

Consider the derogation clause (article 4) and the ‘margin of appreciation’ under the ICCPR, discuss Australia’s obligations under international law, particularly in light of recent anti-terrorist initiatives.

Introduction

The significant terrorist attacks on September 11th 2001 triggered the development and enactment of certain laws that were designed to place authorities in a more appropriate position to deal with terrorist events and their prevention.¹ It has also transformed the perception of international terrorism. This clearly causes an inevitable tension between responding to terrorist activity and human rights principles. This tension exists on both a domestic and an international level. Closer to home, the Bali bombings of 2002 have further prompted that serious consideration and action be taken in Australia with regards to antiterrorism. Australia has enacted several laws since 2001 that deal with a variety of aspects in relation to terrorism, and several of these have been strongly criticised for breaching basic human rights.² These antiterrorist initiatives include the *Anti-Terrorism Act 2004* (Cth) in particular, the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (Cth) (‘ASIO Bill’). State legislation has also been passed to complement the national laws.³ It is contended that Australia has yet to encounter a situation that would permit derogation under Article 4 of the *United Nations International Covenant on Civil and Political Rights* (‘ICCPR’) and has not duly observed the margin of appreciation. Various aspects of the ASIO Bill are demonstrated to severely violate provisions of international human rights treaties. Furthermore, the laws enacted by Australia, and Australia’s general response to certain terrorist situations are inadequate and require extended appreciation of international human rights principles.

¹ Michael Kirby, ‘Terrorism and the Democratic Response 2004’ (2005) *University of New South Wales Law Journal*, 28(1) at 225(2005) *University of New South Wales Law Journal*, 28(1) at 225.

² Hilary Charlesworth, ‘Human Rights in the wake of Terrorism’ (2003) *Law Society Journal*, 62.

³ Daryl Williams, ‘Reference of Terrorism Powers’ (Press Release, 27 March 2003); and Duncan Kerr, ‘Australia’s Legislative Response to Terrorism’ (2004) 29 *Alternative Law Journal* 131.

Article 4 of the ICCPR – the derogation clause

Certain derogation clauses and specific articles themselves allow for states to derogate powers as much as is required in times of ‘public emergency’. This can be found in such international treaties as Article 15 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (‘ECHR’) and Article 4 of the ICCPR (‘Article 4’). Australia has ratified the first optional protocol of the ICCPR making it party to this important international treaty which establishes the fundamental rights and freedoms that Australia, along with other participating countries, has agreed to protect. Article 4 permits a state to take measures in derogating from their obligations under the present Covenant in times of:

‘public emergency which threatens the life of the nation and the existence of which is officially proclaimed...to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely of the ground of race, colour, sex, language, religion or social origin.’

This indicates that freedom of speech, religious group or movement, or a right to privacy cannot be denied in the name of protecting security. Article 4 section 2 continues by prohibiting derogation from articles 6 – the inherent right to life and no arbitrary deprivation; 7 – no torture or cruel, inhuman or degrading treatment or punishment; 8 (paragraph 1 and 2) – no slavery and servitude; 11 – no imprisonment merely due to inability to fulfil a contractual obligation; 15 – no guilt of a criminal offence which does not constitute a criminal offence under national or international law; 16 – recognition everywhere as a person before the law; and 18 – freedom of thought, conscience and religion. In relation to the matter of counter terrorism actions in Australia, article 4 clarifies that a right to a fair trial must in always be respected, regardless of any emergency.

The most recent General Comment on Article 4 of the ICCPR holds the view that it is to be interpreted restrictively. That is, only in extraordinarily strict circumstances can states derogate from their powers. However, it must be noted that this General Comment was made prior to September 11. The narrow interpretation illustrates that

Article 4 was not considered as of much importance prior to this event. Though circumstances have clearly shifted and this issue is increasingly contentious.

Public emergency

Contrary to the United States of America, United Kingdom and other countries, Australia has had minimal terrorism experience. Prior to September 11, there were no Australian laws that dealt specifically with terrorism besides the Criminal Code Act (1983) Northern Territory Part III Div 2⁴ This indicates Australia's lack of knowledge and personal encounters with the issue, perhaps making it more difficult to realise the true implications of such activity. The Australian Government has not declared a war or claimed to have encountered a public emergency that threatens the life of the nation.⁵ Thus, Australia has not declared any circumstances that may justify derogation under Article 4. Australia has yet to proclaim an existence of a 'public emergency' or notified the Secretary-General of the United Nation of an intention to do so, nor has Australia submitted a notice of derogation. This presents the foundation for certain criticisms that can be put forward in relation to Australia's counter terrorism actions.⁶ It correlates directly with the margin of appreciation with regard to Article 4.

Margin of appreciation

'Margin of appreciation' refers to the international doctrine developed by the European where states are allowed a certain measure of freedom in applying a Convention. It recognises that a Convention may be interpreted differently in different states. It requires the sensitivity and accommodation of a states' specific national customs and traditions. The court addressed the issue in *Handyside v United Kingdom* [1976].⁷ This is particularly relevant in relation to a discussion of Article 4 and its application in Australia as it indicates the permissible restrictions to civil and political rights that may be taken on. Article 4 sets out the margin of appreciation by asserting

⁴ Christopher Michaelsen, 'International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11', *Sydney Law Review*, at 281.

⁵ Helen Watchirs, 'Commonwealth Terrorism Bill 2005' Response to Chief Minister and Attorney-General (2005), 3.

⁶ Christopher Michaelsen, above n 4, 277.

⁷ *Handyside v United Kingdom* [1976] 5493/72 ECHR 5 (7 December 1976).

that the nation state can be released from certain duties 'to the extent strictly required by the exigencies of the situation.' This limited interpretation of Article 4 would deem the margin of appreciation as quite narrow and only under extreme circumstances can these rights be restricted. The proportionality clause can be observed to declare that the rights may be derogated from as much as required, relative the situation of emergency. That is, the objective achieved must outweigh the any adversity encountered through the means of achieving that objective. Therefore, Australia has not encountered a situation that falls within the margin of appreciation of Article 4 for lawful derogation.

Australian antiterrorism initiatives

There is a clear conflict between the intentions of the United Nations to maintain its prevailing purpose of security and peace⁸ with the objective of protecting human rights. This forms the foundation for the tension that envelops complying states and nations and has caused friction that has been prevalent throughout the history of the United Nations.⁹ Australia is not an exception and shares the concern of a harmonious balance between antiterrorist initiatives and international human rights obligations, in addition to defending its nation security interests. The most important antiterrorist initiative that Australia has adopted in recent times is the package of antiterrorism legislation which comprises of five bills. These bills include the *Security Legislation Amendment (Terrorism) Bill 2002* [No. 2] (Cth), *Suppression of the Financing of Terrorism Bill 2002* (Cth), *Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002m* (Cth), *Border Security Legislation Amendment Bill 2002*, *Telecommunications Interception Legislation Amendment Bill 2002* (Cth). The second cornerstone of Australia's recent antiterrorism laws is said to be the ASIO Bill.¹⁰ The primary purpose of this legislation was to authorise the detention of persons for questioning in relation to terrorism offences by ASIO, and also to create new offences in relation to withholding information. This bill was revised and reintroduced to

⁸ See the Preamble and Article 1 of the Charter of the United Nations.

⁹ Alex Conte, 'Terror Meets Tyranny? The Interface Between Counter Terrorism and Human Rights' (2002) *Murdoch University Electronic Journal of Law* 38.

¹⁰ Christopher Michaelsen, above n 4, 282.

Parliament in 2003 with slight amendments and subsequently passed.¹¹ These laws were among the most politically controversial in years as certain aspects are contrary to various human rights principles.

Violations of international human rights law in the ASIO Bill

The ASIO Bill permits the arbitrary detention of non-suspects and startlingly the arbitrary detention of children from the age of 16. It also authorises a warrant to detain and question people for up to 24 hours in eight hour intervals, and up to seven days with restricted access to legal counsel for the purposes of intelligence gathering and collection of information that may be material to a terrorist offence. The person detained does not necessarily have to be suspected of any offence and without charges or even the possibility of charges being laid.¹² The detainee can be held against their will without the opportunity to contact family or friends. This has been compared to the British Government's repressive 'internment policy' in Northern Ireland in the early 1970s where many instances of fabricated evidence, coerced "confessions" and complete 'miscarriages of justice' were uncovered.¹³ The ASIO bill is inconsistent with Australian's obligations under Article 9(1) of the ICCPR which asserts that 'everyone has the right to liberty and security...No one shall be subjected to arbitrary arrest or detention.' This section clearly defies this explicit human right under the ICCPR as the detainee is likely to be held on detention against their will. Furthermore, information gathering as the grounds for detention is dubious and nothing less than arbitrary.

Furthermore, Article 9(3) of the ICCPR requires that anyone 'arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.' Under the ASIO Bill, a person may be subject to a preventative detention order when there is 'reasonable grounds' to suspect that they will engage in a terrorist act or that they are in possession of something that may be connected with

¹¹ Act No. 77, 2003, Attorney-General, Stronger Tools for ASIO to Combat Terrorism (News Release 72/03) (26 June 2003) <<http://nationalecurity.ag.gov.au>>

¹² *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (Cth) (ASIO Bill) s34D.

¹³ Jude McCulloch, as cited in Ray Fulcher, "'Anti-terrorist' Laws Not Justified' *Green Left Weekly*, 2002 #497 February.

the preparation of terrorist act. The person can be detained merely for questioning, even with the absence of a criminal charge or even a suspicion of a criminal charge, provided 'reasonable grounds' for questioning can be established. This provokes deliberation on the standards of proof of criminal law in Australia. It is commonly understood that the standard of proof required to satisfy Australian courts for civil matters is 'on the balance of probabilities', whereas the standard for criminal matters is 'beyond reasonable doubt'. A person who wishes to challenge their imprisonment under a preventative detention order has the onus of proof as to why the order should not be imposed on them. Here, the onus of proof has shifted from that of the prosecution to the defendant which appears contrary to criminal offence regulations in Australia. In addition to this, it contravenes Article 14 of the ICCPR which provides that 'All persons shall be equal before the courts and tribunals, in the determination of any criminal charge against him or of his rights or obligations in law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal.' As evident, not only is the ASIO Bill contradictory to Australian law standards, it also defies various obligations under the ICCPR.

Although, Article 9 and article 14 of the ICCPR are not on the list of rights that cannot be derogated from, it is highlighted that these right can only be derogated from in the event of a 'public emergency'. At the time of drafting the five bills in the antiterrorism package, Australia has neither proclaimed an existence of a 'public emergency' or inform the United Nations about any intention to create the proposed legislation.¹⁴ Therefore, it falls short of the margin of appreciation of Article 4. Furthermore, given that Australia was in a state of threat and 'public emergency', it is unlikely that the detention of non-suspects which is authorised by a non-judicial body for the mere objective of collecting intelligence, would be justifiable under the strict requirements by the pressure and 'exigencies of the situation.' Intelligence gathering is not necessarily an effective means of relieving an urgent situation or one of emergency. Therefore, it is clearly unjustifiable to deprive certain people of their civil and political rights merely in the interests of gathering information.

¹⁴ Christopher Michaelsen, above n 4, 301.

The powers granted in the ASIO Bill to detain children from 16 years of age also contravenes several essential provisions in international human rights law, namely the *Convention on the Rights of the Child* ('CRC') which broadly covers civil, political, social, economic and cultural rights of children. Australia ratified the CRC in 1990, although the ASIO Bill incorporates various contraventions of this treaty. The ASIO Bill allows frisk searches and strip searches of the children detained. This clearly disregards Australia's obligations under Article 36 of the CRC which asserts that the child must be protected 'against all other forms of exploitation prejudicial to any aspects of the child's welfare.' Furthermore, Article 37(a) states that 'no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment' and Article 37(b) further asserts that no child shall be deprived their 'liberty unlawfully or arbitrarily' and 'The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.' The detention of children or the purposes of information gathering is questionable in regards to the specific methods used by the officers. There is also no way to ensure that the child will not be mistreated as the officers in charge of the questioning are undisclosed. In addition to this, the treatment of detainees beyond the time of questioning is also unsettled in relation to living conditions and general treatment. This ill-treatment is also applicable to adult detainees. Article 37(d) provides 'Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.' Doubt can also be raised concerning access to legal representative as there are strict rules on such issues as the role of the choice and role of the legal representative.¹⁵ This is a clear deprivation of the liberty and rights of accessing legal and other appropriate assistance. Each of these specific sections of the CRC can certainly be violated by the exercise of powers of the ASIO Bill. This illustrates the irrationality of the ASIO Bill among other Australian antiterrorist initiatives and highlights Australia's failure to comply with international human rights obligations.

¹⁵ Claire Mahon and Karyn Palmer, 'How the ASIO Bill ravages your civil rights' June 2003, *The Age* < <http://www.theage.com.au/articles/2003/06/22/1056220477057.html>>

Despite the Government assurances that ‘safeguards’ have been put in place to protect certain rights, the safeguards themselves carry inherent flaws in relation to enforcement. The officers are able to use ‘force as is necessary’ under 34(v) of the *ASIO Legislation Amendment Act 2006 (Cth)*. This, as mentioned previously, may unlawfully involve cruel, degrading or inhuman treatment of the detainee. The identity of the officer or officers in charge of the questioning must remain confidential and cannot be revealed. Therefore, any misconduct by the officers will be difficult if not impossible to condemn as it is illegal to reveal the officers’ identity.¹⁶ Among other international human rights treaties, this is also contrary to Article 7 of the ICCPR which is also a right that cannot be derogated from. Hence, given that Australia can legally derogate from various under Article 4, it cannot derogate from this right under any circumstance. Although the ASIO Bill does not imply or expressly state that the detainees will be tortured or treated inhumanly or degradingly, it does not take the necessary steps to prevent this from occurring which is likely when the powers of the ASIO Bill are exercised.

The ASIO bill is clearly an abuse of emergency powers and the beyond the margin of appreciation of Article 4. Those that support these antiterrorist initiatives argue that legislation permitting the government to act promptly and decisively to prevent the prospect of a terrorist act occurring on Australian soil was absolutely necessary.¹⁷ National security is a vital issue that must be preserved, however Australia has attempted to protect the national security at the expense of many fundamental human rights. These specific powers clearly go beyond the obligations under the ICCPR in regards to derogation. As provided by Article 4, the states may not derogate from the whole treaty, though they are legally able to suspend their obligations to comply with specific rights contained in the convention. This signifies that not all the rights prescribed in the ICCPR, and other international treaties with a similar derogation clause, are absolute. However, only in exceptional circumstances can certain rights be derogated from. As established, Australia has not encountered or declared an emergency situation in order for the powers of the ASIO Bill to be utilised. Therefore, to apply this regulation is beyond the margin of appreciation that the ICCPR sets up.

¹⁶ Ibid.

¹⁷ Spencer Zifcak, ‘Anti-terrorism Legislation and the Protection of Human Rights’ *United Nations Document E/CN.4/2002/18*, 27 February 2002, 1.

Australian Bill Of Rights and terrorism in Australia

Australia has no Bill or Charter of Rights, thus no set of human rights standards, where governmental action in relation to terrorism, among other contentious issues, can be measured against. This places Australia in an alarming position with the escalating issue of terrorism unable to be ignored, it requires a set criteria that is readily available for Australian law to measure counter-terrorist processes. These processes require a human rights framework. This view has been highlighted by the Commissioner for Human Rights, Mary Robinson who stated:

“An effective strategy to counter terrorism should use human rights as the unifying framework...The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by state or non-state actors, are never justified no matter what the ends. International human rights and humanitarian law define the boundaries of permissible political and military conduct.”¹⁸

No political, religious or philosophical basis may justify violating the right to life or any of the *jus cogens* of human rights as exemplified by section 2 of Article 4. Therefore, no response to terrorism would justify violating fundamental human rights. Australia along with the rest of the world must take this into consideration. Particularly in light of antiterrorist initiatives, a balance must be established between anti-terrorism laws and fundamental human rights.

This month, Sydney man Belal Sadallah Khazaal was found guilty by Latham J of producing a book knowing that it was linked with the assistance of terrorist activity. Furthermore, Australia played an active role in a United Nations conference where the issue of terrorism was emotionally discussed to mark the approaching anniversary of the September 11 attacks. These recent events indicate Australia's persistence on the fight against terrorism. However, the confronting issue at hand remains finding a balance between countering terrorism while preserving fundamental human rights on an international level. On analysis of the recent anti-terrorism initiatives, Australia has fallen short of its obligations under international human rights laws. Due to the

¹⁸ See United Nations Document E/CN.4/2002/18, 27 February 2002.

limited scope of this assessment, every human rights principle that Australia has neglected cannot be discussed in detail. Nonetheless, the illustration of the ASIO Bill adequately emphasises that there remains a lot to be done in Australia.

Conclusion

It has been suggested that the courts of Commonwealth have increasingly realised that the national laws should, where it is relevant, be construed so as to conform to the developing international law of human rights as illustrated by various decisions.¹⁹ However, from the investigation of certain terrorist initiatives and particularly the ASIO Bill, much improvement is required. A standard of human rights is necessary for guidance, perhaps in the form of a Bill of Rights. With increased human rights awareness and greater acceptance of international law on a judicial level, Australia will harmonise the protection of citizens against terrorism and greater national security with the protection of their fundamental human rights. With an advanced system of Constitutional and Administrative law in Australia, the option of challenging an administrative decision is available to those who are affected such as judicial review. Furthermore, s75 of the Australian Constitution allows appeals to High Court decisions. Nonetheless, these options are rigorous and by the time they are requested, specific human rights unfortunately have already been violated. Article 4 of the ICCPR cannot be used as a defence for the limitations to human rights as Australia has not met the criteria for derogation and falls outside the margin of appreciation. Therefore, Australia has clearly failed to comply with international human rights obligations with regards to antiterrorist initiative and requires greater appreciation of the international treaties that have been ratified.

¹⁹ As cited in Michael Kirby, above n 1, 221: *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 42; *Baker v Canada* (1999) 2 SCR 860-861; *Tavita v Minister of Immigration* (1994) NZLR 257, 266; *Al-Kateb v Godwin* (2004) 78 ALJR 1099, 1110-1115.

Bibliography

Articles, Press Releases, Websites

Act No. 77, 2003, Attorney-General, Stronger Tools for ASIO to Combat Terrorism (News Release 72/03)

<<http://nationalecurity.ag.gov.au>> (2 August 2003)

Charlesworth, Hilary. 'Human Rights in the wake of Terrorism' (2003) *Law Society Journal*, 62.

Conte, Alex 'Terror Meets Tyranny? The Interface Between Counter Terrorism and Human Rights' (2002) *Murdoch University Electronic Journal of Law* 38.

Fulcher, Ray 'Anti-terrorist' Laws Not Justified' (2003) *Green Left Weekly* #497 February.

Kerr, Duncan. 'Australia's Legislative Response to Terrorism' (2004) *Alternative Law Journal* 29, 131.

Kirby, M. 'Terrorism and the Democratic Response 2004,' (2005) *University of New South Wales Law Journal*, 28(1) 221, 225.

Mahon, Claire and Palmer, Karyn. 'How the ASIO Bill ravages your civil rights' June 2003, *The Age*.

<<http://www.theage.com.au/articles/2003/06/22/1056220477057.html>> (2 August 2003)

Michaelsen, Christopher. 'International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11', *Sydney Law Review*, 277, 281, 282, 301.

Watchirs, Helen. 'Commonwealth Terrorism Bill 2005' Response to Chief Minister and Attorney-General (2005), 3

Williams, Daryl. 'Reference of Terrorism Powers' (Press Release, 27 March 2003).

Zifcak, Spencer. 'Anti-terrorism Legislation and the Protection of Human Rights' *United Nations Document* E/CN.4/2002/18, 27 February 2002, 1.

Cases

Al-Kateb v Godwin (2004) 78 ALJR 1099.

Baker v Canada (1999) 2 SCR.

Handyside v United Kingdom (1976) 5493/72 ECHR 5.

Mabo v Queensland (No 2) (1992) 175 CLR 1.

Tavita v Minister of Immigration (1994) NZLR 257.

Legislation and Regulation

Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth) ('ASIO Bill').

Charter of the United Nations.

Convention on the Rights of the Child ('CRC').

European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').

United Nations International Covenant on Civil and Political Rights ('ICCPR')