

NATIONAL AND INTERNATIONAL

SECURITY

an introduction to the issues*

In recent times, the shocking reality of terrorist attacks on the World Trade Centre in New York on 11 September 2001 and further attacks in Bali and Kenya have raised national and international security high on the political agenda in Australia.

The international and national security debate currently underway raises interesting legal and policy issues, such as:

- the function of international institutions and criminal tribunals;
- the role and responsibility of sovereign states under international law;
- the effectiveness and limitations of international law measures;
- the relationship between national and international law;
- the safeguarding of recognised human rights; and
- the effectiveness and limitations of national law measures.

This introduction to the issues seeks to provide a basic understanding of international and national law as is necessary to evaluate the international and national responses to recent and ongoing threats to security. Many of the issues are considered in more detail in other articles in this journal.

Threats to security

Terrorism is not the only threat to international and national security, but certainly the most salient in the current debate and most difficult to define at law. First and foremost, there is no universal agreement to any one definition of terrorism at international law. Instead, various 'terrorist' activities such as hijacking or hostage-taking are covered by different specialised

international conventions. This ad hoc approach is different from the clear definition of genocide or the codification of international understanding of crimes against humanity. Second, the uncertainty is exacerbated by the undeniably political element involved in defin-

ing terrorism and the resulting plenitude of definitions applied under the national laws of various sovereign states. With opinion polarised between the cliché that 'one man's freedom fighter is another man's terrorist' and the contention that terrorism is not justified under any circumstance, there is no consensus as to whether national liberation movements fall within the definition or not. Furthermore, the concepts of state-sponsored terrorism and aggression are used liberally by politicians and the media, but neither is defined at international law.

Security at the international level

International law governs the conduct of states towards each other and is primarily comprised of

treaties (also called conventions), international custom and the general principles of law recognised by civilised nations. Basically, then, international law is made up of what states actually agree on as rules and what states believe and act upon as rules. In accordance

with international law, the international community now has three main legitimate responses to threats to or breaches of international peace and security.

1) *Maintaining or restoring international peace and security through the Security Council of the United Nations (UN).*

Under Chapter VII of the UN Charter, the Security Council determines the existence of threats to the peace, breaches of the peace, or acts of aggression, and may make recommendations or decide on measures to take. The action taken may range from calling on the parties to conform with their international obligations, to economic and diplomatic sanctions, to collective military action under the auspices of the UN. Until the necessary UN-sanctioned measures are taken to maintain international peace and security, the particular state under threat can act

individually or collectively with other states in self-defence.

2) *Criminalising transgressions under international conventions.* At various times, states have also made formal agreements to criminalise certain terrorist activities in international conventions. On signing such a convention, the signatory state takes on the obligation not to undermine the convention. On ratifying or acceding to the convention, the state party undertakes to abide by its full responsibilities once the specified number of state parties is reached for the convention to enter into force.

Under the anti-terrorism conventions, these responsibilities are usually to criminalise the terrorist activity under the state party's national law. For example, the *International Convention for the Suppression of Terrorist Bombings* of 1997, which came into force in 2001, required state parties to establish jurisdiction over and make punishable terrorist bombings, to extradite or punish those accused of committing or aiding in terrorist bombings, and to assist each other in any such prosecutions. Unlike genocide, which any state may prosecute so long as it has enacted the necessary legislation, a state may only prosecute terrorist offences which were perpetrated on its territory, by its national or, possibly, against its national. This approach is, however, only reactive to breaches and not proactive.

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watchfulness

3) *Prosecuting transgressors in the International Criminal Court (ICC)*. Recently a third approach has developed of prosecuting the perpetrators of certain international crimes in the ICC. The ICC was set up by the Rome Statute in 1998 and came into force on 1 July 2002 with Australia as an original state party. However, the ICC is limited in its jurisdiction to crimes which:

- occur after 1 July 2002;
- fit the definitions of genocide, crimes against humanity, war crimes and — should a definition be agreed upon — aggression;
- are perpetrated by a national of or on the territory of a state party; and
- the state party is unwilling or unable genuinely to investigate or prosecute.

As with criminalisation of certain activities under international conventions, this approach is only reactive to breaches of security and not proactive.

Security at the national level

National law governs the conduct of the state towards persons on its territory and between persons on its territory and, in some cases, its own nationals not on its territory. In addressing terrorism, however, sovereign states are not entirely

unrestricted in making national law and this is certainly true of Australia.

Balancing human rights and security concerns. One complicating factor is that national law should not derogate from internationally or nationally recognised

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human rights. At international law, human rights are set out in conventions such as the *International Covenant on Civil and Political Rights*, which includes the rights to freedom of expression and association. In Australian law, we do not have a bill of rights but we have certain rights set out in legislation, others which have been developed through the common law (case law), or which our Constitution has been interpreted to imply, such as the freedom of political communication.

Co-ordinating security in our federal system. Another complicating factor is that the power to enact national law in federations is split between the state and federal governments. In Australia, the Commonwealth can only legislate on the topic of security where the particular matters fall under a con-

stitutional power. This power might, for example, be the defence power or, where Australia is party to an international convention which deals with security issues, the external affairs power. Security in Australia therefore involves agencies both at the federal level, such as the Australian Defence Force (ADF), the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP), and at the state and territorial level, such as the various police services.

Conclusion

The last decade has seen significant developments in international criminal law, including further international conventions on terrorism and the new enforcement mechanism of the International Criminal Court. However, the last decade has also seen global trends in the nature of threats to security change from traditional warfare between states to various manifestations of terrorism, including the proliferation of suicide bombing and biological and cyberterrorism. In this light, it is important to recognise the political, ethical and historical limitations in international and national law to the current legal approaches to security as nations seek to articulate security policy for the future.

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