Winter 2005

Terrorism: The International Response of the Courts (The Institute for Advanced Study Branigin Lecture)

Michael D. Kirby
High Court of Australia, mail@michaelkirby.com.au

Follow this and additional works at: https://www.repository.law.indiana.edu/ijgls

Part of the Courts Commons, and the International Law Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ijgls/vol12/iss1/11
I. A Century of Terrorism

The events of September 11, 2001 in the United States, of October 12, 2002 in Bali, and during 2004 in Madrid, Breslan, and Jakarta, have brought home to the world the challenge that acts of terrorism present when combined with new means of causing destruction and of enlivening the capacity of the global media to cover the suffering.

However, terrorism is not new. The last century was a century of terrorism. It was not always so perceived. Yet from the early days—from the anarchists and communists in 1901 through the colonial unrest that followed, right up to the new century we have entered—that was the reality. The Great War began in 1914 with an act of terrorism. The reality struck home within the British Isles in the Easter Rebellion in Dublin in 1916. Not a year of the century was free from acts of terror.

Mahatma Gandhi deployed a very skillful combination of passive resistance, sporadic violence, and political showmanship, ultimately to lead India, the jewel in the Crown, out of British rule. Mohammed Ali Jinnah did the same with Pakistan, obliging the division of the subcontinent that has since witnessed unrest and terrorist acts as a consequence. Over many decades (most of them in prison on Robben Island), Nelson Mandela led the African National Congress (ANC), modeled on that of India. For decades the ANC was branded a “terrorist” organization. What did these three leaders have in common? All were lawyers.¹ All

¹ See also Justice Michael Kirby, Address at the Opening Plenary Session of the Australian Legal Convention of the Law Council of Australia, Canberra, 21 AUSTL. BAR REV. 253 (2001).

¹ Raymond B. Marcin, Gandhi and Justice, 7 LOGOS: J. CATH. THOUGHT & CULTURE, Summer 2004, at 21. There are many recent suggestions concerning earlier manifestations of terrorism. See Primitive Terrorists, ECONOMIST, July 31–Aug. 6, 2004, at 72 (suggesting that pirates who attacked Spanish barques in the 17th century were “primitive terrorists” in their time).
were gifted communicators. Gandhi and Mandela, at different times, were even prisoners in the same jail, near where the Constitutional Court of South Africa now proudly stands in the center of Johannesburg.

Other “terrorist” movements were led by people who refined their skills on the battlefield—Mao Tse Tung, General Giap, Ho Chi Minh, Colonel Boumé-dienne, Gamel Abdel Nasser. As the old European empires crumbled, terrorists struck at their quarry. They did so against the new autocratic Nazi and Soviet empires and were repaid with fearsome reprisals. They did so against the relatively benign British Empire in Palestine, Kenya, Malaya, Aden, Cyprus, and elsewhere. They attacked the faded glories of France in Algeria and Vietnam. The new empires that took the place of the old were then themselves attacked, as in East Timor, Chechnya, Kosovo, and West Irian. Terrorists mounted separatist campaigns in Northern Ireland and Quebec. Successive coups in Fiji deployed unconstitutional and violent means. Bougainville, the Solomons, and East Timor came uncomfortably close to collapse. Indonesia has repeatedly fallen victim to suicide bombers of Jemaah Islamiah. Russia has suffered repeated violence, much of it apparently caused by Chechnyn separatists.

In my youth, I followed the Cyprus campaign of General Grivas. He was a commander of no more than 250 EOKA terrorists with extreme nationalist sympathies, demanding union with Greece. Those few ultimately drove 28,000 British troops from the island by destroying their political capability to wage war. The fate of the French in Algeria was similar. The same has not proved true in Northern Ireland. Whereas the “colons” in Algeria constituted only 2 percent of the population, the overwhelming majority of the Muslims in that country had a common interest in forcing their increasingly desperate and violent French rulers to leave. Eventually they succeeded. In Northern Ireland, there always were, and still are, substantial numbers in both communities who found continuing connection with the United Kingdom acceptable and terrorism unacceptable.

The story of Uruguay is particularly instructive. Before 1974, it was one of the few longstanding, stable constitutional democracies of Latin America. In 1967 it adopted a new and stronger constitution. That document incorporated

3. See id. at 202–03.
4. Id. at 207.
impeccable rule of law and human rights principles. But then Uruguay suffered a serious economic downturn which threatened its welfare laws. At the same time, it had to grapple with a challenge from a small, determined band of terrorists known as the Tupamaros. The Tupamaros resorted to indiscriminate acts of violence and cruelty that shook Uruguayan society. The citizens, and especially the military, began to demand solutions. Coups had occurred in Brazil in 1964, in the Dominican Republic in 1965, and in Chile in 1973. In Uruguay, in 1974, the military, police, and their supporters struck.

After the coup, one by one, the constitutional guarantees in Uruguay were dismantled. More than 5,000 civilians in a country of fewer than three million inhabitants were incarcerated for very long prison terms for having committed "political offenses." Other detainees were kept incommunicado. For a time habeas corpus was withdrawn. Immunity was granted to officials for an increasingly broad range of illegal acts. The country that had been known as the "Switzerland of Latin America" entered a period of escalating lawlessness. At first, the strong governmental tactics had much support in the general population because of fear of the Tupamaros. However, unaccountable power eventually bred oppression. True, the Tupamaros were defeated. But it took twelve years and an enormous struggle to return Uruguay to constitutionalism. Even then, amnesties were imposed for the military, police, and other officials. A deep scar was left on the body politic.

In Australia's region of the world, we have, until recently, had nothing like the threats of terrorism in Cyprus, Algeria, Northern Ireland, or Uruguay. Naturally, everyone wants to keep it that way. Nevertheless, at the Commonwealth Heads of Government Conference in Sydney in February 1978, a bomb was detonated and three people were killed. The Bali bombing on October 12, 2002 also led to soul-searching over the suggested failure of Australian officials to alert tourists about a terrorist risk. Yet one of the most notable consequences of Bali was a close and highly professional cooperation between the Indonesian police and Army and the Australian Federal Police. This was followed by outstanding forensic support provided for in the trial of those accused of the Bali offenses. That cooperation was revived following attacks by suicide bombers on the Australian Embassy in Jakarta on September 9, 2004.

5. Id. at 223.
After the bombing in Sydney in 1978, the shock led to what one analyst called "[a] synthetic panic which gripped the government (and was exploited by the media) . . . ." Leading officials "accepted without question the assumption that . . . [there] was a real and present [terrorist] threat to Australia." Subsequent events showed that this was wrong. Following the more recent attacks on Bali and Jakarta, there was less panic—just pain and grim resolution.

The 1978 bombing in Australia led to inquiries and new legislation. Justice Robert Hope, the Royal Commissioner, found that there was little evidence that Australia's security organizations had the qualities of mind necessary for what he called the "skilled and subtle task" of intelligence assessment. This was an unsurprising conclusion to those in the know. Earlier inquiries into the special branch files of state police in the Australian states of New South Wales and South Australia—the latter conducted by Justice Michael White—found ludicrous biases in the identification of the supposed threats to security. According to Justice White, all state leaders of the Australian Labor Party automatically became the subjects of index cards as suspected "subversives." As he put it, "[l]ike the Maginot Line all defences against anticipated subversion, real or imagined, were built on one side."

This course of conduct reflected, in the antipodes, preoccupations similar to those of the Federal Bureau of Investigation in the United States, where the ratio of files on left- versus right-wing people and organizations was a hundred to one. The Police Commissioner of South Australia at the time defined subversion as "a deliberate attempt to weaken public confidence in the government." Yet, in a constitutional democracy, this is exactly what opposition parties are supposed to do, do all the time, and are doing in the United States and Australia in the current election campaigns. The criticisms of the Australian intelligence services twenty-five years ago, and more recently, bear comparison with the con-

---

8. Id. at 118 (quoting Sir Robert Mark, the Commissioner of the Australian Federal Police).
11. Mack, supra note 2, at 220 (quoting Hope, supra note 9).
13. Id. at 52.
14. Id.
15. Id. at 107.
temporary criticism of those services by the U.S. Senate Select Committee on Intelligence, and the Butler Inquiry in Britain. In Australia, a report has been given on the same subject by Mr. Philip Flood with roughly similar results. This wheel, it seems, must repeatedly be reinvented.

So if we ask why terrorism succeeded in Cyprus and Algeria, had only limited success in Northern Ireland and Quebec, and failed abysmally in Italy, the United States, and Australia and its region (to the extent that it has occurred there), the answers are complex. However, answers there are. The most important answer is that those societies that have succeeded best against terrorists have refused to play into the terrorists' hands. They have rejected the terrorist paradigm. As Rand Corporation analyst Brian Jenkins has pointed out, normally "[terrorists want a lot of people watching and a lot of people listening, not a lot of people dead."

They want publicity, the last thing that most perpetrators of nonpolitical violence seek. Terrorists create a symbiotic relationship with the modern media. They initiate media events. Kidnappings, hijackings, beheadings, suicide bombs, and a thousand windows shattered in an embassy building display elements of high tension, as does indiscriminate brutality.

The media in free societies must, and will, cover such events. Indeed, the electronic media is now particularly well adapted to broadcasting vivid images, with sights of death and suffering. But keeping such visual horror in perspective is an important clue to defeating terrorists at their game. So is keeping one's sense of balance and priority. So is analyzing the reasons that may lie behind acts of terror, to decide if some of them reflect grievances that need to be addressed.

According to Justice Hope's Australian review in 1979, 1,652 deaths could be attributed to international terrorism between 1968 and 1977. Such losses, appalling though they are (and worse still when they are multiplied as they have lately been), pale into insignificance beside other global causes of death and suffering such as the twenty million dead and many more dying of HIV/AIDS, dead due to the general indifference of humanity. Millions, mostly in developing countries, dying from tobacco use and its consequences. From malaria. From

19. Hope, supra note 9, at 18.
lack of water and food. Millions dead in state-run wars. Millions in refugee camps. Anonymous dead and living. Few vivid images. Boring reality. No media interest. No news. Relatively little political appeal. Victims of compassion fatigue. As the United Nations Secretary-General Kofi Annan told the BBC during the recent conference on AIDS in Bangkok: “We hear a lot about terrorism, and we are warned about weapons of mass destruction because of their potential to kill thousands of people. Here we have an epidemic that is killing millions. We really do need leadership.”

The thesis of this lecture is that the countries that have done best against terrorism are those that have kept their appreciation of priorities, retained a sense of proportion, questioned, and where possible, addressed the causes of terrorism, and adhered steadfastly to constitutionalism and the rule of law.

II. INTERNAL SECURITY AND THE COMMUNISTS

Fifty years before September 11, 2001, the Australian Constitution received what was probably its most severe test in peacetime. The enemy then was viewed as a kind of global terrorist and widely hated. This enemy’s ideas were subversive. Its methods were threatening and its goals alarming. I refer to the communists. The communists did not fly commercial aircraft into buildings in crowded cities. Nor did they use suicide bombers to threaten civilian populations. But they did indoctrinate their young. They had many fanatical adherents. They divided the world. They were sometimes ruthless and murderous. They developed huge stockpiles of nuclear and biological weapons. They had a global network. They opposed our form of society.

Out of fear, governments around the world rushed to introduce legislation to increase powers of surveillance and deprivations of civil rights. In South Africa, the Suppression of Communism Act of 1950 became, before long, the mainstay of the legal regime that underpinned apartheid and imprisoned Nelson Mandela and the ANC “terrorists.” In Malaya, Singapore, and elsewhere, the colonial authorities introduced the Internal Security Acts, which is what the

South African Act was also later called. Sadly, many of those laws remain in place, long after independence, to oppress those of dissident opinions.

In the United States, the Smith Act was passed by Congress to permit the criminal prosecution of members of the Communist Party for teaching and advocating the overthrow of the government.\(^{22}\) The law was challenged in the courts of the United States. The petitioners invoked the First Amendment guarantees of freedom of expression and assembly. However, in *Dennis v. United States*,\(^{23}\) the Supreme Court of the United States, by majority, upheld the Smith Act. It held "there was a sufficient danger to warrant the application of the statute . . . on the merits."\(^{24}\)

Dissenting, Justice Black drew a distinction between governmental action against overt acts designed to overthrow the government and punishing what people thought, wrote, and said.\(^{25}\) The latter activities, he held, were beyond the power of Congress. Also dissenting, Justice Douglas acknowledged the "popular appeal" of the legislation.\(^{26}\) However, he pointed out that the Communist Party was of little consequence and no real threat in the United States:

Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state, which the Communists could carry. Communism in the world scene is no bogeyman; but Communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party.\(^{27}\)

A few months after *Dennis* was decided, a similar challenge came before the High Court of Australia. In Australia, there was no First Amendment. There was no established jurisprudence on guaranteed free expression and assembly. Most of the judges participating in the case had no political experience whatsoever.


\(^{23}\) 341 U.S. 494 (1951) (Vinson, C.J., for the Court).

\(^{24}\) *Id.* at 511.

\(^{25}\) See *id.* at 579.

\(^{26}\) *Id.* at 581.

\(^{27}\) *Id.* at 588.
ever. Most of them were commercial lawyers whose professional lives had been spent wearing black robes and a head adornment of horsehair. An Australian contingent was fighting communist forces in Korea.\(^{28}\) The Australian government had a popular mandate for its law. Most Australians saw communists as the bogeyman—indeed their doctrine of world revolution and the dictatorship of proletariat was widely viewed as a kind of political terrorism.

Chief Justice Latham, like his counterpart in the United States, upheld the validity of the Australian anti-communist law. He quoted Cromwell's warning: "Being comes before well-being."\(^{29}\) He said that his opinion would have been the same if the Parliament had legislated against Nazism or Fascism. However, the rest of the High Court of Australia rejected the law.\(^{30}\) Justice Dixon pointed out that:

> History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. . . . [T]he power to legislate for the protection of an existing form of government ought not to be based on a conception . . . adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend.\(^{31}\)

So far as Justice Dixon was concerned, it was for the courts to ensure that suppression of freedom was only imposed within the law. The Constitution afforded ample powers to deal with overt acts of subversion. Responding to a hated political idea and to the propagation of that idea was not enough for the validity of the law.

Given the chance to vote on a proposal to change the Australian Constitution to confer powers over communists and communism, the people of Australia, on September 22, 1951, refused to alter it. When the issues were explained, they rejected the proposed enlargement of federal powers. I believe that history


\(^{30}\) Australian Communist Party, 83 C.L.R. at 143.

\(^{31}\) Id. at 187–88.
accepts the wisdom of the response in Australia and the error of the overreaction in the United States. 32

Keeping proportion. Adhering to the ways of democracy. Upholding constitutionalism and the rule of law. Even under assault and even for the feared and hated, defending the legal rights of suspects. These are the ways to maintain the support and confidence of the people over the long haul. Judges should not forget these lessons. In the United States, even in dark times, the lessons of Dennis and of Korematsu 33 need to be remembered. 34 Every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause before acting. As Professor Bruce Ackerman has proposed, if the need for emergency powers is clearly established, it may be appropriate to subject them to a sunset clause—so that they expire when the clear and present danger passes. 35 The answer that should normally come back from judges, as in Australia in 1951, is: judicial business as usual; human rights upheld; the rule of law maintained.

III. OLD AND NEW LAWS AGAINST TERRORISTS

Laws specifically targeted at the risks of violence perpetrated by enemies, including foreign enemies, are by no means new. In 1939, the U.K. Parliament enacted the Prevention of Violence (Temporary Provisions) Act of that year to deal with a campaign of the Irish Republican Army in the context of a new European war. 36 That law was ultimately allowed to expire, an event described as “an act of faith without contemporary parallel.” 37


33. Korematsu v. United States, 323 U.S. 214, 219 (1944). In that case, the majority of the Supreme Court upheld as lawful the detention of Japanese-Americans during the Second World War.


37. Id.

However, in many countries, it was the events of September 11, 2001 that triggered the passage of enactments designed to put the authorities into a better legal position to deal with terrorist events and, hopefully, to prevent them. In the United Kingdom, Parliament enacted the Anti-terrorism, Crime and Security Act of 2001. Police powers were enlarged by the Criminal Justice and Police Act of 2001 and later laws.

The proliferation of this legislation has led to fragmentation of the criminal law. It has resulted in a derogation by the United Kingdom under Article 15 of the European Convention on Human Rights and in the adoption of intrusive surveillance measures. One commentator, who acknowledged fully the need for special and extra powers, concluded:

> [T]he alternative to the war model is still an extensive security State, with increasing focus on surveillance and financial scrutiny and approaches indicative of risk management and prevention rather than prosecution. There is no final victory in the war against terrorism. Equally, in an asymmetric conflict, the terrorists cannot destroy western polities, but they may be able to provoke western polities to destroy their own spirits.\(^{39}\)

In Australia, since 2001, several antiterrorism laws have been enacted.\(^{40}\) In fact, seventeen items of legislation restricting civil freedoms have been proposed

---

38. See generally Inquiry into the Legislation on Terrorism, 1996, Cm. 3420 (U.K.).
40. The Australian Security Intelligence Organisation (ASIO) Act 1979 (Austl.) was amended by the ASIO Legislation Amendment Act 2003 (Austl.). Among powers afforded to the ASIO is one of detention under conditions that forbid any public disclosure of the detention for up to 28 days (s 34 VAA) and a two-year prohibition on publishing "operational information." ASIO's
TERRORISM: INTERNATIONAL RESPONSE OF THE COURTS

Most of them have been enacted. In addition, state legislation has been enacted to complement national laws. There is a tendency in this area to give legislation stirring names in the hope of rendering exceptions to civil liberties more palatable and opposition more difficult. In Australia, we have not gone so far as calling such legislation a "Patriot Act." But the media have noticed the Orwellian character of some of the titles, such as the New South Wales Freedom of Information (Terrorism and Criminal Intelligence) Act of 2003, whose object is to restrict access to official information on security grounds.

Most of the Australian legislation, like much elsewhere, has been enacted without significant parliamentary opposition. This caused an editorialist in the Sydney Morning Herald to remark in April 2004:

A Government statement breezily suggests that the law 'protects the community' by restricting people from obtaining security-sensitive information under freedom of information laws. But long experience of the way state and federal governments have perverted the intent of FoI statutes suggests that the agencies will seek to prevent anything they regard as inappropriate from seeing the light of day regardless of whether it may relate to inappropriate behaviour or even budgetary overruns. . . . No one doubts that there exists a deeply troubling threat to orderly society by some fanatical individuals and organisations. But who within the two major Australian political parties is raising his or her voice about the importance of balancing the perceived need for more draconian measures with the equally important preservation of civil liberties? Law enforcement and intelligence agencies habitually

powers of detention have been enlarged while the entitlements of the media and suspects' lawyers curtailed. See Michael Head, Another Threat to Democratic Rights, 29 ALTERNATIVE L.J. 127 (2004). Cf. A. v. Hayden (1984) 156 C.L.R. 532 (stating that the constitutional validity of such laws has not been tested).

41. The most important of these are the Anti-Terrorism Act of 2004 and the Australian Security Intelligence Organisation Legislation Amendment Act of 2003.


want greater powers and licence to manoeuvre with only the minimum of legal constraint or legislative oversight. Liberals of the small "I" variety seem silent within the Liberal Party, apparently bowed and unprepared to break with the prevailing political orthodoxy that too much toughness is not enough. The Labor Left, the traditional campaigner against too much police power, is also strangely quiet.\(^{45}\)

In such an environment, the last line of defense for human rights, fundamental freedoms, and individual liberty tends to be the courts.\(^{46}\) In contemporary democracy, in the matter of antiterrorist legislation, the usual protections and balances may not always be available either in the legislative process or in executive enforcement. Nations that are minor players in the global "war on terrorism" sometimes come under international pressure that they cannot resist to adopt counterpart laws. Necessarily, the courts have only a limited role. Their duty is to give effect to any laws that are constitutionally valid. They must do so according to the language of the legislation and in order to achieve its presumed purpose.\(^{47}\) However, courts are not without lawful and proper means, in some respects, to ensure against an excess of legislative or executive action.

In many countries, such as the United States, where a challenge is brought, courts can evaluate legislative provisions against the standards of a national constitution and bill of rights. Even in countries like Australia that do not have an entrenched charter of rights, courts are not bereft of legal means to uphold fundamental civil rights. In appropriate cases, they may apply settled principles of statutory interpretation that require that laws depriving individuals of long-


standing and basic rights must be clear and without ambiguity. As well, there is an increasing realization within the courts of Commonwealth countries that national laws should ordinarily be construed to conform to the developing international law of human rights.

In recent and not so recent times, in several countries, the judiciary has shown a willingness to ensure the protection of fundamental freedoms, even in the age of antiterrorist legislation. In the balance of this lecture, I will refer to some of these cases.

IV. Terrorism and the European Court of Human Rights

A. The Irish Cases

Before the onset of the most recent coordinated terrorist attacks in Western countries, specific groups in a number of European countries (the United Kingdom, Ireland, West Germany, Italy, and Spain) presented challenges to the legal order that had to be considered in domestic courts and, subsequently, in the European Commission of Human Rights and the European Court of Human Rights at Strasbourg.

The decisions of these bodies, created by the European Convention on Human Rights ("the Convention"), have sought to steer a course between assuring to terrorist suspects, equally with other human beings, the protections stated in the Convention while acknowledging the necessity, on occasion, for national laws to adopt exceptions that take into account the special challenge that terrorists pose to democratic societies and their institutions.


50. Colin Warbrick, The European Convention on Human Rights and the Prevention of Terrorism, 32 INT'L & COMP. L.Q. 82, 118 (1983) (arguing that although there must be a balance between states' rights and individuals' rights to deal with terrorism, it should be left to the states to strike this balance, rather than to the Convention).
Several early cases in the European system related to the antiterrorism legislation of the United Kingdom and the Republic of Ireland. Some of the decisions concerned the extent to which contracting states could lawfully derogate from the rights expressed in the Convention so as to permit them to adopt measures considered necessary to combat what they described as the challenge of terrorism.\textsuperscript{51} Article 15 of the Convention permits such derogations in specified cases. But they are not at large. A country cannot derogate by measures that are inconsistent with other obligations under international law.\textsuperscript{52} And no derogations may be made from specified provisions of the Convention Articles.\textsuperscript{53}

In \textit{Lawless v. Republic of Ireland [No. 3]},\textsuperscript{54} the European Court of Human Rights was concerned with a case in which an Irish citizen had been detained without trial for five months in 1957 on the basis of his alleged activities as a member of the Irish Republican Army (IRA). The derogation and subsequent measures for detention of the prisoner were upheld by the European Court. The Court concluded that the Irish government was justified in declaring a public emergency and acting as it did.\textsuperscript{55}

Between 1957 and 1975, the U.K. government, likewise, gave notice of derogation on six occasions pertaining to the use of extrajudicial powers to deprive suspects of liberty for interrogation, for detention, and as a preventive measure. Without derogation, such measures would have contravened Article 5 of the Convention which guarantees the rights of liberty and security of the person. On a complaint by Ireland,\textsuperscript{56} the European Court found various impermissible breaches among the U.K. measures—most especially in regard to the failure to preserve access to judicial review for persons in detention.\textsuperscript{57} Some of the contraventions were held to be within a permissible derogation. But in regard to in-

\textsuperscript{53} See, e.g., id. art. II (right to life), art. III (prohibition on inhuman treatment and torture), art. IV § 1 (prohibition on slavery and servitude), art. VII (retroactive laws).
\textsuperscript{55} Id. at 32.
\textsuperscript{57} Id. at 87–90.
stances of inhuman treatment, which were found, derogation was not permitted by the Convention. To this extent, the complaint by Ireland was upheld.58

In later cases concerning detention of IRA suspects, the European Court noted that "the growth of terrorism in modern society" necessitated "a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights."59 The Court took notice of "the existence of particularly difficult circumstances in Northern Ireland, notably the threat posed by organised terrorism."60 Nevertheless, it upheld complaints of detainees who asserted that their detention by British authorities for four days and six hours fell "outside the strict constraints as to time permitted by [the Convention]."61 Later, the United Kingdom increased the legal period of detention to seven days which was said to be necessary to maintain the "fight against terrorism." It lodged a formal derogation. Again, the detainees complained to the Court in Strasbourg. However, a majority of the European Court held that, given the circumstances then prevailing in Northern Ireland, it was not appropriate to substitute a judicial opinion for the measures deemed appropriate or expedient by the national government.62 The law was upheld as sufficiently conforming to the Convention, within a lawful derogation.

Further challenges under the Convention concerned the question of who bore the onus of establishing justification of the reasonableness of the measures adopted by a national government to combat terrorism. In an earlier decision, Brogan v. United Kingdom,63 the European Court had effectively held that the onus was on the complainant to demonstrate unreasonableness. However, subsequently in Fox v. United Kingdom, the European Court concluded that "the respondent government ha[s] to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence."64 By a majority of four judges to three, the Court held in the latter case that the United Kingdom had not discharged that onus. It was therefore in breach of Article 5(1) of the Convention. Compensation was ordered.65

58. Id. at 107.
60. Id.
61. Id. at 135–36. The reference is to Art. 5 § 3 of the Convention.
65. Id. at 157.
B. The German Cases

In late 1977, a series of terrorist incidents came to a head in the Federal Republic of Germany. Although Andreas Baader and Ulrike Meinhof had been arrested in 1972 by the national police (and Ms. Meinhof had committed suicide in her cell in 1976), a series of kidnappings and bombings took place between 1975 and 1976 allegedly carried out by members of the Baader-Meinhof Group (or Red Army faction).

In October 1977, a Lufthansa flight was commandeered by members of the Group demanding the release from prison of Mr. Baader and an associate. The hijacking was brought to a violent end. The prisoners, including Andreas Baader, meanwhile were found dead in their cells, allegedly following suicide. The Group thereupon proceeded to kidnap and then execute the President of the German Employers’ Association, a man with minor past associations with the Nazi Party. A number of suspected members of the Group were rounded up.

The legislation used by the German authorities to respond to the foregoing incidents included powers, enacted in 1968, permitting interception of telephone calls and mail of suspects. Proceedings were commenced in the European Court to challenge the German laws against the standards of the Convention.66 Again, the European Court took judicial notice of “the development of terrorism in Europe in recent years.”67 The court held that it was reasonable for democratic states “to undertake the secret surveillance of subversive elements operating within its jurisdiction.”68 In such circumstances, telephonic and mail interception was held compatible with the fundamental rights contained in the Convention.

Earlier, a challenge against the fairness of their trial had been brought by Andreas Baader and his colleagues in Ensslin v. Germany.69 After the deaths of the applicants, the proceedings were maintained by their families.70 They asserted that the prisoners had been subjected to torture and inhuman or degrading treatment or punishment and blamed the death of the prisoners on their conditions. A specific complaint was made about solitary confinement of the prisoners over an extended period.

67. Id. at 232.
68. Id.
70. Id. at 418, 420, 452. See also Mark B. Baker, The Western European Legal Response to Terrorism, 13 Brook. J. Int’l L. 1, 22 (1987).
The European Commission concluded that "[c]omplete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality." It was held that this would be inhuman treatment "which cannot be justified by the requirements of security." Nevertheless, the Commission rejected the complaint that the German suspects had been treated in this way. It also rejected the complaints directed at the conduct of their trial.

C. The Italian Cases

Terrorist actions in Italy also gave rise to proceedings in the European Court that were concerned with the length of detention of terrorist suspects before conviction and the conditions in which convicted terrorists could be held.

The kidnapping and murder of the former Italian Prime Minister, Mr. Aldo Moro, in 1978 constituted the high water mark of terrorist activities in Italy. Responsibility for the death was claimed by the Red Brigade, a political group engaged in numerous terrorist activities since 1972. The Italian legislature increased the powers of police and permitted executive detention orders and other measures. A challenge to such measures was brought in the European Court by Mr. Michele Guzzardi. He was held on remand detention between 1973 and 1979. That detention was even continued despite Mr. Guzzardi's acquittal in 1976 of the terrorist charges. His prolonged incarceration after this acquittal was sustained by an executive order.

By majority, the European Court upheld the complaints. It rejected the attempt of Italy to justify its detention of Mr. Guzzardi on an island off the coast of Sardinia in a dilapidated prison. It found that Mr. Guzzardi was entitled to compensation with regard to such detention. This entitlement was held to have survived notwithstanding his later conviction, on appeal, of the offenses for which he had been initially detained.

Subsequent proceedings upheld unanimously a later complaint by another Italian prisoner concerning the censorship of his correspondence and conditions

---

72. *Id.*
73. *Id.* at 468, 470.
of his detention.\textsuperscript{75} The Court held that the law under which this conduct had occurred allowed “too much latitude” to the state authorities.\textsuperscript{76}

\textit{D. The Spanish Cases}

A number of cases have also been brought from Spain to the European Court. A significant part of the antiterrorism laws enacted in Spain after the death of General Francisco Franco in 1975 was examined by the European Court in \textit{Barberá v. Spain.}\textsuperscript{77} That case concerned alleged members of the Catalan Peoples’ Army. In October 1980 a Catalan businessman had been murdered. The applicants were detained because the crimes were characterized as terrorist acts. The Spanish law in question permitted detention for up to ten days. A judicial order could require that the detainee be kept \textit{incommunicado} during judicial investigation and subject to communication interception. Access to a lawyer was denied during the period of the \textit{incommunicado} holding. Not until three months after they were first detained were the applicants charged with murder, a crime for which they were subsequently convicted and sentenced.

The applicants contended that they had been denied the right to a fair trial guaranteed by Article 6 of the Convention. Specifically, they complained about the withdrawal of their right of access to a lawyer during the early stages of investigation. The European Court concluded that the proceedings did not satisfy the requirements of a fair and public proceeding as contemplated by the Convention.\textsuperscript{78} It found against Spain.

Later Spanish cases in the European Court have concerned the Basque Separatist Movement (ETA). This organization is the most active terrorist group in Western Europe, having been linked to more than eight hundred deaths since 1968.\textsuperscript{79} Following the events of September 11, 2001, the European Union acceded, in December 2001 and June 2003,\textsuperscript{80} to Spain’s request officially to pro-

\textsuperscript{76} Id. at 1775.
\textsuperscript{78} See id. at 392.
scribe ETA as a terrorist organization. Attempts were also made to ban the political wing of ETA (Batasuna) as a political party. It was dissolved by order of Spain's highest civil court. An appeal by the party to the Constitutional Court of Spain was rejected in January 2004.

In November 2003, Batasuna filed a challenge in the European Court complaining about this exclusion from the democratic process. It asserted that it violated the freedom of association expressed in Article 11 of the Convention. The Court has accepted the case but has yet to rule on the issue.

Under the European Court's jurisprudence, the consideration of access of political parties to the electoral process constitutes a fundamental principle in a democracy. Nevertheless, some restrictions may be imposed on the broadcast of live interviews with members of the political wings of terrorist organizations. The challenge by Batasuna will once again require the European Court to walk a difficult path.

The European Court has acknowledged the "margin of appreciation" belonging to the European States when they deal with terrorism. When the Strasbourg Court decides the Batasuna challenge, many will be watching to see whether the "margin of appreciation" is broadened in this context following the events of September 11, 2001 and the March 2004 terrorist attack on civilians in Madrid. Getting the right balance in such matters is by no means easy. However, in Europe, from the Atlantic coast of Ireland to the Pacific coast of Russia, a great multinational court is setting standards that uphold human rights, the rule of law, and democratic government in a way that commands respect. It is important that national judges be aware of this jurisprudence. As the foregoing cases demonstrate, many of the problems concerning legal responses to terrorists and terrorism that have come before national courts in recent years have already been analyzed in well-reasoned and detailed judicial opinions that are available to help the judges of other lands who come later.

V. SOUTH AFRICA AND THE TANZANIAN BOMBING

An early instance of the unwillingness of national courts to bend basic principles in the face of accusations of terrorism was the decision of the Constitu-

83. See Dobson, supra note 79, at 640–41.
tional Court of South Africa in *Mohamed v. President of the Republic of South Africa*.\(^{84}\)

The case concerned Khalfan Mohamed who was wanted by the United States on a number of capital charges relating to the terrorist bombing of the U.S. Embassy in Dar es Salaam, Tanzania, in August 1998. The appellant had been indicted in the United States. A warrant for his arrest was issued by a federal district court. He had entered South Africa unlawfully as an alien. He was detained there by the authorities acting in cooperation with U.S. officials. In his interrogation he was not given the rights provided by South African law. The South African authorities offered him a choice of deportation to Tanzania or the United States. He preferred the latter but applied to the courts for an order that the government of the United States be required to undertake that the death penalty would not be sought, imposed, or carried out on him. That order was refused at first instance and the appellant was deported. This notwithstanding, an application to the Constitutional Court was pursued on his behalf on the footing that the appellant had been denied the protection of South African constitutional law, under which it has been held that capital punishment is contrary to constitutional guarantees.\(^{85}\)

The Constitutional Court of South Africa held that Mr. Mohamed's *deportation* was unlawful and that *extradition*, not deportation, was the applicable law. Such remedy was required, under South African law, to be negotiated with the requesting state under conditions obliging an assurance that the death penalty would not be imposed following a conviction. In this respect, the court below, and the government of South Africa, had failed to uphold a commitment implicit in the Constitution of South Africa. It was held that there had been no waiver by the accused in consenting to deportation to the United States.

Because Mr. Mohamed was, by the time of the Court's orders under trial before a U.S. federal court, it was outside the power of the Constitutional Court by its orders to afford him physical protection. Nevertheless, the decision of the primary judge in South Africa was set aside. A declaration was made that the constitutional rights of the appellant in South Africa had been infringed. The Constitutional Court directed its chief officer, as a matter of urgency, to forward the text of its decision to the U.S. court.\(^{86}\) Following the outcome of the trial in

---

86. *Mohamed*, 2001 (3) SALR 893 at 924 (CC).
the United States, the appellant was convicted. However, he was not sentenced to death. Whether this was due in any way to the South African intervention is unknown. However, the South African court did what it could to uphold the accused's fundamental legal rights notwithstanding the charge of terrorist offenses. The government officials were less respectful of those rights.

In July 2004, a somewhat similar application was before the same South African court. An airplane had departed South Africa for Zimbabwe en route to Equatorial Guinea. South African government officials alerted their counterparts in Harare about certain suspicions. The result was that the plane was searched and a quantity of weapons was found. The alleged mercenaries were arrested and brought before the courts of Zimbabwe. They resisted deportation to Equatorial Guinea on the basis that, if convicted, they would be subject to the death penalty. They also complained about the standards of the Guinean courts.

While this application was pending in Zimbabwe, the applicants also sought relief in the Constitutional Court of South Africa. They alleged that the South African officials had acted without regard to the applicants' rights under the South African Constitution. They also asserted that, in the exercise of its international relations (and in any representations to be made to Zimbabwe and Equatorial Guinea) the South African government was bound, by the language of the Constitution, to take into account the requirements of the Constitution obliging the state to defend, uphold, and protect the constitutional rights of those within its protection.

The decision of the Constitutional Court in this case was delivered in September 2004. It included a limited finding of the South African Government's duty in the case. In the course of argument, the court was reminded of the famous words of Justice Brandeis in *Olmstead v. United States*, cited earlier in *Mohamed*:

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. . . . Government is the potent, omnipresent teacher. For good or ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.

---

These last words have a special resonance in South Africa as the Constitutional Court explained in *Mohamed*:

[W]e saw in the past what happens when the State bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime. The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organised violence. The legitimacy of the constitutional order is undermined rather than reinforced when the State acts unlawfully.\(^8\)

These words were written in May 2001, before the events of September 11th of that year. They remain true today and not only in South Africa.

VI. The United States and Guantánamo Bay

Probably the best known decision in this class of cases is that of the Supreme Court of the United States in *Rasul v. Bush*.\(^9\) That decision was delivered in June 2004. The Court was divided six to three. The opinion of the Court was written by Justice Stevens. Justice Scalia wrote the dissenting opinion, which Chief Justice Rehnquist and Justice Thomas joined.

In the Court opinion, Justice Stevens cited the law authorizing President Bush, after September 11, 2001, to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons.”\(^9\) In reliance on this law, the President established a detention facility at the Naval Base at Guantánamo Bay on land in Cuba leased by the United States from the Republic of Cuba. Two Australians, Mamdouh Habib and David Hicks, who were detained in the facility, together with others, filed petitions in U.S. federal courts for writs of *habeas corpus*. They sought release from custody, access to counsel, freedom from interrogation, and other relief.

---

89. *Id.*
The U.S. district court had dismissed these petitions for want of jurisdiction. It relied on a decision of the U.S. Supreme Court in 1950. That decision held that "[a]liens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus." The Supreme Court reversed the lower court decision, and remanded the case. In effect, Justice Stevens followed what he had earlier written in the *Padilla* case where he said:

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber.... For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.

The decision of the majority of the Supreme Court in *Rasul v. Bush* is reflective of similar notions. It traces the restraint on executive power in the United States to legal and constitutional "fundamentals." It does so through the history of the legal system which the United States shares with other common law countries.

As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown." Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown."

94. *Padilla*, 124 S. Ct. at 2735 (Stevens, J., dissenting) (arguing that habeas corpus should be available).
96. *Id.* (quoting Ex parte Mwenya (1960) 1 Q.B. 241, 303 (Eng. C.A.) (Lord Evershed M.R.)).
The rule of law was upheld by the U.S. judges. Even in the face of executive demands for exemption from court scrutiny because of the suggested exigencies of alleged terrorism, the Supreme Court asserted the availability of judicial supervision and the duty of judges to perform their functions, including on the application of non-citizens. To say the least, the case is an extremely important one.

By rejecting the contention that the executive was not answerable in the courts for the offshore detention by U.S. personnel of alleged terrorists, the Supreme Court of the United States gave an answer to the fear that the U.S. military facility at Guantánamo Bay had become a "legal blackhole." That fear had been expressed not only by civil libertarians, do-gooders, and the usual suspects. It had been expressed by some of the most distinguished lawyers of our tradition, including Lord Steyn,97 Lord of Appeal in Ordinary, Lord Goldsmith QC, Attorney-General for the United Kingdom,98 and Sir Gerard Brennan, past Chief Justice of Australia.99 Lord Goldsmith remarked on the duty of lawyers to influence and guide the response of states and the international community to terrorism:

The stakes could not be higher—loss of life and loss of liberty. The UK government is committed to taking all necessary steps to protect its citizens. I am convinced that this can be done compatibly with upholding the fundamental rights of all, including those accused of committing terrorist acts.100

VII. Recent British Security Decisions

The decision of the U.S. Supreme Court in Rasul was only one of several cases dealing with aspects of the response to terrorism. Such cases are beginning to appear in many jurisdictions. The same determination to uphold the rule of law can be witnessed in Commonwealth countries.

100. Goldsmith, supra note 98, at 11.
On March 18, 2004, the English Court of Appeal delivered its decision in Secretary of State for the Home Department v. M. The judgment of the English Court was given by Lord Chief Justice Woolf. The case was an application by the Home Secretary for leave to appeal against a decision of the Special Immigration Appeals Commission. That body had been established by the U.K. Parliament in response to an earlier decision of the European Court of Human Rights. The latter had criticized the procedures that existed under the legislation then in force to respond to terrorism in Northern Ireland.

The Special Commission is, by law, a superior court of record. Its members, who are appointed by the Lord Chancellor, must be judges who hold, or have held, high judicial office. This provision was in place when the events of September 11, 2001 occurred. Under the Anti-Terrorism, Crime and Security Act of 2001, the British Home Secretary has the power to issue a certificate with respect to a person whose presence in the United Kingdom is deemed a "risk to national security" or who is suspected to be a "terrorist." The Home Secretary, Mr. David Blunkett, duly granted such a certificate in the case of M, a Libyan national present in the United Kingdom. M was taken into custody.

Early in March 2004, the Commission, presided over by Justice Collins, allowed M's appeal against the Home Secretary's certificate. The Home Secretary challenged this action that he saw as judicial interference in an essential political and ministerial judgment. He sought leave to appeal to the Court of Appeal. He complained that the Commission had reversed a decision for which he was accountable in Parliament and to the electorate through the democratic process.

The Court of Appeal rejected the Home Secretary's application. It affirmed the decision of the Commission. It described the role played by the "special advocate" under the arrangements established by the British Parliament for participation of that advocate in the procedures of the Commission in such a case. The aim of the office of "special advocate" is to make the attainment of justice more achievable in a case where certain information cannot be disclosed to the accused or the accused's lawyers because of the suggested interests of national security:

JUSTICE MICHAEL KIRBY

The involvement of a special advocate is intended to reduce (it cannot wholly eliminate) the unfairness which follows from the fact that an appellant will be unaware at least as to part of the case against him. Unlike the appellant's own lawyers, the special advocate is under no duty to inform the appellant of secret information. That is why he can be provided with closed material and attend closed hearings. As this appeal illustrates, a special advocate can play an important role in protecting an appellant's interest before [the Commission]. He can seek . . . information. He can ensure that evidence before [the Commission] is tested on behalf of the appellant. He can object to evidence and other information being unnecessarily kept from the appellant. He can make submissions to [the Commission] as to why the statutory requirements have not been complied with. In other words he can look after the interests of the appellant, in so far as it is possible for this to be done without informing the appellant of the case against him and without taking direct instructions from the appellant.104

Ironically, the alleged terrorist, M, had refused to cooperate with the "special advocate." Clearly, he thought that this was a typical British formality, designed to do no more than to give a veneer of protection where none would in fact be afforded. At the beginning of the proceedings before the Commission, M indicated that he did not wish to take any part in them. However, he affirmed that he was not involved in, nor did he support, acts of terrorism. It was then left to the Commission's own procedures to scrutinize the decision of the Home Secretary to contrary effect.

In the result, the Commission ruled against the Home Secretary. The Court of Appeal, like the Commission, held part of its hearing in closed session. Only part of its reasons were given on the record. The Commission insisted that the suspicion of the Minister had to be a reasonable suspicion. It stated that the Minister had failed to demonstrate error on the part of the Commission. In his concluding remarks, Lord Chief Justice Woolf, for the Court of Appeal, said:

Having read the transcripts, we are impressed by the openness and fairness with which the issues in closed session were dealt . . . .

TERRORISM: INTERNATIONAL RESPONSE OF THE COURTS

We feel the case has additional importance because it does clearly demonstrate that, while the procedures which [the Commission] have to adopt are not ideal, it is possible by using special advocates to ensure that those detained can achieve justice and it is wrong therefore to undervalue the SIAC appeal process. While the need for society to protect itself against acts of terrorism today is self-evident, it remains of the greatest importance that, in a society which upholds the rule of law, if a person is detained as M was detained, that individual should have access to an independent tribunal or court which can adjudicate upon the question of whether the detention is lawful or not. If it is not lawful, then he has to be released.105

VIII. ISRAEL AND THE SECURITY FENCE

At about the same time as the decision of the U.S. Supreme Court was handed down, the Supreme Court of Israel, on May 2, 2004, delivered its decision upon a challenge brought on behalf of Palestinian complainants concerning the "separation fence" or "security fence" being constructed through Palestinian land.106 This "fence" has been justified by the Government of Israel and the Israeli Defense Force as essential to repel the terrorist (specifically suicide) attacks against Israeli civilians and military personnel carried out from adjoining Palestinian lands.

In defense of the security wall, the Israeli authorities pointed to the decline in the number of such attacks following the creation of the barrier. It would not have been entirely surprising if the Supreme Court of Israel had refused to become involved in such a case, ruled the matter not justiciable in a court of law, or

105. Id. at 873.
had said that it had no legal authority to deal with such an issue lying at the heart of the responsibilities of the executive government for the defense of the nation.

However, from bitter experience, the Jewish people learned about the great dangers of legal black holes. In Nazi Germany, the problem was not a lack of law. Most of the actions of the Nazi State in Germany were carried out under detailed laws made by established lawmakers.\(^\text{107}\) The problems for the Jewish people and other victims of the Third Reich arose from the pockets of official activity that fell outside legal superintendence. These, truly, were "black holes."

It is evident that the Supreme Court of Israel was determined to avoid such an absence of judicial supervision. The Court did not question the basic decision of the executive to build the wall. However, applying what common law judges would regard as principles of administrative law or of constitutional proportionality, it upheld the complaints of the excessive way in which the wall had been created in several areas. At the conclusion of his reasons, Justice Aharon Barak, President of the Court, said:

> Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently struck by ruthless terror. We are aware of the killing and destruction wrought by terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security. [In] The Public Committee against Torture in Israel v. The Government of Israel, at 845 [I said]:

\(^{107}\) Such as the Law for the Restoration of the Professional Civil Service 1933 (Germ.) and the Law for the Protection of German Blood and Honor 1935 (Germ.). See discussion in Kartinyeri v. Commonwealth (1998) 195 C.L.R. 337 at 415–17. Note the hortatory titles of these German laws: a practice that has spread.
"We are aware that this decision does make it easier to deal with that reality. This is the destiny of a democracy—she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit and this strength allows her to overcome her difficulties."

That goes for this case as well. Only a Separation Fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law will lead the state to the security so yearned for.108

The Israeli Supreme Court accepted petitions in a number of cases holding that the injury to the petitioners was disproportionate. It ordered relief and costs in favor of those petitioners.

IX. INDONESIA AND THE BALI BOMBING

On July 24, 2004, the world awakened to the news that the Constitutional Court of Indonesia had set aside the conviction imposed on Masykur Abdul Kadir, convicted and sentenced to fifteen years imprisonment for helping Imam Samudra in connection with the bombing in Bali on October 13, 2002. That bombing killed 202 people, including 88 Australians.

The decision of the Indonesian Court was reached by majority, five Justices to four. The problem arose out of the decision of the prosecutor to proceed against the accused not on conventional charges of homicide or the crimes equivalent to arson, conspiracy, or use of explosives, but instead to charge the accused only under a special terrorism law introduced as a regulation six days after the bombings in Bali.109


The amended Indonesian Constitution contains basic principles protecting human rights and fundamental freedoms. One of these principles, reflected in many statements of human rights, is the prohibition on criminal legislation having retroactive effect. As stated in the Convention for the Protection of Human Rights and Fundamental Freedoms, an exception is sometimes allowed to permit trial or punishment "for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations." This statement from the Convention is drawn directly from the statute of the International Court of Justice.

The decision of the Indonesian court was not wholly unexpected among lawyers who were following the Bali trials. During the Bali hearings, the problem of retroactive punishment had been canvassed in the Australian media by experts in Indonesian law. Yet if the Indonesian Constitution explicitly forbids criminal punishment based on laws of retroactive operation, the decision was not legally surprising, subject to any exceptions that may apply.

There would have been many reasons of an emotional and psychological kind for the Indonesian judges to resist the accused Bali bombers' appeal to the prohibition against retroactive punishment. The evidence against the accused, demonstrating their involvement in the bombings, was substantial and often uncontested. The behavior of some of the accused in the presence of grieving relatives was provocative and unrepentant. The pain to the families of victims was intense. The damage to the economy of Bali and Indonesia, caused by the bombings, was large. The affront to the reputation of Indonesia was acute. In this sense, the case was a severe test for judges of the Constitutional Court sworn to uphold the rule of law.

The rule of law is itself one of the fundamental principles which democrats, the world over, defend against terrorists. As Chief Justice Latham once said in


113. In this respect, Mr. Duncan Kerr, MP in Opposition in Australia, supported the assertion by Mr. Tony Abbott MP, in Government, that the defense of Western civilization will fail unless leaders are prepared to uphold its values with the same passion as those who attack them. One of the identified "values" was the rule of law. Kerr, supra note 42, at 134.
an Australian case, it is easy for judges of constitutional courts to accord basic rights to popular majorities. The real test comes when they are asked to accord the same rights to unpopular minorities and individuals. The Indonesian case of Masykur Abdul Kadir was such a test.

Other proceedings may now be brought against Mr. Kadir. Other convicted accused, who have exhausted their rights of appeal, may have no further remedies. Time will tell. But in the long run, the fundamental struggle against terrorism is strengthened, not weakened, by court decisions that insist on strict adherence to the rule of law. This extends to accused who are innocent, or who may be. It also extends to accused who are, or appear to be, guilty. It is in Indonesia's interest, and that of the world, that the courts should enjoy (even in such a case) a reputation for strict adherence to constitutionalism, the rule of law and the protection of human rights and fundamental freedoms. This prolongs the pain of many. But the alternative course is more painful for even more.

In a comment on the Indonesian court's decision, an Australian editorialist said:

The Constitutional Court decision should be seen for what it is—part of a proper legal process in which every person has the right to exhaust all avenues of appeal. This is a positive development for Indonesia. The ensuing legal uncertainty, and the inevitable stress it will cause . . . could and should have been avoided.

X. True Democracy and Real Accountability

Judges in every land can take reassurance from the pattern in the judicial decisions that I have outlined. Of course, I make no comment on their correctness. That is a matter for the courts concerned. All of them are decisions of high judicial officers. But it is essential that strong decisions should be given at every level of the judicial hierarchy of every country—upholding the rule of law even in the age of terrorism.

The assertion of judicial superintendence of the legislature and the executive government is vital for the good health of liberty in every society. This is the


way it must be if we are not to lose our liberties in the struggle against terrorism and its challenge to those same liberties. The rule of law and constitutionalism must be preserved. Moreover, antiterrorist legislation itself must include protections such as those that were seen to work in the U.K. courts in the case of M. Free citizens have a right to look to their legislators for proportionality and protection of the rule of law, not mere rhetoric and a bidding war in extreme measures. Unrestrained, unscrutinised governmental power is the path of tyranny. This is the lesson of the history of the common law. We do well to remember it. Judges must uphold that lesson in their deliberations in court and in their orders.

Throughout the world, there remain autocrats and nations that do not live by the rule of law or respect human rights and fundamental freedoms. In one of the leading newspapers of the Asian region, an editorial commented on the flurry of courtroom activity demonstrating that war has its legal limits, and the rule of law still prevails.\textsuperscript{116} Noting the successive decisions of the Supreme Court of the United States and the Supreme Court of Israel and the appearance in the dock in Baghdad of Saddam Hussein to face charges of war crimes and genocide under conditions which he never granted to his enemies (a public trial and defense by a lawyer of his choice) the editorialist observed:

The rule of law is alive and well. . . . There are those who say democracy is the free election of a government, but that is barely the beginning. The true test of democracy is the accountability of those privileged enough to serve the voters. Almost every nation holds elections. Those that are truly democratic hold the elected officials responsible for carrying out legal policy. In a world where democracy has expanded rapidly in the past decade, this is not a minor detail. Democracy is a legitimate, developmental weapon that can stop and help to defeat terrorism.\textsuperscript{117}

"[L]ike Mr Bush and Mr Sharon, the former dictator also will have to face a court of law and account for his actions."\textsuperscript{118}

\textsuperscript{117} Id.
\textsuperscript{118} Id.