Balance in responding to terrorism: The rule of law, the courts, and human rights - An Australian case study

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A THESIS PRESENTED IN PARTIAL COMPLETION OF THE REQUIREMENTS OF
The Certificate-of-Training in United Nations Peace Support Operations

Peace Operations Training Institute®

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Submitted:

Signature of Student Date: 6 NOV 2006

Forwarded Recommending Approval:

Signature of Thesis Adviser Date: 27th Nov '06

Approved:

Signature of Thesis coordinator Date: _____

INTRODUCTION

The peace and security of nations and of individuals has forever been threatened by acts of violence. However, the recent passing of the fifth anniversary of the terrorist attacks of 11 September 2001 in the United States of America reminds us that our world has been changed by recent gruesome and unjustifiable acts of terrorism. The threat was described by the General Assembly President on the introduction of the *United Nations Global Counter-Terrorism Strategy* as "one of the most serious threats to our common and individual security". The victims of terrorism, those that are killed and deserve to be honoured, those that are injured and the bereaved, and society as a whole require protection and support.

This paper canvasses the social and legal responses to terrorism, using Australia as a case study. Prevailing threat assessments, public fear, and suggestions by some academic writers to legalise 'torture' in preventing acts of terrorism are considered as challenges to the institution of the courts, philosophy of the rule of law, and human rights due to increasing demands for 'security'. Recent Australian responses aimed at the prevention of, and protection of individuals and the State from terrorism, will be used to illustrated these challenges.

This paper has been divided into five main parts. Firstly, attention has been devoted to establishing the scene in Part One of present day Australia, particularly using mainstream media and political sources to generate the context for an understanding of the perception and fear of terrorism in Australia. The threat posed to, and importantly the threat perceived by Australian citizens is emphasised. This is the scene within which the legal discussion that follows should be considered.

Having illustrated the surging momentum that fear can generate behind counter-terror law enforcement and legislative responses in Part One, Part Two addresses the issue of balance. Emphasis is placed on the role that the rule of law and the courts have to play in adjudicating, controlling and moderating measures taken to prevent terrorist acts and to apprehend and prosecute individuals suspected of involvement in terrorism acts. The international recognition of human rights law as a powerful and necessary limitation on State executive action in fighting terrorism is discussed in Part Three.

Following on from the focus on human rights, it is noted and explored in Part Four that certain elements of the global community, society and academia have called for the unshackling of law enforcement agencies in the fight against terrorism. Selected as probably the most extreme example of the challenge to human rights in the fights against terrorism, Part Four addresses the topic of torture and its use by State agents in the combating and prevention of acts of terrorism. The practices of the United States intelligence and military organisations are exposed and discussed. The pros and cons of legitimising torture, either by pre-act judicial endorsement, or by post-act politically bestowed amnesty, are considered. Ultimately the current laws in Australia are considered to prohibit absolutely the use of torture to fight terrorism, although some weakness are identified in relation to the attractiveness of arguments of necessity and success of torture to a fear driven public.

Part Five builds upon the discussions and concepts developed in Parts 2 and 3 concerning the important role that the rule of law, the position and role of the courts and internationally recognised human rights play in moderating the social and legal responses to terrorism. Australian legislative responses to terrorism are reviewed and the presently available protection mechanisms that safeguard individual rights in Australia are also highlighted.

The challenges discussed throughout the paper are a domestic reality in Australia. The post-9/11 world is a challenging environment for citizens, lawmakers and for those bestowed the

responsibility of keeping the former safe from terrorism. The notion of balance and the importance of protecting individual rights while fighting terrorism are of globally significance. The Australian context is no different to that in India, in America, in Europe.

As a military lawyer, and generally one who serves to ensure the safety and security of Australian domestic and global interests, it is my thesis that despite the fear, that despite the challenge that terrorism presents to Australia's casual and friendly lifestyle, the Australian people cannot accept unjustified undermining of human rights. The need for balance must be, and thankfully has been recognised in most legislative action of the Commonwealth and constituent Australian States. Australian courts are demonstrating commitment to their role in achieving continued recognition and protection of individual rights and liberties.

PART 1

The Australian context – threat and perception of terrorism

The modern threat of terrorism materialised on 11 September 2001 when Al Qaeda attacked the World Trade Centre in the USA in an event that was witnessed in almost voyeuristic fashion by Australian citizens on television screens across the country. At that stage though terrorism was still something that happened overseas and was not a reality close to home for many Australians. However, recently the threat of terrorism has been translated into domestic and individual interests for Australians. The reality of terrorism is being thrust home to ordinary citizens almost daily through print and television media. We are being forced to consider terrorism in the context of our daily commute to work, by train, rail and bridge, our dream pacific island holiday, and the celebration of our sporting heroes.

According to statistical data provided by the Terrorism Knowledge Base (TKB)[1] Australia has been subject to 33 terrorist incidents since 1968. However, it has been the following recent incidents that has increased the relevance of the fight against terrorism to every Australian:

a. the recent killing of 88 Australians in Bali on 01 October 2002,

b. the attack on the Australian Embassy in Jakarta in September 2004, and

c. the arrest of 18 suspected terrorists in Sydney and Melbourne in November 2004.

Australian's are now more conscious than ever of the threat of terrorism.

The threat, perceptions and fear

John Howard, Prime Minister of Australia, in his address to the Lowry Institute for International Policy on 31 March 2005[2] described the threat to Australia as "very real". More recently in a Speech to the Business Council of Australia on 30 Aug 06, Australian Security and Intelligence Organisation (ASIO) Director Paul O'Sullivan reminded Australians that 'there has been at least one aborted, disrupted or actual terrorist attack against Australian interests every year since 2000'. The Commonwealth and New South Wales State governments have also in recent times asked their citizens to "be alert, but not alarmed", and instructed them to "See Something, Say Something" through respective awareness campaigns.

Illustrating an increasing sensitivity to and awareness of terrorism, the Australian public has been confronted by reporting in major metropolitan news sources as well as small regional and local news media regarding the terrorist threat and Australia's preparedness to prevent and respond to acts of terrorism. Citizens have been told that 'urban warfare is a form of battle becoming increasingly unavoidable in the age of terrorism'[3]; that the military is training amongst the civilian population as Australian Defence Force (ADF) Army officers train in medium regional cities to equip them with skills to ready them for urban warfare[4]. Australians are reading about the terror

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[1] http://www.tkb.org, accessed 21 July 06. Data taken from the Record of Terrorist Incidents, sorted by Southeast Asia and Oceania, then by country.
[2] *Country Reports on Terrorism*, Released by the Office of the Coordinator for Counterterrorism, U.S. Department of State, on April 28 2006. Chapter 5, page 1.
[3] *Electronic soldiers designed to fight in city battlefields, military doctrine must evolve to handle an increase in urban warfare'*, The Australian, 28 February 2006, page 33.
[4] *Anti-terror squad in city*, Andre Grimaux, Bendigo Advertiser, Tuesday 12 September 2006, page 1.

recruiting process and the *'psyche of a terrorist'*[5]. Articles asking *'Just how safe are we?*[6]*,* and stories telling us of anti-terrorism exercises being conducted in capital and regional cities are conditioning every citizen for the seemingly inevitable time when terror strikes Australia's shores. Revelations that there is *'No escape from terror*'[7] and that the *"Danger of terror strike [will] last for years*"[8] are inescapable as commuters peruse the daily print media to pass time on their train, bus or ferry ride. And, especially then the reality of terrorism must not be far from their minds given for example assessments that 'the Sydney Ferries have been identified as soft targets presenting opportunity for disaster[9], being called essentially huge aircraft that go very slow[10].

Such was the fear and perceived threat of terrorism, in March 2006 a specialist military unit was in Melbourne, on standby and ready to deploy in minutes should a terror attack occur on the Commonwealth Games. As part the Federal Government's $85 million dollar security arrangements fighter jets and choppers were circling the skies of Melbourne during the closing and opening ceremonies'[11]. ASIO Chief Paul O'Sullivan warned that 'a terror attack on Games [is] feasible'[12]. Thankfully the Games passed without incident. However, new laws[13] empowering the ADF to declare and control 'security zones' in responding to terrorism are now a permanent feature of the Australian legal and domestic security framework, as are relevant State and Territory laws expanding the powers of their police forces.

Terror a reality in Australia

Australia's most recent experience with terrorism has been the successful prosecution of 36 year old Sydney architect Faheem Khalid Lodhi[14] on terrorism charges relating to 'preparation for a terrorist act' including inquiring about acquiring chemicals capable of making explosives, possessing maps of the Sydney electricity grid as well as 38 aerial photographs of military sites (including HMAS Penguin, Victoria Barracks and Holsworthy Barracks), and possessing instructions for making explosives, detonators and poisons[15]. In David King's article concerning the matter, *Terror plotter gets 20 years*[16]; he made reference to the sentencing remarks of Justice Wheatley, who provided the following assessment of terrorism in an Australian context:

> "Terrorism is an increasing evil in our world, and a country like Australia, with its very openness and trusting nature, is likely to fall easy prey to the horrors of terrorist activity. This was intended to be a general attack on the community as a whole. It carried the obvious consequence that, if carried out, it would instil terror in to members of the public so that they could never again feel free from the threat of bombing attacks within Australia".

With threats from national citizens, potentially from ones neighbours, being accepted as an increasing reality names like Jack Roche[17], Willy Brigitte[18], 'Jihad' Jack Thomas[19], and Lodhi[20] are

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[5] Natalie O'Brien, The Australia, Thursday 24 August 06, page 12.
[6] *Just how safe are we?* Ian McPhedran, Hobart Mercury, 12 September 2006, page 32.
[7] *No escape from terror,* Katherine Times, 23 August 2006, page 1.
[8] *Danger of terror strike to last for years*, Patrick Walters, The Australia, 11 September 2006.
[9] *Fed: Ferries a soft target says security expert*, Paul Mulvey, AAP Newswire, 30 August 2006.
[10] Ibid, Mr Malcolm Nance, American Security expert briefing delegates from the AFP, Customs, and Defence, currently a lecturer on counter-terrorism at Sydney's Macquarie University.
[11] *Troops prepare to protect the state*, Jasen Frenkel, The Herald Sun, 3 March 2006, page 27.
[12] *Terror attack on Games 'feasible', ASIO chief warns,* Brendan Nicholson, The Age, 3 March 2006, page 6.
[13] *Defence Act 1903*, Part IIIAAA.
[14] *R v Lodhi [2006] NSWSC 691 (25 August 2006).*
[15] Ibid, O'Brien.
[16] David King, The Australian, 24 August 2005, page 1.
[17] In May 2004, Australian citizen Jack Roche pleaded guilty to charges of conspiracy to commit offences against the *Crime (Internationally Protected Persons) Act 1976*. He was sentenced to nine years imprisonment. Roche was associated with Jemaah Islamiyah in Australia and trained in Afghanistan. In 2000 he videotaped the Israeli embassy in

becoming familiar in ordinary family households. There can be no surprise then that the line between what is acceptable, albeit unpalatable, and what is outright abhorrent in the fight against terrorism is being blurred. The tension between morals, individual rights and security is real. This dilemma is developed and considered over the next few parts of the paper, with a focus on the stress placed on the rule of law, the courts and human rights.

Counter-terror initiatives

Recent Australian counter-terrorism initiatives summarised in the *U.S. Department of State Country Reports on Terrorism*[21] have included the 'Wheeler Report on Aviation Security and Policing at Australian Airports'[22], the establishment of the Joint Offshore Protection Command (soon to be the Border Protection Command) - combining both Australian Defence Force and Australian Customs assets to protect offshore areas particularly oil and gas infrastructure and maritime assets and the Australian coastline, as well as the conduct of numerous counter-terrorism exercises under the authority of the National Counter Terrorism Committee (NCTC).

The focus of this paper though is the new laws, the role of rule of law and the courts, and challenges being presented by individuals and a society who are threatened personally and collectively by terrorism. The executive and legislative measures taken in response to terrorism are examined in Part 5.

Canberra and the Israeli Consulate in Sydney as a preliminary measure to support future terrorist attack. For general discussion see *Transnational Terrorism: The Threat to Australia*, Department of Foreign Affairs and Trade, Australia, accessed at www://dfat.gov.au/publications/terrorism/….

[18] French terror suspect alleged to have been involved in planning unspecified terrorist activities in Sydney and having links to al-Qaeda and Lashkar E. Tayida, arrested detained in Sydney in 2003 on 'immigration detention grounds' for breaching his visa conditions and subsequently deported to France following communication between Australian and French intelligence and enforcement agencies, *Brigitte and the French Connection: Security Carte Blance or A La Carte?* Greg Carne (Lecturer, Faculty of Law, University of Tasmania) [2004] Deakin Law Review 26

[19] *R v Thomas [2006] VSCA 165*; *DPP v Thomas [2006] VSC 243*. Discussed later on page 11.

[20] Ibid, note 15.

[21] Ibid, note 1.

[22] Inquiry into developments in aviation security since the Committee's June 2004 Report 400: *Review of Aviation Security in Australia.*

PART 2

Responding to Terrorism with Balance - The Rule of Law and the Courts

Terrorism is a violation of the right to life, liberty and security. It creates an environment that denies the right of people to live in freedom from fear. Without protection of the right to life a human being can exercise no other right.[23] Terrorism can result in the loss of care-free living, the loss of worry free good-byes to children as they walk the streets or catch the train to school, the loss of guaranteed return from holidays. The chance of the catastrophic uncontrollable event and the presence of unpredictable individuals may feel greater following a terrorist event – a reality illustrated in Part 2 by reference to the bombardment of stories emphasising terrorist threats, death and the inevitability of a terror attack on Australian shores.

The emotions felt and expressed by the public in response to terrorism include anger, confusion, shock, sadness, and distress. For some though the most powerful emotion can be a desire for retribution, for revenge and punishment. Those emotions are legitimately felt in response to the tragedy terrorism brings and the impact of terrorism in undermining individual and collective sense of security. Those fears and emotions may then manifest themselves into pressure on governments to respond with immediate action as well as deliberate legislation to prevent further attacks on liberty and life, translating into to issues affecting electoral votes and potentially motivating responsive and reactionary government policy designed to capitalise on public interest. Fear fuelled public sentiment and political opportunism now at the very least influence and potentially threaten the values of democratic society, possibly more than the 'real' threat of terrorism itself[24]. This is why, as in war, limits must be applied to both selfish and nationalistic reactions to the threat of terrorism.

This Part discusses the 'rule of law' as being a key source of principles and safeguards that balance and moderate the reactionary immediate needs and desires of individuals and States to forcefully respond to terrorism and terrorists. The developing role of the courts in promoting and ensuring balance through the rule of law is also demonstrated below. The concept of balance is explored herein through a review of judicial and academic commentary on the role that the 'rule of law' has to play in the 'war / fight against terror'. Furthermore, international conventions and actions of the United Nations referencing the 'rule of law' are outlined and discussed below. The impact of human rights and international humanitarian law on international responses to terrorism is addressed in the Part 3.

The need for balance

Both the individual and the State are worthy of protection. Opportunism aside it must be recognised that social and executive responses to the 'threat of terrorism' and actual terrorist acts may be motivated by legitimate aims of security and order, the preservation of the State and the protection of citizens and social institutions. However, to achieve the protection of both in unison is a challenging balancing act for any democratic State. President Barak of the Israeli Supreme Court expressed the dilemma of democracy in this regard as follows:

> "This is the destiny of a democracy – she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, a democracy has the upper hand. The rule of law and

[23] A/RES/56/160 of 13 Feb 2002
[24] *Terrorism is a threat, but not to our way of life*, Hugh White, The Age, 11 September 2006, page 13.

> individual liberties constitute an important aspect of her security stance. At the end of the day they strengthen her spirit and this strength allows her to overcome her difficulties."[25]

Thus, even the interest of national security, considered at its highest when confronted by enemy action as a formidable and compelling factor justifying unrestrained and unshackled forceful action of war, is qualified by the principles of democratic existence. The principles of individual liberty, freedom and human rights must be thrust forward as appropriate and necessary means by which pure State interests are moderated. The same notions of balance, proportionality and necessity that apply at time of war must be applied to State action taken in reaction to the threat of terrorism.

The idea of balance through State accountability and the need to protect a reactionary fear fuelled public from itself has been expressed in *Korematsu v United States*[26]. In that case Judge Patel provided some sound and relevant advice:

> "In times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability….our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused."

The case of *Korematsu* concerned governmental misconduct in attempting to enforce an 'exclusion order', and the Government in that case was found to have knowingly withheld information and misleading the Court in relation to the consideration of the question of 'military necessity'. The caution expressed in *Korematsu* with respect to the willingness of a frightened public to accept the proposals of a government understandably motivated to protect itself and its citizens should be applied to State action taken in the fight against terrorism. Accountability cannot be avoided, no matter what the circumstance. Additionally, those with power must act positively, moving beyond immediate emotional responsiveness, avoiding the trap of reactive and shortsighted policy making. Balance can be achieved through public and judicial review.

The requirement to recognise the 'rule of law' and the key position that courts hold in promoting and ensuring balanced State action is explored further below. The inherent safeguards preserved and emphasised by the 'rule of law' are referenced in national constitutions, international conventions and declarations, as well as customary international law. The essential elements of a society that prides itself on the 'rule of law' include due process and natural justice, the right to a fair trial, the presumption of innocence and personal recourse to the courts to access legal remedies from an independent judiciary. The rule of law ensures accountability of State action by reference to fundamental principles of justice.

The difficulty of achieving balance

> "It requires the wisdom of Solomon to ensure that human rights are maintained so far as possible, without undermining the ability of the State to protect the most basic right of all, the right of its citizens not to be blown up while drinking a cup of coffee in a café, travelling to work on a bus, or sitting at a desk in the office."[27]

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[25] *Public Committee Against Torture v. State of Israel, Sept 16, 1999*. Cited by the Hon. Justice Michael Kirby AC CMG, Justice of the High Court of Australia, in a speech given by him, *National Security: Proportionality, Restraint and Commonsense,* at the National Security Law Conference, Australian Law Reform Commission, of 12 March 2005. Cited also (translation differs) in *Terrorism: Protecting the State and Civil Society* by Soli J Sorabjee, Attorney General for India, presented at the Commonwealth Law Conference, Melbourne, Australia April 13-17 2003.

[26] 323 215 (1944)

[27] David Pannick, cited by Tehmtan R. Andhyarujina[27] in a paper presented at the *Terrorism: Meeting the Challenges / Finding the Balance,* Commonwealth Law Conference of 2003.

David Pannick above demonstrates the difficult role that Courts are attributed in deciding the legitimacy and legality of State action. Courts occupy a special and difficult position being central to the application and promotion of the 'rule of law'. They are required to first find, and then expound a balanced approach to the interpretation and application of the law regardless of the prevailing socio-political environment. Whilst I do not intend to imply an absolute vacuum, objectivity and steady-handed consideration of competing policy and legal issues and interests is the difficult task of the courts.

The role of the courts in establishing and enforcing balance when called to act in matters concerning the prevention and/or prosecution of terrorism is illustrated below. First, by reference to two cases summarised by both Sorabjee[28] and Andhyarujina[29], examples of instances where Courts have been criticised for failing in their duty to preserve balance are provided below. Then, examples follow of cases where courts have demonstrated a commitment and willingness to promote the rule of law and criticise State action, allowing comparative assessment and consideration. The recent Australian case concerning Jack Thomas is also reviewed in this section providing a contemporary example of the difficult task of courts in Australia when adjudicating terrorism related matters.

Submissiveness criticised

Two cases, one from the United Kingdom and one from India, both from different eras, demonstrate instances where according to hindsight and critical judgement courts have failed to assert sufficient independence to fulfil their role as protectors of the 'rule of law'. These cases are *Liversidge v. Anderson*[30] and *ADM v Shivkant Shukla*[31].

In *Liversidge,* twenty five (25) years after being detained it was revealed that the grounds for Mr Liversidge's detention were that:

a. he was in touch with persons who were suspected of being enemy agents,

b. he was engaged in communal frauds, and

c. he was the son of a Jewish Rabbi.

The case is one now recognised to have be wrongly decided. The Court's failure to challenge the exercise of executive detention power as it applied to Mr Liversidge has been criticised It is considered that had the court called upon the Secretary of State to show 'reasonable cause' for the detention based on those grounds, he would have found it difficult. The importance of judicial review is recognised, and is well illustrated by reference to the following remarks of Andhyarujina[32]:

> "Deference to the political branches should not result in the abandonment of the historic functions of judges as protectors of the liberties of the individuals".
>
> "Courts must allow the derogation of rights only if legislation or the executive action is shown to be required on the basis of some 'credible material; or on the basis of material which is apparent to the court."

[28] Attorney General for India (in 2003)
[29] Senior Advocate, Supreme Court of India, Former Solicitor-General of India, Former Advocate-General of Maharashtra, India (2003)
[30] *1942 AC 206*
[31] *1976 2 SCC 521*
[32] *Terrorism: Meeting the Challenges / Finding the Balance*, Paper presented to the CLA Conference, Melbourne, April 2003, page 3.

In *ADM*, the majority of the Indian Supreme Court held that 'as the fundamental right to freedom had been suspended during the Emergency, a detainee had no right to move the Courts for examining the legality of his detention even if he was detained by an unauthorised or malifide order of detention'. That ruling effectively undermined the place of the doctrine of *habeas corpus* in a democratic society at the time.

Both matters have received universal criticism and condemnation as examples of cases where judges have demonstrated overwhelming submissiveness to the government of the day. Lord Woolf, Chief Justice of England and Wales, referring to both these cases and other examples in deciding the matter of *A, XYZ & Others v Secretary of State*[33], reminds us and his judicial colleagues that:

> "The mistakes which have been made in the past should not be forgotten".

Promoting the rule of law

Seemingly heeding those words of caution, and in contrast to *Liversidge* and *ADM*, an example of proactive enforcement of the role of the judiciary and the 'rule of law' in balancing State action is found in the approach of the Indian Supreme Court in *D.K. Basu v State of West Bengal*[34]. In *D.K. Basu* the court was considering a letter of complaint regarding custodial violence and deaths in police lock up. The concepts and statements from that case excerpted below are validly applied to our consideration of the role of the Courts and rule of law in balancing State responses to the terrorist threat and become particularly relevant to the discussion later regarding the proposal to introduce 'torture warrants' as a means of eliciting information in terrorist matters.

The Court considered its role as follows:

> "The importance of affirmed rights of every human being need no emphasis and, therefore, ***to deter breaches thereof becomes a sacred duty of the Court, as the custodian and protector of fundamental and the basic human rights of citizens***."[35]

Courts of law provide a powerful forum in which State action can be assessed and moderated where required. Necessarily State action is subject to limits; those limits arise from legal principles and doctrines amounting to the rule of law established through history as central to the enjoyment of rights, protections and liberties by individuals. In relation to the primacy and importance of the rule of law the Supreme Court stated:

> "Custodial violence, including torture and death in the lock ups, strikes a blow at the Rule of Law, which demands that the ***powers of the executive should not only be derived from law but also that the same should be limited by law***." [36]

The law permits certain actions, and the law controls those actions. To maintain legitimacy the actions of state agents must be lawful. Building upon the notion of balance, the Supreme Court in *D.K. Basu* further expressed the idea of compromise and need for measured State action:

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[33] *2002 EWCA CN 1502,* a Special Immigration Appeals Commission (SIAC) matter in the Court of Appeal
[34] [1996] INSC 1674 (18 December 1996), accessed on 21 July 2006 at www.commonlii.org/cgi-commonlii/disp.pl/in/cases/INSC/1996/1674.html?que…
[35] *D.K. Basu v State of West Bengal*, p 2-3 of 24.
[36] Ibid, p3 of 24.

> "the Latin maxim *salus populi est supreme lex (the safety of the people is the supreme law)* and *salus republicae est suprema lex (safety of the state is the supreme law)* co-exist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. ***The action of the State however must be "right, just and fair"***. [37]

Whilst the Court did recognised that in some circumstances the rights and protections of an individual must give way to the broader interest of community and national security, the Court was careful to demonstrate that despite strong and sometimes necessary desires of forceful State action, there must be balance. State action must be right, just and fair.

In relation to the actions of those charged with carrying out State policy, enforcing criminal laws and protecting the community, the Court obliged the State and its agencies as follows, emphasising the primacy of the courts as the sole and only legitimate forum for extracting punishment through transparent and public trials of accused terrorists:

> "The State must, therefore, ensure that ***various agencies deployed for it and by it for combating terrorism act within the bounds of law*** and not become law unto themselves, that the terrorist has violated human rights of innocent citizens may render him liable for punishment but it ***cannot justify the violation of his human rights except in the manner permitted by law.***"[38]

Courts must approach matters concerning the prevention or prosecution of terrorism with independence and a degree of scepticism, especially when confronted with State and individual demands for retribution, free wielding power and executive discretion. Following on from the requirements expressed above regarding the control and limits to be applied to actions of State agencies, some poignant words of caution originally offered by Lord Denning in his first Hamlyn Lecture in 1949 were recited by the Supreme Court in *D.K. Basu*[39] are repeated here to close this section:

> "No one can suppose that the executive will never be guilty of the sins that are common all of us. You may be sure that they will sometimes do things that they ought to do: and will not do things that they ought to do…***properly exercised the new powers of the executive lead to the welfare state: but abused they lead to a totalitarian state."***

Judicial assertiveness

By reference to specific individual protections - the right to access legal counsel and *habeas corpus* - the role of courts and the value of confident and assertive judicial review of executive action, and the balance and accountability provided by the rule of law is discussed below. The District Court case of *Padilla v Rumsfeld*[40] provides relevant and recent jurisprudence in this regard.

In that case the District Court ordered that Padilla be able to see a lawyer. However the Government refused and filed a motion for reconsideration on the grounds that Padilla was detained as an 'enemy combatant' during wartime and had been so declared by President Bush. The District Court however, reaffirming its earlier judgement ordered:

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[37] Ibid, p14 of 24.
[38] Ibid, p14 of 24.
[39] Ibid, p19 of 24.
[40] *Padilla v Rumsfeld 124 SCt 2711 (2004)*

> "Lest any confusion remain, ***this is not a suggestion or a request*** that Padilla be permitted to consult with counsel, and it is clearly not an invitation to conduct further "dialogue" about whether he will be permitted to do so. ***It is a ruling – a determination – that he will be permitted to do so***."

That ruling provides a perfect example of the key role that courts can play in maintaining the rule of law. The strong language and judicial assertiveness, independence and courage are one obvious balancing mechanism applied to State action in responding to the threat of terrorism. Accountability and judicial review are crucial to protect individual rights.

A further example of the role that the courts play in ensuring accountability of State action is found in the matter of *Centre for National Security Studies, et al v United States Department of Justice*[41]. Under freedom of information laws, and on the premise that those laws safeguarded the American public's "right to know what their government is up to"[42] the plaintiffs sought release of information concerning the names of persons arrested or detained, and the dates and details of the circumstances of arrest or detention in the massive US Government investigation that followed the terrorist attacks of September 11, 2001. The Government, through the Department of Justice refused. In the Memorandum of Opinion for that case Judge Kessler noted the respective functions and priorities of the state and the judiciary. Judge Kessler emphatically asserted the requirement for balance and promoted the role of the courts and the rule of law as providing that balance stating:

> "Difficult times such as these have always tested out fidelity to the core democratic values of openness, government accountability, and the rule of law. The court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. By the same token, the first priority of the judicial branch must be to ensure that our Government always operated within the statutory and constitutional constraints which distinguish a democracy from a dictatorship."[43]

Judge Kessler ordered the disclosure of names, saying:

> "Unquestionably… the public's interest in learning the identities of those arrested and detained is ***essential to verifying whether the Government is operating within the bounds of the law***".[44]

CNSS v DOJ further demonstrates recognition of the fact that State actions remain subject to the rule of law. State and executive powers are subject to the rule of law. They are accountable both to the people who vote for them as well as the basic and fundamental principles of the law.

The task of achieving a balanced response to the threat of terrorism is a difficult one. Competing interests of the individual, the State, must be weighed. The mechanisms for achieving balance are firmly rooted in preserving the rule of law, and maintaining the avenues of review available through the separation of judicial power from the executive.

Pressure and balance in Australia

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[41] Centre for National Security Studies, et al v United States Department of Justice, United Stated District Court for the District of Columbia, Action no. 01-2500.
[42] *United States v Reporters Committee for Freedom of the Press*, 489 U.S. 748 at 773 (1989). Internal citation from *CNSS* v *DOJ.*
[43] *CNSS v DOJ*, Memorandum of Opinion, page 3.
[44] ibid.

The issues discussed above recently played out in Australia in relation to the matter of Jack Thomas,[45] who was affectionately referred to as 'Jihad Jack' in the media. Even in Australia the role of the courts in responding to terrorism, applying human rights laws and upholding the rule of law has been debated and socially (rather than legally) criticised. The public response to the acquittal of Jack Thomas by the Victorian Court of Appeal, and specifically the alleged pro-human rights background of the President of the Court, provides an enlightening illustration of social sentiments in relation to terrorism matters in Australia.

In response to a background of having been President of *Liberty Victoria*, as well as being appointed to the bench with links to civil liberties lobby groups, coupled with his previous public criticism of the new terror laws, Justice Chris Maxwell came under fire from some sectors of the media who questioned the appropriateness of him having heard the case, seemingly on the basis that the Judge suffered a positive bias toward human rights[46]. Stephen Shirrefs, Chairman of the Criminal Bar Association of Victoria, in reported to have opined '[there was a conflict] between the application of the rule of law, and the popular opinion that this person, on the face of it presents a danger"[47]. The court was accused of 'failing to consider the fact that Australia is waging a war on terrorism, and in war concessions have to be made'[48]. Even Waleed Aly, Melbourne lawyer and board member of the *Islamic Council of Victoria* was reported as recognising that "there are the two tensions that are at play here – security and liberty".[49]

Finally I note that in separate coverage of the case, The Australian newspaper published an article stating "Jihad Jack is on the wrong side in a war. And in war, different standards apply"[50]. A sentiment that the reader will note is repeated in the discussion in Part 5 in relation to justifying torture.

The role of the courts and the rule of law now appear to be subjects of general discussion and mainstream commentary in Australia. In one sense terrorism has propelled the issue into family discussions at the dinner table and conversations of train commuters. Importantly there appears to be an acceptance that the law does provide a necessary balance against emotive public and executive responses to terrorist acts and allegations, and that despite apparent desires for lynching, the courts and the rule of law continue to protect individual rights and interests.

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[45] *R v Thomas [2006] VSCA 165*; *DPP v Thomas [2006] VSC 243*
[46] *Maxwell tainted with the 'Jihad' brush*, Lawyers Weekly, Issue 306, cover page and page 6, 08 September 2006.
[47] *Striver Jack's trial by media*, *with the acquittal of Jack Thomas came a media storm that sought to do more than just influence public opinion*, Alex Boxsell, Lawyers Weekly, Issue 306, page 13, 08 September 2006
[48] ibid.
[49] ibid.
[50] *The Australian*

PART 3

The United Nations responds to terrorism – the relevance of human rights

It is necessary to place State action in its temporal and global context. Therefore, before the Australian social and legislative responses to the threat and reality of terrorism are considered in Part 5, international responses represented by resolutions and declarations of the United Nations are outlined in this Part. Also, comments and reports of the UN Secretary General and the UN High Commissioner for Human Rights are considered below as providing sound and powerful statements of caution and support for the rule of law and the promotion of individual rights as balancing factors relevant to the fight against terrorism.

The Security Council in resolution (hereinafter UNSCR) 1368, of 12 September 2001, expressed its "readiness to take all necessary steps" to combat terrorism. And, UNSCR 1373 (2001) decided that all states shall take action to prevent the commission of terrorist acts, including to prevent financing, to refrain from providing active or passive support to terrorist acts, and ensure that those who commit terrorist acts are brought to justice. The 'call to arms' expressed in the above resolutions, which re-invigorated the international fight against terrorism following 9/11, do not include any discussion regarding applicable constraints or limitations with respect to state action taken in their name. However, modern terrorism must not be promoted as a crisis generating a basis for unlimited, unconstrained, unregulated executive and legislative action.

Some limitations may be implied on the basis that State action taken to implement UNSCRs must accord with the spirit of the UN Charter, being the maintenance of international peace and security, and certain limitations are implied by State obligations to achieve universal respect for and observance of human rights and fundamental freedoms, thankfully we are not limited to inference or implication to find internationally accepted limits to be applied to State action. The international community has recognised that just as there are limits applied to State action in times of war there must be limits applied to State action in the fight against terrorism.

Whilst the principles of legality, necessity and proportionality provide ready and effective mechanisms with which to achieve some balance, ultimately "the rule of law must be a fundamental benchmark, against which all actions in the fight against terrorism are measures".[51]

The UN General Assembly

In Resolution A/RES/48/122 of 14 February 1994 the General Assembly unequivocally condemned, and by extension described terrorism as:

> "Activities aimed at the destruction of human rights, fundamental freedoms and democracy, that threaten territorial integrity and security of States, destabilizing legitimately constituted Governments… having adverse consequences on the economic and social development of States".

The General Assembly has adopted 44 resolutions[52] in relation to terrorism and has devoted a number of those resolutions purely to 'human rights and terrorism', for example; A/RES/59/195,

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[51] Dato' Param Cumaraswamy, the UN Special Rapporteur on the Independence of Judges and Lawyers. Page 2 of an Address to the 13th Commonwealth Law Conference, Melbourne, Australia, April 13-17 2003 *Terrorism: Meeting the Challenge / Finding the Balance*.

[52] Statistic drawn from listed 'UN Action Against Terrorism – Action by the General Assembly', http://www.un.org/terrorism/res.htm, accessed online 21 Jul 06.

A/RES/58/174, A/RES/57/219, A/RES/56/160 and A/RES/54/164. Resolution A/RES/40/61 of 09 December 1985 provides an example of explicit recognition given to human rights and their relevance to fighting international terrorism. Also, acknowledging the date of that resolution serves to remind us that the fight against terrorism is not new.

The General Assembly has consistently called upon member Stated 'to take all necessary and effective measures to prevent, combat and eliminate terrorism in accordance with international standards of human rights'. Building on the interest of the General Assembly in promoting human rights and their place in the fight against terrorism, in A/RES/48/122 the General Assembly stated:

> "The most essential and basic human right is the right to life".

That being the right without which none other can be exercised or enjoyed, and the right ultimately directly attacked by violent terrorist acts. The Assembly also reiterated therein the obligation of all States to 'promote and protect human rights and fundamental freedoms'.

The Assembly's recognition of the role of human rights standards in balancing State action was again demonstrated in its '*Declaration on Measures to Eliminate International Terrorism*' of 1994[53]. Later, and post '9/11', the General Assembly adopted A/RES/57/219 on 27 February 2003, "*Protecting human rights and fundamental freedoms while countering terrorism*". The Assembly again affirmed that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.

In 2003, building on the context of its previous resolutions on the subject, the General Assembly sought recommendations of the UN High Commissioner for Human Rights (OHCHR) in relation to the protection of human rights and fundamental freedoms while countering terrorism. The OHCHR assessed and discussed the compatibility of national counter-terrorism measures with international human rights obligations in a report submitted to the 59th Session of the General Assembly, '*Protection of human rights and fundamental freedoms while countering terrorism' a Study of the United Nations High Commissioner for Human Rights*[54]. In compiling the report the OHCHR sough the views of Member States. Some of those responses as summarised in the Report are excerpted and discussed below. The responses provide a truly international menu of approaches to counter terrorism, highlighting the varied positions taken with respect to the exercise of executive power, and the importance of balance, the role of the rule of law and human rights in responding to terrorism.

Spain responded by concluding that 'terrorism was an exceptional crime and may receive special treatment'[55]. Other nations asserted the importance of balance by reference to the rule of law and human rights. For example, the Russian Federation response included the statement that:

> "all counter terrorism undertaken on its territory should be implemented ***in strict accordance with the principle of the rule of law***". [56]

Mexico also responded with a reference to the rule of law, asserting that:

> "the two obligations [fighting terrorism, and respecting rights and freedoms of individuals] are not exclusive but are, rather, complimentary, since ***it is only in a system in which the rule of***

[53] A/RES/49/60, 09 Dec 1994.
[54] A/59/428
[55] ibid, paragraph 16
[56] Ibid, Paragraph 15

> ***law is promoted and the human rights of all are protected that an effective struggle against terrorism may be assured***". [57]

Argentina expressed views that were based on principles of balance, legality and necessity, emphasising:

> "there is a ***delicate balance*** between the ***protection the State must provide against the threat of terrorism*** and ***respecting and guaranteeing human rights***. The balance does not permit indiscriminate restrictions on human rights, but rather stipulates that ***only those limitations that are unavoidable and legitimate*** under international law, especially international human rights law ***are permissible***." [58]

and that:

> "***Despite the unusual conditions*** under which the struggle against terrorism is taking place—an essential point is that ***State action against terrorism is not a responsibility that is antithetical to the protection of human rights and democracy***." [59]

Whilst terrorism may at times justify 'special measures', those measures must be balanced and must represent only limited compromise and derogation of individual rights based on necessity and international law norms or specific convention provisions affecting particular rights. At all times those measures ought to be reviewable according to the law by an independent judiciary.

Only recently the General Assembly adopted the *United Nations Global Counter-Terrorism Strategy*[60] (the Strategy). The landmark resolution adopting the Strategy and its annexed 'plan of action' represents the first time that all Member States have agreed to a common strategic approach to fight terrorism. Whilst there is still no comprehensive convention on international terrorism the resolution specifically recognises that "development, peace and security, and human rights are interlinked and mutually reinforcing". The plan of action among other things 'resolves to strengthen the capacities of the UN in .the rule of law. Also, in the plan of action in Part II - *Measures to prevent and combat terrorism* Member States resolve to:

> "ensure the apprehension and prosecution…of perpetrators of terrorist acts, in accordance with the relevant provision of national and international law, in particular human rights law…and international humanitarian law".

Responses of the UN Security Council

The UN Security Council identified terrorism as a phenomenon "which endangers the lives and well being of individuals world wide as well as the peace and security of all States" in UNSCR 1269 (1999). In that resolution the Security Council *emphasised* that the fight against terrorism had to be based on the principles of the UN Charter and norms of international law, including international humanitarian law and human rights. A string of Security Council Resolutions have since followed, condemning all acts of terrorism whenever and wherever they have occurred, calling on member states to adopt and implement relevant international conventions and engage in cooperative measures to deny haven, deny facilitation and financing of terrorists.

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[57] Ibid, Paragraph 13
[58] Ibid Paragraph 6
[59] Ibid Paragraph 6
[60] A/RES/60/288, 08 September 2006. www.un.org/terrorism/strategy , accessed online 17 Oct 2006. To be included in the 62nd Session of the General Assembly.

Whilst generally the Security Council resolutions build on those of the General Assembly discussed above, the Council has on occasion gone a step further than the Assembly, developing on the notion of the primacy of the 'right to life'. The Security Council has provided specific examples where the compromise of recognised human rights is accepted as legitimate in response to the threat of terrorism. Such concessions have been made for example in relation to the rights of asylum seekers and the right of freedom of expression. In UNSCR 1269, when two competing sets of rights were being considered; the norms applicable to processing 'asylum-seekers', and the right and obligation of States to assess applicants with respect to terrorist acts, the UNSC called upon States to:

> "take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in a terrorist act".

Screening for security purposes was recognised as a pre-cursor or pre-condition to otherwise generally applied refugee-processing norms. Also, UNSCR 1624[61] called upon States to take action to prohibit by law the incitement of terrorist acts, to prevent incitement and terrorist conduct, to deny safe haven ***based on credible and relevant information*** giving 'serious reasons for considering a person as guilty of terrorist acts, to strengthening border security. In that resolution the Council specifically mentioned:

a. the 'right to freedom of expression' - reflected in Article 19 of the *Universal Declaration of Human Rights* adopted by the General Assembly in 1948 (Universal Declaration), and also reflected in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR) of 1966, and

b. the 'right to seek and enjoy asylum' - reflected in Article 14 of the Universal Declaration and non-refoulement obligation of States under the *Convention relating to the Status of Refugees* adopted on 28 July 1951 and Protocol of 31 January 1967,

as being subject to limitation when affected by measures taken to protect the right to life. Thus, the Security Council has provided us examples of internationally recognised individual rights being compromised, adjusted and restricted as a result of the threat of terrorism. The big question though is obviously how far can this initiative extend? The discussion in Part 4 regarding torture will hopefully provide a context in which to consider such challenging questions.

The UN Secretary General

Also relevant to this discussion of balance, of human rights, and the rule of law in relation to counter-terrorism action are the remarks of the UN Secretary-General in his *Report of the Secretary-General - Protecting human rights and fundamental freedoms while countering terrorism*, of 22 Sep 05[62]. In that report the Secretary-General addressed the fundamental principles of, and challenges to the right to a fair trial and other basic individual rights protected by the rule of law. The Secretary General made the point that:

> "even in a state of emergency, the right to be tried by an independent and impartial tribunal, should be upheld, as well as the right to be heard and to challenge the legality of one's detention; the right to a defence; and the presumption of innocence. Only a court may convict

[61] UNSCR 1624 - the Security Council reaffirmed previous relevant resolutions 1373 (2001), 1535 (2004), 1540 (2004), 1566 (2004), 1617 (2005), and the declaration annexed to resolution 1456 (2003).
[62] A/60/374

> a person for a criminal offence, and any evidence gained as a result of torture must be excluded."[63]

Furthermore, in his *'Address on the launch of Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy'*[64] given in New York on 02 May 06, the Secretary-General told his audience that:

> "***defending human rights runs like a scarlet thread through the report***. ***It is a prerequisite to every aspect of any effective counter-terrorism strategy***. It is the bond that brings the different components together. That means that human rights of all – of the victims of terrorism, of those suspected of terrorism, of those affected by the consequences of terrorism".

Bodies such as the United Nations Commission on Human Rights have consistently urged that all measures taken to prevent, combat and eliminate terrorism must be carried out "in strict conformity with international law, including human rights standards"[65]. The pre-eminence of the rule of law, aside from being well cemented by the resolutions summarised above, has also been recognised and affirmed in a Report from the Policy Working Group established by the Secretary-General of the UN in Oct 2001, where is recommended that:

> "All relevant parts of the United Nations system should emphasise that key human rights must always be protected and never derogated from. *The independence of the judiciary and the existence of legal remedies are essential elements for the protection of fundamental human rights in all situations involving counter-terrorism measures"*[66].

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[63] ibid, paragraph 18
[64] accessed at www.un.org/unitingagainst terrorim/sgstatement.html, on 21 Jul 06.
[65] E/CN.4/RES/2001/37, E/CN.4/RES/2002/35
[66] A/57/273 (S/2002/87) pg 14, Recommendation 4.

PART 4

Torture to prevent terrorism or prosecute terrorists?

The place of human rights in the fight against terrorism has been emphasised by the overwhelming international recognition of the key role that protection afforded to individuals play in balancing executive and populist action. This Part considers one of the more extreme sources of challenge to human rights, the rule of law and role of the courts. Of increasing relevance and gaining public awareness, the employment of torture in the fight against terrorism whether to extract intelligence, confessions or other purely preventative information, represents a massive legal and moral challenge for lawyers and citizens alike.

Consider the hypothetical example of a captured terrorist who knew about an imminent attack, but refused to provide the information necessary to prevent it. One incredibly controversial proposition confronting the prohibition on torture is the claim that it ought not be absolute. There is no more a compelling case justifying torture as a legitimate information gathering technique as the 'ticking bomb' case, and it is proposed by some that torture ought be allowed in the context of fighting terrorism.

Treaty obligations concerning torture are unequivocal, prohibiting the employment of torture no matter how exigent the circumstances. However, in the current environment of fear and anticipation it has been noted that 'few are willing to stand up for constitutional rights when security is still the top priority of the vast majority of voters'.[67] Although, the outrage and surprise expressed in the media responding to recent comments by the Australian Attorney-General, seemingly supporting the use of sleep deprivation as a legitimate interrogation technique[68], suggest that there are still plenty who will stand up for human rights and object to questionable methods of law-enforcement agencies despite prevailing security fears.

Torture techniques

So that this debate is truly informed and the mind of the reader is well situated, below is an outline of some of the techniques being referred to collectively in this Part as 'torture' or 'aggressive interrogation'. As a starting point it is useful to observe that only recently were the following techniques banned from use by the US in the 'war against terrorism':

a. Forced nakedness,

b. hooding and other infamous procedures,

c. sexual humiliation,

d. threatening with dogs,

e. deprivation of food and water,

f. performing mock executions,

g. shocking prisoners with electricity, and

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[67] *Even a bag lady can teach Bus about human rights*, by Henry Porter, Sunday 10 Sep 06, The Observer, accessed on line; http://www.guardian.co.uk/commentisfree/story/0,,1869196,00.thml

[68] *Pollies need wake-up on torture*, Ian McPhedran, The Herald Sun, 6 October 2006, page 20.

h. burning.

The recent re-release of the US Army manual *Human Intelligence Collector Operations*[69] now prohibits these techniques. However, by asserting narrowed definitions of torture and claiming self-defence and military necessity, the United States provides examples of interrogation and 'counter-resistance' techniques that have been politically or executively legitimated. Described by the UN as "of utmost concern" [70], the following 'interrogation techniques' were approved by the Secretary of Defence on 2 Dec 2002[71]:

a. the use of stress positions… for a maximum of four hours

b. Detention in isolation up to 30 days

c. Being hooded whilst being transported and during questioning

d. Deprivation of light and auditory stimuli

e. Removal of comfort items

f. Forced grooming (shaving of facial hair)

g. Removal of clothing

h. Interrogation for up to 20 hours

i. Using detainees individual phobias to induce stress

j. Environmental manipulation eg. Introduction on unpleasant smells, adjusting temperature etc).

k. Reversing sleep cycles.

Moving beyond the simple list of techniques above, and in order to add reality and an understanding of the issues relating to torture, I note for example, that sleep deprivation 'hinders the ability of red blood cells to carry oxygen to the brain, causing fatigue, lapses in memory, lethargy, muscular pain and, in severe cases loss of consciousness'[72]. Therefore, even before discussing the legitimacy and morality of such techniques, an elementary criticism of the usefulness of torture can be made with regards its actual effectiveness in eliciting information upon which action might be taken.

Prohibition of Torture in International law

As a basic starting point to this discussion it is necessary to quickly establish that torture is prohibited in international law. "No violation of any one of the human rights has been the subject of so many Conventions and Declarations as 'torture' – all aiming at total banning of it in all forms" according to the Indian Supreme Court in *D.K. Basu*. The most obvious international convention is the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[73]. Article 2(2) of the 'Convention against Torture' provides:

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[69] *US bans degrading methods of torture*, Canberra Times, Friday 08 Sep 06, page 11. Canberra circulation.
[70] E/CN.4/2006/120, UN Economic and Social Council Report (ECSOC Report), Commission on Human Rights, Sixty-second Session, 15 February 2006 - *Report Concerning the situation of Detainees at Guantanamo Bay*, Part III, page 22-23.
[71] Footnote 55 of ECSOC Report, p23-24.
[72] Ibid, McPhedran, *Pollies need wake-up on torture.*
[73] Entered in to force 26 June 1987. Adopted and opened by General Assembly resolution 36/46 of 10 December 1984.

> "No exceptional circumstances whatsoever, whether a state of war of a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture".

Further emphasising that certain rights can never be derogated, Article 4(2) of the *International Covenant on Civil and Political Rights* (ICCPR) includes the right to life, the prohibition of torture or cruel, inhuman or degrading punishment, freedom of thought, conscience or religion and the principles of precision and non-retroactivity of criminal law as rights that prevail in all circumstances.

According to the UN Economic and Social Council (ECSOC) "The prohibition of torture moreover enjoys *jus cogens* status."[74] Furthermore, in the Report of the Secretary-General, *Protecting human rights and fundamental freedoms while countering terrorism*, of 22 September 05[75], the Secretary-General confirmed that the absolute prohibition of torture is a peremptory norm of international law.

Adding further weight to the discussion above regarding the prohibition of torture, examples of domestic and regional jurisprudence acknowledging the prohibition on torture are provided below. In the European Court of Human Rights (ECHR) case of *Khashiyev and Akayeva v. Russia*[76] two Russian national applicants alleged that their relatives were tortured and killed by members of the Russian federal military in Chechnya in February 2000 during an operation to take control of Groznyy. Responding to testimonies that the bodies were mutilated, bearing numerous stab wounds and firearm wounds, the Court confirmed a fundamental value of democratic society"

> "even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the convention and its protocols, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15(2) even in the event of a public emergency threatening the life of the nation" [77].

These sentiments were reiterated in 2006 in the ECHR Grand Chamber matter of *Ramirez Sanchez v France*[78]. Reference was made to the *'Guidelines on Human Rights and the Fight against Terrorism'* adopted by the Committee of Ministers of the Council of Europe on 11 Jul 2002, and in their decision the Court reiterated the absolute prohibition on torture:

> "The use of torture or of inhuman or degrading treatment or punishment, is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts the person is suspected of or for which he/she was convicted".

Strong condemnation of torture being employed by State agencies is also found in the decision of the Indian Supreme Court in *D.K. Basu*. The Court considered that:

> "Custodial violence, including torture…strikes a blow at the rule of law."[79]…

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[74] Ibid, E/CN.4/2006/120, page 8, paragraph 8.
[75] A/60/374
[76] Former First Section, Applications of 57492/00 and 57945/00. Judgement entered at Strasbourg, 24 February 2005, Final on 06 July 2005.
[77] Paragraph 105 and 106. See also *Selmouni v France [GC], no. 25803/94 95 ECHR 1999* and the *Assenov and Others v. Bulgaria* judgement of 38 October 1998, Reports 1998-VIII, p 3288 , 93
[78] Application no. 59450/00, Judgement adopted on 31 May 2006. Delivered in Strasbourg, 4 Jul 2006.
[79] Ibid *D.K. Basu,* page 3 of 24

> "By torturing a person and using their degree methods, the police would be accomplishing behind closed doors what the demands of our legal order forbid. No society can permit it."[80]

The court emotively described custodial torture as:

> "A naked violation of human dignity and degradation that destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward – flag of humanity must on each such occasion fly at half-mast." [81]

In discussing the powers and immunities of police officers, the court further remarked that:

> "Torture of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word torture today has become synonymous with the darker side of human civilisation…"Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is not way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone paralysing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself"[82]

As demonstrated above, torture has been specifically prohibited in various international instruments, and conventions, is a customary norm of international law, and has been the subject of emotive and powerful condemnation by courts of both national and multinational jurisdiction. Despite this, as will become apparent by review of the next two sections, an increasing acceptance of the difficult task of law enforcement agents in the fight against terrorism, and regular claims of success form torture and aggressive interrogation of terror suspects in preventing further acts of violence and death, are presenting challenges to the absolute prohibition of torture.

Difficult task of police

The difficult role of police and State agents in preventing terrorism and prosecuting terrorists has been recognised, and indeed was taken in to account in the decisions referred to above. It is also recognised that the role and challenges faced in law enforcement quite often form the starting point of calls to reduce rights being attributed to persons suspected of having committed serious criminal offences. For example, in *D.K. Basu* the Court accepted that 'the police have to perform a difficult and delicate task, particularly in view of …terrorist activities'. Also, highlighting the above progression of logic, which would ultimately support the use of torture to combat and counter terrorism, the court noted:

> "It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminal by soft peddling interrogation. It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights such criminals may go scot-free without exposing any element or iota or criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer." [83]

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[80] Ibid *D.K. Basu*, page 12 of 24
[81] Ibid *D.K. Basu*, page 3 of 24
[82] Ibid, *D.K. Basu,* page 3 of 24.
[83]Ibid, *D.K. Basu,* page 13 of 24

In the ECHR matter cited above of *Khashiyev and Akayeva v. Russia* the court accepted that "in the modern world States face very real difficulties in protecting their populations from terrorist violence"[84].

However, in both cases the courts refused to accept that torture held a legitimate place as a law enforcement or interrogation technique. The Court in *D.K. Basu* emphasised that:

> "The cure cannot, however, be worse than the disease itself".

In developing that notion the Court considered the response of the Court in *Miranda v Arizona*[85]. In that case it was noted, "a recurrent argument made in these cases is that society's need for interrogation out-weighs the privilege" [against incrimination and the right to silence]. However, the Court there ruled, "that right cannot be abridged". The Indian Court ultimately concluded:

> "There can be no gain saying that freedom of an individual must yield to the security of the State".[86]

In *Khashiyev and Akayeva v. Russia* the Court returned in its judgement to the fact that say "the convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the conduct of the person concerned (see *Chalal v the United Kingdom*[87])". Even the dissenting judgement in that case was prefaced by reference to case-law establishing that the measures which the States are forced to take to protect democracy against the scourge must be consistent with the essential values of democracy – of which respect for human rights is the prime example – and must avoid undermining those values in the name of protecting them[88].

The crucial role of the rule of law and the courts in protecting and asserting individual rights and providing balance to practices of state agents which was previously established in Part 2 is again emphasised here. Sentiments clearly emphasising the importance of the protection of individual human rights is evident in the above judicial commentary regarding torture.

Arguments for torture

Despite the prohibitions identified above, and the case law clearly applying limits to States and their agents in responding to terrorism, arguments in favour of torture based on 'necessity' and success of 'aggressive interrogation' still abound. Indeed it is these concepts of need, of urgency, and success that a fear fuelled public will feel most comfortable with when their own morals call in to question their support for torture.

President Bush is quoted as having said that, "In a post-9/11 world the United States must make sure we protect our people and our friends from attack"[89]. Also, the need for the information obtained from detained terrorists was emphasised by president Bush as follows:

> "This intelligence [knowledge of deployed operatives, workings of networks etc] – this is intelligence that cannot be found any other place. And our security depends on getting this kind of information"[90].

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[84] Ibid, *Khashiyev and Akayeva v. Russia*, paragraph 116
[85] 384 US 436
[86] Ibid, *D.K. Basu*
[87] Judgement of 15 November 1996, ECHR Reports 1996-V, p 1856.
[88] Page 38 of 41, paragraph 1.
[89] *US suspects 'face torture overseas'*, Dan Isaacs, BBC News, accessed on 12 September2006, http://news..bbc.co.uk/go/pr/fr/-/1/hi/world/americas/4088746.stm. Referring to a response by President Bush at a press conference in March 06.

President Bush's approach to torture and counter-terrorism received some support from Danielle Pletka, Vice President of the American Enterprise Institute where she said:

> "Unfortunately, there are times in war when it is necessary to do things in a way that is absolutely and completely abhorrent to most good, decent people... I don't want to say that the United States has routinely engaged in such practices, because I don't think it is routine by any standard…But that said, if it is absolutely imperative to find something out at that moment, then it is imperative to find something out at that moment, and Club Med is not the place to do it".[91]

No doubt most commuters on the Sydney North Shore train line would agree with Ms Pletka if they were to learn that the police had apprehended a person suspected of plotting to blow up the Harbour Bridge as packed peak-hour trains make their daily journey to the central business district. Those innocent citizens could also refer their conscience to claimed success of torture and aggressive interrogation in preventing terror to support their convictions that it is ok to torture people in certain circumstances. For example, claiming success of interrogation methods, the BBC News website accessed online on 12 Nov 06[92] captured the following 'key quotes' from a speech by President Bush's which revealed the existence of CIA prisons:

> "We knew that (Abu) Zubaydah had more information that could save innocent lives, but he stopped talking. As his questioning proceeded, it became clear that he had received training on how to resist interrogation. And so the CIA used an *alternative set of procedures*… "
>
> Regarding successful outcomes from such interrogations the site reveals that:
>
> "Terrorists held in CIA custody have also provided information that helped stop a planned strike on US Marines...in Djibout… They helped stop a planned attack on the US consulate in Karachi… stop a plot to hijack passenger planes and fly them into Heathrow or the Canary Wharf in London."

Additionally, the questioning of terror suspects such as Zubaydah and other 'high-value' suspects has been claimed to have played a major role in the capture or questioning of nearly every senior Al Qaeda member or associate detained by the US and its allies[93].

Following on from the points and arguments summarised above as generally presented in favour of torture, next, and before specific Australian responses to torture are considered, some recent academic support that has been provided to the legitimacy of torture as a counter-terrorism technique is discussed.

Academic proposal – torture warrants

In his work *'Why Terrorism Works'*[94], Professor Alan Dershowitz presents two claims; firstly, that the prohibition on torture ought to not be absolute, and secondly he introduces the possibility of an

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[90] *Some Bush allies seek to allow CIA to pursue hard terror inquiries, foes say effort could violate Geneva accords*, Anne Plummer Flaherty, Associated Press, accessed on 10 September 06, www.boston.com

[91] *US suspects 'face torture overseas'*, by Dan Isaacs, BBC News, accessed on 12 Sep 06, http://news..bbc.co.uk/go/pr/fr/-/1/hi/world/americas/4088746.stm. On the topic of 'times of war'.

[92] *Key quotes: Bush's secret prisons,* BBC News, http://news..bbc.co.uk/go/pr/fr/-/1/hi/world/americas/5322954.stm, accessed on 12 Sep 06.

[93] *Some Bush allies seek to allow CIA to pursue hard terror inquiries, foes say effort could violate Geneva accords*, Anne Plummer Flaherty, Associated Press, accessed on 10 September 2006, www.boston.com

[94] Why Terrorism Works, Professor Alan Dershowitz, Yale University Press, 2002.

exception to the blanket and internationally recognized prohibition on torture by way of a 'judicial torture warrant'. An application for a torture warrant would have to be based on the absolute need to obtain immediate information in order to save lives, coupled with probable cause that the suspect had such information and is unwilling to reveal it. Dershowitz is in effect arguing for the ex-ante approval of torture. That is, for the grant of a limited specific license for defined action in particular circumstances, with his basic concept being that torture may be morally and legally permissible in certain circumstances.

Interestingly, in all democracies, other than Israel, torture has never been permitted as a legitimate law enforcement technique. As summarized by Dershowitz, courageously and controversially Israel recognized the power of its security agencies to employ what was euphemistically called "moderate physical pressure" to illicit information from terrorists about continuing threats. That information was not permitted for use in courts as evidence of confessions, but was only used to actually prevent an attack. The 'pressure' involved placing a suspect in a dingy room, with a smelly sack over his head, and shaking him violently until he disclosed planned terrorist attacks. [95]

One of the underlying basis for Dershowitz's argument is a belief that torture is already being used, albeit extra-legally. Rather than citizens and politicians continuing to exist in willful blindness and therefore implicitly or at least by acquiescence consenting to its continued unregulated and unreported practice, a system that introduces the requirement of some kind of warrant, with attendant benefits of judicial and neutral consideration, accountability, record-keeping, minimum standards and limitations would be an improvement. Further connected to Dershowitz's proposal is that the information elicited by torture would be unavailable for prosecution. Also, that the warrant would be limited to non-lethal means. Dershowitz colorfully suggests measures such as 'sterile needles being inserted beneath the nails to cause excruciating pain without endangering life'.

A separate proposal by Oren Gross[96] is that rather than overtly undermining the existing comprehensive and absolute prohibition on torture by allowing for torture warrants, society should simply prepare itself and be open to respond to 'catastrophic cases that may entail public officials going outside the legal order, at times violating otherwise accepted constitutional principles'. Society as a whole would then apply its own subjective assessment to the circumstances and the extra-legal actions of law enforcement officials to determine how to respond. That is, Gross envisages 'ex-post ratification' rather than 'ex-ante judicial approval'. Surprisingly, as will become apparent below, the concept proposed by Gross is already represented in Australian law, specifically in relation to torture offences through the permitted prosecutorial discretion granted by statute.

Contrary arguments refuting the proposals to allow torture warrants exist and are soundly based on suggestions that permitting torture would be stepping to the edge of a slippery slope, after which proponents of torture would then attempt to extend its use beyond 'ticking bomb' cases. Recourse to arguments readily attractive to the average citizen who desires protection and retribution, arguments such as necessity, would help them to legitimate torture in wider that originally contemplated circumstances. Furthermore, the caution expressed previously throughout this paper is reiterated as a counter-argument to allowing torture warrants, and can be specifically illustrated in a domestic Australian context be reference to recent remarks by an Australian journalist in a discussion on sleep deprivation and torture. That is that:

> "The war against terrorism is about defending a way of life and a set of values that we argue sets us apart from the Islamist fundamentalists we are fighting… Interrogation is an important

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[95] *Want to Torture? Get a warrant.* Alan M. Dershowitz, Tuesday, 22 Jan 02.

[96] *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, by Oren Gross, University of Law School, Minnesota Law Review, Vol 88, 2004.

> tool in the fight, but politicians shouldn't try to justify torture and therefore lower us to the level of our enemies"[97]

Retaining the high moral ground and the requirement to maintain an absolute prohibition on torture are valid and powerful motivators upon which the proposed torture warrants can be attacked. In fact, out political leaders have recognised that torture is still not acceptable, and are generally at pains to justify the actions taken by law enforcement agents. Likewise they are equally forceful in definitely and unequivocally stating that they do not torture[98].

Australian law in relation to torture

Continuing the discussion on torture, and aiming to situate the above debate in a domestic context, the Australian response to international legal obligations and terrorism again provides relevant examples with which to illustrate the points made above. Firstly, it is noted that torture is prohibited in all Australian jurisdictions. Also, below the requirement for balance and the protection of individual human rights is noted as recognized and emphasized in Australian statutes and jurisprudence, including academic and parliamentary comment concerning torture debate.

Commonwealth, State and Territory laws in Australia specifically legislate against the act of torture. For example, the Commonwealth *Crimes (Torture) Act 1988*, which extends to all external territories and operates with extra-territorial effect, contains an offence of torture.[99] The offence is specifically applicable to 'public officials or persons acting in an official capacity, and persons acting at the instigation of, with the consent or acquiescence of such persons'. The Act applies Australian torture offences to conduct engaged in outside Australia, and implements the *Convention against Torture*. In section 3 of the Act torture is defined as meaning:

> "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person…for such purposes as obtaining information or a confession, punishing a person for an act (committed or suspected) or for the purpose of intimidating or coercing the person"

I note that the Act provides no defence of exceptional circumstances or superior orders[100]. Also, crucially section 11 of the Act specifically precludes any defence relying on 'necessity arising from the existence of a state of war, a threat of war, internal political instability, a public emergency or any other exceptional circumstance. However, those matters may be taken in to account in sentencing. Finally, as alluded to above, similar to the argument put by Gross, it is interesting to note that section 10 of the Act provides that prosecutions for an offence of torture shall not take place without the consent of the Attorney General. So, although a person may be arrested, charged or remanded in custody notwithstanding the absence of such consent, there is scope for some for 'ex-post ratification' discretion vested in Australian public officials.

When inside Australia, acts of torture are prohibited by respective State / Territory or other Commonwealth laws. Without visiting each and every legal regime applicable to law enforcement officials and citizens generally throughout the whole of Australia, I note by way of example that in the Australian Capital Territory (ACT) the *Human Rights Act 2004* provides at section 10 a protection from torture and cruel, inhuman or degrading treatment. Additionally, the Act required all new Bills of the ACT be accompanied by a 'human rights compatibility statement' when passed through the parliamentary process. As a side note, the Chief Minister, Mr John Stanhope,

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[97] Ibid, McPhedran, *Pollies need wake-up on torture.*
[98] Ibid, *US suspects 'face torture overseas*', by Dan Isaacs.
[99] Section 6(1) of the Act.
[100] Section 11 of the Act.

commended on Hansard regarding the *Terrorism (Extraordinary Temporary Powers) Bill 2006* that the Australian Capital Territory laws are consistent with the *Human Rights Act*.[101]

Also on the topic of Australia's torture laws, returning to the Commonwealth jurisdiction, the *International Criminal Court (Consequential Amendments) Act 2002*, at Schedule 1, inserted s 268.13 'crime against humanity – torture' to the *Criminal Code 1995 (Cth)*. That offence covers acts of torture committed as part of a widespread or systematic attack directed against a civilian population. The offence of 'war crime – torture', at section 268.25 of the Code was also introduced making it an offence where the perpetrator inflicts severe physical or mental suffering upon on or more persons for the purpose of obtaining information or a confession, as a punishment, intimidation or coercion for a reason based on discrimination of any kind; and the person or persons are protected under one or more of the Geneva Conventions or under Protocol 1 to the Geneva Conventions. Acts committed against a person or persons who are not taking an active part in hostilities are covered by s 268.75 of the Code.

So, the question of torture warrants in Australia remains a moot issue at this stage of the development of counter-terror laws. The act of torture is specifically prohibited in Australian law. The actions of law enforcement agents soldiers and other citizens alike, whether committed inside or outside Australia are subject to scrutiny against legislated limits accounting for the rule of law, human rights and Australia's international legal obligations.

[101] Legislative Assembly for the ACT: 2006, Week 3 Hansard (30 March) p 824 – 829.

PART 5

Australia's domestic response to terrorism – laws, protections and balance

"Before the September 2001 attacks on the World Trade Centre and the Pentagon, the Commonwealth [of Australia] had various legislative provisions related to terrorism, but no anti-terrorism legislation as such. Of the states and territories, only the Northern Territory had an offence of committing a terrorist act"[102]. Since then through, "The Australia Government has implemented over 100 different measures since 2001 and has committed over A$2 billion to counter-terrorism"[103].

Continuing the discussion of Australian law and the domestic legal responses to terrorism, this Part concludes the paper by drawing together the concepts of balance, the role of the rule of law and the courts, as well as discussing protections availed to individuals in the fight against terrorism in an Australian context. New laws, and amendments to existing laws are identified below. Recent commentary and criticism form both general public media and official parliamentary review forums are also discussed. Firstly though, building on the opening to Part 4, some general policy and strategic responses to terrorism are highlighted, demonstrating the socio-political response to the fear of voters discussed at the opening of the paper.

Policy and diplomatic responses

A key national policy response in Australia has been the development of a Department of Foreign Affairs and Trade (DFAT) White Paper[104]. Australia has also developed a 'National Counter-Terrorism Plan', coordinated within the National Security Division of the Department of Prime Minister and Cabinet. At the operational level Australia has established a 'National Threat Assessment Centre' within the Australian Security and Intelligence Organization (ASIO) as well as a 'Protective Security Coordination Centre (PSCC) in the Attorney-General's Department.[105] There has been a burgeoning of executive bodies, think-tanks and control and coordination centers throughout the law enforcement and legal world in Australia.

Australia's response to terrorism in pursuing both national regional security has also involved participation in multi-lateral programs and meetings. For example, in 4-5 February 2004 Australia and Indonesia co-chaired the *Regional Ministerial Meeting on Counter Terrorism* in Bali, Indonesia. Also, in terms of regional cooperation on matters of counter-terrorism Australia has signed 'memoranda of understanding' with ten countries – Indonesia, the Philippines, Thailand, Malaysia, Brunei, Cambodia, Papua New Guinea, India, Timor Leste, and Fiji.

The focus though of this final part of the paper is the new laws introduced to strengthen Australia's ability to 'fight' terrorism and to complement the policy and organizational initiatives identified above. Australia has responded to terrorism with new laws at the Commonwealth and State level, as well as amendments to existing legislation.

Australia's national security and law enforcement

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[102] *Anti-Terrorism Bill (No. 2) 2005* Bills Digest – introduces to the House of Representatives on 03 Novembers 2005, page 2.
[103] Ibid.
[104] http://www.dfat.gov.au/publications/terrorism/introduction.html
[105] Speech by (then) Minister for Defence, Senator The Honourable Robert Hill, on 18 May 2005 to the *Security, Terrorism and Counter Terrorism Course* at Murdoch University.

The Commonwealth was referred legislative powers from most Australian states and territories in relation to terrorism in 2002 (and later in 2003 by Victoria[106] and Northern Territory[107]) under section 51(xxxvii) of the Australian Constitution. This enabled the Commonwealth to legislate Part 5.3 of the *Criminal Code Act 1995 – Terrorism*. Importantly, that part includes the following definition of 'terrorist act' as:

An action or threat of action where:

a. the action falls within subsection (2) and does not fall within subsection (3); and

b. the action is done or the threat is made with the intention or advancing a political, religious or ideological cause; and

c. the action is done or the threat is made with the intention of:

   i. coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or part of a State, Territory or foreign country; or

   ii. intimidating the public or a section of the public.

(2) Action falls within this subsection if it:

a. causes serious harm that is physical harm to a person; or

b. causes serious damage to property; or

c. causes a person's death; or

d. endangers a person's life, other than the life of the person taking the action; or

e. creates a serious risk to the health or safety of the public or a section of the public; or

f. seriously interferes with, serious disrupts, or destroys, an electronic system including, but not limited to:

   i. an information system, or

   ii. a telecommunications system, or

   iii. a financial system, or

   iv. a system used for the delivery of essential government services, or

   v. a system used for, or by, an essential public utility, or

   vi. a system used for, or by, a transport system. "

(3) Action falls within this subsection if it:

a. is advocacy, protest, dissent or industrial action; and

b. is not intended:

   i. to cause serious harm that is physical harm to a person, or

   ii. to cause a person's death, or

   iii. to endanger the life of a person, other than the person taking the action; or

   iv. to create a serious risk to the health or safety of the public or a section of the public.

[106] *Terrorism (Commonwealth Powers) Act 2003 (VIC)*

[107] *Terrorism (Northern Territory) Request Act 2003 (NT)*

As announced by the Prime Minister of Australia, John Howard, the laws are designed to 'better deter, prevent, detect and prosecute acts of terrorism'[108]. Interestingly, commenting on the outcome of the Council of Australian Governments (COAG) meeting of 27 September 2005 the Prime Minister said that 'as a result of the decision taken today, we are in a stronger and better position to give peace of mind to the Australian Community'. Some might suggest that statements such as that lend support to the notion that Australian (and other) counter-terror laws may be considered as designed to, or as at least as incidentally having, a placebo effect. That is, the laws provide examples of measures being taken in response to the collective fears and demands of the Australia public for action, as warned and suggested in Part 1 and developed throughout the Paper where caution regarding reactionary government policy was expressed. Before developing the concepts introduced throughout the preceding parts of the paper some further definitions are provided below to add details to the Australian legal context.

'National security' is defined by reference to section 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* as meaning "Australia's defence, security, international relations or law enforcement interests". In order to fully understand and interpret elements of that definition however, other legislation must be consulted.

The *Australian Security and Intelligence Organisation Act 1979 (Cth)* states that ***'security'*** means:

a. the protection of, and of the people of, the Commonwealth and the several States and Territories from:
   i. espionage
   ii. sabotage
   iii. politically motivated violence
   iv. promotion of communal violence
   v. attacks on Australia's defence system, or
   vi. acts of foreign interference; whether directed from, or committed within Australia or not; and

b. the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs or paragraph (a).

The term ***'international relations'*** means 'political, military, and economic relations with foreign governments and international organizations' according to section 9 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* Act. ***'Law enforcement'*** interests are defined therein as including the following:

a. Avoiding the disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;

b. Protecting the technologies and methods used to collect, analyze, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;

c. The protection and safety of informants and of persons associated with informants;

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[108] *Proposals to further strengthen Australia's counter-terrorism laws – 2005*, www.aph.gov.au/library/intguide/LAW/Terrorism Laws.htm accessed on 07 December 2005.

d. Ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government or government agencies.

A balanced approach in Australia

The Attorney-General, Mr Phillip Ruddock MP, emphasized values of fairness and tolerance in his 'up-date on counter terrorism' provided on 21 January 2006. Specifically, in a report presented by the *Security Legislation Review Committee*[109] The Attorney-General is recorded to have noted that 'it is a flawed assumption that a society can only have either strong national security or civil liberty'.[110] The SLRC was established to review a package of five anti-terrorism laws introduced and passed later in 2002. The SLRC acknowledged in its report that:

> "an appropriate balance must be struck between, on the one hand, the need to protect the community from terrorist activity, and on the other hand, the maintenance of fundamental human rights and freedoms".[111]

Further illustrating the Australian approach to the development of counter-terror laws, Australian political leaders agreed upon certain criteria that regulate the creation of new counter-terrorism laws at their COAG meeting of 27 September 2005 (referred to above). Capturing the Australian inclination to achieve balance, it was agreed that any strengthened counter-terrorism laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence led, and proportionate.[112]

Also, in summarizing the theme of submissions received by it, the SLRC noted the difficulties encountered in responding to terrorism and striking an appropriate balance between competing interests:

> "There is, on the one hand, the need to protect from terrorist attacks Australian people who are going about their lawful business. On the other hand, there is the need to uphold the human rights of all people, including those who for any reason are suspected of engaging in, or planning, or preparing to engage in, prohibited activity. Striking this balance is an essential challenge to preserving the cherished traditions of Australian society".[113]

New and amended laws

Legislative change inevitably followed the horrific incidents of terrorism discussed above. New laws have been introduced and amendment made to existing law enforcement and intelligence laws. Most States have enacted some form of 'preventative detention'[114], 'community protection'[115] or other law other amending existing police powers, including 'control orders' where judicial orders may be issued to initially detain a person without notice. In 2002 a package of five Bills was introduces and passed later that year. In 2005 the Commonwealth proposed the *Anti-Terrorism Bill (No.2) 2005*. Demonstrating the process of debate adopted in Australia, on 03 November 2005 the

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[109] Chair – The Hon. Simon Sheller AO, QC. Members: Law Council of Australia representatives, Inspector-General of Intelligence and Security, Privacy Commissioner, a nominee of the Attorney-General, Human Rights Commissioner, and the Commonwealth Ombudsman.
[110] *Report of the Security Legislation Review Committee (SLRC Report)*, June 2006. Page 35. ISBN: 0 642 21188 4.
[111] Ibid, SLRC Report, page 3.
[112] Ibid, SLRC Report, page 34; note 6.
[113] Ibid, SLRC Report, page 40 – *Safeguarding Human Rights in the Face of Terrorism: The balance between human rights and national security*.
[114] For example, *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005 (New South Wales)*.
[115] For example, *Terrorism (Community Protection) (Amendment) Bill 2005 (Victoria)*.

Senate referred the Bill to the Senate Legal and Constitutional Legislation Committee for inquiry. Interestingly the Bills Digest noted the following concerns regarding the Bill:

a. The Australian Greens expressed concern that the Federal Government and all the State and Territory governments are cooperating to overturn fundamental human rights in the name of fighting terrorism. They contended that 'national security and the threat of terrorism have been used as a justification for an enormous transfer of power from the people and the parliament to the executive government'.[116]

b. The Australian Democrats expressed concerns that some parts of the Bill are inconsistent with fundamental rights and freedoms, particularly the rights under the International Covenant on Civil and Political Rights 1996 (ICCPR).[117]

Reactions to the government's new laws have ranged from the expression of concerns about the impact on human rights[118], offering words of caution from within legal circles[119], and criticism labeling the proposed laws as 'laws for insecurity'[120]. As far as amendments to existing laws are concerned, there has been a comprehensive review and revision of law enforcement and security legislation including the introduction of, or at least consequential amendment to, the following laws (illustrative list only):

a. *National Security Information (Criminal Proceedings) Act 2004*

b. *Intelligence Services Legislation Amendment Bill 2005*

c. *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* – giving ASIO special powers of questioning and detention under warrant.

d. *Crimes Act 1914 (Cth)* – expanded powers in relation to obtaining information and documents, and powers of stop, questioning and search.

e. *Criminal Code Act 1995*, *Migration Act 1958*, and the *Surveillance Devices Act 2004* – increasing powers in relation to sedition.

f. *Aviation Transport Security Act 2004* – in relation to optical surveillance devices at airports and on board aircraft.

g. *Financial Transactions Reports Act 1988*, and the *Suppression of the Financing of Terrorism Act 2002* – amendments aimed ad combating the financing of terrorism.

h. *Customs Act 1901* and the *Customs Administration Act 1985*.

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[116] Note 14 to the Bills Digest - Senator Kerry Nettle, *Trampling on Human Rights*, media release of 27 October 2005.
[117] Page 6 of the Bills Digest.
[118] *Avalanche of opposition to government's new terror laws*, Australian Lawyers for Human Rights media release, Sydney, 9 September 2005. See also *Safeguards need for New Terror Laws*, media release, Sydney 26 Septembers 2005. *Advice to ACT Chief Minister regarding Council of Australian Government's meeting – potential human rights implications of proposed measures to strengthen counter terrorism laws,* ACT Human Rights Office media release, Canberra 27 September 2005. Also, *New terrorism laws – Tough on terror, tough on human rights*, The Hon. John von Doussa QC (President of the Human Rights and Equal Opportunity Commission) media release, Sydney 27 Septembers 2005.
[119] *Don't rush to 'rubber stamp' anti-terrorism measures Law Council warns*, Law Council of Australia media release, Melbourne 9 September 2005.
[120] *Laws for Insecurity? Report on the Federal Government's proposed counter-terrorism measures*, Agnes Chong, Partick Emerton, Waleed Kadous, Annie Pettit, Stephen Sempill, Vicki Sentas, Jane Stratton, and Joo-Cheong Tham, of 23 September 2005.

As is evident from the above list, all major areas of civilian existence have in one way of or another been affected by anti-terror motivated legislative change. Which has invariably resulted in the exchange of certain freedoms for greater monitoring and intrusion powers in the name of security. Border security, migration, banking, individual freedoms of speech and association, as well as air travel, have all been subject to greater regulation and control.

Individual protections – transparency, avenues of redress and review

Despite the influx of regulation and the apparent trading of individual rights for executive security powers, it is important to note that in Australia the ability of national and State authorities to apply force and exercise their specialized powers is affected by a variety of international treaty obligations as well as domestic legislative and judicial control. Also, protections are available to individuals at the Commonwealth and State level by the presence of the so-called 'integrity arm of government' as well as specific human rights legislation. This section will outline some of the protections existing in Australia that achieve some balance in the face of the new counter-terror legislation discussed above.

The absence of a Federal or Commonwealth statement of human rights, by Bill, Guarantee or specific constitutional provision (specific protections aside) has meant that the States have been left to their own resources in that respect. For example, in the Australian Capital Territory the *Human Rights Act* creates obligations in that jurisdiction that don't necessarily operate in other States of Australia. Also, the impact of Australia's federal structure has meant that citizens in each jurisdiction are afforded slightly different protections through different mechanisms and separate counter-terror laws, law enforcement regimes and so on. For example, in Queensland there is a 'Public Interest Monitor' who now exercises functions in relation to that State's counter-terrorism laws and law enforcement agencies.[121] Also, the Commonwealth and most States provide specific roles for their respective Police Integrity Commissions or Ombudsman's Offices in relation to the application and practical effect and implementation of counter-terrorism laws.

The SLRC, in its reviews of the operation and effectiveness of various pieces of legislation dealing with border security, telecommunications interception, and criminal conduct including treason and sedition, prefaced its report by identifying a number of domestic safeguards that could play a role in preventing or deterring overzealous actions, or at least scrutinizing the actions of public officials in the fight against terrorism. The Committee noted the following further ways in which review of executive action is achieved:

a. The ability of the High Court of Australia to issue a writ of mandamus or prohibition or an injunction against an officer of the Commonwealth means that the Court may command, modify, or restrain the exercise of counter-terror powers. Furthermore, the High Court can quash invalid decisions, declare the laws to be observed by a government agency and/or require the release of a person from unlawful detention by *habeas corpus*.[122]

b. The Federal Court of Australia has similar jurisdiction to that of the High Court and therefore offers much the same protections.[123]

[121] Queensland Premier Mr Peter Beattie, discussing the *Terrorism (Preventative Detention) Bill 2005 (QLD)*, page 16 – 20 of 24.
[122] Refer to s 75(v) the Constitution of Australia. A relevant example is the case of *Church of Scientology v Woodward* in which the High Court accepted it had jurisdiction to decide whether ASIO was acting in breach of its statutory charter.
[123] Section 36B *Judiciary Act 1903 (Cth)*.

c. Additionally, the *Administrative Decisions (Judicial Review) Act 1966* further confers on the Federal Court jurisdiction to undertake judicial review of the executive action taken under Commonwealth legislation.

Other mechanisms in Australia by which balance, scrutiny and transparency is achieved include:

a. Review of actions by ASIO, the Australian Security and Intelligence Service (ASIS), the Defence Signals Directorate (DSD) by the Parliamentary Joint Committee on Security and Intelligence in accordance with the *Intelligence Services Act 2001*, which has in recent times prepared reports concerning questioning and detention powers exercised by those agencies.

b. The *Privacy Act 1988 (Cth)* affects how government agencies access, collect, use, disclose, and store personal information, and provides avenues of complaint to the Privacy Commissioner.

c. The *Human Rights and Equal Opportunity Commission Act 1986* provides specific domestic recognition to international human rights standards through its annexed Conventions, including the ICCPR, and established the Commission and complaints mechanism through which actions of government and private actors may be reviewed.

Whilst there has been an abundance of new laws and changes made to existing laws, generally resulting in more power for law enforcement and intelligence agencies, the avenues of legal review and redress in Australia are varied and constitute an important and effective brake on enthusiastic legislative responses to terrorism. The requirement for balance based on human rights and the rule of law has been recognized and is evident in the Australian context.

CONCLUSION

Terrorism is a reality for Australia. The terrorist threat to Australia is real, and the perception of the threat of terrorism continues to occupy the minds of citizens and parliamentarians alike. Security remains a key issue for Australians and the development of new anti-terror laws and counter-terror coordination and law enforcement initiatives is a testament to that phenomenon. Australia's response to terrorism has included the introduction of specific laws aimed at addressing and reducing the threat and the resulting fear. Thankfully though, the importance of the rule of law, the role of the courts and place of human rights in providing balance has not been lost on members of the public. Nor has it been lost on those charged with drafting, implementing and scrutinizing those laws, as was demonstrated by reference to recent legislative review committee reports and media releases.

The right to life remains the underlying justification for measures designed to combat terrorism. The comments of Australia's Attorney-General, Phillip Ruddock, in responding to criticism from a former Family Court of Australia Chief Justice Alastair Nicholson[124] are excerpted below as illustrating that point as well as the recognition given to the need for new laws to conform with internationally accepted limits:

> "Let me just make it very clear. We have examined each and every one of these measures against our international obligations, and they do not breach our international obligations…one of the first and primary international obligations that we are a party to, is to the protection of the right to life, safety and security. Other rights and international instruments are not absolute".[125]

Whilst the primacy attributed to the 'right to life' is noted, as was the case in UN Security Council resolutions discussed in Part 3, the commitment to meeting international obligations is important. Despite the passing reference to other rights not being absolute, it has been demonstrated that despite that fact in the Australian context, torture is not be permitted as a tool in the fight against terrorism.

Australia has not been immune from pressures on courts for deference to prevailing social fears and demands for punishment of terror suspects. However, the recent case of *R v Thomas* provides a ready example of judicial courage and adherence to the rule of law as balancing those socio-political desires. Likewise Australia appears to have accepted and incorporated the international recognition given to the place of human rights in relation to measures adopted in the fight against terrorism. States such as the Australian Capital Territory (and soon Victoria) have adopted human rights laws and Commonwealth legislation enables individuals to complain of human rights violations to integrity commissions and ombudsman's offices.

Whilst torture has been proposed as a tool for use in the interrogation of terror suspects and those convicted of terrorism, Australian laws comprehensively prohibit acts of torture no matter what the circumstances, as demonstrated in Part 4. And, whilst there has been a large amount of legislative activity in response to modern terrorism, including the concentration of power in the Federal government and the agreement to an Australian definition of terrorism, Australia's national security, international relations and law enforcement interests appear to be adequately met by current laws without the introduction of further laws legitimizing torture.

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[124] *The role of the Constitution, justice and the law, the courts and the legislation in the context of crime, terrorism, human rights and civil liberties*, Speech by Hon. Alastair Nicholson to the Post-Graduate Student Conference, University of Melbourne on 04 November 2005.

[125] Hon. Phillip Ruddock MP, *Press Conference following meeting of the Standing Committee of Attorney's General*, transcript, 4 November 2005. Note 85 to *Anti-Terrorism Bill (No.2) 2005* Bills Digest.

The need for balance in responding to terrorism has been recognized internationally, as was demonstrated in the case law from India, England, the United States and the deliberations, reports and resolutions of the various organs of the United Nations. Australia too has recognized the requirement for balance, as was demonstrated in Part 5. That balance is currently achieved through the political process and close scrutiny of proposed new laws, through public comment and criticism of executive action, and importantly through judicial review of those laws and actions. Safeguards protecting individual rights are also evident in Australian legal environment.

In closing this paper the comments of the President of the Supreme Court of Israel regarding the rule of law are excerpted as demonstrating the key relationship of the rule of law and security:

> "Regarding the State's struggle against the terror that rises up against it, we are convinced that at the end of the day, the struggle according to the law will strengthen her power and spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security."[126]

Furthermore, the commonsense in the Australian character and the sense of fairness and a 'fair go' are proffered as innate and inherent qualities of the Australian context that will prevail to ensure that measures proposed in response to terrorism remain balanced, as surmised by The Hon. Justice Michael Kirby AC CMG, High Court of Australia, in an address to the Australian Law Reform Commission National Security Law Conference, Sydney 12 March 2005, *National Security: Proportionality, restraint & commonsense*. As summarised therein, Australia is blessed with a strong history of balance being achieved through judicial review of the actions of public officials and the executive government. Restraint, and determination to preserve the free and respectful lifestyle of the Australian people must prevail in response to terrorism, as was the case in *Australian Communist Party v The Commonwealth*[127]. The threat at the time was not terrorism, but communism. The march of communism south through the pacific region was perceived as the biggest threat to the State and capitalist society at the time and fear of communism lead to the *Communist Party Dissolution Act 1950 (Cth)*. The High Court held that the Act was beyond the power of the Federal Parliament and was constitutionally invalid, a decision that was endorsed later when voters rejected a proposal to amend the Constitution to grant the parliament such law making powers.

The rule of law and fundamental values shall prevail today in the face of terrorism. "National security in a country like Australia ultimately resets not on fear or restrictive laws. It lies in the loyalty of the people, their love of the country and their respect for its institutions, including those that safeguard the rule of law, due process of law and equal justice under law for all".[128]

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[126] *Bit Sourik Village Council v Government of Israel (Unreported) (HCJ 2056/04) 2 May 2004.*
[127] *(1951) 83 CLR 1*
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