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The Internationalisation of Terrorism: Winning the War, While Preserving Democratic Rights – A Balance Gone Wrong

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I. INTRODUCTION

In looking at the scourge of terrorism it is worth looking to the experience of nations such as Israel. Despite the prevalence of terror in that jurisdiction, the Israeli courts have affirmed that there is no choice in a democratic society seeking freedom and security, but to create a balance between freedom and dignity on one hand and security on the other.[1] In arriving at that balance, the most senior judge in that nation has declared:

> It is the fate of democracy that it does not see all means as justified, and not all the methods adopted by its enemies are open to it. On occasion, democracy fights with one hand tied. Nonetheless, the reach of democracy is superior, as safeguarding the rule of law and recognition of the freedoms of the individual, are an important

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[1] *Anon. v Minister of Defence* (1997) 7048/97 54(1) P.D. 721 at 743. As discussed in Emanuel Gross, "Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?" (2001) 18 Az. J. Int'l. Comp. L. 721.

> component in its concept of security. Ultimately, they fortify its spirit and strength and enable it to overcome its problems.[2]

Despite these warnings, since the terrorist attacks of 11 September 2001, it has become apparent that concerns of national security have gained priority over the protection of civil rights in many countries. In many ways, the sense of balance supposedly associated with the rule of law has been betrayed.

Part II of this paper explores the problem of defining the term "terrorist" and notes the often fine line between the labels of "terrorist" and "freedom fighter". It is argued that greater clarification by the international community is needed to delimit the concept of terrorism in order to deter State leaders from eroding fundamental democratic rights.

Part III analyses the new, "internationalised" turf of terrorism, highlighting the increasingly nimble and entrepreneurial nature of terrorist cells and the multifarious challenges they present. Specifically, it is suggested that for the "war on terrorism" to be successful it must be fought on two fronts. Strong domestic measures must be complemented by sophisticated multilateral alliances. Most importantly, this must be achieved within the parameters of the rule of law. It is argued that, at present, many nations are loosing on both fronts. This would seem to be as much the case for nations whom have historically exalted themselves as exemplars of democratic ideals as those with histories of despotism. For example, on a multilateral level it is shown that the U.S. has failed to foster the necessary multilateral environment so crucial to combating internationalised terrorism. Factors behind this include: its undermining of a number of international treaties, its hegemonic defence expenditure and its seeming disregard of international opinion in choosing to go into Iraq by the means decided. In striving for a fair perspective with respect to the multilateral fight against terrorism, the subservience, and in some instances, utter dormancy of many other nations worldwide is also challenged.

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[2] *Public Committee Against Torture in Israel v Government of Israel* (1999) P.D. 817 at 840 (Barak P.). As discussed in Emanuel Gross, "Trying Terrorists - Justification for Differing Trial Rules: The Balance Between Security Considerations and Human Rights" (2003) 13 In. Int'l. Comp. L. Rev. 1 at 2.

Despite the manifold challenges facing the United Nations counter-terrorism effort, it is argued that Security Council Resolution 1373 may still provide an effective forum for dealing with the new terror. However, amongst a host of challenges, the Counter Terrorism Committee (which gives effect to Resolution 1373) must ensure that all of its member States take positive steps to combat terrorism without eroding fundamental civil liberties – a balance that seems to be under enormous strain to date.

Thus, Part IV of this paper analyses the questionable domestic terrorism responses of the United States, while Part V looks, in some detail, at the equally disturbing anti-terrorist legislation in Australia - a nation that has yet to experience a significant episode of terrorism on its soil.[3]

II. THE PROBLEM OF DEFINITION

The task of formulating a universal definition of terrorism has been complicated by the freedom fighter/terrorist dilemma. There are countless examples where an individual has been labelled a terrorist only to be dubbed as a "freedom fighter" down the track. An oft-cited example is that of the Irgun Jewish resistance movement that emerged after the Second World War. Consistent with the work of Seto, the Irgun's method, expressed succinctly by their leader, Menachem Begin, was "a prolonged campaign of destruction".[4] At the time, his organisation was widely deplored as being a terrorist group of the highest order (even amongst mainstream Jews of the time).[5] Begin's picture, that of a wanted terrorist, was posted in all British prisons and offices in Palestine and a significant price was put on his head. Menachem Begin was never prosecuted for any of his actions as Head of the Irgun. In 1977, he became sixth Prime Minister of Israel. In 1978, he was awarded the Nobel Peace Prize.[6] The Boston Tea Party, abettors to the American Revolution, would likely fall within the ambit of terrorism under a number of legal jurisdictions, as would John Brown's raid on the federal arsenal at Harpers ferry which similarly assisted in the abolition of

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[3] Although the "Bali Bombing" took the lives of 80 Australians, obviously this did not take place in Australian territory.

[4] Theodore P. Seto, "The Morality of Terrorism" (2002) 35 Loyola L.A. L. Rev. 1227.

[5] Ibid.

[6] Ibid.

American slavery.[7] Indeed, the old adage "one person's terrorist is another's freedom fighter" has not diminished with the onset of the new, "internationalised terrorism".

Although admittedly the 1977 Protocols Additional to the Geneva Conventions,[8] went some way in illuminating the terrorist/freedom fighter dilemma,[9] the position of the United Nations on terrorism has transformed over the last three decades from one that at least arguably permitted terrorism in support of the struggle for self-determination, to one that condemns terrorism as criminal and unjustifiable in all circumstances wherever and by whomever committed.[10] Even before the newfound blanket ban on acts of terrorism it would be difficult to maintain that there was a level playing field under these Protocols. For example, Israel, the United States and Britain have all refused to sign Protocol 1 to the Geneva Conventions of 1977. This Protocol extended the application of the Geneva Conventions to armed conflicts. Article 44 recognised that there were situations in which, given the nature of the hostilities, that combatants could not distinguish themselves from the civilian population. In these situations, they retained their status as combatants provided that they openly carried their arms during a military engagement and during such time that they were visible to an adversary while engaged in a military deployment preceding the launching of an

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[7] Ibid.

[8] *Protocol Additional to the Geneva Conventions of August 12 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 U.N.T.S. 3, arts 4(E), 272(F) (entered into force 7 December 1979) ('Protocol I'); and *Protocol Additional To The Geneva Conventions Of August 12, 1949, and Relating To The Protection Of Victims Of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609, arts 610(E), 650(F) (entered into force 7 December 1978) ('Protocol II').

[9] Protocol II extended the recognition accorded to irregular forces by providing protections during armed conflicts which occurred in the territory of a High Contracting Party between its armed forces and "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Matthew Lippman, "The New Terrorism and International Law" (2003) 10 Tulsa J. Comp. Int'l. L. 97 at 299 and 333-334.

[10] Malvina Halberstam, "The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed" (2003) 41 Colum. J. Trans. L. 573.

attack. This substantially modified the traditional four-prong requirement (under Article 44) for recognition of prisoner of war status articulated in the Geneva Conventions.[11] Therefore, we now have a world in which even if attempts are made by various organisations to receive freedom fighter status these may be rejected by other nations. The question remains: how can we expect certain terrorist groups to abide by international law if we refuse to recognise them under that law in the first place?

So from the outset, it can be seen that responding to terrorism is inherently problematic as one person's solution is another person's problem, and the answers are often unclear or evasive. [12]

Undoubtedly, the instruments of terror are varied and the motivations of terrorist's diverse but experts agree that terrorism is the use or threat of violence, a method of combat or strategy to achieve certain goals, that its aim is to induce a state of fear in the victim, that it is ruthless and does not conform to humanitarian norms, and that publicity is an essential factor in terrorist activity.[13]

If intellectuals, practitioners, or members of our civilisation do one good thing in the next few years, it would be to develop a generally accepted and workable definition of terrorism. This is not only important to ensure that unsatisfactory laws are not passed by both totalitarian and democratic states alike (for democratic nations have been just as culpable in passing dubious terrorist laws) but also to add some clarity to the ephemeral boundaries inherent in the internationalised terrorist landscape. As Tharoor has declared: "what is needed to maintain the sense of shared mission - across nations but also across cultures, religions, and ethnicities

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[11] Lippman, above n. 9.

[12] Charles W. Kegley, Jr. and Eugene R. Wittkopf, *World Politics Trend and Transformation* (2003), at p. 433.

[13] Ibid.

- is that elusive consensus definition. We must keep trying to find it until we succeed".[14]

Finally, as the recent train bombings in Spain and in Britain brought home - terrorism and the war against it did not start on September 11 and will not end any time soon.[15]

III. THE INTERNATIONALISATION OF TERRORISM

It was globalisation that was supposed to bring an end to or at least ameliorate what some have coined the "root causes of terrorism". The perils of poverty, hunger, lack of education and other socio-economic problems were, according to its proponents, to evaporate with the emergence of a new borderless society. Despite the promises of internationalisation,[16] we know that it is not making life better for all. Former U.N. Commissioner for Human Rights at the United Nations, Mary Robinson has highlighted the severity of the situation:

> Every twenty-four hours, more than 30,000 children around the world die of preventable diseases. 6.3 million children die each year of hunger. Women are still the poorest of the worlds poor – eight hundred million of them – representing two–thirds of those people living on a dollar a day. A thousand million people are still without access to clean water supplies, and 2.4 billion lack access to basic sanitation.[17]

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[14] Shashi Tharoor, "September 11, 2002: Understanding and Defeating Terrorism, One Year Later" (2003) 27 Fletcher F. World. Aff. 9 at 12. It should be noted that the U.N. General Assembly's Sixth Committee is currently considering a draft Comprehensive Convention on International Terrorism which would include a definition of terrorism if adopted. See Counter Terrorism Committee, <http://www.un.org/Docs/sc/committees/1373/definition.html>, at 12 December 2003.

[15] Robert S. Mueller, "The FBI's New Mission: Preventing Terrorist Attacks While Protecting Civil Liberties" (2003) 39 Stanford J. Int'l. L. 117 at 118.

[16] The terms internationalisation and globalisation are used interchangeably. There are, however, semantic differences. See e.g., Fritz Machlup, *Essays in Economic Semantics* (1967).

[17] Mary Robinson, "Making Human Rights Matter: Eleanor Roosevelt's Time Has Come" (2003) 16 Harv. H. R. J. 1 at 8.

It is somewhat ironic that globalisation, the very thing that was supposed to abate worldwide suffering has also contributed to it. While internationalisation is not a panacea for the multifarious challenges afflicting the contemporary world there is no denying that it presents just as many opportunities for terrorist organisations as for any other enterprise, state or actor that uses it effectively.

It has been said that it has almost become axiomatic that we look at everything through the lens of September 11.[18] Unequivocally, it was this event that transformed dramatically the way in which people perceived the threat of terrorism.[19] The "new"[20] "megaterroism"[21] is truly internationalised. In the past terrorist attacks were directed at targets which were related to the groups philosophy and objectives; indiscriminate violence might diminish the terrorists' image and support, create internal schisms and risk harsh counter-reaction. However, in this period of prodigious violence only the spectacular was likely to mesmerise the media. This is not to say that precedents did not exist for the terrorist attacks that took place on September 11, 2001. We know that they did but certainly, the degree of indiscrimination was somewhat new in its spread. The perpetrators of the act engaged in a coordinated and callous campaign that enabled them to achieve results comparable to those analogous to deploying weapons of mass destruction.[22]

To curtail attacks like those that occurred on September 11 may be a tall order indeed. Terrorist organisations are no longer the localised and poorly organised institutions they once were. They like so many other actors have ridden the wave of the information technology revolution even

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[18] John Shattuck, "Religion, Democracy, & Human Rights" (Paper presented at the Harvard Human Rights Journal Conference, Harvard Law School, 15 February 2002).

[19] On this change of cognition and possible reasons for it see Harvard Law Review Association, "Response to Terrorism, Crime, Punishment and War" (2002) 115 Harv. L. Rev. 1217 at 1228–1238.

[20] Ian O. Lesser *et al.*, *Countering the New Terrorism* (1999).

[21] "Megaterrorism is violence against civilian targets that achieves significant levels of substantive as well as symbolic harm, causing damage on a scale once associated with large-scale military attacks under state auspices, and thus threatening the target society in a warlike manner that gives rise to a defensive urgency to strike back as effectively as possible." See Richard Falk, *The Great Terror War* (2003) at pp. 7- 8.

[22] Lippman, above n. 9, at 303.

diversifying into acts of cyber terrorism and netwar strategies.[23] Terrorism is now bundled up with drug, arms trafficking, sexual exploitation, and other international crimes. The internationalisation of terrorism has lead to the birth of sophisticated, autonomous and decentralised cell networks that converge to conduct specific missions, then separate, and splinter.[24] Once a terrorist milieu is consolidated, it tends to generate its own dynamics and to attract other terrorists and monetary investment from around the world. Unless halted, "virtuous cycles"[25] may emerge as the internationalised turf makes the practice of terrorism so effortless. In short, the terrorists of today are the new breed of entrepreneurs.

To speak of an internationalised terrorism is not to deny the heterogeneity of the terrorist enterprise. In 2002, the U.S. State Department identified 33 major terrorist collectives worldwide all of which varied in size, scope and other demographic characteristics.[26] Nor has the internationalised terrorism completely supplanted the terrorism of old.[27] The occurrence of September 11 was conspicuous, however, in that the pilots who hijacked the planes were well educated and not born of poverty. It would be myopic of us to assume that mentally unstable fundamentalists or unintelligent individuals monopolise the global terrorist enterprise. To the contrary, it would seem that within certain countries and within certain terrorist webs a disturbing amount of those people pledging allegiance to terrorist causes are young, college educated, middle class, technicians, professionals and business persons.[28]

What arguably has made September 11 a historic watershed ushering in a new age is that it marked the advent of new rules for a violent old game by the weak against the strong, but now conducted by ideological terrorists

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[23] John Arquilla, *Networks and Netwars: The Future of Terror, Crime, and Militancy* (2001).

[24] Lippman, above n. 9, 303.

[25] Charles Hampden-Turner, *Corporate Culture: From Vicious to Virtuous Circles* (1990).

[26] Kegley and Wittkopf, above n. 12.

[27] See Lippman, above n. 9. For example, Boaz Ganor summarised the research on Hamas suicide bombers suggesting that a generic profile was a young, unmarried and unemployed male from an impoverished family.

[28] Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1993); John Esposito, *Jihad and the Struggle for Islam Unholy War: Terror in the Name of Islam* (2002), at pp. 50-51; and Nara Hassan, "Letter from Gaza: An Arsenal of Believers", *The New Yorker* (New York), 19 November 2001, at p. 36.

with grandiose revolutionary ambitions acting transnationally to transform the international status quo.[29]

For regulatory frameworks to make a meaningful indent in terrorist operations, they must be equally nimble and equally entrepreneurial. Crucial to wining the war on terrorism will be the creation of synergy and strategic alliances. No state, not even the contemporary superpower the United States, will be able to pursue a "go it alone" strategy if terrorism is to be eradicated. It has been shown, for instance, that States other than the United States accomplished roughly seventy percent of the freezing of terrorist funds.[30] Terrorism does not originate in one country, its practitioners are not based in one country, its victims are not found in one country and the response to it must therefore involve all countries.[31] Thus, legal arrangements must at once be both internationalised and localised and they must do better than the terrorists they wish to catch. Unfortunately, it would seem that the US has failed to recognise this and one may be forgiven for thinking that America is intent on creating a unipolar world.

A. September 11: From Sympathy to Suspicion

In the immediate aftermath of September 11, it cannot be disputed that there was a sense of immense sympathy for the United States.[32] This sympathy was as omnipresent in much of the Arab and Islamic world as anywhere else. Yet only one year later, it became apparent that the attitude towards the U.S. had descended into one of deep suspicion, and in some instances, one of acrimony. America became the target of widespread criticism not only from the Arab and Islamic world[33] but also nations that it has traditionally regarded as its closest allies and supporters.

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[29] Kegley and Wittkopf, above n. 12, at p. 440.

[30] Michael M. Collier, "The United States and Multilateralism 2001-2003: A Mid-Term Assessment: The Bush Administration's Reaction to September 11: A Multilateral Voice or a Multilateral Veil?" (2003) 21 Berk. J. Int'l. L. 715 at 729.

[31] Tharoor, above n. 14, at p. 10.

[32] C.N.N., "NATO to Support US Retaliation" (2001) <http://www.cnn.com/2001/WORLD/europe/09/12/nato.us/ > at 13 September 2001.

[33] For a comprehensive outline regarding the mutation of attitude in the Arab world see William A. Rugh, "Perceptions in the Arab World and Debates in Washington: Analyzing US Mideast Policy After September 11" (2003) 27 Fletcher F. World Aff. 47.

The staunchest advocate of the US would encounter difficulty in defending that nations position on a number of fronts. Relevant in this regard is America's massive, if not outrageous, defence expenditure[34] and its decision to proceed with its entry into Iraq.[35] Although a detailed discussion of these more political issues is beyond the scope of this paper, it is worth looking briefly at America's recent performance at international law especially in relation to multilateral treaties.[36]

With respect to multilateral treaties, the U.S. (along with Australia) is one of the few remaining industrialised nations to reject the Kyoto Protocol on climate control. In the arena of humanitarian law, after influencing significantly the form of the Rome Statute constituting the International Criminal Court (I.C.C.)[37] the U.S. refused to ratify it, while simultaneously requesting - and in some cases coercing various nations dependent on aid - to sign the so-called section 98 bilateral immunity agreements favouring U.S. personnel.[38] Also in relation to the I.C.C., the

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[34] See Gareth Evans, "US: Bully Or Benefactor?: The US Versus the World? How American Power Seems to the Rest of Us" (2003) 27 Fletcher F. World Aff. 99, at 103-105. Close to $40 billion in defence expenditure was passed in the 2001 American budget. At nearly $400 billion this equates to forty percent of the world's total: surpassing the combined total of the seven "rogue states" identified by the Pentagon as being most likely adversaries (Iraq, Iran, North Korea, Libya, Sudan, Syria and Cuba), not to mention China, Russia, and its eighteen N.A.T.O. allies. Evans proceeds to put these figures into perspective. Whereas the average industrial country spends $7 on its military for every $1 devoted to aid, for the U.S. the ratio is closer to 38 to 1. It is worth noting in this context that the amount the U.S. has spent on the war against Iraq is of the order of $ 100 billion, nearly twice what is needed to bridge the global aid gap in 2004, 10 times Washington's own current annual aid expenditure, and 100 times the $1 billion the U.S. is offering each year to fight the global scourge of A.I.D.S. - which is causing deaths on the scale of two-and-a-half 9/11s everyday.

[35] Although an exploration of the decision to go into Iraq is beyond the scope of this paper, comments made by President Bush, namely "You're with us or against us", are hardly conducive to generating the level of support so imperative to fighting the internationalised terrorist networks of today.

[36] Adapted from Evans, above n. 34.

[37] On U.S. objections to the form of the Rome Statute during negotiations see Human Rights Watch, "Summary of the Key Provisions of the ICC Statute", at <http://www.hrw.org/campaigns /icc/docs/icc-statute.html> at 16 March 2003.

[38] For a particularly disturbing account of this see Coalition for the International Criminal Court, <http://www.iccnow.org/documents/usandtheicc.html> at 18 November 2003; and Jean Galbraith, "The Bush Administration's Response to the International Criminal Court" (2003) 21 Berk. J. Int'l. L. 683.

U.S. acted contrary to Article 18 of the Vienna Convention that obliges signatories to refrain from undermining treaties they decline to ratify and in doing so has disavowed itself of an arguably effective forum for bringing terrorists to justice.[39] Thus, commentators have demonstrated how future terrorism offences could quite easily fall within the competence of the I.C.C. insofar as they constitute a crime against humanity.[40] With respect to human rights America has continued to refuse, along only with Somalia in the entire U.N. system, to ratify the Convention on the Rights of the Child. Yet it continues to press a number of other nations about their commitment to human rights.[41]

Of particular concern also is America's role in relation to preventing the proliferation of arms. After playing an important leadership role a decade ago in securing a rigorous international inspection regime for chemical weapons the U.S. has gone some way in eroding that good work.[42] Hence, recent contributions of the U.S. include sidestepping a draft protocol seeking a similar enforcement mechanism for biological weapons. Further to assert in the Nuclear Posture Review the U.S. right to develop a new generation of nuclear weapons. Finally, to withdraw unilaterally from the Anti-Ballistic Missile (A.B.M.) treaty which despite catchcries that the Cold War is over has considerable strategic implications beyond Russia.[43] Against this backdrop, one American academic has gone so far as to call the U.S. its own worst enemy.[44]

In admonishing the U.S., it is easy to overlook what former Foreign Minister of Australia, Gareth Evans, has called the raw genuine and realistic facts.[45] He notes that more people were killed in the September 11 attack than in all the terrorist incidents in Israel and Ireland combined

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[39] See generally Richard J. Goldstone and Janine Simpson, "Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism" (2003) 16 Harv. H. R. J. 13.

[40] Ibid.

[41] Evans, above n. 34, at 124.

[42] Ibid.

[43] Ibid.

[44] Tony Judt, "Its Own Worst Enemy: The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone", *The New York Review* (New York), 15 August 2002, at pp. 12-13.

[45] Evans, above n. 34.

for the last 50 years[46] and that, for all the vulnerability the rest of us are feeling, the U.S. and its citizens still remain the most likely targets for further terrorist activity.[47] In levelling charges against America, it is necessary to acknowledge our own complacency and tardiness in relation to a whole range of international affairs of which law making is but one. Too many States and too many senior politicians seem to have been consumed by a culture of subservience towards the U.S. allowing it to dominate the terrorist agenda as they have, for best and worst, so many other international priorities. This deference, however, fails to take account of the complexities of global terrorism. As has been demonstrated its oversight cannot be left to any one nation. Subject to their capacity, all nations must play an active role in relieving the burden borne by global powers. This means rigorous contribution in formulating, mediating and enacting strategies and laws to deal with global problems. When nations contribute according to their means, they earn the right to speak out against what they might consider counterproductive deviations in international law by certain states. They must exercise that right and in some cases where a change in international strategy is required they must exercise that right collectively. This, it is submitted is especially the case for the scourge of terrorism and the legal challenges it presents.

Accordingly, it can be seen see that states throughout the world can do far more on the international plane to suppress the cancer of terrorism. America, in particular, can improve its multilateral relations by taking a hard look at its foreign policy and international legal performance. Other nations can do better by being less subservient dormant and through actively participating in alleviating the terrorist burden. The optimal way for other nations to extend their purview of power is through informed, critical and actual support. When it comes to terrorism, one way that smaller states can contribute is via Security Council Resolution 1373. However, if progress to date is to serve as any indicator this may be "easier said than done".

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[46] Incidentally, the author has surveyed various figures and he is not at all certain whether this is accurate.

[47] Evans, above n. 34, at p. 106.

B. Security Council Resolution 1373 and the Counter Terrorism Committee

On 28 September 2001, Security Council Resolution 1373 was adopted.[48] This represents the cornerstone of the United Nations' counter terrorism effort. Adopted under Chapter VII it declares international terrorism a threat to "international peace and security"[49] and imposes binding obligations on all U.N. member states. Previously, dealing with international terrorism occurred under the aegis of the General Assembly.

Resolution 1373 requires all 191 U.N. member states to take positive steps to combat terrorism hence going beyond the existing international counter terrorism conventions and protocols that merely bind those that have become parties to them. Specifically, the Council has adopted provisions from a variety of international legal instruments that do not yet have universal support such as the Terrorism Financing Convention, and have incorporated them into a resolution that is binding on all U.N. member states.[50] Rosand is quick to highlight the far-reaching nature of the resolution:

> Some mistakenly think Resolution 1373 is directed mainly at terrorist financing. It does address this crucial area, but it also requires or urges other steps by states against terrorists, their organisations, and supporters - for example, to update laws and to bring terrorists to justice, improve border security and control traffic in arms, cooperate and exchange information with other states concerning terrorists, and provide judicial assistance to other states in criminal proceedings related to terrorism. More generally, it requires all member states to review their domestic laws and practices to ensure that terrorists cannot finance themselves or find safe havens for their adherents or their operations on these states' territory.[51]

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[48] *United Nations Security Council Resolution,* S.C. Res. 1373, 4385th mtg. [6] (2001).
[49] Eric Rosand, "Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism" (2003) 97 A.J.I.L. 333 at 334.
[50] Ibid.
[51] Ibid.

Seminal to Resolution 1373 is the establishment of the Counter-Terrorism Committee (C.T.C.). The C.T.C. is charged with the role of monitoring the implementation of the Resolution and embodies all members of the Security Council.[52]

The C.T.C. has asked all States to report to the Committee on steps taken or those planned to implement Resolution 1373.[53] These reports form the basis of the C.T.C.'s work with Member States. All reports received by the C.T.C. are considered in one of the C.T.C.'s three Sub-Committees. Each of these is chaired by one of the three Vice-chairman. As part of the review process, the relevant Sub-Committees have also invited the States concerned to attend part of the Sub-Committee's discussion of the report. The Sub-Committees are advised on the technical aspects of States' reports by a group of independent Expert Advisers appointed to support the work of the C.T.C.[54] Based on its analysis of reports and any other available information, the C.T.C. assesses States' compliance with Resolution 1373. The C.T.C. then sends a letter to each State, prepared with guidance from its Experts. These letters ask further questions of States on issues considered in their reports, and any other matters the C.T.C. may consider relevant to the implementation of Resolution 1373. States are requested to respond to the C.T.C. in a further report, within three months. Implementation of Resolution 1373 is an ongoing process.

C. Effectiveness of the C.T.C.

The support generated by the C.T.C. is by anyone's yardstick, a remarkable accomplishment.

In September 2001, only two States were parties to all 12 Conventions and Protocols[55] regarding international terrorism. By June 2003, there were over 40 parties. To date all 191 states submitted the first round reports

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[52] For a full outline of the C.T.C.'s operations see e.g., Counter Terrorism Committee, <http://www.un.org/Docs/sc/committees/1373/> at 17 November 2003.

[53] *United Nations Security Council Resolution,* S.C. Res. 1373, 4385th mtg. [6] (2001).

[54] For an outline of the assistance that the C.T.C. can provide to states see e.g., Counter Terrorism Committee, <http://www.un.org/Docs/sc/committees/1373/assistance.html> at 17 November 2003.

[55] For a full list of the relevant treaties and conventions see e.g., <http://untreaty.un.org/English/Terrorism.asp> at 17 November 2003.

required by the Resolution and it appears that the predominant amount have also submitted second round reports responding to questions posed by the C.T.C.[56] Thus, figures reveal that the C.T.C. had received 385 reports from States pertaining to measures contained in resolution 1373 and had worked intensely in the field of technical assistance.[57]

However, it is equally apparent that the C.T.C.'s job is far from complete.[58] Problems relating to cost and inadequate resources are of particular concern. For example, all 385 reports received (and possibly more) must be translated into the six official U.N. languages.[59] As mentioned, the C.T.C. is doing an admirable job in following up and providing assistance to states but all of this is extremely costly. As with everything pertaining to the war on international terrorism unless resources are managed effectively and synergies created the relative success of the C.T.C. may be very short lived indeed.

It is questionable just how much can be achieved from surveying the reports furnished by the states. True permanence and enforceability of the Resolution may require C.T.C. members to visit various states. This may not only unravel the sense of harmony and supportive atmosphere that has characterised the relationship between C.T.C. and member states (as the sovereignty of the latter is challenged)[60] but also compound the resource problems alluded to above.

Third, providing a satisfactory definition of terrorism has remained just as elusive for the C.T.C. as it has for many others in the international community. Thus, Resolution 1373 does not appear to define terrorism but rather leaves it to the respective member state to formulate a definition. In light of the lack of agreement surrounding terrorism such an open-ended approach may be the only way forth. Nevertheless, it is quite possible that the C.T.C. could encounter a situation in which a particular state might refuse to prosecute a terrorist act because it does not

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[56] Rosand, above n. 49.

[57] U.N. News Centre, "Security Council Hears Call for Increased Global Cooperation to Fight Terrorism", <http://www.un.org/apps/news/storyAr.asp?NewsID=7810&Cr=terror&Cr1> at 17 November 2003.

[58] Rosand, above n. 49.

[59] Ibid.

[60] *Charter of the United Nations*, art 2(7).

fall within its particular definition. This may be the case notwithstanding the fact that the majority of other states would, without hesitation, condemn and prosecute the act at hand.

It remains to be seen whether the C.T.C. will be able to meet its mandate. Crudely, the C.T.C.'s mandate is to increase the capability of States to fight terrorism.[61] As Rosand has opined, this may be optimistic:

> Is it realistic to expect a Security Council committee with scarce financial resources, with a small number of experts hired on short-term contracts to review literally tens of thousands of pages of written submissions, with limited support from the UN Secretariat, and which operates by consensus, to be effective over the long term?[62]

The ravaging effects of September 11, and the frenzy surrounding it, meant that terrorism was afforded significant priority from the outset. It is doubtful, however, whether such momentum will be sustained. While the train bombing in Madrid, Spain and the recent bombing in London has brought terror back to the fore it is still far less pressing for various States as the everyday realities of famine, hunger, A.I.D.S. and poverty, the dire ramifications of which were highlighted in Part III of this paper. It would be self-indulgent to believe that the death of an American office worker or an Australian tourist has a greater distress value than the death of another nation's citizens from starvation, disease, violence and oppressive military regimes.[63] Thus, if Resolution 1373 is to be efficacious, it will require an unflinching resolve on behalf of the C.T.C. to ensure that state obligations are being met.

Finally, and perhaps most importantly for the purposes of this paper, is the challenge of combating terrorism while simultaneously preserving fundamental human rights. The C.T.C. Chairman in his briefing to the Security Council on 18 January 2002 expressed the C.T.C. policy on human rights. He stated:

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[61] Counter Terrorism Committee, "Mandate" <http://www.un.org/Docs/sc/committees/1373/mandate.html> at 17 November 2003.

[62] Rosand, above n. 49, at p. 341.

[63] Desmond Keith Derrington, "The Terrorist Threat: Australia's Response" (2003) 13 In. Int'l. Comp. L. Rev. 699 at 700.

> The Counter-Terrorism Committee is mandated to monitor the implementation of Resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organisations to study States' reports and take up their content in other forums.[64]

At the same meeting, the U.N. Secretary General stated:

> We should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long term we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism. Of course, the protection of human rights is not primarily the responsibility of this Council – it belongs to other United Nations bodies, whose work you do not need to duplicate. But there is a need to take into account the expertise of those bodies, and make sure that the measures you adopt do not unduly curtail human rights, or give others a pretext to do so.[65]

The C.T.C. has been in dialogue with the Office of the High Commissioner for Human Rights, which has developed guidelines for States on their human rights obligations in the context of counter-terrorism. In July 2003, the U.N.H.C.H.R. also published a "Digest of Jurisprudence of the U.N. and Regional Organisations on the Protection of Human Rights while Countering Terrorism".[66] While the later comments and initiatives are welcomed, it is a shame that a greater commitment to human rights did not explicitly constitute part of the C.T.C. mandate. Arguably, it would have been advantageous for human rights objectives and guidance to be strategically aligned with C.T.C.'s

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[64] Counter Terrorism Committee, *Terrorism and Human Rights* <http://www.un.org/Docs/sc/committees/1373/human_rights.html> at 17 November 2003.

[65] Ibid.

[66] United Nations Office of the High Commissioner for Human Rights, Digest of Jurisprudence of the UN and Regional Organisations on the Protection of Human Rights While Countering Terrorism <http://www.unhchr.ch/html/menu6/2/digest.doc> at 17 November 2003.

operations from the outset. Of course, it is possible that such a focus may have undermined the atmosphere of cooperation between the U.N. and states that has pervaded to date, but as the discussion below will show human rights have come under attack and come under attack badly. Worst still the erosion of civil liberties has occurred in states that have historically exalted themselves as exemplars of democratic ideals. This can be seen by exploring the counter terrorism efforts of two nations, those being America and Australia.

IV. THE DOMESTIC RESPONSE OF THE U.S.A.

Following the terrorists attack on U.S. soil it became clear that the American people were willing to back their government in the war against terror. In early October 2001, nearly two thirds of its population expressed the opinion that Congress should approve everything deemed necessary by the Attorney General and the security agencies to subdue terrorist attacks.[67] Republican Bob Carr, then member of the House Judiciary Committee and one of the most prominent civil liberty advocates, explained Congresses narrow room for manoeuvre: "it is very difficult to get members of Congress to do anything that might appear to the untrained eye ... not to be going after terrorists ... [A] lot of members think the folks back home will feel we're not tough enough".[68]

It is questionable, however, whether the American people anticipated the measures that have ensued and as time goes on it would appear that some serious misgivings are emerging regarding current government responses.[69] These will be explored in turn.

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[67] Josef Braml, "Rule of Law or Dictates by Fear: A German Perspective on American Civil Liberties in the War Against Terrorism" (2003) 27 Fletcher F. World Aff. 115.

[68] Ibid.

[69] See e.g., ibid. It is worth noting that ethnic myriads who have histories of marginalisation (for example African Americans) have tended to express greater reservations to terrorist related government regulative measures than their Caucasian counterparts.

A. The Status of Detained Taliban and al-Qaeda Combatants

As many as 800 Taliban and al-Qaeda fighters chiefly captured during combat in Afghanistan have been detained at the U.S. Marine base in Guantanamo Bay, Cuba.[70] From its inception this exercise has been a precarious one. The decision to place Taliban and al-Qaeda combatants here was undoubtedly a strategic one as the American courts have declared that Guantanamo Bay is outside the purview of U.S. territorial sovereignty and accordingly foreign nationals held there posses no right to trial by an American jury. It would seem, therefore, that aliens not within the United States enjoy few, if any, constitutional protections.[71]

Furthermore, in breach of its obligations under international law, President of the United States has revoked the detainees Prisoner of War (P.O.W.) status via his designation of them as "unlawful combatants". Pursuant to Article 5 of the Third Geneva Convention, this decision should not have been made by the President but by an appropriate court.[72] Indeed senior members of the Bush administration (including Bush himself) explicitly stated that the Third Geneva Convention should not and would not apply to the detainees. These statements provoked considerable criticism from the Bush Administration and the international community alike. Secretary of State Colin Powell, together with the Joint Chief of Staff, managed to persuade Secretary of Defence, Donald Rumsfeld, to oppose the President's standpoint.[73] Their well-founded concern was that if the U.S. chose not to afford such basic rights America could hardly expect other nations to abide by the international norms governing warfare. Therefore, it appeared that it was America's desire for reciprocity as opposed to a genuine concern for the preservation of fundamental human rights that eventually led President Bush to revise his

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[70] Lyle Denniston, "Terror-War Issues Head for High Court Cases May Be Test for Justice Dept.", *The Boston Globe* (Boston), 7 October 2002, at A1.

[71] American Bar Association, "Task Force on Terrorism and the Law, Report and Recommendations on Military Commissions" (2002) <http://www.abanet.org/leadership/military.pdf> at 4 January 2002. Decisions quoted therein include *Johnson v Eisentrager*, 339 U.S. 763 (1950); *Zadvydas v Davis*, 533 U.S. 678 (2001); *United States v Verdugo-Urquidez*, 494 U.S. 259 (1990).

[72] *Third Geneva Convention*, art 5.

[73] Braml, above n. 67, at 122.

position on 7 February 2002.[74] This revision involved an announcement that the Third Geneva Conventions would apply to the Taliban combatants (but not members of al-Qaeda).[75] Despite this so-called concession, Bush remained steadfast in his refusal to grant the detainees P.O.W. status for fear of giving individuals the attendant higher protections, especially their right to refuse giving testimony upon interrogation. Thus, U.S. security agencies may still interrogate "enemy combatants" for elucidating operationally important information concerning terrorist activity.

B. Creation of Military Commissions through Presidential Executive Order

As commander-in-chief, President Bush has, to some extent, assumed the power of both legislator and judge.[76] Without the backing of Congress, Bush unilaterally executed an order on 13 November 2001, authorising the establishment of military tribunals.[77] The effect of the executive order was to not only deprive the accused of his / her right to a trial before a jury but also employ *in camera* proceedings. Amongst other things it was the President's intention not to grant the defence counsel access to incriminating witness testimony and a two third-majority of the witness panel (as opposed to the usual unanimous jury verdict) could convict and even endorse a death sentence.[78] Finally, the President had reserved a right to enforce a "final decision" effectively nullifying the opportunity for the accused to launch an appeal.[79]

After a profusion of public backlash, the President was compelled to sanitise the order indicating that the trials would now take place in public, the defence could now be furnished with the prosecution's evidence, and the accused would now be permitted to refuse giving testimony. Significantly, the President's word would no longer be decisive in respect

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[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Ibid.

of the proceedings, although significantly, a verdict of guilty or not guilty would "not be changed".[80]

Notwithstanding these modifications, the constitutional validity of these military tribunals remains highly dubious. Specifically, President Bush's reliance on the Congressional Resolution passed on September 2001,[81] coupled with various precedents would appear to rest on shaky ground. As Braml notes, in the *Ex Parte Milligan*[82] case, the Supreme Court contended in 1866 that President Lincoln had not been granted approval by Congress to establish military tribunals. Further, in *Ex Parte Quirin*[83]can be distinguished also in that the World War II had been formally declared by Congress, explicitly granting President Roosevelt the right to create military courts. Finally, in both of these cases other procedural safeguards had not been eroded, notably the right to seek judicial review of executive decisions.[84]

Particularly disturbing is the fact that two American citizens, Yaser Esam Hamdi and Jose Padilla have both been classified as "enemy combatants" giving way to an extension of martial law.[85] As Braml notes, Yaser Hamdi an American citizen, is said to have joined al-Qaeda with a view to doing harm to Americans and is therefore unlikely to arouse many sympathies particularly from his American brethren.[86] Nevertheless, the potential damage of deeming American citizens as "enemy combatants" ought to evoke alarm for in defending the rights of unsavoury citizens, the rights of ordinary citizens are ensured. In restricting them, the Court demeans liberty.[87]

Although Judge Robert G. Doumar of the Federal District Court in Norfolk, Virginia, twice ordered the government to allow Hamdi access to

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[80] Ibid, at 123.

[81] Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. Law. 40, 107th Congress, 1st session, September 15, 2001.

[82] 71 U.S. 2 (1866).

[83] 317 U.S. 1 (1942).

[84] Braml, above n. 67, at 123.

[85] Ibid.

[86] Ibid.

[87] See Laurie L. Levenson, "Detention, Material Witnesses and the War on Terrorism" (2002) 35 Loyola L. A. L. Rev. 1217, at 1219.

a lawyer the government refused to comply, appealing the orders to the 4th Court. The 4th Court upheld the orders and returned the case to Judge Doumar who requested that the government provide evidence that Hamdi constituted an enemy combatant. Seemingly expecting endorsement, the government, refused to do this also, appealing on the basis that this was classified information, pertinent to national security.[88] The 4th Circuit Court of Appeals ruled on 8 January 2003, that in an armed conflict the President has the authority to detain enemy combatants captured abroad in active zones of combat regardless of citizenship and effectively without access to a lawyer.[89] While acknowledging the continued right to judicial review even in wartime the Court essentially noted that this had little meaning given the sweeping deference due to the President under the constitution.[90] Anthony Lewis has highlighted the far-reaching implications of this for civil liberties in the United States:

> In the view of President Bush and his lawyers, anyone in this audience can be picked up by Federal agents at any time and detained indefinitely in a military prison – without charges, without a trial, without access to a lawyer. The detention can continue legally, they say, until Mr. Bush or some other president declares that what he calls the "law on terrorism" is over. All this can happen if the President simply designates any one of you an "enemy combatant". If he does, you are an enemy combatant. You cannot effectively challenge the designation in any court. You cannot speak to any lawyer, your own or one appointed to represent you. You just remain in prison, very likely in solitary confinement, until the war on terrorism is declared over, years or perhaps decades from now.[91]

Padilla was held as a "material witness," a device used by the present Department of Justice to hold people incommunicado arguably in direct violation of his Fifth Amendment due process rights and Sixth Amendment rights to counsel.[92] He was transported to New York where

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[88] Michael J. Kelly, "Executive Excess v Judicial Process: American Judicial Responses to the Government's War on Terror" (2003) 13 In. Int'l. Comp. L. Rev. 787 at 796.

[89] Ibid.

[90] See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

[91] Anthony Lewis, "Civil Liberties in Times of Terror" (2003) Wis. L. Rev. 257 at 258.

[92] See e.g., Adam Liptak, "Traces of Terror: The Courts; Questions on US Action in Bomb Case", *The New York Times* (New York Times), 11 June 2002, at p. A18.

the Department successfully sought a material witness warrant before a Federal Court Judge. Although the Judge appointed a lawyer to represent Padilla on 9 June 2002, President Bush designated Padilla an "enemy combatant". He was then escorted to a prison in South Carolina.[93]

On 10 June 2002, Attorney General John Ashcroft, who was in Russia, appeared on television announcing that Padilla had been planning to explode a "dirty bomb" (a radioactive bomb of sorts).[94] As disturbing as this sounds one must inquire what happened to the America in which the accused had an opportunity to contest allegations made and whatever happened to the America in which the media could ensure the transparency of the same? Indeed, convictions by announcement seem more akin to dictatorships than they do to the supposed bastion of democracy the United States of America.[95]

It is necessary to note that the judges in both the *Padilla* and *Hamdi* case did not go so far as to deny *habeas corpus*. However, judicial review of the legality of internment was reduced to a minimum.[96]

C. Arrest and "Preventative Detention" of Suspicious Foreign Nationals

In assessing the appropriateness of the balance arrived at by the Bush administration we must keep in mind the following facts regarding the September 11 attacks. Mueller indicates that in the months that preceded the attacks each of the nineteen hijackers entered the U.S. with lawful visas. They used its schools, particularly flight schools, motels, restaurants and transportation systems as they hatched the plans to launch their assault. None of them had computers. They all used Kinko's or public-access opportunities to access the Internet to communicate and when their communications were not on the Internet they were personal. They used 133 prepaid calling cards to make phone calls from kiosks and other buildings. They shopped at Wal-Mart. They ate at Pizza Hut. In many

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[93] Lewis, above n. 91.
[94] Ibid.
[95] Ibid.
[96] See generally Braml, above n. 67, at 124.

ways, they turned the liberties of the USA against it.[97] This should not signal the way however for a significant erosion of civil liberties. As stated, it is the fate of democracy that it does not see all means as justified.[98]

On 18 September 2001, the Bush administration issued a directive authorising security personnel in a national state of emergency to detain suspicious immigrants of foreign nationals residing in the United States. Although unofficial figures on the amount of persons detained vary, it would seem that some 1,000 persons of Arabic or South Asian origin were rounded up held in secret for months, interrogated, subjected to *in camera* immigration hearings and then summarily deported.[99]

Many of the individuals were detained on grounds of visa expiration or other relatively harmless indiscipline. Others, however, were detained on grounds that they were "material witnesses" deemed useful to the process of collecting and collating terrorist information. The designation of material witnesses dates back to common law. The original concept was that individuals who have relevant testimony regarding a case have a responsibility to appear as witnesses.[100] It was never envisaged, however, as a means to detain those whom the authorities suspected of being a threat to society but did not have enough evidence to charge.[101] Thus, the

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[97] Mueller, above n. 15, at 119.

[98] Barak P., above n. 2.

[99] See generally Vijay Sekhon, "The Civil Rights of Others': Anti-Terrorism, the Patriot Act, and Arab and South Asian American Rights in Post 9/11 American Society" (2003) 8 Tx. F. Civil. Lib. Civ. R. 117.

[100] Levenson, above n. 87.

[101] Ibid., at 1222.

designation of a material witness has often become a temporary moniker to identify the individual who will soon bear the status of defendant.[102]

To bolster its position the Bush administration obtained the backing by Congress via the U.S. Congress culminating in the United States of America Patriot Act of October 26, 2001.[103] Under the Patriot Act if the Attorney General designates an alien as a terrorist threat that individual may be held for repeated six-month periods with no ceiling on the number of times such a designation may be made.[104] This stands in the face of decisions such as *Zadvyas v. Davis*[105], which declared that indefinite detention of removable aliens violates due process,[106] and suggests that the notion of preventative detention has become so acceptable in the U.S. landscape that the Attorney General is now charged with administering it rather than a court. In this regard, it would seem that the executive has and will prioritise the preventative function over fundamental civil rights such as due process and the rule of law.[107]

This has occurred despite vehement criticism. Representatives of 22 civil liberties advocacy groups, among them the Centre for National Security Studies, the American Civil Liberties Union, the Reporters Committee for the Freedom of the Press, the American Arab Anti-Discrimination Committee and the People for the American Way brought forth litigation against the government's arrest.[108] Justice Gladys Kessler from the Federal

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[102] Professor Levenson proceeds to provide the example of Terry Lynn Nichols who was designated as a material witness in relation to the bombing of the Murrah Federal Building in Oklahoma City. When Nichols contested the material witness warrant it was quickly substituted with a criminal complaint charging malicious destruction of government property. He states: "Given the breadth of our conspiracy laws, it is not difficult to find a sufficient link to charge a person who has intimate knowledge regarding a crime as a co-conspirator to that crime. ... Similarly, it has not been difficult for prosecutors in terrorism cases to convert material witnesses into defendants. One standard technique is to question the witness before the grand jury, knowing that the individual is unlikely to cooperate fully. When the detainee withholds information or lies to the grand jury, charges of perjury or obstruction of justice can be substituted for the material witness warrant". See ibid.

[103] See *The USA Patriot Act of 2001,* Pub Law No 56, § 236(a), 107 Stat.

[104] Ibid.

[105] *Zadvyas v. David*, 533 U.S. 678 (2001).

[106] See generally Levenson above n. 87, at 1220.

[107] Braml, above n. 67, at 125.

[108] Ibid.

District Court in Washington, D.C., ruled that the government had to publish the names of those in custody with only a few exceptions. She emphasised that regardless of the executive's task to protect the American people the highest priority is still given to operating within the constraints of democracy and the rule of law.[109] While this was on the whole a resounding victory for the right to access this crucial information the disclosure was stayed, pending appeal. On 17 June 2003, the Court of Appeal for the D.C. Circuit in a 2-1 decision reversed Judge Kessler's ruling. The majority decision of the Circuit Court expressed the surprising position that it was not fitting for the judiciary to act as an independent arm of government to protect the rights of the people in the United States. Instead, it was put that this role should fall to the Executive. Surely, however, the people possess the right to test the veracity of the government's claims? For instance, it has already been shown that one of the detainees (an Egyptian student) had evidence constructed against him, with further investigations taking place as to whether or not threats were made against his family.[110]

Suffice it to say, America provides a classic example of a lopsided balance between ensuring national security and preserving fundamental human rights. It would seem other nations too have fallen foul to America's mistakes. Disturbing is the response of Australia.

V. AUSTRALIA'S RESPONSE TO TERRORISM[111]

Unlike the U.S. and Israel, Australia has had little direct experience with terrorism before September 11.[112] Indeed, prior to this time there were no

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[109] Ibid, at 126.

[110] Benjamin Weiser, "FBI Faces Inquiry on a False Confession from an Egyptian Student", *The New York Times* (New York), 6 August 2002, at p. 4.

[111] Michael Head, "The Global 'War on Terrorism: Democratic Rights Under Attack" in R. Brownsword and N. Lewis (eds.), *Global Governance and the Quest for Justice* (2004) 11 at 32; George Williams, "Australian Values and the War Against Terrorism" (2003) 26(1) U.N.S.W. L. J. 191 at 192-194.

[112] The last bombing was detonated in a garbage bin outside the Hilton Hotel in Sydney on the 13 February 1978. Sadly, the bomb took the life of a garbage collector. See <http://members.tripod.com/~Hilton_Bombing/> at 14 November 2003.

Australian laws dealing directly with terrorism.[113] However, in response to the escalating threat of "international terrorism" two packages of anti-terrorism legislation were introduced in March 2002. It is important to recognise that the introduction of this legislation preceded the "Bali Bombing" event on 12 October 2002, which some have called "Australia's own September 11". In that event, 202 individuals were killed because of a terrorist attack of which eighty-eight were young Australians.[114] Australia's loss did not match the World Trade Centre tragedy in numbers but to a country of only twenty million, it was egregious enough.[115] The Bali bombers say that they targeted Australia because of its support of the United States in Afghanistan to which they attributed the deaths of a large number of Muslims including women and children.[116]

From their inception, the packages were highly contentious. Numerous submissions to parliamentary committees including those of the Law Council of Australia and the Civil Liberties Councils of New South Wales and Victoria inquired as to the genuine utility of the legislative package. As Head reveals,[117] any conceivable terrorist activity such as bombing, kidnapping or assassination was already a serious crime under existing law. This view is consistent with the approach of previous governments who had indicated that it was unnecessary, inadvisable and constitutionally precarious to introduce generic anti-terrorism legislation. In the 1979 Protective Security Report, Justice Robert Hope, although recommending an extensive boost to the powers and resources of the police, intelligence and security forces, refrained from recommending the creation of new criminal offences indicating: "terrorism by its very nature involves breaches of ordinary criminal law".[118] In an opinion

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[113] *Criminal Code Act 2005* (N.T.), pt. III div. 2. The provisions were modelled on the *Prevention of Terrorism (Temporary Provisions) Act 1974* (U.K.).

[114] Martin Chulov and Sian Powell, "We Will Never Forget – The Bali Memorial", *The Australian* (Sydney), 13 October 2003, at p. 1.

[115] Derrington, above n. 63, 699.

[116] See Amanda Morgan, "Australians targeted, says Bali bomber", *Sydney Morning Herald* (Sydney), 11 February 2003. Australia's interference in East Timor has also been cited as a reason for the bombing.

[117] Head, above n. 112.

[118] Robert Hope, *Protective Security Review*, A.G.P.S., Canberra, 1979 at 13. Cited in ibid.

commissioned by the Fraser government as part of Justice Hope's review, former High Court Justice Victor Windeyer[119] arrived at the same view.[120]

It is timely therefore to ask why the government has departed from this stance. It is difficult for Australia to assert that it is particularly susceptible to a terrorist attack for Australia's spy agency, the Australian Security Intelligence Organisation (A.S.I.O.), confirmed prior to the introduction of the two legislative packages that "there is no specific threat to Australia at present".[121] Even since the tragic events in Bali (which did not take place on Australian soil) Prime Minister Howard has only very recently commented that "Australia is less vulnerable than most".[122] Accordingly, it is easy to see why some commentators claim that the "war on terrorism", like the "war on communism" half a century ago,[123] is being used for political ends culminating in the erosion of fundamental civil liberties.[124]

A. The First Legislative Package

A first package of anti-terrorist legislation, entailing some five acts, was introduced into the Federal parliament on 12 March 2002.[125] The most prominent Act in that package was the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) (the "Terrorism Act"), which confronted with formidable public opposition and adverse parliamentary reports, was substantially amended.

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[119] Victor Windeyer, "Opinion on Certain Questions Concerning the Position of Members of the Defence Forces When Called Out to the Aid the Civil Power", cited in Head, above n. 112.

[120] Head, above n. 112.

[121] "Australia will be terrorist target for years: ASIO", *The Age* (Melbourne), 19 April 2002.

[122] Mark Forbes and Ellen Connolly, "Australia Low as Terrorist Target: PM", *The Age* (Melbourne), 19 November 2003, at p. 4.

[123] Williams, above n. 112, at 192-194.

[124] Head, above n. 112.

[125] The five Acts are as follows: *Security Legislation Amendment (Terrorism) Act 2002* (Cth.), *Suppression of the Financing of Terrorism Act 2002* (Cth.), *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth.), *Border Security Legislation Amendment Act 2002* (Cth.), and *Telecommunications Interception Legislation Amendment Act 2002* (Cth.).

In its original guise, the above Act purported to introduce panacean definitions of terrorism, treason and espionage. The Act sought to criminalise activities undertaken "with the intention of advancing a political, religious or ideological cause' that caused harm or damage". This could have subjected Australians, including farmers, unionists, students, environmentalists and even internet protestors who were engaged in minor unlawful civil protest,[126] to life imprisonment.[127]

Additionally under the original version of the Act the Attorney General was empowered to proscribe any organisation on a number of vague grounds, notably if that group had "endangered, or is likely to endanger the security or integrity" of Australia or another country.[128] Taking into consideration the increasingly liberal interpretations afforded to the term "national security" and the impediments associated with obtaining judicial view in cases where national security is invoked by government[129] provisions of this nature have given rise to further cause for concern.

Faced with severe public backlash the government was forced to reconsider these provisions. The Act possesses a more limited definition of terrorism[130] and no longer endows the Attorney-General with a unilateral power of proscription.[131] That power now resides largely with the courts. However, the government may still outlaw an organisation if the U.N. Security Council has listed them as a terrorist organisation.[132]

B. The Second Terrorism Act

The second package of anti-terrorism legislation was presented to Federal Parliament on 21 March 2002 and contained only one Act being the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act* (the A.S.I.O. Bill).

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[126] Williams, above n. 96, at 194-195.
[127] *Security Legislation Amendment (Terrorism) Act 2002* (Cth.), s. 101.1.
[128] Ibid., s. 102.2.
[129] See e.g., *Church of Scientology v. Woodward* (1982) 154 C.L.R. 25.
[130] *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s 100.1(1).
[131] Ibid., s. 102.1(3).
[132] Ibid., s. 102.1(3)(a).

From its inception, this Act was equally contentious and was not passed until some fifteen months later on 26 June 2003. The Act received a scathing reception from a number of leading academics. For example, in its original form, the Act was described as "rotten at the core"[133] with some going so far as to suggest that that it would not be out of place in former dictatorships such as General Pinochet's Chile.[134] Despite Government compromise in relation to many of the sticking points it would seem that, the A.S.I.O. Act remains very different from achieving a satisfactory equilibrium between human rights and national security.

The ultimate passage of the A.S.I.O. Act effectively empowers A.S.I.O. to detain and question people, who are not even terrorist suspects, without charge or trial. Thus A.S.I.O. and Federal Police officers possess the power to raid anyone's home or office, potentially at any hour of the day or evening[135] and forcibly remove, interrogate, strip-search and hold them incommunicado possibly indefinitely via the use of repeated warrants.[136]

As mentioned, it is immaterial that the detainee is not a terrorist suspect (or a suspect of any other criminal offence for that matter). The Attorney-General can certify that the interrogation will "substantially assist the collection of intelligence that is important in relation to a terrorism offence"; even if a terrorism offence has not taken place.[137] It is easy to envisage how such a provision may apply to journalists and political activists together with relatives, acquaintances and even children[138] having some kind of nexus with the alleged terrorist suspects. Any of the detainees who refused to cooperate by answering A.S.I.O.'s would be punishable by five years imprisonment. Even where detention for questioning purposes is to be considered vital there is no cogent reason

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[133] George Williams, "Why the ASIO Bill is Rotten to the Core", *The Age* (Melbourne), 27 August 2002, at p. 15.

[134] Williams, above n. 112. For a good summary of some of the concerns and deficiencies of the Bill see Sev Ozdowski, "Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD" (2003) Human Rights and Equal Opportunity Commission, <http://www.hreoc.gov.au/human_rights/index.html> at 13 August 2003.

[135] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34JA.

[136] Ibid., ss. 34A – 34Y.

[137] Ibid., s. 34C.

[138] Note that, despite the age of majority being eighteen with respect to criminal offences, the ASIO Bill 2002 (Cth.) permits detention of sixteen year olds.

why such detention could not be delimited to those reasonably suspected of being terrorists or those associated with terrorist activities.

Police Officers are entitled to use "such force as is necessary and reasonable" in breaking into premises and taking people into custody.[139] Detainees have no entitlement to know why they are being detained for interrogation.

Detainees, including teenagers as young as sixteen, will be unable to contact their families, friends, employer, political affiliates or the media. If they happen to know the name of a lawyer, they may contact her or him for legal advice if A.S.I.O. does not find the nominated lawyer objectionable.[140] In the instance that A.S.I.O. does accept the detainee's choice of lawyer, questioning may commence without the lawyer being present.[141] Nevertheless, the lawyer is not permitted to object or intervene during questioning and if they do, they can be ejected for disruption.[142] Should they inform a detainee's family, friends, media or others regarding the detention, they also may be susceptible to five years imprisonment.[143] Finally, conversations between the detainee and their lawyer may be monitored.[144]

Detention cannot exceed 168 hours continuously,[145] although this provision can be cumulatively extended if "additional or materially different" information emerges.[146]

Although interrogation must be video recorded[147] and conducted in the presence of a judge, retired judge or presidential member[148] of the Administrative Appeals Tribunal, retired judges and tribunal members, with limited or no judicial tenure, may be susceptible to the desires of the

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[139] *Australian Security Intelligence Organisation Act 1979* (Cth), s. 34JB.
[140] Ibid., s. 34TA.
[141] Ibid., s. 34TB.
[142] Ibid., ss. 34U(5) and (6).
[143] Ibid., s. 34VAA.
[144] Ibid., s. 34U. See also ibid., s. 34WA which thankfully insures that legal professional privilege is not displaced.
[145] Ibid., s. 34HC.
[146] Ibid., s. 34C.
[147] Ibid., s. 34K.
[148] Ibid., ss. 34B and 34DA.

executive. It is submitted the Canadian approach would have been preferable. This approach stipulates (*inter alia*) that a regular judge (not a retired judge or administrative member) must make out the orders for so-called investigative hearings.[149] It should also be pointed out that the requirement of video recording has, in the Australian context, failed to insure against corrupt practices such as the planting of evidence or extracting false confessions.[150]

In a notable departure from established law,[151] the Act effectively reverses the onus of proof for a range of serious offences, again providing scope for the corrupt practices highlighted above. For example if A.S.I.O. alleges that an individual has information or material, it is incumbent on the individual to prove otherwise.

Indeed the power of A.S.I.O. has increased dramatically. Prior to this Act, the agency had no powers of arrest and interrogation that remained the prerogative of Federal and State Police, or territory police where appropriate. The State and Federal police have always been able to detain individuals provided they suspect them of committing a criminal offence.[152] Those individuals must either be charged or released within a reasonable time (generally no more than four hours)[153] and cannot usually be detained for interrogation.[154] Citizens are by no means required to attend a police station so as to "assist police", unless they have been the subject of an arrest, in which case they are generally permitted to contact a lawyer or friend.[155] Finally, prisoners have historically enjoyed the right to remain silent.[156]

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[149] See David Jenkins, "In Support of Canada's Anti-Terrorism Act: A Comparison of Canadian, British, and American Anti-Terrorism Law" (2003) 66 Sask. L. Rev. 419.

[150] See e.g., *R. v. Sahin* (2000) 115 A. Crim. R. 413; *R. v. Williams* [2000] Q.C.A. 518; *R. v. McMahon* [1996] N.S.W.C.C.A. No. 60588/93 (Unreported, 26 June 1996).

[151] *Purkess v. Crittenden* (1965) 114 C.L.R. 164, 167-8; and *Currie v Dempsey* (1967) 2 N.S.W.L.R. 235.

[152] See e.g., *Mammone v. Chaplin* (1991) 54 A. Crim. R. 163; *Hussein v. Chong Fook Kam* [1969] 3 All E.R. 1282; and *D.P.P. v. Carr* (2002) 127 A. Crim. R. 151.

[153] See e.g., *Crimes Act 1900* (N.S.W.), s. 356C.

[154] *Williams v. R.* (1986) 66 A.L.R. 385.

[155] See e.g., *Crimes Act 1900* (N.S.W.), s. 356N, which affords a right to communicate with friend, relative, guardian or independent person and legal practitioner.

[156] *Evidence Act 1995* (Cth.), s. 89.

Endowing A.S.I.O. with such extensive powers seems a little dubious when one considers the already broad nature of its powers. Thus, even before the A.S.I.O. Act, the Organisation could use search warrants, computer access warrants, listening and tracking devices, inspect postal articles not to mention a host of other powers. [157]

In addition, A.S.I.O. has recently launched a $50 million National Threat Assessment Centre (N.T.A.C.) and is part of an expansive intelligence network including the Australian Federal Police, the Australian Secret Intelligence Service, the Defence Intelligence Organisation, the Department of Foreign Affairs and Trade, the Department of Transport and Regional Services and the Office of National Assessments, not to mention a number of international security agencies.[158]

C. Australia's International Obligations?[159]

The A.S.I.O. Act also appears to raise some very serious questions concerning Australia's obligations at International law namely the International Covenant on Civil and Political Rights (I.C.C.P.R.).[160] A compelling argument can be mounted that the A.S.I.O. Act breaches the I.C.C.P.R. in providing for the arbitrary detention of non-suspects and children, offering limited access to judicial review and through removing the right to silence.[161]

Article 9(1) of the I.C.C.P.R. states that "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention". Referring to the I.C.C.P.R.'s *travaux préparatoires* Manfred Nowak pointed out that the term "arbitrary" is not to be equated with

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[157] *Australian Security Intelligence Organisation Act 1979* (Cth.) ss. 25-34.

[158] Phillip Ruddock, "New Counter-Terrorism Intelligence Centre Launched" (2003) Australian Security Intelligence Organisation, <http://www.asio.gov.au/media/contents/ntac%5Flaunched.htm>at 17 October 2003.

[159] Adapted from Christopher Michaelsen, "International Human Rights on Trial: The United Kingdom's and Australia's Legal Response to 9/11" (2003) 25 Syd. L. Rev. 275 at 282-294.

[160] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Australia signed the I.C.C.P.R. on 18 December 1972 and ratified it on 13 August 1980.

[161] See generally Michaelsen, above n. 161, at 282-294.

"against the law" but includes elements of injustice, unpredictability, unreasonableness, capriciousness and unproportionality (*sic*).[162] This has also been affirmed in *Van Alphen v. The Netherlands* where it was held that detention "must not only be lawful but reasonable in all the circumstances" and "must be necessary in all the circumstances for example to prevent flight, interference with evidence or the recurrence of a crime".[163]

In light of Prime Minister Howard's recent comments that "Australia is less vulnerable than most"[164] it becomes rather easy to refute the proposition that detention of this character is "reasonable and necessary in the circumstances". Even the U.S.A. and Britain, which the Australian government has indicated as being the most at risk, have opted not to introduce legislation that facilitates the detention of non-suspects for the purposes of questioning.

Of equal concern under the I.C.C.P.R., is the restrictions placed on judicial review. Article 9(3) requires that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release". Pursuant to the A.S.I.O. Act, individuals are not detained for criminal charges but rather for the purposes of questioning/interrogation. The fact that the article applies to those "arrested or detained on a criminal charge" means that if anything the standard of protection for an innocent individual should be higher.

Under the A.S.I.O. Act, a detainee can be detained for up to 168 hours (i.e. seven days) without judicial oversight. In *Fremantle v. Jamaica,* a four-day delay in bringing the detainee before a judge was found to violate Article 9(3) of the I.C.C.P.R.[165] Similarly, the European Court of Human Rights held in *Brogan v. United Kingdom* that four days and six hours was too long to satisfy the requirement of "promptness".[166] Accordingly, it can

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[162] Ibid., citing Manfred Nowak, *U.N. Covenant on Civil and Political Rights: C.C.P.R. Commentary* (1993), at 178.

[163] Ibid., citing *Van Alphen v. The Netherlands* (1990) H.R.C. Comm. No. 305/1988. See also *A. v. Australia* (1997) H.R.C. Comm. No. 560/1993 at ¶9.2.

[164] Forbes and Connolly, above n. 123.

[165] *Freemantle v. Jamaica* (1998) H.R.C. Comm. No. 625/1995.

[166] *Brogan v. United Kingdom* (1988) 11 E.H.R.R. 117.

clearly be seen that the A.S.I.O. arrangements constitute a serious breach of Article 9(3) of the I.C.C.P.R.[167]

Open to contest is the role played by retired judges or presidential members of the Administrative Appeals Tribunal who are required to oversee the questioning process. As mentioned a desire to be reappointed or receive judicial tenure may result in acquiescence to an executive agenda. With respect to this issue, Michaelsen has demonstrated that this is:

> similar to a British non-judicial body known as the "three wise men". The "three wise men" acted as a review of the Home Secretary's decisions to remove aliens from the United Kingdom whose presence was deemed to be "not conducive to the public good" for reasons of national security. The European Court held in *Chahal v. United Kingdom*[168] that the system of the "three wise men" contravened the European Convention and that the national authorities could not be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved.

As discussed, the A.S.I.O. Act effectively removes the longstanding right to silence in Australian law as well as reversing the onus of proof in various circumstances.[169] More specifically the Act fails to provide protection from the *derivative* use of any answers in future proceedings. This means, for example, that if police forces find evidence based on the individual's answers during interrogation (e.g. by later discovering incriminating evidence at his/her premises) this evidence may be adduced against the individual in criminal proceedings. These provisions breach the non-derogable right to be presumed innocent until proven guilty enshrined in Article 14(2) of the I.C.C.P.R. and recognised in the *Universal Declaration of Human Rights.*[170] Article 14(3) (g) of the I.C.C.P.R. further clarifies that

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[167] Michaelsen, above n. 161.
[168] *Chahal v. United Kingdom* (1996) 23 E.H.R.R. 413.
[169] See e.g., *Australian Security Intelligence Organisation Act 1979* (Cth.), s. 34G.
[170] Michaelsen, above n. 161.

the accused has the right "not to be compelled to testify against himself or confess guilt".[171]

Finally and particularly distressing, is the fact that the A.S.I.O. Bill permits the detention of children aged 16 to 18. This sits uneasily with Australia's obligations under the *U.N. Convention on the Rights of the Child* to which Australia became a party in 1991. In particular, it breaches Article 37(b), which stipulates that no child should be deprived of his or her liberty arbitrarily and that any detention should "be used only as a measure of last resort and for the shortest appropriate period of time".[172]

Under the I.C.C.P.R., there can be derogation from various rights provided for in the Convention during times of "war or other public emergency threatening the life of the nation". Crudely, requirements for derogation can be summarised as follows:

1. the existence of a "public emergency";
2. the requirements of proclamation and notification;
3. the proportionality of the measures: "to the extent strictly required"; and
4. the principles of consistency and non-discrimination.[173]

There is no doubt that there is an atmosphere of alert in Australia at present. This does not, however, mean that Australia meets the threshold tests at international law giving rise to a state of "public emergency". This is especially the case given that Prime Minister Howard has indicated that Australia is less vulnerable than most and that to date there has been no real terrorist assault on Australian soil. Furthermore, Australia has neither proclaimed the existence of a "public emergency" nor intimated a decision to do so. In any event, it is highly debatable whether Australia's terrorist packages can be justified as "strictly required by the exigencies of the situation". To date, the Federal Government has failed to furnish to the Australian public any cogent reasons why less repressive and

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[171] Ibid., citing *Saunders v United Kingdom* (1996) 23 EHRR 313; Human Rights Commission, *General Comment,* No 13 (1984).
[172] Ibid.
[173] Ibid, 288.

internationally consistent measures available to relevant bodies cannot be relied upon. Thus, concerns of national security have been prioritised at the expense of fundamental human rights, providing yet another example of a balance gone wrong.

VI. CONCLUSION

As we deal with the cancer of terrorism, the comments of Sir David Williams Q.C. and Emeritus Vice-Chancellor of the University of Cambridge are instructive:

> ... It is important to bear in mind that emergencies do come to an end - even the Hundred Years War, or the Thirty Years War, or the Wars of the Roses - and we should not dig trenches for all time. At the end of the nineteenth century many people feared the activities of anarchists - indeed, it was an anarchist who assassinated President McKinley on 6 September 1901 - but the threat receded; there were subsequent fears about radicals in politics and later post-war fears about Communists during the McCarthy period in American politics, but in these and other cases of fear and even hysteria the mood changed with the passage of time and the turn of events. For reasons indicated earlier, the present emergency over international terrorism is unprecedented, but realistic and well-informed responses are not incompatible with the demands of balance and proportionality in a democratic country. The courts owe a special responsibility to maintain a watching role in volatile times.[174]

Even if we are to accept that a state of emergency exists (and this remains particularly contentious in the Australian context) we cannot forget the wisdom of the old proverb "prevention is better than cure". Before States' start encroaching upon the territory of civil liberties, they must ensure that they have done as much as practicable with respect to preventative strategies in the fight against terrorism. The Director of the F.B.I. has indicated publicly that the U.S.A. has much more to do on this front. Specifically, he has alluded to "deep seated technological problems"

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[174] David Williams, "The United Kingdom's Response to International Terrorism" (2003) 13 In. Int'l. Comp. L. Rev. 683.

including a lack of support for its agents, inadequate access to databases and other information requirements necessary to collate, analyse and disseminate relevant terrorist data.[175] Other F.B.I. representatives have stated that much more can be done on both a domestic and international level to stem the flow of terrorist financing.[176] If this is the case for the world's superpower then it can be sensibly said that it would also be prudent for many other nations to review and upgrade their preventative measures and strategies. Some may contend that the democratic nations may not have adequate resources to divert to these wide scale preventative measures. In the short term the costs of implementing measures if this nature may be taxing but no less taxing than the costs of twin towers crashing down (with all the associated pecuniary and non-pecuniary costs that brought) and less expensive still than declaring a war on the "axis of evil". Problems relating to resources are not just confined to the two nations explored in this paper. They are equally acute (if not more serious) for many nations grappling with the new, internationalised terrorism as well as the U.N. fight against it.

Finally, in fighting international terrorism we must fight fairly. A fair fight means that we do not see all means as justified nor adopt the methods used by our adversaries. In fighting fairly we uphold the dignity of the rule of law and reject the temptation of impinging on fundamental democratic rights. It has since been acknowledged that the way in which American's and Australian's alike treated so-called "aliens" during the 1940's was wrong. It was wrong in the 1950's to arrest, harass, and falsely accuse American and Australian communists. Similarly, it is wrong today to tackle the cancer of terrorism in the fashion that has been noted.

In order for a democratic state to achieve victory in its war against terror, it does not need to alter the balances it has created between these competing interests:

> What message does it send to the world when we act to change the rules of the game in order to win? If we are acting justly with faith in our cause and truth on our side, then we will prevail. We don't

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[175] Mueller, above n. 15, 121.

[176] Matthew Levitt, "Iraq, US, And The War On Terror: Stemming The Flow Of Terrorist Financing: Practical And Conceptual Challenges" (2003) 27 Fletcher F. World Aff. 59.

need to change the rules. They are sufficient for our purpose and fairly crafted to ensure a legitimate outcome.[177]

[177] Michael J. Kelly, "Understanding September 11th - An International Legal Perspective on the War in Afghanistan" (2002) 35 Creighton L. Rev. 283, at 291-92. Cited in Gross, above n. 2, at 786.