

THE LEGAL RESPONSE TO GLOBAL TERROR

GEOFF HOON*

San Diego is famous for many things: its zoo, the Hotel Del Coronado, and probably the best climate in the United States. But, most of all, San Diego is known for its citizens' support for the Armed Forces, particularly the United States Navy.

I was very much aware of that during my tenure as the United Kingdom's Defense Secretary from 1999 until 2005. To say the least, that was an eventful time in the history of our armed forces, our two countries, and, for that matter, the rest of the world. During that period, British forces took action to prevent ethnic cleansing of the Muslim population of Kosovo, they intervened to defeat the rebels and restore democracy in Sierra Leone, they assisted in toppling the brutal

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Taliban regime in Afghanistan, and they helped secure the first democratic elections in Iraq in very many years. Common threads run through all these interventions: they were all controversial, and they all relied on our close friends, the United States. I like to think I appreciate this more than most.

I hope that you will excuse me for giving a very personal explanation of why I am here, and from that personal perspective why our two countries are so close. My father's much-older brother fought in the First World War, and like millions of others on his return home he decided to look for a new life for his young wife and family. They left for the United States in the early 1920s. As a result I have more family members in the United States than the United Kingdom. One of my uncle's children served in the U.S. Air Force during the Second World War and was stationed in the United Kingdom. Unfortunately, he did not actually meet my father, his uncle, who was serving in the Royal Air Force in the Far East. They were two closely-related young men serving their countries a long way from home, fighting on the same side against violent and oppressive totalitarian regimes.

They both returned home safely and, in turn, produced another generation of Hoons. Thanks in part to cheap travel, my generation is able to meet far more often than our predecessors. Now our own children use the internet to discuss far more immediate events such as what happened in school that day.

Whenever I have had the chance, I have visited this remarkable and dynamic country. I lectured in Louisville in my twenties and have traveled widely around the states of this wonderful country.

So, in my case, the United States and the United Kingdom share a very personal connection. It is a truism to say that the United Kingdom and the United States share far more in terms of our legal and political heritage. We share the same values—a belief in democracy, in freedom, and in the rule of law. Our countries stood together in the face of common threats: fascism in the 1940s and communism through the Cold War. Now we stand together as partners in a global effort to counter the threat of international terrorism. In each case, by standing together we have upheld the values we share in common.

On November 9, 1989, I visited Berlin as a Member of the European Parliament to attend a routine meeting of the European Parliament's Legal Affairs Committee. A few weeks earlier, on a

brief visit to East Berlin, I witnessed the demonstrations that were then becoming almost daily events. That November, I wanted to see what had happened since. But, at Check Point Charlie by the Berlin Wall, the East German border guards would not accept my European Parliament travel documents. That was at about 8:30 in the evening. The Wall came down that night and thousands of young East Germans flooded into the West. I may well have been the very last person in history to be refused entry into East Germany.

The momentous fall of the Berlin Wall led to far-reaching changes in Central and Eastern Europe. Former members of the Warsaw Pact became part of the NATO alliance and former Soviet States became part of the European Union, leading to fundamental changes in defense policies.

During my time as the U.K. Defense Secretary, most of my policy initiatives were focused on restructuring our Armed Forces to address the challenges of the post-Cold War global environment. There was an emphasis on rapid deployment and quick reaction. Forces were moved from fixed bases in Germany and other Cold War outposts to more flexible positions. Investment was shifted from heavy artillery to light, hi-tech weaponry. Military cooperation began with Warsaw Pact countries that were once our enemies. Ironically, forces that were once organized to fight each other in a conventional war on the West German plain are now going through the painful process of reconstruction to be able to fight alongside each other in the great challenges of the twenty-first century. Above all else, military forces were restructured to meet the threat of global terrorism.

It may surprise some of you in this room, but many in my country and across Europe do not fully appreciate the profound impact on the United States of those appalling attacks on September 11, 2001. The extent of the reaction was brought home to me by an old friend who lived in Louisville, Kentucky (not somewhere that would perhaps be considered an obvious target for terrorists). I spoke with him a year after the attacks, and he told me that he and his wife were only then feeling safe to go out to restaurants for dinner. This story shocked my counterparts in Britain, but my sense is that it was not an unusual response in this country.

But, as we all know, terrorists have not just killed innocent civilians in the United States. Since 2002, there have been terrorist atrocities in countries as diverse as Indonesia, Turkey, Spain, Egypt,

and of course, the United Kingdom. And the terrorist threat did not begin in 2001. There were many earlier attacks and failed plots on the road to 9/11, including the horrific attacks on U.S. embassies in East Africa in 1998 and U.S. forces in Saudi Arabia in 1996.

These attacks opened the eyes of all people to the threats we face. But, different countries have responded in different ways. After the 7/7 attacks in London, when over fifty people were murdered on the London Underground by British-born suicide bombers, the city went into a state of shock. But, what was remarkable was how quickly the city got back to normal. The following day people continued to use the underground in significant numbers. They carried on with their daily lives, determined to not let the terrorists win.

In so many ways this British characteristic is admirable. It showed itself during the Blitz, when our courage confounded Nazi efforts to intimidate us by indiscriminate bombing, and it defeated the IRA terrorist campaign on the streets of London. But, the other side of this great British trait is skepticism about the motives of government in tackling the challenges of our country. This skepticism is a healthy and necessary ingredient of a mature democratic society and a helpful constraint on overeager politicians who might be tempted to cast away our hard-won civil liberties without appropriate justification. But, I suspect it might surprise many in an American audience just how politically difficult it has been for us to introduce measures requested by our security services to assist in their work.

We in the U.K. Government judged that these changes, including extending the length of time terrorist suspects could be held for questioning before being charged, were necessary because the threat we face today is on a different scale from anything we faced before. The perpetrators of today's threats belong to brutal, global networks intent on indiscriminate killing. Al-Qaeda's so called representatives have announced repeatedly and unashamedly that "you love life and we love death."¹ Osama bin Laden and his lieutenants are willing to train young people to give up their own lives as human suicide bombs to kill as many innocent people as possible. It cannot be said that

1. This phrase was used in a Mar. 20, 2004, videotaped message following the Madrid train bombings from a man purporting to be al-Qaeda's military spokesman in Europe. Bobby Ghosh & James Graff, *Terror on the Tracks*, TIME, Mar. 22, 2004, available at <http://www.time.com/time/magazine/article/0,9171,993637-2,00.html>.

religion is their motive because I would assess that many more Muslims have been killed by suicide bombers in recent years than the number of believers from all other religions combined.

This threat is like nothing we have seen before—a murderous mindset, with political demands that are completely unacceptable in a modern and civilized world. And the threat involves a different magnitude—aiming for mass casualties in so-called spectacular attacks. I would never want to downplay the blood-thirstiness of terrorists in the past on both sides during the troubles in Northern Ireland, but al-Qaeda’s complete contempt for the value of human life, both Muslim and non-Muslim, is on a completely different scale. And let us not be under any illusion about al-Qaeda’s targeting. Look at their bombing of a wedding party in a hotel in Jordan, their strike at the heart of multi-cultural London, or their merciless attacks on ordinary Iraqis. They kill men, women, and children without compunction.

Yet, as I have already indicated, it has sometimes proved difficult to get support in the House of Commons, particularly among opposition parties, for new measures to strengthen our anti-terrorist legislation. All European countries are grappling with the same questions as we seek to defend our people and protect the liberties we hold dear. What extra support do our security services need? Does this require new legislation? How can we legislate without damaging our civil liberties? Do we need to protect these liberties with further legal guarantees? These questions go to the very heart of the current legal and political debate. How do we balance an individual’s liberties with the state’s responsibility to protect its citizens from terrorism?

In this new age of global terrorism, that recognizes no national or legal boundaries, states must act together to protect civilized society from the risk of attacks. These actions will inevitably have the effect of limiting individual liberties. The key questions are how far do we limit and is it a price worth paying? Or are we, as some of our critics suggest, doing the terrorists’ work for them?

This debate has recent historical roots in the Cold War. One of our greatest political philosophers, Isaiah Berlin, warned against the dangers of state intervention restricting the liberty of the individual.²

2. See generally ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1969).

His critique was directed at the authoritarian state of the Soviet Union, which used a contorted concept of liberty to justify its otherwise unjustifiable actions.³ In contrast, the emphasis in the West during the Cold War and its subsequent thaw was on how an individual's action should not be overly restricted by state action and state intervention. That difference helped us distinguish the free countries of the West from the oppressive state power of the Soviet bloc.

Today, the threat that causes the restraint no longer comes from a state. The global terrorist threat that we now face is unpredictable and indiscriminate. Given the extremes to which terrorists are willing to go, we may need to reconsider our approach to dealing with those who pose a real risk to the fabric of our society.

We have to make and win the arguments for this state intervention. There is an understandable reluctance from many liberal-minded commentators from across the political divide to accept these arguments. But, we need to show that our cherished modern concept of liberty will not work if we cannot guarantee the basic freedom of security. Winning these arguments in our countries and across the world is our common challenge. The battle against terrorism is truly a global conflict, marked more clearly than ever before by the fact of global interdependence. Terrorists use our freedoms to exploit this: traveling from country to country and using electronic financial networks to channel their funds, the internet to spread their message, and the latest technologies to communicate with each other. This was highlighted more than ever during the September 11 attacks: training and planning in the Far East, preparing the attacks from bases in Europe, and traveling to perfect the arrangements. It follows that we can only defeat this threat by working and cooperating together more effectively than we did in the past against the more conventional threats to our freedoms.

I have set out the similarities between our two countries in terms of values, but, of course, when it comes to tackling these challenges we have different constitutional arrangements. You have a written Constitution; we do not. You have a presidential system with many checks and balances, a strong Congress, and powerful states; we have a doctrine of Parliamentary Sovereignty with individual Members of Parliament elected from constituencies around the country. Your most

3. *Id.*

senior judges sit in a Supreme Court; ours are in the House of Lords (at least for now until we create our own Supreme Court). You have a Bill of Rights; we have the European Convention on Human Rights.⁴

The European dimension is particularly relevant for me. For the United Kingdom, the way we tackle this threat must be seen in a European context. Against the backdrop of the rights guaranteed by the European Convention on Human Rights, we have brought in our own domestic legislation: the Prevention of Terrorism Acts of 2000 and 2006 contain a number of measures to provide our enforcement agencies with the tools they need to tackle terrorism.⁵

Much of my time as Europe Minister is spent working with counterparts in other European countries. In response to the escalation of terrorist attacks, in recent years we have intensified cooperation with European partners to fight cross-border crime and terrorism. During the United Kingdom's six-month Presidency of the European Union in 2005, we exported our four-pronged counter-terrorism strategy—the four Ps—Prevent, Pursue, Protect, and Prepare.⁶

One key success story is the European Arrest Warrant which has greatly facilitated the extradition of suspected criminals from one member state to another.⁷ In cooperation with our European partners, we are currently refining a complementary measure that will streamline the process of exchanging evidence for criminal proceedings. This will prevent criminals escaping charges as the

4. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222 [hereinafter ECHR].

5. *See Terrorism Act 2006*, Home Office, <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/terrorism-act-2006> (last visited Nov. 19, 2007) (outlining the anti-terrorism tools provided to police, intelligence agencies, and courts by the Act).

6. Council of the European Union, EU Counter-Terrorism Strategy and Action Plan on Combating Terrorism, 5771/1/06, Feb. 13, 2006, available at <http://register.consilium.europa.eu/pdf/en/06/st05/st05771-re01.en06.pdf> (revision incorporating comments received on the Dec. 15, 2005, draft (15358/1/05/Rev1), which incorporated the four strategic pillars of prevent, protect, pursue, and respond).

7. European Union, European Arrest Warrant, available at <http://europa.eu/scadplus/leg/en/lvb/l33167.htm> (last accessed Oct. 8, 2007).

result of evidence gathered in one country not being automatically admissible in the justice system of another European state.⁸

Terrorists use global networks. Their level of sophistication often allows them to cross borders undetected. To combat this, the European Union has put in place Europe-wide legislation to crack down on money laundering and to enable the freezing of the assets of suspected criminal networks.⁹

There is also an emphasis on prevention. The European Union is working to determine how to best pursue counter-radicalization.¹⁰ We need to understand the origins and the motivation of these new threats—especially in the United Kingdom when our own citizens are involved. What ultimately motivates the men and women who are the front-line criminal elements of these global terrorist networks?

But, we cannot just operate within the borders of the European Union and hope for the best. Terrorist networks are global. The European Union is therefore actively involved in building technical capacity in third world countries, where the threat is highest and there is a lack of government infrastructure to respond to it. These

8. Council of the European Union, Proposal for a Council Framework Decision on the European Evidence Warrant (EEW) for Obtaining Objects, Documents and Data for Use in Proceedings in Criminal Matters, 11235/06, July 10, 2006, *available at* <http://register.consilium.europa.eu/pdf/en/06/st11/st11235.en06.pdf>. *See also Q&A: European Evidence Warrant*, BBC NEWS ONLINE, June 6, 2006, <http://news.bbc.co.uk/1/hi/world/europe/5051532.stm> (generally explaining the international warrant process).

9. *See, e.g.*, European Council, Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering, and Terrorist Financing, PE-CONS 3631/05, Aug. 9, 2005, *available at* http://ec.europa.eu/internal_market/company/docs/financial-crime/unoffical3dir_en.pdf (last accessed Oct. 8, 2007). *See also* European Commission, Financial Crime, *available at* http://ec.europa.eu/internal_market/company/financial-crime/index_en.htm (last accessed Oct. 8, 2007) (providing an overview of European legislation “adopted to protect the financial system and other vulnerable professions and activities from being misused for money laundering and financing of terrorism purposes”).

10. *See, e.g.*, Council of the European Union, Strategy for Combating Radicalisation and Recruitment to Terrorism, 174781/1/05, Nov. 24, 2005, *available at* <http://register.consilium.europa.eu/pdf/en/05/st14/st14781-re01.en05.pdf>, and European Commission, Terrorist Recruitment: a Commission’s Communication Addressing the Factors Contributing to Violent Radicalization, MEMO/05/329, Sept. 21, 2005, *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/329&format=HTML&aged=0&language=EN&guiLanguage=en>.

European initiatives should be replicated on a global scale where possible.

The United Kingdom has strong bilateral links with the United States on these issues as well as participating in E.U.-U.S. cooperation. However, we could and should do more together. The stereotypical distinction between the United States and the European Union in this field is that the United States is more interested in pursuing the terrorists and the European Union more focused on preventing terrorism. However, let us not allow stereotypes to distort our view of reality. Both of these Ps—Pursue and Prevent—are necessary and complementary. We can learn from each other in both of these areas, as well as cooperate together more closely and more effectively.

The extent to which the state should intervene to both prevent terrorism and pursue terrorists depends on the balance between individual civil liberties and the right to security. The legal parameters of this debate deserve further consideration. Just as you have the U.S. Bill of Rights, we have the European Convention on Human Rights. Our common law heritage is now underpinned by the European Convention which was designed to further protect human rights and fundamental freedoms—the classical civil and political rights: the rights to life, liberty and security, to a fair trial, and to freedom of expression.

It is worth considering for a moment the historical context of the European Convention on Human Rights.¹¹ It was drafted in the post-war period of the late 1940s and early 1950s in direct relation to the abuse of state power by the Nazis but with the oppressive state Communism of the Soviet Union in mind. There is no question that it remains a vital protection of our fundamental freedoms, but like all such documents it needs to evolve and develop in the light of changes in the wider world. The question we now face is whether this document remains entirely adequate to deal with non-state global terrorist organizations.

Two articles of the Convention are particularly relevant to this question. Article 17 provides that no one may use the rights guaranteed by the Convention to seek the abolition or limitation of the

11. ECHR, *supra* note 4.

rights guaranteed in the Convention.¹² Shouting down someone exercising a right to free speech will usually not be protected, but what is the limit of religious freedom? Does it include preaching the virtues of a holy war against the Western infidel in the mosques of our own towns and cities? Article 15 does provide a derogation from the rights guaranteed by the Convention in time of “war or other public emergency threatening the life of the nation.”¹³ Those that drafted this provision had two world wars in mind—vast conflicts that in the case of the Second World War were fought out in almost every corner of the globe by state actors.

In the twenty-first century, faced with the scale of the terror threats that I have outlined, there is a question about whether these articles are sufficient today to deal with problems posed by non-State actors like al-Qaeda. Inevitably and rightly, clauses allowing derogations from the basic principles are tightly drawn and tightly interpreted. I would not argue against such an approach for one moment, but it is worth noting that they were written long before the idea of an international terrorist organization capable of such massive destructive force was even contemplated.

This new global threat may well require a new legal approach, one that recognizes that threats to our way of life may come not only from state actors in time of war. Such an approach could be the only way in which we can confidently guarantee the security of our citizens and the rights that they enjoy. Like the United States, we all face many similar challenges. I do not want to leave anyone in this room in any doubt—no country can win this battle on its own, but the close and personal friendship between the United States and the United Kingdom will go on making a real difference and a real contribution.

Thank you for your kindness and your attention. There are difficult times ahead for the United States, for the European Union, and for the whole of the civilized world. I recognize today that I have not set out all of the possible solutions, but I believe we are on the right track: defending our values, making difficult decisions to protect our freedoms, and, most importantly, standing and working together.

12. *Id.* art. 17.

13. *Id.* art. 15.