

**"THE REPUBLIC IS OURS. THE INDONESIAN
RESPONSE TO THE SO-CALLED WAR AGAINST
TERRORISM"**

(A paper delivered by Colin McDonald QC at the Northern Territory Criminal Lawyers Conference at the Bali Hyatt Hotel, Sanur, Bali Indonesia 4 July, 2005)

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DEDICATION

This paper is dedicated to Agus Sardjana, First Secretary in the Republic of Indonesia Embassy to the European Union and formerly Vice Consul in the Indonesian Consulate in Darwin and his example of intelligence, compassion and tolerance – the true enemies of terrorists.

Executive Summary

Indonesia is no stranger to terrorism. Since the foundation of the new Republic in 1945 Indonesia has opted for a secular constitution. This choice of a secular Republic and constitution, in the world's most populous Muslim nation, alienated a minority of Muslim activists who waged a guerilla war during the 1950's to achieve an Islamic State. This rebellion was crushed in the successive, virtual (but not absolute) dictatorships of President Sukarno and from 1965 onwards that of President Soeharto.

From 1965 to 1998 the Soeharto regime clamped down on dissent, including religious dissent. Some Islamic fundamentalists left or escaped Indonesia and joined in fighting against the Russian occupation of Afghanistan. They subsequently linked up with other similarly minded fundamentalists who wanted Islamic states across the Middle East and parts of Asia.

When Soeharto fell from power in May 1998 Indonesia's third revolution was a democratic one. Never in contemporary political history was a revolution overturning a military dictatorship so bloodless and peaceful as the revolution which manifested itself in 1998. The revolution was driven by a passionate hunger for democracy and a desire to return the republic to the hands of the people. One of the guiding principles of the revolution was the restoration of a core principle of the 1945 Constitution – *Negara Hukum* – the equivalent of the Western concept of the rule of law.

Rapid changes ensued. The constitution was amended to enhance democratic values. A charter of rights was entrenched in the constitution to guard against the forty or more years of the restrictions and disempowerment to which ordinary Indonesian people had been subject. Democratic and peaceful elections were held for national and regional legislative assemblies. Decisions were made for greater freedoms for expression, association and movement in the country. Power shifted from the executive President to the democratically elected House of Representatives (the DPR).

However, these new freedoms also allowed for greater freedom for those dissidents who harboured the dream of an Islamic state and an Indonesia governed by Islamic law. To these persons, democracy was the enemy.

So, in the midst of democratic national building, these fundamentalists unleashed their first bombs in Jakarta in 2000. Beset with so many national problems including the war in Aceh and sectarian violence across Eastern Indonesia, there was uncertainty, even denial that Indonesia had a terrorist problem.

However, when bombs ripped through the Sari Club and Paddy's Bar at Kuta on 12 October 2002 an awareness was triggered that terrorism does exist in Indonesia and that Indonesian citizens were part of a global terrorist network.

What followed was a determined and disciplined investigation which drew on assistance from outside police agencies, including the Australian Federal

Police. The investigation was conducted within the normal procedural confines of the criminal justice process. Many person over the ensuing 18 months were caught, charged and tried in the ordinary, open criminal Courts of Indonesia. For the first time these cases were watched by a concerned and confused population on TV screens across the nation.

In these many public and televised trials – and the one I instance in this paper is that of Amrozi – the prosecutors won over the hearts and minds of the nation.

By dint of the careful adduction of evidence that withstood rational inquiry and forensic and intellectual testing, the prosecutors across Indonesia were able to show in the Courtrooms the evil of these fanatics. At all times, the prosecutors pressed their cases using the investigative efforts of the civilian police, the ordinary criminal law procedures and in open public trials that permitted complete public scrutiny. Although one of the nations most directly affected and endangered by terrorist violence, Indonesia's approach permitted appeals from conviction and truly judicial determinations, again in accordance with the ordinary laws of the nation.

The strength of the new, democratic Indonesia was attested to when in respect of some only of the Bali bombers, the new Constitutional Court, by a majority, declared invalid terrorist laws passed in the wake of the Bali bombing and which purported to be retrospective.

The bombings which followed in 2003 and 2004 of the JW Marriott Hotel and outside the Australian Embassy in Jakarta were dealt with in a similar manner – careful police investigation, detection of culprits and putting them on trial in the ordinary criminal courts. The investigation process has become relentless in Indonesia with arrests of Jemah Islamiah fanatics and suspects being commonplace.

Indonesia has avoided the apocalyptic rhetoric that led to the so-called war on terror and has focussed on dealing with the persons and the acts involved in the context of the criminal law and bringing accused persons to justice. In so doing, it has used the normal criminal process and not allowed itself to be distracted or depart from its new found democratic principles.

As the evidence contained in the police interviews with the defendants in the Bali bombing trials disclose, the real conflict behind the terrorist acts was not one to be resolved by regime change in Iraq and conventional warfare. The real conflict ignited by terrorist acts inside and outside Indonesia is not between Islam and an America led Judeo-Christian civilisation. The real challenge is within the world wide community of Islam, the Ummah; it is between moderate and progressive Muslims on the one hand and extremist fundamentalists on the other. The conflict is for the hearts and minds of those many poor and neglected Muslims who aspire to a better life.

The military interventions America and Australia have participated in are not likely to turn the tide against bigotry, ignorance and hate. The costly

interventions in Afghanistan and Iraq have not brought decisive victories, but unravelled even deeper complexities.

Indonesia's method of dealing with fundamentalists who kill and cause terror by using its ordinary criminal justice process has not only been effective in bringing persons to justice, it has also assisted the cause of moderate Muslims in winning the hearts and minds of those who embrace and are nurtured by the Islamic faith.

The Indonesian approach is in stark contrast to that of the United States and its allies. Indeed, as Indonesia, the world's newest real democracy embraces more and more democratic change, the great democracies of America and Australia have tightened their laws and their approach to the so-called war to such an extent that they risk compromising the very values democracies seek to uphold.

Both America and Australia have recent experience of costly, ill considered intervention and war in Vietnam. The practical example of moderate Muslim nations, like Indonesia, in dealing with terrorism comes at a critical time as both America and Australia seek to find security and peace. If lessons are not learnt from nations like Indonesia there is the danger of fulfilling by ignorance George Santayana's famous adage:

"Those who forget the lessons of history are bound to relive them".

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There is no other choice. We must

Go on

Because to stop or withdraw

Would mean destruction

Ought we sell our certitude

For meaningless slavery

Or sit at table

With the murderers

Who end each sentence

"As your majesty wishes"

There is no other choice. We must

Go on

We are the people with sad eyes, at the edge of the road

Waving at crowded buses

We are the tens of millions living in misery

Beaten about by flood, volcano, curses and pestilence

Who silently ask in the name of freedom

But are ignored in the thousand slogans

And meaningless loud-speaker voices

There is no other choice. We must

Go on¹

¹ Taufik Ismail "The Republic is Ours" translated into English by Harry Aveling in
"Contemporary Indonesian Poetry" University of Queensland Press, 1975 Reprinted 1985
p169.

Introduction

Indonesia is no stranger to terrorism. In a true sense Indonesia has been living and dealing with terrorism for much of its life as a Republic since 1945. How Indonesia has dealt with terrorists, particularly in recent years, is potentially instructive to us in Australia and the west. In many important respects, the Indonesian approach stands in contrast with the rhetoric-burdened war paradigm of intervention opted for by the United States of America and its allies, including Australia.

Whilst the military interventions in Afghanistan and Iraq have left the 'coalition of the willing' bogged down defending guerilla wars with no exit strategies, Indonesia's approach has been to focus internally and use its ordinary criminal justice processes in both detecting and apprehending criminal terrorists and bringing them to open, public justice. In so doing, just as Indonesia has probably been more effective than any other nation in dealing with modern terrorism, it has done so without discarding new democratic values reclaimed with determination in 1998 after the fall of Soeharto.

In this paper I look at the Indonesian response to the so-called war on terror by adverting briefly to Indonesia's history and how Indonesia has responded to the phenomenon of extremist terrorism in more recent times since the bombing of the Philippine Embassy and the Jakarta Stock Exchange in 2000. I contrast Indonesia's response, again briefly, with that of the United States, the United Kingdom and Australia. I set out by way of example how the use of open ordinary Court processes in the trial of Amrozi has helped win the so-called 'war' in the battle for the hearts and minds of believers. As the prosecutors in the Bali bombing trial readily perceived, the real conflict is the ongoing struggle in Islam between moderate and progressives on the one hand and the fundamentalist extremists on the other.

The Indonesian experience is steeped in a turbulent history. It is helpful to get some sense of this history.

Background

Soon after the agreement to a ceasefire with Dutch colonial forces on the American ship USS Renville in January 1948, militant Islamic guerillas rallied around a Javanese mystic, S. M. Kartosuwirjo.² Kartosuwirjo had a background of radical political ideas and when convalescing from serious illness studied Islam under various mystic teachers. He disliked leftist ideas, distrusted the new Republican leaders and became head of a band of Hizballah guerillas in West Java. In May 1948 Kartosuwirjo waged the first rebellion against the new Republic of Indonesia.³

Kartosuwirjo proclaimed himself *imam* (head) of the new Indonesian Islamic State often referred to by its Arabic name, *Darul Islam* (literally *dar al-Islam*, territory or house of Islam). This *Darul Islam* proclaimed state was based on Islamic law and administered by *Kyais* (teachers of Islam) at first in Western Java.⁴

Kartosuwirjo was a proponent of the mystical Sufi stream of Islam. Amongst many things, he wrote:

"It seems not enough filth of the world was eliminated and chased away in the First and Second World Wars... We are obliged to foment the Third World War and World Revolution (because) God's kingdom does not yet exist on earth."⁵

He went on putting what the choices there were for his Muslim followers:

"Eliminate all infidels and atheism until they are annihilated and the God-granted state is established in Indonesia, or die as martyr's in a Holy War."⁶

² M.C. Ricklefs "A Modern History of Indonesia" Macmillan, 1985, p215

³ Ibid.

⁴ Ibid p215-216.

⁵ Greg Fealy, "*Darul Islam and Jemaah Islamiyah: An Historical and Ideological Comparison*" ANU 2004, quoted in S. Neighbour "In the Shadow of Swords. On the Trail of Terrorism from Afghanistan to Australia" p10.

Thus, by the logic Kartosuwirjo created, those who fitted into the infidel and atheist categories (necessarily so many unknown persons in the world) were ordained for annihilation. Hatred, intolerance and inhuman sentiment were at the root of this extreme world view.

Much of *Darul Islam's* support was ascribed to the charismatic Kartosuwirjo whose followers believed he had supernatural power. As the years progressed *Darul Islam* attracted disaffected elements and, contrary to the image of a grand religious movement, it degenerated into large groups of bandits, extortioners who committed "terrorism on a grand scale".⁷ They bombed cinemas, poisoned water supplies and engaged in hold-ups. The peasants became the subject of forced exactions.⁸ Failure to comply with *Darul Islam's* regulations and demands was met with brutality.⁹

The *Darul Islam* movement spread regional rebellion from West to Central Java, Sumatra and Central Sulawesi right up until 1962 when Kartosuwirjo was captured and summarily executed by Republican forces. When Kartosuwirjo was executed in 1962, the *Darul Islam* movement was crushed. The Islamic State of Indonesia collapsed.¹⁰

However, the execution of Kartosuwirjo proved to be a pivotal event. For a generation of young Muslim activists, including one Abu Bakar Bashir, Kartosuwirjo's execution by the secular Republic was "a profoundly galvanising event". Leaving aside doctrinal differences, the dead rebel leader was given martyr status and his movement, *Darul Islam*, was to be an inspiration for Muslim radicals for the next forty years.¹¹ *Darul Islam's* true and dark history was ignored.

⁶ Ibid.

⁷ M.C. Ricklefs op cit. p216.

⁸ G. McTurnan Kahlin "Nationalism and Revolution in Indonesia". Cornell University 1952, reprint 1970 pp330-331.

⁹ Ibid.

¹⁰ M.C. Ricklefs op cit p215-216.

¹¹ S. Neighbour op cit p11,

In 1959, supported by the military, President Sukarno dumped the 1945 Republican Constitution and opted for an authorisation style of Government which he termed 'Guided Democracy'. Part of Sukarno's assertion of authority was the banning of the Muslim Party, Masyumi for supporting regional rebellion. The Republicans were seen by *Darul Islam* members as atheists contaminated by new republican ideas and communism. Sukarno pursued them relentlessly, gaoling *Darul Islam* leaders or forcing others into exile.

The Guided Democracy experiment failed. An abortive coup led by leftist Generals was put down with Muslim support. The Communist Party was blamed on flimsy evidence and a tragic bloodbath was unleashed across Indonesia. Some of the most senseless slaughter took place a short distance from this room. To quell the crises a new military strongman emerged, Major General Soeharto. Gradually Sukarno was stripped of his powers. An embattled President Sukarno reluctantly handed formal power over to him on 11 March 1966.

The New Order brought in by President Soeharto had initially attracted a new generation of revolutionary youth ("*Pemuda*"). They were keen to set aside the Guided Democracy controlled by the ousted President Sukarno and see a society in which the law would reclaim a role as the "normative machinery of social equilibrium mediating between citizen and between citizen and state".¹²

However, these revolutionary hopes were dashed not just with the deaths of hundreds of thousands in that year of living dangerously in Indonesia - 1965. General Soeharto also sustained the model of government initiated by Sukarno in 1959 whereby law was subordinated to executive policy.¹³ Political and religious groups were watched closely. Any gathering of a group of more than five people required a permit – as early organisers of this biennial conference well know. There were "blacklists" preventing movements of Indonesians out of the country and on certain foreigners into the country. Lawyers could be and were arrested and sometimes gaoled in the discharge

¹² T. Lindsey "Indonesian Law and Society" p13

of their professional duties. Political activists were taken to court. Journals like the prestigious national *Tempo* magazine were banned. Politics of resentment simmered under the surface as did racial and sectarian issues.¹⁴ The idea of an Islamic state (although suppressed) was not extinguished in the minds of some fundamentalist Muslims. Again, to avoid gaol, many zealots fled Indonesia and went into exile in Malaysia.

There being no central organisational authority in Islam, zealots were free to come together and be nurtured in a stream of Islam that hearkened back to Kurtosuwirjo and his philosophy. One very material congregation was the establishment of a *pasantren* (religious school) at Ngruki in East Java by Abu Bakar Bashir. As was revealed in police raids at the school in neighbouring houses after the Bali bombings, the school provided military training at night and attracted sons from the severe Saudi Arabian imported Wahhabi school of Islam as well as dissidents involved in sectarian conflict in Sulawesi, East Timor and Ambon and the Moluccas.¹⁵

In Soeharto's time the Ngruki school came under official scrutiny. Its founders Abu Bakar Bashir and Abdullah Sungkah were arrested along with about 200 others in November 1978 and accused of plotting to overthrow the Government by parading and campaigning for an Islamic state. Bashir and Sungkah were convicted and sentenced to nine years gaol for subversion, which sentence was reduced to three years then months on appeal¹⁶. To those responsible for maintaining security in the New Order, the human successors to the *Darul Islam* movement had once again been thwarted. Not so.

During the New Order regime, there was a resurgence in Muslim faith across Indonesia. Many were disillusioned with materialism and corruption and the

¹³ Ibid.

¹⁴ B. Grant "Indonesia" p68.

¹⁵ S. Neighbour op cit 1.

¹⁶ S. Neighbour op cit. pp16-17.

apparent moral depravity of "the West".¹⁷ Hard line, self proclaimed clerics, like Bashir, became heroes to some.

Among those who went into exile, some ended up as fighters in Afghanistan inspired by the desire to rid Afghanistan of the infidel Russians. Ironically, the support for the Mujahaddin from over the Islamic world came from the United States at that time caught up in Cold War politics. Those Indonesians who fought in Afghanistan developed links with Arabic groups such as Al Qaeda – a national global network of committed terrorist was rapidly forming.

The Fall of Soeharto and the Democracy Revolution

On 21 May 1998 President Soeharto was driven from office. Seventy two days later after his unanimous re-election as president for his seventh term in office, Soeharto resigned amidst the worst rioting seen in Indonesia since the fall of President Sukarno thirty two years earlier. It was the end of the New Order regime in Indonesia.¹⁸ What ensued was a democratic revolution. In the last fifty years there has hardly been a Nation where the transition from military dictatorship has been so swift, so determined and so peaceful. where Taufik Ismail's 1966 poem of the justification for change, 'The Republic Is Ours' was brought out of mothballs and recited publicly again with new hope. The people were reclaiming their Republic; they were reclaiming the Republic in a manner that had profound implications for the future of Indonesia and its role in the region. The lessons learnt from two previous revolutions and two virtual dictatorships which had spanned almost the entirety of Indonesia's brief political history since 1945 fired a new national resolve for change, democratic change in the world's most populous Muslim nation.

The fall of Soeharto spawned a new, committed democracy movement imbued with new determination. Those who drove the revolution were determined to restore the principle of '*Negara Hukum*' ('a nation of law'),

¹⁷ This followed a rich world tradition. See Ian Buruma & Avishai Margalit "Occidentalism. The West in the Eyes of its Enemies" The Penguin Press, New York 2004.

¹⁸ Geoff Forrester and RJ May (editors) "The Fall of Soeharto" p.1.

literally the equivalent of the Western concept of the rule of law. Executive power was reigned in. Political power moved from the President to the House of Representatives (the DPR). Indonesia gained a new, more democratic constitution containing a Bill of Rights. The judiciary was restored as a meaningful institution and given real judicial power including the power to review and declare laws invalid.

Law number 14 of 1970 which denied Indonesian courts the power to review the constitutionality of statutes was rescinded and a new Constitutional Court was given the power to strike down laws on constitutional grounds. Peaceful, genuinely democratic elections occurred across the vast archipelagic country for the national and regional Parliaments. Executive power transferred peacefully and today, Susilo Bambang Yudhoyono is the fourth Indonesian President since Soeharto, the third to be democratically elected. Indonesia has re-emerged almost Phoenix - like as the world's newest and certainly one of its most determined democracies.

When Soeharto fell there was not just freedom for those (the huge majority of Indonesians) who championed or supported a *Negara Hukum* nation. New freedom of expression was also given to those who deplored democracy, who advocated an Islamic state and who harboured violent and passionate ambitions to save Indonesia from the evils of democracy and a secular constitution.

The Bombings in Jakarta 2000

So when the first bombs went off at the Philippine Embassy on 1 August, 2000 and at the Jakarta Stock Exchange on 13 September 2000, it was at a time when the nation was focused on forging its new identity and committed to its new democratic direction. And it is remarkable that Indonesia kept this democratic focus despite being beset with so many internal problems: a war in Aceh, sectarian violence in Ambon, Maluku and Sulawesi, endemic corruption, the loss of East Timor, inflation, a sluggish economy and poverty everywhere. At first there was denial of there being a problem with internal

terrorism. Then, there was doubt in many circles as to who were the true culprits. Some blamed rogue elements in the military. Others blamed Archenese separatists. There was a period of indecision.

We in Australia and the West hardly reacted to the first fanatical violence that ripped through Indonesia in 2000 at the cost of so many innocent Indonesian lives – drivers, security guards, cleaners, workers, innocent passers by. The profound changes taking place next door and the challenges to the *Negara Hukum* and the secular constitution which the detonations posed went almost unnoticed in Australia. We did not know that we had an enemy and those blasts were harbingers of more to come.

Insofar as most Australlans thought about Indonesia in 2000, it was, I suggest, at best impressionistic: a “beaut holiday spot” in Bali, otherwise a primitive country in every sense, without a real legal system and a system of law entirely at the whim of executive Government and its cronies. And as with so much of Australia's sense of its northern neighbours, there has been a dangerous disposition to stereotype. One size fits all. The complexities of Indonesia were not understood. Apart from some every gifted Australian academics, ex-patriates and analysts, the implications of the revolution post-Soeharto Indonesia did not fully register, if they registered at all among the general public.

As Sally Neighbour's book *"In the Shadow of Swords"*¹⁹ reveals and an interview for *"Inside Indonesia"* in 2004 with Irfan Awwas, the Chairperson of the Executive of the Indonesian Council of Mujahiddin bluntly records – democracy and the secular state were and are loathed by certain Islamic fundamentalists and seen as the biggest obstacles to an Islamic state and the dominance of Islamic law.²⁰ The fundamentalists included the Jakarta bombers as was later discovered.

¹⁹ S. Neighbour op cit Chapter 7.

²⁰ Imam Subkahn "Islam and Democracy Cannot Meet in *"Inside Indonesia"* July-September 2004 pages 4-6

Soon after 11 September 2001 Bush officials and the Australian Government claimed Indonesia as a partner in the struggle against terrorism. Indonesia did not involve itself in any coalition of the willing or approach the issue of Islamic fundamentalist violence as if it could be dealt with by the rules of military engagement. Indonesia was a cautious and necessarily a careful ally given that 90% of its 220 million population were Muslim. More importantly, it had an appreciation by reason of its history of the difficulty of battling by conventional war methods, ignorance, hatred and bigotry which was at the core of the fundamentalists credo.

However, even a cursory reading of Indonesian newspapers over the period 2001 to 2004 reveals an active appreciation in the Indonesian government and intellectual elite that the sources of fundamentalist violence were complex had historical connotations and had to do with the divisions in Islam itself.

The Bali Bombings

It was not until 12 October 2002 when bombs ripped through the Sari Club and Paddy's Bar claiming the lives of 202 people, including 88 Australians, that the awareness was triggered that terrorism existed inside Indonesia and that fanatical Indonesian nationals were connected to an international terror network.

The bomb blasts in Kuta were evidence that the new democracy movement and the constitutional structure based on a secular state were being challenged. Saturday, 12 October 2002 was a dark day in the history of both Indonesia and Australia. It was nevertheless a day when the nation's respective futures coalesced.

In the week after the bombing the Australian Foreign Minister and Justice Minister were despatched to Jakarta. What followed would have been unthinkable prior to 12 October 2002. Antagonisms arising from Australia's participation in September 1999 in UN intervention in East Timor were set

aside. Indonesia welcomed Australian police and intelligence officers to work alongside their own police and intelligence services on Indonesian soil.

A joint police task force was created to investigate the bombings and bring the perpetrators to account. Australia moved, at least in Indonesia, from a military to a civilian, forensic model of counter terrorism.

Slowly the investigation drew leads, names and faces. Relentlessly, Indonesian police and undercover agents tracked down most of the Bali bombers gaining valuable intelligence in respect of the nature, scope and dimensions of the terrorist network inside Indonesia and beyond. These investigations in turn led to arrests and charges laid against the bombers in Jakarta in 2000.

Under pressure from the west, President Megawati Sukonoputri decreed anti terrorist laws that were shortly afterwards passed in the new democratic national assemblies. The laws were designed to retrospectively cover the events at Kuta on 12 October 2002.

Defendants were charged and quickly brought to trial. The criminal procedure in Indonesia from the time of arrest to trial is usually three to four months. The defendants who faced trial for the Bali bombing were numerous. It is instructive to look at the trial of one – Amrozi bin Nurhasyim – for it demonstrates well the Indonesian approach.

The Trial of Amrozi

Whilst in America, citizens are used to televised criminal trials, Indonesia is not. Nevertheless, a component of the lasting notoriety of the trial of Amrozi was that it was televised and had the nation glued to its television sets awaiting daily the presentation of evidence and antics in the Nari Graha courthouse in Denpasar.

The stark simplistic medium of television captured and magnified Amrozi's smile into the homes of Indonesia and the world. Amrozi gained the sobriquets of the "smiling assassin" and the "smiling bomber".

The trial had most of the components that make for famous trials. The nature and enormity of the charges 202 people killed, 325 wounded and 423 separate properties destroyed or damaged were grisly by any world standard. There was intrigue and treachery, meticulous detective work and a manifest lack of remorse.

The trial was in depth and carefully crafted to make a point to the majority Muslim population in Indonesia.

Beyond the usual ingredients of famous trials, the trial of Amrozi had an extra and compelling element. Like the trial of Eichmann in Jerusalem and the Kosovo trials in the Hague, the trial of Amrozi involved the exposé of the uncivilized devastation of extremism and bigotry. What the trial of Amrozi did was canvass, sometimes in graphic detail, the major contemporary political issue confronting Indonesia, all modern Islamic nations and the western world – the threat of criminals who espouse extremist Islamic views. The trial confirmed that the conflict sparked off by the Bali bombings and the earlier bombings in Jakarta in 2000 concerned itself more with the world of ideas than the battle plans of generals and military interventions.

In a civil law system most evidence is admitted and it is a matter for the judges what weight is to be given to it later. Also, given the Indonesian civil law system, the trial was not characterised by decisive, or triumphant cross examinations. However, in exploring the issue of political terrorism and in the battle of ideas, the trial was sensational. Under the calm guidance of the Chief Judge I Made Karna, a Balinese Indonesian, the five member Court examined the evidence carefully and made gentle points concerning religious values, respect for human beings and freedom that was a foil to the irrational bigotry often mouthed by Amrozi.

The trial of Amrozi was important because it demonstrated in the normal public court forum the persuasive capacity of objective evidence and the importance of reason. In selecting witnesses for trial, the prosecutors no doubt had their eye on the wider national and international issues of the threat posed by Islamic extremists. In their presentation of evidence and the mix of witnesses, the prosecutors quietly, deftly proved their case both legally and in the forum of public opinion.

In providing the statement of Mrs Endang Isnani and calling her testimony, the prosecutors exposed the criminal lie behind the politico/religious slogans of Amrozi and the other Bali bombers. Mrs Isnani was a mother of three young boys, a Muslim, widowed and left destitute by the bomb blasts. Her husband, Aris Manandar, was incinerated outside the Sari Club. She was quoted as saying – and no doubt a Muslim nation listened to what she said:

"I wanted to show him that he had not only killed foreigners, but Muslims as well. We were also the victims of his terrible crime. But he showed no remorse or regret for his actions, and just sat smiling, and he really broke my heart that day".

The testimony of Ms Isnani and other Muslim witnesses was compelling, not in the way the ample forensic evidence pointed to guilt, but in the wider war of ideas and morals. The testimony reminded Indonesians of all faiths that Amrozi was no freedom fighter. Amrozi's smile and comments were shown for what they were – banal and evil. The smile and the slogans failed to convince the national jury. A sceptical Muslim nation was convinced by the power and weight of the evidence. The Indonesian prosecutors produced a decisive victory in the battle for the hearts and minds of believers and non believers alike. If lack of public protest and the Indonesian national press was any guide, the nation by and large accepted the death penalty as just. The death penalty is a rarity in Indonesia.

Like those who attacked the World Trade Centre in New York on 11 September, 2001, the criminals involved in the Bali bombings had three aims: to terrorize Americans and other westerners; secondly, to polarise the world

and separate Muslim from non Muslim and thirdly, to undermine the Indonesian Government and the secular state. In acting as they did they certainly achieved their first aim. But the detection and trial of Amrozi and others helped thwart them in their other two aims.

An appeal by Amrozi and others to the Indonesian High Court failed. Then, appeals were launched in the new Constitutional Court. As events transpired, the first case to get to the Constitutional Court was an appeal brought by another one of the Bali bombers, Masykur Abdul Kadir.

In a majority of 5-4 decision, the Constitutional Court used its review powers and struck down Law No. 16 of 2003. Law number 16 purported to authorize police and prosecutors to use Indonesia's Anti-Terrorism Law introduced urgently in the tumultuous aftermath of the Bali bombings. The Anti-Terrorism laws (Interim Law Number 1 of 2002 which later became Law No. 15 of 2003 and interim Law Number 1 of 2003, which later became Law No. 16 of 2003) did not exist on 12 October 2002 when bombs blew away the Sari Club and Paddy's Bar in Kuta.

Argument before the Constitutional Court was vigorous and well presented. Again the nation watched the case on TV and the extensive print media covered counsels' arguments thoroughly.

Mr Kadir's case was that Law Number 16 of 2003 conflicted with a new provision in the recently amended Indonesian Constitution. Mr Kadir argued that Article 28(1) of the Constitution gives every Indonesian a constitutional right not to be prosecuted under a retrospective law. Article 28(1) is contained in the new Bill of Rights in the Indonesian Constitution. Mr Kadir sought and obtained, by a majority, a declaration that the *Anti-Terrorism law* was invalid.

It is important to note that of the thirty or so persons convicted in relation to the Bali bombings, many were also convicted and sentenced to death or given heavy gaol terms for the possession of firearms and explosives under the old

Emergency Law No. 12/1951. The more senior and culpable defendants like Muklas and Samudra fell into this category.

The engagement with Indonesia over the Bali bombings has been in contrast to Australia's other responses to the events of 11 September 2001.

September 11 and the 'War Against Terrorism'

Even before the events of 11 September 2001 the political conditions were in place in America and Australia for the promotion of policies that were not respectful of international law and established international conventions. Both America and Australia were at loggerheads with the United Nations. To the consternation of each country's neighbours both the President of the United States and the Prime Minister of Australia espoused the new doctrine of pre-emptive strike.

When a hijacked American Airlines 767 bound for Los Angeles crashed into the north tower of the World Trade Center in New York and then a second United Airlines jet ploughed into the south tower of the Center on 11 September 2001, the western world reacted with alacrity to the menace of international terrorism. Under the leadership of US President George Bush, America and its allies, including Australia, committed themselves to a "war on terrorism".

The horrible events of 11 September 2001 unleashed an immediate and sustained new language of terrorism, rhetoric that allowed no possibility for analysis and operated almost as a new vernacular. It was a vernacular that preyed on and manipulated community fear and relegated reason. President Bush's description of the 11 September events as "terrorist acts against all freedom loving people everywhere in the world" left no room for debate. The language of terrorism provided over-simplified choices: "Either you are with us

or you are with the terrorists”²¹ and “The nations of the world face a “stark choice”: join in our crusade or face the certain prospect of death and destruction”. The discourse on terrorism fed community fear, anger and the argument that anything is justified in countering terrorism. This language of terrorism paved the way for striking back using Western military might. “Operation Infinite Justice” and “Operation Enduring Freedom” followed. But who were we operating against?

The characterisation of the response to the events of 11 September 2001 as a “war on terrorism” has had the effect of taking deeply evil acts outside of existing criminal laws and into the rules of armed conflict. The response of America and its allies has been that of waging a war – the attack on Afghanistan and the change of regime in Iraq. Stripping aside the rhetoric, the military response has in so many ways rejected the complexity of what gave rise to the dreadful bombings and slaughter of innocent people in New York. The war on terror option and the language of terrorism set a construct of good against evil and, in doing so, deny not just causal complexities, but also reason. The conviction of the language and the spectre of the war option has allowed for the more ready acceptance of measures that otherwise would have been regarded with deep concern and resistance. Important freedoms and domestic civil liberties have been potentially outflanked.

What has occurred is the development of a type of western holy war against evil. As Jenny Hocking quotes in her absorbing book “Terror Laws”:

“The notion of a holy war against evil – a war in which normal restraints do not apply – has all but disappeared from international law... But it has had a revival in a special form thanks to the struggle against terrorism. This notion leads, all too easily, to a view that in the struggle between the legitimate authorities on the one hand and terrorists on the other, anything goes: neither ethical nor legal restraints should be

²¹ President GW Bush, “Address to the Joint Session of Congress and the American People” 20 September 2001, <http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html>

allowed to hamper the pursuit and extermination of terrorists".²²

This notion leads to the normal criminal laws being by-passed, and established international norms such as the rights of prisoners of war being relegated or neglected.

The point that concerns Ms Hocking and others is that the evil of terrorism is tackled in a manner that rejects the value and importance of ethical or legal constraint. The appalling degradation of prisoners at Abu Grahیب Prison in Iraq is the tragic, some might say inevitable, result of this approach which relegates the principles and constraints of ordinary criminal laws and international law to the primacy of the pursuit of terrorism.

Tragically, there is evidence that this notion has come to pass. It is evidence that cannot be ignored. Thus, the worlds' most advanced democracy acting unilaterally and with no international or legal sanction and contrary to the Geneva Convention set up a detention centre at Guantanamo Bay whereby detainees could be held indefinitely and outside the protections of the law. This issue is explored more expertly by other participants in this conference and there is no need for me to descend into too much particularity in this paper on this important issue. However, two references, one from distinguished Australian Senior Counsel, Ian Barker QC, and the other from the English Court of Appeal, are apposite in this context.

In the Summer 2003/2004 edition of the NSW Bar News, Ian Barker QC wrote:

"The US Government, followed by our own government, seeks to justify the process by invoking President Bush's *Military Order* of 13 November 2002 by which any foreign national designated by the president as a suspected terrorist, or as aiding terrorists, can potentially be detained, tried, convicted and executed without a public trial or adequate access to

²² J. Hockey "Terror Laws ASIO Counter Terrorism and the Threat to Democracy" p7 quoting A. Roberts "Ethics, Terrorism and Counterterrorism" *"Terrorism and Political Violence"* no. 1 January 1989 948.

counsel, without the presumption of innocence, without proof beyond reasonable doubt, without a judge or jury, without the protection of reasonable rules of evidence and without a right of appeal. Whether or not a person detained is tried, he can be held indefinitely, with no right under the law and customs of war, or the US Constitution, to meet with counsel or be told upon what charges he is held".²³

The second reference I allude to comes from the English Court of Appeal in an application brought by the mother of Feroz Ali Abassi, a British national captured by the United States in Afghanistan.²⁴ In January 2002 he was transferred to Guantanamo Bay in Cuba, a naval base on territory held on a long lease by the United States pursuant to a treaty with Cuba. By the time the appeal application came to be heard before the Court, Mr Abassi had been held captive for eight months without access to a Court or any other tribunal or even to a lawyer. The application was founded on the contention that one of Mr Abassi's fundamental rights, the right of not being arbitrarily detained was being infringed. The mother sought to compel the British Foreign Office to make representations to the United States Government or take other appropriate action to have Mr Abassi dealt with and the merits of his situation addressed.

The Court of Appeal dismissed the mother's appeal on grounds relating to the conduct of relations between foreign sovereign states. But the Court dismissed the application not without registering its deep concerns: After extensive review of English and American texts and authorities dealing with civil liberty and the writ of habeas corpus, at paragraph 64 of its judgment the Court said:

"For these reasons we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognised by both

²³ Ian Barker QC "The Guantanamo Bay Scandal" in Bar News. The Journal of the NSW Bar Association Summer 2003/2004 pages 21-25.

²⁴ The Queen (on Application of Abassi & Another) v Secretary of State for Foreign and Commonwealth Affairs and Another [2002] EWCA Civ 1598 Case No: 2002/0617A; 0617B delivered 6 November 2002 by English Court of Appeal comprising Lord Phillips MR, Waller and Carnwall LJ.

jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'."

At paragraph 107, toward the end of its reasons, the Court further said:

"We have made clear our deep concern that, in apparent contravention of fundamental principles of law, Mr Abassi may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal."

The Court also referred to and endorsed the speech (at paragraph 60) of Lord Atkin (written in one of the darkest periods of the Second World War):

"In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. (*Civersidge v Anderson* [1942] AC 206, 245 at p 244)"

The plight of Mr Abassi and others at Guantanamo Bay highlight the dangers of dealing with terrorism on a war paradigm or without regard for the ethical and legal rules fundamental to a democracy. The timely historical review of important cases in the history of civil liberties in the United States and the United Kingdom and the expressions of the Court's concerns were a contemporary reminder of Albert Einstein's reflection in his old age:

"Democratic institutions and standards are the result of historical developments to an extent not always appreciated in the lands which enjoy them".²⁵

The "war on terrorism" and its war paradigm has led to problematical interventions seeking to strike and eliminate an elusive terrorist enemy. No doubt well motivated, the policy to strike out at this enemy as if he/them were tangible and identifiable warriors or regimes has led many to doubt the efficacy of the "war" approach. In my own case it occurred when, at a friend's home, I

²⁵ "Einstein A Portrait" Pomegranate Art Books, Corte Madera, California, USA 1984 p87)

watched and heard the United States Secretary of State Donald Rumsfeld describe in confident, serious terms the dimensions of this war on terrorism:

“As we know, there are no known knows. There are things we know we know. We also know there are known unknowns. That is to say we know there are some things we do not know. But there are also unknown unknowns, the ones we don't know we don't know.”²⁶

Even given the erosion of public language, I was left with a deep sense of unease. The jury remains out on whether the West's current leaders fully appreciate the nature and the dimensions of the conflict they are dealing with.

This is why the relevant example of Indonesia can be so important.

Conclusion

What Indonesia's history and its response to the bombings inside its national borders since 2000 demonstrate is that the violent extremism and fundamentalism demonstrated in the terrorist bombings can be countered only from within the faith of Islam. No amount of military interventions will roll back the hatred, bigotry and ignorance displayed by Amrozi and his cohorts. Indeed, as we see in Iraq, it can radicalise a community even more.

Indonesia for all its upsets and political troughs since 1945 has been a Muslim country which as adapted to and embraced new and alien forces – democracy is but one of them. In Indonesia commerce, economics, science and technology as well as the political constructs of democracy and human rights are dealt with face to face in authentic discourse within its Muslim population.

There are rich traditions of scholarship in Indonesia and huge moderate mass movements in Indonesian Islam which have embraced new ideas and sought to interpret the Koran in a way compatible with democracy and human rights

and social justice. Indonesia has the tools in its own historical experience to overcome the threat of extreme fundamentalism.

Indonesia's recent history of near dictatorship and the peoples' loss of political power and subjugation has also given Indonesia a passion for democracy of which we in the west need to be reminded. The passion and the good sense of those American founding fathers who wrote *The Federalist* is alive and active in Indonesia today.

The world has been made more complex and potentially unsafe with the emergence of technologies which permit the spread of weapons of mass destruction. Similarly, the world order has had to adjust to the transnational terrorist groups capable of posing a potentially global threat. These developments and the number of failed states or rogue states provide challenges to the rules of international law premised on an assumption of sovereign states having a monopoly on the use of force and control over technology. So no-one should deny the enormity or the difficulties facing world leaders. Nevertheless, lessons can be learnt from history.

Both America and Australia have recent experience in costly, ill considered intervention and War in Vietnam. The practical example of moderate Muslim nations, like Indonesia, in dealing with terrorism comes at a critical time when America and Australia seek to find peace and security. If lessons are not learnt from nations like Indonesia there is a danger of fulfilling by ignorance George Santayana's famous adage:

"Those who forget the lessons of history are bound to relive them".

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²⁶ I could not remember the exact words I heard, but mercifully, they are preserved in Don Watson's "Death Sentence. The Decay of Public Language" at p45.

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