2001 Mitchell Oration

Geoffrey Robertson QC

"Justice and Revenge: The Lessons of Sept 11"

Thank you for that overkind introduction, Robert. Rather better than the one I received a couple of weeks ago when I spoke in Scotland, and the Chairman through a very thick Glaswegian accent described me as, "That distinguished liar."

Private Eye of course calls me in England, "An Australian who's had a vowel transplant."

And I do sometimes have to apologise to home-town audiences for the roundedness of my vowels; it comes from 30 years of bowing and scraping in the English Courts.

The very first case I did as a nervous Barrister in the Old Bailey brought it home to me. I still had my irritable Australian vowels picked up from the western suburbs of Sydney where I grew up. I'd say "Going to France" or "Something on a branch," and it fell to me to get up before a deeply reactionary and ferocious Judge to explain the case that I was appealing; it was a conviction for indecency. My client had been convicted of wearing an indecent T-shirt. And I had to explain, I got up nervously and said, "My Lord, this is a case, an appeal against the finding of indecency for the T-shirt logo which says, `Fuck Art, Let's Dance'."

There was a terrifying silence, and then an explosion from the bench, "Fuck Art, Let's WHAT, Mr Robertson?".

"Dance, Your Honour. Dance."

There was a long silence, he said, “Oooh, you’re an Australian. What you mean to say is: 'Fuck Art, Let’s dance'.”

And so I learned to round my vowels.

It’s a very great and very personal pleasure to say a few words in honour of **Dame Roma Mitchell**. She is the only woman in my life that I've ever written a song for, and the only woman I've ever serenaded.

This unique event took place in 1968, when I invited her to undergo what was then certainly the greatest hazard of occupying an Australian judicial office, namely to make the speech at the annual Sydney University Law Society Dinner.

This was a very violent occasion. Lord Denning had made the speech just before her, and when he said he was Master of the Rolls he was pelted with bread rolls, and was injured as a result. So we had difficulty finding a replacement, but Roma came along, and in order to make the occasion a bit more civilised, I wrote a song for her. It had a good tune, a good chorus: “Arrieve derci Roma”. Get it?

It was satirical of the time, those colossal personalities of the late 1960s: Playford, Dunstan, Andrew T Jones. Whatever happened to Andrew T Jones? He was a sort of Bill O’Chee of 60s politics.

It’s lost, unfortunately. I turned over the family attic last night to see if I could find it so we could all sing it at the end, but alas, my 1960s jokes are long gone.

But she did manifest on that occasion something that isn’t mentioned so often in her biographies, namely, an enormous sense of humour. And that of course she must have had to make her way in what was very much a man’s world.

And what a way she made. She was the first female QC in the world, the first female Judge in the Commonwealth, the first State Governor.

It must have come as a great shock to the Chief Justice when she was appointed a Judge. He of course was 83 years old, Sir Mellis Napier, and she said looking back, "On my appointment he was faced with the inexorable oddity of a woman placed on the bench when he was 83. I think he was shocked. He certainly appeared to be shocked; but he recovered from his shock after about 24 hours."

Others no doubt took longer.

But by the end of her life, Roma had lived to see come to pass that which she had hoped to achieve by giving up her beloved life at the Bar—she didn't want to be made a Judge at all—but it was, she said, "To live long enough to see the fact that a woman's appointment to the bench was not regarded as anything abnormal."

Has that ambition been completely achieved?

Many would say so, and it may be impolite to think otherwise, especially on this occasion. But I note, skimming her biography, that somehow she never made it to Chief Justice of South Australia; odd that. And nor incidentally did her great friend Mary Gaudron, although she was the senior High Court Judge a few years ago when the position fell vacant.

So, there may still be mountains to climb, minds to prise a little bit more open.

In those days back in the 60s of course you didn't have women Article Clerks, because we didn't have the toilet facilities. You didn't have - "Oh well, if you had to appoint a woman on the bench, you can stick her in the Family Division". That was very much the attitude.

When the heights are scaled, when we do have a female Chief Justice of a State, when we do have a female Chief Justice of Australia, it will be Roma Mitchell who paved that way.

Tonight I want to talk about a subject that was very close to Roma's heart, she lavished a great deal of work in later life upon it: it was the cause of Human Rights, and most specifically the cause of enforcing Human Rights Standards. Particularly in respect of criminal justice, looking at some of the difficulties and perhaps opportunities that have been created in the wake of September 11th.

In fact, the topic on which I invited her to speak all those years ago, was very much on this, "The *how* to enforce Human Rights Standards," because South Australia had just passed the first Race Discrimination Act in the Commonwealth and she was optimistic in her speech all those years ago about the role that law could play in changing deep-rooted prejudices.

Well, tonight I want to speak a little more generally about the problems of enforcing universal Human Rights Standards in a world where sovereignty, where national pride, and national - where international law is still developing. We are after all at the end of a week which saw the effective end of the first war of the 21st Century. The United States and its allies, including Australia, did not in that war vanquish terrorism; what they did was to overthrow and to replace the sovereign Government of Afghanistan.

Now, in these days, making war means inevitably making law, in the sense of creating a precedent for future action, future invasions of other countries. So, in analysing the question of whether it was a just war, and just what it was fought for, I want to raise the question of how does the assault on Afghanistan fit in with the development of International Human Rights Law; what sort of precedent have we created for the future?

I also want to ask, well, what happens if by the light of a sickle moon in the Hindu Kush tonight some little Australian battalion finds two figures emerging, one blinded in one eye, Mullah Omar, the other 6'6", flowing robes, bin Laden, and the extraordinary fact in this hypothetical: they both have their hands up?

What do you do? Do you shoot them? Do you hand them over to the Northern Alliance troops to disembowel? Do you send them to the Americans? Or do you bring them back home and see who applies for their extradition?

This problem I will address towards the end of this talk. But let me first take a deep breath and talk a little about the world as it was on September 10th, how the cause of Human Rights seemed then to stand, and see whether we can make some generalisations about how things have changed as a result of September 11th.

The question of where to start in the Human Rights story is always a tough one.

Let's go back to about the time when Australia was settled by whites, where the first age of Human Rights was coming into focus. The declarations of the rights of man (it was always the rights of "man") by the French Revolution and the American Revolution. Those great declarations building on the habeas corpus, and the Bill of Rights in England in the previous centuries, but writing down for the first time the idea that individuals should have vested rights that they could assert against governments.

This was based on the philosophy of Natural Rights. And what happened in the next century was that the idea of Natural Rights were disputed by two great thinkers—by Jeremy Bentham who called them "nonsense, nonsense on stilts," and explained the logical fallacies in the idea, and by Karl Marx who attacked them as "bourgeois rights", as right of free speech and so forth being rights of the wealthy.

So, we get to the 20th Century with very little progress in terms of enforceability of any kind of universal standards; International Law only applied to States, it didn't apply to individuals. In the 20th Century, the most remarkable thing about it is for the first 40 years the concept of Human Rights is never mentioned, not by the League of Nations, not by the Permanent Court of International Justice. Even as Hitler was making Human Rights irrelevant in Germany, still the idea of the concept did not advance.

The first time that Human Rights—the idea of Universal Human Rights Standards—was projected in a serious-minded way was in 1939 and 1940 by a remarkable group of thinkers around H G Wells: a group of middle class English socialists. There was J B Priestley, Barbara Wootton. And A A Milne would motor up from Pooh Corner to add his comments to the draft, and they produced a little Penguin special called: "H G Wells and the Rights of Man," which was translated into 30 languages. Immediately, H G Wells would speak to thousands under the banner "H G Wells on the New World Order." The idea that there should be fundamental basic standards which could be enforced by an international organisation was the - reviving this idea was to this group.

It went so far that the British Foreign Office, in what must be the greatest act of Human Rights optimism yet seen, had the text translated into German, and actually dropped it on the SS as they were advancing across France. They didn't stop to read it.

But the person who did was a friend of Wells: that was President Roosevelt, and it inspired him to make his famous “For Freedom” speech at the end of 1941, guaranteeing a world that was for freedom of speech and freedom of religion, freedom from fear and freedom from hunger. And in 1942, for the first time, Human Rights was actually set in print as an Allied war aim.

The next great question, however, that is very relevant, as you will see, today was what to do about the Nazi leaders. As the Second World War progressed, and came to progress in favour of the Allies, this was the subject of a very heated debate between the leaders and the Secretaries of State. Winston Churchill had no doubt that they could not be put on trial. The British were all for selecting the top hundred Nazis and having them executed within 6 hours of capture. They went back to medieval times and the concept of outlawing: they were going to brand them as outlaws, to be shot as soon as they were captured.

This did not go down well with Roosevelt, and particularly with Truman who succeeded him, and with Stimpson the Secretary of State. Truman said, "Historically it would not sit well on the American conscience, and it would not sit happily with our grandchildren, it would not fill our grandchildren with pride if we were to execute these men without proving first their guilt". And so it was deadlock between Truman and Churchill.

And of course the casting vote went to Joe Stalin, and Stalin liked nothing more than show trials where everyone got shot in the end. And it was thanks to him that we had the Nuremberg Statute, and the Court at Nuremberg, which ushered in the second era of Human Rights with its rule that sovereign immunity did not mean impunity, that no matter how high you were in a political apparatus, if you were guilty of war crimes or what the Nuremberg Statute defined for the first time as a crime against humanity—multiple mass murder of civilians on a widespread and systematic basis pursuant to a political program—the fact that you were clad in Machiavelli's armour of state sovereignty, as a head of state, as a general, or whatever, that didn’t avail you. And Nuremberg of course brought International Law home to the leaders of states. Its promise was that in relation to crimes against humanity, which could be defined, I suppose, as crimes that are so black that the very fact that a fellow human being can conceive and commit them, reduces us all as human beings. So the crime against humanity unlocks the traditional bar of sovereign immunity. And that of course ushered in the great triptych of Human Rights in 1948.

There was the Universal Declaration, which was based very much on the evidence that was coming out at Nuremberg. There was the Genocide Convention, the day before. Both those documents historically handed to the President of the General Assembly of the United Nations, where it was sitting in Paris—and that President was Doc Evatt, the Australian Foreign Minister. And then a few months later, the Geneva Conventions for the proper treatment of prisoners of war and civilians in time of war. And these three documents became the great triptych of Human Rights, for what I call the Second Age of Human Rights, the writing down, the promise. And the Genocide Convention specifically made it an obligation on States to intervene where there was genocide, and to put the authors of that genocide on trial at an International Court.

Well, the sad thing of course for the next 50 years was that the Cold War divide made Human Rights simply a propaganda tool to be hurled across the divide. There were Conventions, there were so many Conventions that followed. There were Conventions against Apartheid, against Race, Conventions for Equal Opportunities, Conventions for the Rights of the Child. There were so many of these good conventions. And as someone said I think in surveying the hundreds of thousands of dead in Rwanda in 1994: “The road to hell is paved with good Conventions”.

They weren’t enforceable. There was no enforcement mechanism attached. When dictators and tyrants left the bloody stage, they always left with the amnesty in the back pocket and the Swiss bank account intact. There was no enforcement mechanism. Diplomacy decreed that there would be no retribution for the greatest crimes of all. And I remember in Sarajevo in 1994 hearing this joke - there aren’t many jokes in this business, but this was one of them - “What do you do to a man who kills another man? Will you put him in prison for life. What do you do to a man who kills 20 other men? Will they go to a mental asylum? What do you do to a man who kills 200,000? Do you take him to a luxury hotel in Geneva for peace negotiations?”

That was a joke, a black joke, told of Slobedan Milosevic, and it got even blacker over the next few years. That was a point at which it seemed that to despair in terms of the world developing any way of retribution against those guilty of the gravest crimes.

But then there were an extraordinary 18 months at the fag end of the 20th Century. Six quite remarkable events that can be pulled together.

The first was the Conference at Rome in July of 1998, in which 120 countries agreed to set up an International Criminal Court. It would only act in the future, of course, but it was nonetheless an extraordinary event, an extraordinary agreement.

It didn't have the United States' blessing—in fact the United States voted against it, although Clinton was personally in favour. Unfortunately, the vote coincided with the sending of Monica's blue dress for DNA analysis, and the President was fatally weakened. One of the consequences of Lewinksi was that America voted against because the Pentagon, violently opposed, won the day. But that was the first event.

A few months later there came the arrest of General Pinochet in London for mass torture on a Spanish extradition warrant, and he'd come to London to take tea with Margaret Thatcher—although I am reliably informed it was whisky. He was placed under house arrest. It was mansion arrest, but it was nonetheless arrest, for 18 months while the House of Lords came to terms with these Treaties, these good Conventions that the world had signed, that Pinochet had signed, Mrs Thatcher had signed back in the 80s—the Torture Convention—and said by the time the case came back to the last lot of Law Lords - they had to get rid of anyone who had any connection with Amnesty International - so they ended up with 7 contract lawyers, commercial lawyers, who wouldn't know a Human Right if they fell over it, but knew what contracts meant. And they read the Torture Convention as a Treaty, and they said, "It says here, there's this extradite or punish provision, there should be no hiding place. This means what it says." Of course diplomats had always acted in the past 50 years on the basis that these good Conventions could be signed and they never have any impact. But the Pinochet proceedings, and the Pinochet precedent, was the second remarkable event in 1998-99.

The third was how—and this had much to do with the election of the Blair Government—where Britain actually said that NATO had to get serious about arresting those individuals indicted by the Court that had been set up a few years earlier very much as a fig leaf by the United Nations to cover its own incompetence and failure in Bosnia: the tribunal that was set up at the Hague to punish crimes against humanity and war crimes in Bosnia, and the Tribunal at Arusha.

Now in 1998-99, the British actually started to arrest some important figures. Generals, Concentration Camp Commanders, the Prime Minister of Rwanda pleaded guilty in Arusha to crimes against humanity over being one of the authors of the genocide. So that international justice started to work, started to feel the collars of important people.

The fourth remarkable event was the NATO invasion of Yugoslavian sovereignty over Kosovo, to stop the ethnic cleansing in Kosovo. Ratcliffe Havelle described it as the first war fought entirely for Human Rights, where none of the NATO countries had economic or other advantages to gain by that war. It was an uneasy beginning for the enforcement of Human Rights - bombing from 15,000 feet, a lot of collateral damage (euphemisms for killing citizens) - but nonetheless it was an example, the first if you like, of going to war to stop the commission of crimes against humanity, and to punish those who had committed them.

Now, there were a number of preconditions that one can draw from the Kosovo experience. Certainly those who make war in the name of Human Rights, who are prepared to kill for Human Rights, must first of all be sure of their evidence, and must pick up the pieces, and must be prepared to put those they go to war against on trial in an International Court subsequently.

But nonetheless, killing for Human Rights is one thing; being killed for Human Rights is another. And I think that we can list as the next the fifth remarkable fact, East Timor, in which Australia played that part. And thinking back, remember how it was assumed that there would be casualties. The ferocious militia, who in the end melted over the borders, were assumed to be capable of killing quite a few of the invasion force. But nonetheless East Timor was the fifth remarkable example. Although the killing, remember, continued for two weeks after the Referendum because China insisted that it would impose its veto on any force sent without Indonesia's approval. And it's perhaps to President Habibi, who generally got a bad press, that we do owe the courage of signing his own political death warrant by allowing that force in. We still had the problem of the Security Council veto, but nonetheless East Timor was quite remarkable.

So it was the other event of the end of the Century, the Lockerbie Tribunal, in which Libya, having resisted for 10 years, handing over the two suspects for blowing up the Pan American

jet, finally did so, under the force of sanctions, for trial under Scottish Law by Scottish Judges at an American airbase in the Netherlands.

So those six remarkable events seems to presage which might be termed a millennial shift from the old idea of diplomacy and appeasement, to the notion that justice would be a dominant factor in international relations. Or was this, as my wife says, an example of PMT— "pre millennium tension" —that we wanted to in a sense at the end of a century in which a 160 million lives had been lost by war and genocide and the like, to make a rather better world.

Well, the progress continued, most notably with Slobodan Milosevic handed over. Admittedly, there was a bait—a large sum of reconstruction aid—but the interesting feature was that the lack of protest to Milosevic's handover came very much from the result of a free press, from the weeks before exposing the fact that in order to avoid the scrutiny of the Criminal Court of The Hague Tribunal, a lot of bodies killed by Serbian paramilitaries in Kosevo had been dug up and taken in freezer lorries across to - some of them were dumped in the Danube, others were buried in a mass grave outside Belgrade. So, there was an element in the Milosevic handover in which there was a genuine acceptance that International Criminal Justice could work and that the 21st Century would be a century in which Human Rights would be enforced, if need be, at the very last resort by war, that crimes against humanity when committed by a government against its own people, by genocide, by mass torture, by racist persecution, or committed against others, would be punished.
So on September 10th I think it could have been said with some confidence that the third age of Human Rights, the epoch in which basic humanitarian norms would achieve a level of enforcement, was underway. Forty-two States, including Britain, France and Russia, had ratified the Rome Statute, and the ICC (International Criminal Court) was expected to open its doors by the end of next year. I say as a coda how disgraceful it is that now today there is about 48 States have ratified that Treaty; Australia isn't one of them. And unless we do so very quickly, we will not be among the first 60 States to have brought the International Criminal Court into being.

But nonetheless, Milosevic was in The Hague dock. The Tribunals to deal with Vidal Sanco and his brutal men who lopped off arms and legs, were being set up in Sierra Leone. The United Nations had agreed Tribunals, mixed Tribunals, to try the Khmer Rouge Commander.

And there was an International Court in East Timor dealing with some of the militia people accused of the massacres. Megawati was saying she would approve - she now has - prosecutions against at least some junior officers. The picture was sufficiently optimistic for the two main Human Rights NGOs, Amnesty International and Human Rights Watch, to formally turn their spotlight onto economic and social rights of a kind that they had rather neglected.

Well then quite literally out of a clear blue sky come the Kamikaze attacks on the World Trade Towers and the Pentagon. The generation, who could still remember where they were when they heard the news that Kennedy had been shot, was replaced by a generation who will forever live with the freeze-frame in their mind's eye of the passenger jets exploding their tanks on the buildings that served as the buck teeth of New York.

The world is generally held to have changed on that day, although its full impact on International Human Rights Law will not be clear for some time. But if there is a silver lining in that black cloud that hung for so many days over Manhattan, it may be to send the message to Americans that their ultimate safety lies in International Law and co-operation. But injured pride and emotional chauvinism have meant bursts of isolationism in this world's most prosperous and powerful nation.

In the weeks after September 11th, Tony Blair, who played Cicero to George Bush's verbally dysphraxic Caesar, spoke very movingly, did Tony Blair, about putting the world to rights. But Donald Rumsfeld's asides hinted at a simpler desire; to nuke the enemy and then go home and turn on the Star Wars security system.

On the evening of September 11th, when the President came down from his flying bunker—he'd been sent aloft in Air Force I for his own safety—he faced the television cameras in that speech that Robert quoted from, and he said, quote, "Freedom itself was attacked this morning by a faceless coward". Although the attacks were anything but cowardly. And later added the afterthought, as if a light bulb had flashed in a caption above his head, "This could be an opportunity."

Well, what opportunities and what difficulties the Coalition Against Terror will have for Human Rights Law, I want now to consider.

Before I do, I want to say briefly something about the Taliban and bin Laden, because it's crucial to understand, I think, their relationship, before postulating any legal consequences.

When the Russians withdrew from Afghanistan in 1989, you remember they were beaten by those brave fighters, the Mujahedin: Afghan fighters bolstered by about 30,000 so-called Afghan Arabs from the Islamic Diaspora—mainly Pakistan, Saudi Arabia and the Gulf States. Now recruitment of the Afghan Arabs and the emergence of the Taliban had been sponsored by, amongst others, the United States. Those policy-makers obviously hadn't heard of the parable of the dragon's teeth; Zib Brezinski, Jimmy Carter's security advisor, said, and I quote, "What was more important in the world view of history: the Taliban, or the fall of the Soviet Empire? A few stirred-up Muslims, or the end of the Cold War?"

Well, the stirred-up Muslims spent a few years fighting viciously among tribal and warlord allegiance lines, until Mullah Omar and his zealous students from the Madrases —the Colleges that study nothing but the Koran—won a stream of victories, and in September 1996 captured Kabul. There lived Mohammed Najibullah, the country's President from 1986 until 1992, where he went into the UN Compound in Kabul protected by International Law, which even the Afghan factions had respected.
The Taliban's first act in Kabul was to violate the UN immunity by seizing and torturing the former President, then castrating him, and dragging his body behind a jeep before hanging it from a lamppost. Well, this premeditated barbarism by men who came in the name of religion gave fair warning of their approach to Human Rights, as the Taliban, who were mainly Pashton, battled the Tajik forces of Masood and the Uzbek Forces of Dostum and others, they did behave with a calculated ferocity. Mullah Omar personally authorised the massacre in August 1998 in the town of Mazar which left 6,000 civilians, many of them woman and children, dead in the streets. It's no excuse that their opponents behaved in kind, although many of our allies, particularly Dostum and Hickmeyer, certainly did.

The world simply looked the other way. Afghanistan was a basket case in a too-hard basket. Until Madeleine Albright eventually noticed that the Taliban were refusing to allow woman to work or be educated, and that was when she described them as despicable. Until that point the repression that had been instituted by the Taliban through its Ministry for the Prevention of Vice and Promotion of Virtue, its brutal public executions, often for crimes of apostasy; homosexuals were crushed to death under walls; bans on television and music and sport;

disruption of UN aid supplies; massacre of opponents. These had all gone uncondemned . The CIA had pumped billions of dollars through the Pakistan Intelligence Service fully knowing that the lion's share was going to arm the Taliban.

So what made the world sit up and take notice? Was it its association - not the monstrosity of the regime - but its association with bin Laden?

Bin Laden had formed al-Qaeda back in 1988 when he was a Mujahadin Commander. Initially it was a social organisation to keep in touch with the fighters, the Afghan Arabs, that he was bringing over. But, after this innocuous beginnings it did develop firstly in the Sudan, and then when he accepted Mullah Omar's invitation in 1996 to relocate. There in the Hindu Kush Mountains he issued his first declaration of jihad against Americans recorded on audio tape, distributed in 40 different countries.

The following year he gave his first CNN interview, muttering vague threats to American civilians. And in February 1998 he delivered a widely published and full-blooded fatwa calling upon Muslims to kill Americans, including American civilians, wherever they could be found.

In August 1998 his operatives exploded truck bombs outside the US Embassies in Kenya and Tanzania killing 234 citizens, 12 of them Americans, and wounding 5,000.

So the Security Council finally at the end of that year passed a resolution condemning the Taliban for harbouring terrorists and violating Human Rights.

By this time al-Qaeda was an organisation rather like a multi national company with some 6,000 members, training camps throughout Afghanistan, and it had a number of operations, many of them foiled, but since 1992 it had been planting bombs and trying to kill Americans. And of course in the year 2000 it was responsible for killing 17 of them in the bombing of the USS Cole.

So we get the Security Council Resolution in December 2000 prohibiting military assistance to the Taliban until it handed bin Laden over to face a number of indictments that had already accumulated against him in New York.

So, against this background I suppose the most astonishing thing about September 11th, was that Western Intelligence didn't see it coming. By that time there can be no doubt that the organisation had a policy of committing multiple murder of civilians as part of a widespread and systematic attack directed in particular against Americans. It was a racist jihad, and that of course precisely satisfies the definition for a perpetrator of a crime against humanity as set out in Article 7 of the International Criminal Court Statute.

So this characterisation of the September 11th atrocities means, on the precedent of NATO's attack on Serbia, that the international community would be entitled to invade sovereignty in order to punish the crime, so long as the sovereign State invaded, namely Afghanistan, bore responsibility for it in International Law. And that would depend entirely on the relationship that the Taliban forged with al-Qaeda.

There is a pithy summary by a British diplomat who said they were two sides of the same coin. But what we do know is that Mullah Omar was a close friend who knew what he was doing when he invited bin Laden to relocate in 1996 with his Afghan Arab army who would fight alongside the Taliban army in its war against the Northern Alliance.

Bin Laden became in effect, if not in title, a Taliban General, commanding special and specially motivated forces in much the same way as Himmler commanded the SS Divisions alongside the Regular German Army. Omar and his ministers knew and approved of bin Laden's conspiracy to kill American civilians. They knew of his fatwahs in 1996 and 1998, of his propaganda videos. They permitted him to construct training camps not far from their capital of Kandahar, and the eagle's nest of tunnels throughout the mountains behind Tora Bora was the country's largest military complex. There are hundreds of recorded incidents of al-Qaeda fighters serving the Taliban with its army, or in special suicide bombings such as the bombing that killed Masood two days before the September 11th attack. And since the fall of Kabul, of course, we have got a great deal more evidence which seems to show Taliban and al-Qaeda co-operation in projects to develop weapons of mass destruction.

So to sum up: the Taliban knew that bin Laden was conspiring to commit a crime against humanity, namely a crime that would involve the mass murder of innocent civilians, and with that knowledge gave him every possible assistance, ranging from physical protection, to the use of state facilities. The Taliban leaders wouldn't have known precisely the date or the

nature of the September 11th attack, but they knew that a crime of that dimension was being planned, they deliberately assisted, and politically and ideologically approved.

So there is a compelling case against the Taliban leaders for aiding and abetting the crime against humanity that was committed on September 11th. So that would provide one basis, a very limited basis, based on partly the Kosovo precedent for responding, as the allies did. But that wasn't the way they did respond.

You will remember the horror of September 11th, although the casualty figures are dropping every day, nonetheless they are likely to be above 3,000. The highjackers were, it seems, members of al-Qaeda selected, steeled themselves for this kamikaze operation by an interpretation of the Koran which required them to accept the religious duty of jihad, Holy war on infidel America, in which the moment of a martyr's death would see them translated into a parallel universe. Judging from the jottings of their leader, Mohammed Attar, they would have torn off their shirts at the moment of impact, puffed out their chests to meet the steel of the World Trade Centres, entrusting what was left of their bodies to, I quote, "The women of paradise waiting and calling out come hither."

It is one of the blacker ironies of Islamic jihadry that condemnation of pornographic films in life is rewarded in death by stepping into one.

This is not offered as a cheap aside, but as proof that their actions were motivated by a superstitious belief system that must qualify, however grotesque, as religious.

But nonetheless as part of a program which however brainwashed they were, they were enacting a policy, and it's of an organisation, and it is that organisational policy that fits in with the definition of a crime against humanity. Well, of course in the weeks that followed there were various assertions of the guilt of certainly bin Laden and eventually of the Taliban Government.

Various formulations have been criticised as being based on circumstantial evidence, although of course as every criminal lawyer knows, circumstantial evidence can sometimes be rather better evidence than fallible eye witness testimony and other forms of human evidence.

But whether the evidence of guilt of bin Laden and his senior planners for a crime against humanity, or whether the evidence that's comes through of the Taliban leadership aiding and abetting that crime, would remain as compelling as it seems when fleshed out in a court room and tested by cross examination, is another matter. But nonetheless we can say at this point that there is no doubt that there is strong evidence that they are parts of a conspiracy to commit mass murder.

What's more, the evidence shows that bin Laden is not, as first appeared, just a peripatetic gang leader, a modern pirate receiving no state assistance, but he hasn't been a guest of the Taliban, he has been part and parcel of the state apparatus.
So that is the way I would wish to characterise the atrocities, together with the Embassy bombings in 1998, and the other attacks on civilians, part of, and I quote again the Rome Statute, "Multiple acts of murder committed as part of a widespread and systematic attack against a civilian population".

It was to punish that sort of crime in Kosovo that NATO breached Yugoslavian sovereignty, and the principles might have applied to an international coalition approved under Chapter 7 preferably of the United Nations Charter by the Security Council. I've dwelt on that in some detail because it is the way I wish the world had responded to September 11th.

Because International Law is a curious doctrine that kind of pulls itself up by its own boot straps, it allows wars and the like to happen and then sits back and says, "Well, how will this characterise itself as part of State practice to go as a precedent in future".
So it is still open to us to see the attack on Afghanistan in that light. But it was not the approach of the Bush administration, and this is what I now want to question. Because the Bush administration has relied from beginning to end on the customary law right of self defence. And it's very important for International Law to see whether, in the course of extrapolating principles from the practice of America in going to war, to see whether it really can be justified as an exercise of self defence from beginning to end. Because if it can, how many other States may be lain to waste when super powers anticipate attacks - which attacks might never have come, because America is saying we are entitled to do this by way of anticipatory self defence - and whether it's rather better if we try to bring what's happened within the limiting notion of a Human Rights offensive to prevent and punish a crime against humanity.

Well, self defence, the right to use force in self defence, is expressly preserved by Article 51 of the United Nations Charter. It is there in self defence, enabling the use of force in International Law, just as it does in Domestic Law. But it is severely limited by Customary Law itself.

Firstly, because it's grounded in necessity the counter attacks must be solely and immediately designed to remove the threat, and they must remain proportionate to that objective. The key precedent in this respect comes from rebellion against British Rule in Canada. The rebels, who were terrorists in Britain's eyes, had many American supporters across the Niagara, and those American supporters harboured them and they allowed one of their steamboats, "The Caroline", to be used to ferry them across to an island where they had their headquarters.

In response the British soldiers seized "The Caroline", they boarded it, they then pushed it over, set it on fire and pushed it over Niagara Falls, where a number of Americans were killed. And there was a great to-do between the British and the American Government, and finally they agreed, and all International Law cases since have said this is still the definition of self defence, to show a necessity of self defence it must be instant, overwhelming, leaving no choice of means and no moment for deliberation. There must be nothing unreasonable or excessive, since the Act justified by the necessity of self defence must be limited by that necessity and kept clearly within it.

So there's no doubt that the United States and its allies were entitled, under the doctrine of self defence, to bomb, to invade Afghan sovereignty, to bomb bin Laden's training camps and terrorist infrastructure, so long as this extraterritorial law enforcement was the object of the expedition, and so-- But the real question that arises is whether when the war changed, when the war on terrorism changed from attacking the terrorist infrastructure, when it changed in mid October into a war to obliterate the Taliban Government, could self defence justify that change?

It seems to me that the requirements of self defence - and remember that a war of self defence is the most extreme and lethal course of action that can be open to any State, especially the United States with its military fire power - that access to it must not be allowed on flimsy or unsatisfactory excuses. And there can be no question that in October and November the requirements, traditional law of self defence, of immediacy, the requirements of

proportionality, the requirements of necessity were simply not there. You can't argue that the fact that the attack occurred on American soil, in circumstances of spectacular symbolism, justified going to war to topple the sovereign government. You can't find a difference in the casualty figures. You can't find a difference in - it seems to me, justify a retaliation as self defence at a time when your country is in no danger at all. The Anthrax scare of course had by that stage been quite clearly not coming from Afghanistan.

The only imminent and specific danger that America was facing at the time were further Anthrax letters, but that as I say, was not a threat emanating from Afghanistan. There was no evidence of the kind of urgency and immediacy that "The Caroline" case requires to justify self defence.

There were some vain efforts to negotiate a position in early October, shortly before the bombing campaign began, where America started by acting as the Air Force of the Northern Alliance, and ended by using the Northern Alliance as surrogate ground troops in the attack on Kabul and Kandahar. But there were various attempts by Taliban spokesman, they offered to look at the evidence, or to surrender bin Laden for trial to an Islamic State. It was never clear that these offers were serious, and in any event they fell on deaf ears, namely those of President Bush who responded, quote, "When I said no negotiations, I mean no negotiations. We know he is guilty, turn him over."

This ultimatum 6 weeks after the original attack is not the language of self defence. It's a gun-point demand to extradite America's Public Enemy Number One.

When the Taliban didn't respond by immediately producing bin Laden trussed up for transport to a New York gaol, the B52s began to bomb in earnest, and the Northern Alliance went in, as I say, as America's surrogate ground forces.

So by mid October when this started the legal basis for bombing under Article 51 of the UN Charter had elapsed. It failed all the tests; necessity, proportionality, immediacy. The United Nations Security Council didn't disapprove, but many UN agencies on the ground were calling for a halt to avert the crises in aid delivery. There hadn't been a single terrorist incident imputable to al-Qaeda in the US or elsewhere for 3 months, and the Anthrax letters had stopped. So how could, when Donald Rumsfeld warned that America was not in a

position to take prisoners and that he hoped that the Taliban's foreign recruits would not be allowed to return home - something very close to inciting the slaughter of surrendered POWs - how could any of this be related to a necessity, let alone a proportionate and immediate defensive response to the attack of September 11th.

It could be said, it was certainly felt I know, by my American friends that September 11th was so horrendous that it justified annihilation of bin Laden's followers and supporters. That can't be allowed. Twice as many human beings were exterminated at Srebrenica, and using September 11th as a warrant to wipe out a government is simply to invest American lives with an importance above all others.

American self defenders are forced back on this doubtful doctrine of anticipatory self defence, and that was the basis upon which America notified the Security Council. It spoke of the ongoing threat to the United States and its nationals posed by the al-Qaeda organisation from the territory of Afghanistan, it continues to train and support agents of terror.

Well, this is plainly a complaint that Afghanistan was harbouring terrorists. It doesn't allege that the Taliban Government controlled them. It's a notification of the exercise of self defence to destroy al-Qaeda, but it shows no reason, no justification, for overthrowing the Taliban Government.

If the United States and Australian action in Afghanistan is to stand as a precedent for the legality of anticipatory self defence, it will twist dangerously Customary Law to the point where it becomes perhaps a vigilante's charter, a cart blanche for the US or for Israel or for China, or any other aggressive country, to respond to a trans-border terrorist attack by a force designed to overthrow the State from which it's launched. For as long as the Security Council, which may be immobilised - as for two weeks the Security Council was in East Timor - if it declines to act.

This danger, I think, was demonstrated just 10 days after the US notification when Israel retaliated for the killing of a former government minister by invading several towns in the Palestine National Authority. It said it was acting against the authority, I quote, "In the way currently accepted by the international community".

In the weeks that followed Israel interpreted George W Bush's doctrine of self defence as an Eye for Eye, a Tooth for a Tooth, meeting each Palestinian suicide bombing with a revenge sortie.

Although International Law forbids reprisal attacks, they'll always be justified under Article 51 if self defence can automatically be engaged by a terrorist incident. And I think the consequences for world peace, one has to think of China already rounding up dissidents in Tibet. We know, history teaches us, how easily a border incident, a provocation, can be manufactured. The Gulf of Ton kin was believed to be one, another could be a provocation from Taiwan that could, on the basis of self defence, justify a Chinese invasion. The consequences for world peace, it seems to me, of permitting this Article 51 knee-jerk retaliation to acts of terrorism are considerable.

Self defence in International as in Domestic Law is a blunt and primitive doctrine. It's difficult to distinguish from revenge, it's excessively dependent on the subjective assessment of a wronged self defender. If International Law is to permit a response to terrorist attack which involves the overthrow of the State from which it's launched, then justification is much better found in the obligation of the world community to punish a crime against humanity, than in the self-assessed defence exigencies of the State which is being attacked. In the latter case the attacked State is always likely to judge that its defence requires the destruction of the Government which has harboured - in that loose word - harboured the terrorist, even of it's in the sense of merely permitting them to reside, without any proof that high government officials have known and approved of their plans.

The self defender may attack the rogue state without -and I think this is a basis for action under the Crimes Against Humanity doctrine - without having any commitment to pick up the pieces, as NATO is picking up the pieces by billions poured into Yugoslavia at the moment. And particularly, it lacks the duty which I think is the crunch duty in the Crimes Against Humanity scenario, of bringing the leaders to justice before an impartial Court.

And so as the Court at Nuremberg said when Germany, when the Nazi leaders claimed to be acting in self defence, that a State can't be its own judge of what amounts to self defence. It said, "Whether action taken under the claim of self defence was in fact aggressive or

defensive must ultimately be subject to investigation and adjudication if International Law is ever to be enforced".

So the Crimes Against Humanity approach which requires proof at a subsequent international trial of complicity with a terrorist crime of the magnitude of a crime against humanity, seems to me a far more satisfactory approach, and far more consonant with the International Court of Justice decisions in the Nicaragua case, and in the Teheran hostages case which require that for State responsibility proof of an element of, or at least substantial involvement with, the criminal force.

That seems to me to provide the US and its Allies with a more persuasive legal justification for- and it is one that I hope will gain acceptance, as International Law wrestles with what sort of precedent Afghanistan is going to constitute.

The war, in other words, was just insofar as it was a war to overthrow a Government that was committing, or was aiding and abetting the commission of ongoing crimes against humanity by a terrorist organisation.

But the catch, the catch is, that if that approach is taken there must be a correlative obligation on those who go to war for that purpose to put the leaders of the State on trial, and on a fair, and before an independent Court.

Let's recall that the immediate response, as Robert said, of the United States to the atrocity was to demand justice. Although the word sounded in some powerful mouths like the cry of the lynch mob for summary execution, assassination squads, bin Laden's head on a plate, he was soon fingered as the prime suspect, he was wanted dead or alive, his mugshot was dropped over Afghanistan promising 25 million US dollars for his capture. And the confusion over this word 'justice' became acute when the Pentagon chose "Operation Infinite Justice" as its first slogan for the operation. Justice is not infinite, it is - human justice is finite and fallible. And so in a philosophical sense it made no sense, but more importantly it begged the question of exactly what forensic procedure you are going to adopt to persuade the rest of the world of the guilt.

Milosevic in The Hague dock was an early aim of NATO's war, recently come to pass. Lockerbie, the Tribunal had resulted from the economic war against Libya for blowing up an American aircraft. But what Court awaits Bin Laden, Mullah Omar and the Taliban Ministers?

It was odd, I think, that at the beginning the last thing the western leaders wanted was for bin Laden to come out with his hands up. Bush and his advisers made it clear that they preferred him dead rather than alive, and ironically this was the consummation bin Laden himself devoutly wished. In his belief system, so it was said, the prospect of paradise required him to die at mid-jihad and not of old age on a prison farm in up-state New York. It didn't occur to the presidential policy makers who produced the plans for the special military commissions to convict and speedily execute the al-Qaeda leaders, that this would ensure his earthly martyrdom, and if only in his own mind, his fast track to paradise.

But suppose he were to be captured and interrogated, and later sit like Milosevic for some months in a criminal Court dock, and then after a reasoned written judgment be locked up for the rest of his life in a cell in Finland. Surely this would rather assist the work of demystifying the man, debunking his callers, and de-brainwashing his thousands of followers. A fair trial before an independent Court might serve this practical purpose, besides which, it seems to me, certainly if we choose the Crimes Against Humanity route, to be what International Law required. Because after all, there can be no warrant for the cold-blooded execution of a surrendered terrorist. Although at one point in history it was common to instantly hang the captured pirate, terrorists of the high seas, and hang them from the yard arm. The better practice, at least of the British Navy, was to take them back for trial at the Old Bailey.

But summary execution of terrorists is always tempting for law enforcement agencies, it avoids the danger of exposing electronic intelligence, or informers, or indeed hostage taking by other terrorists in an attempt to free them. And the temptation hasn't been resisted always in Europe, as we can see from the killings of the IRA and Basque terrorists. But one of the most fundamental rights in the Human Rights pantheon, in every Human Rights Convention, is the right to life - or at least not to have life extinguished by the State without due process. And that's fundamental in war as well as in peace. See the Geneva Conventions.

So from the moment they applied from the moment that America intervened.
So what are the options for trial of these men in the event that they are captured alive?

Jury trial in New York where bin Laden has been indicted, and where his accomplices might be tried, certainly presents no jurisdictional problems. The problems, it seems to me, of a New York jury - quite literally 12 angry men unable to be dispassionate about these events, even if the trial is moved, as Timothy McVeigh's trial was moved from Oklahoma where he bombed, to Denver. It's difficult to find an unbiased jury in America, given the prejudice. But the other problem is that any verdict, the monosyllabic verdict of guilty by a jury, is not enough to persuade doubters and cynics throughout a world, many parts of which regard trial by jury as a kind of Anglo-American eccentricity. One word from a jury foreman is not enough to convince in the mosques of Pakistan or indeed the Universities of Europe. What's needed is a careful and closely reasoned judgment setting out, preferably with some Muslim jurists involved, setting out an inconvertible case for guilt. Just as the judgment at Nuremberg confounded holocaust deniers, so the trial of the Taliban and of bin Laden must confound those who would defend them by presenting an unimpeachable historical record. Of course the other feature that makes trial by jury in New York unacceptable is that, given that I suspect a conviction would be a forgone conclusion, is the death penalty administered by lethal injection in a State where, as in many other States, the close relatives of victims are entitled to be present. So you can just imagine the spectacle of bin Laden spotlit, stretched on a trolley in some theatre large enough to accommodate the relatives of his victims. Really too grotesque to contemplate.

In its favour, however, is the fact that a jury trial is a full- blooded adversary affair in which defendants can be aggressively defended, the Government evidence can be tested, the so-called [unclear] of the tape that has recently been played that suggests bin Laden is certainly guilty. The fear that Churchill had in opposing the Nuremberg trial, that you might be exploited to provide a soapbox for the enemy's philosophy, proved entirely unfounded. The issues at a criminal trial concern what the defendants did, what knowledge they had of what their accomplices were doing; their political and religious views are irrelevant. In bin Laden's case, for example, his evidence would have to be confined either to denying his alleged role, or to trying to - since it seems impossible to justify, except I suppose by a plea of insanity.

But the assumed danger of giving al-Qaeda its day in Court so weighed on the Bush Administration that on November 13th he signed an executive order to set up one of these Extraordinary Special Military Commissions. Vice President Cheney, who announced the order said, I quote, "The perpetrators of September 11th don't deserve to be treated as prisoners of war. They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process." Instead they deserve to be, I quote, "Executed in relatively rapid order, like German saboteurs tried in secret during Word War II by a Special Military Commission."

This concept was last used to convict General Yamashita, one of the few Japanese Generals who historians now believe was innocent. The US actually proposed one of these Commissions for the Lockerbie trial, but the Scottish Law Officers rejected it because of its palpable unfairness. And it is very important to understand that a Special Military Commission is nothing like a Court Martial. A genuine Court Martial in the Anglo-American tradition used to try members of the Armed Forces, and familiar from movies like "A Few Good Men" in which Tom Cruise and Demi Moore proved that military justice is not a contradiction in terms. But a Special Military Commission is a group of 3 career officers ordered by the President,as their Commander-in-Chief, to sit in judgement on certain defendants.

And the principle objections to them are: Firstly, they're not an independent and impartial Tribunal, as the Geneva Convention and the Universal Declaration of Human Rights requires, because the Army officers who act as judges are paid and promoted by the Defence Department, an arm of the Government which has alleged their guilt, and which acts in any event as their detaining power.

Secondly, there's no appeal except to - guess who - the President, who can't be impartial because it's an appeal against the decision of his own Tribunal.
Thirdly, there are no evidentiary rules. Evidence is admissible if the presiding officer thinks it should be admitted.

One very distinguished American Judge who did a study of these commissions as they operated at the end of the second Word War, said that they provide a stark example of the

potential for abuse when rules of evidence are so flexible as to be non existent. Then the hearings are in secret, transcripts will not be made available.

Fifthly, there's no burden or standard of proof, no beyond reasonable doubt; guilt is simply to be established by evidence of probative value to a reasonable person. Two-thirds majority will convict - two out of three. And no reasoned or written judgment.

Finally of course we have the problem of the death sentence, a problem that is particularly curious in the case of the Military Tribunal which at the moment, as a Federal Military so-called Court can only execute by firing squad. There is of course the tradition that one member of the firing squad gets to shoot a blank, but I suspect if it's bin Laden who's up against the wall, all the squad will clamber for live ammunition.

But these Military Commissions have been very widely criticised as “Kangaroo Courts” - that's offensive to we Australians who know the lovable nature of these marsupials. But in truth, it's not a Court at all. It's an extension of the power of the President, who personally, or through the officers he commands, acts as prosecutor, judge, jury and court of appeal judge. The Military Commission is really a Government device for execution, as summary as it thinks it can get away with, at a time when the American public has ceased to protest about denial of constitutional rights to aliens. And should the Bush Administration take this line, it will make a historic volte face from the position that Truman took over Nuremberg, that it was - and indeed Truman rejected the Military Commission model when it was suggested for Nuremberg.

It seems to me that the need to impress upon the rest of the world the true evil of al-Qaeda’s philosophy, to expose bin Laden and Mullah Omar and their lieutenants to the light of day before they acquire mythical or martyr status, and to expound the irresponsible misuse of sovereign power by the Taliban, would be entirely lost in these Special Military Commissions. It would be sacrificed to a fear that justice as we know and love it is simply not up to the job.

The alternative, and I think the only satisfactory alternative should the leaders be captured, is to request the Security Council to use its Chapter 7 powers to set up an ad hoc International Tribunal, as it did with the genocide in Rwanda, and as it did with the wars in the Balkans.

The Council, I have no doubt at all, would readily accede to such a request, and it's already in its resolutions characterised the situation in Afghanistan as a threat to international peace, which is a pre-condition to setting up an International Court. There'd be no problem about America providing the prosecutor. Mayor Guiliani, who was a great prosecutor of the Mafia in his time, will soon need another job after City Hall. Kenneth Starr is a Republican favourite, who could well be entrusted with the prosecution.

Judges, however, would have to be international judges of the kind who are trying those accused of Crimes Against Humanity in The Hague, and they include a number of distinguished Muslim jurists.

The Hague Tribunal Rules of Evidence and Procedure afford basic rights to defendants, while permitting the reception of reliable evidence, protocols for evaluating hearsay, and the national security evidence. A trial of bin Laden and the Taliban leaders would be most appropriately held in The Hague, away from local prejudices and pressures in America or Afghanistan, and less obviously a target for reprisals. I suppose if any were on the cards we could find a suitably isolated place - St Helena has a certain historical redolence. But a trial in The Hague is appropriate.

American Constitutional Law apologists for the Bush Administration’s refusal to take this course have argued that, "Oh well we accept bombing restraints by our own lawyers, we don’t want to be second guessed by an International Tribunal”. But the US Government won’t support a new tribunal that has authority over US Forces. But a Tribunal would not have authority over US Forces, unless they too were accused of involvement in a war crime, or Crimes Against Humanity. Its mandate would be to prosecute, judge and punish those who bear criminal responsibility for the Crime Against Humanity committed on September 11th.

Well, an International Court was first proposed by The League of Nations as long ago as 1937 to deal with terrorist crimes. When President Gorbachev revived the idea in 1987 it was for the same purpose. But there it is, it's not happening as yet, because nervous politicians in America raised the spectacle of terrorists permitted to justify their crimes from the witness box, or guilty men who may walk free because of retaining clever defence counsel.

But this hasn't been Britain's experience in bringing IRA bombers to justice. The greatest danger has been of prejudiced juries in fact, and prejudiced against Irish and wrongful convictions. It hasn't been the experience of the United States in trials of violent radicals in the 60s and 70s. There is no reason why an International Court can't perform well in this respect, with the added advantage over a jury of providing a reasoned written judgment.

In judging political and military leaders an International Court has the advantage of impartiality, and it can also subject so-called heroic leaders to a demystifying process, confronting them with the evidence of the moral and physical squalor in which they've operated, with their hypocrisy and cruelties, and with the barbaric results of their rhetoric and theology. Any cult status that they've acquired must dissipate with evidence that their savage God has failed. His promise of triumph or of a martyr's glorious death is refuted by the simple fact that they are now neither in power, nor in paradise; they're in the dock.

That may be one reason why al-Qaeda members haven't come out with their hands up for the most part. The choice of suicide rather than surrender derives from the superstition that by dying in mid-jihad, they'll be transported to paradise. But it may be also a recognition among the leadership that capture followed by trial will fatally damage the cause. That's because a criminal trial would strip bare its philosophical basis and reduce it to one essential element, the mens rea for commission of a Crime Against Humanity. The hateful and hate-filled mind thus displayed through prosecution evidence, and the optional addition of the defendant's own testimony, confined to the issue of whether he really did intend to kill innocent civilians, will not inspire love or respect or emulation.

The trial of bin Laden is probably hypothetical because he is likely to die at his own hand or by others, but it's worth envisaging, if only to see what cathartic effect it might have on his own followers. In the dock he would no longer appear the tall, wistful, almost Christ-like figure on the mountain, nor leave the world with pictures of his martyred body strung from a lamp post by the Northern Alliance, or stretched like that picture of Che Guevara on the mortuary table. On trial he is reduced to human stature. His disciples are, and there are now perhaps many more thousands in the world, have sacrificed, or are prepared to sacrifice their own lives in a Holy War for Islamic domination, well, logic has its limits in persuading people bent on glory through death. Committed minds can't be prised open by rational argument, and terrorism of this nature self evidently can never be deterred by the death

penalty. But since the belief is essentially mystical, a process of demystifying apostles is necessary. A fair trial of al-Qaeda leaders, and of the Taliban, might serve to start the de-programming process for people like David Hicks and others.

So they're my arguments for urging an International Court to try such of the al-Qaeda or Taliban leadership as are captured.

There will be another final challenge of September 11th to International Law and policy, to reach universal agreement on what constitutes terrorism, or since terrorism is something that you can't go to war on, it's a description of a technique for waging war on the kinds of terrorism that should attract international action and punishment. You know there are at least 12 United Nations Conventions which refer to terrorist acts, none offers a definition. And the suggestions that have come about have always floundered on the inconvenient fact that one person's terrorist is another's freedom fighter, so that the label, terrorist, is merely a pejorative description of the insurgence whose aims we do not like, or whose enemies we do. Terror tactics, as first developed by the Nerodnic [ph sp] opponents of the Tzar in the last 19th Century were calculated to provoke savage, disproportionate reprisals which would prove counterproductive by rallying popular support against the repressive regime. And this was probably the best argument for not going to war on Afghanistan, since it was obviously what bin Laden wanted to provoke, so that reaction to it in the Muslim world would swing popular support to his cause.

But al-Qaeda is not unique in its use of terror techniques. Before it began in earnest, each year before 1990 and 1996 brought over 5000 terrorist attacks in the world. Eight civilian casualties for every soldier or diplomat who fell. And it's this propensity, and often this intention, to produce civilian deaths that makes that form of terrorism unconscionable in the 21st Century no matter how justified its political objectives.

States which fight are bound by the Geneva Convention to avoid civilian casualties if at all possible, and there can be no longer any reason not to hold insurgents who aspire to run States to the same standards. Freedom fighters must no longer be supported, they should on the contrary be arrested if mass murder of civilians is part of their record. It's here that the concept of the Crime Against Humanity can serve to make the crucial distinction which hinges, not on the politics of the perpetrator, but on the horrendous nature of the deed.

Individual terrorist acts that cause collateral damage may stay beneath the severity of threshold and remain for Domestic Law to prosecute and punish. But terrorists conspiracies, which envisage widespread or systematic attacks, mass murder of innocent civilians, are a breach of International Criminal Law. They should attract universal jurisdiction, and when domestic prosecution is unavailable, or unfair, they should be certified by the Security Council as fit for investigation and trial by the International Criminal Court, which I hope will come on steam next year.

Whether this way forward is eventually taken by the international community may depend on how America's war against Afghanistan is characterised in hindsight. If it stands as an exercise of self defence simpliciter, or of anticipatory self defence, then woe be unto civilians and solders in many countries punished by angry armed States for the transgressions of extremists sheltering amongst them. As Ariel Sharon made clear in ordering payback on the Palestinians, he took his cue from George W Bush. "Self defence offers a blank cheque to vigilante States, a convenient excuse to States who simply want to lock up dissidents." In no time at all Robert Mugabe was using President Bush's rhetoric to denounce opposition MPs as terrorists, and have them arrested.

Treating true terrorist onslaughts as Crimes Against Humanity when they mass murder civilians, and responding to them within the limits fixed by Human Rights Law - the Kosovo pre-conditions, the need not only be sure of your evidence when you start, the need to use force as a very last resort, the requirement that you abide by the Geneva Conventions throughout, that your attacks are proportionate, the requirement that you stay around to pick up the pieces afterwards, and ultimately the requirement that you put those you have accused on trial at a fair and independent Court - those requirements of International Human Rights Law coming to bring the war on terrorism within its own framework, and prevent the kind of revenge attacks, the retaliation, that I fear from States like China, Taiwan, Russia and Chechnya, and India in relation to Kashmir. The examples are limitless, and in the future there will be many more. It seems to me that this is the great importance of characterising America's war, not as a war on terrorism, because that's rhetoric, not as a war in self defence because plainly it wasn't, and if was it's an incredibly dangerous precedent, but as a war fought within the scope of International Human Rights Law with, as a result, the establishment of a Court to try the leaders, because that is the important consequence of the developments that I've outlined that happened before September 11th.

To insist that State coalitions - let's hope there always are - which choose to rage wars in the 21st Century must no longer be confident merely of conquering their enemies on the battlefield, they must be prepared subsequently to prove their guilt beyond reasonable doubt in an International Court Room.

Thank you.