

The Rule of Law: A Powerful Tool in Combating Terrorism

The Honourable Mary Robinson, a barrister, former President of Ireland, former United Nations High Commissioner on Human Rights and a leading international human rights advocate, was made an Honorary Fellow of the American College of Trial Lawyers at its October 15, 2007 annual meeting in Denver, Colorado. These are her remarks on that occasion.

President David Beck, ladies and gentlemen, I am indeed delighted and honored to accept honorary fellowship in the American College of Trial Lawyers.

And I'd like to thank President Beck and also Michael Cooper, who first contacted me about this, and the Board of Regents, for this signal honor and indeed for their patience in renewing the invitation so that I could come here personally and accept today.

I'd also like to thank Michael Mone for his very kind words. As he said to you -- and we talked about this earlier -- he has strong Irish roots, and I think he has a touch of the Irish blarney, as well.

I very much enjoyed the presentation of Madame Louise Charron, and I was glad she mentioned a former colleague of hers on the Supreme Court, Louise Arbour, who is now my successor as UN High Commissioner for Human Rights. And I'm a little puzzled, because during my time in the United Nations, a Canadian woman was also serving as Deputy Secretary General, Louise Fréchette. Do you have to be called Louise to be a very prominent woman in Canadian life?

It's, in fact, quite a while since I practiced as a trial lawyer, but I remember after I was elected President in December 1990, every few months I would have a terrible nightmare that I was appearing before the Irish Supreme Court and I hadn't read my brief, and I really woke up in a cold sweat, and I still sometimes have that nightmare. I just hope this award won't trigger it again in the coming months.

The last case I pleaded was not, in fact, before an Irish court. It was in October 1990, towards the end of a hard-fought presidential campaign and, to the consternation of some of my loyal supporters, I broke off from the campaign to go to Luxembourg to plead a case before the Court of the European Union. It was a case on behalf of two married women, Mrs. Cotter and Mrs. McDermott, who had been discriminated against, or so they claimed, unsuccessfully, that they were discriminated against by the Irish Social Welfare code, because when they became unemployed, they got less in unemployment benefits and for a lesser period than married men.

And we did succeed in that case, and the Irish government, and therefore I'm afraid the Irish taxpayer, had to pay up something, 200 million Irish punts in those days. So it wasn't a bad case to sort of fold my tent on.

I've chosen today to talk briefly about the Rule of Law, a powerful tool in combating terrorism. It's a tough subject, but someone has to do it. And 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.

I saw this very vividly at the beginning of September, when I led a number of women leaders -- there were eight of us -- to eastern Chad on the border of Darfur to listen to women and their stories of being chased out of their villages, their husbands killed, gang raped, and yet when they came to the camps in eastern Chad, they still weren't safe.

The proliferation of weapons of mass destruction, dramatic changes in the global climate that we hear about, the HIV and AIDS pandemic and international criminal syndicates which traffic 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 that the respect for the Rule of Law should be somehow put aside or diluted in order to confront such challenges more 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 makes strengthening respect for the Rule of Law so important. Why? Because without the Rule of Law, government officials aren't bound by agreed standards of conduct. Without the Rule of Law, the dignity and equality of all people isn't affirmed, and their ability to seek redress for grievances and fulfillment 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'd 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, and 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?

I've said on many occasions over the past six years - since the terrible attacks in this country that we now capture by the term "9/11" - that language is vital in shaping our reactions. The words we use to characterize an event may determine the nature of our response.

In the immediate aftermath of the 11th of September 2001, while still serving as the United Nations High Commissioner for Human Rights, I came to New York, I went to Ground Zero, I met the bereaved families, the FEMA workers, the many volunteers. And I went into my office and sat with my colleagues, as we formulated what would be the approach, the response, under international human rights law. Based on this work, I described those attacks here in the United

States as constituting crimes against humanity. I stressed the duty on all states to find and punish those who planned and facilitated these crimes.

It's worth recalling why this description was 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 overriding priorities.

As in the past, the world has learned that emphasis on national order and security often involves 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 doesn't rule out the possibility 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 conflicts there, and in particular the subsequent decision to go to war in Iraq, have reinforced the perception of a War on Terrorism which goes beyond the rhetorical use of the term. I have used the term "war" many times, a "war on poverty," a "war on want," a "war on hunger." But the "war on terrorism" is not meant in that sense.

The reality is that by responding 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, to suppress political dissent and to stifle expression of opinion of many who have no link to terrorism and are not associated with political violence.

When I was serving in the United Nations, Hans Correll was the Legal Counsel, and he made a similar point at a recent international conference on "*International law in flux.*" I'd like to quote what he said. "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 of 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 in New York, in Madrid, in Sharm El Sheikh, in Bali, in 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, and I quote him, "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 balances struck by the courts interpreting the vague provisions of the Constitution that protect personal liberty, as it is constantly being re-struck as perceptions about safety and liberty change. The more in danger 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 don't believe that. Six years after 9/11, I believe we must evaluate such assumptions and ask ourselves if all the measures taken have been justified and consistent with the Rule of Law and if they have, in fact, been effective in combating terrible acts of terrorism.

Were the decisions taken by the United States government, for example, to hold detainees at Guantanamo Bay without Geneva Convention hearings; to monitor, detain and deport immigrants against whom no charges have 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 six years. The question facing us today is, How are we to respond to the situation, and what steps can we, and must we, take to restore and protect the international Rule of Law?

I'm actually hopeful that things are beginning to change for the better. There is a swing back in realizing that a lot of damage has been done, that the mistakes of the past six years are beginning to be recognized and some steps taken, including by the courts in this country, to redress that damage.

What is needed now is a broader approach. As a guest in this country, I just offer my thoughts -- that we need, in fact, legislation that reaffirms the United States' adherence to the Geneva Conventions, to the UN Convention Against Torture, and to the McCain Amendment, which establishes an absolute ban on cruel, inhuman and degrading treatment of all detainees in U.S. custody or control by any U.S. personnel. It would be important to remove any provision which seeks to grant broad immunity from liability for war crimes right back to September 2001. The 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, I'm glad to say, emerging. For example - the Club of Madrid, a club of former heads of state and government, exalted has-beens like myself! - convened a summit called the International Summit on Democracy, Terrorism and Security two years ago,

on the first anniversary of the terrible train bombings in Madrid. The purpose of the Summit was to build a common agenda on how the community of democratic nations could most effectively confront terrorism while maintaining commitment to civil liberties and fundamental rights.

The Summit brought together many 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, which you can find on the website of the Club of Madrid (www.clubmadrid.org), makes a compelling case, not only for more effective joint action against terrorist organizations – so it's very strong in countering terrorist organizations -- but also the need to increase resources aimed at tackling the humiliation, the anger and frustration felt by many that can be manipulated, as we know, to draw recruits for terrorist action.

There is also a relevant initiative of the International Commission of Jurists. I serve on the board of the ICJ, and I'm sure a number of you are also supporters of the ICJ. It gathered together 200 members in Berlin in 2004 and adopted a Declaration on Upholding Human Rights and the Rule of Law. You can find that Declaration at www.icj.org. I believe that it does actually restore the balance which was lost in the aftermath of 9/11. It's a declaration that should hang in law offices and judges' chambers around the world. It's the Rule of Law charter to counter the imbalances of what has sometimes been called "the new normal."

And arising out of this initiative, the ICJ established an Eminent Jurists Panel - on which I'm 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. We conducted hearings in some 20 countries. I took part in hearings in Washington, D.C., relating to the United States in September a year ago. I was in Moscow in January for another hearing. And we've gathered all this material, which again is on the website of the ICJ. We will meet in Geneva in January 08 to try to formulate a report, which looks at the trends, looks at the way in which the dipping of standards -- I have to put it that way -- in this country have such a knock-on effect in so many other countries that don't have similar checks and balances: the independent courts, the trial lawyers like yourselves, the academics and a Congress that can sense the mood of a people and begin to renew commitments.

So, in conclusion, I would say with sadness that over the past six 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.

Bodies like the American College of Trial Lawyers must do more to challenge that approach. They must use -- you must use -- your 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's the right thing to do, but because it's the most effective strategy in countering the forces which fuel terrorism.

We are the professional lawyers. I speak now as an honorary member of the American College of Trial Lawyers, 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 aroused by possible threats and references to threat levels. As we have seen, the role of the courts is vital in scrutinizing any measure taken. But the courts themselves need support and vocal advocacy on their behalf when their independence or judgments come under increasing attack.

As Judge Chaskalson has warned, and I quote him, "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."

So I really thank you for the honor, and, as I said at the beginning, I hope it doesn't give me any new nightmares.

Thank you very much indeed.