Law Council
OF AUSTRALIA

Comparative Law: Improving International Cooperation in the War on Terror

Speech delivered by Fiona McLeod SC, President, Law Council of Australia, at the National Security Summit, Hyatt Hotel, Canberra.

30 August 2017

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639 • *Email* mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Lessons of history

In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution.

Thomas Jefferson, *Kentucky Resolutions* 1798

First, may I acknowledge the traditional owners of the land we meet on – and pay my respect to their Elders, past and present.

I would also like to take this opportunity to thank Informa for once again hosting this event and for their ongoing support of this conference.

The Law Council is very pleased to be involved in this event, as a key national security conference.

I would like to begin with a note of caution, recalling the words of Thomas Paine.

He that would make his own liberty secure must guard even his enemy from oppression, for if he violates this duty he establishes a precedent that will reach to himself.

Thomas Paine *The Complete Writings* 1945[1]

As we navigate the complex challenges of terrorism and global crime, we must keep an eye on the erosion of rights and liberties lest we go too far in the name of protection.

On 19 January 2010, four masked Mosad agents infiltrated room 230 in the Bustan Rotana hotel in Dubai. There they suffocated, electrocuted and poisoned Hamas operative Mahmoud Al-Mabhouh.[2]

There is no doubt Israel sanctioned the execution. Israeli, Irish, French, German, Australian and British passports, were used to facilitate the attack – and curiously it was this fact, rather than the blatant breach of the sovereignty of the UAE and extra judicial execution which prompted harsh condemnation around the world.[3] In retaliation, Australia expelled an Israeli diplomat.

Israel denied involvement, but claimed its use of force towards Palestinians was an act of pre-emptive and retaliatory self defence.[4]

---

[1] Thomas Paine *The Complete Writings* 1945, edited by Foner 588., recited by Mr Justice Rutlege *In Re Yamashita* 327 US 1, at 41 in closing his dissenting judgment. His Honour also stated: 'It is never too early for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power that due process of law in the trial and punishment of men … whether citizens, aliens, alien enemies or enemy belligerents' at 21-22.

[2] See for example: BBC News, 23 March 2010, *Britain expels Israeli diplomat over Dubai passport row* at" http://news.bbc.co.uk/2/hi/uk_news/8582518.stm and 28 March, 2010, *Dubai's starring role in Israli-linked murder plot* at: http://news.bbc.co.uk/2/hi/middle_east/8588872.stm. Israel has not denied involvement, for example: ABC News, 19 February, 2010 *Dubai '99pc sure' Mossad killed Hamas chief* at http://www.abc.net.au/news/stories/2010/02/19/2824214.htm.

[3] See for example: The Telegraph *British threat to Israel over Dubai Hamas assassination,* Gordon Rayner et al, 18 February, 2010 at http://www.telegraph.co.uk/news/worldnews/middleeast/isreal/725831/British-threat-to-Israel-over-Dubai-Hamas-assassination.html; Sydney Morning Herald 25 February 2010 *Australia warns Israel on Dubai assassination plot* at: http://www.smh.com.au/national/australia-warns-israel-on-dubai-assassination-plot-20100225-p4cj.html.

[4] Statement by Amb Shalev to the UN Security Council, 14 Apr 2010 at: http://mfa.go.il/MFA/Foreign+Relations/Isreal+and+the+UN/Speeches+-+statements/Statement_Amb_Shalev_UN_Security_Council_14-Apr-2010.

The brazen nature of this particular attack outside the territory of both of the disputing parties is indicative of the significant realignment of global attitudes towards the constraints of international law upon the use of force since 9/11 and the emboldening of a far greater peril, namely, the abandonment by the US and its allies of long held convictions and inconvenient principles of humanitarian law.[5]

Or at least, the abandonment of the pretence of observance.

Those principles were shaped in large part at the urging of Australia and the US, and have been defended and developed by both vigorously in the public arena since the end of the Second World War.

Even when US troops were tortured by the Viet Cong, the US urged its allies to treat the enemy with all the protections of the Geneva Conventions. For the most part, with some notable exceptions, the rules were observed.

The events in Dubai, however, and almost a decade of action by the US and its allies in Iraq and Afghanistan, point to radical departures from the principles of humanitarian law that were said to justify military intervention in the first place.

And since that time, many pieces of legislation have passed through our own parliament, with bipartisan support and cursory scrutiny by our parliamentary processes, eroding the protections we once held inviolable.

It must be accepted that the nature of war has changed. And it is undeniable that the nature of the threat has changed.

Hostilities are characterised not by open declaration of war, but by civil disturbance, collapsing states, cross-border and terrorist attacks, humanitarian and environmental crisis and the targeting of civilians.

One cannot underestimate the profound impact of 9/11 upon the human psyche across the globe and our preparedness to accept all manner of counter-terrorism measures with direct erosion of human rights on the basis of the barest whiff of asserted need by intelligence and law enforcement agencies.

Acts of such terrible destruction delivered the moral imperative for unchecked claims for supreme military authority by President Bush and his Administration.

The Bush administration responded with a program of radical domestic legislative amendment alongside plans for military action, in blatant disregard for settled principles of domestic law, an unprecedented assertion of the supremacy of executive power and abrogation of the US constitution in a number of important respects.

The US Constitution has always been understood to restrain political power, particularly during times of war.[6] The Reform program of the Bush Administration saw the 'preventative detention' of hundreds of individuals for intelligence gathering purposes,[7] the

[5] For convenience in this paper I have abbreviated the United States of America, to **US** and the terrorist attacks on the US of 9 September, 2001 to **9/11**. I have adopted spellings of **Al Qaeda** and **Guantanamo** unless directly quoting from material where spelling differs.

[6] *United States v. Robel*, 389 U.S. 258, 264 (1967); *Homebuilding BLDG and Loan Association v. Blaisdell*, 290 U.S. 398, 426 [1934]. *Kentucky Resolution* 1798.

[7] 762 people were arrested and held in preventative detention, none were charged with an offence in connection with 9/11: US Department of Justice, Office of the Inspector General: *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of September 11 Attacks* (April, 2003, released June 2003); David Cole *Enemy Aliens*, New

freezing of assets of all persons deemed by Treasury to have been 'otherwise associated' with anyone deemed a terrorist by the administration, including those providing support to terrorists under duress, in breach of First Amendment rights of association and Fifth and Fourteenth Amendment rights of due process.

It saw a vast and pernicious expansion of surveillance of suspects but also of non-suspect US citizens permitted under the *US Patriot Act*[8] and a burst of intelligence gathering activity by the FBI in breach of even those expanded powers under the *US Patriot Act*, in infringement of Fourth Amendment rights of privacy.[9]

It saw an unabashed defiance of the Geneva Conventions with the indefinite detention of those designated 'enemy combatants' without charge or trial and with limited access to legal representation outside the physical boundaries of the US and an assertion that these combatants were not entitled to the protection as prisoners of war under the Geneva Conventions and protocols as agents of violence not associated with any particular state.

It saw the imposition of sentences of death on inexact proof and coerced testimony; the use of torture in interrogations particularly at Guantánamo and Abu Ghraib detention facilities; and it saw an escalation of the secret rendition of enemy combatants and those discovered on the field of war in breach of Fifth Amendment rights of due process and fundamental guarantees under international law.

The US President did all this in the face of express constitutional protections, ignoring the rulings of invalidity of the Supreme Court asserting Presidential supreme executive power as the commander in chief.

There is not time this afternoon to examine the conspiracy of effort by senior legal office holders including Alberto Gonzalez, Counsel to the President,[10] Assistant Attorney-Generals John Yoo and Jay Bybee and Secretary of Defence Donald Rumsfeld to circumvent the protections of the US constitution and the rule of law.

But the active participation of senior law officers in the erosion of decades of protections should be the most frightening aspect of all that has happened on our watch.

Now it is no small thing to recognise the courage required by those advising an executive hell bent on seizing power to themselves that what they are seeking to do is wrong.

It is no small thing, especially when the public narrative is that we need to be afraid of wickedness in our midst. When the justification for our responses to apparent wickedness is unchallenged with no assessment of necessity or proportionality.

When opposition to executive measures will brand one a sympathiser of evil.

Lone voices of concern in the US found themselves isolated and marginalised. The rule of law was seen to be elastic, capable of stretching and moulding around noble purposes and the urgent demand for retribution.

York, New York Press 2003, 30; Joseph Marguiles *Guantanamo and The Abuse of Presidential Power* Simon & Schuster, 2007, 22.

[8] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act* (USA Patriot Act), 24 October 2001, Pub. L. No. 107-56 (Oct 12, 2001). The stated purpose of the law is to 'deter and punish terrorists acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.'

[9] Human Rights Watch, *Presumption of Guilt, Human Rights Abuses of September 11 Detainees* (August 2002), available at http://hrw.org./reports/2002/us911/aamfbi.pdf; Marguiles above n# 22-23.

[10] Jay Bybee, Memorandum for Alberto Gonzales, Counsel to the President *Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949, 7 February 2002.*

For our purposes, it is enough to note that we here in Australia do not have the benefit of those constitutionally entrenched protections. We must rely instead upon the common law. And upon our High Court, with its reluctance to import norms of international law into our legal lexicon.

International cooperation and a comparative law approach

This is the context of our present discussion.

Terrorists confront us with unprecedented intent and sophistication of means, requiring a corresponding level of cooperation within the bounds of the law.

Law enforcement and intelligence agencies are 'increasingly confronting sophisticated, internationally networked criminals' where 'operational successes rely more and more on their ability to share information with other law enforcement agencies and cooperate in common investigations'.

International cooperation is both a logical and necessary response.

Cooperation assists in addressing and preventing incidents.

It also promotes a comparative law approach, creating the potential for laws and structures to interact positively.

Indeed a comparative law analysis – whether we know it or not – has been critical in defining anti-terror legal discourse.

Nation states, including Australia, continually re-examine their counter-terrorism laws, studying laws in other jurisdictions, and seeking to discover something which may work within their own jurisdictions.

While amendments are made in response to specific terrorist incidents, international law is also a key driver.

After the September 11 attacks, United Nations Security Council Resolution (UNSCR) 1373, of 28 September 2001, called for the promotion of international cooperation and the full domestic implementation of the relevant international conventions relating to terrorism.

This Resolution also required states to establish terrorist acts 'as serious criminal offences in domestic laws and regulations, with commensurably serious punishment'.

Article 25 of the United Nations Charter states that all 'members of the United Nations agree to accept and carry out the decisions of the Security Council'.

Security Council Resolution 1373 is therefore binding on all nation states who have an international law obligation to ensure domestic laws implement the terms of its resolution.

Prior to the adoption of this resolution and the establishment of the Counter-Terrorism Committee, the international community had already promulgated 12 of the current 19 international counter-terrorism legal instruments.[11] However, the rate of adherence to these conventions and protocols by United Nations Member States was low.[12]

[11] https://www.un.org/sc/ctc/resources/international-legal-instruments/
[12] Ibid.

Subsequent to the adoption of Resolution 1373, the rate of adherence increased. Some two-thirds of UN Member States have either ratified or acceded to at least 10 of the 19 instruments, and there is no longer any country that has neither signed nor become a party to at least one of them.[13]

Additional international law-making involved Security Council Resolutions 1624 of 14 September 2005 (Prohibitions of incitement to commit terrorist acts) and 2178 of 24 September 2014 (Addressing the growing issue of foreign fighters).[14]

International laws often act as a catalyst for triggering international cooperation efforts seeking 'to implement strategies promoting cooperation through harmonized legal regulation, such as common legal frameworks and the harmonisation of criminal law and procedure'.[15]

International bodies such as the UN's Counter Terrorism Committee or the Financial Action Task Force also seek to generate international cooperation to agreed set of measures.

International instruments and bodies have in turn created an international discourse whereby regions and nations seek consensual and consolidated solutions to combating terrorism.

However, there is a variety of ways states may choose to implement Security Council resolutions or other treaties imposing counter-terrorism obligations.

For example, the UK's Terrorism Act 2000 and the US Patriot Act 2001 have, at times, been used as a benchmark or template for other countries in developing their own counter-terrorism law. But each have their own approach grounded in their jurisdictional framework.

This is a critical feature of good international law – it allows states to work out the best way to implement measures that will be effective for their own jurisdictions.

This is where international cooperation may be particularly challenging as agencies develop 'compensatory strategies' to create measures to 'compensate for a lack of harmonised legal regulation and to overcome divergent cultures and organizational structures of cooperating agencies'.[16] Compensatory strategies may include for example education, training, forums and common agencies.[17]

Bilateral, multilateral or regional cooperation initiatives are developed seeking harmonisation or greater understanding to promote efficient 'information exchange, joint investigations and cross-border incursions'.[18]

Some important regional initiatives include the Association of Southeast Asian Nations' (ASEAN) overarching counter-terrorism framework to coordinate and secure region endorsement, including the ASEAN Convention on Counter-Terrorism (ACCT).[19] The

[13] Ibid.
[14] Ibid.
[15] Hufnagel, Saskia, *Policing Cooperation Across Borders: Comparative Perspectives on Law*, 2.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Opened for signature 13 January 2007 (entered into force 27 May 2011).

ASEAN Declaration on Terrorism also urged member states 'to continue to intensify their cooperation in combating terrorism'.[20]

The Asia-Pacific Economic Cooperation (APEC) has developed a Statement on Fighting Terrorism and Promoting Growth (2002) and Counter-Terrorism Action plans.

Mutual legal assistance treaties in criminal matters are also important in the terrorism context.

These, and numerous other, efforts help to lay the groundwork for the meaningful exchange of principles and rules to assist in combating terrorism.

While today's topic is on international cooperation, it should be recognised that our Australian agencies also have to navigate domestic cooperation in a federal structure. This is no easy feat.

Legal transplant caution

The differences in state structures, history and culture mean that there is inconsistency in national and regional adaptations of international counter-terrorism law obligations.[21]

Where inconsistency does arise, yes, it is necessary to determine whether there are any gaps available for exploitation.

But inconsistency does not necessarily equate to potential gaps.

There may be many means to achieving the same objective.

Kim Lane Scheppele has noted:

> *The global anti-terror campaign may appear to have broken down the international law barrier to creating a binding legal framework applicable to all states. But that just tossed the problem of global coordination over to the comparatists, who could easily have predicted that the variety of national legal systems would produce hugely varying responses to the same mandates. The world is not yet a place where globally coordinated action will produce a world-wide web of legal interdiction*.[22]

Caution needs to be exercised therefore for policy transfer or 'legal transplants'[23] given that populations differ in cultural history, regulation overlay, forms of democracy, and adherence to the rule of law and human rights.

Of course, international cooperation can generate ideas as to how Australia's counter-terrorism policy should be framed to meet our international law obligations and to ensure the security of Australians.

But while it may be tempting for Australia to transfer counter-terrorism policies from the international stage or particularly from the common law tradition, this should only be done where it fits within Australia's own legal framework, tradition and Constitutional restraint.

---

[20] *Declaration on terrorism by the 8th ASEAN Summit*, adopted 3 November 2002, para 4.
[21] Francesca Galli, Valsamis Mitsilegas & Clive Walker, 'Terrorism investigations and prosecutions in comparative law' *The International Journal of Human Rights* (2016) 20:5, 594.
[22] Kim Lane Scheppele, 'International Standardisation of National Security Law', *Journal of National Security Law & Policy* 4 (2010): 437-53.
[23] Francesca Galli, Valsamis Mitsilegas & Clive Walker, 'Terrorism investigations and prosecutions in comparative law' *The International Journal of Human Rights* (2016) 20:5, 595.

Otherwise there is a risk that measures will be ineffective and costly – both financially and in the sense of undermining confidence in public order.

It should also be recognised that inconsistency can produce a growth in overlapping legal regimes and regulations, which can 'potentially give rise to security concerns of various states and other actors'.[24]

This can impact not only on law enforcement and intelligence agencies seeking to comply with their counterparts but also on private sector actors that operate globally.

Conclusion

To sum up, the array of different legal frameworks to combat terrorism, developed since the September 11 attacks, have invoked international cooperation challenges.

But there are also opportunities to innovate, and a capacity to set a new leading international benchmark which strikes the appropriate balance between protecting both the security and liberties of individuals.

We must bear in mind as we navigate international and domestic arrangements that also means navigating the encroachments on our precious human rights and civil liberties. We should also bear in mind that our responses will engage the attention of those with an eye to guard those precious rights and liberties and bear in mind the words of Thomas Paine ringing in our ears.

Patrick Pantano

Director, Public Affairs

T. 02 6246 3715

E. Patrick.Pantano@lawcouncil.asn.au

[24] Hitoshi Nasu, 'The Expanded Conception of Security and International Law: Challenges to the UN Collective Security System' *Amsterdam Law Forum* (2011) 33.