

Rule of Law Symposium

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Attorney General of the United Kingdom, the Rt Hon Lord Goldsmith QC

In his speech at the Los Angeles World Affairs Council on the 1st August this year Prime Minister Tony Blair called for a complete renaissance of our strategy against the arc of extremism fanning out across the world.

His central message was that we will not win the battle against this global extremism by conventional means alone but by winning at the level of values as much as force. He asked which values will govern the future of the world: those of "tolerance, freedom, respect for difference and diversity" or those of "reaction, division and hatred". To win the war of values we have to show, in his words, that "our values are stronger, better and more just, more fair than the alternative" and that "we are even-handed, fair and just in our application of those values to the world."

I believe this statement of the central position of values in the struggle to defeat extremism is of key significance in understanding why the topic of the rule of law which you are discussing today is so important. Thank you therefore for the invitation to speak to you. It is not only an honour to be here among so many distinguished international jurists but also a real pleasure as I see so many friends and colleagues in the audience.

My argument to you today is that maintaining a commitment to the rule of law is a key element in winning the war of values and thus in defeating the forces of extremism, of chaos and of terror.

In developing that theme I will want to discuss the role that law plays in the fight against terrorism. But I will also want to argue that there is a key responsibility for us all to help establish the rule of law in countries which lack it, through war or conflict or because it is not part of their present development. And I want to commend your determination to produce an action plan to support the rule of law campaign. The two organising Associations between them have access to the resources of more lawyers in more countries than any other of which I know.

I want to start by making it clear that the problems of terrorism are real, deep and widespread. I know there are some people who argue that the threats are isolated and only involve a handful of people. I am very aware from my own responsibilities as Attorney General of the UK, from my role in prosecuting the cases we uncover and from what I see from our security services that such people are wrong. We know not only of the outrages which have been committed: 9/11, Madrid, Beslan, Indonesia, India and Israel on several occasions and London on the 7th July last year and others; but also of those which we and our colleagues in other countries believe we have thwarted. That applies not only to the recent arrests in the UK but also in Canada and Cologne for example.

These same events show that terrorism is also a global threat: it respects no boundaries, no frontiers; it does not – contrary to the views some people express, including in my own country – draw fine distinctions between different countries based on their supposed attitude to foreign policy.

Terrorism and extremism are a threat to all nations.

This is why it has been so important to have strong international alliances.

The UK and the USA are strong allies and I am privileged to be here in

Chicago addressing this audience because of the strong links between us.

Let us not forget as we do so not only the many innocent victims of terrorism who have been killed or maimed and their families but also the brave members of the Armed Forces, in particular the British and American who have been fighting shoulder to shoulder and risking their lives in defence of the values we share.

Over the past five years we in the UK have struggled to find the right solutions to tackle terrorism. This is a debate in which the timing of my appointment – 3 months to the day before 9/11 – means I have necessarily had to play an intimate part. We have made many changes. We have significantly increased the resources we devote to counter-terrorism (by 2008 we will be spending £2bn, double what the budget was before 9/11) with more police, more security and intelligence service resources and more prosecutors devoted to counter-terrorism work. We have striven with our international partners to create a better framework for international cooperation: with new

fast-track extradition procedures in Europe and beyond and enhanced systems for mutual cooperation.

And of course we have overhauled our laws on terrorism. We have passed three anti-terrorism laws since 9/11, creating new offences, increasing security for aviation and sensitive industries, tackling the sources of terrorist funding, creating new powers to exchange information and to protect against those who would destroy their fellow citizens.

I do not pretend that we have found all the answers. Or that we have got right all that we have done. Plainly we have not. One plank of our first anti-terrorism law enabled us to detain overseas terrorist suspects whom we wanted to deport but could not because of fears for the protection of their human rights in their countries of origin. Our highest court, the House of Lords, ruled against that legislation at the end of 2004. Even though the argument was much closer than some of the judgements indicate – after all a strong Court of Appeal presided over by our Lord Chief Justice had upheld the laws – the ultimate decision shows that we had got that wrong. We do not yet have final judicial clearance for the replacement strategy: we have been negotiating clear and formal commitments from the relevant countries that they will pay full respect to the human rights of the people we want to deport if they are returned. Though the courts have now accepted one such set of assurances there are other countries still to consider and no doubt appeals to come as well. In addition we are asking the European Court of Human Rights in a Dutch case called *Ramzy* to re-examine the question whether, in

deportation cases, no balance at all can be struck between the interests of the deportee and the interests of the people of our country, as the earlier decision of Chahal held.

Parliament also created a system of so called "control orders" – a system under which restrictions could be placed on the activities of suspects, subject to strong judicial scrutiny, so as to provide public protection. The first round of litigation on these orders reached our Court of Appeal recently. Judgments were given in late July. Legal issues about these orders no doubt remain.

We have been open to criticism, sometimes from those we say we have not done enough; and sometimes from those who say we have done too much. There have been anxious and difficult debates in Government too. I cannot agree with those civil libertarians who believe that 9/11 changed nothing and therefore no changes to our traditional ways of safeguarding fundamental values can be allowed. I am firmly of the view that 9/11 brought about a step change in the threat of terrorism and therefore our necessary response to it.

But equally I do not share the view of those who assert that 9/11 changed everything and therefore any changes are worth making if they might increase our security, whatever the impact on the fundamental values and liberties on which our societies are based. Because to my mind what some would minimise as mere civil liberties are in fact the fundamental values on which our societies are based: liberty, justice and equality before the law. Our forefathers fought hard to build these rights in the Civil Wars in my country

and in the war of independence in this country; and to protect them – on the landing beaches of France in 1944 for example. These actually are the very freedoms and values that the terrorists would destroy. We cannot give them their victory by destroying them ourselves.

So although we cannot claim to have found all the answers, and although we are open to criticism for having gone further than our highest court now says we should have gone, we have tried in dealing with these issues to be guided by what I see as three principles.

The first of these is the principle of the rule of law. So we have always striven to ensure that our actions are justified and supported by the law. As Aharon Barak, the recently retired President of the Israeli Supreme Court, put it:

'the war against terrorism is a war of a law-abiding nation and law-abiding citizens against law breakers. It is, therefore, not merely a war of the state against its enemies; it is also a war of the law against its enemies.'

The rule of law also means adhering to our domestic and international legal obligations. For us the most important is the European Convention on Human Rights. It means recognising that although there are certain liberties which can be adjusted or even derogated from in times of war or emergency – as Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights both explicitly allow – those

changes should be only those which are truly needed to deal with the emergency threat and are proportionate to it. It means recognising that domestic executive action must be subject to democratic and judicial control.

So we are clear too that, as well as subjecting ourselves to the democratic process – to parliament and the people – we accept the critical role of the courts in reviewing our action. So in all the special measures we have taken we have allowed for the courts to have the right to review not only the action taken but the basis on which it has been taken.

And where the courts have ruled, then we recognise that it is part of the rule of law that we must obey. So, when in 2004 the House of Lords ruled that, despite the safeguards we had built in, a power we had taken in our Anti-Terrorism, Crime and Security Act 2001 was not compatible with rights in the European Convention, the Government was sorely disappointed by the decision. In strict law, because of the structure of our Human Rights Act the Government was not obliged to comply with the judgment without more. Nonetheless, the Government did so, bringing forward new legislation to replace in more modest terms what the Law Lords had disagreed with. In doing this the Government was acting to apply the rule of law.

But it also means that we must be prepared to subject our domestic executive action to the close scrutiny and control of the independent courts. This is a key part of the rule of law.

The second principle I would identify is that we should maintain our commitment to fundamental values and freedoms. Many are to be found in the European Convention on Human Rights which, stripped to its essentials, remains a statement of all that democracy stands for: respect for life, prohibition of torture and degrading treatment, freedom from arbitrary arrest and the right to a fair trial, the rights to freedom of thought and association, of religion and speech, rights to privacy and property.

I cannot believe that it would be right to give up these fundamental values on which our societies are based in our struggle to meet the challenge of terrorism. These shared freedoms and values represent our democratic way of life. These are liberties which were hard won over the centuries. They are the very liberties the terrorists would destroy. We cannot give the terrorists the victory they seek by the way we seek to combat their evil.

The third principle is that of proportionality. One of the key themes of the European Convention on Human Rights is the concept of balance. The Convention took its lead in this respect from the Universal Declaration of Human Rights – and in particular, Article 29, which expressly recognises the duties of everyone to the community and the limitation on rights in order to secure and protect respect for the rights of others. Under the Convention some rights are absolute. They are so fundamental that there can be no compromise on them. We take the view that the prohibition on torture is simply non-negotiable. I regard the right to a fair trial as another of those

fundamentals. That is why we have rejected reducing the burden of proof for terrorism offences and allowing secret evidence in terrorism trials.

Other rights however may be subject to adjustment or even derogation in the interests of others. Where, however, there is adjustment our actions need to be proportionate and necessary to meet the threats we face. Let me make it clear that prosecution of criminal offences should be the first line of defence against those who would attack our country. Whilst we have introduced new ways of protection and prevention which the Government has regarded as essential, prosecution will remain our first resort. Only where it is not possible will other options be considered. One such option is control orders to which I referred previously. Before such an order can be made, the test of necessity must be met and provision exists for judicial scrutiny. For the more stringent orders, a higher level of judicial involvement is provided for, in that only a court can make the order. This illustrates that proportionality requires stronger safeguards in order to ensure the appropriate use of the toughest sanctions.

That is a summary of how I think we have approached our own legislation. Our concerns, however, have not been limited to our own legislative work. In particular, one of the issues I was also faced with arose in 2003 when the USA first announced that it was proposing to put on trial before specially created Military Commissions suspects who had been detained and brought to the naval base at Guantanamo Bay in Cuba. My government recognised at the time the unprecedented situation the US found itself in, and the security

concerns which prompted the US to go down this path. I was given the responsibility by the Prime Minister of considering the terms of those Military Commissions in relation to the British detainees in Guantanamo. I looked hard at what those commissions represented and whether they would provide a fair trial – whether they would provide justice. My clear conclusion was that they would not. Despite negotiations in which concessions were offered, the process never reached in my view the guarantees of fairness required by international standards, even after I had received guarantees that the death penalty would not be applied to any of them. We would not allow our nationals to be put into a process which did not guarantee fairness. So we insisted on their return – because we would not countenance their simply being detained without trial for indefinite duration, and the US Administration accepted this. All of this is public knowledge.

Three years later and after successive decisions of the US Court, the issues we discussed with the Administration remain the subject of public debate within the United States. I am not embarrassed to repeat here my views on Guantanamo Bay which are well known; that it is unacceptable and that it is time that it should be closed; that it has become a symbol of injustice, a recruiting agent for terrorists. It is a symbol which the long American tradition of justice and liberty deserves to see removed at the earliest moment. As President Bush has said: "Guantanamo sends a signal to some of our friends – provides an excuse, for example, to say the United States is not upholding the values that they're trying to encourage other countries to adhere to." I welcome the President's own stated desire to see Guantanamo closed.

Now the decision of the Supreme Court in Hamdan has provided an opportunity for reflection on what would happen to Guantanamo. It has, as I am well aware, provoked a vigorous debate within America as to what the right response should be. The fact of that debate, its intellectual depth, its commitment to grapple with difficult moral issues, says a great deal about the finer qualities of this nation. The way in which the courts, the executive and the legislature are engaged in trying to identify a just way forward exemplifies the process of democratic and judicial involvement in tackling key issues which the rule of law demands.

I have thought hard about whether in these circumstances I should say anything about what is to happen now. To do so would be to interfere in a live, and sensitive, domestic political debate. However, this is not a purely domestic issue. In the first place, the detainees to whom these procedures apply are non-US citizens who, unlike immigrants, did not seek the shelter of US shores and are detained in a place in fact outside the USA. And I have already mentioned the continuing negative impact of Guantanamo on international public opinion.

We share common values and have wrestled with the same problems. We will not always agree on the solutions. But we can be frank with each other. And if, as Tony Blair said in the speech I quoted at the outset, we are in a war which is a battle of values as much as a battle of force, then justice is one of those values for which we are fighting.

In that context we outside the United States, including in my own country, will therefore watch with close attention what is now to happen. I and my colleagues in Government would be neglecting our duty to our own people if we did not continue to discuss and debate these issues with US colleagues. Those discussions are bound to cover the issues currently being played out in the legislature and the media.

There is a significant debate already about Common Article 3 of the Geneva Conventions. This is the Article of course which in more than one of the Geneva Conventions sets standards for the treatment of people such as those detained in combat and prohibits amongst other things outrages upon personal dignity, in particular humiliating and degrading treatment. We welcome the acceptance, in the light of the Hamdan decision, that these are standards which must apply to all those detained in what has been termed the "War on Terror". Given the political discussion about this issue at the moment, I must be careful what I say. I will say only this today: that this is an international standard of very considerable importance and its content must be the same for all nations.

We understand why Guantanamo was thought to be a sound legal proposition, and the circumstances which led to its creation. We look forward now to the Administration and the Legislature clarifying a just and definitive way forward for those who remain detained there

And there will be widespread interest in the trial procedures that they are subjected to, in the structure, standards and quality of the justice they dispense.

We have ourselves wrestled with some of the peculiar problems involved in trying suspected terrorists, for example whether we should allow evidence to be brought against them that, for security reasons, they do not see. For our part, although we have been prepared to allow some relaxation of normal rules when dealing with immigration issues or the placing of restrictions on individuals, we have drawn the line at allowing this approach in criminal trials.

A further issue during our negotiations three years ago concerned that of the ability of lawyers effectively to represent their clients, including having confidential access to them.

The other theme that I indicated I wanted to touch on was the work that can be done by Associations such as yourselves and by the lawyers who are your members in supporting the rule of law by helping to build and maintain fit for purpose legal systems in countries which do not have fully functioning and independent legal systems. I will touch on that topic only lightly as I know you will be discussing aspects of this in detail. But the brevity of my remarks should not be misunderstood as indifference to these issues. On the contrary I applaud the work done in Eastern European countries emerging from the Iron Curtain, notably by CEELI; the work being done in countries damaged by external war or civil war and disturbance. And I welcome new proposals to

increase this work. I recently proposed for example that the excellent pro bono work being done by lawyers in my country should in part be devoted to capacity building and rule of law projects in other countries abroad. I look forward to new initiatives.

The UK has been in the forefront of promoting at the level of the United Nations work of this nature. So we have argued that there needs to be new momentum in the rule of law and transitional justice in post conflict situations. Sustainable peace cannot be based on anarchy, impunity or dictatorship. And we have welcomed the emphasis on rule of law in the mandates of new peace-keeping and peace-building missions. But we recognise too that more needs to be done and have supported to that end the Secretary General's idea of a Rule of Law Assistance Unit.

Let me conclude. In these remarks I have been arguing that the values of the rule of law are values which are worth fighting for even though this is not easy and requires courage and commitment. But the end result is what matters.

Tony Blair concluded his Los Angeles speech by saying this:

"Our values are worth struggling for. They represent humanity's progress through the ages and at each point we have had to fight for them and defend them. As a new age beckons, it is time to fight for them again."

For me that says it all. (ENDS)