decision to place them on a sanctions list. Furthermore, the AIV argues that counterterrorism measures should be examined for compatibility with the criteria of necessity and proportionality in cases where the protection of personal data is at issue.

In general, the AIV recommends a more open assessment of the impact of EU measures on the rights of citizens. Within the European Union, the legal department of the Council Secretariat or the Commission could play a role in this regard, provided that the results of the assessment are made public. In addition, the adoption of far-reaching measures should be preceded by a public debate, in which the European Parliament, as well as national parliaments, are given a chance to examine closely how governments assess the various issues concerned. Finally, the AIV emphasises that the European Union must ensure, by fostering transparency and conducting periodic evaluations, that counterterrorism powers are not used for other purposes and do not remain in force after the specific threat has passed.

#### *Respect for human rights*

In its request for advice, the government specifically asks to what extent human rights can be restricted in the fight against terrorism. The answer to this question lies in the prevailing norms and case law, which both underscore the principles of necessity and proportionality. The existing human rights system provides sufficient options for restricting these rights or taking even more far-reaching temporary measures in times of emergency. The AIV emphasises the need to exercise restraint in this regard, in order to ensure that the system is not undermined, and to strictly comply with the requirements of national and international control.

The AIV would reiterate that certain rights (e.g. the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment) are absolute and, as such, cannot be violated under any circumstances. The AIV remains concerned about ongoing developments that undermine the ban on torture. These are described in its interim report of December 2005. In this context, the AIV emphasises once again that the principle of non-refoulement, as enshrined in the relevant conventions and case law, should be respected unconditionally and that the practice of extraordinary rendition, which often involves the use of secret transports and occurs without any form of legal authorisation, violates the basic principles of international law.

With regard to prisoners of war and other prisoners held outside the territory of the detaining state due to alleged involvement in terrorist activities, the AIV points out that states are also obliged to comply with human rights treaties in the case of persons located outside their territory, when such persons are under their effective control and authority. This obligation also applies to peacekeeping and other military operations involving the Netherlands and other countries, for example, the Dutch mission to the Afghan province of Uruzgan.

The AIV sees the further reinforcement of the corpus of human rights law less in terms of new norms and more in terms of the stricter enforcement and observance of

existing norms. This requires better coordination of human rights instruments and counterterrorism measures. In addition, it is imperative to incorporate a human rights test into legislation and other measures adopted in the fight against terrorism. This applies both to the counterterrorism organs falling under the Security Council and the counterterrorism activities and instruments employed at EU level.

The AIV further believes that there is a need to strengthen national and international oversight and monitoring of the compatibility of legislative and implementing measures aimed at combating terrorism with basic human rights norms. In this connection, it would point to the important role of independent judicial and semi-judicial organs at national and international level. The AIV also believes that the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, who was appointed in 2005, deserves strong support.

The AIV thus concludes that, in the fight against terrorism, the full corpus of international human rights law should be strengthened chiefly by means of two approaches: promoting the coordination of human rights instruments and counterterrorism instruments, both in the United Nations and in the European Union, and intensifying the monitoring tasks of the existing judicial, semi-judicial, supervisory and advisory organs in the field of human rights. The AIV therefore advises the government to provide strong political and material support to strengthen these approaches.

In summary, the AIV concludes that terrorism is never justifiable and that it must be fought. However, this fight should always be compatible with the rule of law and the principles of international law, in particular those concerning human rights, refugee law and humanitarian law.

Mr F. Korthals Altes  
Chairman of the Advisory Council  
on International Affairs  
Postbus 20061  
2500 EB Den Haag

Ministry of Foreign Affairs  
Political Affairs Department  
Bezuidenhoutseweg 67  
2594 AC Den Haag

Date 15 July 2005  
Our ref. DPZ-234/05  
Page 1/5  
Encl.

Contact Jules Gerzon  
Tel. 070-348 5503  
Fax 070-348 4638  
Email jules.gerzon@minbuza.nl

Re: Request for advice on combating terrorism from a European and international perspective

Dear Mr Korthals Altes,

The bombings of 7 July 2005 in London emphasised yet again the urgency and necessity of combating terrorism effectively. Since the attacks on 11 September 2001, a myriad of anti-terrorism measures has been introduced worldwide. The attacks of 11 March 2004 in Madrid sharpened Europe's awareness of the threat, prompting an additional package of measures and the appointment of an anti-terrorism coordinator for the EU. The Dutch government introduced measures to increase safety in the Netherlands and prevent terrorists making preparations within its borders for attacks elsewhere. In the post 11 September era, individual nations, the European Union and the international community should be developing anti-terrorism measures that reinforce and complement each other.

During its presidency of the EU in 2004, the Netherlands dedicated itself to strengthening anti-terrorism measures within the EU framework and implementing the related legislation that had already been adopted. In addition, it actively laboured to improve enforcement by EU member states of international sanctions against terrorist organisations. During the Dutch presidency, the EU began providing technical assistance to third countries on the basis of EU threat analyses. Since 2001 the Netherlands has been engaged nationally and internationally (e.g. within the United Nations and the Financial Action Task Force) in the development of effective measures against terrorism financing, and has consistently emphasised the need to introduce preventive measures.

In its bilateral and multilateral relations, the Dutch government stresses the importance of fulfilling human rights obligations and international humanitarian commitments in the fight against terrorism. Examples of this include its consultations with the United States regarding the treatment of prisoners in Guantánamo Bay, Afghanistan and Iraq and its efforts in 2005 within the UN Human Rights Commission to obtain a resolution on respect for human rights in the fight against terrorism. In this regard, a Special Rapporteur was appointed and given a strong mandate to advise states, to respond to information that comes to his attention and developments that could lead to human rights violations, to visit countries, and to coordinate cooperation between governments, UN bodies and agencies, NGOs and regional and national institutions.

Introducing measures to prevent attacks and protect Dutch citizens and suppressing terrorists groups is of the highest priority to the Dutch government. In addition, there is growing interest in what drives terrorists and, perhaps more importantly, in trying to understand why some citizens support terrorism implicitly or explicitly. While research data is available, an all-embracing explanation for terrorism and support for terrorism remains elusive. Another important question is whether the factors that fuel terrorism and radicalism could be eroded by, for example, US and European initiatives for reform in the Middle East and North Africa.

The High Level Panel (HLP) of the United Nations recently published a report focusing for a large part on a comprehensive strategy for suppressing international terrorism. The report addressed the issue of the Comprehensive Convention Against International Terrorism and the definition of terrorism, the set of international sanctions including those described in UN Security Council resolutions 1267 and 1390, the UN Convention against Nuclear Terrorism, the importance of respecting human rights and civil liberties, and the underlying causes of terrorism.

The HLP report sets the tone for an international debate on the role of the international community as a whole in tackling transnational problems. In his speech at the International Summit on Democracy, Terrorism and Security in Madrid in March 2005, UN Secretary-General Kofi Annan said that fighting terrorism was one of the most important challenges facing us in the decades ahead. He urged the international community to form a united front and called for effective international cooperation to combat terrorism, the very aim of which is to disrupt society and the international legal order. At the same time, Mr Annan emphasised the importance of respecting human rights and the rule of law.

The Dutch government supports the Secretary-General's view that combating terrorism calls for an effective response from the international community. This response should not only focus on terrorism but also on the strategic elimination of the roots of terrorism and radicalisation. The international response should be reflected in regional and national measures. The Dutch government adds that the measures we take should be in compliance with our obligations with respect to human rights and under international humanitarian law.

The government asks the Advisory Council on International Affairs (AIV) to assess the fight against international terrorism since 11 September 2001 and to look ahead at the agenda for the coming years, as outlined in the HLP report. I would ask the Council to devote special attention to discussing the ways in which international measures impact on the national approach and vice versa.

The Dutch government also requests the AIV to advise on how human rights and the rule of law can best be safeguarded in the struggle against terrorism. The government is especially interested in whether the AIV finds there is justification for restricting human rights and international humanitarian law and, if so, to what degree and in what circumstances.

I would like to ask the AIV to address the following points in its advisory report:

1. What is the AIV's assessment of the international measures taken to combat international terrorism in response to the attacks of 11 September 2001? And more specifically, what is the AIV's view on the development of the international legal order with regard to combating terrorism, particularly in terms of the relevant UN Security Council resolutions and UN conventions and their influence on the European and national legal order?
2. How can the international acquis for combating terrorism be strengthened? Does the AIV believe that improvements can be achieved through more legislation or through improved implementation and, where necessary, enforcement of existing conventions and Security Council resolutions?
3. What is the AIV's assessment of international and European policy development and the underlying analysis in terms of the fundamental causes of radicalisation and its international roots? What is the AIV's opinion on the development of international and European policy on the underlying causes of recruitment of individuals for terrorist objectives and implicit and explicit support of terrorist groups? Are there gaps or shortcomings in the underlying analysis or policymaking with regard to radicalisation and recruitment?
4. To what extent can the relevant analysis and policy help in the medium to long term to curb radicalisation and, consequently, the terrorist threat?
5. What should the Netherlands be doing to continue building analysis capacity, developing know-how and instruments for strengthening the international architecture for both the prevention and the suppression of terrorism?
6. What could the Netherlands do to add to or possibly intensify the international initiatives already in place to combat the financing of terrorism and to support third countries (i.e. a contribution which, relative to the contributions of other countries, could enhance effectiveness, and may be made autonomously and through international cooperation)?
7. In its report, the HLP discusses the definition of terrorism. Of the defining elements proposed by the HLP, terrorism during armed conflict receives the most attention. In his report to the 61st session of the UN Commission on Human Rights,<sup>1</sup> independent expert Robert K. Goldman insists that the struggle against terrorism should not invariably be conflated with acts of war. How does the AIV assess the HLP definition of terrorism in the light of Mr Goldman's remarks?
8. What is the AIV's view on the applicability of human rights conventions and conventions on humanitarian law in the event that the fight against terrorism leads to armed conflict or is ongoing during an armed conflict, specifically in relation to the treatment of detained terrorist suspects? Can individuals or groups of individuals detained on suspicion of terrorism during an armed conflict fall outside the Geneva Conventions or be disqualified from protection under the Conventions?

1 E/CN.4/2005/103, part III.C, para. 17 et seq.

9. In view of the extraordinary and sometimes far-reaching measures that public authorities are required to take to protect the population against terrorism, could the AIV explain its views on the limits of justifiable restrictions of human rights and international humanitarian law? What is the AIV's opinion in this respect on the suspension of certain rights and the invocation of derogation provisions?
10. Intelligence gathering is an essential part of preventing terrorist acts. In that light, what is the AIV's opinion on how public authorities should handle information obtained from third parties when it is unclear how it was obtained, partly in view of the absolute ban on torture. I am also interested in the AIV's opinion on whether diplomatic guarantees concerning the proper treatment of persons to be extradited on suspicion of terrorism to countries where human rights violations occur are an acceptable means of safeguarding these persons' rights.
11. In the AIV's opinion, how can the international human rights acquis be improved with respect to the fight against terrorism? Should greater emphasis be placed on new legislation or on implementation and enforcement of existing human rights instruments?

I look forward to receiving your advisory report at your earliest convenience.

Copies of this letter will be sent to the President of the House of Representatives of the States General and the President of the Senate of the States General.

Yours sincerely,

(signed)

Bernard Bot  
Minister of Foreign Affairs

**List of Abbreviations**

<b>AER</b>	General Energy Council
<b>AIV</b>	Advisory Council on International Affairs
<b>AIVD</b>	General Intelligence and Security Service
<b>ATU</b>	Action against Terrorism Unit
<b>AVV</b>	Advisory Council on Peace and Security
<b>CAVV</b>	Advisory Committee on Issues of Public International Law
<b>CFSP</b>	Common Foreign and Security Policy (of the EU)
<b>CIA</b>	Central Intelligence Agency (of the USA)
<b>CODEXTER</b>	Council of Europe Committee of Experts on Terrorism
<b>CTC</b>	Counterterrorism Committee of the United Nations
<b>CTED</b>	Counterterrorism Executive Directorate
<b>CTITF</b>	Counterterrorism Implementation Task Force
<b>EAW</b>	European Arrest Warrant
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>ESCWA</b>	Economic and Social Commission for Western Asia
<b>ETA</b>	Euskadi Ta Askatasuna
<b>EU</b>	European Union
<b>HCHR</b>	UN High Commissioner for Human Rights
<b>HLP</b>	High-Level Panel
<b>IAEA</b>	International Atomic Energy Agency
<b>ICAO</b>	International Civil Aviation Organisation
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICG</b>	International Crisis Group
<b>ICLN</b>	International Criminal Law Network
<b>IMF</b>	International Monetary Fund
<b>IMO</b>	International Maritime Organisation
<b>IRA</b>	Irish Republican Army
<b>ISAF</b>	International Security Assistance Force
<b>NATO</b>	North Atlantic Treaty Organisation
<b>NGOs</b>	Non Governmental Organisations
<b>OHCR</b>	Office of the High Commissioner for Human Rights
<b>OSCE</b>	Organisation for Security and Cooperation in Europe
<b>OPCW</b>	Organisation for the Prohibition of Chemical Weapons
<b>ROB</b>	Public Administration Council
<b>UN</b>	United Nations
<b>UNDP</b>	United Nations Development Program
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organisation
<b>WRR</b>	Netherlands Advisory Council for Government Policy

## Previous reports published by the Advisory Council on International Affairs

- 1 AN INCLUSIVE EUROPE, *October 1997*
- 2 CONVENTIONAL ARMS CONTROL: urgent need, limited opportunities, *April 1998*
- 3 CAPITAL PUNISHMENT AND HUMAN RIGHTS: recent developments, *April 1998*
- 4 UNIVERSALITY OF HUMAN RIGHTS AND CULTURAL DIVERSITY, *June 1998*
- 5 AN INCLUSIVE EUROPE II, *November 1998*
- 6 HUMANITARIAN AID: redefining the limits, *November 1998*
- 7 COMMENTS ON THE CRITERIA FOR STRUCTURAL BILATERAL AID, *November 1998*
- 8 ASYLUM INFORMATION AND THE EUROPEAN UNION, *July 1999*
- 9 TOWARDS CALMER WATERS: a report on relations between Turkey and the European Union, *July 1999*
- 10 DEVELOPMENTS IN THE INTERNATIONAL SECURITY SITUATION IN THE 1990s: from unsafe security to unsecured safety, *September 1999*
- 11 THE FUNCTIONING OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS, *September 1999*
- 12 THE IGC AND BEYOND: TOWARDS A EUROPEAN UNION OF THIRTY MEMBER STATES, *January 2000*
- 13 HUMANITARIAN INTERVENTION, *April 2000\**
- 14 KEY LESSONS FROM THE FINANCIAL CRISES OF 1997 AND 1998, *April 2000*
- 15 A EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS?, *May 2000*
- 16 DEFENCE RESEARCH AND PARLIAMENTARY SCRUTINY, *December 2000*
- 17 AFRICA'S STRUGGLE: security, stability and development, *January 2001*
- 18 VIOLENCE AGAINST WOMEN: LEGAL DEVELOPMENTS, *February 2001*
- 19 A MULTI-TIERED EUROPE: the relationship between the European Union and subnational authorities, *May 2001*
- 20 EUROPEAN MILITARY-INDUSTRIAL COOPERATION, *May 2001*
- 21 REGISTRATION OF COMMUNITIES BASED ON RELIGION OR BELIEF, *June 2001*
- 22 THE WORLD CONFERENCE AGAINST RACISM AND THE RIGHT TO REPARATION, *June 2001*
- 23 COMMENTARY ON THE 2001 MEMORANDUM ON HUMAN RIGHTS POLICY, *September 2001*
- 24 A CONVENTION, OR CONVENTIONAL PREPARATIONS? The European Union and the ICG 2004, *November 2001*
- 25 INTEGRATION OF GENDER EQUALITY: a matter of responsibility, commitment and quality, *January 2002*
- 26 THE NETHERLANDS AND THE ORGANISATION FOR SECURITY AND COOPERATION IN EUROPE IN 2003: role and direction, *May 2002*
- 27 BRIDGING THE GAP BETWEEN CITIZENS AND BRUSSELS: towards greater legitimacy and effectiveness for the European Union, *May 2002*
- 28 AN ANALYSIS OF THE US MISSILE DEFENCE PLANS: pros and cons of striving for invulnerability, *August 2002*



- 29 PRO-POOR GROWTH IN THE BILATERAL PARTNER COUNTRIES IN SUB-SAHARAN AFRICA:  
an analysis of poverty reduction strategies, *January 2003*
- 30 A HUMAN RIGHTS BASED APPROACH TO DEVELOPMENT COOPERATION, *April 2003*
- 31 MILITARY COOPERATION IN EUROPE: possibilities and limitations, *April 2003*
- 32 BRIDGING THE GAP BETWEEN CITIZENS AND BRUSSELS: towards greater legitimacy and  
effectiveness for the European Union, *April 2003*
- 33 THE COUNCIL OF EUROPE: less can be more, *October 2003*
- 34 THE NETHERLANDS AND CRISIS MANAGEMENT: three issues of current interest, *March 2004*
- 35 FAILING STATES: a global responsibility, *May 2004\**
- 36 PRE-EMPTIVE ACTION, *July 2004\**
- 37 TURKEY: towards membership of the European Union, *July 2004*
- 38 THE UNITED NATIONS AND HUMAN RIGHTS, *September 2004*
- 39 SERVICES LIBERALISATION AND DEVELOPING COUNTRIES: does liberalisation produce  
deprivation?, *September 2004*
- 40 THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, *February 2005*
- 41 REFORMING THE UNITED NATIONS: A closer look at the Annan report, *May 2005*
- 42 THE INFLUENCE OF CULTURE AND RELIGION ON DEVELOPMENT: Stimulus or stagnation?,  
*June 2005*
- 43 MIGRATION AND DEVELOPMENT COOPERATION: coherence between two policy areas,  
*June 2005*
- 44 THE EUROPEAN UNION'S NEW EASTERN NEIGHBOURS: *July 2005*
- 45 THE NETHERLANDS IN A CHANGING EU, NATO AND UN, *July 2005*
- 46 ENERGETIC FOREIGN POLICY: security of energy supply as a new key objective,  
*December 2005\*\*\**
- 47 THE NUCLEAR NON-PROLIFERATION REGIME: The importance of an integrated and  
multilateral approach, *January 2006*
- 48 SOCIETY AND THE ARMED FORCES, *April 2006*

### **Advisory letters issued by the Advisory Council on International Affairs**

- 1 Advisory letter THE ENLARGEMENT OF THE EUROPEAN UNION, *December 1997*
- 2 Advisory letter THE UN COMMITTEE AGAINST TORTURE, *July 1999*
- 3 Advisory letter THE CHARTER OF FUNDAMENTAL RIGHTS, *November 2000*
- 4 Advisory letter ON THE FUTURE OF THE EUROPEAN UNION, *November 2001*
- 5 Advisory letter THE DUTCH PRESIDENCY OF THE EU IN 2004, *May 2003\*\**
- 6 Advisory letter THE RESULTS OF THE CONVENTION ON THE FUTURE OF EUROPE, *August 2003*

\* Issued jointly by the Advisory Council on International Affairs (AIV) and the Advisory Committee on Issues of Public International Law (CAVV).

\*\* Joint report by the Advisory Council on International Affairs (AIV) and the Advisory Committee on Aliens Affairs (ACVZ).

\*\*\* Joint report by the Advisory Council on International Affairs (AIV) and the General Energy Council.

- 7 Advisory letter FROM INTERNAL TO EXTERNAL BORDERS. Recommendations for developing a common European asylum and immigration policy by 2009, *March 2004*
- 8 Advisory letter THE DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: from Deadlock to Breakthrough?, *September 2004*
- 9 Advisory letter OBSERVATIONS ON THE SACHS REPORT: How do we attain the Millennium Development Goals?, *April 2005*
- 10 Advisory letter THE EUROPEAN UNION AND ITS RELATIONS WITH THE DUTCH CITIZENS, *December 2005*
- 11 Advisory letter COUNTERTERRORISM IN A EUROPEAN AND INTERNATIONAL PERSPECTIVE: interim report on the prohibition of torture, *December 2005*