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“The Rule of Law: Striking a Balance in an Era of Terrorism”

The International Rule of Law Symposium: A Plan for Action

Organized by the American Bar Association and the International Bar Association

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Ladies and Gentlemen:

It is a great pleasure to be here with all of you at this symposium on the International Rule of Law. I would like to warmly thank the American Bar Association and the International Bar Association for jointly organizing this event.

I must admit that I was very much looking forward to serving only as a participant in one of the panels scheduled over the next two days until my friend Judge Richard Goldstone suggested recently that I should also be the opening key note speaker this morning – a much taller order to be sure! I accepted his invitation, not only because I welcome the initiative of the IBA and ABA to provide a space for members to share experiences and combine forces, but because I believe strongly that promoting and strengthening the rule of law around the world is fundamental to achieving greater human security, human development and human rights for all people.

It is clear that this realization has been made when looking at the program for the symposium. Over the next two days, you will be exploring how the rule of law intersects with a range of critical issues - from economic development to corruption to corporate responsibility, from the importance of an independent judiciary and legal system to women’s rights and environmental sustainability.

I was particularly pleased to see that the aim of this meeting is not just to encourage dialogue and learning, important though these are, but also an occasion to renew our common commitment as bar leaders and lawyers to promoting strong and accessible legal processes in every country – developed and developing alike. It is this symposium’s call

for a “plan of action” to strengthen the rule of law globally which is so needed in our world.

For the truth is that the values and processes associated with the “rule of law” are questioned by many people today. We live in times of new threats to human security and public order. Terrorist groups are prepared to attack anywhere, at any time, without regard for innocent lives. Failing and failed states are unable to secure even the most basic structures of governance, leading in many countries to violent conflict, mass migration and increased poverty. The proliferation of weapons of mass destruction, dramatic changes in the global climate, the HIV/AIDS pandemic and international criminal syndicates, which traffic in everything from small arms to the most vulnerable human beings, all require new approaches.

Some question whether the law can help to meet these threats. They ask whether respect for the rule of law should be put aside in order to confront such challenges effectively. Our job as lawyers is to make the case that it is precisely these dangers, and the changing, more interconnected world we live in, that make strengthening respect for the rule of law so important. Why? Because without the rule of law, government officials are not bound by agreed standards of conduct. Without the rule of law, the dignity and equality of all people is not affirmed, and their ability to seek redress for grievances and fulfilment of societal commitments is limited. Without the rule of law, we have no way to ensure meaningful participation by people in formulating and enacting the norms and standards which organize society.

But we acknowledge that to be effective, legal systems must be able to respond to changing circumstances which put individual freedoms and public order at risk. I would like to focus my remarks today on how we as lawyers committed to promoting respect for the rule of law should respond to one of these threats. That threat is terrorism. How can we be strong in confronting and bringing to justice those who carry out terrorist acts while holding to our core values, including our commitment to respecting the rule of law and defending fundamental human rights?

It is a question the people of this country and people around the world have been asking for the past five years. This week, we have marked the 5th anniversary of the terrible

attacks on the United States of 9/11 2001. We have reflected on the horror of that day. We have been confronted once again, as we were five years ago, with an overwhelming sense of anger and loss. We know instinctively that justice must be served, that security and order must be restored, that such acts must be prevented in the future. The question, of course, is how best to achieve all of these while remaining true to our core values. How, precisely, should we respond?

I have said on many occasions over the last five years that language is vital in shaping our reactions: the words we use to characterize an event may determine the nature of the response. In the immediate aftermath of 11 September, while still serving as United Nations High Commissioner for Human Rights, I stressed the duty on all states to find and punish those who planned and facilitated these crimes. I described the attacks on the United States as constituting a crime against humanity.

It is worth recalling why that description is appropriate. The 9/11 attacks were mainly aimed at civilians. They were ruthlessly planned and their execution timed to achieve the greatest loss of life. Their scale and systematic nature qualify them as crimes against humanity within existing international jurisprudence.

But as we know, despite efforts to frame the response to terrorism within the framework of crimes under national and international law, an alternative language emerged post-9/11. That language, which has shaped to a much larger extent the response at all levels, has spoken of a war on terrorism. As such, it has brought a subtle change in emphasis in many parts of the world; order and security have become the over-riding priorities. As in the past, the world has learned that emphasis on national order and security often involved curtailment of democracy and human rights. Misuse of language has also led to Orwellian euphemisms, so that 'coercive interrogation' is used instead of torture, or cruel and inhuman treatment; kidnapping becomes 'extraordinary rendition'.

I should make it clear that characterizing major terrorist attacks as crimes against humanity does not rule out the possible need for an appropriate military response, such as the invasion of Afghanistan when the Taliban refused to hand over Osama Bin Laden and his associates.

However, the conflict there and, in particular, the subsequent decision to go to war on Iraq, have re-enforced the perception of a war on terrorism which goes beyond the rhetorical use of the term, as in a “war on poverty” or a “war on hunger.” The reality is that by responding in this way the United States has, often inadvertently, given other governments an opening to take their own measures which run counter to the rule of law and undermine efforts to strengthen democratic forms of government. The language of war has made it easier for some governments to introduce new repressive laws to extend security policies, suppress political dissent and stifle expression of opinion of many who have no link to terrorism and are not associated with political violence.

Hans Corell, former Legal Counsel of the United Nations, made this point at a recent conference on *International Law in Flux*.

“To suppress terrorism is not a war. You cannot conduct a war against a phenomenon. As a matter of fact to name the fight against terrorism a “war” was a major disservice to the world community including the State from where the expression emanates. The violations of human rights standards that have occurred in the name of this so called war – no matter how necessary it is to counter terrorism – have caused tremendous damage to the efforts by many to strengthen the rule of law.”

Yet despite these negative global consequences, many still believe strongly that such measures were necessary to guard against further terrorist attacks. The security argument maintains that the terrorist attacks on New York, Madrid, Sharm al-Sheikh, Bali, London and elsewhere were so heinous, so unprecedented, that new strategies and sometimes “exceptional measures” were required. In other words, fundamental principles underlying the rule of law could be put on hold to address the more urgent threat.

As Judge Richard Posner has suggested:

“...the scope of our civil liberties is not graven in stone, but instead represents the point of balance between public safety and personal liberty. The balance is struck by the courts, interpreting the vague provisions of the Constitution that protect personal liberty; and it is constantly being re-struck as perceptions about safety and liberty change. The more endangered public safety is thought to be, the

more the balance swings against civil liberties. That is how it is and that is how it should be..."

But what is the limit? How far can the balance swing against the core principles underlying the rule of law? Comments like Judge Posner's could imply that the security imperative outweighs all other considerations. I do not believe that. Five years after 9/11, I believe we must evaluate such assumptions and ask ourselves if all of the measures taken have been justified and consistent with the rule of law.

Were the decisions taken by the U.S. government, for example, to hold detainees at Guantanamo Bay without Geneva Convention hearings, to monitor, detain and deport immigrants against whom no charges had been made or to put in question long held commitments, such as, forbidding the use of torture, justifiable actions to protect the American people?

I fear that the authority of law has been undermined in many important ways over the last five years. The question facing us today is: how are we to respond to this situation and what steps can we – and must we – take to restore and protect the international rule of law?

I am hopeful that things are beginning to change for the better; that the mistakes of the past five years are beginning to be recognized and steps taken in the right direction. Here in the US, we have seen a strong reaction just over the past week to the proposals put forward by the Bush administration in the Military Commissions Act of 2006 which would redefine Common Article 3 of the Geneva Conventions. Many voices, including leading Republicans in the Senate, have questioned the President's proposal and an alternative bill has been endorsed by the Senate Armed Services Committee. It addresses concerns raised by a group of retired military leaders of the U.S. Armed Forces and former officials of the Department of Defense who stressed in an open letter earlier this week that the Administration's proposed changes violate the core principles of the Geneva Conventions and pose a grave threat to American service-members, now and in future conflicts. This position has now been endorsed by Secretary of State and former Chair of the Joint Chiefs of Staff Colin Powell.

Many experts agree that the White House's proposal would actually encourage Central Intelligence Agency interrogators to use abusive methods that have long been prohibited by US law and are now explicitly banned from military interrogations by the new Army Field Manual governing the treatment of detainees. It was important to hear Lt. General John Kimmons, the Deputy Army Chief of Staff for Intelligence, say when releasing the new Manual that abusive interrogations do not yield results and undermine the professionalism of US armed forces.

What is needed now is legislation that reaffirms the United States' adherence to the Geneva Conventions, the UN Convention Against Torture, and the McCain Amendment which establishes an absolute ban on cruel, inhuman and degrading treatment of all detainees in US custody or control by any US personnel. It would be important to remove any provision which seeks to grant broad immunity from liability for war crimes back dated to September 2001. Rule of law requires that there be accountability for serious wrongdoing by those responsible.

On the international stage, new efforts to reassert the importance of the rule of law in the struggle against terrorism are also emerging. For example, the Club of Madrid, a group of former heads of state from countries in all regions of which I am a member, came together last year to organize an International Summit on Democracy, Terrorism and Security. Its purpose was to build a common agenda on how the community of democratic nations could most effectively confront terrorism while maintaining commitments to civil liberties and fundamental rights.

The Summit brought together leading experts who examined the underlying factors of terrorism, the effective use of the police, the military, the intelligence services and other national and international agencies to prevent and fight terrorism. Our aim was to construct a strategy against terrorism based on the principles of democracy and international cooperation and on strengthening civil society against extremists and violent ideologies. The resulting Madrid Agenda makes a compelling case not only for more effective joint action against terrorist organizations but also the need to increase resources aimed at tackling the humiliation, anger and frustration felt by many that can be manipulated to draw recruits for terrorist action.

I would also note that the International Commission of Jurists adopted in 2004 a Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism. That Declaration acknowledges that terrorism poses a serious threat to human rights, and affirms that all states have an obligation to take effective measures against acts of terrorism. But it sets out boundaries as follows:

“In adopting measures aimed at suppressing acts of terrorism, states must adhere strictly to the rule of law, including the core principles of criminal and international law and the specific standards and obligations of international human rights law, refugee law and, where applicable, humanitarian law. These principles, standards and obligations define the boundaries of permissible and legitimate state action against terrorism. The odious nature of terrorist acts cannot serve as a basis or pretext for states to disregard their international obligations, in particular in the protection of fundamental human rights.

A pervasive security-oriented discourse promotes the sacrifice of fundamental rights and freedoms in the name of eradicating terrorism. There is no conflict between the duty of states to protect the rights of persons threatened by terrorism and their responsibility to ensure that protecting security does not undermine other rights. On the contrary, safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the state. Both contemporary human rights and humanitarian law allow states a reasonably wide margin of flexibility to combat terrorism without contravening human rights and humanitarian legal obligations.”

The Declaration affirms 11 principles which states must give full effect to in the suppression of terrorism and calls on all jurists to act to uphold the rule of law and human rights while countering terrorism. This Berlin Declaration, available at (www.icj.org) restores the balance which was lost in the aftermath of 9/11. It is a declaration which should hang in law offices and judges' chambers throughout the world. It is the rule of law charter to counter the imbalances of what has been called today's "new normal."

Arising out of this initiative, the ICJ has recently established an Eminent Jurists' Panel, on which I am proud to serve, composed of eight jurists from all regions and legal traditions. The Panel is chaired by Arthur Chaskalson, Former Chief Justice of South

Africa and the first President of South Africa's new Constitutional Court. It has been mandated to consider the nature of today's human rights threats and the impact of new and old counter-terrorism measures on human rights. Another member, Professor Viti Mutarbhorn, set out its approach, saying

'No one can doubt that States have a duty to protect people from terrorist acts. It is important to understand the justifications for new laws and policies to counter terrorism. At the same time any measure to counter terrorism must be proportionate to the exigencies of the situation and respect in law and practice the rights of people under international human rights and humanitarian law.'

The Panel is holding hearings around the world this year to explore how considered counter-terrorism measures and policies can produce effective results while also assuring the necessary respect for human rights and the rule of law.

Earlier this year in Kenya, the Panel heard testimony concerning recently adopted legislation and increased executive powers in some African countries which made it easier to declare individuals or groups as terrorists or terrorist organizations, often without judicial remedy. It was encouraging to see the principled stand of the East African Law Society and its chapters in Kenya, Uganda and Tanzania, on what are and what are not acceptable measures to counter the threat of terrorism.

At another hearing, in the UK, we heard concerns about the long-term impact of powers introduced to fight terrorism and their potential impact on institutions and their gradual extension to other areas of law.

And at hearings in Morocco, the Panel heard how some offences contained in special counter-terrorism laws such as praising or justifying terrorism, or the association with terrorist organizations, are so broadly worded that they may lead to excessive interferences with freedom of association, expression and the media in countries in the region.

Just this week we completed our hearings in the United States which were held in Washington, DC. We were taken aback by the testimony we heard and the extent to which fundamental rights and freedoms had been undermined over the past five years. We expressed our deep concern about the cumulative impact that such inroads could have on the US legal system and the rule of law.

In our Press Statement we expressed the opinion of the panel as follows:

- There is no circumstance where a person, however classified, can be placed outside the protection of international human rights or humanitarian law.
- No person should be convicted on the basis of evidence obtained by torture or cruel, inhuman or degrading treatment or punishment.
- No person should be convicted on the basis of secret evidence that the accused can neither see nor rebut.
- There should be no departure from minimum standards for the treatment of detainees under international law, including those contained in common article 3 of the Geneva Conventions.
- There should be no impunity for serious violations of international human rights or humanitarian law.
- All detainees should be entitled to have the legality of their detention determined by an independent court and effective remedies for serious human rights violations, such as torture or ill-treatment.
- All persons convicted of crimes should have a right to full judicial review before an independent and impartial court.

Further hearings will take place in countries of South Asia, in Russia and Canada and in Brussels for the EU. The Eminent Jurists Panel plans to submit its report in the Fall of 2007.

CONCLUSIONS

The sad reality is that over the past five years, the view that governments will ultimately only rule by power and in their own interest, rather than by law and in accordance with international standards has been strengthened significantly. Individual Bar Associations, and wider associations - such as the ABA and IBA - must do more to challenge this approach. They must use their collective voice to maintain the integrity of international human rights and humanitarian law norms in the light of heightened security tensions. Not just because it is the right thing to do, but because it is the most effective strategy in countering the forces which fuel terrorism.

We are the professional lawyers – I speak as an Honorary member of the Bar of the City of New York – who know through our professional experience how vital it is to maintain and safeguard the rule of law, and the principle that no executive office of government is above the law. These are anxious and confusing times when public fears are easily roused by possible threats and references to threat levels. As we have seen, the role of the Courts is vital in scrutinizing any measures taken, but the Courts themselves need support and vocal advocacy on their behalf when their independence or judgement comes under increasing attack. As Arthur Chaskalson has warned:

“We have to be vigilant from the very beginning; if you concede the first step, every next step will lead to the further erosion of the rule of law and disregard of human dignity.”

I hope that this Symposium will result in the ABA and IBA members standing even taller, more vocal and more vigilant for the rule of law.