Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia

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Abstract

The case of the Bali Nine directly raises the question of whether it is possible to reconcile Australia's opposition to the death penalty with the recognised desirability of strengthening international police cooperation in response to transnational crime. This paper considers the tension between these two objectives and examines both Australia's existing approach to international police cooperation in possible death penalty cases and whether there is a need for reform in this area. It is argued that the actions of the Australian Federal Police ('AFP') in the Bali Nine case were lawful in terms of existing domestic and international legal obligations and, further, that Australia's current approach strikes an appropriate and practical balance between two competing public policy objectives.

I Introduction

Over the past decade the AFP has actively sought to expand and strengthen cooperation with foreign law enforcement agencies, with international police cooperation being seen as integral to the prevention and investigation of transnational crimes such as terrorism and drug trafficking. This has not been without controversy, with enhanced international police cooperation necessarily involving greater engagement with criminal justice systems that differ in important respects from the Australian system. The most obvious example of this is the controversy surrounding police cooperation with countries that continue to impose the death penalty. While it can be argued that such cooperation is simply a practical necessity given the retention of the death penalty by key regional neighbours such as Indonesia, Singapore and Vietnam, it has also been suggested that it risks undermining Australia's stated commitment to the abolition of the death penalty and the protection of human rights.[1]

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1 See, for example, Amnesty International, *'Bali 9' Death Sentences: Australia's Deadly Double Standard?*, 17 February 2006; NSW Council for Civil Liberties, *AFP Should Stop Aiding and Abetting the Death Penalty* (Media Release, 3/2005) 19 April 2005; Human Rights Law Resource

This paper will consider whether it is possible to reconcile Australia's opposition to the death penalty with the recognised desirability of strengthening police cooperation in response to transnational crime in a region with numerous retentionist neighbours. The case of the Bali Nine directly raises this question, and will be used as a case example through which to examine both the existing approach in Australia to police cooperation in possible death penalty cases[2] and whether there is a need for reform in this area so as to give greater priority to human rights concerns, most notably Australia's opposition to the death penalty. Unlike other articles that have considered the involvement of the AFP in the arrest of the Bali Nine,[3] it will be argued in this paper not only that the actions of the AFP in the Bali Nine case were lawful in terms of existing domestic and international legal obligations but, also, that Australia's current approach strikes an appropriate and practical balance between competing public policy interests, namely Australia's opposition to the death penalty and broader law enforcement objectives.

II The Bali Nine

The Bali Nine—Andrew Chan, Si Yi Chen, Michael Czugaj, Renae Lawrence, Tach Duc Thanh Nguyen, Matthew Norman, Scott Rush, Martin Stephens and Myuran Sukumaran—are Australian citizens who were arrested in Bali on 17 April 2005 in connection with an attempt to smuggle 8.2 kilograms of heroin from Indonesia to Australia. Czugaj, Lawrence, Rush and Stephens were arrested by the Indonesian National Police ('INP') at the Ngurah Rai International Airport before boarding a flight to Sydney and were discovered to have quantities of heroin strapped to each of their bodies. Chan, who is alleged to have been one of the organisers of the attempted importation, was arrested separately at the airport and was not found to be carrying drugs on his person. The remaining four (Chen, Nguyen, Norman and Sukumaran) were arrested in a hotel room at the Melasti Beach Bungalows, with the INP finding almost 350 grams of heroin in a suitcase in the room.[4]

Each member of the Bali Nine was charged with trafficking heroin, an offence that carries the death penalty in Indonesia.[5] The first of the trials commenced on 11 October 2005, with the 'Melasti Three' (as Chen, Nguyen and Norman have become known) being jointly tried and the remaining six defendants facing separate trials[6]. They were all found guilty, with the Denpasar District Court handing down sentences in February 2006. Chan and Sukumaran, who were alleged by the prosecution to be the two ringleaders, were sentenced to death by firing

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Centre, Submission No 17 to Joint Standing Committee on Treaties, *Inquiry into the Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*, 8 February 2007.

2 The term 'death penalty cases' is used in this paper to refer to cases involving charges for which the death penalty is potentially available, whether or not charges have yet been laid.

3 See, for example, Simon Bronnitt, 'Directing Traffic and the Death Penalty: Policing the Borders of Drug Law Enforcement' (2006) 30 *Criminal Law Journal* 270; Ronh Sifris, 'Balancing Abolitionism and Cooperation on the World's Scale: The Case of the Bali Nine' (2007) 35 *Federal Law Review* 81.

4 Cindy Wockner and Madonna King, *Bali 9: The Untold Story* (Harper Collins, 1st ed, 2008).

5 *Law of the Republic of Indonesia No 22 of 1997 on Narcotics*, Arts 78(1)(b) and 82(1)(a).

6 'Two 'Bali Nine' Trials Open Today', *ABC News Online*, 11 October 2005 <http://www.abc.net.au/news/newsitems/200510/s1479084.htm>.

squad. This was the first time the Denpasar District Court had ever imposed the death penalty.[7] The remaining seven defendants were all sentenced to life imprisonment.[8]

Each of the Bali Nine appealed against the District Court sentences. On 26 April 2006 the Bali High Court confirmed the death sentences imposed on Chan and Sukumaran. On 27 April 2006 the Court reduced the sentences of five of the Bali Nine (namely, Chen, Czugaj, Lawrence, Nguyen and Norman) from life to 20 years' imprisonment. On the same day, the life sentences that had been imposed on Rush and Stephens were upheld.[9]

The prosecution then lodged appeals against the reduction in sentences (except in the case of Lawrence), and further appeals were lodged by each of the Bali Nine (again, with the exception of Lawrence). On 6 September 2006 it was confirmed that the Indonesian Supreme Court had upheld the convictions of the 'Melasti Three' and Rush, annulled the lighter sentences granted by the Bali High Court, and imposed the death penalty instead. This was despite the prosecutors in their appeal not seeking the death penalty, and instead recommending that a term of life imprisonment be imposed. The Supreme Court also upheld the death sentences imposed on Sukumaran and Chan, upheld the life sentence imposed on Stephens and reinstated the life sentence that was originally imposed on Czugaj.[10]

Three of the Bali Nine (namely, Chan, Rush and Sukumaran) subsequently lodged a constitutional challenge against the death penalty. This ultimately failed, with the Indonesian Constitutional Court ruling that the death penalty was allowed under Indonesian law for the crime of drug trafficking.[11]

The two avenues that then remained open were for a final appeal to the Supreme Court, which is known as a *Peninjauan Kembali* ('PK') and, if that final appeal was rejected, to seek Presidential Clemency. On 6 March 2008 the PKs brought by the 'Melasti Three' were upheld, with the Supreme Court reducing their death sentences to life imprisonment.[12] Final appeals have also been lodged by Martin Stephens,[13] Scott Rush,[14] Andrew Chan and Myuran Sukumaran.[15] Hearings have been held in each of these cases but, at the time of writing, final verdicts have

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7 Mark Forbes and Neil McMahon, 'Death for Bali Ringleaders', *The Age* (Melbourne) 15 February 2006.

8 'Bali Nine Pair Jailed for Life', *Sydney Morning Herald,* 13 February 2006; Mark Forbes and Neil McMahon, above n 7; AAP 'Final Three Jailed for Life', *Sydney Morning Herald,* 15 February 2006.

9 'Some Bali Nine Jail Terms Cut', *ABC News*, 27 April 2006 <http://www.abc.net.au/news/stories/2006/04/27/1625021.htm>.

10 Mark Forbes, 'Execution Shock for Four of the Bali Nine', *The Age* (Melbourne) 6 September 2006.

11 *Judicial Review of Law Number 22 Year 1997 regarding Narcotics against the 1945 Constitution of the State of the Republic of Indonesia*, Indonesian Constitutional Court Decision No. 2-3/PUU-V/2007, [2007] IDCC 16 (30 October 2007).

12 Mark Forbes, 'Bali Three Spared Death', *The Age* (Melbourne) 6 March 2008.

13 Adam Gartrell and Gde Suardana, 'Court Told to Reject Bali Nine appeal', *The Age* (Melbourne) 3 June 2010.

14 Matt Brown, 'Rush Makes Final Appeal against Death Penalty', *ABC News* (Australia) 26 August 2010.

15 Adam Gartrell, 'Chan and Sukumaran Beg for their Lives', *Sydney Morning Herald,* 21 September 2010.

yet to be delivered by the Supreme Court. Therefore, three of the Bali Nine have been sentenced to death by firing squad,[16] five have been sentenced to life imprisonment[17] and one has been sentenced to 20 years' imprisonment.[18] The three facing the death penalty have all yet to have final decisions made on their PKs, and it is therefore still possible that their death sentences may yet be commuted to a lesser penalty by the Indonesian Supreme Court. Regardless, however, of whether any members of the Bali Nine are ultimately executed, the case has clearly highlighted a possible tension between the recognised desirability of strengthening international police cooperation in response to growing transnational crime and Australia's stated opposition to the death penalty.

Prior to their arrests the Bali Nine had been subject to surveillance by the INP. The surveillance was instituted following a tip-off by the AFP through a letter written to the INP on 8 April 2005 by the AFP Senior Liaison Officer in Bali, Paul Hunniford. The letter indicated that the AFP had received information about a planned attempt to smuggle heroin from Bali to Australia, and provided details such as the names of suspects, possible travel dates, and other specific intelligence concerning the operation. The AFP requested the INP's assistance in the investigation, including a request that the suspects be kept under surveillance. The letter went on to say:

> If identified by INP it is strongly requested that no action is taken until interdiction commences in Australia as early interdiction will hamper the identification of the organisers/recipients in Australia. Also until the possible narcotics are located on the couriers it is possible that the syndicate is still in the organisational phase.[19]

It was, however, also said towards the end of the letter that 'should [the INP] suspect that CHAN and/or the couriers are in possession of drug [sic] at the time of their departure that [the INP] take what action they deem appropriate'.[20] On their face these two statements appear 'hard to reconcile'[21] reflecting, as they do, an ever-present tension in multi-jurisdictional police investigations. On the one hand, in this letter the AFP are attempting to convey to the INP the way that they would prefer the investigation to be conducted, and their broader interest in not only stopping these particular couriers but also identifying the people behind the attempted importation. On the other hand, the letter also recognises the practical reality that the AFP is unable to dictate terms to a foreign police force; once the information had been shared in this case the INP would be 'free to enforce its domestic laws within its territory'.[22]

This was then followed by a second letter to the INP on 12 April 2005 that provided further details of the operation, including that the couriers would return to Australia on two separate flights, with one group scheduled to depart two days before the other. In this second letter the AFP requested that if the first group of couriers was arrested before leaving Bali, then the second group should be searched

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16 Andrew Chan, Scott Rush and Myuran Sukumaran.
17 Si Yi Chen, Michael Czugaj, Tach Duc Thanh Nguyen, Matthew Norman and Martin Stephens.
18 Renae Lawrence.
19 *Rush v Commissioner of Police* (2006) 150 FCR 165 [22] (Finn J).
20 Ibid.
21 Simon Bronnitt, above n 3, 271.
22 Ibid.

shortly afterwards to guard against that group abandoning the operation and escaping the police as a result of the second group becoming suspicious of the arrest and deciding not to attempt to board their later flight with narcotics.[23]

In providing this information to the INP, the AFP has stated that it was acting pursuant to the Memorandum of Understanding between the Government of the Republic of Indonesia and the Government of Australia on Combating Transnational Crime and Developing Police Cooperation ('Memorandum of Understanding').[24] Following the arrests of the Bali Nine, the INP formally requested that the AFP provide them with evidence gathered in Australia 'with the intention the information be used in any potential prosecution initiated with Indonesia against the nine Australians'.[25] In subsequent Ministerial Briefs the AFP confirmed that such requests would be facilitated 'on a police to police basis',[26] that the AFP was continuing to collaborate with the INP in the investigation, and that it was 'providing information to the INP about the Australian-based investigation and related international inquiries'.[27]

III Exporting the Death Penalty?

There has been significant criticism in Australia of the actions of the AFP in providing information to the INP in the Bali Nine case, including claims that the AFP has 'blood on their hands'.[28] It has been suggested that the AFP should have either ensured that the Bali Nine members were arrested in Australia (rather than Indonesia) or sought an undertaking from Indonesian authorities that the death penalty would not be imposed before 'tipping off' the INP.[29] The failure to do either of these things is argued to have undermined Australia's stated opposition to the death penalty, particularly when the involvement of the AFP in the arrest of the Bali Nine is contrasted with the later statement of then Prime Minister John Howard's that, although he would not request clemency while legal appeals

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23 *Rush v Commissioner of Police* (2006) 150 FCR 165 [23] (Finn J); Cindy Wockner and Madonna King, above n 4, 283.

24 *Rush v Commissioner of Police* (2006) 150 FCR 165 [25], [43] (Finn J). Note that the *Memorandum of Understanding* was not produced on the Federal Court application and is not publicly available.

25 AFP, *Ministerial Brief: Update on the Arrest of the Nine Australians in Bali*, 3 June 2005 <http://www.nswccl.org.au/docs/pdf/dbfoi2.pdf>.

26 'Police to Police Assistance Refers to Assistance that the AFP or State and Territory Police Services give their Counterparts in Foreign Police Services': Attorney-General's Department, *A Better Mutual Assistance System: A Review of Australia's Mutual Assistance Law and Practice* (2006), 33. In this context, the AFP is indicating that requests for information in this case would be dealt with directly between the AFP and INP without, for example, escalating such requests beyond the individual agencies to the more formal government to government level.

27 AFP, *Ministerial Brief: Update on the Arrest of Nine Australians in Bali*, 3 June 2005. See also AFP, *Ministerial Brief: Update on the Arrest of Nine Australians in Bali*, 19 May 2005; AFP, *Ministerial Brief: Arrest of Nine Australians in Bali–Death Penalty Issues*, 5 May 2005 <http://www.nswccl.org.au/docs/pdg/dbfoi2.pdf>.

28 ABC, 'Road to Kerobokan', *Australian Story,* 13 February 2006 (Bob Myers) <http://www.abc.net.au/austory/content/2006/s1569903.htm>.

29 See, for example, ABC, 'AFP Under Renewed Scrutiny over Bali Nine', *Lateline*, 6 September 2006 (John Stewart); ABC Radio National, 'UN Advisor urges Australia to Take Strong Stance against Death Penalty', *AM Transcript*, 25 January 2005 (Daniel Hoare); NSW Council for Civil Liberties (NSWCCL) *Busted: AFP's 'Anything Goes' Policy on Death Penalty* (Media Release 4/2005, 23 August 2005).

were still ongoing, he would appeal to the Indonesian President for clemency if any of the Bali Nine were sentenced to death and all other avenues of appeal were exhausted 'because we don't believe in the death penalty'.[30]

The Bali Nine is not an isolated example. Questions have also been raised about the AFP's involvement in a number of other death penalty cases in recent years. For example, Australian citizen Huu Trinh, who was originally sentenced to death by firing squad in Vietnam for heroin trafficking,[31] was arrested following cooperation between Australian and Vietnamese authorities.[32] Another example is 'Operation Alliance', which is the investigation into the Bali Bombings that occurred on 12 October 2002. The AFP and INP formally established a joint operation to investigate the Bali Bombings[33] on the same day that Indonesia's then President Megawati Sukarnoputri issued anti-terrorism laws[34] allowing the death penalty to be imposed for terrorism offences.[35] These laws were to apply retrospectively to the Bali Bombings.[36] Polling showed considerable support within Australia for the Bali bombers being sentenced to death,[37] and both the Prime Minister, John Howard, and Opposition Leader, Kevin Rudd, publicly stated during the 2007 federal election campaign that Australia would not attempt to intervene diplomatically to prevent the death penalty being carried out by Indonesian

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30 'PM Rejects Clemency Call', *The Age* (Melbourne) 8 September 2006.

31 The sentence was subsequently commuted to life on 17 November 2006.

32 Tom Hyland, 'AFP under Fire over Vietnam Drug Arrest', *Sydney Morning Herald,* 19 February 2006; Tom Hyland, 'Man Faces Death after AFP Drug Help', *The Age* (Melbourne) 19 February 2006.

33 See the *Joint Technical Arrangement between the Indonesian National Police and the Australian Federal Police on Joint Operation in Dealing with the Bomb Blast Case in Bali on 12th October 2002*, signed 18 October 2002.

34 The interim laws were issued by the President under the power granted by Article 22 of the Indonesian Constitution, which permits the President to issue *Peraturan Pemerintah sebagai Pengganti Undang-undang* [Government Regulations in Lieu of Law]. These interim laws have the equivalent legal status of statutes, however they must be approved by the Indonesian Legislative Assembly at its next sitting in order to remain valid. For further discussion regarding these anti-terrorism laws see Simon Butt, 'Anti-Terrorism Law and Criminal Process in Indonesia', *Islam, Syari'ah and Governance Background Paper Series*, ARC Federation Fellowship, University of Melbourne (2008); Simon Butt and David Hansell, 'The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/2003' (2004) 6 *Australian Journal of Asian Law* 176.

35 See *Interim Law No. 1 of 2002 on the Eradication of the Crime of Terrorism* (Indonesia). This was subsequently adopted by the Indonesian Legislative Assembly on 4 April 2003 in the form of *Law No. 15 of 2003 on the Stipulation of Interim Law No. 1 of 2002 on the Eradication of the Crime of Terrorism as a Statute* (Indonesia).

36 See *Interim Law No. 2 of 2002 on the Application of Interim Law No. 1 of 2002 on the Eradication of the Crime of Terrorism to the Bali Bombings of 12 October 2002* (Indonesia). This was subsequently adopted by the Indonesian Legislative Assembly as *Law No 16 of 2003 on the Stipulation of Interim Law No 2 of 2002 on the Application of Interim Law No 1 of 2002 on the Eradication of the Crime of Terrorism in the Bali Bombings on 12 October 2002 as a Statute* (Indonesia) ('*Law No. 16 of 2003*'), although it should be noted that the Indonesian Constitutional Court subsequently declared *Law No. 16 of 2003* to be invalid on the basis of the constitutional prohibition on prosecutions using retrospective laws: see *The Masykur Abdul Kadir Case,* (Unreported, Decision No 013/PUU-I/2003, Indonesian Constitutional Court) [Simon Butt and David Hansell, Trans, The *Masykur Abdul Kadir* Case: Indonesian Constitutional Court decision No 013/PUU-I/2003' (2004) 6(2) Australian Journal of Asian Law 1].

37 A Newspoll conducted for *The Australian* newspaper in August 2003 showed that 57 per cent of survey participants were personally in favour of the death penalty being carried out for those found guilty of the Bali bombings <http://www.newspoll.com.au/image_uploads/cgi-lib.28293.1.0803_Death_Penalty_poll.pdf>.

authorities.[38] Although the case is obviously distinguishable from that of the Bali Nine (most significantly in that the Bali Bombers were not Australian citizens), the polling and public statements do highlight the fact that the question of police cooperation in death penalty cases is a complex one and is acutely sensitive to the particular facts of each individual case, political factors and perceptions of public opinion. The role played by the AFP in Operation Alliance was not, however, entirely immune from criticism. For example, Tracey Benson of the Australian Coalition against the Death Penalty publicly stated that it was 'regretful (sic) that Australian government agencies may have had some impact on the trial of those responsible for the Bali bombing'.[39]

Although the death penalty was part of the early Australian criminal justice system its use was gradually restricted in the 20th century[40] and it has now been abolished in every Australian State and Territory.[41] At the Commonwealth level, the death penalty is prohibited under the *Death Penalty Abolition Act 1973* (Cth). This legislation was recently amended to extend the prohibition on the death penalty to State laws, with the amendment intended to 'ensure the death penalty cannot be introduced anywhere in Australia'.[42] Australia's opposition to the death penalty is also reflected at the international level with Australia having signed and ratified both the *International Covenant on Civil and Political Rights* (**'***ICCPR*')[43] and the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty* ('*Second Optional Protocol*').[44] More recently, Australia has voted in favour of United Nations General Assembly resolutions calling for a global moratorium on the use of the

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38 Dan Harrison, 'PM Slams Rudd over Death Penalty', *The Age* (Melbourne) 9 October 2007; Dennis Shanahan, 'Let Bali Bombers Die, says Kevin Rudd', *The Australian* (Australia) 9 October 2007.

39 Attorney-General's Department (Cth), *Bali Bombing—Australia's Assistance with Investigations into Death Penalty Cases*, 26 February 2003, 35 <http://www.nswccl.org.au/docs/pdf/dpfoi.pdf>.

40 This can be seen by comparing the 114 people executed in Australia since 1901 with the estimated 80 people executed each year in the 19th century. See Ivan Potas and John Walker (Australian Institute of Criminology), *Capital Punishment*, *Trends and Issues in Crime and Criminal Justice*, Vol 3, February 1987, 1.

41 Formal abolition occurred in the various jurisdictions between 1922 and 1985, with the last execution being carried out in 1967. See *Criminal Code Amendment Act 1922* (Qld); *Criminal Code Act 1968* (Tas); *Crimes (Capital Offences) Act 1975* (Vic); *Statutes Amendment (Capital Punishment Abolition) Act 1976* (SA); *Acts Amendment (Abolition of Capital Punishment) Act 1984* (WA); *Crimes (Amendment) Act 1955* (NSW), *Crimes (Death Penalty Abolition) Amendment Act 1985* (NSW); *Miscellaneous Acts (Death Penalty Abolition) Amendment Act 1985* (NSW).

42 Explanatory Memorandum, Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009 (Cth)

43 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force generally 23 March 1976 and for Australia 13 August 1980). Article 6(1) states:
Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

44 Opened for signature 15 December 1989, 1642 UNTS 85 (entered into force 11 July 1991). Article 1 states:

> No one within the jurisdiction of a State Party to the present Protocol shall be executed.
> Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

death penalty,[45] and it has been declared on numerous occasions that Australia is 'universally and consistently opposed to capital punishment'.[46]

It has been argued that there is 'a basic inconsistency in the Australian position', in that Australia's stated opposition to the death penalty is undermined by police cooperation arrangements 'which are feeding information into a process leading to death penalties'.[47] To this end, it has been suggested that the Bali Nine case 'represents a paradigm example of the failure of Australia's present intelligence sharing arrangements to protect the fundamental rights of Australian citizens'.[48]

IV The Importance of International Police Cooperation

In response to criticism surrounding the AFP's involvement in the Bali Nine case, Federal Agent Mike Phelan, then National Manager of the AFP Border and International Network, has claimed that the AFP 'have no regrets in the way which we've handled this particular case' and that 'should the same set of circumstances present themselves again with another syndicate or other people, we would do exactly the same thing'.[49] In relation to the specific facts of the case the then AFP Commissioner Mick Keelty has argued that the AFP did not have sufficient evidence to lay any criminal charges before the Bali Nine left Australia and that the AFP could not dictate to the INP as to how it should run operations in Indonesia or the timing or location of arrests. Keelty also claimed that it was 'preposterous' to suggest that the AFP could have let Australians travel to Indonesia and commit crimes in that jurisdiction but not say anything to the INP and instead wait for the members of Bali Nine to return to Australia before arresting them.[50] Federal Agent Mike Phelan emphasised that this particular operation was a 'successful operation' in that the INP 'ended up seizing eight kilograms of heroin and got that off the street' and that the AFP 'believe we've actually closed down the whole syndicate'.[51]

More generally, the AFP have defended this operation within the broader context of the war on drugs, the benefits of the AFP policy of forward engagement, and the need for international cooperation between law enforcement agencies in the fight against transnational crimes such as drug trafficking, terrorism, people smuggling and child sex tourism. The AFP Commissioner Keelty has noted that many of the countries the AFP share information with retain the death penalty and

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45 For example, *Moratorium on the use of the Death Penalty* GA Res 62/149, 62nd Res, 76th plen mtg, UN Doc A/62/PV.76 (18 December 2007).

46 For example, Alexander Downer, Minister for Foreign Affairs, 'Vietnam: Death Penalty', (Media Release, FA 120, 28 August 2002); Alexander Downer, Minister for Foreign Affairs, 'Nigerian Death Sentence is Inhumane', (Media Release, FA 114, 22 August 2002); Alexander Downer, Minister for Foreign Affairs, 'Death Sentence Upheld on Le My Linh', (Media Release, FA 114, 23 December 2002); Alexander Downer, Minister for Foreign Affairs, 'Execution in Iran', (Media Release, FA 101, 25 July 1998).

47 Tim Goodwin (Amnesty International), quoted in: Tom Hyland, above n 32.

48 Human Rights Law Resource Centre, above n 1, 7.

49 *Australian Story*, 'Interview with Mike Phelan, AFP', 13 February 2006 (Mike Phelan) <http://www.abc.net.au/austory/content/2006/s1568894.htm>.

50 Ian Munro, 'Keelty says Bali Nine Critics 'Preposterous'', *The Age* (Melbourne) 18 February 2006.

51 *Australian Story*, above n 49.

that '[f]or the AFP not to deal with them because they have the death penalty would be effectively to shut down our international operations'.[52]

Section 8(1)(bf) of the *Australian Federal Police Act 1979* (Cth) ('*AFP Act*') expressly provides that the functions of the AFP extend to providing assistance to, or cooperating with, foreign law enforcement, intelligence and security agencies. The importance attached to international police cooperation can be seen in the Ministerial Direction issued on 31 August 2004, which required the AFP 'to be active in pursuing opportunities for cooperation and strategic alliances with ... international partners in law enforcement, to support effective action against multi-jurisdictional crime'.[53] The same Ministerial Direction required the AFP to give 'special emphasis' to, *inter alia*, 'preventing, countering and investigating transnational and multi-jurisdictional crimes, illicit drug trafficking ...'.[54]

The AFP Commissioner Keelty has pointed to successful multinational operations such as the 2005 closure of an amphetamine factory in Jakarta after the transfer of intelligence between the AFP and INP, and the 2004 seizure of 1.5 tonnes of pseudoephedrine following cooperation with the Philippine National Police as examples highlighting the importance of international police cooperation in the fight against drugs.[55] This cooperation is central to the AFP policy of forward engagement, or 'policing at the source', which aims actively to target illegal drugs at their source of origin and to interdict these drugs offshore, rather than wait for the drugs to arrive in Australia. The *2008 World Drug Report* produced by the United Nations Office on Drugs and Crime observes that while Australia used to have one of the highest heroin prevalence rates among industrialised countries:

> This changed in the early years of the new millennium. Following a major heroin shortage in 2001, engineered by the authorities through the dismantling of some major trafficking networks, purity levels fell while heroin prices rose strongly, squeezing large sections of heroin users out of the market. The number of drug related deaths declined substantially during this period.[56]

The AFP sees cooperation with regional law enforcement agencies as 'a fundamental element' in this fight against drugs, and note that AFP operations and seizures in recent years have contributed to a significant reduction in the number of heroin related deaths in Australia[57] and an estimated $3.1 billion being saved due to a decrease in the levels of drug-related harm in the five years to June 2004.[58]

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52 Keith Moor, 'Police Right Over Bali Nine Tip-Off', *Herald Sun* (Melbourne) 24 January 2006.

53 Under section 37(4) of the *AFP Act*, the Commissioner of Police is required to comply with a written Ministerial Direction.

54 *Rush v Commissioner of Police* (2006) 150 FCR 165, [34] (Finn J).

55 Senate Legal and Constitutional Legislation Committee, *Official Committee Hansard (Supplementary Budget Estimates)*, 31 October 2005, 57; Laurie Oakes, 'Interview: Mick Keelty', *Sunday*, 24 April 2005.

56 United Nations Office on Drugs and Crime, *2008 World Drug Report* (June 2008), 60.

57 Specifically, the number of people between the ages of 16 and 35 who died in Australia of heroin related causes was reduced from more than 1,100 people in 2000 to an estimated 350 people in 2004: AFP, 'AFP contests assertions in preliminary discovery application' (Media Statement, 8 October 2005).

58 Ibid. This is calculated according to the AFP Drug Harm Index, which 'represents the dollar value of harm that would have ensued had the seized drugs reached the community'. This calculation

Australia is not alone in emphasising the need for strengthened cooperation with other countries' national law enforcement and intelligence agencies to respond to the threat posed by drug trafficking and other transnational crimes. For example, the United Nations Secretary-General's High-Level Panel on Threats, Challenges and Change identified transnational organised crime as one of 'the six clusters of threats with which the world must be concerned now and in the decades ahead'.[59] Drug trafficking specifically was identified as one of the 'core activities' of organised criminal groups, and it was suggested that states and international organisations have reacted too slowly to the threat of organised crime and corruption with the observation that:

> Three basic impediments stand in the way of more effective international responses: insufficient cooperation among States, weak coordination among international agencies and inadequate compliance by many States.[60]

There are now a number of international treaties to which Australia is a party that require states to cooperate with each other in the fight against transnational crime, including the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*[61] and the *United Nations Convention Against Transnational Organized Crime*.[62] Australia has also signed law enforcement cooperation agreements with a number of specific countries. An example is the *Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*.[63] This agreement reinforces the commitment of both Australia and Indonesia to strengthening cooperation between relevant institutions and agencies in preventing and combating criminal activity, and expressly emphasises crimes related to 'illicit trafficking and narcotic drugs and psychotropic substances and its precursors' [64] as an area of focus.

V Balancing Competing Public Interests

Cases such as that involving the Bali Nine highlight the potential tension between Australia's opposition to the death penalty and cooperation with retentionist countries in criminal investigations and prosecutions, and squarely raise the question of whether Australian law enforcement agencies should be able to cooperate with, or assist, overseas law enforcement agencies in cases that may ultimately result in the death penalty being applied. In considering this question both Australia's opposition to the death penalty and the importance of international police cooperation in combating transnational crime are factors that must be considered. This need to balance competing public interests was acknowledged by Justice Finn in *Rush v Commissioner of Police*:

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includes costs relating to 'health care, road accidents, crime, loss of life, pain and suffering'. For further information about the AFP Drug Harm Index see AFP, *Research Note 5: AFP Drug Harm Index* (March 2004).

59 Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility* [2004] UN Doc A/59/565, 2.

60 Ibid, 53 [167].

61 Opened for signature 20 December, 1988 UNTS 164 (entered into force 11 November 1990).

62 Opened for signature 12 December, 2000 UNTS 39574 (entered into force 29 September 2003).

63 Opened for signature 13 November 2006, [2008] ATS 3 (entered into force on 7 February 2008) ('*Lombok Treaty*').

64 *Lombok Treaty* art 3(7)(g) .

> It may be possible to discern in Australian legislation, treaties, official guides, etc. a declared antipathy to the death penalty. That antipathy, though, has not been pursued unqualifiedly in our legislation and guides in relation to dealings with foreign countries in respect of matters which could attract the imposition of the death penalty … It is unsurprising that it has not. In particular contexts, the call of other public interests may be the more powerful.[65]

The question of police cooperation in death penalty cases will be considered using the Bali Nine case as a factual illustration. The first issue that will be discussed is the legal framework that governed AFP actions in the Bali Nine case, and whether the AFP breached existing domestic or international legal obligations. The question of whether changes should be made to the legal framework governing police cooperation in death penalty cases will then be considered, with a number of suggested reforms being examined to see how they may have been applied in relation to the specific facts of the Bali Nine case.

VI Domestic Legal Framework

The existing domestic framework that governs cooperation in death penalty cases in Australia distinguishes between extradition, mutual legal assistance and agency-to-agency cooperation. The information provided by the AFP to the INP in the Bali Nine case is an example of agency-to-agency cooperation and, more specifically, of police-to-police cooperation. This term refers to cooperation between police at the agency level, and includes the sharing of general intelligence and operational information between police forces. Cooperation at this level in death penalty cases is regulated by internal police guidelines in the form of the *AFP Practical Guide on International Police to Police Assistance in Death Penalty Situations* ('the Guidelines'), which were first introduced on 26 October 1993.

The Guidelines in place at the time of the Bali Nine arrests distinguished between requests for information made in relation to matters where charges for a crime attracting the death penalty had already been laid by the requesting state, and requests for information that were made before such charges were laid. Where charges had already been laid the matter was to be referred to the Attorney-General or Minister for Justice. The Guidelines provided that a discretion would be exercised in relation to such requests, but that '[i]n the exercise of that discretion, assistance may be refused in the absence of an assurance from the requesting country that the death penalty would not be imposed or carried out'. Prior to charges being laid police-to-police cooperation was a matter left to the discretion of the AFP, with The Guidelines providing that:

> [P]olice-to-police cooperation may continue on the present basis i.e., the AFP may provide such assistance as requested, provided it meets existing policy

[65] *Rush v Commissioner of Police* (2006) 150 FCR 165, [70] (Finn J).

> guidelines, irrespective of whether the investigation may later result in charges being laid which may attract the death penalty.[66]

The decision to provide assistance at this point is an operational decision for the AFP.

An important practical point to be noted here is that while in Australia charges are generally laid shortly after a person is initially arrested this is not the case in all jurisdictions and there may be a significant gap between the time of arrest and charges being formally laid. The Bali Nine is a case in point. While Bali Nine members were arrested on 17 April 2005 they were not formally charged until they were brought before the Denpasar District Court in October 2005 for the commencement of their trials.[67] This is the standard practice under the Indonesian criminal process, with the Bali Nine being held up until this point on the basis of being suspect ('*tersangka*'). As discussed above, The Guidelines allow the AFP to provide requested assistance right up until the point that charges are laid, regardless of any delay between the initial arrest and formal charging of the individual.

The actions of the AFP in the Bali Nine case did not breach any existing domestic legal obligations. The sharing of information with the INP falls within the lawful functions of the AFP under section 8(1) of the *AFP Act* and within the scope of the cooperation contemplated by the Ministerial Direction of 31 August 2004. The Guidelines themselves were not directly applicable to the case of the Bali Nine, being focused exclusively on situations where the AFP responds to requests for information from overseas police and being silent as to the question of the AFP voluntarily sharing information in the absence of such a request. However, even if the AFP was held to the standards provided for in The Guidelines (possibly on the basis that the *Memorandum of Understanding* establishes an ongoing request by the INP for information of this nature), these standards were not breached by AFP actions in this case as the Bali Nine had not been charged at the time of the information being provided by the AFP. The Guidelines expressly allow for police-to-police cooperation to be provided at this stage in death penalty matters without requiring prior ministerial authorisation.

The conclusion that no domestic legal obligations had been breached was also reached in *Rush v Commissioner of Police*,[68] which was an application for preliminary discovery brought in the Federal Court of Australia by Scott Rush, Renae Lawrence, Michael Czugaj and Martin Stephens. One of the prospective claims being raised was that the AFP had acted without lawful authority in sharing information with the INP in the Bali Nine case. Justice Finn ultimately found that its actions had been lawful, although the following observation was made in the opening paragraph of the judgment:

> The circumstances revealed in this application for preliminary discovery suggest there is a need for the Minister administering [the AFP Act] and the Commissioner of Police to address the procedures and protocols followed by members of the [AFP] when providing information to the police forces of

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66 *AFP Practical Guide on International Police to Police Assistance in Death Penalty Situations* (Document Identifier: OG00014, Date Valid: 1998) <http://www.nswccl.org.au/issues/death_penalty/afp.php>.

67 *Rush v Commissioner of Police* (2006) 150 FCR 165 [29] (Finn J).

68 (2006) 150 FCR 165.

> another country in circumstances which predictably could result in the charging of a person with an offence that would expose that person to the risk of the death penalty in that country. Especially this is so where the person concerned is an Australian citizen and the information is provided in the course of a request being made by the AFP for assistance from that other county's police force.[69]

Revised Guidelines were subsequently released in September 2006. These provide that prior to a person being charged with an offence that attracts the death penalty '[p]olice-to-police assistance can be provided, without reference to the Attorney-General or Minister for Home Affairs, until charges are laid for the offence'. After charges have been laid, 'the Attorney-General or the Minister for Home Affairs may decide that police-to-police assistance can continue to be provided'.[70] The basic approach has therefore remained effectively the same, although arguably the revised language adopts a tone that is somewhat more permissive towards continued cooperation after charges have been laid, by emphasising that cooperation may be continued (as opposed to the language of the previous Guidelines that focused on the discretion to refuse assistance) and by removing the reference to an assurance being sought from the requesting state that the death penalty would not be imposed or carried out.

VII International Legal Obligations

While Australia has committed itself to the abolition of the death penalty at the international level through its ratification of the *ICCPR* and the *Second Optional Protocol*, these international instruments have not been expressly incorporated into Australian law and, as such, do not have direct and justiciable force under domestic law within Australia.[71] The scope of these international obligations is, however, relevant in determining whether the actions of the AFP in the Bali Nine case breached Australia's international obligations.

The argument that AFP actions breached Australia's obligations under international law is primarily based upon the expansive interpretation of the obligations arising under Article 6 of the *ICCPR*[72] adopted by the United Nations

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69 Ibid [1] (Finn J).

70 The Revised Guidelines can be accessed online at <http://www.afp.gov.au/international/liaison.html>.

71 *Rush v Commissioner of Police* (2006) 150 FCR 165 [67] (Finn J).

72 Article 6 of the *ICCPR* provides:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
>
> When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

Human Rights Committee ('UNHRC') in *Judge v Canada*.[73] In that case the UNHRC held that Canada breached Article 6 by deporting the applicant to the United States of America, where he had first been sentenced to death, without previously ensuring that the death sentence would not be carried out. The UNHRC held that the purpose of Article 6 is to protect life, and that states that have abolished the death penalty have an obligation 'to so protect in all circumstances'.[74] While Articles 6(2)–(6) provide exceptions to the right to life in the context of the death penalty, it was held that only retentionist states can avail themselves of these exceptions. Abolitionist and retentionist States are therefore, according to this interpretation, subject to different obligations under Article 6. The UNHRC concluded that:

> For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.[75]

Although Canada itself was not imposing the death penalty, the UNHRC held that by deporting the applicant Canada had 'established the crucial link in the causal chain'[76] that made the execution possible.

There are a number of reasons why this approach should not be adopted and, more specifically, should not be extended to police-to-police cooperation. Most obviously, the broad interpretation adopted by the UNHRC did not consider the jurisdictional limits that are expressly provided for under the *Second Optional Protocol*. At the time of this decision Canada was not a signatory to the *Second Optional Protocol*. Nevertheless, the limited nature of the obligations imposed by the *Second Optional Protocol* strongly suggests that the UNHRC was incorrect in stating that the general rule that '[e]very human being has the inherent right to life'[77] imposes an extended obligation on abolitionist states not to expose a person to the real risk of the death penalty being applied. Such an expansive obligation extends far beyond the limited words agreed to by the signatories to the *Second Optional Protocol*.

Article 1 of the *Second Optional Protocol* provides:

> '1. No one *within the jurisdiction* of a State Party to the present Protocol shall be executed.
>
> 2. Each State Party shall take all necessary measures to abolish the death penalty *within its jurisdiction*'. (emphasis added)

> Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
>
> Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
>
> Nothing in the article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

73 UN Human Rights Committee, Communication No. 829/1998, 49th sess, UN Doc CCPR/C/78/D/829/1998 (2003), ('*Judge v Canada*') [10.3].

74 Ibid [10.4].

75 Ibid.

76 Ibid [10.6].

77 *ICCPR* Art 6(1).

The wording of this article places a clear and unambiguous jurisdictional limitation on the nature of the obligation. The article does *not* impose an obligation on states not to expose a person to the real risk of the application of the death penalty. Rather, the language expressly limits the obligation to the abolition of the death penalty within the state's own jurisdiction. This is apparent from a plain reading of the words used. Article 6 of the *ICCPR* needs to be read in conjunction with the *Second Optional Protocol*. The UNHRC did not do this in *Judge v Canada*. A plain reading of Article 1 of the *Second Optional Protocol* clearly establishes this jurisdictional limitation and weighs against an expansive reading of the obligation under Article 6 of the *ICCPR*.[78]

The interpretation adopted by the UNHRC in *Judge v Canada* marked a significant departure from its earlier jurisprudence in *Kindler v Canada*, where it was found that the deportation of a person from an abolitionist country to a country where he or she was under a sentence of death did not amount to a *per se* violation of Article 6 of the *ICCPR*.[79] This interpretation of Article 6 was subsequently confirmed in *Ng v Canada*[80] and *Cox v Canada*.[81] In *Judge v Canada*, the UNHRC recognised the desirability of ensuring 'both consistency and coherence of its jurisprudence'[82] and yet proceeded to do neither, instead adopting a significantly more expansive view of the scope of Article 6. In reviewing the scope of Article 6 in *Judge v Canada* the UNHRC noted that there had been a 'broadening international consensus in favour of abolition of the death penalty',[83] that Canada itself had amended its laws in the period since *Kindler v Canada* to provide a measure of protection to individuals being extradited in death penalty cases and, significantly, that 'other abolitionist countries do not, in general, extradite without assurances'.[84]

Even if the approach adopted in *Judge v Canada* is accepted, the facts of that case can be clearly distinguished from the Bali Nine case. *Judge v Canada* considered removal by deportation or extradition, whereas the Bali Nine case concerns police-to-police cooperation. In this respect, the weight that the UNHRC placed on its finding that 'other abolitionist countries do not, in general, extradite without assurances' assumes particular significance and is a point of clear difference in the case of the Bali Nine. In cases of extradition there is a strong pattern among abolitionist states of prohibiting extradition in death penalty cases either entirely or in the absence of a prior undertaking from the requesting state that the death penalty will not be applied.[85] State practice in relation to police-to-police

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78 Noting that state parties can always, through domestic legislation, commit themselves to standards exceeding the obligations adopted in treaty-form. An example of this are the limits imposed on extradition in death penalty cases in Australia under the *Extradition Act 1988* (Cth).

79 UNHRC, *Views: Communication No. 470/1991*, 48th sess, UN Doc CCPR/C/48/D/470/1991 (30 July 1993) ('*Kindler v Canada*').

80 UNHRC, *Views: Communication No. 469/1991*, 49th sess, UN Doc CCPR/C/49/D/469/1991 (5 November 1993) ('*Ng v Canada*').

81 UNHRC, *Views: Communication No. 539/1993*, 49th sess, UN Doc CCPR/C/52/D/539/1993 (31 October 1994) ('*Cox v Canada*').

82 *Judge v Canada,* UN Doc CCPR/C/78/D/829/1998 (2003) [10.3].

83 Ibid.

84 Ibid, quoting *United States v Burns* [2001] 1 SCR 283.

85 See, for example, Angola: *Constitution*, Art 27(2); Australia: *Extradition Act 1988* (Cth), s 22(3)(c); Canada: *United States v Burns* [2001] 1 SCR 283; New Zealand: *Extradition Act 1999* (NZ), s

cooperation is significantly different, with abolitionist states not imposing the same restrictions on cooperation as are placed on extradition, and with cooperation at this level in death penalty cases being treated as a matter for police discretion (at least prior to charges being laid). The settled state practice that was central to the decision in *Judge v Canada* does not exist at the level of police-to-police cooperation.

Even if it is accepted—contrary to the express wording of the *Second Optional Protocol*–that the legal obligations of abolitionist countries under Article 6 of the *ICCPR* extend beyond their own jurisdiction to a more general requirement not to expose a person to the real risk of the death penalty being applied—it is doubtful that *Judge v Canada* extends such obligations beyond the specific factual scenario confronted in that case, namely the removal of an individual facing the death penalty by deportation or extradition. Under this narrower interpretation, Australia's obligations under the *ICCPR* and the *Second Optional Protocol* are limited to individuals within Australian territory, subject to Australia's jurisdiction, or (by way of *Judge v Canada*) who were within Australian territory prior to deportation or extradition. The actions of the AFP in the Bali Nine case—involving individuals arrested in Indonesia and outside of Australia's jurisdiction—did not breach these obligations.[86]

An additional argument that has been suggested is that exposing the Bali Nine to the death penalty in Indonesia specifically breaches Australia's obligations under Article 7 of the *ICCPR*,[87] with death by firing squad (being the method of execution used in Indonesia) constituting cruel or inhuman punishment.[88] This draws support from the decision of the UNHRC in *Ng v Canada*, where it was held that the imposition of the death penalty under the limited circumstances provided for by Article 6 of the *ICCPR* will nevertheless breach Article 7 if the execution is not 'carried out in such a way as to cause the least possible physical and mental suffering'.[89] In that case Canada was held to have violated Article 7 by extraditing Ng to California (where he was facing murder charges and possible execution by

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30(3)(a); Portugal: *Constitution*, Art 33(3); South Africa: *Mohamed and Another v President of the Republic of South Africa*, Constitutional Court of South Africa, CCT 17/01 (28 May 2001); United Kingdom: *Extradition Act 2003* (UK), s 94; *European Convention on Extradition*, opened for signature 13 December 1957 ETS 24 (entered into force 18 April 1960), Art 11; *Inter-American Convention on Extradition*, opened for signature 25 February 1988 20 ILM 723 (entered into force 28 March 1992) art 9.

86 It is relevant to note here that there is no evidence to suggest that the actions of the AFP were motivated by anything other than legitimate operational considerations. If there had been evidence demonstrating that the decision to provide information to the INP was based upon a desire to circumvent Australia's domestic legislation abolishing the death penalty and a specific intention to expose the Bali Nine to the death penalty by manoeuvring to have them arrested in Indonesia rather than Australia, then this would seem to raise questions as to the good faith performance of Australia's international treaty obligations as required under Article 26 of the *Vienna Convention on the Law of Treaties*, *opened for signature* 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). Article 26 outlines the obligation of p*acta sunt servanda*, namely that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.

87 Article 7 of the *ICCPR* provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

88 Ronli Sifris, *Balancing Abolitionism and Cooperation on the World's Scale: The Case of the Bali Nine* (2007) 35 *Federal Law Review* 81, 100.

89 *Ng v Canada*, UN Doc CCPR/C/49/D/469/1991 (1994) [16.2].

gas asphyxiation) without seeking assurances that the death penalty would not be applied.

Again, this may be distinguished from the Bali Nine case on the basis that it is a case concerning extradition.[90] In extraditing Ng to the United States of America, Canada was held to be exposing him to the 'real risk' of being sentenced to death, in the sense of the death penalty being 'a necessary and foreseeable consequence'. In the case of the Bali Nine, while it may have been foreseeable that one consequence of sharing information with the INP could have been the exposure of Australian citizens to the death penalty, this was not a necessary consequence. The information that was provided was information of a suspected future crime yet to be attempted, and which the suspected individuals could conceivably have decided not ultimately to attempt. The connection is significantly more remote than in extradition cases. The actions of the AFP can be distinguished on this basis and did not breach Australia's obligations under Article 7 of the *ICCPR*.

Any argument that Australia has breached its obligations under Article 7 of the *ICCPR* on the basis of death by firing squad being cruel and unusual punishment faces a further hurdle, namely that this is an argument that has been previously rejected by domestic courts in a number of jurisdictions. For example, the US Supreme Court in *Wilkerson v Utah*[91] held that death by firing squad did not constitute cruel and unusual punishment within the meaning of the Eighth Amendment to the US Constitution. More relevantly for our purposes, the Bali Bombers recently attempted to argue that execution by firing squad could be classified as torture, and was therefore unconstitutional under Indonesian law. This was rejected by the Indonesian Constitutional Court.[92]

It is important to recognise here that while there is a clear international trend towards abolition, the death penalty is not yet prohibited under international law.[93] This is apparent from Article 6(2) of the *ICCPR*, which recognises the continued availability of the death penalty in a number of countries and outlines various restrictions on its use. While Australia has a clear obligation under international law, by virtue of its ratification of the *Second Optional Protocol*, not to apply the death penalty within its territory, there are a number of countries in the Asia-Pacific region who have not adopted the same approach and who retain the death penalty, including Indonesia, Malaysia, Singapore, Thailand and Vietnam. Further, and

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90 Similarly, the decision in *Soering v United Kingdom* (1989) 11 EHRR 439 can also be distinguished on this ground. *Soering* concerned the extradition of a West German national from the United Kingdom to the United States of America, where he was to face trial in Virginia on a charge of capital murder. The European Court of Human Rights held that the extradition, and subsequent exposure of the applicant to the 'death row phenomenon', would violate Article 3 of the *European Convention on Human Rights*.

91 *Wilkerson v Utah* 99 US 130 (1878).

92 *Amrozi*, *Muklas and Samudra*, Indonesian Constitutional Court Decision No. 21/PUU-VI/2008.

93 This point was highlighted by the statement made by the UN Secretary-General Ban Ki-moon on the first day of his term that '[t]he issue of capital punishment is for each and every Member State to decide'. This was quickly clarified in response to criticism that the Secretary-General had effectively reversed the United Nations official stance opposing the death penalty, with the Secretary-General emphasising at his next press conference that he recognised and encouraged 'the growing trend in international law and in national practice towards a phasing out of the death penalty'. See UN Secretary-General, *Transcript of Press Conference by Secretary-General Ban Ki-moon at United Nations Headquarters*, 11 June 2007.

importantly when considering police-to-police cooperation, the United States of America also retains the death penalty and is a major ally in terms of intelligence sharing and police cooperation.

VIII Reforming Police-to-Police Cooperation

The above analysis concludes that the AFP acted lawfully in the Bali Nine case and did not breach either domestic or international legal obligations. There have been, however, renewed calls for existing procedures to be reformed following the Bali Nine arrests, with the AFP being criticised on the basis it has 'effectively exported the death penalty for Australians'.[94] An example of this is the concern raised by the Joint Standing Committee on Treaties during consideration of the *Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*. The Committee concluded that while it was generally satisfied with the safeguards governing the sharing of intelligence and information between the two countries '... it has some outstanding concerns that information shared lawfully under police-to-police cooperation may inadvertently result in the death penalty being carried out'.[95]

With the AFP's continued commitment to strengthening cooperation with overseas law enforcement agencies it is unlikely that the Bali Nine will be the last case to raise questions about the involvement of the AFP in the application of the death penalty. There has been a range of possible reforms suggested, including that police-to-police cooperation in death penalty cases should be subject to the same restrictions that currently apply to extradition or mutual legal assistance requests in death penalty cases. Under section 22(3) of the *Extradition Act 1988* (Cth) an individual may only be surrendered to a requesting country in relation to an extradition offence that is punishable by death if the requesting country provides an undertaking that the person will not be tried for that offence, the death penalty will not be imposed, or the death penalty will not be carried out. This approach is further reinforced in the specific extradition agreements that Australia has entered into with individual countries. For example, Article 7 of the *Extradition Treaty between Australia and the Republic of Indonesia* provides that:

> Extradition shall not be granted if the offence with which the person sought is charged or of which he is convicted, or for which he may be detained or tried in accordance with this Treaty, carries the death penalty under the law of the Requesting State unless the State undertakes that the death penalty will not be imposed or, if imposed, will not be carried out.[96]

Extending this framework to police-to-police cooperation in death penalty cases would require the AFP to refuse a request for information by an overseas law enforcement agency in the absence of an undertaking that the death penalty will not be imposed or carried out. The potential problems with such an extension are discussed in detail below.

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94 *Australian Story*, above n 49.

95 Joint Standing Committee on Treaties (Parliament of the Commonwealth of Australia), *Report 84: Treaty tabled on 6 December 2006* (2007).

96 *Extradition Treaty between Australia and the Republic of Indonesia* [1995] ATS 7 (entered into force 21 January 1995).

Another possibility is that the existing Guidelines could be replaced by a framework similar to that governing mutual assistance requests made at the formal government-to-government level in relation to criminal investigations and prosecutions, which provides the Attorney-General with a measure of discretion when considering requests in death penalty cases. The *Mutual Assistance in Criminal Matters Act 1987* (Cth) ('*Mutual Assistance Act*') draws a distinction in death penalty matters based upon whether or not formal charges have been laid. Where an individual has been charged with an offence that attracts the death penalty section 8(1A) provides that a request for assistance under the *Mutual Assistance Act must* be refused 'unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted'. While 'special circumstances' is not defined within the legislation it has, in practice, been given a limited interpretation. Examples of 'special circumstances' have included cases where the requesting state provides an undertaking that the death penalty will not be imposed or carried out, or where the assistance requested is of an exculpatory nature and would help the accused person avoid the death penalty.[97] When a request is made in circumstances where no charges have yet been laid, section 8(1B) provides that a request for assistance *may* be refused if the Attorney-General 'believes that the provision of the assistance may result in the death penalty being imposed on a person' and 'after taking into consideration the interests of international criminal cooperation, is of the opinion that in the circumstances of the case the request should not be granted'. The level of discretion provided to the Attorney-General under section 8(1B) is considerably broader than in cases where charges have already been laid, with the Attorney-General not being required to refuse these types of requests and being expressly required to take the 'interests of international criminal cooperation' into account.

This discretion is somewhat controversial with, for example, the Human Rights and Equal Opportunity Commission arguing that the discretion should be removed 'consistent with Australia's international obligations and bipartisan opposition to the death penalty'.[98] Following a recent review of Australian extradition and mutual assistance arrangements, the Australian Government has released exposure draft legislation outlining proposed reforms to the extradition and mutual assistance framework. The exposure draft proposes amending the *Mutual Assistance Act* to remove this discretion, extending the mandatory requirement that the Attorney-General refuse a request for assistance (absent special circumstances) to circumstances where an individual has been arrested or detained on suspicion of committing an offence that attracts the death penalty, regardless of whether or not they have been formally charged.[99]

Australia has also entered into treaties with individual countries specifically addressing the question of mutual legal assistance in criminal matters. For example, the *Treaty between Australia and the Republic of Indonesia on Mutual Assistance*

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[97] Australian Government Attorney-General's Department, Fact Sheet 3—*How does Mutual Assistance Work in Death Penalty Matters?* <http://www.ag.gov.au/extraditionandma>.

[98] Human Rights and Equal Opportunity Commission, *Submission to the Attorney-General's Department Mutual Assistance Review* (2006) [20].

[99] Parliament of the Commonwealth of Australia, *Exposure Draft: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2009* (2008-2009).

in Criminal Matters, which entered into force on 17 July 1999, provides in relation to death penalty matters that 'assistance may be refused if ... the request relates to the prosecution or punishment of a person for an offence in respect of which the death penalty may be imposed or carried out'.[100]

When evaluating the reform possibilities described above the first point to note is that even if the extradition or mutual assistance frameworks were extended to police-to-police cooperation in death penalty cases, this would not itself prevent the police in the future from sharing information in exactly the same way that as for the Bali Nine case. To prevent or restrict the sharing of information in these circumstances the relevant legislation would need to extend beyond requests for information to also cover the voluntary provision of information. This would have significant consequences for the AFP, who regularly share information with overseas law enforcement agencies and who would then, for example, be prevented or restricted from sharing terrorism-related information with countries such as Indonesia or the United States of America, or information concerning drug trafficking with countries such as Indonesia, Singapore or Vietnam. This would then, in turn, impact upon the information that these countries would be prepared to share with Australia. This point was emphasised by Federal Agent Mike Phelan:

> We work in an environment, across all sorts of crime types, whether it be drugs, counter-terrorism, people smuggling, where intelligence exchange is a two way street. We require intelligence from overseas law enforcement agencies and they require our intelligence. So we regularly transfer that information and not only on drugs.[101]

One way of assessing the various possibilities for reform is to imagine that either the extradition or mutual assistance frameworks had applied to the case of the Bali Nine. How would this have changed the outcome in that case? The INP itself does not have the authority to provide the undertaking required under the extradition framework and it is unlikely the Indonesian government would have done so. Even if it did, no such undertaking would bind the sentencing judge, with sentencing being a matter reserved for judges under the Indonesian legal system. In relation to the mutual assistance framework,[102] the information given to the INP does not fall within the previously accepted categories of 'special circumstances', with it being unlikely therefore that the Attorney-General would have approved the information being provided. The likely result, therefore, is that the AFP would not have been able to provide information about the Bali Nine to the INP. Given that 'the Indonesian authorities had no knowledge of this investigation whatsoever'[103] before receiving the tip-off from the AFP, it is unlikely then that the Bali Nine would have been arrested in Indonesia and exposed to the death penalty. At the same time, Australian authorities would not have had the benefit of the information gathered by the INP, which would have been significant evidence in any attempts to prosecute the Bali Nine in Australia and which was information that assisted the AFP in dismantling the responsible syndicate.

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[100] Article 4(2)(a).

[101] *Australian Story*, above n 49.

[102] Assuming that the more restrictive criteria under section 8(1A) applied, requiring the mandatory refusal of assistance in the absence of 'special circumstances' and ministerial authorisation.

[103] *Australian Story*, above n 49.

It is, of course, impossible to know with any certainty exactly what would or would not have happened if the Bali Nine had been arrested in Australia in the absence of any assistance from the INP. There are numerous unknown variables, such as whether the second group arrested at the Melasti Beach Bungalows would have been caught carrying heroin into Australia and what information may have been obtained from police interviews if the known members of the Bali Nine had been arrested and interviewed on Australian soil. Any analysis is, furthermore, necessarily limited to consideration of the materials relating to this investigation that are publicly available. While acknowledging these uncertainties and limitations, it can also be suggested that any investigation and prosecution in Australia would have been considerably more difficult in the absence of the surveillance evidence and other information collected by the INP. For example, prior to this surveillance, the AFP was unaware of the involvement of Myuran Sukumaran, who was alleged to be one of the ringleaders of the operation. The evidence against the second alleged ringleader, Andrew Chan, would also have been significantly weaker, particularly given that he was not found to be personally carrying any drugs when arrested. If the AFP had not shared intelligence with the INP, and had instead allowed the drug mules to return to Australia before arresting them, it may well have been the case that the two alleged ringleaders would have escaped conviction (with Sukumaran not being arrested at all and Chan facing a weaker case) and that the drug syndicate responsible for organising the importation would have continued to operate.

Beyond its particular effect on the Bali Nine case, there are also more general difficulties and costs that attach to police-to-police cooperation in death penalty cases being restricted in this way. One important distinction that can be drawn between police-to-police cooperation and both extradition and mutual legal assistance is the sheer volume of information that is exchanged. In 2004–5 Australia received 15 new requests for extradition and 205 requests for mutual legal assistance.[104] In 2008–9 this had grown to 17 new requests for extradition and 340 requests for mutual legal assistance.[105] By contrast, from November 2004 to October 2005 'there were something of the order of 14,975 taskings going out from the AFP on a police to police basis and something of the order of 7,095 taskings coming into the AFP from police to police arrangements'.[106] The sheer volume of information exchanged would make any requirement for the prior ministerial authorisation of information exchanges at the police-to-police level significantly more difficult than similar restrictions being applied in relation to cases of extradition or mutual legal assistance.

Police-to-police cooperation can also be distinguished by the nature of the information being exchanged. Whereas in the case of extradition an alleged crime has already been committed, the information exchanged at the police-to-police level may be intelligence aimed at the prevention or detection of suspected criminal activity that is yet to occur. The linkage between the assistance provided and an

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104 Attorney-General's Department, *Annual Report 2004-2005*, 257, 259.

105 Attorney-General's Department, *Annual Report 2008-2009*, Appendix 11.

106 Senate Legal and Constitutional Legislation Committee, *Official Committee Hansard (Supplementary Budget Estimates)*, 31 October 2005, at 167. A 'tasking' in this context refers to a request or inquiry.

individual being sentenced to the death penalty as a result of that assistance is more remote and is contingent upon factors beyond the control of the agency providing the information, most notably the decision of an individual suspect actually to engage in the planned criminal activity. This point has been previously emphasised by the AFP Commissioner Keelty:

> ... to make a comment that 'predictably' somebody would be involved in something is very difficult to do operationally. We get 13,000 pieces of information that are transmitted overseas to overseas law enforcement agencies each and every year. We get something in the order of 11,000 back. Of the 13,000 that go overseas, there are not 13,000 Australians arrested overseas. Clearly, a lot of that information is useful intelligence but it does not result in the arrest of an individual. We cannot predict the activities of individuals. We cannot predict that at the last moment an individual will decide to pull out of a criminal enterprise.[107]

Restricting police-to-police cooperation by the application of the extradition framework to potential death penalty matters would prevent the sharing of a significant volume of useful and important information, and have the counter-intuitive effect of allowing information about relatively trivial criminal activity to be freely shared while at the same time restricting cooperation aimed at preventing and prosecuting the most serious offences. The ability to share information would effectively decrease as the severity of the related crime increased. For example, if it was decided that approval would not be given for any exchange of information in circumstances 'where it is reasonably foreseeable that the provision of information may lead to the charging of a person with an offence that would expose that person to the risk of the death penalty'[108] this would have the benefit of reinforcing a consistent position in terms of Australia's opposition to the death penalty. At the same time, however, it would significantly restrict counter-terrorism cooperation with both Indonesia and the United States of America, and would prevent the exchange of drug-trafficking intelligence with countries such as Indonesia, Singapore and Vietnam.

The restrictive effect on police cooperation and law enforcement is also the primary difficulty when requiring an undertaking to provide an assurance that the death penalty will not be imposed before information can be exchanged at the police level. For example, in the case of the Bali Nine the INP itself would not have had the authority to provide such an undertaking. Requiring overseas police authorities to obtain undertakings from the relevant prosecution or government authorities before allowing information to be shared would limit the flexibility and responsiveness that is the key advantage of cooperation at the police-to-police level in the first place. Given the volume of information shared at this level and the fact that it is often not known exactly where such information will ultimately lead or how it will prove useful it is, realistically, far from certain that Australia's retentionist neighbours would agree regularly to provide undertakings in relation to information provided at the police-to-police level. The costs of not being able to cooperate with retentionist countries at this level in relation to offences such as

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[107] Senate Legal and Constitutional Legislation Committee, Official Committee Hansard (Estimates), Parliament of Australia, Canberra, 17 February 2006, 56.

[108] As suggested by the Human Rights Law Resource Centre in Submission No 17 to Joint Standing Committee on Treaties, *Inquiry into the Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*, 8 February 2007.

terrorism and drug trafficking would be significant, particularly for a country such as Australia, which is primarily a 'destination country' for drugs.

IX Conclusion

While the actions of the AFP in the Bali Nine case were criticised for undermining Australia's opposition to the death penalty, it is also important to recognise that attempting to prevent information sharing and cooperation at the police-to-police level in death penalty cases will itself have significant consequence in terms of the fight against transnational crime. Australia's opposition to the death penalty needs to be balanced against other public policy objectives, including the importance of international police cooperation in Australia. The Bali Nine case highlights the possible tension between these two objectives.

It would seem, however, that Australia's current legislative framework strikes an appropriate and practical balance. Whereas cooperation in death penalty cases is strictly restricted and controlled in relation to requests for extradition and mutual legal assistance, the connection between cooperation at a police-to-police level and the application of the death penalty is more remote and less certain; the interest in crime prevention and protecting innocent individuals from the effects of crimes such as terrorism and drug trafficking weighs heavily in favour of allowing greater scope for cooperation at this level. Acknowledging these competing public policy concerns does not, in itself, undermine Australia's 'in principle' objection to the death penalty. Rather, it recognises the reality that some neighbouring countries have made a conscious decision to retain the death penalty, that this choice is still available to them under the current state of international law, and that Australia does not have the right to make this choice on their behalf. It further recognises, in a practical sense, the regional environment within which Australia is situated and the importance to Australia of maintaining effective avenues of police-to-police cooperation.