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Plenary 3: International Security and the Criminal Law- International  
Cooperation in Dangerous Times

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*In the course of mutual perspective-taking there can develop a common horizon of background assumptions in which both sides accomplish an interpretation that is not ethnocentrically adopted or concerted but rather inter-subjectively shared.<sup>1</sup>*

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<sup>1</sup> Jürgen Habermas *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida*

## **OVERVIEW**

This paper explores legislation enacted to enhance international security and cooperation during dangerous times. Consideration will be given to the history of the development of the legislation designed to assist and protect traditional state mechanisms based on frontiers and order, from the threat of the changing nature of security challenges associated with the advent of modern terrorism. Emphasis will be placed on the legislative reforms introduced as a result of these security challenges and threats within the United States of America, the United Kingdom, Canada and Australia. There will be an assessment and comparative analysis of the current policies, legislation and practices within these jurisdictions. Whether the present provisions are adequate in countering current atrocities as well as being capable of evolving to counteract the ever changing face of terrorism will be addressed. Whether these provisions violate human rights, fundamental freedoms and international law will also be examined. Consideration will also be given as to the need for greater international cooperation to effectively overcome the threat of terrorism during dangerous times. The need for international cooperative strategies to focus beyond the immediate challenges towards the future will additionally be explored. However, unless there is greater consistency in the treatment of those who perpetrate “terrorist” acts and a concerted attempt to educate and/or inform disaffected populations, any such strategies will have little effect.

# International Cooperation in Dangerous Times

*We have come to a fork in the road. This may be a moment no less decisive than in 1945 itself, when the United Nations was founded... [W]e must decide whether it is possible to continue on the basis agreed then, or whether radical changes are needed.*<sup>2</sup>

Terrorism has affected nations throughout history. Where causes to fight for have existed, whether legitimate or illegitimate, terrorist tactics have been exploited. However, the threat posed by international terrorism since September 11 has acquired a new intensity and led to a fundamental re-evaluation of the importance of international law in contemporary world affairs.<sup>3</sup> The resulting climate of instability and uncertainty has led the international community to evaluate whether the threat posed by modern terrorism is such a radical new threat that it warrants an overhaul, or even rejection of the existing international legal order.<sup>4</sup>

## The United Nations

*We strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security.*<sup>5</sup>

## The History of the United Nations

*Revenge is a kind of wild justice; which the more man's nature runs to, the more ought law to weed it out. For as for the first wrong, it doth but offend the law; but the revenge of that wrong putteth the law out of office.*<sup>6</sup>

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<sup>2</sup> Secretary-General Kofi Anan (Speech delivered at the General Assembly 58<sup>th</sup> sess, 7<sup>th</sup> plen mtg, 23 September 2003) UN Doc A/58/PV.7 (2003)

<sup>3</sup> Shaw MN *International Law* 5<sup>th</sup> Ed (2003) Cambridge Cambridge University Press 1048

<sup>4</sup> Hovell D "Chinks in the Armour: International Law, Terrorism and the Use of Force" (2004) 27.2 *UNSW LJ* 398

<sup>5</sup> 2005 *World Summit Outcome* adopted by the United Nations General Assembly by its resolution 60/1

The international order established at the end of the Second World War was founded on two interrelated basic principles of 'justice' and 'common interest':

- (i) To ensure the resolution of international disputes by peaceful processes using force only as a measure of last resort; and
- (ii) Recognition that the use of force would only be acceptable in the interest of the international community, and not individual states.<sup>7</sup>

The *Charter of the United Nations* (the Charter) *Article 2(3)* declares that states must 'settle their international disputes by peaceful means' and *Article 2(4)* states:

*all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*

The language used in *Article 2(4)* has been held to be ambiguous and liable to interpretation.<sup>8</sup>

Under *Articles 39 and 42* the Security Council may permit the use of force in response to 'any threat to the peace, breach of the peace, or act of aggression' where it regards such force as being necessary to maintain or restore international peace and security. *Article 51* provides that states may resort to 'the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations'. Under *Article 51*, self-defence is expected to be an interim measure, allowable 'until the Security Council has taken measures necessary to maintain international peace and security'. Where a nation retaliates to deal with an injury suffered during peacetime and refers to this as 'public reprisal', its revenge is prohibited as a result of the ban on the use of force as encompassed within the Charter.<sup>9</sup>

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<sup>6</sup> Francis Bacon *Essays of Revenge* (1597)

<sup>7</sup> Hovell 401

<sup>8</sup> Ibid 399

<sup>9</sup> Brostrom P & Amneus D "A Lawful Fight against Terrorism?" (2005) in 'Combating Terrorism and its Implications for the Security Sector' / Editors Winkler TH, Ebnother AH & Hansson MB 226

The international community failed to create the means for collective security and enforcement through the provision of armed forces that could be utilised by the Security Council when necessary to do so in the interests of preserving international peace and security, a requirement of both *Articles 43 and 47* of the Charter. Additionally, the acceleration of tensions between the Soviet Union and the United States during the Cold War resulted in the Security Council being deadlocked. Between 1945 and 1991, the veto power under *Article 27(3)* was used two hundred and seventy six times.

### **The UN and International Terrorism Law**

- (1) *'Terrorist acts are never justified no matter what considerations may be invoked'. At the same time the counter-terrorist campaign should not distract from action on other UN principles and purposes, the achievement of which could by itself reduce and eliminate terrorism.*
- (2) *The adoption of preventative measures to be undertaken on a cooperative basis should be 'in accordance with the Charter and other relevant provisions of international law'.*
- (3) *The search for legal precision must be subordinated to 'moral clarity' on the subject of terrorism.<sup>10</sup>*

Some say that the United Nations has been at the forefront of the international battle against terrorism<sup>11</sup> but some nations, notably the United States of America and Israel often act unilaterally citing frustrations at the impotence and/or lack of speed of any action taken by the UN. The UN has taken two approaches when establishing rules of international law pertaining to terrorism:

- (i) To deal directly with specific manifestations of terrorist activity and

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<sup>10</sup> Secretary-General Kofi Anan (Speech delivered at the UN General Assembly 56<sup>th</sup> 12 September 2001)

<sup>11</sup> Dhanapala "The United Nations' Response to 9/11" (Spring/ Summer 2005) 17.1/2 *Terrorism & Political Violence* 17

- (ii) A general condemnation of the phenomenon.<sup>12</sup>

The first approach has comprised of the UN adopting twelve international conventions dealing with specific terrorist activities such as hijacking aeroplanes, taking hostages, financing terrorist activities and terrorist bombings. These comprise of the:

1. *Convention on Offences and Certain Other Acts Committed on Board Aircraft*;<sup>13</sup>
2. *Convention for the Suppression of Unlawful Seizure of Aircraft*;<sup>14</sup>
3. *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*;<sup>15</sup>
4. *Convention on the Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*;<sup>16</sup>
5. *International Convention against the Taking of Hostages*;<sup>17</sup>
6. *Convention on the Physical Protection of Nuclear Material*;<sup>18</sup>
7. *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*;<sup>19</sup>
8. *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*;<sup>20</sup>
9. *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*;<sup>21</sup>
10. *Convention on the Marketing of Plastic Explosives for the Purpose of Detection*;<sup>22</sup>
11. *International Convention for the Suppression of Terrorist Bombings*;<sup>23</sup> and

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<sup>12</sup> Shaw 1049

<sup>13</sup> Opened for signature 14 September 1963, 704 UNTS 219 (entered into force 4 December 1969)

<sup>14</sup> Opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971)

<sup>15</sup> Opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973)

<sup>16</sup> Opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977)

<sup>17</sup> Opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983)

<sup>18</sup> Opened for signature 3 March 1980, 1456 UNTS 124 (entered into force 8 February 1987)

<sup>19</sup> Opened for signature 24 February 1988, 1652 UNTS 499 (entered into force 6 August 1989)

<sup>20</sup> Opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992)

<sup>21</sup> Opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992)

<sup>22</sup> Opened for signature 1 March 1991, 39 SD 28 (entered into force 21 June 1998)

## 12. *International Convention for the Suppression of the Financing of Terrorism.*<sup>24</sup>

The majority of these conventions work on a common concept, whereby quasi-universal jurisdiction is established with an interconnected arrangement of international obligations.<sup>25</sup> The offences are defined within the convention and there is an automatic incorporation of these offences within all extradition agreements between state members. Member States have an obligation to make these offences an offence under their domestic law and to establish jurisdiction over these offences.<sup>26</sup> Jurisdiction includes where an offence has been committed in the territory of the state or on board a ship or aircraft registered there, or where the offence has been committed by a citizen of that state. There is also a discretionary basis where citizens of that state have been victims.<sup>27</sup> Where the alleged perpetrator is present in a state, there is a duty to either prosecute them or to extradite them to another state that is willing to do so.<sup>28</sup> These conventions aim to create a world in which there is 'nowhere to run and nowhere to hide'.<sup>29</sup>

The second approach has led to an all-encompassing strategy. The General Assembly established an ad hoc committee on terrorism in December 1972.<sup>30</sup> In 1994 a *Declaration on Measures to Eliminate International Terrorism*<sup>31</sup> was adopted. This condemns:

*all acts, methods and practices of terrorism, as criminal and unjustifiable, whatever and by whomever committed... criminal acts intended or calculated to provoke a state of terror in the general public, a group or person or persons or particular persons for*

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<sup>23</sup> Opened for signature 15 December 1997, 2149 UNTS 284 (entered into force 23 May 2001)

<sup>24</sup> Opened for signature 9 December 1999, 2178 UNTS 229 (entered into force 10 April 2002)

<sup>25</sup> Shaw 1049

<sup>26</sup> Ibid 1049

<sup>27</sup> Ibid 1049

<sup>28</sup> Ibid 1049

<sup>29</sup> Hovell 406

<sup>30</sup> General Assembly resolution 3034 (XXVII)

<sup>31</sup> General Assembly resolution 49/60

*political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.*<sup>32</sup>

In 1996 a supplementary declaration was adopted which affirmed that terrorist activities and any assistance given to terrorists is in defiance of the objectives and standards of the UN.<sup>33</sup>

The issue of asylum-seekers who had been responsible for terrorist acts was also addressed.<sup>34</sup> A number of other resolutions have been adopted to appeal for the ratification of the various conventions and for the improvement in support and collaboration between states.<sup>35</sup> In 1996 an Ad Hoc Committee was created to expand international conventions on terrorism. This resulted in the adoption of the *Convention for the Suppression of Terrorist Bombing, 1997* and the *Convention for the Suppression of the Financing of Terrorism, 1999*.

The Security Council has classified international terrorism as a threat to international peace and security. The attack on the World Trade Center on the 11 September 2001 caused the UN to intensify its campaign against terrorism, transforming it into a global issue. The UN moved quickly to adopt viable and efficient methods to overcome terrorism through greater emphasis on international cooperation.<sup>36</sup> The UN response to September 11 was not one of vengeance and retribution, but rather based on fundamental international legal concepts and values with previous antiterrorism conventions being taken into consideration.<sup>37</sup> Emphasis was placed on the protection of civilians, with the UN stressing the indiscriminate nature of terrorist attacks.<sup>38</sup> A tripartite strategy to combat terrorism has been proposed:

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<sup>32</sup> Ibid

<sup>33</sup> General Assembly resolution 51/210

<sup>34</sup> General Assembly resolution 55/158 2001

<sup>35</sup> These include General Assembly resolutions 34/145, 35/168 and 36/33

<sup>36</sup> Dhanapala 17

<sup>37</sup> Ibid 18

<sup>38</sup> Ibid 18

- (a) *Dissuade affected groups from embracing terrorism.*
- (b) *Deny groups or individuals the means to carry out acts of terrorism.*
- (c) *Cooperate internationally in the struggle against terrorism and its multifaceted nature.*<sup>39</sup>

In *Resolution 1368 (2001)*, adopted the day after September 11, the Security Council asserted that it was 'determined to combat by all means threats to international peace and security caused by terrorist attack'. The UN explicitly condemned the attack and confirmed that it deems such attacks 'like any act of international terrorism, as a threat to international peace and security'. *Resolution 1373 (2001)* confirmed this stance and emphasised the need to oppose international terrorism by all means in compliance with the Charter.<sup>40</sup> Member States have been called upon to avoid arranging, initiating, assisting, financing or tolerating terrorist activities and to take active steps to ensure that their territories are not exploited for terrorist installations, training camps or for the preparation of terrorist acts against other states. States must additionally apprehend and prosecute or extradite perpetrators of terrorist acts and must assist other states in exchanging information and tackling terrorism.<sup>41</sup> This Resolution aims to create a united international front in the fight against terrorism and to bring to justice individuals suspected of collaborating with terrorist organisations.<sup>42</sup> A Counter-Terrorism Committee was established to supervise the implementation of *Resolution 1373*. Member States were called upon to report on their progress in implementing this Resolution. By March 2003 the Counter-Terrorism Committee had received three hundred and twenty eight reports and assessed and replied to two hundred and twenty six of them.<sup>43</sup> The efforts

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<sup>39</sup> Ibid 21

<sup>40</sup> Ibid 17

<sup>41</sup> Shaw 1050

<sup>42</sup> Brostrom & Amneus 228

<sup>43</sup> Shaw 1052

of the Counter-Terrorism Committee have been hampered by lack of funding, the risk of replicating other UN bodies work and various human rights issues.<sup>44</sup> Additionally, the Counter Terrorism Committee is unable to provide direct assistance and is only capable of providing information about potential donors or providers of assistance.<sup>45</sup> While this Resolution requires nations to take action, it fails to define what constitutes a 'terrorist act', leaving this to the individual nations' discretion.<sup>46</sup> In *Resolution 1377 (2001)*, the Security Council declared that acts of international terrorism 'constitute one of the most serious threats to international peace and security in the twenty-first century'.

On the 8 July 2005 Member States adopted the *Amendments to the Convention on the Physical Protection of Nuclear Material* and on the 14 October 2005 Members agreed to both the *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* and the *Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*. Member States are currently in the process of drafting a comprehensive convention on international terrorism which would complement the existing framework of international anti-terrorism instruments. This convention aims to place greater emphasis on the criminalisation of terrorist acts, making them punishable by law through the prosecution or extradition of the perpetrators.<sup>47</sup> The Convention additionally aims to address the need to eliminate legislation which establishes exceptions to the criminalisation of terrorist activities on political, philosophical, ideological, racial, ethnic, religious or similar grounds.<sup>48</sup> The need for nations to actively prevent terrorist offences and to cooperate with one another in the exchange of

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<sup>44</sup> Dhanapala 17

<sup>45</sup> Ibid 19

<sup>46</sup> Golder B & Williams G "What is 'Terrorism'? Problems of Legal Definition" (2004) 27.2 *UNSW LJ* 275

<sup>47</sup> *International Instruments to Counter Terrorism* [www.un.org/terrorism/instruments.html](http://www.un.org/terrorism/instruments.html) (14 June 2007)

<sup>48</sup> Ibid

information and provide assistance to prevent, investigate and prosecute terrorist acts will also be focused on.<sup>49</sup> On the 8 September 2006 the *United Nations Global Counter-Terrorism Strategy* was adopted, whereby nations pledged to ratify existing international counter-terrorism instruments without delay. In April 2005 the *International Convention for the Suppression of Acts of Nuclear Terrorism* was adopted which aims to encompass:

- (i) A broad range of acts and possible targets, including nuclear power plants and nuclear reactors;
- (ii) Threats and attempts to commit such crimes or to participate in them, as an accomplice;
- (iii) The extradition and prosecution of perpetrators;
- (iv) Cooperation in preventing terrorist attacks by sharing information and assisting other nations in connection with criminal investigations and extradition proceedings; and
- (v) Both crisis situations (assisting States to solve the situation) and post-crisis situations (rendering nuclear material safe through the International Atomic Energy Agency (IAEA)).<sup>50</sup>

## **The Role of the United Nations Today and in the Future**

*The United Nations is by no means a perfect instrument, but it is a precious one. I urge you to seek agreement on ways of improving it, but above all of using it as its founders intended: to save succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights, to re-establish the basic conditions for justice and the rule of law, and to promote social progress and better*

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<sup>49</sup> Ibid

<sup>50</sup> Ibid This Convention is not yet in force. It was adopted in April 2005, opened for signature on the 14 September 2005 and will become enforceable once it has been ratified by twenty two Member States. It is otherwise known as the *Nuclear Terrorism Convention*

*standards of life in larger freedom. The world may have changed, but those aims are as valid and urgent as ever. We must keep them firmly in our sights.*<sup>51</sup>

The previous danger of nuclear confrontation between rival superpowers during the Cold War has been replaced by the 'new' threat of extensive and organised networks of terrorists who resist repression by sovereign borders and seek weapons of mass destruction.<sup>52</sup> President George W Bush warned the United Nations that its failure to permit force against a rogue nation posing such a threat would see the United Nations 'fade into history as an ineffective, irrelevant debating society'.<sup>53</sup> In March 2003, the United States led military action against Iraq in the absence of United Nations approval. This served to highlight the extraordinary breakdown of the United Nations Security Council and its failure to prosecute the use of force through the rule of international law. In *Oil Platforms (Islamic Republic of Iran v United States of America)*<sup>54</sup>, Judge Simma declared:

*Everybody will be aware of the current crisis of the United Nations system of maintenance of peace and security, of which Articles 2(4) and 51 are cornerstones. We currently find ourselves at the outset of an extremely controversial debate on the further viability of the limits on unilateral military force established by the United Nations Charter... What we cannot but see outside the courtroom is that, more and more, legal justification of use of force within the system of the United Nations Charter is discarded even as a fig leaf, while an increasing number of writers appear to prepare for the outright funeral of international legal limitations on the use of force.*<sup>55</sup>

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<sup>51</sup> Secretary-General Kofi Anan (Speech delivered at the UN General Assembly 58<sup>th</sup> sess, 7<sup>th</sup> plen mtg, 23 September 2003) UN Doc A/58/PV.7 (2003)

<sup>52</sup> Hovell 403

<sup>53</sup> George W Bush (Speech delivered at the Naval Station Mayport, Florida, 13 February 2003)

<sup>54</sup> (*Merits*) [2003] ICJ Rep 1

<sup>55</sup> *Ibid* Separate Opinion of Judge Simma [6]

Despite nations in recent times actively resorting to military action which extends beyond the narrow exceptions recognised in the Charter, the legal principle *ex injuria jus non oritur* – law cannot originate in an illegal act – has been affirmed. In *Military and Parliamentary Activities in and against Nicaragua (Nicaragua v United States of America)*<sup>56</sup> the International Court of Justice held that:

*instances of a state's conduct inconsistent with a given rule should generally... [be] treated as breaches of that rule, not as indications of the recognition of a new rule.*<sup>57</sup>

However, it was noted that this principle has significant exceptions including:

*reliance by a State on a novel right or an unprecedented exception to the principle [of customary international law] might, if shared in principle by other States, tend towards a modification of customary international law.*<sup>58</sup>

The *Vienna Convention on the Law of Treaties Article 31(3)(b)* establishes that a treaty should be interpreted with regard to 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. Accordingly, state practice may result in an expansion of the Charter provisions pertaining to the use of force.<sup>59</sup>

This notion was upheld by the International Court of Justice in both *Oil Platforms* and *Nicaragua*. In *Nicaragua* the International Court of Justice acknowledged that when interpreting the Charter, consideration must be given to customary international principles:

*As regards the suggestion that the areas covered by the two sources of law [the Charter and customary international law] are identical, the Court observes that the United Nations Charter... by no means covers the whole area of the regulation of the*

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<sup>56</sup> (*Merits*) [1986] ICJ Rep 14

<sup>57</sup> *Ibid* [207]

<sup>58</sup> *Ibid* [109]

<sup>59</sup> Hovell 404

*use of force in international relations. ... It cannot therefore be held that Article 51 is a provision which 'subsumes and supervenes' customary international law. It rather demonstrates that in the field in question ... customary international law continues to exist alongside treaty law.*<sup>60</sup>

The long-term consequences of amendments to the Charter must be taken into account. Military measures are only effective in the short term and fail to solve the underlying problem. Although the expression 'war against terrorism' has facilitated the acceptance of the use of armed force in response to terrorism on the political front, some policies may not be as readily acceptable from an international legal perspective.<sup>61</sup> International law provides a mechanism for greater accountability and transparency. Although political rationalisation need only persuade the domestic conscience in the short-term, legal rationalisation requires a longer-term consideration of precedent and the impact on international cooperation.<sup>62</sup> The acceleration of globalisation calls for the formation of a united international front in the fight against international terrorism.<sup>63</sup> The creation and maintenance of stable societies are essential to the preservation of international security. The framework of international justice needs to be strengthened and increased international financial, political and social cooperation must be observed.<sup>64</sup> These principles will act to promote democracy, economic development, effective governance, human rights and resilient civil societies which will overcome marginalisation and the exclusion of religious groups and individuals.<sup>65</sup>

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<sup>60</sup> (*Merits*) [1986] ICJ Rep 14 at 94 [181]

<sup>61</sup> Hovell 405

<sup>62</sup> *Ibid* 405

<sup>63</sup> Brostrom & Amneus 233

<sup>64</sup> *Ibid* 233

<sup>65</sup> *Ibid* 233

## Regional Instruments Condemning Terrorism

A number of regional instruments condemning terrorism have also been adopted. These include the:

- (i) *European Convention on the Suppression on Terrorism, 1977;*<sup>66</sup>
- (ii) *South Asian Association for Regional Co-operation Regional Convention on Suppression of Terrorism, 1987;*
- (iii) *Arab Convention for the Suppression of Terrorism, 1998;*
- (iv) *Convention for the Organisation of the Islamic Conference on Combating International Terrorism, 1999;*
- (v) *Ministerial Declaration and Plan of Action on Combating Terrorism, 2001;*<sup>67</sup> and
- (vi) *Organisation of American States Inter-American Convention against Terrorism, 2002.*

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<sup>66</sup> This was amended in February 2003 to incorporate new offences referred to in subsequent international conventions

<sup>67</sup> Adopted by the Organisation on Security and Co-operation in Europe

# International Terrorism Law and Human Rights

*They that can give up essential liberty to obtain a little temporary safety neither deserve liberty nor safety.*<sup>68</sup>

There has been increasing concern that, in some instances, international law pertaining to terrorism breaches fundamental human rights law. This has led the UN Secretary General to declare 'I firmly believe that the terrorist menace must be suppressed, but states must ensure that counter-terrorist measures do not violate human rights'<sup>69</sup>. Where there is a collapse in the rule of law in the fight against terrorism, the terrorists have succeeded, no matter what the original aim of their cause was.<sup>70</sup> On the 15 July 2002 the Council of Europe adopted international guidelines on human rights and anti-terrorism measures.<sup>71</sup> In October 2002 the Inter-American Commission on Human Rights adopted a *Report on Terrorism and Human Rights*.<sup>72</sup> Ties have been established between the High Commissioner for Human Rights and the Counter Terrorism Committee, to facilitate cooperation and the exchange of information. A *Directory of Counter Terrorism Information and Sources of Assistance* has also been established to assist nations to fight terrorism.

In many countries, police and security forces have acquired greater authority in the fight against terrorism. In many cases this has caused an increase in discrimination, injustice and abuse of power.<sup>73</sup> This includes arbitrary arrests, the legal detention period being exceeded, interrogation methods that are cruel and degrading, the lack of a right to due process,

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<sup>68</sup> Benjamin Franklin (1759)

<sup>69</sup> Report of the Secretary-General on the Work of the Organisation, A/57/1, 2002, p. 1

<sup>70</sup> Brostrom & Amneus 230

<sup>71</sup> Council of Europe, 369a (2002)

<sup>72</sup> OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr

<sup>73</sup> Brostrom & Amneus 232

extradition without a mechanism for appeal and discrimination relating to race and ethnicity for immigrants and asylum seekers, unlawful surveillance, as well as other violations of personal liberties.<sup>74</sup> The preservation of a democratic society entails unfaltering respect for three of liberal society's founding principles: the rule of law, civil liberties and human rights. The safeguarding of human rights requires compliance with international treaties such as the UN *International Covenant on Civil and Political Rights (ICCPR)* and the *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*. *Resolution 54/164* states 'all measures to counter terrorism must be in strict conformity with the relevant provisions of international law, including international human right standards'. Both the *ICCPR* and *ECHR* provide for 'derogation' from treaty obligations in times of 'public emergency threatening the life of the nation'. The validity of any derogation is dependant on compliance with strict legal principles established in the treaties and enhanced by relevant jurisprudence of the international monitoring organisations.<sup>75</sup>

### **The Military Offensive Against Afghanistan After September 11**

*There is no trade-off between effective action against terrorism and the protection of human rights.*<sup>76</sup>

Afghanistan's continual non-compliance with previous Security Council resolutions and the fact that they had supported and given refuge to Al Qaeda, provided the United States with a region in which to direct its military resources to counter the existing terrorist threat which had intensified after the attacks on September 11.<sup>77</sup> Members of the Al Qaeda terrorist organisation as well as members of the Afghani Armed Forces became legitimate military

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<sup>74</sup> Ibid 232

<sup>75</sup> Michaelsen C "Derogating from International Human Rights Obligations in the 'War against Terrorism'?"- A British-Australian Perspective" (Spring/ Summer 2005) 17.1/2 *Terrorism & Political Violence* 131-155

<sup>76</sup> Secretary-General Kofi Anan Dhanapala "The United Nations' Response to 9/11" (Spring/ Summer 2005) 17.1/2 *Terrorism & Political Violence* 22

<sup>77</sup> Brostrom & Amneus 228

targets in accordance with the 'Laws of Armed Conflict'.<sup>78</sup> In compliance with international law, every individual captured on the battlefield was considered a combatant until a recognised court of law decided on his or her status. Additionally, no one could be subjected to torture or degrading and humiliating treatment, and suspects were to be guaranteed of a fair trial in a court of law as soon as possible. Protected persons were not to be unreasonably subjected to the effects of war, and the customary law principles of distinction and proportionality had to be complied with. In hindsight, few of these principles were abided by.<sup>79</sup> Individuals suspected of being members of Al Qaeda or Taliban Forces were subjected to torture or degrading treatment in the search for intelligence.<sup>80</sup> In contravention of the Geneva Conventions, hundreds of people were transported to the United States base in Guantanamo Bay in Cuba – 'a vacuum of international law'.<sup>81</sup> On numerous occasions civilians and civilian property fell victim to indiscriminate bombings, resulting in unacceptable deaths, injuries and damage.<sup>82</sup> When the United States finally received international support, it failed to observe its duty to comply with *jus in bello* – the 'Laws of International Conflict'.<sup>83</sup>

## **International Terrorism Law and the Preservation of Human Rights**

*Reaffirming that acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments, and that the international community should take the necessary steps to enhance cooperation to prevent and combat terrorism.*<sup>84</sup>

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<sup>78</sup> Ibid 228

<sup>79</sup> Ibid 228

<sup>80</sup> Ibid 228

<sup>81</sup> Ibid 228

<sup>82</sup> Ibid 228

<sup>83</sup> Ibid 228

<sup>84</sup> *United Nations Global Counter-Terrorism Strategy* Adopted by the General Assembly on 8 September 2006 (resolution 60/288)

The concern of further terrorist attacks within new countries has progressively led to measures where human rights have been sacrificed in the campaign against terrorism. A utilitarian method has been adopted whereby efficiency has gained the upper hand to the detriment of human rights.<sup>85</sup> In January 2002 the Security Council adopted *Resolution 1390* in relation to smart or directed sanctions against terrorists. All Members were compelled to freeze funds belonging to Usama bin Laden, members of Al Qaeda and people or groups who support them, in compliance with a specified sanctions list.<sup>86</sup> The list results in a blacklisting of individuals, consequently amounting to punishment without a fair trial in a court of law and without the opportunity to appeal. The allegations of terrorism cannot be assessed as the charges and proof must remain confidential.<sup>87</sup> This violates the customary legal principle that individuals should be assumed innocent until proven guilty. Despite the UN Security Council Sanctions Committee approving guidelines on how to remove individuals from the list in 2002, it has proved difficult and complicated to do so.<sup>88</sup> The freezing of an individual's funds not only impacts that person, but also their family and those associated to them. The provision of social security to an individual who has been blacklisted is also in direct contravention of the sanction.<sup>89</sup> Domestic and international legal policy must not be disproportionate to the threat posed by terrorism and should be consistent with fundamental human rights and the rule of law.<sup>90</sup>

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<sup>85</sup> Brostrom & Amneus 230

<sup>86</sup> Ibid 231

<sup>87</sup> Ibid 231

<sup>88</sup> Ibid 231

<sup>89</sup> Ibid 231

<sup>90</sup> Golder & Williams 272

## Defining 'Terrorism'

*The reality is that, like war, terrorism is an immensely complicated phenomenon with multiple objectives and causes, a multitude of weapons and agents, and virtually limitless manifestations.*<sup>91</sup>

Terrorism comprises of both political and criminal acts.<sup>92</sup> In 1937 the League of Nations in its *Convention for the Prevention and Punishment of Terrorism*<sup>93</sup> failed to establish a comprehensive code on terrorism. As seen previously in this paper, there are a number of international conventions pertaining to specific terrorist acts – *modus operandi*, but all fail to bestow a broader definition on terrorism.<sup>94</sup> Today, there is still no universally accepted definition of what constitutes terrorism. One of the problems faced in drafting an all encompassing definition is the need to include all international terrorists and exclude freedom fighters – 'one person's terrorist is another person's freedom fighter'.<sup>95</sup> The conflicts in both Chechnya and the Middle East serve to highlight the difficulty in preserving such a distinction. The need for judicial flexibility when faced with contemporary terrorist threats does not overcome the need for an all encompassing definition. Defining 'terrorism' assists to overcome the severe consequences when used against an individual, act or organisation unfairly.<sup>96</sup>

Most measures designed to counter terrorism are doomed to fail unless there can be some consistent international agreement as to what defines terrorism and what measures can be legitimately undertaken to combat it. Whilst established nations continue to laud those

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<sup>91</sup> Secretary-General Kofi Anan Dhanapala "The United Nations' Response to 9/11" (Spring/ Summer 2005) 17.1/2 *Terrorism & Political Violence* 22

<sup>92</sup> Dhanapala 21

<sup>93</sup> League of Nations Doc C.546 M.383 1937 V (1927) This document never entered into force. This resulted in a more specific approach being taken.

<sup>94</sup> Golder & Williams 273

<sup>95</sup> Brostrom & Amneus 231

<sup>96</sup> Golder & Williams 292

responsible for bombings that kill innocent civilians and install Prime Ministers who rose to power as leaders of murderous terrorist organisations, it becomes very difficult to explain to those inciting or perpetrating terrorist acts against such nations why their actions are not the legitimate actions of nation-building patriots. The ends should never be allowed to justify unacceptable means and all the actions referred to above should always incur universal condemnation. However, unless such condemnation is consistent it leads to a 'justified sense of grievance' within those condemned which is ruthlessly exploited by radical terrorist elements.

Recently, a genuine attempt was made to define terrorism in the *International Convention for the Suppression of the Financing of Terrorism*. The first limb of the Convention refers to specific acts encompassed in various international conventions, whilst the second limb refers to:

*Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act.*

*Article 2(1) of the Draft Comprehensive Convention on International Terrorism states:*

*Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:*

- (a) Death or serious bodily injury to any person; or*
- (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or*

*(c) Damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or abstain from doing an act.<sup>97</sup>*

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<sup>97</sup> This definition is still subject to debate as the Convention is still in its draft form.

## The United States and the 'War against Terrorism'

*Look at that destruction, that massive, senseless, cruel loss of human life, then I ask you to look in your hearts and see there is no room for neutrality on the issue of terrorism. You're either with civilisation or with the terrorists.*<sup>98</sup>

The publication of the United States Government entitled the *National Security Strategy of the United States of America*<sup>99</sup> (the Strategy) provides the blueprint for the United States 'war against terrorism'.<sup>100</sup> The Strategy expands the opportunity for unilateral use of force beyond the exception of 'self-defence if an armed attack occurs against a Member State of the United Nations' recognised under *Article 51* of the Charter. Additionally, the Strategy includes three doctrines of questionable legality under the present international legal framework.<sup>101</sup> These comprise of:

- (i) *Unilateral attacks against terrorist organisations and the states harbouring them;*
- (ii) *Unilateral pre-emptive self-defence; and*
- (iii) *Unilateral humanitarian intervention.*

### ***Unilateral attacks against terrorist organisations and the states harbouring them***

*The spiral of violence begins as a spiral of distorted communication that leads through the spiral of uncontrolled reciprocal mistrust to the breakdown of communication.*<sup>102</sup>

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<sup>98</sup> Rudolph Giuliani, Mayor of New York, addressing the United Nations General Assembly, 1 October 2001

<sup>99</sup> National Security Council *National Security Strategy of the United States of America (2002)* The White House

<sup>100</sup> Hovell 407

<sup>101</sup> Ibid 407

<sup>102</sup> Jürgen Habermas *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida*

The Strategy states that it will disrupt and defeat terrorist organisations by 'defending the United States... by identifying and destroying the threat before it reaches our borders'. The Strategy states that there is an intention to enlist the support of the international community, however it also advises that

*we will not hesitate to act alone, if necessary, to exercise our right of self-defence by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country.*

The Strategy also asserts that 'we make no distinction between terrorists and those who knowingly harbour or provide aid to them'.

The United States response to al Qaeda's attack on the World Trade Center and the Pentagon on the 11 September 2001 was asserted hastily in terms of resorting to force. Thirteen hours after the attack, President Bush assembled his most senior national security advisers in the Presidential Emergency Operations Centre where he informed them that 'this is the time for self-defence. We have made the decision to punish whoever harbours terrorists, not just the perpetrators.'<sup>103</sup> The Director of the CIA George Tenet responded that the CIA had been investigating al Qaeda for years and action of this magnitude would involve combating terrorism in over sixty countries. President Bush responded 'lets pick them off one at a time'.<sup>104</sup>

In 2001 the United States invaded Afghanistan at the same time testing the recognised international legal boundaries of self-defence. The United States Ambassador of the United Nations, John Negroponte wrote to the President of the Security Council to advise him that

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<sup>103</sup> Hovell 408

<sup>104</sup> Ibid 408

*the United States of America, together with other states has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on September 11, 2001.*<sup>105</sup>

In effectively analysing whether the United States breached its international legal obligations in its use of force against Afghanistan, the meaning of *Article 51* must be examined. Whether there was an imminent threat, whether the use of force was necessary to overcome the threat and whether the overthrow of the Taliban regime was proportionate to the perceived threat must be explored.<sup>106</sup> It is debateable whether *Article 51* encompasses an armed attack by a non-state terrorist group and any third party nation responsible for the harbouring of the terrorists.

The International Court of Justice's Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*<sup>107</sup> suggests that this type of attack does not fall within the ambit of an 'armed attack' under *Article 51*. In that case, the Court refused to acknowledge Israel's ability to rely on self-defence based on the underlying principle that 'Israel does not claim that the attacks against it are imputable to a foreign State'.<sup>108</sup> The Court asserted that 'Article 51 of the Charter... recognises the existence of an inherent right of self-defence in the case of armed attack by one State against another State'.<sup>109</sup> However, the powerful dissenting judgments of Judge Higgins, Judge Kooijmans and Judge Buergenthal should be noted. Additionally the International Court of Justice in *Nicaragua* held:

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<sup>105</sup> Letter from the Permanent Representative of the United States of America to the President of the Security Council United Nations, 7 October 2001, UN Doc S/2001/946 (2001)

<sup>106</sup> Hovell 409

<sup>107</sup> (*Advisory Opinion*) [2004] ICJ Rep

<sup>108</sup> *Ibid* at [139]

<sup>109</sup> *Ibid* at [139]

*It may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (inter alia) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'.<sup>110</sup>*

The United States has received relatively little opposition from the international community in its counter-terrorist military offensives. This can be highlighted prior to September 11 in the United States offensives against Libya in 1986, Iraq in 1993, and Sudan and Afghanistan in 1998.<sup>111</sup> A climate of increasing international tolerance has emerged, which has consequently resulted in extensive support for the expansion of the application of *Article 51*.<sup>112</sup> This can be highlighted by the Security Council's unanimous assertion of support for the United States and its allies military action against the Taliban regime in Afghanistan.<sup>113</sup> This additionally led to the adoption of the *Resolution on International Co-operation to Combat Threats to International Peace and Security Caused by Terrorist Acts*<sup>114</sup>. The military action against Afghanistan has accordingly served to highlight that international law is capable of developing to incorporate modern-day threats to the international community, and that proportionate force may legally be used in self-defence against a nation, which is directly responsible for the harbouring of terrorists who have committed a terrorist attack.<sup>115</sup>

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<sup>110</sup> *Military and Parliamentary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 at [101]

<sup>111</sup> Hovell 413

<sup>112</sup> *Ibid* 413

<sup>113</sup> *Resolution 1368*

<sup>114</sup> SC Res 1373, UN SCOR, 4385<sup>th</sup> mtg, UN Doc S/RES/1373 (2001)

<sup>115</sup> Hovell 414

### ***Unilateral pre-emptive self-defence***

This refers to the unilateral use of force to counteract a threat that is not imminent but may materialise at any stage in the future. Emphasis is placed on the necessity of such action against states that possess weapons of mass destruction and who have shown hostile behaviour against other nations and it is suspected that these weapons may be distributed to terrorist organisations. Part V of the Strategy states:

*Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option... The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.*

An important example of pre-emptive self-defence was the Israeli bombing which destroyed the Iraqi Osirak nuclear reactor on the 7 June 1981. This was unanimously opposed by the Security Council and by over one hundred nations in the General Assembly, resulting in the passing of *Resolution 487*.<sup>116</sup> Despite Israel being unable to provide evidence of the threat of an imminent nuclear attack by Iraq, Israel relied on Iraq's failure to recognise Israel's status

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<sup>116</sup> Ibid 416

as a nation in its own right and Israel's active participation in the three previous wars against Iraq in 1948, 1967 and 1973.<sup>117</sup> Israel declared that

*in removing this terrible nuclear threat to its existence, Israel was only exercising its legitimate right to self-defence within the meaning of this term in international law and as preserved also under the United Nations Charter.*<sup>118</sup>

This doctrine enables the requirement of 'imminence' of attack to be discarded and establishes the right to act in self-defence 'even if uncertainty remains as to the time and place of the enemy's attack'.<sup>119</sup> An example of this was the Chechen terrorists' school siege in southern Russia in September 2004, where the Russian Chief of Staff General Yury Baluyevsky told the media that 'as for carrying out preventative strikes against terrorist bases, we will take all measures to liquidate terrorist bases in any region of the world'.<sup>120</sup> This policy violates the Charter's underlying founding principles of 'justice' and 'common interest'. In the wider international context, this would undeniably threaten if not destroy international peace and security, particularly when utilised by countries such as Iran, North Korea, India, Pakistan and Israel. Accordingly, any attempt by nations to justify their actions based on this principle would be in violation of international law.<sup>121</sup>

### ***Unilateral humanitarian intervention***

This refers to the unilateral use of force to relieve a population subjected to terrible human rights abuses.<sup>122</sup> This is based on the notion that danger can develop in fragile, incompetent and corrupt nations where transnational terrorist groups can establish safe havens in which to

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<sup>117</sup> Ibid 416

<sup>118</sup> *Explanation of Votes on Security Council Resolution* (1981) 20 ILM 994, 996

<sup>119</sup> Hovell 417

<sup>120</sup> Ibid 418

<sup>121</sup> Ibid 418

<sup>122</sup> Ibid 407

prepare, enlist, train and conceal, following a terrorist attack. Humanitarian intervention includes 'supporting moderate and modern government, especially in the Muslim world, to ensure that the conditions and ideologies that promote terrorism do not find fertile ground in any nation' and 'diminishing the underlying conditions that spawn terrorism by enlisting the international community to focus its efforts and resources on areas most at risk'.<sup>123</sup>

This doctrine contravenes the Charter's founding principles of 'justice' and 'common interest' as well as *Article 2(7)* which prohibits the United Nations from intervening 'in matters which are essentially within the domestic jurisdiction of any state'. In *Nicaragua* the International Court of Justice held that in the absence of authorisation provided for in the Charter, 'the use of force could not be the appropriate method to monitor or ensure... respect [for human rights]'.<sup>124</sup> An example of this was the North Atlantic Treaty Organisation (NATO) forces military strike against Serbia in 1999 which was strongly opposed by the Security Council. International law was unable to provide a mechanism for opposing the Bosnian Serb Forces unrelenting and extensive ethnic cleansing of the Kosovar Albanians. Self-defence was not feasible as it could only be utilised by the nation responsible for the genocide. The Security Council was deadlocked as China and Russia were concerned about the impact such a precedent would have on their own relations with Taiwan and Chechnya respectively.<sup>125</sup>

Recently the Security Council has revealed an increasing inclination towards recognising widespread violations of human rights committed by an individual nation as a threat to international peace and security, resulting in the justification of action under the Charter Ch

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<sup>123</sup> Ibid 418

<sup>124</sup> *Military and Parliamentary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 at [268]

<sup>125</sup> Hovell 419

VII. This has been justified on the basis that destabilisation within a country has ramifications for the wider international community, including the flow of refugees or the threat of hostilities spreading to neighbouring countries.<sup>126</sup> This interpretation was relied upon during the 1990s in the Security Council's intervention in:

- (i) Somalia: *Resolution on Measures to Establish a Secure Environment for Humanitarian Relief Operations in Somalia*<sup>127</sup>;
- (ii) Rwanda: *Resolution on Establishment of a Temporary Multinational Operation for Humanitarian Purposes in Rwanda until the Deployment of the Expanded UN Assistance Mission for Rwanda*<sup>128</sup>;
- (iii) Haiti: *Resolution on Authorisation to Form a Multinational Force under Unified Command and Control to Restore the Legitimately Elected President and Authorities of the Government of Haiti and Extension of the Mandate of the UN Mission in Haiti*<sup>129</sup>; and
- (iv) Zaire: *Resolution on Establishment of a Multinational Humanitarian Intervention Force for the Great Lakes Region*<sup>130</sup>.

Accordingly, the modern international community recognises that the concept of sovereignty encompasses responsibilities to the international community. Consequently nations do not have autonomy over the decision whether or not their policies should be founded on established human rights principles.<sup>131</sup>

The United States invasion of Iraq in March 2003 can be distinguished from the above justification as it is arguable whether or not the requirements for humanitarian intervention

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<sup>126</sup> Ibid 422

<sup>127</sup> SC Res 794, UN SCOR, 47<sup>th</sup> sess, 3145<sup>th</sup> mtg, UN Doc S/Res/794 (1992)

<sup>128</sup> SC Res 929, UN SCOR, 49<sup>th</sup> sess, 3392<sup>nd</sup> mtg, UN Doc S/Res/929 (1994)

<sup>129</sup> SC Res 940, UN SCOR, 49<sup>th</sup> sess, 3413 mtg, UN Doc S/Res/940 (1994)

<sup>130</sup> SC Res 1080, UN SCOR, 51<sup>st</sup> sess, 3713 mtg, UN Doc S/Res/1080 (1996)

<sup>131</sup> Hovell 422

were in fact satisfied at the outset of the Iraqi offensive.<sup>132</sup> Although Saddam Hussein's regime was undeniably one in which human rights were abused, there was no evidence at the outset of the conflict of genocide or mass killing, and the Security Council was not unreasonably deadlocked.<sup>133</sup> The Security Council refused to authorise the use of force against Iraq on the grounds that after a genuine assessment by a majority of the Council, force could not be reasonably justified under the circumstances.<sup>134</sup>

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<sup>132</sup> Ibid 425

<sup>133</sup> Ibid 425

<sup>134</sup> Ibid 425

# International Security and the Criminal Law

## Domestic Policies Pertaining to Terrorism

Great care has to be taken to ensure that over-reaction to the increasing threat of global terrorism does not lead to harsh and unjust laws which, apart from eroding confidence in the rule of law, will provide more ammunition for the propaganda machines inciting terrorism. Care has to be taken to avoid the excesses of politicians getting involved in anti-terrorism bidding wars and individuals and parties have to be prepared to moderate such excesses. For example, during the debates on the Serious Crime and Anti-Terrorism Bill in the United Kingdom it was proposed that there should be 90 days detention without charge for those suspected of involvement in terrorist activity. This period was reduced to 28 days after vigorous opposition by Members in the House of Lords including Baron Condon, a former Commissioner of the Metropolitan Police. However, in early June 2007 the incoming British Prime Minister has indicated that he considers this period too short and foreshadowed a substantial increase.

### United States of America

On the 23 September 2001 President George W Bush made an *Executive Order on Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism*.<sup>135</sup> Section 3(d) defines 'terrorism' as:

*An activity that-*

*(i) involves a violent act or an act dangerous to human life, property or infrastructure; and*

*(ii) appears to be intended-*

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<sup>135</sup> Exec Order No 13,224, 66 Fed Reg 49 079 (September 23, 2001)

- (A) *to intimidate or coerce a civilian population;*
- (B) *to influence the policy of a government by intimidation or coercion; or*
- (C) *to affect the conduct of a government by mass destruction, assassination, kidnapping or hostage-taking.*

Consequently, on the 25 October 2001 the United States Congress enacted the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* ('USA Patriot Act'). The *USA Patriot Act* s 802 amended the definition of 'domestic terrorism' within the *United States Code Title 18 s 2331*. Section 2331 provides:

(2) *the term 'international terrorism' means activities that-*

(a) *involve violent acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;*

(b) *appear to be intended-*

(i) *to intimidate or coerce a civilian population;*

(ii) *to influence the policy of a government by intimidation or coercion; or*

(iii) *to affect the conduct of a government by mass destruction, assassination, or kidnapping; and*

(c) *occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum...*

(5) *the term 'domestic terrorism' means activities that-*

(a) *involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;*

*(b) appear to be intended-*

*(i) to intimidate or coerce a civilian population;*

*(ii) to influence the policy of a government by intimidation or coercion; or*

*(iii) to affect the conduct of a government by mass destruction,  
assassination, or kidnapping; and*

*(c) occur primarily within the territorial jurisdiction of the United States.*

This legislative definition has been described as a 'new breathtakingly vague and broad definition of terrorism'.<sup>136</sup> Unlike Australia and Canada, the United States definition lacks an appropriate exclusion clause.<sup>137</sup>

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<sup>136</sup> Golder & Williams 278

<sup>137</sup> Ibid 290

## United Kingdom

As a result of the bombing campaign conducted by the Irish Republican Army throughout the 1970s, 1980s and 1990s, the United Kingdom has had counter-terrorism provisions in place for decades.<sup>138</sup> The *Prevention of Terrorism (Temporary Provisions) Act 1974 (UK) s 9(1)* defines terrorism as the use of violence for political means and encompasses any use of violence which puts the public or any section of the public in fear. In 2000, the United Kingdom consolidated all of its counter-terrorism laws, many of which were temporary, into a single act; the *Terrorism Act 2000 (UK)*. Unlike Australia and Canada, the *Terrorism Act 2000* fails to specifically exclude industrial disputes and mass public protests.<sup>139</sup> Sir David Williams describes the definition of terrorism encompassed within this Act as being vague and criticises it for placing

*a significant amount of trust in the 'good' sense of the police and security services, prosecutors, judges and jurors to maintain a sense of proportion when acts of terrorism are alleged.*

The *Terrorism Act 2000 s 1* provides:

*(1) In this Act 'terrorism' means the use or threat of action where-*

- (a) the actions falls within subsection (2);*
- (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public; and*
- (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.*

*(2) Action falls within this subsection if it-*

- (a) involves serious violence against a person;*

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<sup>138</sup> Golder & Williams 279

<sup>139</sup> Ibid 290

- (b) involves serious damage to property;*
  - (c) endangers a person's life, other than that of the person committing the action;*
  - (d) creates a serious risk to the health or safety of the public or a section of the public; or*
  - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.*
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection 1(b) is satisfied.*
- (4) In this section-*
- (a) 'action' includes action outside the United Kingdom;*
  - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated;*
  - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom; and*
  - (d) 'the government' means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.*
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for a benefit of a proscribed organisation.*

This definition has been preserved in the United Kingdom's legislative response to the September 11 terrorist attacks in its *Anti-terrorism, Crime and Security Act 2001 (UK) (ATCSA)*.<sup>140</sup> ATCSA addresses a variety of issues including immigration, weapons of mass destruction and incitement of racial hatred. The ATCSA comprises of one hundred and

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<sup>140</sup> cl 19(1) of sch 1

twenty nine sections and eight schedules and has been described as the ‘most draconian legislation Parliament has passed in peacetime in over a century’.<sup>141</sup> Whilst the ATCSA comprises of a number of effective provisions including those relating to important security safeguards such as powers to freeze ‘terrorist’ assets or security in the nuclear industry, the pivotal and most controversial aspect, *Part 4*, creates powers to detain ‘suspected international terrorists’ indefinitely and without trial.

The ATCSA s 23 authorises the detention indefinitely where either a ‘point of law’ or a ‘practical consideration’ prevents the individual’s removal from the United Kingdom. This provision relates to individuals who are the subject of immigration control under the *Immigration Act 1971* and consequently does not apply to British citizens. Around the same time as introducing the ATCSA, the United Kingdom officially derogated from the *ECHR*<sup>142</sup> *Article 5* and *ICCPR*<sup>143</sup> *Article 9* as a result of threats posed by international terrorism. Although the *Human Rights Act 1998 (UK)* provides a mechanism for declaring an act incompatible with a listed right, the making of a declaration of this nature does not affect the operation of the act.<sup>144</sup> The ATCSA s 23 is in direct breach of the *ECHR Article 5* which guarantees the right to liberty and security and aims to prevent arbitrary detentions.<sup>145</sup> The *ECHR Article 5(1)(f)* specifically relates to the

*lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

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<sup>141</sup> Michaelsen 133

<sup>142</sup> *European Convention on Human Rights*

<sup>143</sup> *International Covenant on Civil and Political Rights*

<sup>144</sup> Michaelsen 133

<sup>145</sup> *Ibid* 133

The ATCSA s 23 enables the detention of suspected international terrorists who cannot be extradited from the United Kingdom as a result of a point of law. Thus, deportation is not contemplated under these circumstances. Consequently, s 23 directly breaches *Article 5(1)(f)*. The ATCSA s 25(1) provides that a 'suspected international terrorist' may not appeal to a British court of law against his or her certification under s 21 unless authorisation has been received from the Special Immigration Appeals Commission. This is in breach of the *ECHR Article 5(4)* which declares that

*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

## **Australian Law**

Prior to September 11, Australia had no national laws relating directly to terrorism. Since September 11 the Commonwealth, New South Wales, Victoria, Queensland and the Northern Territory are the only Australian jurisdictions which make specific reference to terrorism in their legislation. The Federal Government provided the foundation for the Australian legal response to September 11 through its enactment of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2002 (Cth) (ASIO Act)*. The ASIO Act inserted a new definition of 'terrorist act' in the *Criminal Code Act 1995 (Cth) s100.1 of part 5.3* which provides:

(1) **Terrorist act** means 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 of 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, seriously 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) Actions 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.*

*(4) In this Division:*

*(a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and*

*(b) a reference to the public includes a reference to the public of a country other than Australia.*

The phrases used in this provision are undefined and leave enormous scope (and certainly the necessity) for further judicial elaboration.<sup>146</sup>

The *ASIO Act* permits the detention by Australian Security Intelligence Organisation of individuals for questioning regarding terrorist offences, and creates a new offence for withholding information. The *ASIO Act* enables ASIO to obtain a warrant to detain and question individuals for up to forty eight hours even where a person is not suspected of any offence and charges need not be laid. *Section 34D(1)* states that it is sufficient that the 'issuing authority' has 'reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence'. *Section 34F(4)(aa)* allows for successive warrants to be issued to extend the detention period for up to one hundred and sixty eight hours (seven days) without judicial oversight.<sup>147</sup> This is in direct contravention of the *ICCPR Article 9(1)* which declares that 'everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention'. In *Van Alphen v The Netherlands*<sup>148</sup> the Human Rights Committee held that detention 'must not only be lawful but reasonable in all the circumstances' and 'must be necessary in all of the circumstances, for example to prevent flight, interference with evidence, or the recurrence of a crime'.<sup>149</sup>

*Section 34D(1)* and *Section 34F(4)(aa)* also breach the *ICCPR Article 9(3)* which proclaims that 'anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial

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<sup>146</sup> Golder & Williams 292

<sup>147</sup> Michaelsen 136

<sup>148</sup> (1990) HRC Comm. No. 305/1988, UN Doc. A/45/40

<sup>149</sup> *Ibid* para 5.8

within a reasonable time or to release'. Under the *ASIO Act* individuals are not detained on criminal charges, but rather for the purpose of questioning. In *Fremantle v Jamaica*<sup>150</sup> a four day delay in bringing the detainee before a judge was held to in direct contravention of *Article 9(3)*. A similar decision was reached by the European Court of Human Rights in *Brogan v United Kingdom*<sup>151</sup>. The *ASIO Act s 34G* creates a strict liability offence liable to five years imprisonment for the failure to provide information, a record or thing requested in compliance with the warrant. The detainee bears the onus of proof to establish that he or she does not have the information sought, thus removing the established traditional legal principle of the right to silence as well as reversing the onus of proof.<sup>152</sup> The European Court of Human Rights in *Saunders v United Kingdom*<sup>153</sup> held that the right to remain silent and the privilege against self-incrimination are established international legal standards which are essential to the perception and safeguarding of a fair trial. *Section 34G* accordingly breaches the *ECHR Article 6* (the right to a fair trial). The *ASIO Act s 34NA* also allows the detention of children between the ages of sixteen and eighteen where it is likely that an individual 'will commit, is committing or has committed a terrorism offence'. This contravenes the *UN Convention on the Rights of the Child* specifically *Article 37* which states that 'no child should be deprived of his or her liberty arbitrarily' and that 'any detention should be used only as a measure of last resort and for the shortest appropriate period of time'.

The States which have legislated specifically against terrorism have predominantly relied upon the Commonwealth's definition. The *Terrorism (Community Protection) Act 2003 (Vic) s 4* is identical to the Commonwealth definition. The *Terrorism (Police Powers) Act 2002*

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<sup>150</sup> (1998) HRC Comm No. 625/1995

<sup>151</sup> (1988) ECHR Applic. No. 11209/84

<sup>152</sup> Michaelsen 137

<sup>153</sup> (1996) 23 EHRR 313

(NSW) s 3 differs only to the extent to which it excludes threats of a terrorist act. The *Crime and Misconduct Act 2001 (Qld) s 22A* is similar to the Commonwealth's definition. The Northern Territory has had legislation relating to terrorism in force since 1984 which was based on the United Kingdom's *Prevention of Terrorism (Temporary Provisions) Act 1974 (UK)*. The *Criminal Code 1983 (NT) ss 50 and 54* create a specific offence of terrorism punishable by life imprisonment. The *Criminal Code 1983 (NT)* is problematic as it fails to provide any exclusion for advocacy, protest or industrial action. As there is no Bill of Rights in either the Northern Territory or at a Federal level, there is no legislative protection to ameliorate its effect.<sup>154</sup> Police have also been granted enhanced powers of investigation and arrest in relation to terrorist offences as a result of the *Australian Security Intelligence Organisation Act 1979 (Cth)*, *Terrorism (Police Powers) Act 2002 (NSW)* and *Terrorism (Community Protection) Act 2003 (Vic)*.

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<sup>154</sup> Golder & Williams 291

## Canada

The concept of terrorism is *open to politicised manipulation, conjecture and polemical interpretation*.<sup>155</sup>

The now repealed *Canadian Immigration Act s 19(1)* provided that individuals involved in ‘terrorism’ or ‘terrorist organisations’ were to be refused entry into Canada.<sup>156</sup> This Act failed to define ‘terrorism’. In the unanimous Supreme Court of Canada decision in *Suresh v Canada (Minister of Citizenship and Immigration)*<sup>157</sup>, the Court held that there is no universally accepted definition of ‘terrorism’ and the term ‘provides a sufficient basis for adjudication and hence is not unconstitutionally vague’. The Court recognised the difficulty of defining the concept, but relied upon the *International Convention for the Suppression of the Financing of Terrorism* in stating that ‘terrorism’ as encompassed within s 19 refers to any:

*act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.*<sup>158</sup>

This decision was upheld in *Fuentes v Canada (Minister of Citizenship and Immigration)*<sup>159</sup>.

Just before the judicial definition of ‘terrorism’ in *Suresh* was handed down, the Canadian Parliament enacted the *Anti-terrorism Act, RSC 2001, c 41*. Section 4 of this Act inserts a new definition of ‘terrorist activity’ into the Federal *Criminal Code, RSC 1985 c 46*. Section 83.01 of the *Criminal Code* defines ‘terrorist activity’ under two limbs comprising of para (a) and (b). An act is classified as a ‘terrorist activity’ if it falls within the ambit of either

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<sup>155</sup> *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 [94]

<sup>156</sup> Golder & Williams 280

<sup>157</sup> [2002] 1 SCR 3 Unanimous decision of McLachlin CJ, L’Heureux-Dube, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ

<sup>158</sup> [2002] 1 SCR 3 [98]

<sup>159</sup> [2003] 4 FC 249

paragraph. Firstly a specific approach is taken where ‘terrorist activity’ is defined as ‘an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences’ including the conventions pertaining to specific terrorist *modus operandi* such as hijacking, taking hostages, financing terrorist activities and terrorist bombings. Secondly a more general approach is taken:

*(b) an act or omission, in or outside Canada,*

*(i) that is committed*

*(A) in whole or in part for a political, religious or ideological purpose, objective or cause; and*

*(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organisation to do or to refrain from doing any act, whether the public or the person, government or organisation is inside or outside Canada, and*

*(ii) that intentionally*

*(A) causes death or serious bodily harm to a person by the use of violence;*

*(B) endangers a person’s life;*

*(C) causes a serious risk to the health or safety of the public or any segment of the public;*

*(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of the clauses (A) to (C); or*

*(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of Clauses (A) to (C),*

*and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.*

Consideration of the legislation set out above indicates that we still have some way to go before achieving consistency in the measures taken by like-minded nations to combat terrorism let alone obtaining a satisfactory degree of consistency amongst the disparate members of the United Nations. However, a basis has been established which may well lead to greater consistency which will not be achieved unless a universal and dispassionate agreement is reached as to what is acceptable behaviour on the part of not only established nations but also those seeking nationhood.