The Criminal Lawyers Association of the Northern Territory
LAW, LIBERTY AND THE LAB
Port Douglas, 28 June-6 July 2003

TERRORISM AND THE RULE OF LAW

Nicholas Cowdery AM QC
Director of Public Prosecutions, NSW
President, International Association of Prosecutors

"Sooner or later one has to take sides.
If one is to remain human."

Thomas Fowler's Vietnamese colleague,
Mr Heng, in "The Quiet American" (Graham Green)

INTRODUCTION

When I was at school, history was something that we learned from books. Teachers sought to interpret it – to flesh out the bare chronology of events with analysis of the characters and motives of the actors – to identify connections between events – to explain why things happened as they did.

I did not realise it then, but as I have lived longer I have learnt that, in fact, we are all living in history. The present of today is the past of tomorrow. The difference between learning about and living in history is that we all have the potential to influence events and thereby to affect and therefore to make the history of the future. However, explaining why events occur can still be problematic.

I believe that we all have an obligation to do what we can to make our history an honourable one. That means action on our part, now.

History often unfolds in a leisurely fashion as routine events take their course. Sometimes, however, it is made suddenly and unexpectedly. How we react to such events shapes our present, of course – but it also shapes our future. Even more importantly than determining how we will be judged by posterity, we thereby incur a debt to our children, from whom the future is borrowed.

In this paper I am addressing the issue of terrorism and a few of the ways in which we have responded to it. My submission is that we are doing violence to the rule of law, which must be remedied.

HISTORICAL CONTEXT

On 11 September 2001 history of the sudden and unexpected kind was made. We all know what happened. It is one of those days in our lives when we will always remember where we were when we heard the news (as for the assassination of President Kennedy in 1963, the moon landing in 1969 or the dismissal of the Whitlam government in 1975).

Some Americans asked at the time: "What have we done to deserve this?" The answer, of course, was "nothing". No community could do anything to deserve an attack like that.

They then asked: "What can we do to fix it?" That was the wrong question. Of course there were things to be done to heal the community and repair the physical damage; but it was wrong to suppose that the wider damage could be undone or the broader situation "fixed" by any immediate and direct action. A new situation had been created and the responses to it had to be got right. [1] It is sometimes said that on that day "the world changed" – but however cataclysmic the events were for the USA, the global situation is always changing.

The questions asked by Americans were greatly influenced by the TV grab style of inquiry and discourse – and they tended to promote TV grab style responses at a time when long and deep reflection might have served us better. We acquired a whole new vocabulary: "9/11"; "axis of evil"; "war on terror"; "homeland security"; "weapons of mass destruction"; "coalition of the willing"; "regime change"; "shock and awe"; the "fog of war"; reporters who were "embedded" with troops; a "target of opportunity" presented itself. French fries (which actually came from Belgium) and French toast became "freedom fries" and "freedom toast" in the US Congress cafeteria.

Of course, explosive attacks on civil society are not new, even in recent history. The Atlanta Olympics and Oklahoma City come to mind. There were Nairobi and Tanzania in 1998. There have been decades of attacks in Northern Ireland and England, in Israel and Palestine. And then we had Bali on 12 October 2002 (a matter of special significance to Australia and to this conference); Kenya again; Riyadh; Chechnya; Casablanca – and the list (unfortunately) continues to grow. Terrorism was well known before 11 September 2001 – and it has continued.

Conduct of this kind is criminal in nature. Often the perpetrators die; but there is no shortage of appropriate offences or of legal avenues for the prosecution of the survivors. The normal response of the lawful authorities is to investigate, identify suspects, prosecute and punish. That has been the course in most of the cases I have mentioned, including Bali where trials are presently under way; but not for 11 September 2001. Those events were also criminal – trans-national crime of a shocking

[1] In his book "The Hot Seat" (HarperCollins, 2003) Richard Woolcott wrote (p 298): "In the heady mix of understandable outrage, assumed moral superiority, fear and vengeance that has followed that fateful day, few of America's leaders have paused to address the fact that terrorist acts grow out of an unresolved political, social or economic problem. This does not justify the act of terrorism, or the cause of the terrorist, but the fact remains that until national institutions in weak, disorganised states are strengthened and the root causes of terrorism – political, social, economic – are successfully addressed, these states will continue to be unwitting hosts to terrorists."

kind. Some offenders remained alive; but the criminal justice response was not given priority by those in power in the USA.

US RESPONSE

I am dealing with the response of the USA in some detail because it has had such a significant effect on the response of Australia to the threat of terrorism. [2]

Instead of following the criminal justice path, the war paradigm was invoked – the "war on terrorism", another good media grab – and it has continued. It is institutionalised revenge beyond the usually accepted limits of criminal justice; and without the principled constraint of the rules of criminal justice, it is difficult to control and direct. As will be seen, it has enabled the rule of law to be bypassed in a number of respects.

Although war was declared on an abstract noun, real places and real people were attacked, including sovereign states. Afghanistan was overcome (or at least, parts of it) and a new government installed – Australians were there. Iraq was later invaded and occupied with the assistance of the UK, Poland and again Australia.

It was probably believed that the masterminds of the 11 September 2001 attack and their supporters were in Afghanistan, but they have not been found. Most of the known perpetrators were in fact from Saudi Arabia.

The leader of Iraq has also disappeared, along with many members of his family and many of his henchmen. The publicly announced reason for the invasion, the neutralisation of weapons of mass destruction that might have become available to terrorists, has yet to be justified.

Where does the war against terrorism head next? Iran? Or North Korea – where it is actually known that there are weapons of mass destruction and where threats have been made to use them? For present purposes, however, what consequences is the war against terrorism having for the rule of law?

WAR

During World War II the US Attorney General, Francis Biddle, said: *"The Constitution has not greatly bothered any wartime President"*. A permanent "war on terrorism" may therefore spare President Bush from bothering greatly about the Constitution now. Some evidence for that already exists and the debate continues.

Francis Biddle's statement may be contrasted with that of Justice Breyer of the US Supreme Court, speaking to the Association of the Bar of the City of New York on 14

[2] Woolcott (op cit) wrote (pp 298-9): "There is a danger that Washington's preoccupation with terrorism will assume the mantle of a moral crusade and distort its approach to other foreign and defence policy issues. September 11 has drawn Australia closer politically to the United States but it has not changed our geography. To the extent that the present Australian Government may feel obliged to support and participate in such a crusade because of the alliance with the United States, so too our own foreign and defence policies could risk distortion."

April this year, when he said: *"The Constitution always matters, perhaps particularly so in times of emergency."* He said that by searching for alternative methods that avoid "constitutional mistakes" lawyers, judges and security officials help the government avoid extreme positions (at both ends of the spectrum): that the Constitution does not matter or that security emergencies do not matter.

At the close of World War II a warning was sounded when Justice Murphy said in the case of *Duncan v Kahanamoku,* 327 U.S. 304 (1946), quoting also from *Ex parte Milligan,* 71 U.S. 2 (1866): "[W]*e must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties. There must be a careful balancing of interests. And we must ever keep in mind that 'The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances'".*

In 1962, however, Earl Warren, then Chief Justice of the USA, wrote in the New York University Law Review that courts are unreliable in time of war or emergency and that *"other agencies of government must bear the primary responsibility for determining whether specific actions they are taking are consonant with our Constitution."* In a democracy, he wrote, *"it is still the legislature and the elected executive who have the primary responsibility for fashioning and executing policy consistent with the Constitution... the day-to-day job of upholding the Constitution really lies elsewhere. It rests, realistically, on the shoulders of every citizen".* Those statements are entirely in accord with our understanding of the rule of law; but they devalue the role of the courts in maintaining it.

CONSEQUENCES

In his declaration of war on terrorism President Bush spoke of "bringing the perpetrators to justice". However, it appears to be a special kind of justice – somewhat militaristic, virtually amounting to killing them where they can be found or trying them in special military tribunals where many basic and universal protections would not apply and then killing them. It is reported that plans are afoot to prepare execution facilities at Guantanamo Bay.

One cannot help wondering what the response would have been if the perpetrators of 11 September 2001 had all come from within western states, rather than from the shelter of the Taliban in Afghanistan and from other countries of inferior power, mainly in the Middle East.

Another consequence of adopting the war paradigm is the effect on the web of relations between states and the international mechanisms that bring them together, such as the UN. Chris Patten, External Relations Commissioner for the European Commission, said (of US involvement in Iraq) at the Commonwealth Law Conference in Melbourne in April 2003: *"I do not believe that there is any other or better way of dealing with these matters than through the mechanisms and procedures of the United Nations. That may not always produce a consensus, as we can see today. But if we do not try to apply the matrix of international agreements and institutions to the resolution of these issues, we will find ourselves increasingly living in a world where might is confused with right, and double standards are seen to reign supreme."*

In the USA there has been a mix of prosecution and detention without charge:

- John Walker Lindh, a US citizen of California, captured in Afghanistan among Taliban forces, was tried (on a plea bargain) and convicted in a civil court;
- Yasser Esam Hamdi of Louisiana, captured with Lindh, was first taken to Guantanamo Bay but, being a US citizen, is now being detained at the Norfolk Naval Station in Virginia without charge;
- Zacarias Moussaoui, a French citizen of Moroccan descent, is being tried in a civil court;
- Richard C Reid, the British "shoe bomber" and UK citizen, was convicted in a civil court;
- Jose Padilla (aka Abdullah al Muhajir), a US citizen of New York, was arrested as a material witness in Chicago by the FBI on 8 May 2002. He was allowed his guaranteed right to counsel. He was later declared to be an enemy combatant and incarcerated in South Carolina without any rights. He is yet to be charged with an offence;
- 640 people (originally 647) from 42 countries (including two Australians) are incarcerated without charge in Camp X-Ray at Guantanamo Bay, Cuba. One is reportedly aged 98 and several are children. There are reports that many of them may soon be released without charge.

DETENTION OF NON-CITIZENS

Guantanamo Bay was put on our mental maps after 13 November 2001 when the US President issued a Military Order. In it he made findings about acts and threats of terrorism and made subject to the Order *"any individual who is not a United States citizen with respect to whom I determine from time to time in writing that"* the individual is or was a member of "al Qaida", or has been engaged in certain activities linked with terrorism, or has knowingly harboured such an individual, and *"it is in the interest of the United States that such individual be subject to this order"*.

Arrangements for detention are made in section 3. They provide for detention anywhere designated by the Secretary of Defense, for humane treatment without adverse discrimination, for *"adequate food, drinking water, shelter, clothing and medical treatment"*, for the free exercise of religion and for other conditions to be prescribed by the Secretary of Defense.

Section 4 provides for the trial of such individuals by a military commission, for such trial to be a *"full and fair trial"*, for any evidence that *"would ... have probative value to a reasonable person"* to be admitted, for legal representation for the defence, for conviction and sentence *"only upon the concurrence of two-thirds of the members present at the time of the vote, a majority being present"* and for submission of the record of the trial for final approval by the President or the Secretary of Defense (if so designated by the President).

Section 7, paragraph (2) provides: *"the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal"*.

Camp X-Ray, where most of the people are being detained, is on a patch of land at Guantanamo Bay at the eastern end of Cuba which is leased from Cuba by the USA. A term of the lease is that Cuban law does not extend to that territory. US law has been held by US District Courts not to apply to it, either, because it is outside the territorial jurisdiction of the courts (this is subject to what, if anything, the US Supreme Court might have to say in due course). It is a lawless enclave where might is right. The detainees are "non-persons" with no rights. They are not allowed access to legal representation, there are no inspections from human rights organisations (except for limited access by the Red Cross), no accountability of the captors or checks on abuses, they have not been charged with any crimes, their identities have not been disclosed, they do not have POW status and if they are tried, the trials will be in secret.

ENEMY COMBATANTS

In addition to the plight of the non-citizens detained at Camp X-Ray, the US President may designate any person, US citizen or not, as an "enemy combatant". That person may be held without charge and has no right to a lawyer and the courts cannot review the determination (according to the US Department of Justice). An "enemy combatant" includes a member, agent or associate of Al Qaeda or the Taliban. An "enemy combatant" may remain in custody until this or another President declares that the war on terrorism is over.

Courts of first instance have ordered that such detainees be accorded the normal right to counsel, but they have been routinely overturned on appeal. Earl Warren's words resonate in those decisions.

The American Bar Association Task Force on Treatment of Enemy Combatants in February 2003 made a number of recommendations about enemy combatants. It recommended: that enemy combatants (whether US citizens or not) who are detained in the USA be afforded the opportunity for meaningful judicial review of their status; that they not be denied access to counsel; that clear standards and procedures be established governing their designation and treatment; and that the Executive Branch consider how US policy may affect the response of other nations to future acts of terrorism. But none of that touches the non-citizen detainees at Guantanamo Bay.

(I shall return to the designation of "enemy combatants".)

These have not been the only official responses, however. The USA, the western democracies and many other countries, quite rightly, have been quick to condemn terrorism as a specific crime and to legislate; but sometimes they have done so in ways that erode human rights and ignore the rule of law. Those provisions do not apply just to the remote hills of Afghanistan or the deserts of Iraq – they are not confined to small parts of the globe – they reach to every resident of the states and territories from which we come.

INTERNATIONAL RESPONSE

Perhaps the oddest reaction of any government to the terrorist threat, especially after the Bali bombings, has been our own government's issuing to all Australian households, at a cost of $15M, of a fridge magnet on which there are warnings about and requests to report unusual behaviour, the exhortation to be "alert, but not alarmed" and on which one can write emergency numbers and contacts. It has spawned much satirical comment. Privacy International (perhaps best known for its annual Big Brother awards for intrusive practices) received 5,000 nominations from 35 countries for an award as the most stupid security measure since 11 September 2001. Our fridge magnet won on account of its scale, cost and meaningless nature.

Australia has also developed legislation that will see the intelligence organisation ASIO – not a policing or investigative body – given wide powers, in conjunction with police, to detain on warrant people as young as 16 for interrogation for indefinite periods (initially periods of up to eight hours each, with no more than three in seven days – but renewable) and without access to counsel or family and friends. Such people need not be suspected of having engaged in any criminal conduct. All that is required is a suspicion that they may have knowledge relevant to terrorist activity. Presumably to avoid detention they will have to demonstrate that they do not know something. (Think of the broad range of persons who might become subject to such measures, including priests, teachers, doctors, nurses, lawyers, journalists and so on.)

There has been much activity internationally. On 12 September 2001, the day after the New York and Washington attacks, the UN Security Council adopted Resolution 1368. Among other things, it *"Calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable".*

On 28 September 2001 Resolution 1373 was adopted. It mandated that all states shall prevent and suppress the financing of terrorist acts by various prescribed means, deny support to terrorists and take other quite specific and detailed measures to suppress and combat terrorism. The Resolution placed a heavy legal and administrative burden on all states, an obligation that the vast majority of smaller and less developed states (and some wealthy developed states) are still struggling to discharge.

These measures were followed in due course by Resolution 1456 of 20 January 2003 which reinforced the earlier resolutions. It contains two paragraphs of particular relevance to the place of laws and legal systems in the response to terrorism:

"3. States must bring to justice those who finance, plan, support or commit terrorist acts or provide safe havens, in accordance with international law, in particular on the basis of the principle to extradite or prosecute...

6. States must ensure that any measure taken to combat terrorism complies with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law".

The Council of Europe (now of 45 nations) in its Common Position of 27 December 2001 defined a "terrorist act"[3]. It is but one of the attempts made around the world to define terrorism. It is capable of embracing state-sponsored terrorism, even that committed in the course of a "war on terrorism". Perhaps for fear of that eventuating, and for other unspecified fears held for US servicemen abroad, we have the spectacle of the USA opposed to the International Criminal Court and coercing states (at the latest US count 44 who are prepared to admit to it and seven who are not) to exclude its jurisdiction over Americans in those places. These are called "Article 98 agreements". (It is incongruous, for example, that the USA is seeking such an agreement from Croatia while at the same time attempting to persuade it to surrender citizens to the ICTY.)

On 24 January 2002 the Assembly of the Council of Europe adopted Resolution 1271. It states the need to "take stock" of the means to combat terrorism and paragraph 5 states significantly that *"The combat against terrorism must be carried out in compliance with national and international law and respecting human rights"*. It calls on all member states to take various specific and detailed steps to assist in the prevention and suppression of terrorism.

---

[3] Article 1

...

3. For the purposes of this Common Position, "terrorist act" shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organization, as defined as an offence under national law, where committed with the aims of:

i. seriously intimidating a population, or

ii. unduly compelling a government or an international organization to perform or abstain from performing any act, or

iii. seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization:

a. attacks upon a person's life which may cause death;
b. attacks upon the physical integrity of a person;
c. kidnapping or hostage-taking;
d. causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;
e. seizure of aircraft, ships or other means of public or goods transport;
f. manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
g. release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;
h. interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
i. threatening to commit any of the acts listed under a to h;
j. directing a terrorist group;
k. participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

For the purposes of this paragraph, "terrorist group" shall mean a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. "Structured group" means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure. [Adopted 24 January 2002]

RULE OF LAW

Democracy, human rights, the rule of law: three expressions that sit together like air, earth and water. They are elemental for all right-thinking people. They are inter-dependant. As Lord Woolf, Chief Justice of the UK has said: *"Human rights come with democracy, whether the government wants them or not"*. It is appropriate, therefore, to look at just what is meant by the rule of law.

Democracy is a given. Let us also assume that human rights are desirable. In the words of the Vienna Declaration of 1993 they are universal, indivisible, interdependent and interrelated and should be promoted in a fair and equitable manner.

In *Ex parte Milligan,* 71 U.S. 2 (1866) Justice Davis, writing for the Court, said: *"No graver question was ever considered by this court, nor none which more nearly concerns the rights of the whole people... By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people"*.

Democracy and human rights cannot be enjoyed without the rule of law. The Preamble to the Universal Declaration of Human Rights (1948) states that:

> *"it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."*

So what is the "rule of law"? How does it operate? Why is it important? How may it protect human rights?

It does not mean:

- rule by law: that is, so long as there is a law on the subject the rule of law is operating;
- the law of the ruler;
- "law and order";
- the law of rules; or even
- the rule of the lawyer.

A clue to its meaning would be given by the addition of one word to the phrase: "the *just* rule of law". Justice requires the importation of principles that arise under other labels, such as peace, freedom, democracy and fairness. Such principles are echoed in the rule of law.

There are two principal features of the rule of law.

- The people (including the government) should be ruled by the law and obey it.
- The law should be such that the people will be able and willing to be ruled (or guided) by it.

From those features commentators have deduced 12 more particular requirements to be met before it can be said that the rule of law is truly in operation.

1 There must be laws prohibiting and protecting against private violence and coercion, general lawlessness and anarchy.

2 The government must be bound (as far as possible) by the same laws that bind the individual.

3 The law must possess characteristics of certainty, generality and equality. Certainty requires that the law be prospective, open, clear and relatively stable. Laws must be of general application to all subjects. They must apply equally to all.

4 The law must be and remain reasonably in accordance with informed public opinion and general social values and there must be some mechanism (formal or informal) for ensuring that.

5 There must be institutions and procedures that are capable of speedily enforcing the law.

6 There must be effective procedures and institutions to ensure that government action is also in accordance with the law.

7 There must be an independent judiciary, so that it may be relied upon to apply the law.

8 A system of legal representation is required, preferably by an organised and independent legal profession.

9 The principles of "natural justice" (or procedural fairness) must be observed in all hearings.

10 The courts must be accessible, without long delays and high costs.

11 Enforcement of the law must be impartial and honest.

12 There must be an enlightened public opinion – a public spirit or attitude favouring the application of these propositions.

If all these features exist in large part, the climate will exist for the protection and enforcement of human rights – those rights that are enjoyed by humans simply because they are human beings. Those rights are to be found in the great international instruments accepted by the community of nations. That climate will be one of acceptance, observance and incorporation into domestic law of those international standards and their enforcement in everyday life. Those 12 features also provide the internal mechanisms for that enforcement.

Professor Geoffrey de Q Walker wrote in *The Rule of Law* (Melbourne University Press, 1988) that the rule of law

"is plainly the essential prerequisite of our whole legal, constitutional and perhaps social order ... The rule of law is not a complete formula for the good society, but there can be no good society without it."

PUBLIC INFORMATION

The 12th point made above in relation to the rule of law was reinforced by Justice Potter Stewart of the US Supreme Court, when in 1971 the Court ruled on an application by the Nixon administration to prevent the New York Times from publishing Pentagon papers about the history and origins of the Vietnam War (what the Vietnamese call the "American War"). He addressed the role of the press on national security issues, noting that on those matters the usual legislative and judicial checks on executive power scarcely operate – Congress and the courts defer to the President. In an echo of Earl Warren nine years before, he said: *"The only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry".*

Anthony Lewis, delivering the inaugural Joseph M Beck Distinguished Lecture in Journalism and Law at Emory University on 19 March 2003, just before Iraq was invaded, commented on this. *"Think about Stewart's phrase 'enlightened citizenry'. In a national survey* [recently], *45 percent of Americans who were polled said they believed that Saddam Hussein was 'personally involved' in the terrorist attacks of Sept. 11, 2001; 44 percent said that some of the men who hijacked the planes that day were Iraqis. There is no evidence for either of those propositions. The millions of Americans who believe them, if the poll figures are projected, are an extraordinarily unenlightened citizenry".* These beliefs may well have arisen from statements by senior officials in the administration.

In the absence of an enlightened citizenry, an informed and enlightened public opinion, the rule of law may be corrupted. In present times President Bush first made Al Qaeda and Osama Bin Laden the targets. Action was taken swiftly. Then he treated Saddam Hussein as the urgent danger and tried to connect him up with September 11. It was asserted in the USA and elsewhere (notably Britain and Australia) that Saddam had weapons of mass destruction that could be provided to terrorists at any time. We now know from the intelligence community that the link could not be made; but the citizenry, relying on its leaders, knew no better at the time.

What have the public media done to enlighten the citizenry? In Australia, at least, too little, too late.

ADHERENCE TO THE RULE OF LAW

An enlightened citizenry might well demand of its leaders measured and lawful responses to common threats. Emergencies pass – emergency, short term measures must be dismantled and longer term responses must be found that are unobjectionable in principle.

The world has responded in a measured way to many of our greatest challenges. There is a long history of legal responses to large scale or particularly serious

international criminality, extending back to the 15th Century in Germany. In the early 1900s Americans were tried for offences in the nature of war crimes committed in the Philippines. In 1921 twelve German soldiers were tried for crimes committed in Leipzig.

And so it went until the largest breakthroughs after the Second World War with the Nuremberg trials and the Tokyo trials.

In modern times we have had the International Tribunals for the former Yugoslavia and for Rwanda (where hundreds of thousands were killed). We have had the very successful Lockerbie trial, a collaborative effort between a number of states. And now we have the International Criminal Court – in my view the single most important development in international criminal justice in a hundred years.

There are also proceedings for crimes against humanity in tribunals in East Timor. A special court has been set up in Sierra Leone with collaboration between the government and the UN – an imaginative model. Trials may be held in Cambodia of former Khmer Rouge. Will we see international tribunals dealing with offences committed in Iraq under Saddam? Will we see prosecutions in the Congo?

These are rule of law responses to large scale breaches of international criminal law and to forms of terrorism between and within states. These are the sorts of responses that can be made – and that should be made – rather than having resort to "war".

IGNORING THE RULE OF LAW

When the rule of law is cast aside anywhere, we all have reason for concern.

Legislation has been passed in many countries that seriously interferes with the previously accepted rights of the citizenry (the Patriot Act in the USA being one example; the ASIO legislation in Australia being another); but action has also been taken that does not seem to require legislation. In this section I am returning to "enemy combatants", the non-US citizens detained at Guantanamo Bay and the US citizens detained in the USA.

The term "enemy combatant" seems to have been appropriated from the case of *Ex parte Quirin,* 317 U.S. 1 (1942). In that case German saboteurs landed in New York and Florida, buried their uniforms and proceeded inland in civilian dress. They were convicted by military tribunals. On appeal, the US Supreme Court said that: *"an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property* [would exemplify] *belligerents who are generally deemed not to be entitled to the status of prisoner of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."*

In accordance with the Third Geneva Convention of 1949, the expression "enemy combatant" encompasses lawful and unlawful combatants, each of which is subject to capture and detention for the duration of a conflict. They are different, however. Lawful combatants become prisoners of war and subject to the internationally

recognised protections (such as keeping personal effects, corresponding with people outside detention, practising religion, having living conditions equivalent to the armed forces of the detaining power). Unlawful combatants, however, do not have these protections and, in accordance with *Ex parte Quirin*, may be *"subject to trial and punishment by military tribunals for acts which render their belligerency unlawful"*.

The *Quirin* case, however, does not stand for the proposition that any detainees may be held incommunicado and denied access to counsel. In that case the defendants had counsel, were put on trial within weeks of capture and, patently, were able to appeal to the US Supreme Court.

In *Johnson v Eisentrager,* 339 U.S. 763 (1950) the Supreme Court said: *"The contention that enemy alien belligerents have no standing whatever to contest conviction for war crimes by habeas corpus proceedings has twice been emphatically rejected by a unanimous Court. In Ex parte Quirin ... we held that status as an enemy alien did not foreclose 'consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission'. ... This we did in the face of a presidential proclamation denying such prisoners access to our courts."*

President Bush's Military Order of 13 November 2001 is restricted to non-citizens. There is no provision in US law for the detention of US citizens as "enemy combatants". However, in 1971 there was a law passed[4] which provides that *"*[n]*o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress"*.

Of course, even if either class of detainees could gain access to the courts, the non-citizens do not even have this argument.

Once imprisoned, any detainee – US citizen or not – should have the right of habeas corpus. The US Constitution provides that *"the privilege of the Writ of Habeas Corpus shall not be suspended"* except by Congress, and then only *"when in Cases of Rebellion or Invasion the public Safety may require it"*. There is no rebellion; there is no invasion; and Congress has not acted to suspend it.

To this point I have referred only to US law. The international law of human rights is also being flouted. Rights of detainees to counsel and judicial review of detention are firmly entrenched in the International Bill of Rights[5] and in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988).

There is further reinforcement of the paramountcy of the law and courts, even in times of emergency, to be found in the legacy of the famous English case of *Liversidge v Anderson* (1942) AC 206. The strong dissenting judgment of Lord Justice Atkin has since become law (indeed, Lord Justice Diplock has since proclaimed that the majority decision in *Liversidge v Anderson* should be "buried six feet deep"). Lord Atkin said in 1942: *"In this country, amid the clash of arms, the laws are not silent.*

---

[4] 18 U.S.C. &4001(a)

[5] Universal Declaration of Human Rights, Articles 8 and 9; International Covenant on Civil and Political Rights, Article 14

They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law".

CONCLUSION

The rule of law is not an optional consideration if human rights and democracy are to be assured. It requires a strong, independent and principled judiciary. (Conversely, a weak or compromised judiciary contributes to the erosion of the rule of law.) It requires an acknowledgement of the separation of the judicial power from both the legislative and the executive and of the role of the judiciary in the constitutional enforcement of the law – including observance of the law by the two other branches of government.

In times of emergency there is a temptation on the part of the citizenry to give the executive its head. That may be appropriate, to a point; provided it is done within the law. But emergencies do not last forever and special measures put in place at those times must be wound back as the circumstances permit.

An open-ended, undefined "war against terrorism" is little more than an excuse for executive excess. The ramifications may be felt domestically and internationally. Real harm may be done to the fabric of society and to the fabric of international relations that may take decades to overcome and repair. Importantly, also, that conduct may in fact increase, not diminish, a state's exposure to terrorist acts.

In matters of security and in criminal justice there must always be balance. It is impossible in either field to achieve final certainty. There must be room for trust, properly based, between the guardians and the guarded. If the balance of powers is destroyed, then trust will also be lost, rights will be put at risk and life will become intolerable.

Let us imagine a worst case scenario – multiple, simultaneous, violent attacks (for example, bombings) on populous establishments in many centres in many countries, in many regions of the world. Where does a war against terrorism point us in those circumstances? How could it possibly help us?

Is it not far preferable, in those and other cases, to rely on the best mechanism we have and that we know will work with very little downside – the pursuit of the perpetrators through the criminal justice processes that are already in place and ready to be activated?

If we place priority on that course, we have a chance to make our history a better one than the version presently being written for us by those who, for whatever reason, ignore the rule of law.