
*Royal Netherlands Embassy
Washington, DC*

*Counterterrorism strategies from an international law
and policy perspective*

Address by His Excellency Christiaan M.J. Kröner, Ambassador of the Kingdom of
the Netherlands to the United States of America

at the International Networks and Homeland Security Conference

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Ladies and gentleman,

(Introduction)

It is a great honor and a pleasure for me to speak to you tonight. As a former student of International Law, I feel privileged to be able to address such a distinguished gathering of experts under the auspices of the American Bar Association. I hold the American Bar Association in high regard, because it not only defends the interests of its members, but also upholds the principles of the Constitution, to assist those who seek justice and to promote the rule of law in the world. I was tempted to start off with a few lawyer jokes, but my collaborators advised me against it lest I might be sued! So, I will resist the temptation.

The title of your conference is: International Networks and Homeland Security: Challenge and Opportunity. I would like to look at this subject from a slightly different perspective than homeland security as such. Instead, I will take a closer look at the conceptual underpinning of effective international cooperation to defend our societies and the international order in which our societies thrive. As lawyers, it won't surprise you that this entails a legal perspective, or, a perspective of the rule of law.

The Netherlands cherishes its strong legal tradition, both at home and in its dealings with other nations. The founding father of international law, my compatriot Hugo Grotius, would be pleased that under our constitution, foreign policy must not only further national interests, but also promote the international legal order. As we see it, a strong international legal order is a precondition for a more equitable, peaceful and prosperous world. A world that safeguards freedom, equality, democracy and human dignity. These are values we hold dear and seek to protect, in all circumstances. I would add that a strong, international legal order, is also an indispensable prerequisite for our national security.

(Evolution of international law)

This year will mark the hundredth anniversary of the Second Hague Peace Conference, which was held in 1907. The Hague Conventions, which resulted from that conference, were among the first formal statements of the laws of war in the corpus of modern international law. I recall that in the wake of two World Wars, the Geneva Conventions of 1949 created the framework for international humanitarian law. In the decades that followed, additional protocols were added and various human rights conventions were concluded. As new realities presented themselves, international law adapted to the changing times. Thus, over the last hundred years, the evolution of legal norms has resulted in a rich body of international law.

Then, at the turn of our new century, modern terrorism reared its ugly head and confronted the world with a threat of new dimensions. The 9/11 attacks on the World Trade Centre and the Pentagon changed the scale and nature of terrorist destruction. Also, they were not isolated incidents. They were followed by bombings in Bali, Madrid and London, and other terrorist atrocities around the world. Our societies were suddenly under attack, not from a familiar enemy, but from international terrorist networks, intent to harm civilian populations to the greatest extent possible. This new threat does not fit old patterns of international aggression: there is no country or other recognisable enemy, no traditional boundaries, no traditional warfare. Modern terrorism is an international threat, as real as those that nations have faced in the past, but far less familiar. It is a new phenomenon that threatens our very legitimate security interests.

Ladies and gentlemen,

(Response to modern terrorism; differences of opinion)

The world is united in its condemnation of terrorism. But to date, the world has failed to come up with a full, united and effective response to the challenges it poses, either in the political or in the legal domain.

Of course, we've made important progress in developing legal and policy frameworks over the past few years. We have agreed on counterterrorism strategies both at the United Nations and, for us Europeans, within the EU. But there is still no comprehensive convention on terrorism, largely because we cannot agree on the definition of a terrorist act.

Opinions also differ on the relevant law. Is the fight against terrorism an armed conflict, meaning that international humanitarian law should apply? Or is it actually the domain of criminal law? So we have to decide which law should prevail, and we must also address an even broader question: is contemporary international law equipped to meet the challenges of modern terrorism? There is a lot on our plate and there are no easy answers. It is essential therefore, that we get the basics right.

(The Dutch position, specifically on rule of law and human rights)

The Netherlands has maintained that the rule of law must always be upheld when combating terrorism, both nationally and internationally.

The orator Cicero was once called upon to defend the Roman praetor Milo from accusations that he had murdered his rival, Clodius. Cicero argued that the killing had been in self-defence, saying, '*Silent enim leges inter arma*'. In the face of arms, the law stands silent.

Ladies and gentlemen,

I would remind you that Cicero lost that case. And rightfully so, I would say, though I do realise that it's dangerous for a diplomat to comment on legal verdicts, even if they are over 2000 years old! Yet, the rule of law is an inflexible imperative. Any response to modern terrorism must be within the bounds of the law, also, or, I would rather say, *in particular*, when armed conflict is involved. It is our firm conviction that, in defending ourselves and our values from terrorist attacks, we mustn't compromise those same values. Moral authority ought to be an important element of any action taken to rid the world of terrorism. This implies that we must recognise the human rights of our worst enemy, even if we find it difficult. Respect for human rights standards is a line we must not cross.

And yet we know that human rights are under pressure, in the responses that governments seek to protect their citizens. But we must make sure that we do everything we can to prevent undermining human rights in our fight against terrorism. Not only because of the moral imperative, but essentially, because our security is ill-served by doubts about our own standards or by being perceived to apply double standards.

Ladies and gentlemen,

(Guantánamo Bay – moving away from the trenches)

I will not surprise you if I say that we consider Guantánamo Bay a case in point. To my regret it has become a litmus test of our differences. The United States has detained a large number of 'illegal enemy combatants' there, in the face of worries and misgivings from much of the rest of the world. Many legal arguments have been made on both sides of the debate, however without progress so far.

Recently, the Dutch Foreign Minister, Maxime Verhagen, visited Washington, where he discussed inter alia the future of Guantánamo Bay with Secretary of State Rice. Minister Verhagen restated the Dutch position that the detention facility should be closed, but he also indicated his understanding some problems the United States face in doing so. Of course we are in agreement that perpetrators of terrorist acts must be dealt with and that governments have a prime duty to protect their citizens. So, while we agree on the goals, we differ on some of the means.

Ladies and gentlemen,

(Results of expert seminar)

'The law must be stable, but it must not stand still', said Roscoe Pound, dean of Harvard Law School from 1916 to 1936. Pound could not possibly have foreseen the current situation, but his observation still rings true. This notion and the realization that a transatlantic dialogue on the basics of our legal understanding of the fight against terrorism is indispensable, led my government to sponsor a meeting in the Netherlands of leading international experts on international law to explore these issues and come up with creative thinking. Ideas that will build on the strong foundations of international law and address new realities accordingly.

Allow me to give you some notions that were discussed by experts and which I think are important in the further debate between Europe and the US on the international legal order with respect to the fight against terrorism.

1. We have to keep working on an agreed definition of what is terrorism;
2. Self-defence on the basis of Article 51 of the UN Charter is – under certain circumstances – an appropriate framework for military action against certain terrorist threats. Operation Enduring Freedom in Afghanistan is an important example.
3. The qualification of a certain act as an act of terrorism has no direct consequence for the applicability of a specific field of law (i.e. humanitarian or human rights law). A specific terrorist act does not in itself give rise to an armed conflict. Rather, a specific determination to that effect should be made on a case by case basis. Where use of force is required, it should be necessary and proportional and should be limited in time;
4. In many instances criminal law is an effective tool to combat terrorism, though one has to recognize its limitations. International cooperation (information sharing, police cooperation, extraditions) should be used more fully. Existing counterterrorism conventions should be used more fully and capacity building in less-developed states should be increased.
5. The international community should increase its efforts to prevent countries from becoming failed or failing states – which are vulnerable to become hiding places for international criminal and terrorist groups – by a broad policy of political action, military action, and stabilization assistance.

Ladies and Gentlemen,

I have given you a few expert notions that could guide our future dialogue. The Netherlands aims to reconnect the US and Europe in the realm of international law. After all we are a community of shared interests, based on shared values. In our 21st century world, with its unprecedented interdependence and interconnectedness, we are confronted by many the same threats and challenges. We therefore have a joint obligation to get our international legal house in order so that we can lead the international community together in combating international terrorism.

The question of whether we need to adapt international law to new realities is a legitimate one. And suggestions to explore such options as an additional protocol to the Geneva Conventions or a new, sui generis, Terrorism Convention or Treaty, can not be dismissed out of hand. But until we decide to modify international law or its application, we must honor the laws and conventions that are currently in place.

I thank you for your attention.