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Preview from Notesale.co.uk
Page 4 of 304

accept the new status quo. And insofar as human societies have a concern with justice, nor should they. History cannot be reversed but sometimes injustices can be remedied or at least not perpetuated. In principle, none of us wishes to perpetuate a recognized injustice, however difficult we may find it to perceive the injustice of our actions.

For the analogy with ritual human sacrifice to be complete, then, we should have to be able to say that the victims of terrorism die for no reason at all. And this, I think, we cannot say. We can say, perhaps, that they are sacrificed for no reasons of their own and that this is what makes death by terrorism so hideous. But even this formulation must be attenuated. For when we say that the victims of terrorism are innocent, we are making a technical point.

The standard definitions of terrorism involve variants on the following: terrorism means inflicting violence on the innocent for political purposes. Michael Walzer defines it as 'the random murder of innocent people'.² Jeff McMahan in this volume defines 'acts of terrorism' as 'intentional efforts to kill or seriously harm innocent people as a means of affecting other members of a group with which the immediate victims are identified'. Here Walzer and McMahan might seem at variance over 'random'. But the experience of terrorist outrages has told us all too clearly what is meant. Terrorism is not the same as assassination – a deliberate attempt to kill specified individuals – but nor is it wholly random. Osama bin Laden writes: 'And know that targeting Americans and Jews is the origin and breath of the world is one of the greatest duties'.⁴

The body of doctrine and law under which terrorism is generally thought to fall is the law of war, which is twofold. It is customarily divided into '*jus ad bellum*, the justice of war' and '*jus in bello*, justice in war'.⁵ Detailed discussion of the principles of international law can be found here in the essay of Michael Byers and the very significant response by Dino Kritsiotis. I wish to make just two points about it here. First, international law is not an immutable code that stands forever remote from public opinion. There are grounds for saying that the Bush government has sought and even obtained a change in international law in favour of pre-emptive aggression. It is possible that overwhelmingly large anti-war demonstrations in the United States and Western Europe could have blocked this (though this is contested here by Thomas Dublin and the demonstrations were very large). Second, the function of the codes of war is or should be that of ensuring that, if war breaks out, as little harm as possible is done by the belligerents to innocents on either side.

Within this body of law, there is nothing to legitimate terrorism and its deliberate targeting of innocents. Who, then, *are* the terrorists? The terrorists from whom everyone has most to fear are states. 'Inflicting violence on the innocent for political ends' is something that can be done most effectively with the arsenal of the

these particular acts were exceptional in their scale alone: some 50 per cent of the casualties in World War II were civilians.

Who, then, are the innocent? This is the 'technical point' referred to earlier. In just war theory, the 'innocent' are non-combatants. We say nothing about their moral character when we refer to 'innocents'. Some of the civilian victims of Allied bombing during the Second World War were Nazi voters or convinced Nazis; many of those will have adhered to the Nazis' genocidal anti-Semitism. Others may have colluded with Nazism only as the victims of a tyrannical state. These are controversial propositions, which I do not intend to argue here. But the victims' innocence in this context was and is that of non-combatants, a category whose targeting is forbidden in the laws of war developed in the aftermath of World War II.

And it takes little thought to understand that the punishment of even an active exponent of genocide should not take the form of random incineration. This is a different sense of innocent, but is the one from which the former sense derives. Those who serve in the army do so in the knowledge that, on declaration of war, they are at all times legitimate targets. The non-combatant has the right not to be killed. If he or she is suspected of taking part in atrocities, the courts must adjudicate. Incendiary bombs cannot be used to further the rule of law. In a fire-bombing like that of Dresden, the dissident is caught up in the flames alongside the concentration camp commandant. The innocence of the non-combatant is ultimately reducible to innocence before the law.

I have said that non-state terrorism normally has its origin in a specific injustice or a series of injustices. However, I do not wish to suggest that terrorism is ever justified by injustice. Nor can it be described as caused by injustice. It is, however, generally *motivated* by injustice or the perception of injustice. But we must repeat that it is a strategy of deliberately targeting the innocent and this is not generally the only strategy available to the oppressed seeking to remedy an injustice.¹² Where it is the only strategy available, their dilemma is indeed a desperate one. The commission of atrocities in the pursuit of justice leaves no one unharmed. Terrorism is a training in moral insensitivity and a deplorable preparation for civil government, as many post-independence 'liberation' regimes have shown.

The terms we use here are excessively broad. We might wish to distinguish the actions of insurrectionary groups that target strategic property or infrastructure (with only accidental loss of life) from those of terrorists who deliberately target the innocent civilian. In the 1960s, the ANC began a campaign of violence intended to overthrow the apartheid South African state. It did not initially target people. But Umkhonto we Sizwe (Spear of the Nation) went on to use car bombs and other forms of violence that killed innocent people, often, the perpetrators subsequently claimed, in response to atrocities committed by the apartheid government. Once insurrectionary violence has begun against an efficiently oppressive state, this form

Preview from Notesale.co.uk
Page 16 of 304

of escalation is all too predictable. We should contrast Umkhonto's initial principles with those of the Real IRA and those responsible for 9/11. In one of the worst non-state terrorist outrages in Northern Ireland, the Real IRA killed 29 people on 15 August 1998 in Omagh.¹³ It did, however, issue several warnings before the bomb went off. It is possible to think that, had these warnings been clearer, the death toll might have been lower, and that the obscurity of the warnings (which in fact contributed to the loss of life) was not intended.¹⁴ When planes were flown into the Twin Towers on 11 September 2001, no warning was given and the maximum possible loss of life was clearly sought. This was not merely a terrorist act, it was a terrorist spectacular.

What should a government faced with non-state terrorists do? The outrage of its citizenry at seeing their innocent compatriots blown up normally results in a punitive military reaction: a 'crackdown'. That this should be the government's first reaction is entirely predictable. But we have said that terrorism often arises out of injustice and though its method might seem to disgrace its cause, the next thing that a government should do is attempt to recognize and deal with that injustice. To suggest this is, of course, to beg the question of why violence was adopted in the first place. If we take the example of Umkhonto, the apartheid state was dedicated to racial injustice: that was its primary function, in the name of which it justified torture and killing. But there have been occasions in the recent past in which a political solution has been found to a conflict in which terrorist violence was the principal expression of one side's sense of injustice. Northern Ireland is a classic case. The difficulty for a government is then to negotiate with an entity whose methods are abhorrent. But this is what the U.K. government (at first secretly) did. The results are clear today.

To point this out is to point out that a 'war on terror' could never be successful. 'Terror' is a diffuse notion that takes no account of local particularities and 'war on terror' is a contradiction in terms.¹⁵ If the object was to reduce the incidence of either state or non-state terrorism in the world, it has failed. If the object was to combat the Jihadist terror associated with the figure of Bin Laden, it has failed in this objective too, opening in Iraq an unrelated new front in which Jihadist terrorism has proliferated.¹⁶ Those who wish to reduce the incidence of Jihadist terror will have to go about in a different way. One such way is to listen to what the terrorists have to say and see if there is an injustice that has given rise to this outbreak of violence. But no such thing has been attempted by either of the main participants in the 'war on terror', the U.S.A. and the U.K.

Let us therefore consider what Bin Laden has to say. His writings are in some respects exemplary and in the Arab street he holds a symbolic position perhaps analogous to that once held by Che Guevara for the European left. Bin Laden's primary

that it has been dealt with in Afghanistan and Iraq, and the fact that greater value is attached to Western lives than to those of (non-Western) Muslims is a point on which Bin Laden rightly insists.

In his most explicit attack on the U.S., 'To the Americans' (dated 6 October, 2002), Bin Laden's sentiments echo those of many who would never accept his terrorist goals. 'The British handed over Palestine, with your help and support, to the Jews, who have occupied it for more than 50 years; years overflowing with oppression, tyranny, crimes, killing, expulsion, destruction, and devastation'.²³ (The creation of Israel in Palestine was indeed made possible by the U.K. and the U.S.A.) 'You supported the Russian atrocities against us in Chechnya, the Indian oppression against us in Kashmir and the Jewish aggression against us in Lebanon'.²⁴ (We have dealt with two of these heads above; the last is, of course, true if we substitute Israeli for Jewish.) 'Your forces occupy our countries'.²⁵ (This is a reference to the U.S. troops in Saudi Arabia and precedes the invasion of Iraq.) 'You have starved the Muslims of Iraq, where children die every day. It is a wonder that more than 1.5 million Iraqi children have died as a result of your sanctions, and that you have not shown concern. Yet when 3,000 of your people died, the entire world rises up and has not yet sat down'.²⁶ (In this volume, Thomas Pogge cites Dennis Halliday, former co-ordinator of humanitarian relief to Iraq and Assistant Secretary General of the United Nations: 'I had been instructed to implement a policy that satisfies the definition of genocide: a deliberate policy that has effectively killed well over a million individuals, children and adults'.) Bin Laden goes on to talk about democracy: 'When the Islamic party in Algeria wanted to practice democracy and they won the election you annihilated your collaborators in the Algerian army on them, and attacked them with tanks and guns, massacred them and tortured them – a new lesson from the "American book of democracy"'.²⁷ (The West showed no taste for democracy in Algeria when an Islamist regime was on the point of taking power. It is not an isolated case.²⁸ This Western refusal of the verdict of the people was repeated when Hamas won a majority in the Palestinian parliamentary elections. The party was elected having clearly stated its non-recognition of Israel but was required to reverse this policy before any other government was prepared to recognize it.²⁹ By contrast, no disavowal of the project of Eretz Israel ('Greater Israel') is required of Israel.) Bin Laden continues: 'You are the last ones to respect the resolutions and policies of International Law, yet you claim to want to selectively punish anyone who does the same. Israel has for more than fifty years been pushing U.N. resolutions and rules to the wall with the full support of America'.³⁰ (Between 1972 and 2006, the U.S.A. vetoed thirty-two U.N. Security Council Resolutions condemning Israel, thus exercising its veto more often than all the other members combined.)³¹ He adds: 'You have claimed to be the vanguards of Human Rights, and your Ministry of Foreign Affairs issues annual reports containing statistics of those countries that

Preview from Notesale.co.uk
Page 20 of 304

- 47 Ibid., 58–9.
- 48 Ibid., 60.
- 49 Ibid., 67.
- 50 Ibid., 78. The record is that of Moshe Kalman, who led the attack: 'We left behind 35 demolished houses and some 60–80 dead bodies'. See Walid Khalidi, ed., *All That Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Washington, DC: Washington Institute for Palestinian Studies, 1992), 181–2.
- 51 *The Ethnic Cleansing of Palestine* (note 39), 91. Hirst notes that the Palmach (an elite section of the Haganah) nevertheless took part. See *The Gun and the Olive Branch* (note 41), 248–53.
- 52 *The Ethnic Cleansing of Palestine* (note 39), 95.
- 53 Ibid., 96.
- 54 Ibid., 101.
- 55 Ibid., 46.
- 56 *The Gun and the Olive Branch* (note 41), 354.
- 57 Ibid., 314.
- 58 Ibid., 315.
- 59 Ibid., 317.
- 60 Ibid., 307.
- 61 Hirst's source here (*The Gun and the Olive Branch* (note 41), 558) is an Israeli one cited in the study by the Israeli journalist Amnon Kapeliouk, *Sabra et Chatila: enquête sur un massacre* (Paris: Seuil, 1982), 30. The Kahan Report, which Hirst, partly on this account, dismisses as 'by and large a whitewash', 535, did not corroborate this.
- 62 *The Gun and the Olive Branch* (note 41), 55.
- 63 'It is our view that responsibility is to be imputed to the Minister of Defense for having disregarded the danger of acts of vengeance and bloodshed by the Phalangists against the population of the refugee camps, and having failed to take this danger into account when he decided to have the Phalangists enter the camps. In addition, responsibility is to be imputed to the Minister of Defense for not ordering appropriate measures for preventing or reducing the danger of massacre as a condition for the Phalangists' entry into the camps. These blunders constitute the non-fulfillment of a duty with which the Defense Minister was charged'. See www.mideastweb.org/Kahan_report.htm.
- 64 See *The Israel Lobby* (note 31), 26.
- 65 See *The Gun and the Olive Branch* (note 41), 109.
- 66 Prior to 9/11, the U.S.A. had not infrequently been involved in supporting terrorist groups, notably the Contras in Nicaragua and the *mujahidin* in Afghanistan. When it objects to Iranian 'meddling' in Iraq, it is objecting to precisely the kind of action it undertook against the Soviet invasion of Afghanistan: funding and arming local militias.
- 67 See *The Gun and the Olive Branch* (note 41), 37–40.
- 68 Michael Mann notes that the civilian deaths in Afghanistan caused by U.S. bombing 'must have been close to 10,000' (Michael Mann, *Incoherent Empire* (London: Verso, 2003), 30).
- 69 See the Johns Hopkins Bloomberg School of Public Health survey published at www.jhsph.edu/publichealthnews/press_releases/2006/burnham_iraq_2006.html for a revised estimate confirming the results of the famous estimate published in the *Lancet*.

state, one that lives peaceably side by side with Israel. But it can never find a partner for peace. Israel has been and continues to be under existential threat. The Israeli army is a Defence Force. It is the most humane army in the world. It adheres to 'purity of arms'. It weeps as it shoots.

As with the American national narrative it is clear that some elements here are true and some are false. More than any other story in the world today, the Israeli narrative is under challenge. It is challenged and defended because its acceptance or rejection crucially affects the lives of millions of people. And if the narrative, or the founding myth, is one level of presented history, in the case of Israel, the other two types of historical evidence – the traces (the rubble of pre-1948 Palestinian villages for example) and the messages (memoirs, letters, reports, etc.) – are still very much the province of research. The Israeli narrative, still in the course of formation, is fascinating because it is in such a dynamic relationship both with the evidence against it and with its present.

The four fronts I described earlier that are causing problems for the American narrative are causing more acute problems for the Israeli one – which is also facing one challenge the American narrative has been spared.

(1) Israel's claim, as a state, to the ancient part of its narrative is contested by varied groupings of Jewish people who object that they have not given the state of Israel a mandate to speak for them or to appropriate the history of ancient Jews. Among these are 'Jews for Justice for Palestinians', 'Natanzi Korti', 'Rabbis of Palestine', 'Rabbis for Peace' and others. They are very vocal in wanting to reclaim the Jewish story.⁹

(2) One could say that as far as Israel is concerned, the 'end of the age' in the West is or has been conflicted. It was prepared – despite its general anti-colonial stance – to grant special privileges to Israel after World War II. Until the 1980s, for example, you were hard pressed to find a voice in the Western liberal press that would criticize Israel's policies, even though they ran counter to the new universalist spirit of respect for international law and human rights. U.N. resolutions could be ignored, poets could be assassinated, lands annexed, communities punished, friends spied on: the young Israel was indulged, partly because its cultural and civilizational placing of itself rendered it immune, and partly because it had come from such an 'abused' background. It took not just the invasion of Lebanon in 1982 but the massacres of Sabra and Chatila for the world to wake up to the activities of the Israeli generals.

(3) The Palestinians have already been through the experience of Israeli colonization. When families that had been unable to return to Safad or Yafa or Ramle in 1948 come under attack today in their refugee camps or in the homes they have managed to build in Tulkarm or Jenin or Nablus, they sit on the rubble of their homes and declare that they will not leave. Many Palestinians are holding on to the keys of their homes in Yafa, Nazareth and countless other towns and villages inside the 1948 border and demanding their legal right of return – which some

Today, the question is: forced to re-assess their relationships to their founding narratives, will the U.S. and Israel decide to abandon current policies and try to draw closer to the ideals those narratives express? Or will they jettison the narratives and the ideals in favour of making gains on the ground (and in the air, and in space) and accept that their story from now on will be brutal, bloody – and short?

This is the time when the real owners of these narratives, the people, need to speak. And there is, now, a global voice that is making itself heard. The story it is telling speaks of the history of man on earth as one narrative. It tells of how man started to fashion tools and weapons a million years ago, but started to fashion an ethical vision of life only five thousand years ago. This vision, based on concern for man and concern for the planet, on principles of justice and solidarity, became global in the second half of the twentieth century. Now, in the twenty-first century, it remains to be seen whether it can lead to a unified narrative for all mankind. For it is in that larger narrative that our hope lies, a narrative made of reconciling, of braiding together, the stories of the different nations of the world.

Notes

- 1 Jan Assmann, *The Mind of Egypt* (Cambridge, MA: Harvard University Press, 2003), 10.
- 2 Ibid., 7, quoting Jakob Burckhardt, *Die Kunst der Betrachtung: Aufsätze und Vorträge zur Bildenden Kunst*, ed. Henning Ritter (Cologne: Dumont, 1984), 175.
- 3 *The Mind of Egypt* (note 1), 8.
- 4 Ernest Renan, *Le Réforme intellectuelle et morale* (1871), quoted in Aimé Césaire, *Discourses on Colonialism*, tr. Joan Pinkham (New York: Monthly Review Press, 1972), 165. See also Edward W. Said, 'Nationalism, Human Rights and Interpretation', in *Freedom and Interpretation: The Opus of Ernesty Lectures 1992*, ed. B. Johnson (New York: Basic Books, 1993), 87–8.
- 5 *Freedom and Interpretation* (note 4), 196–7.
- 6 www.whitehouse.gov/infocus/achievement/chap1-nrn.html.
- 7 See www.notinourname.net/index.html.
- 8 The websites of World Can't Wait, CodePink and Another Day in the Empire are well worth a visit and lead to a multitude of other sites.
- 9 See www.jfffp.org/.
- 10 See Salman H. Abu-Sitta, *Atlas of Palestine 1948* (London: Palestine Land Society, 2004).
- 11 See particularly <http://electronicintifada.net/new.shtml>.
- 12 Matt Bradley, 'Flap Over Young Jews' Visit to Holy Land', *Christian Science Monitor*, 12 January 2006.
- 13 For Rachel Corrie, see www.guardian.co.uk/world/2003/mar/18/usa.israel (Editor's note).
- 14 Amira Hass quoting her mother Hannah in conversation with Ahdaf Soueif on 13 April 2005 at the Lannan Foundation, Santa Fe, New Mexico. See www.Lannan.org/lf/cf/detail/amira-hass-with-ahdaf-soueif/.

Terrorism, war and international law

Introduction

Most of humanity shares two searing memories: the collapse of the World Trade Center on 11 September 2001; and a hooded man standing on a box with wires dangling from his outstretched hands. These images capture the painful truth that both sides in the so-called 'war on terror' have violated fundamental rules. But while non-state actors can violate international law, only states are able to change the law, making their breaches of greater potential consequence. In this chapter, I consider how the recent actions of the United States have stressed and stretched two distinct but related areas of international law: the right of self-defence, and the rules of international humanitarian law. I conclude by arguing that even a disproportionately powerful state is constrained, in its ability to change international law, by the actions of other countries and by public opinion – both at home and abroad.

There are two principal sources of international law. 'Customary international law' is an informal, unwritten body of rules deriving from a combination of 'state practice' and *opinio juris*. State practice is what governments do and say; *opinio juris* is a belief, on the part of governments, that their conduct is obligated by international law. Rules of customary international law usually apply universally: they bind all countries and all countries contribute to their development and change. Whenever a new rule of customary international law is being formed, or an existing rule changed, every country has a choice: support the developing rule through its actions or statements, or actively and publicly oppose the rule. A new rule will not come into force until it receives widespread support, either expressly or tacitly.

Treaties are the second main source of international law. They are contractual, written instruments entered into by two or more countries and registered with a third party, nowadays usually the U.N. Secretary-General. Treaties may be referred to by any number of different names – including 'charter', 'covenant', 'convention' or 'protocol' – but legally speaking are any written instrument entered into by two or more countries with the intent of creating binding rights and obligations.

jus ad bellum of the U.N. Charter and self-defence. Also known as the ‘laws of war’ or the ‘law of armed conflict’, international humanitarian law originated in 1859 when the Swiss businessman Henri Dunant witnessed the aftermath of the Franco-Austrian Battle of Solferino – where 40,000 men died, many as the result of untreated wounds – and initiated a movement that became the International Committee of the Red Cross.

Today, the rules of international humanitarian law are found primarily in the four Geneva Conventions of 1949. The protections guaranteed under these treaties are replicated and elaborated in two Additional Protocols of 1977, a multitude of more specific treaties, and a parallel body of customary international law.

Protection of civilians

More than 300 Iraqi civilians died on 13 February 1991 when U.S. stealth bombers targeted the Al’Amiriya bunker in Baghdad. Photographs of the charred and twisted bodies of women and children shocked a world which, thanks to General Norman Schwarzkopf and CNN, had seen little of the horrors of the Gulf War. Pentagon officials, who claimed to have intelligence indicating the bunker was a command and control centre, denied knowledge of the civilian presence. Had they known, the attack would probably have been a war crime, since a key principle of international humanitarian law prohibits the direct targeting of civilians. As Article 51(2) of Additional Protocol One explains:

The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.¹⁹

It follows that civilians cannot be collectively punished. Indeed, attacks on civilians or civilian infrastructure may never be justified by similar violations on the other side. The actions of U.S. forces in Fallujah, Iraq in April 2004, following the killing and mutilation of four U.S. contractors, certainly looked like war crimes from afar. Hundreds of civilians were killed, many of them with apparent indiscriminate, as U.S. marines fought their way into the densely populated city – before retreating out of concern about public opinion in the United States and elsewhere. Then, immediately after the U.S. presidential election on 2 November 2004, the marines moved back into Fallujah. Howitzers and 2,000 pound bombs, neither of which are particularly precise weapons, were used to soften up the city. Fuel-air explosives were dropped on residential neighbourhoods and virtually every house was struck by U.S. tank, machine-gun or rifle fire.

Even if the assault on Fallujah was not motivated by revenge, it appears to have been an illegally indiscriminate attack – because all reasonable measures were not taken to avoid harming civilians. The ‘carpet bombing’ of North Vietnam in the early 1970s was a violation of international humanitarian law, as were moves to

bullets, booby traps and blinding laser weapons are banned on the basis that the military benefits of their use can never be proportionate to the suffering they cause. A special treaty – the 1925 Geneva Protocol – precludes the use of poisonous gas and biological weapons. These prohibitions have achieved the status of customary international law, as was confirmed by the harshly negative reaction of other countries to the use of nerve and mustard gas during the Iran-Iraq War of the 1980s. Other weapons, such as anti-personnel landmines, have been banned by most but not all countries. Today, the United States' refusal to ratify the 1997 Ottawa Landmines Convention sometimes creates awkward situations for its allies. In 2002, Canadian soldiers operating in Afghanistan were ordered by their U.S. commander to lay mines around their camp. When the Canadians refused to do so, U.S. soldiers, who were not subject to the same restrictions, laid the mines for them.

Depleted uranium, cluster bombs and fuel-air explosives are among the weapons whose use remains legally uncertain. Favoured for their armour-piercing abilities, depleted uranium shells leave radioactive residues that can pose health problems for civilians and combatants alike. Given the scientific uncertainty as to the extent of the risk, humanitarian concerns should prevail – though depleted uranium was used extensively by American and British forces during the 2003 invasion of Iraq. Cluster bombs, for their part, are the aerial equivalent of a shotgun. A single cluster bomb contains hundreds of individual bomblets which are deliberately scattered over a wide area, killing everything there. Worse still, depending on the model and age of the particular bomb, the hardness of the ground, the presence of vegetation, and weather conditions, between 5 and 30 per cent of the bomblets fail to explode on impact. They lie in wait until disturbed by an unsuspecting passer-by, usually a civilian – often a child. Cluster bombs have been used by the United States in Vietnam, Laos and Cambodia; by the United States and Britain in Kosovo, Afghanistan and Iraq; by Russia in Chechnya; and by Israel in Lebanon. The use of cluster bombs by the Israeli Defence Forces in 2006 attracted particular attention, in part because 90 per cent of the cluster bomb strikes occurred in the last 72 hours of the conflict, when everyone knew that the hostilities were about to end.²² At the same time, Hezbollah's use of rockets packed with ball-bearings was just as contemptible.

At an arms control conference in Geneva in November 2006, the United States and Britain defeated a proposal to begin negotiations on a treaty banning cluster bombs. Although the U.S. and British delegations argued that any discussion of cluster bombs belonged within the framework of the 1980 U.N. Convention on Conventional Weapons, this move was clearly intended to stymie any attempt at a meaningful ban. The same two countries had used the exact same tactic when opposing a ban on anti-personnel landmines a decade earlier. Fortunately, Norway refused to treat the defeat as determinative. Its foreign minister, Jonas Gahr Støre, immediately announced: 'We must now establish concrete measures that will put an end to the untold human suffering caused by cluster munitions. Norway will

organize an international conference in Oslo to start a process toward an international ban on cluster munitions that have unacceptable humanitarian consequences.’²³ On 23 February 2007, forty-six countries adopted a declaration calling for a treaty banning the use of cluster bombs by 2008.²⁴

Although nuclear weapons are not banned, their use is subject to the general constraints of international humanitarian law. And while it is difficult to envision how any use of such weapons could produce a military advantage that was proportionate to the extreme suffering caused, the legal constraints have, again, been shrugged off by the Bush administration. In March 2002, the Pentagon issued a Nuclear Posture Review that cited the need for new nuclear weapons specifically designed to destroy deeply buried command centres and biological weapon facilities. Not to be left out, the British Defence Secretary, Geoff Hoon, affirmed in February 2003 that Britain reserved the right to use nuclear weapons against Iraq in ‘extreme self-defence’ – overlooking the fact that Iraq was, at the time, the only country in serious danger of being attacked.²⁵

Protection of prisoners

Soldiers are legitimate targets during armed conflict. Killing members of the enemy’s armed forces is one of the goals of military action. Still, soldiers – referred to under international humanitarian law as ‘combatants’ – benefit from some protections, including the prohibitions on certain types of weapons discussed above. Important protections are also available to wounded soldiers as well as to those who lay down their arms.

Soldiers who have been wounded are deemed *hors de combat* (out of combat) and accorded protections similar to those that apply to civilians. Soldiers who clearly express ‘an intention to surrender’ become prisoners of war. Wounded soldiers and prisoners of war cannot be killed, used as human shields, held hostage, or used to clear landmines. The execution-style shooting of a wounded and unarmed Iraqi in Fallujah in November 2004, as captured on tape by an embedded television cameraman, was almost certainly a war crime. Medical personnel benefit from similarly strict protections, while medical facilities, ambulances and hospital ships are off-limits as targets unless used as locations from which to launch attacks. As with many rules of international humanitarian law, this rule is sometimes honoured in the breach. In 1992 and early 1993, the main hospital in Sarajevo, Bosnia-Herzegovina, was hit by no less than 172 mortar shells while full of patients.

In January 2002, the first Taliban and suspected al-Qaeda members were transported from the Afghan battlefield to Guantánamo Bay. Against the advice of the Pentagon’s professional lawyers in the State Department and Pentagon and despite expressions of concern from a number of European leaders, Donald Rumsfeld insisted the detainees could not be prisoners of war and refused to convene the tribunals required under the Geneva Conventions to determine their status. Even now,

Preview from Notesale.co.uk
Page 73 of 304

more than five years after the intervention in Afghanistan, hundreds of the detainees have neither been charged nor granted access to lawyers.

Guantánamo Bay has been the focus of public concern about the Bush administration's efforts to evade legal strictures during its 'war on terrorism'. The President and his advisers have consistently maintained that the naval base, located on leased land in Cuba, is beyond the reach of U.S. law and courts. The assertion of extra-legality prompted scathing criticism from around the world. In November 2002, the English Court of Appeal described the position of the Guantánamo Bay detainees as 'legally objectionable'; it was as if they were in a 'legal black hole'.

The U.S. Supreme Court was finally shamed into action in June 2004. On behalf of a 6–3 majority of judges, Justice John Paul Stevens wrote:

Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.²⁶

Sadly, the judicial victory was short-lived. A cross-party majority of Congressmen and women, anxious to affirm their commitment to national security in the lead-up to the November 2006 mid-term elections, adopted legislation that stripped the detainees of the right to contest their imprisonment.²⁷

The Bush administration is now reeling ahead with the first prosecutions of Guantánamo Bay detainees before special 'military commissions' designed to restrict the release of evidence to defence counsel and journalists. The commissions are authorized to impose the death penalty if a three of the military officers who serve as judges agree. The first prosecution took place in March 2007 against David Hicks, an Australian charged with providing 'material support for terrorism' as a result of having guarded a tank for the Taliban. In the end, Hicks, who had already spent five years at Guantánamo Bay, agreed to a plea bargain. In return for promising never to allege that he was mistreated in U.S. custody, Hicks will serve just nine months in an Australian prison.²⁸

Unfortunately, the focus on Guantánamo Bay has drawn attention away from many other, arguably more serious, violations against detainees elsewhere. In November 2001, a prisoner revolt at Mazar-i-Sharif, Afghanistan, was put down with air-to-surface missiles and B-52 launched bombs. More than 175 detainees were killed; 50 died with their hands tied behind their backs. In December 2002, the *Washington Post* reported on the use of 'stress and duress' techniques at Bagram Air Base.²⁹ In March 2003, the *New York Times* reported that, while in custody over a three-month period, a suspected member of al-Qaeda was 'fed very little, while being subjected to sleep and light deprivation, prolonged isolation and room temperatures that varied from 100 degrees to 10 degrees'.³⁰ That same month, the *New*

York Times reported that a death certificate, signed by a U.S. military pathologist, stated the cause of death of a 22-year-old Afghan detainee at Bagram Air Base in December 2002 as ‘blunt force injuries to lower extremities complicating coronary artery disease’.³¹ The form gave the pathologist four choices for ‘mode of death’: ‘natural, accident, suicide, homicide’. She marked the box for homicide.

In July 2003, U.N. Secretary-General Kofi Annan reported that his Special Representative for Iraq had expressed concern to the United States about its treatment of detained Iraqis. One week later, Amnesty International claimed that U.S. forces were resorting to ‘prolonged sleep deprivation, prolonged restraint in painful positions – sometimes combined with exposure to loud music, prolonged hooding and exposure to bright lights’.³² The reports attracted little attention until March 2004 when CBS television aired photographs showing prisoners at Abu Ghraib prison in Iraq who had been stripped naked, sexually and culturally ridiculed, terrorized with dogs and threatened with electrocution. The actions were blatant violations of international humanitarian law and some of them violated the 1984 Torture Convention, a treaty ratified by the United States and 143 other countries.

Additional violations were committed when the International Committee of the Red Cross was denied access to some detainees, as reportedly occurred in Iraq early in 2004. Under the Geneva Conventions, the ICRC is mandated to visit (and register) prisoners of war: this promotes their good treatment and ensures they do not disappear. Although the ICRC traditionally does not publicly denounce governments that fail to uphold the law – in order to preserve its neutrality, thereby ensuring future access to individuals in need – it has, on several occasions since 2001, openly expressed concern about the actions of the United States.

Torture.

In December 2005, Louise Arbour, the U.N. High Commissioner for Human Rights, said:

The absolute ban on torture, a cornerstone of the international human rights edifice, is under attack. The principle we once believed to be unassailable – the inherent right to physical integrity and dignity of the person – is becoming a casualty of the so-called war on terror.³³

President Bush and his advisers vehemently deny that the United States engages in torture. However, these denials have failed to address either the sharp distinction between the international definition of torture and the more flexible definition favoured by the Bush administration, or their fall-back position: that any method of interrogation may still be used if authorized by the American president.

The Torture Convention defines torture as ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person’.³⁴ The Bush administration prefers a standard articulated by the Justice Department in an

Preview from Notesale.co.uk
Page 75 of 304

Guantánamo and elsewhere; according to Binyam Mohamed, MI6 agents visited him in Pakistan and threatened that he would be 'tortured by Arabs'.⁵⁷ It also seems the British government has used information obtained by other governments through torture. Craig Murray, a former British ambassador to Uzbekistan, posted secret documents on his website that, if authentic, showed British officials deciding that information obtained through torture by other governments could be used for British intelligence purposes.⁵⁸ When Murray questioned the practice, the government produced a legal opinion which, by focusing narrowly on the express language of the Torture Convention, carefully sidesteps two decisive points: the convention codifies a general prohibition on complicity in torture, and international law requires that any treaty's provisions must be interpreted in light of its 'object and purpose'.⁵⁹ The documents are all the more troubling because Uzbekistan is notorious for using especially horrific methods of torture, such as immersing detainees in boiling water.

There has also been Canadian complicity, above and beyond the Arar affair. According to government documents obtained by the Canadian Press, as many as twenty airplanes linked to the CIA have used Canadian airports since 11 September 2001, including for refuelling stops in Newfoundland and Nunavut.⁶⁰ Many more rendition flights presumably crossed Canadian airspace, given that the shortest flight lines from the United States to Europe or the Middle East cross that country's vast territory.

In September 2006, after months of denials, George W. Bush finally admitted the existence of the secret prisons – and declared that they'd be closed. However, it has since emerged that the practice of extraordinary rendition has simply been shifted elsewhere, including to Ethiopia, which in April 2007 admitted to holding 41 terrorism suspects from 17 countries. According to a report in the *New York Times*, U.S. intelligence officials had questioned several of the detainees in Ethiopian prisons.⁶¹

All this complicity demonstrates how the law-breaking of a powerful state can tempt other, less powerful countries to engage in their own violations on the basis of the same dubious justifications. The mass of violations can then lead to the undermining and eventual change of international rules. This is all the more likely today because, prior to George W. Bush's presidency, the United States often acted as a champion of robust legal protections for both combatants and civilians. Under Bush, the United States has shifted from positive role model to very bad example, with deleterious consequences for human beings everywhere.

Conclusion

At first, many experts predicted that the terrorist attacks of 11 September 2001 would prompt the United States to adopt a multilateralist approach. These predictions were initially reinforced when a 'coalition' was constructed to facilitate the freezing of terrorist assets and the gathering of intelligence overseas. But they were then

quickly shattered, when the Bush administration rejected offers of a U.N. Security Council resolution to authorize the Afghan War, forged new alliances with illiberal regimes in Pakistan, Kyrgyzstan, Tajikistan and Uzbekistan, and began mistreating detainees. Most disturbing, however, were some of the threats uttered by George W. Bush. The assertion that 'you're either with us or against us' obviated a central aspect of state sovereignty – the right not to be involved – and recast the United States as the ultimate arbiter of right and wrong. The identification of an 'axis of evil' between Iran, Iraq and North Korea, and the concurrent claim to a greatly extended right of pre-emptive self-defence, challenged one of the twentieth century's greatest achievements: the prohibition of the threat or use of force in international affairs.

Powerful countries have always shaped the international system to their advantage. In the sixteenth century, Spain redefined basic concepts of justice and universality to justify the conquest of indigenous Americans. In the eighteenth century, France developed the modern concepts of borders and the 'balance of power' to suit its continental strengths. In the nineteenth century, Britain introduced new rules on piracy, neutrality and colonialism, again to suit its interests as the predominant power of the day. George W. Bush's United States has been no different – except that the world has fundamentally changed.

The international legal system has grown more complex, with a far broader and denser network of customary international law and treaties, and an unprecedented multiplicity and diversity of actors, both state and non-state. The involvement of these new actors – former colonies, inter-governmental organizations, transnational corporations and NGOs – make the contemporary legal system qualitatively different from before and makes the exercise of hegemonic influence more difficult.

That a role for non-state actors has long been recognized in the domain of international humanitarian law. Most treaties in this field contain something called the Martens Clause, which in its original form was drafted by the Russian delegate to the conferences that produced the Hague Conventions of 1907:

Until a more complete code of the laws of war is issued, the high contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience.

During the last few years, the public conscience has had a discernible effect on the conduct of war. Recall the delay in the assault on Fallujah in 2004, or the Bush administration's withdrawal of its most obviously odious memorandum on torture, or the recent push for a treaty banning cluster bombs. Even governments that disrespect international rules do their best to court public opinion, and to avoid sustained and public criticism. For this reason, human rights and other activists must press continuously for transparency and accountability, especially with regard to

conflict not of an international character occurring in the territory of one of the High Contracting Parties' (common Article 3). These provisions need to be read with considerable care, for they mark out the modern provenance(s) of the *jus in bello* and, as is immediately clear, they remove the tremendous significance that the *jus in bello* has traditionally attached to a legal state of 'war'.¹⁹ As we can observe from their language, the emphasis of both of these provisions is on the existence of an 'armed conflict', a concept that is broader in its reach than that of 'war' (we can tell this because common Article 2 specifies that a 'declared war' is one *example* of an armed conflict; it does not represent that concept's totality).

As far as international law is concerned, therefore, it is incumbent on us to cut through the considerable political verbiage that has accompanied the 'war on terror' – including the very term 'war on terror' itself – in order to determine *whether* the laws of the *jus in bello* are applicable, and, if so, *which* of these laws are applicable. We say this because the laws differ depending on what *form* an armed conflict assumes: hence the differentiation between armed conflicts in common Article 2 and common Article 3 of the Geneva Conventions noted above. According to these schemata, common Article 2 concerns international armed conflicts, to which the full panoply of rules in the Geneva Conventions then becomes applicable, and common Article 3 concerns non-international armed conflicts, to which the more limited coda – contained in common Article 3 – becomes applicable.

(1) Persons taking no active part in the hostilities (including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause), shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.²⁰

This dichotomy presents us with difficulties for the 'war on terror' because of common Article 2's specification of an international armed conflict existing between High Contracting Parties to the Geneva Conventions, and because of the pervasive assumption that common Article 3 was created with a very particular understanding of the meaning of 'armed conflict not of an international character occurring in the

‘terrorism expert’ and was to become Israeli prime minister in due course – was published seven years before Samuel Huntington’s famous article on the ‘clash of civilisations’.¹¹ Taking advantage of the fact that Palestinian radicals struck outside Israel, institutes and think-tanks were established to study the ‘problem’ of ‘international terrorism’: one such particularly influential organization, the Jonathan Institute, held large conferences in Jerusalem in 1979 and in Washington in 1984, calling for the ‘need for a better understanding of terrorism and for mobilizing the West against it’.¹² It was named after the Israeli commando who had died in the raid on Entebbe in 1976. After Iran began to support anti-Israeli forces in Lebanon, new studies began of ‘state-sponsored terrorism’ and if countries in the region fell out with the U.S., they found themselves at risk of being classified as ‘terrorist states’ – a label that came and went as relations with Washington ebbed and flowed.¹³

The joint interest of the West and Israel in developing a common front against terrorism was consolidated in the 1980s. These were the Reagan years when pressure was being ratcheted up on the Soviet Union, or Evil Empire (as opposed to Axis of Evil) as it was then often described, without a trace of irony. A succession of books and articles and terrorist commentaries made the link between the Soviet Union and the sponsorship of international terrorism in general and of the PLO in particular. This was the first global terrorist campaign; though it is not largely forgotten, much was made of it at the time. Books with titles like *The Soviet Strategy of Terror*,¹⁴ *The Grand Strategy of the Soviet Union*,¹⁵ *The Soviet Union and Terrorism*,¹⁶ *The Soviet Connection: State Sponsorship of Terrorism*,¹⁷ and the evocatively titled *Hydra of Carnage*¹⁸ flowed from the presses and the think-tanks. Especially influential was Cherie Stringer’s *The Terror Network: The Secret War of International Terrorism*, published by Weidenfeld and Nicolson in 1981.¹⁹ The point being made by all this academic scholarship was that Soviet support for the Palestinian cause essentially made it the Godfather of international terrorism the world over. So successful was this strategy of linkage between Palestinian actions and international terrorism that the attempted murder of the Israeli ambassador to the U.K. in London in 1982 (by the Abu Nidhal faction) was capable of being made into a plausible *casus belli* of the invasion of Lebanon – Operation Peace in Galilee – which was launched two days later. An eye for an eye has never been the counter-terrorist’s motto in the Middle East, more like 10,000 eyes for every eye. But the invasion, and the siege of Beirut that followed, were not terrorism; they were counter-terrorism, ‘acts of peace’ – regardless of the terror that actually happened on the ground.

This framework for seeing the Israeli-Arab conflict, embedded so brilliantly in our public discourse in the 1970s as part of a worldwide contagion of irrational terror, remains with us to this day. Of course the Soviet dimension has declined, but it has been replaced by a new pernicious superno, radical Islam. Where once it was the Kremlin it is now al-Qaeda. The Politbureau has been replaced by Osama bin Laden, with brief stops for Abu Nidhal and President Gaddafi along the way.

Response to Conor Gearty

It is the tragic paradox of our times that democratic governments, facing what they see as threats to their democracy, are so quick to surrender the values of that very democracy. From Guantánamo Bay to Belmarsh, human rights are seen as increasingly disposable in the name of preserving democracy against terrorism. For me, as a human rights lawyer and a South African who grew up during apartheid, where all opposition was labelled terrorist and detention without trial was an ever-present reality for all who opposed the state, it is chilling to witness the ease with which democratic leaders seem able to give up on human rights principles. Yet as Lord Hoffmann recently put it: 'The real threat to the life of the nation does not come from terrorism but from laws such as these'.¹

Terrorism poses grave dilemmas for democratic governments. Faced with the need to protect their citizens against death or injury by groups willing to strike randomly to achieve political aims, the temptation is to respond with measures outside the rule of law and the reach of human rights standards. Yet as Chief Justice Barak stated when the Israeli Supreme Court struck down torture: 'It is the destiny of democracy that not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often 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'.²

Lord Hoffmann and Chief Justice Barak are, sadly, increasingly lone voices in a world in which counter-terrorism is seen as a ready excuse for giving up on human rights. It is thus particularly apposite for a leading human rights lawyer like Professor Gearty to focus his lecture on 'Human Rights in an age of counter-terrorism'. Gearty's focus is on ideology. For him, the real problem is not *acts* of terrorism, but the *language* of terrorism: the ways in which the terminology is used by powerful states to legitimate their own wrongful actions, both domestically and

as well. The model also resembles current international society pretty closely. This is not to deny that there is a great deal of serious moral discourse going on, not merely in universities, but also within other (for instance religious) associations and in political fora such as in some committees of the United Nations and of various national legislatures. But the public visibility and impact of such serious moral discourse is small and diminishing, and the political fora in which it takes place are therefore increasingly shunned and marginalized. This may not seem like a calamity comparable to terrorism. And yet, such moral corruption is, in one sense, a more profound danger.

When moral language degenerates into just one more tool in the competitive struggle for advantage, then this struggle becomes ultimately unconstrained. To be sure, the power of political leaders and factions is limited by the power of other leaders and factions, and is restricted also by procedural checks and balances. But all these constraints are soft and flexible, themselves subject to indefinite modification through the use of political power. In so far as political players understand that their competitive struggle for power is always also a struggle over the rules governing this competition, they tend to be ruthless in this competition because there is no other long-term protection of their interests and values. This problem is well explicated in Rawls's discussion of a *modus vivendi*. Rawls's preferred alternative model is that of an overlapping consensus, for such a firm, widely recognized social rules to which all major groups (perhaps for diverse reasons, have a principled moral commitment.¹⁶ But even without such an overlapping consensus, there can at least be a trust among adversaries which comes from recognizing one another as genuinely moral agents who are at least committed to *their own* morality. The moral importance of avoiding a world without trust and without shared social rules gives us further moral reasons to honour morality's central imperative. Our applications of moral language to both domestic and international issues.

VII

We can now appreciate the promised second reason for considering it important – even if we have not the slightest doubt – to articulate the grounds of our firm belief that these five terrorist attacks were heinous acts; to articulate our understanding of why these attacks are wrong, or what makes them wrong, as I have tried to do earlier. We must do this to honour morality's central imperative, which requires us to elaborate and extend our moral commitments to the point where they impose clear constraints on our own conduct. This is crucial for being moral persons, rather than persons acting under colour of morality. And it is crucial also for being properly recognized as moral persons, as persons with genuine moral commitments that we are willing to discuss and are determined to live up to.

There is considerable scepticism outside the affluent West about the moral fervour with which we have condemned the terrorists and prosecuted our war against them. Occasionally, such scepticism comes with sympathy for and even celebration of the terrorists. Far more frequently, however, the sceptics share our conviction that those terrorist attacks were very wrong. Their scepticism involves the judgment or suspicion that we are moralizing in bad faith, that we are interested in morality when this serves to win us support or sympathy or at least acquiescence, but that we have no interest in the moral assessment or adjustment of our own conduct and policies.

In my view, these sceptics are essentially correct. But before presenting some evidence to support their case, I should state clearly two points that I am not making and in fact strongly reject. I reject the view that wrongful conduct by our governments renders the terrorist attacks any less unjustifiable. My moral condemnation of such attacks is based on the harms they inflict on innocent civilians, who do not become permissible targets for lethal attack by wrongful policies of – even their own – governments. I also do not claim that it is impermissible for those who are doing wrong to fight the wrongs done by others. My main point in discussing our governments' conduct and policies is to show that our politicians take momentous action, in our name, without any effort to apply the morality they profess in our name to decisions that cry out for moral justification. That they can get by, comfortably, without any such effort is our fault, not theirs.

Let me illustrate the point by recalling some well-known events of the 'global war on terror' (GWOT) as conducted by the U.S. and U.K. governments. Central to the GWOT as they conceive it is the doctrine that the terrorist danger justifies pervasive secrecy and disinformation towards the media and the general public, and even towards the legislature. The suggestion was, and still is, that the success of the war effort requires that most of this effort be exempt from public scrutiny and that even the scope of this exemption should not be disclosed.¹⁷ A well-known and typical example is U.K. Attorney General Lord Peter Goldsmith threatening British media with criminal prosecution for reporting that President Bush had proposed to bomb the Al Jazeera television station in peaceful Qatar.¹⁸

An early episode in the GWOT was the overthrow of the Taliban regime in Afghanistan. In this initiative, our governments chose to rely heavily on the United Islamic Front for the Salvation of Afghanistan. This 'Northern Alliance' had been losing the civil war against the Taliban, but massive Western air support, funding, and U.S. teams of special forces turned the situation around in its favour. Thousands of Taliban fighters who had laid down their arms in exchange for a promise of safe passage to their home villages in an orderly surrender negotiated with the participation of U.S. military personnel, were instead crammed into metal shipping containers without air or water for several days. Between 960 and 3,000 of them died in agony from heat, thirst, and lack of oxygen. Some of the survivors were shot dead

course, they traffic heavily in moral and specifically religious rhetoric, on both sides of the Atlantic. But is there any evidence that those who design and implement coalition methods in the global war on terror have thought carefully about their moral justifiability? Such serious reflection is what they would engage in if they were genuinely concerned that their conduct – or let me say, *our* conduct, for they are acting as our elected representatives in our names – be morally justifiable. And had they engaged in such serious moral reflection and convinced themselves that these methods are indeed morally justifiable under existing conditions, would they not want this justification to be publicly known so that we all can appreciate that what is being done in our names is, appearances notwithstanding, really morally justifiable?

The conduct of our politicians is better explained by their desire to act under colour of morality. This requires no more than the bald assertion that we are doing the right thing, presented in appealing tones of sincerity and commitment. What is most astonishing here again is that our politicians get away with this so easily. This is astonishing not merely in the GWOT case here under discussion, but in U.S. and U.K. foreign policy more generally.

In the 1990s, the United Nations maintained a stringent regime of economic sanctions against Iraq. These sanctions greatly reduced access to foodstuffs and medicines for poor Iraqis and further degraded Iraq's heavily damaged infrastructure, preventing the provision of electricity, water and sanitation. The devastating effects on the incidence of contagious diseases. Madeleine Albright, then U.S. ambassador to the U.N., defended the same regime on 60 Minutes:

Lesley Stahl: We have heard that a half a million children have died. I mean, that's more children than died in Hiroshima. . . . Is the price worth it?

Albright: I think this is a very hard choice, but the price – we think the price is worth it. . . . It is a moral question, but the moral question is even a larger one. Don't we owe to the American people and to the American military and to the other countries in the region that this man [Saddam Hussein] not be a threat?

Stahl: Even with the starvation?

Albright: I think, Lesley, it is hard for me to say this because I am a humane person, but my first responsibility is to make sure that United States forces do not have to go and re-fight the Gulf War.⁵²

The interviewer left it at that, and the remarks drew scant media attention in the U.S. and Europe and were not noted in Albright's Senate confirmation hearings for Secretary of State that same year. The remarks were much reported and discussed in the Arab world, however, and apparently motivated at least one of the terrorists involved in the attacks described above.⁵³ In her biography, Albright expresses deep regret about her remarks: 'Nothing matters more than the lives of innocent people. I had fallen into a trap and said something that I simply did not mean'.⁵⁴

But if nothing matters more than the lives of innocent people, then why were these very severe sanctions continued without regard to their effects on Iraqi

civilians? Despite considerable variation in the estimates, it was clear from the start that the sanctions' health impact on Iraqi civilians would be devastating.⁵⁵ The most careful studies I have found are Richard Garfield's, who estimates that mortality among children under 5 rose from about 40–45 per 1,000 in 1990 to about 125 per 1,000 during 1994–99 and stresses that many of the surviving children sustained lasting damage to their health.⁵⁶ Garfield estimates excess deaths among children under 5 at around 3,000 per month for the 1991–2002 period, with a confidence interval of 343,900 to 525,400 deaths for this entire period.⁵⁷

In 1998, Denis Halliday, co-ordinator of humanitarian relief to Iraq and Assistant Secretary-General of the United Nations, resigned after thirty-four years with the U.N. Explaining his resignation, he wrote: 'I am resigning, because the policy of economic sanctions is totally bankrupt. We are in the process of destroying an entire society. It is as simple and terrifying as that . . . Five thousand children are dying every month . . . I don't want to administer a programme that results in figures like these'.⁵⁸ He added in an interview: 'I had been instructed to implement a policy that satisfies the definition of genocide: a deliberate policy that has effectively killed well over a million individuals, children and adults. We all know that the regime, Saddam Hussein, is not paying the price for economic sanctions; on the contrary, he has been strengthened by them. It is the little people who are losing their children or their parents for lack of untreated malaria. What is clear is that the Security Council is now out of control, its resolutions here undermine its own Charter, and the Declaration of Human Rights and the Geneva Convention. History will slaughter those responsible'.⁵⁹ In 2000, Halliday's successor, Hans von Sponeck, also resigned after thirty-two years of U.N. service, while harshly criticizing the sanctions regime as well as the dishonesty of the relevant officials in the Blair and Clinton governments.⁶⁰ Jutta Burghardt, director of the U.N. World Food program in Iraq, also resigned for the same reasons.⁶¹

Nothing matters more than the lives of innocent people. Most of us would agree with Albright on this point. Most of us would also agree that her, and our, first responsibility is to our own country. And most of us endorse these two commitments in such a shallow way that, like Albright, we do not even notice the tension. Then, when a choice must be made between promoting the interests of our country – our government, citizens or corporations – and those of innocent people abroad, we routinely prioritize the former without so much as examining the cost that our choices will impose on the lives of the innocent.

In this spirit, the U.S. and U.K. governments have stated that they do not track civilian deaths in the aftermath of their invasions and occupations of Afghanistan and Iraq.⁶² And in the same spirit our governments press their favoured economic rules and policies upon the rest of the world. Structural adjustment programmes required by the IMF have deprived millions of African children of elementary schooling.⁶³ Protectionist trade barriers are unfairly depriving poor populations of a decent livelihood.⁶⁴ Loans and arms sales are keeping brutal and corrupt rulers in

Preview from Notesale.co.uk
Page 138 of 304

David Miller

Response to Thomas Pogge

Thomas has given us a challenging lecture and essay on terrorism, and the war against it. Like everything he writes, it is notable for its lucidity, directness and conviction. His criticisms cut deep, and they are directed even-handedly at both sides – at the terrorists who wantonly destroy lives without even asking themselves what could justify their deeds, and at Western governments and their agents who in the name of forestalling terror commit gross violations of human rights. Both parties, he argues, use moral language to vindicate their conduct, but they use it insincerely, because they make no serious attempt to explain how the principles they claim to stand for apply to that conduct. Nor can either side excuse itself by appealing to what the other is doing: the behaviour of Western governments, in the Middle East and elsewhere, is not sufficient to justify or excuse terrorist attacks like those that occurred on 9/11 or 7/7. Nor are these attacks sufficient to justify or excuse the treatment meted out to suspected terrorists by the U.S. and U.K. governments, among others – holding them indefinitely without trial, transferring them to countries known to practise torture and so forth.

So, a plague on both your houses: it is hard to disagree with the main charges that Thomas brings. But is he right to be quite so even-handed in his criticisms? Is there nothing that can be said in defence of the Western response to terrorism? I want to address this by looking first at how Thomas understands the particular form of terrorism that concerns him, and the reaction it has provoked among citizens in the countries where the attacks have occurred. Initially he seems inclined to explain this reaction in terms of the interests of the news media, who see terrorist attacks as attention-grabbing, and of leading politicians, who can use the new climate of fear to enhance their states' prestige and freedom of manoeuvre internationally. But he sees that there is more to it than this. Ordinary citizens regard these attacks as 'exceptionally heinous', and Thomas does not think they are wrong to believe this. But why are they so heinous? According to Thomas, because acts that inflict serious harm on people can only be justified by showing that they

to liberal democracy a special worth, this ascription is not value-neutral.⁴⁶ The case for the *special* merit of liberal democracy is value-laden or pragmatic and usually both.⁴⁷ This does not detract from Rawls's assessment of Nazism. The evidence on the subject is quite uncontroversial.⁴⁸ As odious as I find Nazism (and its more recent avatars), I do not think that my valuation of liberal democracy confers a special right on liberal democracies: the right to a 50/50 or better chance of success in its own self-defence. If one cannot confer such right, one cannot make sense of the 'supreme emergency exception' and its licence for intentional targeting of civilians during war. Being 'on the side of the angels' does not confer a right to victorious self-defence, independent of the means used to achieve it.

Michael Walzer has recently reassessed his own arguments in favour of the 'supreme emergency exemption'.⁴⁹ He now argues that the 'supreme emergency exemption' presupposes an understanding of communities as self-perpetuating over time. He believes that a serious threat to the 'ongoingness' of a community constitutes a 'supreme emergency' and as such overrides the values and principles that otherwise restrain strategies of war. As a result, he cannot help but admit that terrorism might be justified in a 'supreme emergency'.⁵⁰

Walzer believes that he can avoid excessive appeals to the 'supreme emergency exemption' by insisting that it is very restrictive. I am more doubtful about it than he is. I note that Walzer finds a way to argue for the rightness of the Mutual Assured Destruction (MAD) nuclear strategy adopted by the superpowers during the Cold War. Ideas play an important role in the shaping of practice and his position on MAD reinforces realist perspectives rather than the moral ones he elsewhere recommends.⁵²

Norms and their relative strength at any given time can determine a state's choices and conduct. The turn towards strategic targeting of civilians by both sides during World War II can be understood, as Ward Thomas shows, to demonstrate that the norms requiring a careful distinction between combatants and civilians had been weakened.⁵³ The 'supreme emergency exemption', as Walzer, Rawls and others have stated it, may contribute to this weakness. Where faith in the efficacy of force prevails, reliance on it is likely to follow; weaker norms make it easier to contemplate war and terrorism alike.

III

The norms requiring that belligerent parties discriminate between combatants and civilians during war have been strengthened and weakened since World War II. International treaties and laws have attempted to defend civilians while adjusting to new technological capabilities.⁵⁴ Legal and ethical training for officers and cadets may have enhanced the effectiveness of these norms.⁵⁵ But they have been undermined by the willingness of the Cold War superpowers to use the world's population

- 58 The most famous position in defence of terrorism was offered by Jean Paul Sartre in his preface to Franz Fanon's *Wretched of the Earth* (New York: Grove, 1965 [French, 1961]). Also see Ted Honderich's *Political Violence: A Philosophical Analysis of Terrorism* (Ithaca: Cornell University Press, 1976).
- 59 For examples see various publications at the Center for Security Policy at www.centerforsecuritypolicy.org/ (accessed December 2006).
- 60 Hannah Arendt offers the strongest argument regarding the difference between politics and violence. See *On Violence* (note 2). Arendt, though, seems to search for a coercion-free politics, which I find utopian. Jane Mansbridge criticizes Arendt and others on this point in 'Using Power/Fighting Power: The Polity', in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton: Princeton University Press, 1996), 46–66.
- 61 I tend to an agonistic view of politics. See Chantal Mouffe's *On the Political* (London: Routledge, 2005) for an articulation of an agonistic position. I am more Arendtean in my tendencies than Mouffe.
- 62 I disagree with John Rawls's position regarding liberalism and its others. See his *Law of Peoples* (note 43).
- 63 For analyses see The Brookings Institute at www.brook.edu/ (accessed September 2005).
- 64 For a sense of the U.S. current and future military plans see Brigadier General Mike Milano's 2006 document 'The Army in Transition' which can be downloaded via link at www.comw.org/tct/terrorism.html#6 (accessed December 2006).
- 65 See reports and current information at Amnesty International (www.amnesty.org) and Human Rights Watch (www.hrw.org).
- 66 See American Civil Liberties Union (ACLU) on the Patriot Act at www.aclu.org (accessed May 2005).
- 67 News about Abu Ghriib broke in May 2004. In June 2005 the U.S. submitted a report to the UN admitting torture at various detention centres in Afghanistan and Iraq, and in Guantanamo Bay, a fact widely reported. Information about U.S. reliance on torture by third parties has been given a relatively little coverage.
- 68 Wendy Brown, 'Wounded Attachments', in *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995), 52–76. See also Judith Butler 'Precarious Life': *The Powers of Mourning and Violence* (London: Verso, 2004).
- 69 Chantal Mouffe introduces the idea as she begins to engage with Carl Schmitt's work. See her *The Return of the Political* (note 46) and the *Democratic Paradox* (London: Verso, 2000), as well as *On the Political* (note 61).
- 70 See Giovanni Arrighi and Beverly J. Silver's *Chaos and Governance in the Modern World System* (Minneapolis: University of Minnesota Press, 1999).
- 71 Hannah Arendt, 'Organized Guilt and Universal Responsibility', *Jewish Frontier* (1945), 23. I refer to Arendt's very impressive statement in my *The Subject of Violence: Arendtean Exercises in Understanding* (Lanham, MD: Rowman and Littlefield, 2002), 58. See also Larry May's discussion in 'Socialization and Institutional Evil', in *Hannah Arendt: Twenty Years Later*, ed. Larry May and Jerome Kohn (Cambridge, MA: MIT Press, 1996), 83–105.

Preview from Notesale.co.uk
Page 167 of 304

Thomas Dublin

Response to Bat-Ami Bar On

Bat-Ami Bar On offers a thoughtful treatment of similarities and differences between war and terrorism as both have evolved in the contemporary world. She emphasizes the difficulty of accepting the most common criterion for distinguishing between war and terrorism: their different treatment of civilians and non-combatants. Drawing on the work of Mary Kaldor and on discussion of the recent Israeli-Hezbollah War, she shows how difficult it is nowadays to accept the frequently cited distinction that warfare attempts to minimize civilian casualties while terrorism specifically targets the civilian population.

Having acknowledged the blurring of the boundaries between 'new' war and terrorism, Bar On concludes by arguing that the significant difference is that warfare as waged by modern, liberal or democratic states has at least the merit of being susceptible to control by the political process. As conducted by states, warfare is subject to state policies, which in turn may be supported or reversed by political action. Copying a modest silver lining in an otherwise distinctly cloudy setting, Bar On concludes that 'an taste for courage . . . can still be found in everyday life'. She continues 'to trust politics as the space of responsibility'.

Bar On's analysis certainly forces readers to think about the place of violence in the contemporary world. By remaining on the level of abstract analysis, however, she seems to me to gloss over a crucial dimension of these issues. For historians, and that is the perspective I bring to this discussion, the devil is in the details. And as I think about the application of this analysis to the current United States war in Iraq, I am painfully aware of the divergence between her conceptual analysis and recent history. In democratic states, leaders are accountable for acts of aggression committed under their leadership, she argues; non-state actors are not accountable to any constituency. Is her argument justified in the light of the American and British invasion of Iraq in 2003? The concept of accountability that she invokes has proven a thin reed that has done and is doing very little to constrain the actions of the American presidency.

Consider for a moment the various sorts of accountability that might have operated in the circumstances. First, international agencies were significant players in

War, terrorism and the 'war on terror'

What terrorism is

Most of us agree that terrorism is always, or almost always, wrong, which is hardly surprising, since the word is generally used to express disapproval. If an act of which we approve has features characteristic of terrorism, we will be careful to deny that it is in fact an act of terrorism. For example, those who believe that the bombings of Hiroshima and Nagasaki were morally justified tend to deny that they were instances of terrorism. So while we agree that terrorism is almost always wrong, we sometimes disagree about what it is we are condemning.

To avoid misunderstanding I will say at the outset what I understand terrorism to be. Acts of terrorism are intentional efforts to kill or seriously harm innocent people as a means of affecting other members of a group with which the immediate victims are identified. Its aim is to terrorize and intimidate the other members as a means of achieving some political or broadly ideological goal, though the aim might be different: it might, for example, be to punish or achieve vengeance against the group as a whole. Although the group against which terrorism is directed is usually political in nature, it need not be. It might, for example, be the group of doctors who perform abortions.

Because the term 'terrorism' is normatively loaded and therefore tends to be used by people to describe their enemies whatever their enemies may do, there is no definition that can capture all the many ways in which the term is ordinarily used. But the definition I have offered seeks to identify the core descriptive features of terrorism, while also explaining why terrorism, in its paradigm instances, is morally so abhorrent. Many of the definitions currently on offer in the literature stipulate that the agents of terrorism must be 'non-state actors' (thereby conveniently ruling out even the conceptual possibility that states can be guilty of terrorism; the most that states can do is to 'sponsor' terrorism), or that the targets of terrorist action must be non-combatants rather than, as I suggest, innocent people (thereby

terrorism and just warfare. But I will, as a means of understanding the moral and legal status of terrorists, examine the moral difference between terrorism and *unjust* war.

A war can be unjust for various reasons. It might be fought for a just cause but be unnecessary for the achievement of that cause, or disproportionately destructive relative to the importance of the cause. Usually, however, wars are unjust because they are fought for a goal, or cause, that is unjust. I will refer to combatants who fight for an unjust cause as 'unjust combatants' and to combatants who fight in a just war as 'just combatants'.

Unjust combatants pose a problem for the understanding of terrorism that I have offered. When unjust combatants attack just combatants, they are attacking people who are morally innocent, since those who merely defend themselves and others against wrongful attack are not thereby guilty of a wrong that makes them liable. If unjust combatants attack just combatants intending not only to eliminate the threat they pose but also to elicit fear in other just combatants, hoping thereby to deter them from fighting, then by the definition I have given, those unjust combatants are terrorists. Even if they mistakenly believe that their cause is just and thus that their adversaries are not innocent, that should not exclude their being terrorists, just as the abortion clinic bomber's mistaken belief about the status of his victims does not prevent him from being a terrorist if his aim is intended in part to intimidate other abortionists.

In practice this may not mean that many unjust combatants count as terrorists, since most presumably do not specifically intend for their acts of war to intimidate other enemy combatants. But those unjust combatants who do have that intention seem to be counter-examples to my definition, since no one believes that they are terrorists. Indeed, most people believe that unjust combatants do not act wrongly at all, provided they obey the rules of engagement, even if they intend for their acts of war to frighten and deter other enemy forces.

It is, however, hard to discern relevant differences between an unjust combatant and the abortion clinic bomber who intends to terrorize abortionists generally, and whom most will agree is guilty of terrorism. The unjust combatant is, of course, an agent of the state and does not act illegally, whereas the bomber is a private individual who violates the law. But these differences do not seem to constitute the difference between permissible killing and terrorism. The unjust combatant is, after all, the agent of a state that is acting illegally through his action.

I suspect that our tendency to treat the clinic bomber but not the unjust combatant as a terrorist derives from our correct sense that terrorists deliberately attack illegitimate targets together with the mistaken but widely accepted view that all combatants are legitimate targets. Our unreflective acceptance of the just war theory's identification of the distinction between combatants and non-combatants with the distinction between legitimate and illegitimate targets has, if I am right,

recognized even by Palestinian terrorists as morally different from the killing of Palestinian civilians as a side effect of an attack on a launch site for missiles aimed at Israel. And it is reasonable to hold such terrorists accountable for failing to recognize the inconsistency between the belief that terrorist acts by their enemies would be specially heinous and the belief that their own terrorist acts are permissible. In general, therefore, there is less epistemic justification for terrorists than for unjust combatants to believe that what they do is morally permissible.

Yet the appeal to excuses cuts both ways, for some of the excuses that are often cited on behalf of unjust combatants also apply to *some* terrorists. Many suicide bombers, for example, are credulous and uneducated young people who have been repeatedly assured by the moral, political and theological authorities in their culture that the killing of randomly chosen members of a population they regard as their enemy is supremely meritorious and will gladden the heart of the deity. From the nature of their action we may infer that they strongly believe that what they do is right – more strongly, presumably, than most unjust combatants believe in the rightness of what they themselves do. So, if we accept that unjust combatants do wrong but, because of the epistemic limitations under which they act, are not to be condemned or punished, we should also accept that the same may be true, though perhaps to a lesser degree, of some terrorists.

There is, moreover, a further reason for thinking that the excuses available to unjust combatants do not provide a significant ground for differentiation between them and terrorists. The claim that a person's action is excused presupposes that the person has acted wrongly. Yet what most people believe is not that terrorists and unjust combatants both act wrongly but that unjust combatants are excused while terrorists are not; it is, rather, that terrorists act wrongly while unjust combatants act permissibly, provided that they obey the rules of engagement.

The second important difference is that whereas unjust combatants who attack just combatants usually intend only to eliminate an obstacle to the achievement of their goals, terrorists who kill innocent people *use* their victims strategically as means to their ends. Common sense intuition tends to distinguish between these modes of agency, and to regard the opportunistic use of the innocent as the more seriously objectionable of the two.⁶ It is important to note, however, that this does not distinguish all unjust combatants from terrorists. Those who intend the killing of just combatants as a means of terrorizing the enemy also use their victims opportunistically.

The third and perhaps most important difference between unjust combatants and terrorist, is that unjust combatants who obey the rules of engagement thereby respect and preserve laws and conventions designed to limit the violence of war. Even though unjust combatants act wrongly when they attack just combatants, we nevertheless grant them *legal* permission to do so. This legal permission is endorsed by morality because of its pragmatic utility. Morality is in effect compelled by

Preview from Notesale.co.uk
Page 177 of 304

those with a just cause and that it should always be punishable under the law. But doubts can arise about this. At least in certain cases, it can be and has been debated whether terrorists have, or ought to have, combatant status. Terrorists themselves often claim to be combatants, particularly when they are captured, since they would like to be accorded prisoner of war status. And, perhaps surprisingly, the Bush administration also claims that terrorists are enemy combatants in its 'war on terror'. Are terrorists combatants?

The concepts 'terrorist' and 'combatant' are not mutually exclusive. Given the definition of terrorism I have proposed, it is clearly possible for regular, uniformed military personnel to use terrorist tactics in the course of a war. These would be combatants who had also become terrorists. Their use of terrorist tactics would make them war criminals.

Consider, though, whether terrorists who are not members of any regular army or militia, and who do not openly distinguish themselves as combatants, are nevertheless entitled to combatant status. In the immediate aftermath of 9/11, Bush vowed that he would bring the surviving terrorist plotters to justice. But this is not what one does to enemy combatants.⁸ The rhetoric soon shifted, however, and terrorists were declared to be enemy combatants. This is perhaps surprising because it appears to accord to terrorists a kind of legitimacy that they lack. But the reasons for the shift are transparent. Under international law, combatants may be attacked and killed at any time, anywhere, by enemy combatants. Thus, by declaring that terrorists are combatants, the administration invested itself with the right to hunt them down and kill them anywhere in the world without making an attempt to capture them.

There are, however, disadvantages from the Bush administration's point of view, to declaring that terrorists are combatants. For those with combatant status are legally granted rights and immunities as well as liabilities. It is because combatant status carries certain rights and immunities that captured terrorists seek to be classified as combatants. Combatants who are captured have prisoner of war status, which means that they may not be interrogated and must be treated humanely and be repatriated at the conclusion of hostilities. Enemy combatants also have the legal right to attack military targets, such as military, police, and government personnel and facilities. If the terrorists of 9/11 were combatants, those who flew planes into the World Trade Center were guilty of war crimes. But if the others had worn uniforms and had flown an otherwise empty plane into the Pentagon, their action would not have been a war crime; it would not have been illegal at all. They would have been acting within the legal rights accorded to combatants.

How could the Bush administration invest itself with legal rights to do all that it wanted – that is, how could it claim the right to hunt down terrorist suspects and kill them while also denying them both the legal right to attack U.S. military personnel as well as legal rights against interrogational torture and punishment in the

Preview from Notesale.co.uk
Page 179 of 304

innocent people to unreasonable levels of risk at the hands of those assigned to their defence.

Perhaps the most significant risk is the risk of misidentification. In domestic law, the principal, though by no means only, reason we insist that criminal suspects be arrested and tried is to ensure that the innocent are not punished by mistake. For mistakes are easy to make when criminals try as well as they are able to evade identification. In this respect both domestic police work and anti-terrorism are quite different from war. For in war combatants are required to wear uniforms to distinguish themselves both from civilians and from combatants of other countries. But no one wears a uniform to identify himself as a criminal or a terrorist.

The risks of misidentification are considerable even in domestic anti-terrorist action, as was shown recently when British police killed a Brazilian man whom they mistook for a terrorist shortly after the terrorist bombings in London in 2005. But the risks of misidentification are exacerbated when anti-terrorist action has to be conducted in foreign countries, and especially when it has to be carried out without the co-operation of the government of the country in which it is conducted. In 1973, for example, agents of Mossad, the Israeli intelligence and counter-terrorism agency, killed an innocent Moroccan waiter in Norway in the mistaken belief that he was the leader of the Palestinian 'Black September' terrorist group that had massacred Israeli athletes at the 1972 Munich Olympics. This case provoked an international scandal, but in general the incentives to exercise reasonable care in identifying and attacking foreign terrorists are weaker than those for exercising care in domestic police work or anti-terrorist action. Governments will naturally take greater precautions to avoid killing their own citizens by mistake.

Another reason for insisting on the requirement of arrest in anti-terrorist actions is that terrorists seldom offer the opportunity to attack them in isolated areas. If one attempts to deal with them preventively, one generally must attack them where other people live, thereby imposing grave risks on the innocent. This objection to hunting down and killing terrorists is often expressed by saying that the harm caused to the innocent by the attempt to kill terrorists may be *disproportionate* to the harm that such acts might be expected to avert.

While there are thus good reasons grounded in the necessity of avoiding harming the innocent to impose a requirement of arrest on anti-terrorist action, there are also reasons to believe that the requirement of arrest must sometimes be suspended in anti-terrorist action. These reasons derive from the various ways in which anti-terrorist action frequently differs from domestic law enforcement.

May the requirement of arrest sometimes be suspended in anti-terrorist action?

There are three features that together tend to distinguish anti-terrorist action from ordinary police work. The most important of these is, of course, that the threats

and perhaps overlapping. The problem of misidentification is that anti-terrorist agents may mistakenly attack people who have no association with terrorism of a sort that would make them dangerous to others. The problem of liability is that anti-terrorist agents may attack people who *are* associated with terrorism in ways that may make them dangerous but who as yet have done nothing to forfeit their rights against attack. In terrorism, as in crime, there are many people who are dangerous, in the sense that they are significantly more likely than most other people to commit terrorist or other criminal acts, but who have so far not acted in a way that would make them liable to preventive action. Such people would be wronged if they were attacked to prevent them from posing a threat in the future.

The problem of liability is not an objection to preventive defence *in contrast* to arrest. For it would also be unjust to arrest a person if one has no reason to believe that he has done anything to make himself liable to punishment. The problem of liability is instead a general problem for any anti-terrorist action that is preventive in character, as most action against suicide terrorists – and indeed most action against all other first-time terrorists – must be.

The problem is not serious when there is compelling evidence that a person has been actively engaged in planning and preparing for a terrorist attack. In these cases we can follow the law of attempts by claiming a right of intervention against an uncompleted attempt, or the law of conspiracy in claiming that the preparatory actions are themselves a ground of liability to preventive measures, including arrest and even, if the conditions for the suspension of the requirement of arrest obtain, preventive attack.

Liability to preventive action

But what about people who have recently joined a terrorist organization and are currently performing non-violent functions within the organization while training for possible future missions, yet are not planning, preparing for, or participating in any actual mission? Are such people liable to preventive attack?

To answer this question, it may help to consider a parallel problem in war. Suppose that our intelligence services discover decisive evidence that the leaders of another country are planning a war of unjust aggression against us. At this point, however, the ordinary rank-and-file soldiers of the country know nothing about their leaders' plans. Suppose we can defend ourselves against the planned aggression only by attacking now, preventively. Are the unmobilized soldiers of our potential adversary liable to attack, even though they are not attacking us and even though there is at present no war between them and us? Most people believe that they are indeed liable, simply by virtue of their membership in the military. Anyone who wears their uniform is considered by most people to be a legitimate target of attack. Even if our surprise, preventive attack were illegal, the law holds that our own rank-and-file

Preview from Notesale.co.uk
Page 189 of 304

is in many ways an aberration within a law-governed society. Self-defensive violence is sometimes necessary to protect the rights of innocent persons, but it threatens the moral presumption that violence should never be inflicted without legal oversight. Self-defensive violence engages the two elemental fears that lie at the core of political philosophy: permitting self-defensive violence involves the risk of anarchy by multiplying opportunities for the private use of force, and it risks tyranny by providing opportunities for the extra-legal use of violence by agents of state. The conditions for using defensive force have been formulated with these risks very much in mind and traditionally the conditions have been very restrictive indeed. Defensive force must be necessary, proportionate and in response to a threat that is imminent. It is limited, in other words, to necessary action against grave threats that wear their injustice and immediacy clearly on their face. To borrow a formulation from international legal jurisprudence, self-defence is restricted to cases in which there is 'necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'.³

McMahan contests the requirement of imminence, in cases where the threat to innocent people from potential terrorist attack is high. He argues that if five carefully specified tests are met, then a terrorist suspect may be liable to preventive force – in other words he may be killed before he poses an imminent threat to the innocent. The five tests involve the risk posed by the suspect, the effectiveness of the preventive killing compared with arrest, the date of appeal to enforcement officers by attempting arrest, active membership of a terrorist organization and that the killing make an actual contribution to protecting innocent persons.

I am sceptical that we can become liable to preventive force in this way. But let us assume that we accept these five tests as correctly stating objective criteria for liability to preventive force. We must still ask how appropriate these tests would be as operational principles for real state officials. As we have seen, the norms that govern arrest and the permissibility of defensive violence are not determined only by the liability or immunity of suspects. They are also responsive to the need to protect all of us from arbitrary state power. In this context we must interrogate the proposed criteria carefully: who will be applying the criteria? On the basis of what evidence? With what oversight? Are we willing to grant the conditional right of preventive killing to officials of our own state, knowing what we know of their mode of operation and the reliability of their intelligence? Would we be willing to extend these rights to our allies in the 'war on terror' such as the Russian, Pakistani, Turkish or Moroccan secret service agencies?

There is moreover an important additional restriction on defensive force, codified within most legal systems. We insist on subjecting defensive action to a *post hoc* judicial review, in order to determine whether the conditions of self-defence have really been met. Those who act in self-defence are therefore required to undertake a significant legal and moral risk: they assume the presumption of wrongful

avert harm by killing potential sources of intelligence are long, complex, and dependent on many unknowable counter-factual assumptions. It is highly unlikely that general argument or specific evidence will settle the question of preventive effectiveness conclusively one way or the other.

In the hypothetical examples of philosophical argument, we can simply stipulate that conditions such as effectiveness and necessity are met, and this makes for seductive conclusions. Who would not want to take effective preventive action against terrorist atrocities, if we know the person killed is really liable to defensive force? But in the real world evidence is always ambiguous and problematic. The traditional, restrictive conditions for self-defence are precisely tailored to this ambiguous reality. They operate in a way that is symbiotic and supportive – when an attack is imminent it is much easier to be sure of the necessity and proportionality of the response, and of the unjust nature of the threat. But as soon as one departs from this traditional context of imminent self-defence, the ambiguity and indeterminacy of the conditions become radically amplified. How can we know that the future attack 'prevented' by the police killing of a terrorist suspect would ever have occurred? The evidential void created by expanded conceptions of self-defence will most often be filled by violent action that is arbitrary or politically motivated.

In my view then there are just two appropriate contexts for police violence against suspected criminals. The first is the ordinary right to use the least necessary proportionate force in defence against an imminent threat. The police share this right with all persons.⁶ Second, the police have the right to use proportionate force against those who resist a properly mandated attempt at arrest, after having been given a reasonable opportunity of surrender. Of course the crucial question here is: what constitutes a 'reasonable opportunity to surrender'. In Hollywood shows the police officer always shouts out – 'you are under arrest, come out with your hands up!' This may not be appropriate in complex and dangerous terrorist operations, and other more cautious protocols may need to be developed. But many police forces around the world have experience in conducting arrests of well-organized and well-armed mafia and drug gangs. This experience must be supplemented by comprehensive ethical and jurisprudential debate to establish an appropriate set of powers and protections.

This seems like a restrictive account of police powers – and it is. But I believe that it follows from the premise of treating terrorists as criminals. One risk of drawing this conclusion, of course, is that it will only serve to cast doubt on the premise. If the requirement to arrest suspected criminals is really as strong as I have suggested, perhaps one should after all treat them as combatants. But the reasons for treating terrorists as criminals rather than combatants are political and strategic as much as they are moral.

Since 2001 we have learned the hard way that traditional military force is poorly suited to combating global terrorist movements. Admittedly the occupation of Iraq was executed with mind-boggling incompetence, and it is in any case

The Rationalists of Islam made substantial contributions to human thought – to the ethical legacy of humanity and not just of Islamic culture. They did not conceive of the religious text as supplanting reason but as a firm moral foundation that propels ethical investigation. In doing so, they contributed to the idea of a universal truth both accessible and accountable to human beings and binding upon them. They made Islamic civilization part of a historical progression from Greek philosophy to the European Renaissance and the Age of Enlightenment.³⁰ Ibn Rushd (Averroes), not Thomas Aquinas, was the first to argue systematically that the a priori principle of moral obligation is to enjoin the good and avoid wrong.³¹ This was also Aquinas's First Principle – often credited with opening the door to the Natural Rights tradition. And Aquinas was quite familiar with the thought not just of Averroes but with that of prominent Muslim Rationalists such as Ibn Sina (Avicenna), Ibn Baja (Avenpace), and al-Ghazali.³² In his *Summa*, evincing his familiarity with the micro-discourses of the Muslim Rationalist scholars, Aquinas frequently takes sides with one Muslim philosopher against another.

My point is not to make the typically apologetic and historically inaccurate claim: Muslims did it first! Quite the opposite. Although the Islamic classical tradition was rich with ideas well suited to a cultural trajectory favouring human rights, it did not bear this fruit. In the West, in part by co-opting Islamic intellectual achievements, the Natural Law tradition eventually gave birth to the Natural Rights tradition, which in turn was instrumental in developing the revolutionary idea of universal human rights.³³ And it should be emphasized that the human rights culture is not secular in origin. Many Western historians tend to ignore the fact that Natural Rights emerged from deeply religious (notably Christian) perspectives.³⁴ The most prominent jurists of the Natural Rights tradition from William of Ockham and Jean Gerson through Pufendorf, Vitoria, Suarez and Grotius to Locke and Rousseau and more recently Karl Barth, Germain Grisez or John Finnis were all deeply religious people. Christian ethics influenced their commitments, choices and priorities.³⁵ Until the end of the nineteenth century, Natural Rights theorists continued to invoke the Divine as the ultimate source of obligation; even if rights are said to exist in nature, it is the Divine that is the source of obligation.

In Islam, the classical Natural Rights thesis was philosophically developed by Rationalist jurists such as the Andalusians: Ibn Baja (d. 1138), Ibn Aqil (d. 1185), Ibn Rushd (d. 1198), and Ibn Tufayl (1185).³⁶ The same thesis was treated by Rationalists such as Sadr al-Din al-Shirazi (aka Mulla Sadra) (d. 1641), Ibn al-Hasan al-Tusi (d. 1067), Nasir al-Din al-Tusi (d. 1274), Ibn Aqil (d. 1119), al-Suhrawardi (d. 1191, founder of the school of Illumination), Abu Bakr al-Razi (d. 925), and Fakhr al-Din al-Razi (d. 1209). The Rationalists had a profound impact on the foundations of Islamic jurisprudence but their influence on Islamic civilization as a whole waned after the twelfth century. This was a pivotal point; Islamic civilization, under siege by the Christian West, had now to defend itself against renewed waves of

schools that increasingly monopolized the legal market, and the implementation of numerous legal reforms. The end result was the replacement of Islamic law, in most cases, with the Civil Legal system. The institutions that had once supported the development of Islamic jurisprudence became entirely marginal. Most schools of Islamic law were closed primarily due to the shortage of clientele. The death warrant of Islamic law was the co-optation by the state of the private endowments that funded the largest and oldest institutions for the study of Islamic law.⁴³ A paradoxical duality developed in Muslim cultures: from the age of colonialism to this day, Muslims have mostly been governed by the French legal system. At the same time, the very experts who implemented foreign legal systems would write books exalting the superiority of the Islamic system. In effect, modern Muslims transformed Islamic jurisprudence from a dynamic living system to a relic admired but never used. The reality today is that modern Muslims have been completely deracinated from their own legal tradition. Muslim legal experts are woefully ignorant about the institutions and epistemologies that informed Islamic jurisprudence. As a final irony, Western scholarly discourses on the Islamic legal tradition nowadays have considerable authority in Muslim secular academies.⁴⁴

Some countries attempted to Islamize their legal systems in the 1970s and 1980 by implementing specific measures mostly derived from the *hady* law. But these politicized measures were not geared to providing legal solutions to existing problems but to reinforcing the appearance of Islamic identity. Such campaigns were high on propaganda but did little more than strengthen the perception that Islamic law is fundamentally at odds with the Natural Rights of human beings. Consider the obscene examples paraded before the world: Palestinian and (later) Nigerian rape laws. The unfriendly views of Islamic law in the contemporary age are hardly surprising. In part, the sensationalism and caricatures that plague the field of Islamic law are explained by the feeling throughout the Muslim world of being under siege. Given Western interventionism, this was probably unavoidable.⁴⁵ This sense of being under siege, combined with an intense sense of alienation from modernity, generated sharply reactive tendencies including the conservatism and intolerance of the Wahhabis. Clinging to idealized prototypes ('the Golden Age') led to a superficial Islamicity that was fundamentally rejectionist.

The discussion thus far explains why Muslims failed to develop the full potential of the Natural Rights strain in their own tradition. Contrary to prevalent stereotypes, the Muslims of today do not reflect the normative systems of their forefathers. Wahhabism, the dominant creed of Saudi Arabia (founded on the intolerant theological views of Muhammad bin Abd al-Wahhab, d. 1791), has popularized the most anti-Rationalist and despotic trends within the Islamic tradition. Ironically, Wahhabis would agree with the secularists that there is no place for human autonomy in the light of God's sovereignty; they would go on to argue that whatever limited rights humans may earn are contingent on the fulfilment of their

member of the Security Council. This reinforced the perception that the Charter marked a continuation of Western hegemony. The power of veto enjoyed by the permanent members (especially in the context of the Cold War) greatly diluted the impact of the Universal Declaration.

In the 1950s, 1960s and 1970s, Muslim countries signed many human rights instruments of the consensual positivist model. But (as we have seen), the signature of treaties by authoritarian governments does not necessarily reflect the cultures of those peoples. Moreover, these conventions and treaties were signed as a means of gaining favour with the superpowers during the Cold War. The U.S. could refuse to sign major human rights treaties with impunity but few Muslim countries dared do the same. Instead, some Muslim countries signed but entered reservations; they would comply with the provisions only in so far as they were consistent with Shari'a,⁴⁸ thus allowing them to interpret Islamic law in any way that they wished. In repeated declarations, such as the Cairo, Doha and Casablanca Declarations,⁴⁹ Muslim governments affirmed their commitment to human rights. But the governments most active in passing these declarations were the ones with the worst record of human rights abuses. None of the countries affirming the incompatibility of international human rights with Shari'a actually enforced the Islamic legal system.

Because of the limited effectiveness of worldwide conventions, the 1980s witnessed the enactment of regional human rights conventions such as the European, African and American conventions.⁵⁰ McDougal argued that regional conventions were designed to reflect the customs of the regions that enacted them. But this really holds true only of regions where governments represent the normative choices of their people. Far from affirming the integrity of international human rights, regional conventions represented concessions to particularism and cultural relativism.

VIII

The moral and ethical logic informing human rights treaties did not influence the normative commitments of Muslims. From the Muslim point of view, the whole field seemed somewhat farcical. Even if superpowers such as the United States agreed to be held accountable, they often zealously backed governments with abysmal human rights records, such as that of Iran under the Shah. The U.S. was willing to pretend that friends like Israel and South Africa did not engage in discrimination. It verbally condemned but in effect ignored human rights abuses by countries such as Saudi Arabia. Inconsistency, hypocrisy, or multiple standards infected the foreign policies of the supposed champions of rights.⁵¹ Muslims have swung back and forth between the idealism and realism of the West. If Muslims had identified ethical goals and anchored them in their own intellectual heritage, the effect of Western double standards might have proved negligible. But one reason why Muslims have not

most basic and fundamental human rights are not, it seems, *always* applicable. This is the theory of the occasionality of rights⁶² and it never seems to be invoked in *favour* of Muslims.

The harm that befalls Muslims from this politically oriented manipulation of human rights is immeasurable. Very often it affects the Muslim sense of dignity and honour. Protectoratism is a particularly humiliating form of the occasionality of rights and a mirror image of the colonial practice of special privileges. Acting like a traditional or colonial power, the U.S. has privatized significant sectors of the Iraqi oil industry and then granted itself special oil concessions in Iraq. This comes after all Muslim countries, Iraq included, had begun nationalizing their oil industries during the 1950s and 1960s in what was then celebrated as a major step towards self-determination. And again, consistent with colonial practices, American soldiers who raped a young girl and killed her family were not tried in an Iraqi court but prosecuted by an American tribunal. This behaviour replicates the policies of colonial powers in refusing to submit their own citizens to the jurisdiction of native courts. American military tribunals have given out disproportionately lenient sentences to soldiers convicted of torture, rape and murder. If these soldiers were to commit the same offences on American soil or if they were tried under Iraqi law, their punishments would have been much more severe.⁶³

Even more troubling is the return to a dangerously imperialist form of protectoratism, with the idea that certain ethnicities or religious minorities must be protected by the U.S. I was appointed by President Bush to the I.N.T. Commission on International Religious Freedom. Having served as a commissioner for three years, I became extremely concerned that there was a strong orientation towards the colonial practice of *misaya* – the placing of non-Muslim religious minorities under the protection of Western powers. In May 2006, American Copts held a convention in New York City, drawing attention to the purported persecution of Copts in Egypt. The convention received a letter from President Bush stating the protection of Copts in Egypt was a matter of U.S. national security. The letter did not explain why the protection of Copts, as opposed to, let us say, Muslims living in Israel, is a matter of U.S. national security.⁶⁴ Clearly, the U.S. is following the age-old rule of 'divide and rule', replicating the colonial practice of Balkanization by playing off the Muslim world's religious, sectarian and ethnic divisions.

All of the practices discussed above – exceptionalism, occasionality, the civilizing mission and so on – are means to something much more important. This is to provide the U.S. with its claim to high moral ground. It enables Americans to see their interventions as by definition benevolent and to react with shock and contempt when their interventions are resented. A narrow range of words is used to articulate this objective: freedom-loving people, God-given rights, and God-given liberty. Symbolically, this language differentiates between the good and bad – it distinguishes friend from foe. It is a partly secularized version of the historical 'God-fearing people' versus 'savage heathens'. Muslims are told that in order to become

they have remained quiet about the escalating levels of repression in countries where Islamic groups were believed to be particularly strong (Tunisia, Mauritania, Yemen, Bahrain); and failed to take decisive stands when popularly elected governments with Islamic proclivities have been overthrown by secular military juntas (Pakistan, Turkey). The same bias is responsible for wasted opportunities in dealing with liberal but Islamic orientations in Sudan and Iran and has led to the immoral practice of persuading one country to invade another either to bring the downfall of a purportedly Islamic government or to prevent such a government from coming into power, as in the invasions of Iran by Iraq and Somalia by Ethiopia. Part of the price tag for attempting to overthrow the Islamic Republic of Iran was a decade-long silence on Saddam's intolerable human rights record and his infamous genocide against the Iraqi Kurds.

In short, it is difficult to ignore the reality of Western anxiety concerning Islam in power. It is difficult to explain to Muslims the ease with which Western countries deal with extremist Hindu parties coming to power in India or fundamentalist Jewish parties coming to power through coalition in Israel. Compare this with the attitude of Western states towards any Islamic political party regardless of its profession of democratic values: the Muslim Brotherhood in Egypt and Jordan, and the Islamic Renaissance Party in Tunisia.⁶⁷ It is hardly surprising that the Muslim laity responds to these inconsistencies by supporting states not too distant from historical memory; its experience with the West supports arguments about double standards, hypocrisy, and religious insularity.

The despotic secular governments of Muslim countries certainly believed they had understood the nature of the game – they could avoid being pressured by Western governments about their abysmal human rights records if they limited their repression to Islamists, who just happened to be their most formidable foes. With the end of the Cold War there was euphoria about the possibility of a new era for human rights. But in the Middle East this sense of hopefulness was shared only by a few secular thinkers. Almost all Islamists took a pessimistic view of this new period. During the Cold War, Western governments sought tactical advantages in supporting some Islamist movements – alas, not always the most humanistic or enlightened movements. With the end of the Cold War this incentive no longer existed. It is important to remember that most of the governments of the Muslim world are not only staunchly secular but have a well-founded fear of anything Islamic that they cannot control. Some governments, such as the Moroccan, Sudanese, Libyan, Pakistani, and other states, wear a thin Islamic veneer in the belief that this bolsters their legitimacy, coupled with zero tolerance towards any competing claim to Islamicity. This intolerance is even more severe in the case of Saudi Arabia, whose proclaimed *raison d'être* is its guardianship of the two holy sites of Mecca and Medina and of authentic orthodox Islam. A dissenting Islamist in Saudi Arabia is guaranteed to meet a grimmer fate than that of a dissenting secularist.

- 13 It is perfectly possible for a jurist to find no convincing evidence that God has any will concerning the situation at issue. In these situations, jurists are supposed to rely on mandatory legal presumptions such as: Unless there is specific evidence of a prohibition, permissibility should be assumed, or: Every person is presumed to be free of obligation or liability unless there is evidence to the contrary, or: Individual harm cannot be presumed to constitute a public harm, but public harm is evidence of impermissibility. For a more detailed discussion, see Khaled Abou El Fadl, *Speaking in God's Name* (Oxford: Oneworld, 2005), 9–169. For a more detailed discussion of the Fatwa and the Islamic legal process in general, see Khaled Abou El Fadl, *The Authoritative and the Authoritarian in Islamic Discourses*, 3rd printing (Alexandria: Al-Saadawi Publications, 2002).
- 14 See *Islam and Human Rights* (note 4).
- 15 In the wake of the genocide against Muslims in Bosnia the United States did not react by demanding that educational curricula in Serbia or Croatia be revised to remove bigoted teachings about Islam. Likewise, the United States never admits the existence of racially prejudiced or religiously bigoted portrayals of Arabs and Islam in Israel. Moreover, the American government itself has not been open to having conversations either with Muslim states or NGOs about the way that Islam is taught in public schools in the U.S. These facts are well known in the Muslim world and contribute to the sense of disempowerment felt by many Muslims.
- 16 All Islamic sects and schools of thought agree that enjoining the good and forbidding the evil is a solemn ethical obligation on Muslims. There was, however, some theological disagreement as to whether this obligation was a singular pillar of the faith. All Muslims are in agreement that there are five pillars that define the Islamic faith: (1) the testament of faith; (2) five daily prayers; (3) fasting the month of Ramadan; (4) paying alms to the poor (the obligation of *zakat*); and (5) Hajj or pilgrimage to Mecca once in a lifetime for those capable of doing so. The rationalist school of thought (historically known as the Mu'tazila) contended that the duty to enjoin the good and forbid the evil was a singular pillar of the Islamic faith. See *The Great Theft* (note 10), 122–4.
- 17 The term 'law' here does not necessarily mean a detailed set of positive commandments; the law means the fundamental and basic Divine directives to human beings, directives not subject to the vagaries of time and place. The Covenantal Law is absolute, immutable, eternal, and inherently good (Shari'a). What is derived from the Covenantal Law is contingent, contextual, revisable and experimental (*fiqh*). On the distinction between Shari'a and *fiqh*, see *Speaking in God's Name* (note 13), 30–40; Irshad Abdal-Haqq, 'Islamic Law: An Overview of Its Origin and Elements', in *Understanding Islamic Law*, ed. M. Ramadan (Lanham, MD: AltaMira Press, 2006), 3–42.
- 18 See *Speaking in God's Name* (note 13), 27–8.
- 19 There are various definitions of the Islamic classical age, but in this context I use the expression to refer to the period from the time of the death of the Prophet to the ninth/fifteenth century.
- 20 Modern-day Islamists retort that the Qur'an provides a coherent ethical framework for a humanitarian ideology. This often-heard argument ignores the distinction between the potentially perfect realization of the Qur'an and a cultural realization of it. The Qur'an

Preview from Notesale.co.uk
Page 228 of 304

in general vis-à-vis non-Muslim religions and their religious laws is also well known.

Such openness cannot be taken for granted in our age. And, more importantly, it cannot be imposed. It reflects a healthy societal attitude towards diversity that is sustainable only when it comes from within.

This is especially relevant with respect to the provisions for capital punishment (*hudud*) in the Islamic tradition. A majority of pre-modern jurists agreed that these punishments should form part of the law but accepted that the execution (or suspension, commutation or revocation) of these punishments was the prerogative of the supreme political authority. They also insisted on the extremely strict standards of evidence and procedure required for conviction. However, they could never reject the principle of capital punishments: to do so would have implied that their legislative predecessors, including the Prophet, had been mistaken. No Muslim jurist would or could do that. Thus provision of the death penalty for a capital crime enjoys a wide consensus; and in classical legal doctrine, only considerations extrinsic to the crime itself, such as the intervention of the state, constitute any impediment (*mani'*) to the prescribed punishment. The 'capital' nature of the crime itself is unalterable. The dynamism of the tradition allows for an essential continuity that can accommodate a changing world. This kind of essentialism may remind us of the English constitution.

In the search for a common language for the human family – an ethical lexicon – there are therefore more than sufficient resources within the Muslim tradition to contribute to contemporary philosophical ethics. Islamic institutions within the Muslim world, such as the Aaral-Bayt Institute (Jordan), the International Institute of Islamic Thought and Civilization (Malaysia), Nahdhatul Ulama (Indonesia) and the Taahah Foundation (Algeria), are leading the way in this regard. It is still early days, but the signs are promising, particularly with the growth of a scholarly class conversant with Western traditions. They have taken a long time to reach this point, it might be said. But by the same token, the yoke of colonialism and imperialism was also of long-standing. Change does not often come quickly and cannot have permanent results unless it comes from within the tradition.

The loss of the caliphate – a previously unthinkable event – left an indelible mark on the development of the Islamic intellectual and juridical traditions. Western hegemony led to the degradation of the schools of law. Imperialism, colonialism, and then nationalism realigned priorities in public education and downplayed the importance of a sound religious education. It is not surprising that, in such a system, many who favoured the 'open exploration' recommended by al-Ghazali¹ no longer went into religious studies but became engineers and doctors.

And today we are seeing the results of this redefinition of educational priorities. When 'Islamization' came about, it was informed by identity politics rather than a real philosophical impetus towards the creation of a modern Islamic nation

recital of their 'deserving it' or 'asking for it'. Such language attempts to justify what is always unjustified: the infliction of suffering.

By creating a trauma-aesthetic and sorting perpetrators, bystanders and victims into positions of hierarchy, we are complicit with this language and recognize degrees of responsibility in the victim, thus in some sense ourselves justifying the infliction of pain.⁶ When the pitiless actions of some perpetrators are presented as more 'comprehensible' than others (more on this later), we, too, sort victims into a hierarchy of suffering. Indeed, we aestheticize not only the pain of the victims but our own responses to their pain. The very process of discussing injustice inevitably promotes the distancing process that we so loudly lament. The debate invites us to assess what becomes a spectacle of pain and to do so aesthetically, contemplatively. Like it or not, vision is an act of aggression, a disciplining activity. As one of Iraq's greatest female poets, Nazik al-Mala'ika, put it in her poem about the torture by the French of an Algerian resistance fighter:

The details of your torture were on every tongue,
And that hurt us, it was hard for our sensitive ears to bear.

Going on to add:

Did we not use her suffering to give meaning to our poetry?
Was that a time for song?⁷

Simone de Beauvoir – an ardent opponent of torture during the French-Algerian War – reminds us of an important fact: we get accustomed to other people's pain. As she acknowledged, in 1947, the burns in the face, in the sexual organs, the nails torn out, the emplacements, the shrieks and convulsions, outraged me', but by the first month of December 1947 she was saying: 'like many of my fellow men, I suppose, I suffer from a kind of leanness of the imagination . . . One gets used to it'.⁸

Are we so numb? In an article published over ten years ago but even more relevant today, historian Eric Hobsbawm observed that people have 'got used to' terror. 'I don't mean we still can't be shocked by this or that example of it', he observed, 'On the contrary, being periodically shocked by something unusually awful is part of the experience'.⁹

III

The international shock caused by the Abu Ghraib photographs suggested that 'something unusually awful' had happened. The horror was not because of the torture as such, since that was well known, and continues to be endorsed at the highest levels. Of course, there were those in whom the photographs elicited patriotic celebration rather than distress. Republican senator James Inhofe, speaking to a Senate Armed Services Committee hearing, was, he said, 'outraged' by the

itself to the realities of conflict, which are far different from the Western European environment from which the ICRC's interpretations of the Geneva Conventions [is] drawn', he alerts us to the fact that the 'human' in his conception is Western.¹⁵ When the military does not even deign to record Iraqi deaths, we are bound to reflect on the construction of a racial and religious enemy that is evidently not as human as 'us'.

Four main anthropogenetic strategies help draw the line between the human, the inhuman, and the non-human: torture, religion, human rights, and trauma narratives.

IV

First: torture. The shock of the current 'war on terror' resides particularly in the way acts of inhumanity have focused on the sexualized body. In the contemporary crisis, the emphasis on *sexual* abuse is not (as some critics may wish to insist) a deviation from hardnosed considerations of all-pervading state power and seemingly unassailable military muscle. Where discrepancies of power between protagonists are so disproportionate as to render systems of law (national or international) hollow, and where individuals from forty different nations can languish in the liminal space of Guantánamo Bay, a place of doubtful legal status,¹⁶ but not 'of' Cuba, a country with which the U.S. has no diplomatic ties, politics operates on the body. This body has been extraordinarily sexualized.

It is surprising, therefore, that although sex has been used cruelly and relentlessly in the 'war on terror' there has been little analysis of a sexualized dimension. Descriptions of rape as a weapon of war and a technology of dehumanization were successfully applied in the cases of Bosnia and Rwanda (both dubbed primitive, warring nations), but commentators remain reluctant to draw similar conclusions about reports of the behaviour of American and British troops – even after digital culture provided us with an avalanche of abusive images, a visual glossolalia of sexual horror.

This occurred despite the fact that the full extent of the abuse has been concealed. After all, when the Abu Ghraib scandal broke, members of Congress were shown 1,800 other photographs and videos, some of which were – and still are – considered far too revolting to be broadcast.¹⁶ In particular, photographs of female victims of abuse have been deemed far too politically explosive to be placed in the public domain. The emphasis laid on abuse by female perpetrators, with its implication that this was particularly injurious to Islamic men, has been allowed to overshadow the equally heinous but more 'conventional' abuse of women, for which the Bush government seems to have escaped responsibility.

For many principled feminist, pacifist, and human rights campaigners, it has been difficult incorporating the existence of *female* perpetrators into their analyses of

or (fire-) arm. In talking about weapons of torture, Elaine Scarry refers to the way in which 'in converting the other person's pain into his own power, the torturer experiences the entire occurrence exclusively from the non-vulnerable end of the weapon'. But in those forms of sexual abuse employing the penis, the perpetrator's attention begins to 'slip down the weapon toward the vulnerable end', contesting its power.²⁶ The cruel triumph of the female perpetrators resides in the fact that they tortured without consciousness of that form of self-vulnerability.

Finally, some attempts to understand female perpetrators at Abu Ghraib ask: might sexual violence 'masculinize' torturers who happen to be biological female, while 'feminizing' victims who happen to be biologically male? In studies focusing on sexual violence in war and in prison contexts, this is a popular argument. Male victims are said to become 'social women'; male perpetrators have their masculinity enhanced; female perpetrators become 'social men'. On this account, cruelty is synonymous with virility and the female abuser is 'really' a man. Thus, Lynndie England is described as a 'phallic female', 'tomboyish', 'a leash-girl', who turned out to be 'something other than a natural lady'.²⁷

At first sight, this is a simple way out of the dilemma: nothing much changes – just a few labels. The female is erased and coded as male. There is an easy logic to the argument. And there is no doubt that both male and female perpetrators taunted victims with degraded words used to refer to females. In Abu Ghraib, for instance, male prisoners were goaded for being 'girls' and were forced to wear female underwear. There is also no doubt that perpetrators of both sexes take strength and power, as well as pleasure from their actions. But to say this turns female perpetrators into 'social men' is both to ignore an essential link between manliness and violence, and to reinforce the dichotomy of male-active and female-passive. The gendered notion of masculinity and femininity as active/passive confuses social imaginary with lived practice, placing women outside the symbolic order.

Moreover, what we have seen in Iraq (and elsewhere) is not women participating in masculine rituals, but women using conventional tropes of their gender to shame and subjugate. While male guards in Abu Ghraib stomped on male prisoners with boots, threatened to bugger the men in the showers, and poked phosphoric lights up their arses, the women threw menstrual fluid and slowly strip-teased. We have to take seriously the idea that female perpetrators are not simply imitating men, but living out their own fantasies about power and sexuality. Sharon Marcus put it succinctly when she pointed out that taking 'male violence or female vulnerability as the first and last instances in any explanation of rape is to make the identities of rapist and raped pre-exist the rape itself'.²⁸

This was what made much of the world recoil in horror when the Abu Ghraib photographs were released: female rapists as agents of extreme sexual cruelty. These women were regarded as much worse than their male comrades in atrocity: they were not merely inhuman, but monstrous. Even when women were engaging in abuses

Preview from Notesale.co.uk
Page 246 of 304

- 23 National Coalition for the Protection of Children and Families, 'Abu Ghraib: Lessons in S-xual [sic] Morality', www.nationalcoalition.org/culture/articles/ca050523.html.
- 24 Frank Rich, 'It Was Porn That Made Them Do It', *New York Times*, 30 May 2004, AR1 and AR16.
- 25 Phyllis Schlafly, 'Equality for Women in our Army', *Eagle Forum*, 19 May 2004, in www.eagleforum.org/column/2004/may2004/04-05-19.html.
- 26 Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985), 59.
- 27 'Bitch Bites Man!' (note 12).
- 28 Sharon Marcus, 'Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention', in *Feminists Theorize the Political*, ed. Judith Butler and Joan W. Scott (London: Routledge, 1992), 391.
- 29 It has already been noted that there were plenty of female victims, whose privacy the U.S. government is somehow inclined to protect.
- 30 Moira Gatens, *Imagining Bodies: Ethics, Power and Corporeality* (London: Routledge, 1996), 33.
- 31 Ameen Sa'eed Al-Sheikh in *Torture and Truth* (note 1), 217.
- 32 Ameen Sa'eed Al-Sheikh, *ibid.*, 219.
- 33 Hugh Urban, 'The Secrets of the Kingdom: Spiritual Discourse and Material Interest in the Bush Administration', *Discourse* 27.1 (winter 2005), 141–66.
- 34 Chris Mackey and Greg Miller, *The Interrogators' War: Inside the Secret War Against Al Qaeda* (Boston: Little, Brown, 2004), 182.
- 35 For the best discussion, see Costas Douzina, *The End of Human Rights* (Oxford: Hart Publishing, 2000).
- 36 www.mirror.co.uk/news/affairs/content_objectid=14042695_method=full_siteid=50143_headline=MI-HELL-IN-CAMP-2-DAY-also_page.html.
- 37 See Ingeborg Arendt, *The Origins of Totalitarianism* (San Diego: Harvest Books, 1979), 92 and Karen Halttunen, 'Humanitarianism and the Pornography of Pain in Anglo-American Culture', *American Historical Review* 100.2 (1995), 303–34.
- 38 Michael Ignatieff, 'Lesser Evils', *New York Times Magazine*, 2 May 2004, 86.
- 39 Lieutenant Diane Beaver, 'Legal Brief on Proposed Counter-Resistance Strategies to Department of Defense, Joint Task Force 170', 11 October 2002, in *Torture and Truth* (note 1), 175.
- 40 Cheney Offended by Amnesty Criticism', CNN.com and 'Bush: Amnesty Report "Absurd"', CNN.com.
- 41 Christian Davenport and Michael Amon, 'Accused Soldiers a Diverse Group', *Washington Post*, 9 May 2004, 18, in www.ccmep.org/2004_articles/general/050904_wp.htm.
- 42 For the best discussion, see Michelle Brown, "'Setting the Conditions" for Abu Ghraib: The Prison Nation Abroad', *American Quarterly* 57.3 (September 2003), 973–97.
- 43 Max Blumenthal, 'America's Rape Rooms: From the War on Drugs to the War on Terror', viewed 6 May 2006, www.buzzflash.com/contributors/04/05/con04209.html.
- 44 *Ibid.*
- 45 For estimates, see Alan J. Davis, 'Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans', *Trans-Action* (December 1968) and Wayne S. Wooden and Joy Parker, *Men Behind Bars: Sexual Exploitation in Prison* (New York: Plenum Press, 1982), 99.

Preview from Notesale.co.uk
Page 259 of 304

least at the personal level. Indifference to identity was transformed by repetition into reliance on identity.

That Victorian world could not contain its tensions and hostilities, and it took more than half a century, until the 1960s, to restore the project of an open world governed once again by the imperatives of commerce. The hostile Soviet bloc (an ideological enemy of markets and commerce) collapsed and gave way to this ideal in 1989, and one neo-liberal (Fukuyama) famously proclaimed it as the End of History. The theory of comparative advantage, a new freedom of the seas under the flag of neo-conservative globalization, was meant (once again) to dissolve antagonisms and anxieties, to flatten the earth, to integrate the Lexus and the Olive Tree. That, at any rate, was the proclaimed purpose of the 'Washington Consensus'.

But many of the putative beneficiaries did not see it that way. The reason they failed to appreciate the benefits was that a global dollar hegemony undermined their own existing local hegemonies. The prospect of rising standards of living was no compensation for loss of local identity and authority. Across the various global peripheries the spread of globalization (in its commercial or military forms) menaced those who had held sway there before as domestic generals, chieftains, politicians and priests. The British Empire in its day (and its French, Belgian, Spanish, Portuguese, and American contemporaries in the nineteenth century) often used force to subjugate local supremacies. Between the wars, Britain used air power effectively to intimidate village chieftains. But the firepower, economic power, and 'soft' power of cultural persuasion (though often described as 'soft') were less than those of the U.S.A. today. Across cultures it has generally been accepted that a challenge to identity is a mortal threat that evokes the prohibition on killing. A challenge to selfhood, to the honour of the family, to the integrity of the nation and its symbols, to the icons of religion, justifies discretion, restraint and resorting to violence.

One interpretation of the outrage of 9/11 was that this was the long-delayed revenge of the wretched of the earth. In response, it was rightly pointed out that the perpetrators of terror were often well educated and well off. Bin Laden was the rich son of a rich construction mogul; Mohamed Atta had professional training in a German university. Even Ayatollah Homeini or Mullah Omar belonged to their countries' elites. Their sources of their authority were local, not universal: the secular nationalist development dictatorship of a Saddam Hussein, Assad, Mubarak or Mugabe; the nationalism of Pushtun warlords in Afghanistan; the religious fundamentalism and Arab nationalism of Bin Laden; the divine authority of Ayatollahs, Mullahs, and Taliban. However powerful on the spot, these local elites could not compete in the dollar game. But they had a measure of immunity as well. No one has claimed the reward for Bin Laden yet. They were bound to be beaten in the globalized game of commerce. The challenge of dollar globalization has elicited a broad range of evasive and defensive responses, across the globe. For

If the killing was not premeditated, the murderer's punishment would be subject to the authority's discretion [*ta'zīr*] and he would in any case be liable to pay the relevant compensation [*diyya*].

As for a valid military target in a war zone, the Shāfi'i School has historically considered the possibility of justifying collateral damage, whereas other schools have held it to be outlawed in all cases. The following are the conditions stipulated for allowing this controversial exception (in addition to meeting the most important condition of them all: that this takes place during a valid war when there is no ceasefire):

- 1 The target is a valid military target.
- 2 The attack is as a last resort [*min ḍarūra*] (such as when the civilians have been warned to leave the place and after a period of siege has elapsed):

وجوب الإنذار قبل البدء بالقتل لأنه لا يجوز أن يقتل إلا من يُقاتل

- 3 There are no Muslim civilians or prisoners.
- 4 The decision to attack the target is based on a considered judgement on the part of the executive or military leader that by making the attack, there is a good chance that the war or battle will be won.

(Furthermore, this position is subject to *khilāf* among our jurists with regard to whether the military target can be a Jewish or Christian [*Aḍ al-Kitāb*] or other non-Muslim one, since the sole primary text that is invoked to allow this exception concerns an incident restricted to the same '*mushrikīn*' and in the reverse of Sūra al-Tawba in Question 11 above.)

Intentionally to neglect any of the strict conditions is analogous to not fulfilling the conditions [*shurūṭ*] for a prayer [*Ṣalāt*] with the outcome that [the action] becomes sinful [*ḥarām*] and ineffective [*fasād*]. This is why the means of an act [*amāl*] must be correct and valid according to the rule of Law in order for its outcome to be sound and accepted, as expressed succinctly in the following aphorism of Imām 'Aṭā Allāh (may Allāh sanctify his soul!):

مَنْ أَشْرَفَتْ بِدَائِيهِ أَشْرَفَتْ نَهَائِيهِ

[He who makes good his beginning will make good his ending.]

In our Law, the ends can never justify the means except when the means are in themselves permissible, or *mubāḥ* (and not *ḥarām*), as is made clear in the following famous legal principle:

وَسِيلَةُ الطَّاعَةِ طَاعَةٌ وَوَسِيلَةُ الْمَعْصِيَةِ مَعْصِيَةٌ

[The means to a reward is itself a reward and the means to a sin is itself a sin.]

Hence, with even a simple act such as opening a window, which on its own is only *mubāḥ* or *ḥalāl*, that is, neither worthy of reward nor sinful, when a son does it with

IV Glossary of Arabic terms – Shaykh Gibril F. Haddad

- Aḥādīth al-Aḥkām* ḥadīthīc proof-texts for legal rulings
ahl [1] people; [2] experts or qualified adherents or practitioners
'aql intellect, reason
'amal deed, action
aṣl see *uṣūl*
Āyāt al-Aḥkām Qur'ānic proof-texts for legal rulings
bāb chapter or legal subject
Banū Ādam human beings
dābiṭ see *ḍawābiṭ*
dā'ī summoner or preacher
Dajjāl lit., 'imposter'; the Anti-Christ
ḍarūra necessity
ḍawābiṭ pl. of *dābiṭ*, standard or principal rule
Doctor Angelicus The Angelic Scholar, a title given to Thomas Aquinas, the great theologian of the Western Church, who is compared here to al-Ghazālī
dunyā this world, this life
fā'ida benefit
faqīh see *fiqh*
farḍ 'ayn personal obligation
farḍ kifāya communal obligation
far'ī adj. from *far'* see *far'*
faṣl see *fuṣūl*
fatwā legal opinion, legal response
fiqh Islamic jurisprudence, the expertise of the *faqīh*; adj. *fiqhī* = legal
fitna strife, temptation, seduction, delusion, chaos, trial and tribulation
fiṭra sane mind and soul, primordial disposition
fuqahā' pl. of *faqīh* (q.v.)
furū' pl. of *far'* = [1] branches (of the Law), secondary legal texts; [2] corollaries, corollary legal principles
fuṣūl pl. of *faṣl* = sections or legal particulars
Ḥādīth a saying of the Prophet Muḥammad, upon whom blessings and peace
ḥalāl lawful, permitted
ḥaqīqa truth, reality; true meaning; substance
ḥarām categorically prohibited, unlawful
ḥāsil legal outcome
ḥukm [*shar'ī*] legal status, legal ruling
Iblīs Satan
Iḥsān Excellence, the pinnacle of religious practice
Ijmā' Consensus

Preview from Notesale.co.uk
 Page 292 of 304

- smart missiles 59
- South Africa 4, 6, 5, 7, 8, 99, 104, 206
- Soviet Union 3, 87
- Srebrenica massacre 7, 120
- State Department, the 22, 51, 61, 221n64
- state practice 47, 75
- stealth bombers 55
- Stern Gang 11, 12
- sub-state actors 85, 100, 103
- 'sucker exemption' 111
- Sudan 49, 66, 102, 212
- suicide bombers 16, 88, 165, 176 *see also*
self-martyring, suicide terrorism
- suicide terrorism 16, 23n16
- Sunni Islam 6, 16, 202, 256, 275
- 'supreme emergency' 16, 17, 147
- 'surge' 157
- surveillance 90, 92, 106
- Syria 11, 13, 14, 19, 22, 65, 66, 94, 100–2,
123, 124, 218n38
- Taliban, the 19, 49, 53, 58, 61, 62, 113,
119, 120, 250
- Tamil Tigers 16, 26n90
- Tanzania 49
- 'targeted killing' 175
- 'terror network' 8
- terrorism, 22, 36, 37, 63–70, 77, 83, 84,
91–2, 96, 98n24, 99, 100, 120,
122–4, 130n19, 133n46, 133n47,
145, 153n37, 155n67, 158, 170,
194, 208, 209, 220n57, 227–44,
248
- Torture Convention, the 63, 66, 68
- Treaty of Westphalia 146
- Tripoli 83
- Tunisia 14, 212, 219n52
- Twin Towers 5, 58 *see also* 9/11,
September 11, World Trade
Center
- U.K. 5, 8, 10, 13, 14, 17, 21, 89, 90, 96,
98n44, 102, 105, 107, 119, 120,
122, 126, 133n51, 134n62
- Ulster 7
- Umkhonto we Sizwe 4
- umma* 7, 20, 203, 255, 256, 261, 274, 275,
276, 277, 282
- U.N. 7, 8, 12, 13, 32, 33, 47, 48, 49, 53, 55,
60, 63, 101, 125, 126, 139
- Resolutions 7, 8, 33, 50, 52, 69, 70, 75,
76
- Security Council 50, 51, 52, 69, 70,
205
- United Islamic Front for the Salvation of
Afghanistan 119
- United States Supreme Court 78, 79
- Universal Declaration of Human Rights
30, 67, 205
- universalism 194, 224
- 'unjust combatants' 162
- unjust war 3, 161, 162, 166, 178
- 'unlawful combatants' 168
- U.S. Commission on International
Religious Freedom 216
- U.S. Institute for Advanced Strategic and
Political Studies 14
- U.S. military 56, 63, 67, 119, 141, 122,
130n24, 131n29, 134n62, 144,
166
- U.S. troops 8, 14
- Vietnam War, the 57, 91
- Virginia Polytechnic 176
- Wahhabi 6, 18, 19, 202, 204, 205, 207,
208, 214, 226
- Walzer, Michael 2, 17, 26n89, 147,
152n52, 180
- war crimes 55, 56, 79, 102, 167, 168, 178,
220n54
- 'Washington Consensus', the 250
- waterboarding 22, 27n113
- weapons of mass destruction 51, 54, 94,
120 *see also* WMD
- Weathermen, the 86
- Webster's criteria 48 *see also* 'necessity and
proportionality'

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Page 303 of 304