

functions of the PJCAA do not include scrutiny of the agencies' activities or operations: that is a matter for IGIS. In this regard, the position differs from that pertaining in the United States.

It is perhaps significant that when the Bill for the IS Act was being debated, which was well before 11 September, its contents provoked little controversy. While this probably reflects the bi-partisan approach on this topic of the major political parties, it also suggests that the IS Act establishes an appropriate framework for ASIS and DSD.

In the opinion of the author, the IS Act properly implements key recommendations of the Samuels Inquiry. The legislative framework, particularly the IS Act and the IGIS Act contains appropriate safeguards to ensure that ASIS and DSD behave lawfully.

The AIC together with the Australian Defence Force and the Australian federal, State and Territory police, constitute Australia's defences against terrorism. The events of 11 September will continue to provoke debate as to how these institutions, and the laws they operate under or administer, might be changed to better protect the nation and its citizens.

- 1 Security Treaty between Australia, New Zealand and the United States of America [ANZUS], made at San Francisco, 1 September 1951, Australian Treaty Series 1952 No. 2.
- 2 *Ibid.*, Article IV.
- 3 The term 'terrorism' was apparently first used in relation to 'The reign terror' of the French revolutionaries of 1793-4. Mathew Parris of The London *Times* wrote on 22/10/01 'Terrorist' might be thought a recent expression but goes back at least as far as 1795 when it was used in

England to describe the Government of France unleashing 'the Terror' on its citizens.'

- 4 Law Council Of Australia; 32nd Australian Legal Convention Canberra, 11 October 2001; *Australian Law - After September 11, 2001*; http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_after11sep01.htm
- 5 Press release at see also <http://www.ag.gov.au/ministers/attorney-general/transcripts/asiopowers.html>
- 6 *Ibid.*
- 7 *Ibid.*
- 8 *Ibid.*
- 9 *NSW Crime Commission Act* (NSW) s16.
- 10 *NCA Act* s28.
- 11 Samuels Report pp. 1-2.
- 12 Part 1AB.
- 13 Senate Legal and Constitutional Legislation Committee, Consideration of legislation referred, to the Committee Inquiry into the Provisions of the Cybercrime Bill 2001, August 2001
- 14 s29 of the IS Act.

Enduring law

By N R Cowdery Q.C., Council Member, Human Rights Institute President, International Association of Prosecutors

Nicholas Cowdrey argues the case for the alleged terrorists to be prosecuted in an International Criminal Court.

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On 11 September 2001, attacks were made by individuals (some identified, some not) against property in the United States of America, against persons in the US and against aspects of the fabric of US society. Over 5,000 individuals from over 80 countries were killed.

This was criminal conduct on a large scale and with a significant international dimension.

These actions provoked understandable human responses including (as for many crimes) outrage and a desire for revenge. In response, the government of the US acted against its main suspect, his associates and the government of the country

believed to be sheltering him. A 'war against terrorism' was declared (to be known first as Infinite Justice, then as Enduring Freedom). The US purported to exercise its right to individual or collective self-defence under customary international law and Article 51 of the United Nations Charter and set about building a coalition of nations under various agreements and relationships.

It should be noted, however, that Article 51 allows such measures against armed attack 'until the Security Council has taken measures necessary to maintain international peace and security'.

A few weeks later the UN and its Secretary General were awarded the 2001 Nobel Peace Prize. Kofi Annan wishes the UN to be the centre of a 'global coalition against terrorism'. A useful first step would be for the Security Council to act under Chapter Seven of the UN Charter - by taking such action as may be necessary to restore international peace and security and by establishing an international tribunal to try those identified as the surviving perpetrators of these crimes.

Although the attacks on 11 September had warlike features and consequences, they were criminal actions. A criminal law response is the most appropriate one and the mechanism exists for it to be made. Such a response enables the guilty to be identified, targeted and dealt with under the rule of law. The highly successful Lockerbie trial is an example of what can

be achieved by such means. A warlike response is less discriminating and open to allegations of the pursuit of ulterior objectives, especially in the absence of UN Security Council direction. It allows those against whom the 'war' is waged to trade on the injustices that it will necessarily produce. It also introduces superfluous allegations against the principal wagger of the war - in this case, the world's only superpower.

Domestically, members of the coalition that has been formed have introduced emergency measures to address the continuing threat of terrorism. Care must be taken to ensure that such measures are proportionate to the threat and that they do not extend beyond the term of any clear and present danger.

It is disturbing that the 'war' is being directed by a country that is so opposed to the establishment of the International Criminal Court. The ICC will be created and it will supersede the presently under-resourced tribunals at The Hague. It will have jurisdiction over crimes like these if countries otherwise having jurisdiction are unable or unwilling to try the offenders. It will assist in avoiding wars.