Moreland City Council

SIXTEENTH MAURICE BLACKBURN ORATION

Professor Hilary Charlesworth

HUMAN RIGHTS IN THE AGE OF TERROR

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HUMAN RIGHTS IN THE AGE OF TERROR

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Cr Anthony Helou
Mayor, Moreland City Council

INTRODUCTION

It gives me great pleasure to introduce the 16th Maurice Blackburn Oration, which is being delivered tonight by the eminent Australian human rights academic, Professor Hilary Charlesworth.

The Oration, which is made possible through a trust fund, honours the lives and work of two political and human rights activists: Maurice and Doris Blackburn.

Maurice Blackburn devoted his life to the cause of social justice, trade union rights, civil liberties and international peace. He was a Victorian representing the seat of Burke in the federal Parliament – an area now part of Moreland. Maurice Blackburn took from his middle-class background the notion of public service, particularly service to progressive, social movements.

Doris Blackburn was also a federal Member of Parliament. She was committed to peace and social justice and was an early campaigner for women's rights, a promoter of pre-school education and played a central role in the establishment of organisations for the advancement of Indigenous Australians.

Professor Charlesworth joins a select list of distinguished past presenters of the Blackburn Oration, including the President of Timor Leste, Xanana Gusmao, the award winning Australian author Thomas Keneally, the civil rights lawyer Julian Burnside QC, the prominent Indigenous leader and former head of the Aboriginal and Torres Strait

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Islander Commission, Dr Lowitja O'Donoghue, and the former Australian Prime Minister Bob Hawke, each having presented a unique perspective on contemporary human rights issues.

Professor Hilary Charlesworth is a distinguished scholar. She is currently Professor at the Regulatory Institutions Network and Director of the newly established Centre for International Governance and Justice (CIGJ) at the Australian National University, where she also holds an appointment as Professor of International Law and Human Rights in the Faculty of Law. In 2005, she was awarded a Federation Fellowship by the Australian Research Council for a project on building democracy and justice after conflict.

In addition, Professor Charlesworth has held a number of visiting scholar appointments, including the Washington and Lee School of Law, the Harvard Law School and the New York University Global Law School. In 2005, she was the 24th Wayne Morse Professor at the University of Oregon and also the Sir Ninian Stephen Fellow at the Asia-Pacific Centre for Military Law at the Faculty of Law, at the University of Melbourne.

Among her many other accomplishments and contributions to the pursuit of justice, human rights and the law, Professor Charlesworth was the inaugural President of the Australian and New Zealand Society of International Law. Since 1996, she has also been Co-Editor of the Australian Yearbook of International Law and, since 1999, she has been a member of the Board of Editors of the American Journal of International Law.

As part of her contribution to public life, Professor Charlesworth has worked with various non-governmental human rights organisations on ways to implement international human rights standards. Currently, she is a Patron of the ACT Women's Legal Service and was also Chairperson of the ACT government's inquiry into a Bill of Rights, which culminated in the adoption of the ACT Human Rights Act 2004.

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Professor Charlesworth's Oration will focus on the topical issue of the balance between human rights and security concerns. She will explore the current debate about where human rights fit into public life in the "post-11 September 2001" era.

In recent public commentary and debates there has been a great deal of discussion about whether human rights and civil liberties are an impediment to community security and whether community security concerns ought to be paramount, even if this means that civil liberties and human rights are to be curtailed, suspended or severely limited.

Professor Charlesworth will expand on these claims from a legal perspective and challenge the idea that we should see human rights and security concerns as being in conflict with one another.

Terrorist activity is, of course, among other things, a violent breach of human rights standards. Professor Charlesworth will argue that human rights law is not a matter of absolute protection of some rights and that it can accommodate some limits to them in changing circumstances. But, as she also argues, it is imperative that care be taken so that current anti-terror laws do not run the risk of going beyond acceptable limitations on human rights and liberties.

Without any doubt, one central thread that runs right through Professor Charlesworth's impressive work and background of social engagement is her commitment to, and dedicated pursuit of, issues of justice. She is a passionate and fearless advocate for human rights and social justice, which is reflected in her many social engagements and in her analyses of the legal and human rights issues of our time, including her readiness to speak out on difficult issues.

It would be fair to say that the title of "public intellectual and scholar" would be an appropriate appellation that might capture Professor Charlesworth's many engagements and invaluable contributions to our society and beyond in the cause of justice and the rule of law.

It is with much pleasure, then, that I present to you the 16th Maurice Blackburn Oration by Professor Hilary Charlesworth.

Cr. Anthony Helou,
Mayor
Moreland City Council

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MAURICE AND DORIS BLACKBURN

Maurice Blackburn
(1880 – 1944)

Doris Blackburn
(1889 – 1970)

Maurice McCrae Blackburn (1880 - 1944) was born to a middle class family. However, in 1886 his father died of typhoid, leaving his widow and four children with very little means of support. Although Maurice matriculated in 1896, due to financial constraints he had to wait ten years before he graduated in Arts and a further three before he earned a Law degree. Maurice Blackburn was a clever man who, despite his financial circumstances, was sufficiently well-connected to have succeeded in a comfortable, conventional legal career. Instead, he chose to throw in his lot with the exploited and the under-privileged. He took from his middle class background the notion of public service and transformed it into service to the labour movement.

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Maurice Blackburn did not move to the centre stage of political activity until his studies were completed. In 1911, he joined the Victorian Socialist Party. However, when the party decided not to stand candidates at elections, Maurice, along with a number of others, chose to join the Labor Party. In 1914, against the odds, Blackburn won the seat of Essendon and so began his time as a Labor member of the Victorian Parliament. His opposition to conscription placed him completely beyond the pale of a patriotic society. Conversely, it elevated him immediately to the status of labour hero. Maurice lost his seat in a campaign marked by vicious personal attacks. In the following four years as the labour movement throughout Australia was struggling to clarify and redefine its aims and practices, Maurice played a major role in the Labor Party's development. After winning the seat of Fitzroy, he re-entered the Victorian Parliament in 1925 and remained there until 1933. In 1934, he served as the Federal Member for Burke, which then covered large parts of the Moreland area. In the Federal Parliament, Blackburn relished the opportunity to speak on war and peace, industrial and civil rights issues. He remained in federal politics until 1943.

Throughout his political life, Maurice devoted his considerable intellectual abilities to the cause of social justice, civil liberties and international peace. In many ways he served as a conscience for the Australian Labor Party. Maurice Blackburn always stood firm in defence of democratic values both in society at large and within the party. Tolerant, cheerful and unambitious for high office, he was admired inside and outside the labour movement for his integrity and commitment. Doris Amelia Blackburn (1889 - 1970) shared her husband's values and principles and led an active political career of her own, beginning with the early campaign for women's rights. She went on to promote pre-school education in conjunction with an enduring involvement in the peace movement. She was the Federal Member for Burke from 1946 to 1949. Doris played a central role in the establishment of organisations for the advancement of Indigenous Australians.

Derived from *Maurice Blackburn – the man and the legend* by Carolyn Rasmussen Ph.D.

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PROFESSOR HILARY CHARLESWORTH

28 SEPTEMBER 2006

BRUNSWICK TOWN HALL

I would like to acknowledge the traditional owners of the land on which we meet, the Wurundjeri people, and pay my respects to their elders.

Mayor Helou and Councillors, friends and colleagues – I am very honoured to have been invited to present the 2006 Maurice Blackburn Lecture here in my home town and I am delighted that Maurice Blackburn's daughter, Louisa Hamilton, is here tonight.

Maurice Blackburn was a remarkable and courageous man who championed ideas of human rights long before they were widely accepted and understood.[1] His major consistent interests throughout his legal and political career were defending marginalized groups and preserving civil liberties. He always put principle before his personal advancement and has been well-described as a "conscience of the labour movement".

I should also note that he is remembered as a wonderful human being – tolerant, simple in his tastes and with a great sense of humour. Blackburn is said to have had a "magnificent, rich voice" although some complained that his speeches lacked excitement because they were too calm and thoughtful!

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[1] Biographical information is taken from the entry about him written by Susan Blackburn Abeyasekere in the *Australian Dictionary of Biography* vol 7, MUP 1979 pp 310-312.

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After he established the law firm that still bears his name, Maurice Blackburn's legal work was devoted to trade union law and he also was involved in civil liberties cases in the Police Court. Blackburn became interested in politics through his work with the anti-sweat work campaign in the early years of the 20th century. He was elected to the Victorian Legislative Assembly as the Labor member for Essendon in 1914, but lost the seat in the next election because of his strong stand against the First World War and involvement in the anti-conscription movement, although he supported the idea of a civilian army. The Australian Dictionary of Biography entry on him notes that "Early in World War I his revulsion against the diminution of civil liberties and what he regarded as the useless slaughter in Europe turned him against the patriotic fervour of the times". Later, as the member for Fitzroy, Blackburn ensured the passage of the Women's Qualification Act in 1926 to remove discrimination against women in public life.

In 1928 Blackburn won the seat of Burke in federal parliament, which he held until the year before his death in 1944. He clashed with many in the Labor Party because he was committed to opposition to international fascism rather than the ALP's concern with the spread of communism. At the outbreak of World War II, Blackburn was at the forefront of Labor's opposition to PM Menzies' first national security bill because he thought that it undermined civil liberties without good reason and that it allowed the executive to avoid parliamentary oversight. As the war dragged on, Blackburn's position became less popular in the ALP and he was often left as "the sole watchdog for his major concerns: civil liberties and opposition to conscription for overseas service".[2] He was the only member of Parliament to vote against a bill introducing overseas conscription in 1943.

Blackburn was expelled from the ALP in 1941 because of his involvement with the Australia-Soviet Friendship League. He lost his seat in the 1943 election and died the following year at the still youthful age of 64. His wife, Doris Blackburn, won the seat as an independent Labor member in 1946.

I hope that Maurice Blackburn would approve of the topic of my lecture in his honour tonight. It reflects his passionate concern with the need to protect human rights especially at times when they are most vulnerable.

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[2] Ibid.

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It is difficult to open a paper, or to listen to the radio, without reading or hearing the argument that, at least since the events of 11 September 2001, we live in an age of terror and that, in this context, talk of human rights and civil liberties is irrelevant, or frivolous at best. At worst, the argument goes, we are jeopardizing our security by acknowledging such rights; that the community's security should be paramount. For example, the columnist, Janet Albrechtsen, recently attacked people who emphasized the importance of human rights as "September 10 thinkers". She wrote:

"In a pre-September 11 world, human rights tended to breed like rabbits and drafting fine-sounding bills of rights looked harmless enough. ... We now know, however, that there are bad guys and that requires a recalibration of the balance between civil liberties and national security."[3]

In the same newspaper, Paul Kelly also accused lawyers who criticized the use of a control order against Jack Thomas as being in the throes of "intellectual failure and the depths of prejudice."[4]

I want to explore these claims from a legal perspective and challenge the idea that we should see the protection of human rights and the security of our community as inevitably in tension with one another. Terrorist activity is of course (among other things) a violent breach of human rights standards. I will argue that human rights law is not a matter of absolute protection of some rights and that it accommodates some limitations, but, at the same time, that our current anti-terror laws run the risk of going beyond acceptable limitations on rights.

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[3] *The Australian* 13 September 2006, p 14.

[4] *The Weekend Australian* 2-3 September 2006, p 18.

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We are reminded on a daily basis that we are in the midst of a "war on terrorism". The war was declared by President Bush just after the devastating events of 11 September 2001 in the United States and this language of war has been adopted in many countries, including Australia. The result is what Amitav Acharya has termed "an age of total fear" in which narrow concepts of national security trump all other ideas of freedom and human security.[5]

I plan to focus on the narrowness of the *legal* approaches deployed in this age of total fear; particularly the way that the fight against terrorism is presented as of such national and international significance and urgency that it makes talk of human rights seem irrelevant, irresponsible or hopelessly idealistic.

In the legal context, across the globe the post-September 11 era has generated laws that attempt to reduce the threat of terrorism. These laws are premised upon the existence of a warlike situation; the idea that we are vulnerable to outside forces and that tough measures are necessary for the duration of the war. Terrorism is a very complex phenomenon and it's crucial to understand this to be able to work effectively against it. It has also been around for a long time, at least since Guy Fawkes in the seventeenth century. The word "terrorism" can very easily be used in an omnibus way to mean any activities that we do not approve of, or the activities associated with particular cultures and religions.

UK Prime Minister Tony Blair said, in the wake of the Bali bombings, that the West was facing a "monolithic" terrorist threat. This might be politically effective rhetoric, but it's inaccurate. As the Oklahoma bombing or the bombing of the Rainbow Warrior showed, terrorism is a tool of many types of disaffected groups and terrorists fit no particular profile.

The idea of a monolithic terrorist also plays into problematic stereotypes of western virtue and oriental menace which themselves can exacerbate the likelihood of violence. Failure to understand the complexity of terrorism and its causes can also lead to a judgment that the protection of human rights is a minor, marginal issue in the fight against terrorism.

[5] Amitav Acharya, 'Human Security, Identity Politics and Global Governance', paper presented at Conference on Civil Society, religion and Global Governance, National Museum of Australia, 1 September 2005 available at http://law.anu.edu.au/nissl/cs.papers.html

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The idea seems that to be that human rights are some kind of fancy optional extra and that, in times of crisis, we should forget such frills and allow our police and security agencies to be able to operate unfettered by the troublesome guarantees of human rights. The term "civil libertarians" is regularly used to describe opponents of these laws in a way that trivialises their concerns.

Indeed Greg Sheridan of *The Australian* recently unveiled a new variant on this term: "*Melbourne* civil liberties lawyers". Who would you rather sit next to on a plane hijacked by terrorists, he asked: a Melbourne civil liberties lawyer or a strapping rugby player? I imagine that this example was used to emphasise the uselessness of talk of rights and the advantages of force.

The style of the new wave of security laws is strikingly consistent: they typically

- mandate strict immigration controls
- restrict the due process rights of persons who are suspected of having some knowledge of terrorist activities
- create a regime without the safeguards of the regular criminal law to detain and question and try suspects, and,
- (more recently) move to restrict freedom of speech and religious practices.

While these laws are justified by their drafters as essential for the preservation of our civilisation, the darker side of their implementation has been little analysed. Some anti-terrorist laws and practices have targeted particular groups such as political activists, asylum seekers, refugees and religious and ethnic minorities. Ronald Dworkin has made the point that in practice "no American who is not a Muslim and has no Muslim connections actually runs the risk of being labelled an enemy combatant and locked up in a military jail."

A 2002 report by the UN Secretary-General's Special Representative on Human Rights Defenders, Hina Jilani, has illustrated how terrorism laws have been used to target human rights groups in many countries. For example, people advocating for the independence of Tibet have been labelled as terrorists by the PRC government. The presumption of innocence, the right to privacy and the right to a fair trial (or indeed any trial at all) have all been regularly waived in the name of counter-terrorism.

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It's striking that both sides in this debate invoke the idea of a balance to explain their support or criticism of the anti-terror laws. The idea is that law should strike a balance between the rights and freedoms we associate with democracy on the one hand and with the hard headed realisation that tough action is essential to respond to terrorism and to achieve security. The only conceptual difference between the two positions is where the balance should be struck.

I want to argue (along with others)[6] that the idea of balance is not a useful one in this context because of the implication that the protection of human rights and the prevention of terrorism are somehow inevitably at odds with each other. The notion of a balance or a set of scales gives a quasi-scientific air to the discussion, but it does not explain what will be placed into the balance or how the right balance will be judged or who is best placed to judge it.

It quickly becomes a lopsided debate because it pits the interest of "us" – the majority – against the interests of particular individuals; as Lucia Zedner points out – "the weight of numbers hangs implicitly in the balance to tip it in our favour. Claims to rebalance in the 'public interest' or 'national security' are laid down as trump cards against which any individual claim to liberty cannot compete. This polarisation is evident in judicial approaches to the new wave of security laws. Researchers have chronicled the tendency of the judiciary to defer to the executive on security issues, especially in the wake of terrorist violence".[7]

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[6] E.g. Lucia Zedner, 'Securing Liberty in the face of Terror' (2005) *Journal of Law and Society*; Christopher Michaelsen, Counterterrorism and the Misleading Rhetoric about Balancing Liberty against Security, Unpublished seminar paper (delivered at the ANU May 2005); Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *The Journal of Political Philosophy* 191.

[7] Oren Gross & Finola Ni Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' 15 *Human Rights Quarterly* 625, 640 (2001).

We can see this deference in both United Kingdom and US decisions dealing with anti-terror laws, although the December 2004 decision of the House of Lords in *A v Home Secretary* is a strong and dramatic counter-example in which the Judicial Committee used the UK HRA to declare provisions in the Anti-Terrorism legislation that allowed indefinite detention of non-UK nationals (but not UK nationals) inconsistent with human rights. I want to suggest that a better course would be to develop a more symbiotic understanding of the concepts of human rights and security: they are not antithetical human goods.

In fact, the definition of international human rights principles already strikes a balance between the enjoyment of particular freedoms and national security. The ICCPR, for example, provides that some rights *can* be limited in very specific circumstances. The Covenant refers to "times of public emergency which threaten the life of the nation and [which] ... is officially proclaimed".[8] There are parallel provisions in all major international and regional human rights treaties. The ICCPR makes it clear that the permitted derogations from rights cannot involve discrimination solely on the ground of race, colour, sex, language, religion or social origin: in other words, you could not simply deny a particular religious group freedom of speech, or movement, or a right to privacy in the name of protecting security.

[8] Article 4.

The ICCPR also states explicitly that there are particular rights from which derogation is never permitted: these include the rights to life, to be free from torture, not to be enslaved, and the right to freedom of thought, conscience and religion. It is also clear that the elements of a right to a fair trial must be respected even during an emergency. All of the rights contained in the Convention on the Rights of the Child apply even during times of emergency.[9]

Mary Robinson, then UN High Commissioner for Human Rights, proposed criteria for the building in human rights protection with the combating of terrorism in 2002.[10] Her proposals included the requirement that laws restricting human rights in a time of emergency would have to:

1. Use precise criteria and
2. Not confer unfettered discretion on those charged with their execution.

The proposals also make clear that any limitations must:

1. Conform to a principle of proportionality
2. Respect the principle of non-discrimination
3. Be compatible with the objects and purposes of human rights treaties and not impair the essence of any right
4. Be necessary in a democratic society.[11]

[9] Article 38.

[10] UN Doc. E/CN.4/2002/18, Annex, 27 February 2002.

[11] See also the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, 15 July 2002 available at http://press.coe.int/cp/2002/369a(2002).htm.

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Some provisions of the Australian anti-terrorism legislation do not appear to meet these standards. Take, for example, the ASIO legislation that was enacted in June 2003. Although the draft legislation was held up by the scrutiny of a number of parliamentary committees, and considerably amended in the process, eventually the Labor Party agreed to it, saying that it was the best outcome under the circumstances. In essence, the ASIO Act allows ASIO the power to detain people, not just those who are suspected of terrorism, but also who are thought to have information about terrorism, for up to seven days and to question them for up to 24 hours in that seven days. The law effectively reverses the onus of proof, removes the right to silence and restricts access to independent legal advice while a person is in detention (eg ASIO can apply for particular lawyers to be disallowed). Questioning of a person held by ASIO can begin without a lawyer being present; and a lawyer can be removed.

A very troubling aspect of the legislation is the criminalisation of releasing what is termed "operational information" about detention, even if the information is a part of a media story on the detention system within two years of the detention. The effect of this provision is to give ASIO an immunity to media scrutiny for abuses of the detention system. George Williams has called the law: "an extraordinary law for an extraordinary time. It can be justified only as a temporary response to the threat of terrorism".

But my concern is that this law will in fact have a longer life and impact and set a precedent for scaling back human rights. There have already been proposals to remove the sunset clause from the ASIO legislation. This is unsurprising: The war on terror as depicted by our politicians can never end and thus these laws will always appear necessary.

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In 2005, the Australian Parliament enacted even more draconian laws in response to the London bombings. This legislation had three major aspects: it introduced preventative detention orders, control orders and expanded the definition of sedition. This is not the time for a detailed analysis of this legislation, but both preventative detention and control orders are mechanisms that are inconsistent with the rule of law and with human rights principles such as the right to a fair trial and the right not to be arbitrarily detained.

You may recall that the legislation was kept secret initially until ACT Chief Minister, Jon Stanhope, released a draft on the web. Although a Senate Committee held hearings on the draft legislation, the government ignored all its recommendations for amendment. The Labor Party announced that it would support the legislation, perhaps fearful that not to do so would allow it to be depicted as "soft on terror". Despite the haste surrounding the passage of the 2005 law through Parliament, it was not used until a few weeks ago, when an interim control order was placed on Jack Thomas.

The bi partisan support for the flawed anti-terror legislation enacted since 2001 indicates, I think, the importance of having a set of human rights standards against which governmental action in relation to terrorism can be measured. As we have no bill of rights, no such set of standards is available in Australian law to measure counter-terrorism measures. The international human rights regime can thus provide a useful framework for assessing Australian law.

Apart from the issue of principle, it's worth noting that there are some quite practical pitfalls in assuming that, when the chips are down, security concerns should have priority over human rights. We know from the United States experience that a certain insouciance about truth, justice and human rights can develop in agencies responsible for security. Indeed the secret federal court that approves spying on suspected terrorists in the US found in 2002 that the Justice Department and FBI officials supplied erroneous information to the court in more than 75 applications for search warrants and wire taps.[12]

[12] 'Secret spying court rebuffs Ashcroft' *Guardian Weekly* 29 August – 4 September 2002, p 31.

The tragic shooting of an innocent person by the London police after the July 2005 bombings is another example of the fallibility of security experts.

Another strategic issue is that all the evidence we have about the causes of terrorism indicates that the enactment of tough security laws without securing human rights is counter-productive. There is considerable research that reveals that both alienation and humiliation play a large part in the decision to engage in terrorism or political violence.[13] Laws that are repressive or that appear discriminatory in operation can exacerbate a sense of grievance and injustice, and push moderates to support extreme action.

My point is that legal responses to terrorism require a human rights framework. Just as no political or religious or philosophical cause can justify violating the right to life of civilians, no response to terrorism can justify violating fundamental human rights. I should note that the Commonwealth Attorney-General and the head of his department, Robert Cornall, have moved outside the metaphor of balance in the context of anti-terror laws.[14] They have suggested that the Australian government's approach to terrorism does not scale back human rights, but is in fact aimed at delivering human rights, or at least one human right; the human right at the centre of this new approach is one sourced to article 3 of the Universal Declaration of Human Rights (UDHR): Article 3 states that "everyone is entitled to life, liberty and security of the person". Relying on this provision, the Attorney-General has developed the idea of a human right to security, which is used to justify restrictions on other human rights, such as the right to a fair trial or the right to be free from arbitrary detention.

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[13] E.g. Jeff Victoroff, 'The Mind of the Terrorist' (2005) 49 *Journal of Conflict Resolution* 3; see also Walter Reich, ed., *Origins of Terrorism: Psychologies, Ideologies, Theologies, States of Mind* (Washington, D.C.: Woodrow Wilson Center Press, 1998), Jessica Stern, *Terror in the Name of God: Why Religious Militants Kill* (New York: Ecco, 2003) pp 9-62, cited in Michaelsen, above note 6.

[14] The source of this approach seems to have been the Canadian Attorney-General, Irwin Cotler, although Greg Carne has closely analysed the differences between the Australian and Canadian positions: see Greg Carne, 'Reconstituting "human security" in a new security environment: One Australian, Two Canadians and Article 3 of the Universal Declaration of Human Rights' (2006) 25 *Australian Yearbook of International Law* 1.

In my respectful view, the Attorney-General's new approach is problematic because it misreads the actual text of article 3 of the UDHR which is that "everyone is entitled to life, liberty and security of the person" and converts an individual right to one belonging to the state and society. The dropping of the reference to liberty and the elevation of the idea of community security is completely at odds with the accepted meaning of the right in international law. The Attorney-General's approach is, at heart, a proposal of a right to homeland security, not to *human* security. I would argue that homeland security at any cost is too high a price to pay.

Individual liberty, properly understood, is basic to the public interest; and security must also include security of the individual from unwarranted interference by the state. Many governmental reactions to terrorist incidents do not realise that "building a durable global human rights culture, by asserting the value and worth of every human being, is essential if terrorism is to be eliminated".[15] I do not see this as "legal idealism" but rather as politically crucial to creating an effective response to the phenomenon of terrorism.

The Chief Justice of Israel, Aharon Barak, has said, memorably, in a 1999 case where the Israeli Supreme Court declared some practices of the Israeli Security Forces illegal:

"This is the destiny of democracy as not all means are acceptable to it, and not all practices employed by its enemies are open before it".

He went on:

"Although a democracy must fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties".[16]

[15] Mary Robinson, above note 10.

[16] 38 *International Legal Materials* 1471.

Rather than rushing to appear to appear draconian in the face of terror, it's worth taking some time to consider the most effective long-term strategies. At the end of the day, true human security depends on broadening respect for human rights, rather than treating human rights as dispensable when the going gets tough.

For these reasons, I would like to see the rhetoric of the "war on terror" abandoned: the idea of a war suggests that it's possible to use lethal force on the enemy regardless of their personal involvement with violence and it justifies action on the basis of feared or anticipated harm; it implies that harm to civilians is justifiable, if it assists the prosecution of the war; it also allows fair requirements of evidence and proof to be watered down.[17]

One way ahead would be to consider terrorism, not as a distinct crime, but one that can be dealt with through the criminal law. On this analysis alleged terrorists would be regarded as criminal suspects to whom the standard principles of due process should apply. As Lucia Zedner has argued, the criminal law can offer a principled approach to managing the tensions between security and human rights.[18] This would require national legal systems incorporating a set of rights that could be safeguarded through rules of procedure and evidence.

The values of the criminal process offer a framework for anti-terrorist policies including "the principles of reasonable cause; no detention without trial; *habeas corpus*; innocent until proven guilty; an open trial in a judicial court; legal advice and representation of choice; and punishment reflecting the seriousness of the crime".[19]

Such an approach does not preclude specific anti-terror measures in particular circumstances, but emphasises the need for these measures to have in-built human rights safeguards, respecting the values of necessity, proportionality, non-discrimination, transparency and accountability.[20]

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[17] David Luban, 'The War on Terrorism and the End of Human Rights' *Philosophy and Public Policy Quarterly*.

[18] Lucia Zedner, above note 6. For a contrary view see Bruce Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029, 1034 (arguing that the nature of the current terrorist threat goes beyond the criminal law).

[19] P Thomas, 'Emergency and Anti-Terrorist Powers 9/11: USA and UK' (2003) 26 *Fordham International Law Journal* 1193, 1194-5.

[20] Lucia Zedner, above note 6.

We need to think much more seriously about long term strategies and the causes of terrorism - talk of the "war on terror" gives the impression of strong action while in fact exacerbating the very phenomenon it seeks to eradicate. We can see this dramatically in the classified report from 16 American intelligence agencies, in the press just this week.[21] The report, from the US government's own security experts, found that the invasion and occupation of Iraq, a key operation in the war against terror, has in fact generated a new generation of Islamic radicalism and that the overall threat of terror has grown since the war was declared.

For the short term, however, the most useful legal approach to terrorism, I want to suggest, would be one based on the rule of law and which ensures respect for human rights. As Kofi Annan has said "If we compromise on human rights in seeking to fight terrorism, we hand terrorists a victory they cannot achieve on their own".[22]

Here in Australia, we can detect a national mood that is reluctant to question measures taken in the name of national security or the war against terror. The Labor Party is reluctant to criticise the extraordinary Australian anti-terror legislation and reference to human rights is made to seem anti-patriotic and unreasonable. There are few politicians who are willing to argue, as Maurice Blackburn did in the context of Robert Menzies' national security bill in 1939, that human rights and civil liberties are worth preserving, especially when a nation feels under threat.

In such a context, I think the example of Maurice Blackburn is really significant and I welcome this chance to honour his memory. His life shows us today that it is important to stick up for basic principles ahead of political advantage, although this may take a significant toll on a person's career, and to work to protect human rights, particularly of marginalised groups, so that we can live in a tolerant, creative and productive society.

[21] E.g. Mark Mazzetti, 'Spy Agencies say Iraq War Worsens Terror Threat' *New York Times* 24 September 2006.

[22] Press release SG/SM/8798.

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Year	Speaker	Topic
1987	Bob Hawke	Speech by the Prime Minister Inaugural Maurice Blackburn Memorial Lecture
1988	John Bannon	The Relevance of Labor in Today's Australia
1989	Jean McCaughey, AO	Focus on Families
1990	Dr Jocelynne Scutt	In Praise of Dissent - Power, Politics and the Democratic Ideal
1991	Dr Carolyn Rasmussen	Maurice Blackburn - The Man and the Legend
1992	Jack Culpin, JP	Political Changes
1993	Dr Eric Willmot, AM	A New Dreaming
1994	Hon Chief Justice Alastair Nicholson, AO, RFD	The Australian Family - What is the Future?
1996	Right Reverend Michael Challen, AM	Person, Place and Power
1997	Dr Lowitja O'Donoghue, CBE, AM	Australians for Reconciliation
1998	Thomas Keneally	The Perils of Commonwealths
1999	Mary Crooks	Victoria 2000: Repairing the Social Democratic Fabric
2000	Xanana Gusmão	The Importance of Community Alliances in the Rebuilding of East Timor
2002	Julian Burnside, QC	Hypocrisy and Human Rights
2004	Dr Clive Hamilton	Consumer Capitalism: Is this as good as it gets?
2006	Prof. Hilary Charlesworth	Human Rights in the Age of Terror

HUMAN RIGHTS IN THE AGE OF TERROR

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Language Link	
中文	9280 1910
Italiano	9280 1911
Ελληνικα	9280 1912
العربية	9280 1913
Türkçe	9280 1914
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Español	9280 1916
Hrvatski	9280 1917
Polski	9280 1918
All other languages including اردو, 廣東話, فارسی, **Kurdi, Malti,** Македонски, Српски, **Somali, Tetum**	9280 1919