

Countering violent extremism: understanding the shifting landscape in national and international approaches

Keynote speech at the closing session of the 110th ASIL annual conference

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Madam President of the ASIL,
Madam Deputy Mayor of The Hague,
Honored guests,
Ladies and gentlemen,

It is an honor for me to speak at the closing session of the 110th ASIL annual conference. As a long-standing, active member of the association, I find myself in a familiar setting. However, as the substitute in the programme for Ard van der Steur, I sense the unavoidable disappointment amongst you, since you had expected to hear a speech from the present Minister of Security and Justice of the Netherlands and acting chair of the Council of the European Union for Justice and Home Affairs, Ard van der Steur. I am of course one of his predecessors and have held office in times when we also had to cope with challenging security situations and organised border crossing crime (1989-1994 and 2006-2010). I have worked with the National and European Counter Terrorism Coordinators and security services and have faced possible spillovers of the confrontation with Al Qaeda and their affiliates. But the actual situation is profoundly different. Da'esh (the so-called Islamic State: I stress the words "so-called") engages on the one hand in activities that resemble illegal methods of warfare, in so far comparable to methods of "total warfare" that we thought to be effectively outlawed with the Geneva Conventions and the Rome Statute of the International Criminal Court.

The complicated intertwinement of Da'eshes advancement in Syria and Iraq with the civil war in Syria has created problems that do not fit into the structures with which we intended to uphold *the rule of law in international relations*, the subject of the research programme of the Amsterdam Center for International Law, directed by my colleague André Nollkaemper.¹ On the other hand, Da'esh has also deployed followers who brought devastating terrorist activities to the domestic scene in Europe and North America: think of the recent bombings and shootings in major European cities (Paris, Istanbul and Brussels). Notwithstanding the fact that these terrorist activities originate from the unruly warfare in the Near Middle East and North Africa, they are not part of warfare but of (very serious) crime. Da'esh has all the characteristics of a violent criminal organisation, including its methods of financing and internal discipline. The *national and European rule of law* is rightly seen as the framework for the response of the authorities in our country and other EU Member States to these

¹ Machiko Kanetake, André Nollkaemper, *The Rule of Law at the National and International Levels: Contestations and Deference*, Hart 2016.

attacks. I know that Minister Van der Steur would have reconfirmed this approach. I can say that we agree on that.

Da'esh and its affiliates present themselves, nevertheless, as an organisation with an ideological, even a – albeit in the view of every serious Muslim scholar, distorted - religious motivation. This violent extremism is the motivational infrastructure of the actual violent denials of the international and national rule of law.

The city of The Hague proudly calls itself the city of peace and justice. It hosts courts and a plethora of institutions that promote the *international* rule of law: the International Court of Justice, the Permanent Court of Arbitration, the International Criminal Court, the ICTY, the Special Tribunal for Lebanon and the OPCW, but also institutions that support the rule of law within *domestic* courts and through international and European law enforcement: The Hague Conference on Private International Law, Europol and Eurojust. I am delighted that the President of Eurojust, Michèle Coninx will join our debate today. Warmly supported by the City of The Hague, other institutions, such as the Hague Institute for Global Justice presided by my colleague Abiodun Williams, create a welcoming environment for the people who work within and with these courts and bodies, and their national counterparts.

The Asser Institute for International and European Law is based in The Hague for the past 51 years. We value this city as the most convenient location for this Dutch interuniversity institute, which is entertained by the University of Amsterdam on behalf of the Dutch Law Schools. Our activities consist of high-level academic research, conferences, professional courses and publishing, in the tradition established by the outstanding Dutch legal scholar and – so far only – Dutch Nobel Peace Prize recipient, Tobias Asser (1838-1913). His work as a scholar and diplomat in close cooperation with his colleagues from Britain, France, Germany, the United States and Russia – with Fyodor de Martens as one of his most important counterparts – paved the way for The Hague Peace Conferences, Hague Conference for Private International Law and the Permanent Court of Arbitration.

Before returning to the actual profound challenges to the institutions and societies that want to rely on the international and national rule of law, I would like to say something about the background from which Tobias Asser developed his mission in his time. “Law is, according to Asser in his inaugural address [1862], part of the social sciences. Asser's idealism about freedom, justice and peace, was founded in a realistic, young as he was, view of human behaviour. International trade, regulated by public and civil and international private law, requires peace between the nations, and peace is again the result of responsible behaviour guided by international law. Trade, cultural development and

scientific advancement flourish in a public sphere of freedom, was the core of Tobias Asser's academic mission and his frequent diplomatic missions.”²

The reason why law – i.e. the rule of law – is so important, both in international relations and within a state and a society, is that it creates *trust*. The democratic acceptance of legislation or treaties, access to independent judges, and effective but proportionate law enforcement are the building blocks of trust and the single most important antidote against the violent expression of dissatisfaction, greed and lust for power at the expense of other human beings. This insight was and is the core of our professional identity as jurists.

This is, in my view, exactly what explains the seriousness of the threat to which our societies are exposed by Da’esh and similar manifestations of violent extremism. Political panicking and the predictable success of those politicians who surpass others in their apparent boldness in fighting terrorism and extremism might create a situation in which the rule of law – internationally and domestically – is under attack from two sides: the terrorists and violent extremists themselves, and those people in our midst, in many respects closer to us than the extremists and often sincerely convinced that they are doing the right thing, who recommend to sacrifice the obedience to human rights and legal principles in the fight against terrorism.

Quite often, such responses to violent extremism are presented as a more or less moderate sacrifice that we need to bring in the fight against terrorism. Indeed, we needed farther-reaching powers for anticipative criminal investigation. I am not a specialist in this field, but another Dutch member of the ASIL has published a book on this subject with an extensive evaluation of Dutch and US methods of cooperation between security services and law enforcement.³ New methods of investigation, applying big data analytics, may reveal the preparation of terrorist acts, but when insufficiently controlled, these methods could create a pattern of permanent surveillance.⁴ Methods of prevention that bring municipal officers in touch with youngsters as soon as their religiosity propels them into dangerous contacts, could be viewed as an acceptable meddling in their privacy. Security appears to be a necessary limitation on human rights.

I do not recommend staying away from big data analytics or direct prevention through social work. On the contrary, if proportionately and sufficiently controlled, these methods are much better than domestic warfare. In The Hague

² *A Mission for his Time*, Tobias Asser’s inaugural address on commercial law and commerce, Amsterdam 1862, edited and introduced by Ernst Hirsch Ballin, Asser Press 2012.

³ Marianne Hirsch Ballin, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, Asser Press/Springer 2012.

⁴ See the report *Big Data in een vrije en veilige samenleving* (Big Data in a Free and Secure Society) by the Scientific Council for Government Policy, to be presented to Misniter Vander Steur on 28 April 2016, www.wrr.nl, book edition at Amsterdam University Press.

and other Dutch municipalities, we appear to have successfully reduced the risk of radicalisation among sometimes seriously frustrated youngsters with an immigrant background. But it is not helpful to say that this is merely a question of a new balance between security and human rights like that on privacy. Pitting the two against each other will never create a balance, but a slippery slope. In the end, the more violent extremist movements manifest themselves, the more our fundamental freedoms will be sacrificed.

I recommend a different approach. Let us remember why Tobias Asser engaged himself in the establishment of an international rule of law: only when nations avail themselves of institutions that ensure and protect trust in their relations, they will be able to step aside from conflict and warfare in international relations. Only when the citizens are equally protected by the law, including human rights, and have equal access to the courts, can they, with mutual trust, embark on new avenues of economic, cultural and political life.

The reason *why* security is important for people is because people need security as a condition for trust in the relations among each other. The reason *why* people need protection of their personal privacy is that intimacy requires a high level of personal trust.

Trust is, ultimately, what violent extremists want to destroy – maybe because they have never experienced trust in the dominating social structures that formed their characters and made them believe that their victims are unworthy of protection and respect. We should be aware of the vital significance of trust as the hallmark of what we want to protect: not by all means but only by those that will not turn out to be self-destructive.

At the Asser Institute, we will focus on the role of trust in international law in our research programme, for the next five years. This programme has been prepared by our academic director, Janne Nijman, professor of history and theory of international law. In the development of European Union Law the role of trust is equally important. The purpose of the establishment of the EU as an “Area of freedom, security and justice” – these are the words of the Treaty on the Functioning of the European Union (TFEU) –to establish a level of protection that would enable the European citizens to trust equally the decisions of other member states’ legal authorities. Mutual recognition requires trust. A lack of trust in asylum procedures in some member states has haunted the application of the Dublin and Schengen systems. The differences between the 28 Member states are, at present, still far too great. That was the reason for the rule of law promotion initiated by the Netherlands⁵ and finally accepted by the Commission and the Council.

⁵ See the report of the Advisory Council on International Affairs “THE RULE OF LAW - SAFEGUARD FOR EUROPEAN CITIZENS AND FOUNDATION FOR EUROPEAN COOPERATION”, 2014, <http://aiv-advies.nl/download/57da03fa-3410-4aba-af05-663cb780df72.pdf>.

Dear President,

Thank you for giving me the opportunity to share these ideas with the colleagues and friends in our association, as a contribution from the city of The Hague where Tobias Asser's work was, at its peak, exactly at the time when the ASIL was founded. That was not a coincidence; it was because on both sides of the Atlantic jurists understood their missions for their time. So do we, don't we? Thank you for your attention.