INTRODUCTION

For most of the world, the horrific events of September 11 could bring forth only one judgment in human, moral or social terms. Even for those of us far removed from the United States who saw the events on television - live and replayed time and time again – the truth was simple: the perpetrators and planners of these atrocities had committed a profound wrong, an act of evil and malevolence that surpassed in quality and impact any other terrorist attack in recent memory. While those who had hijacked the four planes and sent thousands of innocent victims to their deaths could not longer be brought to justice before any terrestrial court, there understandably arose out of the anger and grief a grim determination that those who had instigated and supported the commission of these acts would pay the price.

Yet this unanimity of moral outrage and condemnation in the immediate aftermath of September 11 has given way to controversy and uncertainty in relation to many aspects of the legal and political responses to those events. The ordinary citizen might be forgiven for thinking that our international and national law and legal institutions should have no difficulty in bringing to justice those responsible for these outrages against human life and dignity – and that this would be done expeditiously in a manner consistent not only with the goals of justice but also in accordance with the protections of the rule of law, including essential principles of fairness and fundamental rights.
But what have we seen? Almost every aspect of the various responses to September 11 has been controversial and its legality challenged, from the question of whether the US had been the victim of an armed attack entitling it to the exercise of the inherent right to self-defence; whether the actions it took were a legitimate exercise of that right; the status and rights of those captured during the campaign in Afghanistan; the question whether many of these detainees have indeed committed any offence under international or national law; and attacks on proposed national and international anti-terrorist legislation on the ground that they are ineffectual and encroach excessively on important human rights protections. Much – though perhaps not all-- seems confusion, and this in the face of a self-evidently grievous wrong against individuals and the broader community.

Why does the international and national legal response seem so much in disarray and so contested and confused?

In this lecture tonight I wish to address a number of aspects of the aftermath of September 11, in particular the adequacy of the international legal system to respond to the challenges those events have posed and the difficulties that have arisen in our efforts to address the consequences of those events at the international and national levels.

My remarks will be structured around three issues:

**War and crime, or war or crime:** what is the appropriate model of law that should be applied to events such as September 11 and to terrorism more generally?

A. **International efforts to address terrorism, including the problem of definition:** in this section I will discuss the challenges that face us in formulating a workable international definition of terrorism, an endeavour that is fundamental to a global campaign against it.
B. **Terrorism and human rights:** Finally, I will touch on some aspects of the relationship between terrorism and human rights at the international and national levels, and argue that we should not be seduced by the sirenic call of security that lures us in the current calls to root out terrorism in all its forms.

A. **WAR AND CRIME, OR WAR OR CRIME?**

Critical to the debate over how we should respond to September 11 has been a contest between two models, that of war and that of criminal justice. International law's approach to each of these areas is fundamentally different. I will be arguing that neither the laws of war nor the criminal justice model has been a satisfactory response to September 11, and that a rethinking is due of aspects of the legal framework of how we approach the type of situation that has resulted from those events.

In war (or situations of armed conflict as modern terminology has it) many acts are permitted that would be common crimes in non-war times – the immunity of soldiers from prosecution for murder for the killing of enemy soldiers in combat is but one example. Where there is no war, then deliberate killing is murder.

The rules which regulate the conduct of war and the immunities and privileges that certain classes of combatants enjoy is enormously complex, the result of centuries of accretive developments, which reflect changes of thinking about permissible forms of warfare and the development of ever more powerful and effective ways of killing large numbers of people. At the heart of the law of war is the paradoxical acceptance that we may kill if we must, but we must not act inhumanely in doing so and we must restrict our attacks to legitimate military targets, leaving civilians unharmed so far as possible.

This body of law has its origins in the depths of history, as different communities have placed limits on how one's enemies may be treated in warfare, often in response to atrocities and limits whose existence has often been rendered hollow by continued or new forms of atrocity.
A famous example of the embodiment of these moral judgments in the social code, even of warrior societies, is found in the climactic scenes of Homer's *Iliad* which take place after the Trojan prince Hector has killed in battle the Greek warrior Patrocles, the close friend and companion of Achilles, the foremost Greek warrior.  

Patrocles has donned Achilles' famous armour and gone into battle against Hector, because Achilles is on strike, as the result of a quarrel with the Greek leader Agammemnon, who, in an action which Achilles considered dishonoured him, had taken away one of the slave-girls whom Achilles had won as war booty.

Enraged by and guilty about Patrocles' death at the hands of Hector, Achilles leads the Greeks into battle against the Trojans with the goal of taking vengeance on Hector, who is now wearing Achilles' armour, which he had stripped from Patrocles' fallen body. In a famous passage, Achilles pursues Hector three times around the walls of Troy, before finally killing him in face to face combat (with, it must be admitted, some divine assistance along the way).

But that is not the end of the matter. Achilles pierces the tendons of Hector's ankles and ties him to the back of his chariot and drives off, dragging Hector's body feet first behind him, head dragging in the dust. For twelve days, Achilles continues to treat Hector's body in this way, dragging him round and round Patrocles' tomb, to the horror not only of the Trojans but also of his own compatriots. Finally, Hector's father, the frail and elderly King Priam, comes alone to beg Achilles to give him his son's body for burial, and appeals to their common humanity. Achilles, overcome by Priam's appeal, agrees to stop his desecration of Hector's corpse and to return him to his father for burial.

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1 *Iliad*, Books 22 and 24
In this tale and the social condemnation of Achilles' dishonouring of his enemy's corpse – a prohibition that forms part of customary international law – we see a number of features of the modern law of war. Traditionally, the law of war has been primarily concerned with regulating the conduct of hostilities between opposing national armies in the field conducting conventional warfare. These armies are, in modern times, generally reasonably well-organised groups whose members are recognisable as combatants and which possess a command structure that permits control to be exercised over the conduct of the soldiers. This structure enhances the likelihood that the troops will abide by the rules of warfare, which stipulate permissible targets, acceptable methods of killing and causing damage to property and which govern the treatment of non-combatants – or else be disciplined for their failure to do so. In exchange for carrying out armed hostilities in accordance with these rules, those involved are given immunity for their acts of killing and their destruction of property in conformity with those rules, though a failure to observe them strips them of that protection and renders them liable to punishment for war crimes.

This model of warfare - while prevalent at one time in history – has not been the only form or even the dominant one in the last hundred years, as the number of civil wars, wars of national liberation, internal armed conflicts, insurgencies and other forms of intranational conflict have burgeoned. The laws of war and International humanitarian law have evolved to cover many of these situations of non-international armed conflict. As a result, non-State groups engaged in armed hostilities may benefit from the same privileges and immunities that members of the State's armed forces enjoy, provided that they satisfy certain minimum criteria (in particular relating to organisational structure).

But what of those groups which do not satisfy those criteria and yet engage in an attack of the sort we saw on September 11, or in hostilities on the ground

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2 *Prosecutor v Tadic*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, Judgment of 7 May 1997, para. 748.
in Afghanistan? Were those who instigated, planned and carried out the September 11 attacks — even before President Bush rhetorically declared America’s “war” on terrorism and launched the military campaign against Afghanistan — engaged in armed conflict as unprivileged combatants (and thus subject to the rigours of the law of war), or are these merely criminal acts? The notion that there was an armed conflict in existence before September 11 (even taking into account prior Al Qaeda attacks against US interests) seems unpersuasive, so it is hard to see that those acts could be governed by the laws of war, though criminal offences under US law they certainly are, and they may well also qualify as crimes against humanity under international law.

Even after the military campaign had started and there clearly was an armed conflict, the issue is whether the model afforded by the laws of war provides a satisfactory framework for dealing with those who have been captured during the conflict and who are now detained in Guantánamo Bay, or whether a criminal law enforcement approach is more apt.

It seems clear that those captured on the ground in Afghanistan, either because they were fighting as Al Qaeda supporters or because they were perceived to be members of the organisation do not enjoy the status of privileged combatants under international law (though it is arguable that Taleban fighters do). The consequence is that Al Qaeda fighters can be tried for the very act of engaging in combat, in addition to incurring criminal liability for any crimes they may have committed. Further, they are not entitled to the rights granted to prisoners of war under the Geneva Conventions, though they will benefit from minimum standards of protection under international humanitarian law and international human rights law (subject to any permissible limitations or derogations that apply to the situation).

This is the international legal background to the controversy that has surrounded the US treatment of the detainees held in Guantánamo Bay. If they were not lawful combatants, then they do not enjoy the immunities of the lawful combatant; they may be detained and charged with offences arising
from their participation in the conflict, but in so doing the authorities must observe basic procedural guarantees, including presumably the specification within a reasonable time of a charge and a trial within a reasonable period.

But is the framework which is being applied – that of war and the laws of armed conflict – a satisfactory model for these sorts of cases? The laws of war envisage the return of detainees to their countries once hostilities have concluded. When will the war against terrorism be concluded, or at least the relevant part of it that would mean the return of detainees who continue to be held without charge or trial? Is indefinite detention countenanced by the law of war and, if so, should it be in circumstances such as these? How do we address what may be legitimate concerns about detainees returning to their countries and taking up such activities again? Is a criminal law enforcement framework more appropriate, or do we need some hybrid?

President Bush's own Military Order of 13 November 2001 providing for the establishment of military commissions to try detainees suggests that neither framework seems entirely appropriate, as it elides the frameworks of war and criminal justice. In providing for the establishment of military tribunals to try suspected Al Qaeda members, the Order drew on a model of justice appropriate only to war time or its immediate aftermath. This not only reflected the fact that most of the detainees were detained in a situation of armed conflict in Afghanistan, but also that the measure was designed to avoid granting the full panoply of procedural and substantive rights that a criminal trial before a US civil court or event before a court-martial would bring.

On the other hand, the Order also recites international terrorism and membership of Al Qaeda as part of its rationale, terms which are located more securely in the field of international criminal law than in the law of war. The elision is seen in the specification of the crimes for which the detainees may be tried: these include both crimes under the law of war and "other applicable law", the latter presumably referring to violations of US criminal laws. Of course, an act of terrorism may also be a war crime, but the blending of the categories is clear here, and it seems that a detainee may be tried before a
military commission for both a violation of the laws of war and an ordinary criminal offence under US law.

In short, my argument is that in legal terms the "war" approach to issues of international terrorism is a problematic one. It is made possible only by the particular circumstances of the events of September 11 and the fact that the Taliban government was seen to be harbouring the Al Qaeda network on the territory of Afghanistan. Unless similar circumstances arise again (and they may) and the use of force is once again permitted or tolerated as it was in relation to Afghanistan, however useful the metaphor of the war against terrorism may be, the legal utility of a "war" framework will not be of great assistance. The conduct of such a "war" against a network dispersed across many countries will need to take a different form entirely, unless we are perhaps to see a new phenomenon emerge of surgical military strikes by a form of international posse.

At the same time, it may also be appropriate to undertake a further review of the adequacy of the existing international humanitarian and human rights law to cases such as Guantánomo Bay. If that body of law provides us with no fitting solution to a situation of indefinite detention based on an situation of "armed conflict" quite different from those in contemplation when these provisions were drafted, then it may be time to fix the limitations of those laws.

Yet, you might ask, does the criminal justice model provide a better option, in a context where there was no reasonable prospect of securing extradition, there are enormous difficulties in gathering evidence of specific offences, and providing the full range of procedural protections before US courts would involve unacceptable compromises of intelligence sources that could assist in future terrorist attacks? While these sorts of concerns are legitimate, there are reasonable answers to them.

Neither the law of armed conflict model or that of criminal justice – to the extent that they exclude all but the US authorities and trial before either US military commissions or US courts – addresses the concern about legitimacy.
resulting from perceived bias. That could only be addressed if an international tribunal were given jurisdiction, as many have suggested—not one, as one US law professor proposed, consisting only of American and Muslim judges, but one more broadly representative of the international community.

The strategy of addressing international terrorism as an issue of international criminal law enforcement finds clear support in past and present international efforts to address terrorism. It is to these efforts that I now turn, to explore some of the challenges that face us in that arena, notwithstanding the international unanimity that terrorism is a scourge and should be fought by with all the resources that the international community can bring to bear on it individually and collectively.

B. INTERNATIONAL EFFORTS TO ADDRESS TERRORISM: THE CHALLENGE OF DEFINITION

International responses to terrorism are nothing new, though it may be argued that the nature of modern international terrorism and the extent of the suffering and damage that may result from terrorist acts are now significantly different.

The use of violence to intimidate a government or civilian population reaches back to the times of classical history. Yet there are many varieties of terrorism, and historical and political context play a role in defining the form the use of terror may take.

There are at least two broad senses in which the term terrorism has been used. The use of the term as part of modern political discourse is commonly traced to the 18th century, and it "was originally used to denote the use of terror by the French revolutionary government against its political opponents". The term was similarly used to describe the approach of the Bolshevik government to its opponents, and this sense of the term has had contemporary relevance under the designation of State terrorism. Of course,

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the practice of using tactics of terror violence to cow civilian populations has a far longer history than does the term itself. Famous examples include the Roman use of terror over their subjected peoples, such as the use of mass crucifixion in the wake of the slave revolt led by Spartacus in 73 BCE.\footnote{5}

The other important dimensions of the term – the one that is more common today – involves the use of violence against the State or the community. What Halliday calls the prehistory of terrorism involved “acts of assassination for political and religio-political ends”\footnote{6} and is to be found throughout history. Indeed, the word “assassin” entered the English language as a result of the activities of some members of the medieval Islamic sect, the Hashashin, a group that engaged in political assassinations and that no doubt inspired Terry Pratchett’s Assassins’ Guild in his Discworld novels. In more recent times, anti-State terrorism was a feature of the 19\textsuperscript{th} and early 20\textsuperscript{th} century campaigns of anarchists and nationalists.

In our times, though, we have seen further evolution of the phenomenon of “terrorism”. The 20\textsuperscript{th} century saw the frequent use of violence against colonial regimes as part of the struggle for independence from colonial rule. In the second half of the century we saw the use of such tactics by groups using tactics of terror violence to bring about revolutionary changes in their own societies (Latin America being a major area for such activities, but Europe also saw its share of such groups).

International responses to terrorism as a specific phenomenon began as long ago as 1937, when the League of Nations adopted a Convention for the Prevention and Punishment of Terrorism (a treaty that never entered into force). The bulk of the international work, though, has taken place in the United Nations since the 1960s, in response to a series of aircraft hijackings which were followed by other terrorist attacks on a variety of targets using


\footnote{6 Halliday, \textit{supra} note 4.}
different methods. Many of you will remember the killing of Israeli athletes at the Munich Olympics in 1972, the shipjacking of the Achille Lauro, and the frequent hijackings or bombings of aircraft that took place during these years.

The response of the international community within the United Nations framework was to adopt a series of conventions addressing each of these different phenomena – conventions on hijacking of aircraft and ships, on actions against the safety of civil aviation, and related matters.

These conventions – all of which are described by the United Nations as part of its panoply of anti-terrorist measures – share three principal characteristics:

(a) they all adopted an "operational definition" of a specific type of terrorist act that was defined without reference to the underlying political or ideological purpose or motivation of the perpetrator of the act - this reflected a consensus that there were some acts that were such a serious threat to the interests of all that they could not be justified by reference to such motives;

(b) they all focused on actions by non-State actors (individuals and organisations) and the State was seen as an active ally in the struggle against terrorism - the question of the State itself as terrorist actor was left largely to one side; and

(c) they all adopted a criminal law enforcement model to address the problem, under which States would cooperate in the apprehension and prosecution of those alleged to have committed these crimes.

This act-specific approach to addressing problems of terrorism in binding international treaties has continued up until relatively recently. Although political denunciation of terrorism in all its forms had continued apace, there

7 For a useful collection of documents on terrorism see Omer Yousif Elagab (ed), *International law documents relating to terrorism* (London: Cavendish Pub., 2nd ed 1997)

had been no successful attempt to define "terrorism" as such in a broad sense that was satisfactory for legal purposes. There was also some scepticism as to the necessity, desirability and feasibility of producing an agreed and workable general definition.

That situation appears to have changed with the events of September 11. This is not only because States wish for political reasons to be seen to be taking action on a broad front against terrorism by adding to international and national prohibitions on terrorism. It has also become a matter of some legal importance. Following the events of September 11, the UN Security Council, in a binding resolution (Resolution 1373), obliged Member States of the UN to take a wide range of actions to prevent and punish terrorist acts and to attack the support structures of terrorism.

These obligations include ensuring that terrorist acts are criminal offences under domestic law, a task which requires reasonably precise definitions of the act which are criminalised. Yet the Security Council resolution contains no adequate definition or description of the terrorism it roundly condemns. While the events of September 11 may not have given rise to definitional problems, it is by no means certain that a similar consensus can be reached on a comprehensive definition of terrorism of this sort.

**Defining terrorism**

One direct consequence of September 11 was to give significant impetus to efforts by the United Nations to adopt such a comprehensive anti-terrorism convention. The goal is to adopt a convention that is not limited to a specific type of terrorist act but which provides a workable general definition for addressing terrorism through national criminal legislation and transnational law enforcement cooperation. Prior to September 11, the UN had recently adopted conventions on terrorist bombing and terrorist financing, and begun work on a broader convention. Given a significant impetus by the events of September 11, the proposed convention is at the centrepiece of the UN's legal response to those events.
Previous efforts to formulate a general definition of terrorism have run into a number of common difficulties, and the current efforts are grappling with the same issues. These are not just technical issues, but raise controversial policy and political issues.

The first of these is whether to include State terrorism in the definition of terrorism or to limit the concept to acts of non-State entities. Perhaps unsurprisingly, in international fora States have thus far been unwilling to include in a binding treaty provisions applying to acts of terror committed by States themselves – the target of the new regime is non-State entities.

A second stumbling-block has been the question of whether a terrorist act should defined only by reference to the nature of the act or whether it should also take into account the motivation or objective of the person who commits the act. In other words, are all instances of particular types of violence terrorist acts, or are there some which are not unlawful under international law? This question is essentially a variant of the well-worn aphorism that "one person's terrorist is another person's freedom fighter", a view borne out at least by the practice of States over the years (if not by dictates of logic or principled policy on the matter).

A third issue has been the relationship between the acts defined as terrorist acts (and therefore international crimes) and the right of non-State actors to use violence against State targets in situations of armed conflict. This discussion has been motivated by a concern that the relatively powerless non-State actor facing a situation of armed conflict might be deprived of existing rights to use force in response to violence by the State, by the simple expedient of defining the group's resort to violence as terrorism.

A fourth issue has been the critical one of the impact that a broad definition of terrorism may have on the exercise of internationally protected human rights, in particular the tactics that groups may adopt to influence governments and other institutions to adopt or change specific policies or laws (were the events of the "other September 11" in Seattle some years ago terrorist acts?). A
related issue has been the double-edged nature of imposing an international obligation on a State to eradicate terrorism in view of the danger that some States may take advantage of the opportunity to intrude unduly into existing guarantees such as the right to privacy and rights relating to the enforcement of criminal laws, and to erect anti-terrorist measures that are used in a repressive manner.

All of these difficulties can be seen in the latest efforts of the UN committee tasked with the job of drafting the comprehensive convention on international terrorism. The Committee goes by the revealing name of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, but it is in fact the committee which drafted the International Convention for the Suppression of Terrorist Bombings 1997 and the International Convention for the Suppression of Financing of Terrorism Convention 1999.

At its latest meeting (held earlier this year), the Committee came close to finalising much of the text of a draft convention. However, the provisions on which agreement is still to be reached include the final definition of terrorism and whether specific acts of non-State actors resisting foreign occupation, etc are to be excluded from the Convention, and the extent to which actions of a State’s armed forces should be covered by the Convention. The current

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10 The current status of discussions on the definition of terrorism is to be found in "Informal texts of articles 2 and 2 bis of the draft comprehensive convention, prepared by the Coordinator", A/57/37, Annex II. The central feature of the definition of terrorism is the following:  
*Article 2*

1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
   (a) Death or serious bodily injury to any person; or
   (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
   (c) Damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.
definition is of particular relevance for Australian law, as it was in part the basis for the definition in the anti-terrorism legislation that was recently critically reviewed by the Senate Standing Committee on Constitutional and Legal Affairs,\textsuperscript{11} and subsequently withdrawn by the government for revision in the light of the Committee’s report that was critical of the scope of the definition.

It is not my purpose to parse the proposed definition here in any detailed way. But it may be noted that the unresolved issues raise at least one major issue of fundamental legal, moral and political importance. That is the extent to which the international community is prepared to deny to non-State actors the resort to violence or threat of violence in response to repression by the State. While it may still be permissible for a non-State actor to use violence legitimately in situations such as civil war or other situations involving internal armed conflict, the issue has not been finally resolved whether under this convention a non-State actor in what it feels is a powerless position against an oppressor government may legitimately resort to violence, at least against government targets. The two alternatives being discussed diverge on this issue, with the text proposed by the Member States of the Organization of the Islamic Conference providing that the Convention will not apply to “the activities of the parties during an armed conflict, including in situations of foreign occupation”.\textsuperscript{12}

While this disagreement is plainly focused on the situation in the Middle East, there may arguably be other applications. But if we are to grasp the nettle of rejecting violence as a tactic other than in situations of internal armed conflict, then we must also ask what succour international law provides to those who are on the receiving end of the State repression or fundamental denial of rights, and whom States have already shown themselves ready to denounce


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as terrorists and to continue their suppression of them as part of a campaign against terrorism.

C. TERRORISM AND HUMAN RIGHTS

The final aspect of the aftermath of September 11 I wish to touch on tonight is the relationship between terrorism and human rights. The events of September 11 have given governments and communities in many parts of the world a sense of urgency in taking steps to prevent the occurrence of similar acts. These measures have included the passage of legislation creating new offences, the establishment of special procedures for the investigation of persons suspected of involvement in terrorist offences (or even of being able to provide information about such matters), and the detention for long periods without trial of hundreds of people in the United States and Europe on grounds of suspicion of involvement in terrorism or assisting those who are so involved.

This sense of urgency/emergency has led to the proposal of measures that would in “ordinary” times have been rejected by legislatures and societies. But the argument is that times are different, that we face a real threat of an unprecedented sort that can only be addressed by stringent (and possibly unprecedented) measures. We are in the middle of the classic debate that so often occurs in times of real or purported emergency – to what extent do the threats we are told we face justify intruding on the rights we hold dear?

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12 Texts relating to article 18 of the draft comprehensive convention, Text proposed by the Member States of the Organization of the Islamic Conference, A/57/37, Annex IV, art 18(2).
On the international level the relationship between terrorism and human rights has a number of strands. Human rights and terrorism have long been linked as issues. The dominant form of that linkage in the political organs of the United Nations – in particular in the form of regular General Assembly resolutions on the topic – has seen matters from the perspective that terrorism poses a threat to the enjoyment of human rights. The violation of human rights committed by those engaged in actions against the State that may be described as terrorist thus provides a ground of legitimation for measures taken by the State against its political opponents. While these resolutions generally pay lip-service to the need to have regard to international human rights standards in any actions against terrorism at the national level, this caution is very much a subsidiary feature of the discussion, frequently ignored in practice.

The discourse of protection of human rights thus becomes a further ground to legitimate government’s actions in suppressing the activities of terrorism. While we can all accept that terrorism can frequently involve the violation of the human rights of those affected by it, we are only too aware of the way in which that rationale has been selectively used to justify the violation of other human rights.

This pattern has been evident in the post September 11 world. A number of countries have gladly climbed aboard the juggernaut of the “war against terrorism”, happy to denounce their subordinated populations, insurgent groups, or discontented and oppressed minorities as “terrorists”, and to legitimate their efforts to suppress the exercise of internationally guaranteed
rights as part of the fight against terrorism. In addition, many countries have enacted legislation that provides broad powers to infringe on human rights, justified by reference to the fight against terrorism and bolstered by the notion that not only international criminal law but also the protection of human rights can be invoked to justify these measures.

The dangers that such an approach poses have been well recognised by certain parts of the United Nations and many organisations in international and national civil society. The message is that the rush to condemn and eradicate terrorism should not lead us into such a state of intoxication with repressive measures that we lose sight of the damage we may be doing, in the pursuit of what may turn out in any event to be ineffectual measures.

The voice of the UN High Commissioner for Human Rights, Mary Robinson, has been prominent among those who have urged caution and restraint. In joint statements with political leaders and in detailed and thoughtful reports presented to the UN Commission Human Rights, she has not only reiterated this admonition and reminded States of their international human rights obligations, but set out in detail the careful scrutiny that should be undertaken in the light of human rights standards when addressing issues of terrorism. Equally, the UN Committee against Torture has urged States parties to the UN Convention against Torture that situations of emergency do not justify the use of torture and calling on States to ensure that they observe the provisions of the Convention especially in times of emergency, when the temptation to ignore them may be at its strongest. These reminders are important, and have
had an impact in some national debate about anti-terrorist measures, Australia being one example.

However, international experience and jurisprudence also provides other lessons for us in responding to situations of crisis. Primary among them is a warning against the approach of "exceptionalism" – of being too ready to accept that the threats that we perceive are so great that we are justified in establishing new institutions and procedures outside existing institutions to address these threats. The establishment of special or military courts, restrictions on normal procedural rights, incommunicado detention, or secret trials – all variously justified as required by exceptional circumstances – have all tended to bring in their wake further violations of human rights, and too infrequently have they been effective in resolving the problems they seek to address. The troubling exceptionalism of the detention of Al Qaeda and Taliban captives at Guantánomo Bay – where they apparently cannot access US constitutional relief or any international forum – and the exceptional nature of the military commissions proposed to try them are vivid illustrations of the point.

How does this all relate to the Australian situation? None of us wants to see our society suffer the type of terrorist attack seen on September 11, or one of the other types of acts foretold by those who warn us of the (potential) dangers – whether it be a biological, chemical or nuclear threat. You no doubt recall the collective frisson – or perhaps mild panic – seen a few weeks ago in Sydney, when two military aircraft started circling Sydney harbour in the vicinity of the tall buildings of the lower CBD. It turned out that the only
shooting they were doing was photos. But the immediate response was there. Or you may recall the speed with which the NSW police last week assured the community that person who killed himself in a Sydney suburb by detonating a bomb strapped to him was "just" a person who had committed suicide by blowing himself up, and not a suicide bombing gone wrong. The ongoing debate about the vulnerability of the Lucas Heights nuclear reactor in Sydney's suburbs also shows that these fears are now part of our collective psychology. Suggestions that there may be Al Qaeda links with Australia have all contributed to the collective anxiety.

What, then, should be our response at the national level to September 11 and the threats that we are told we may be facing? In addressing this question, we have a number of advantages that give us the chance to react calmly and thoughtfully – we are physically distant from the events of September 11, we are not (or at least so far have not been) a high priority target; we have had the luxury of time to formulate our response; and as a result our political debate over the issue has permitted a wide range of views to be heard – oppositional views have not been silenced or reviled or declared unpatriotic or pro-terrorist, as has been the case elsewhere.

There seems little doubt that as a matter of international legal obligation and policy we need new legislation incorporating many of the features that were contained in the recent package of anti-terrorist legislation introduced by the government. The anomalous situation revealed by the inability of anyone to specify a crime for which David Hicks could be prosecuted under Australian law if he were returned to Australia – treason and mercenarism having been
the only two potential contenders – suggests that there are holes in our legal coverage of acts that deserve sanction.

More problematic, though, are a number of the other provisions of that draft legislation, including the definition of a terrorist act and its potential overinclusiveness, membership offences, reverse onus provisions, and wide-ranging investigative powers. It is not my intention to examine these in detail – that job has been recently done in a painstaking and in my view persuasive analysis by the Senate Committee on Constitutional and Legal Affairs. What the content of the revised version that the government will bring back to the Parliament is unclear, but it is probably too early to conclude that all the problems will have gone away. But the firm approach that the Senate Committee has taken so far commends itself as the appropriate type of scrutiny of such wide-ranging provisions.

You may well ask whether this sort of approach falls too readily into a comfortable civil libertarian complacency that fails to reflect the real extent of the risks we face and the radically different nature of terrorist networks that need different, more extensive powers beyond those that are normally needed for national and international criminal law enforcement? Do not the extraordinary risks and dangers justify the measures that have been proposed?

My own response to these sorts of arguments is still civil libertarian, though I hope not too complacently so. It is a commonplace in the light of such claims of unprecedented dangers to refer to a list of previous examples in which warnings of disastrous consequences to come if particular measures were not
adopted have been unpersuasive and the predicted consequences have not eventuated. Our own Australian locus classicus is, of course, the issue of communism in the early 1950s, and the rejection of the Government's predictions of doom by both the High Court in the *Communist Party case* and by the Australian people at the referendum on the subject held on 22 September 1951 (both of which, it may be mentioned are discussed in the *Oxford Companion to the High Court of Australia*, at p 123).

But, of course, one can be wrong, and it is a brave person who would be bold enough to give an assurance that these things could never happen. However, at a time when there is a real risk of major military conflict between India and Pakistan – possibly involving the use of nuclear weapons – one can be justified in weighing the potential dangers of major terrorist attacks carefully against the intrusions on human rights that may be involved, and being slow to accept claims that existing powers and resources fall significantly short of those that are needed to protect us against these threats.

A related issue is the likely efficacy of the measures proposed. While one can accept that the use of intelligence-gathering powers and powers of investigation may help to identify and prevent some terrorist threats, it is less clear that more, and more extensive powers will bring a proportionate increase in detection and prevention. Recent discussion of the extent to which US government agencies had information that would have enabled it to identify and prevent the attacks of September 11 have shown that the problem may have been too much intelligence.
The call for more and greater powers appeals at a deeper emotional level to our sense of insecurity – in this way, it is intimated, we will achieve a relatively cost-free increase in our personal and community security. This is a troubling sirenic call, since it promises something that is unachievable, total personal security from such threats. It also gives prominence to the terrorist threat in a way that the experience of everyday life does not confirm – the risk of being affected by a terrorist attack, as opposed to some other form of violent crime or being injured in an accident, is still negligible. The US Department of State’s most recent report, *Patterns of Global Terrorism 2001*, released earlier this month, states that 2001 saw the highest number of people killed in any previous year by terrorist attacks. However, of the 3,547 people who died, most of those died in the one series of attacks on September 11, and the overall number of terrorist attacks fell last year from 426 incidents to 328.

It seems inevitable that the Parliament will eventually pass anti-terrorism legislation. The final product will no doubt be less dramatic in reach than the original proposals. Even so, it seems equally inevitable that the process of political compromise and the inherent generality of the definitions of some of the proscribed acts will still be problematic and that the dangers they pose to human rights will only emerge in specific cases in the future. In my view, this type of legislation is yet another illustration of the need for a Bill of Rights – not because the Parliamentary process has not work, in fact it has, and rather well so far – but there are limits to the clairvoyance of even the most far-seeing Parliament.
CONCLUSION

When I was preparing what was the last lecture in this series of inaugural/valedictory series, I thought that it was incumbent on me to do refer briefly to the lectures given by my colleagues. I hope that in my remarks tonight I have touched on some of the themes that they touched on in their lectures, albeit in a different context – these themes being the importance of openness and transparency in the exercise of the power of the State (Joh McMillan), the response of the law to unconscionability (Jim Davis), our pursuit of the goals of fairness in human relations mediated though law (Phillipa Weeks) and, finally treason and the question of a Bill of Rights and the role of judges (Tom Campbell). The challenge of responding to contemporary forms of terrorism is very much with us, and we must reach deep into those traditions to ensure that we find the right way forward.