OPENING SESSION

Moderator:
Colonel J.P. Spijk

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OPENING OF THE CONFERENCE

by A.H. Korthals*

Your Excellencies, Ladies and Gentlemen,

It is a great honour and pleasure for me to say a few words on the occasion of the opening of this conference on ‘Terrorism and the Military: International Legal Implications’. I do not think I need to elaborate much on the relevance of this topic in the context of contemporary world politics. The images of the terrible attacks of September 11th 2001 are still fresh in our minds. And the recent terrorist onslaught in Bali has reminded us again that we cannot let our guard down in the struggle against terrorism.

At this conference, however, we should try to take a step back and look at the legal issues involved. After all, terrorism not only poses challenges to politicians and soldiers. It also raises new questions for legal experts. The list of speakers and guests is impressive. This conference is one of those rare occasions where lawyers, professors, policymakers and military professionals sit down at the same table in order to find answers to the questions of today. This ‘unholy alliance’ of experts should guarantee that legal theory does not become isolated from practical experience.

As Minister of Defence (and former Minister of Justice) I am particularly aware of the challenges in applying law to political issues. Of course, political choices always have to meet the legal standards. On the other hand, reality sometimes poses new challenges that cannot be dealt with satisfactorily within the existing body of rules and regulations. In that case, it can become necessary to build upon the existing legal foundations and develop new interpretations or even new rules. Especially in the international arena, reality provides a constant challenge to the existing legal framework.

The attacks of September 11th, of course, are a case in point. This conference will examine specific developments with regard to national criminal jurisdiction and law enforcement, the international rules for the conduct of hostilities and, last but not least, the international rules concerning the use of force. I would like to take a closer look at this last issue – the international rules for the use of force, or ius ad bellum – and give some comments as a way of starting off the discussion. Of course, I leave it to the specialists of this conference to come up with firm answers.

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* Minister of Defence of The Netherlands.

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Before September 2001, the fight against terrorism was dealt with primarily in the context of national criminal jurisdiction. The scale and magnitude of the terrorist attacks of September 11th, however, could be compared to an armed attack in the conventional sense. In New York, Washington and Pennsylvania more than 3,000 people died at the hands of terrorists. It was evident that the traditional approach would not suffice. The United States had every right to act internationally and to defend themselves against those who committed the act of terrorism. A day after September 11th, the Security Council confirmed this in Resolution 1368.

But who was the enemy? No one claimed responsibility for the attacks. Intelligence, however, determined that the terrorist network Al Qaeda, based in Afghanistan, was the perpetrator. The USA then demanded that the Taliban regime that controlled Afghanistan take action against Al Qaeda. They refused. Consequently, the USA took the initiative and led a coalition effort to root out Al Qaeda from Afghanistan, and their Taliban-hosts with them.

Today, more than one year after the attacks, much has been achieved in this war against terrorism. Al Qaeda and Taliban fighters have been killed, captured and uprooted. But as recent assaults in Bali and in the Gulf region indicate, the war against terrorism is far from over. Of course, the right of self-defense continues to apply to the struggle against Al Qaeda. But in a more general sense, what about future terrorist threats that are not linked to Al Qaeda? Is the existing international legal order equipped to deal with this kind of threat?

There are basically two reasons for asking this question. The first reason is that terrorist organisations are essentially non-State entities, whereas the international rules for the use of force primarily apply to States. On the other hand, however, even terrorists need a place to stay. The State that knowingly or unknowingly harbours terrorists can be held responsible. The same, a fortiori, applies to States that support terrorism. We have seen during the past year that several States have complied with the wish of the international community to eradicate terrorist groups linked to Al Qaeda from their territories. But what about States that are unwilling or unable to comply?

This brings me to the second reason. In order to prevent a terrorist attack, a State may have to act pre-emptively. And although pre-emptive action is as old as international politics, the concept is not without legal risks.

To be sure, it is defensible both ethically and politically that one does not wait for a gun to go off, so to speak. But, as always, there is also a legal dimension. Traditionally, States have legitimised pre-emptive action by referring to their right of self-defense. This can be legitimate, but there are inherent legal risks in the twin concepts of imminent threat and pre-emptive action. For example, when is a threat so imminent that no other recourse is left but military action? To use the analogy of the gun: is it possible to act pre-emptively when the gun is still in the holster?

Terrorism in particular underlines these inherent complications. In the case of conventional warfare, the mobilisation and pre-positioning of armed forces provide clear and distinct evidence of a threat. Clearly, the element of judgment lies in the motive for the mobilisation and pre-positioning, whether they are defensive or offensive. It is also a judgment call if there is still a chance for peace negotiations.
OPENING OF THE CONFERENCE

The threat of terrorist networks, on the other hand, is more difficult to discern. They use non-conventional weapons, civilian aircraft for example, to carry out their attacks. And it is hard to determine where exactly the preparations for an armed attack take place. Their motives, however, leave no room for doubt. No one in his right mind would propose negotiations with Osama bin Laden.

The inherent difficulties in determining the existence of an imminent threat and judging whether pre-emptive action is necessary, are why we need to explore further how the existing legal framework of the UN Charter can be used. Articles 39 and 42, for example, provide starting points for involving the Security Council. These articles describe the competence of the Security Council in determining a threat to international peace and security and in sanctioning appropriate measures. Involvement of the Security Council will help to avoid the perception of arbitrariness and help create international support.

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My concluding remark, therefore, would be that there are good reasons and good possibilities for examining further how to use the existing legal order, based as it is on the UN Charter, to cope with possible future terrorist threats. Of course, the international community makes use of all instruments at its disposal, in particular law-enforcement in the national context, to prevent the emergence of new terrorist threats. But in the last resort, we may have to respond with military force. My responsibility as a Minister of Defence is to ensure that all legal requirements are met when we deploy soldiers. I am, therefore, most curious to hear what the experts at this conference have to say.

I wish you all a very inspiring conference and fruitful discussions. Thank you very much.
OPENING ADDRESS

by S.B. Ybema*

Your Excellencies, Ladies and gentlemen,

It is a great privilege for me, as President of the International Society for Military Law and the Law of War, to address you all today at the opening of this Conference. A most important Conference, I feel, because it permits an essential exchange of ideas and views on the subject of terrorism. In particular, its legal implications and how it affects the military. The importance of this subject has been stressed by the fact that the Minister of Defence, Mr. Korthals, has agreed to open this Conference, and share some of his views on the subject with us. Your Excellency, permit me to express my sincere appreciation for your support and your presence here today. Your most thoughtful comments just now have provided an excellent start to our discussions.

In addition, the importance of this conference is stressed by the fact that several very distinguished speakers have agreed to lead off the discussions by way of presentations. We will hear from them presently.

But before we do, I would like to make some short preliminary remarks, in which I will try to sketch the background to some of the subjects, which will be discussed over the next few days.

The first point I would like to make about the subject of this conference is that we should be aware that, to a certain extent, we will be navigating in uncharted waters. I concede terrorism is as old as the hills yet the events of 9-11 seem to have been the watershed for the introduction of a totally new kind of warfare, which has been emerging over the last years. It combines a specific breed of catastrophic terrorism with the principles of asymmetric warfare. These are the two main ingredients of a disease, which seems to be infecting everything around us. It is changing the context in which we view society and the world we live in.

Of course it must be realised that change is a constant factor of life. Warfare is no exception and has changed and evolved throughout history. The end of the cold war marked such a moment of change and 9-11 is another marker in the history of war. It marks the moment where war has re-invaded society in a more complex, a more subtle and concealed manner, but certainly no less poisonous. Nevertheless, I am

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* President of the International Society for Military Law and the Law of War.

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convinced that we will find an effective cure. Such has been the way of history; society will always learn to adapt if a threat of such magnitude appears that it entails the absolute necessity to do so.

There is no doubt that this combination of catastrophic terrorism and asymmetric warfare is such a ‘threat of great magnitude’. After all, it attacks the very fabric of our society. Catastrophic terrorism maintains some of the basic traditional characteristics of terrorism such as the inability to occupy land, the ambition to achieve fundamental changes in the political order and an inclination to attack in urban settings. However, in other fundamental respects catastrophic terrorism is different. Catastrophic terrorists aim to kill mainly innocent civilians on an apocalyptic scale in order to achieve their political or ideological aims. The attack in Bali is a recent example. They are driven by the perception that they are engaged in unrestricted warfare and not subjected to rules of any kind.

With the attacks on the Pentagon and the World Trade Centre in 2001 this cynical strain of terrorism was combined with the principles of asymmetric warfare to devastating effects. The main principle of asymmetric warfare is to avoid confronting a stronger enemy on the battlefield, but to find and expose the enemy’s weaknesses using unequal, or as it is now called ‘asymmetrical’ means. In the case of the United States and its Western allies this entails an attack on the fabric of its complex and open society. After all, it is easy to hide in an open society and its complexities make it vulnerable. Who could have imagined that civilian airliners would be used as guided missiles?

Ladies and gentlemen, there are no quick fix solutions to counter this threat. Fundamental issues concerning constitutional rights, democratic values and defining the concept of terrorism have to be resolved. The international community may agree on some issues but our points of view are sometimes diverse enough to create heated debate. No doubt we agree on the threats, but we might disagree on the priorities and most certainly on the question what methods are allowed to counter these threats according to the rule of law. We definitely have to make it more difficult to hide in our open society and this confronts us with the difficult choice how much freedom we want to exchange for enhanced security. If we attempt to stop all the leaks we will end up with an airtight controlled society most of us would not want to live in. In fact, we will have done the work of the terrorists for them! If the stakes are principles and values, the terrorists could rightfully claim victory if we would depart from ours. We should accept that total security can only be achieved at total costs and is therefore impossible to achieve. Determining the proper treatment for the disease called terrorism requires not only money and political will, but also some wisdom and restraint.

In addition to the question of how much domestic freedom we are prepared to exchange for enhanced security, there is also another important question to be answered; which methods are allowed to counter the threat of terrorism in international context? In other words; which global rules of the game apply to the current situation? And is a revision of any kind of the organising principles of International law and order necessary or even possible? These are questions that concern the International community as a whole. However, it is no secret that the United States, as the
most vocal nation in addressing these issues, have reacted to the new and apocalyptic character of contemporary terrorist threats by suggesting that the use of force will need to be pre-emptive and perhaps even preventive. Article 51 of the UN Charter, which provides for an inherent right to individual or collective self-defense, is suggested as the legal basis for such a course of action. It must be noted at this point that Article 51 of the UN Charter refers to self-defense – and I quote – in the event of an armed attack occurring. Perhaps this phrasing provides for some measure of pre-emptive action if an armed attack is at hand or an imminent threat has manifested itself, but who shall decide if this is the case? If one country decides to adopt a doctrine where it alone determines which States pose imminent threats, there will be nothing to stop others from adopting a similar policy in the management of their own international affairs. After all, it would not require the intervening State to first provide evidence before it acts pre-emptively. So how could one country then appeal for restraint in the actions of others? Here we come to the questions, which were addressed by the Minister of Defence.

In addition, the Articles 2 (paragraph 7) and 39 of the UN Charter are quite manifest in stating that the Security Council has sole authority regarding the maintenance of international peace and security. It shall determine quite literally – I quote – ‘any threat to the peace’. Does this phrasing leave any room for the notion that pre-emptive or even preventive action is possible without a Security Council resolution? I am sure the speakers and participants at this conference will seek to address this question at some point during the next few days.

Ladies and gentlemen, in closing, there is one more thought that I would like to unfold here. It has to do with the concept of the international community. The nations of this world are often referred to as such, and it implies that there is something that binds us. I would suggest that this commonality is international law. After all, the literal definition of community is – I quote – ‘those that reside in one locality and are subject to the same laws’. Therefore we must take great care not to debase international law in any way.

The current situation in the world is a serious one and the powers that stir into action in times of international crisis will try to redefine the old organising principles of international law and order. This is a natural reaction and to a certain extent it may even be necessary and appropriate. But we must be wary of ‘throwing away the baby with the bathwater’, as they say in The Netherlands. Obviously laws and treaties necessitate a reasonable degree of interpretation, in order for them to function properly, but we must avoid rendering such laws and treaties all sail and no anchor.

The body of International law is one of the most valuable things we share as a community of nations, so we have a duty to develop it further if necessary. But we must not allow it to get trampled in a melee of international politics.

Ladies and gentlemen, I would like to thank you all for your kind attention and I wish you all many fruitful discussions.
WORKING SESSION 1
IUS AD BELLUM
Moderator: Professor C. Flinterman

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IUS AD BELLUM ASPECTS OF THE ‘WAR ON TERRORISM’

Yoram Dinsein

I.

The cornerstone of the contemporary ius ad bellum is embedded (and embodied) in Article 2(4) of the Charter of the United Nations, which promulgates:

‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations’.1

This treaty provision has been held by the International Court of Justice (ICJ), in the Nicaragua case of 1986, to reflect customary international law.2 The correct interpretation of the text is all-encompassing: the use of force in international (inter-State) relations is banned for whatever reason.3

Notwithstanding the general prohibition of the use of inter-State force, recourse to force is still explicitly permitted by the Charter in two exceptional cases: (a) when this is so decided or authorized by the Security Council, in response to a ‘threat to the peace, breach of the peace, or act of aggression’ (Article 39),4 or (b) in the exercise of ‘the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations’ (Article 51).5

The question is how the international legal system – predicated on Articles 2(4), 39 and 51 of the Charter – can cope with terrorism in light of dramatic events like those perpetrated against the United States on 11 September 2001 (9-11). Definitions of terrorism abound, yet none of them is legally binding. There are currently a dozen treaties dealing with disparate aspects of terrorism, ranging from hijacking of planes6 to terrorist bombings.7 However, attempts to formulate a comprehensive

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1 Professor of International Law, Tel Aviv University.
3 Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits), [1986] ICJ Reports 14, 99-100.
5 Charter of the United Nations, supra n. 1, at 343.
6 Ibid., 346.

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convention providing an overall prohibition (and definition) of all acts of terrorism – wherever, whenever and however committed – have so far not been crowned with success. All the same, it is useful to consult Article 2(1)(b) of the 2000 International Convention for the Suppression of the Financing of Terrorism, which refers to:

‘Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act’.

I believe that this text epitomizes the essence of terrorism. Terrorism consists of acts of unlawful violence committed with the intent to intimidate a State, an international organization or a social group, where the victims are civilians (non-combatants) or persons hors de combat attacked at random because of mere association with the target entity or group. In the case of 9-11, the close to 3,000 persons who perished in the Twin Towers of the World Trade Center in New York – a palpably civilian object – were all killed at random: they were just persons who happened to be in the wrong place at the wrong time. The Pentagon is a legitimate military objective. However, it is important to bear in mind that the Pentagon – just like the World Trade Center – was struck by the terrorists with a passenger plane serving as a flying bomb, in total disregard of the civilian status of the numerous passengers who were aboard at the time. Even if the target was legitimate, the methods and means used in attacking it were a flagrant breach of the law of armed conflict.

II.

There are several possible scenarios and contexts in which acts of terrorism are committed:

1. The act of terrorism may be carried out in all its stages (from planning to execution and disengagement) within the boundaries of a single State. As a rule, in these circumstances, the domestic law enforcement agencies (primarily, the police and the judiciary) should be fully capable of coping with the crime. Thus, the act of terrorism may be purely internal both in its actual scope and in its legal repercussions.

2. Even when the act of terrorism itself is domestic, it is possible that the perpetrator will become a fugitive from justice, ending up in the territory of another State. If so, the State where the crime was committed would usually seek his extradition. It is therefore important to have in place the required legal mecha-